

# PECULIAR BUT NOT UNIQUE: SPAIN'S POLITICS OF FORGETTING

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**ABSTRACT:** The present analysis challenges the widespread view of Spain as outside or in violation of international norms of how nations are meant to deal with a difficult and painful past. It argues that Spain is “peculiar but not unique” as it concerns the attempt to overcome the horrific legacy of the Spanish Civil War and the Francoist repression by forging the so-called Pact of Forgetting. Across the Western world, there is a long history of countries forgetting and reinventing their histories for the purpose of consolidating democratic institutions. Moreover, there is no consensus on how nations should conduct themselves with respect to the past. What there is, instead, is a tendency to find pragmatic solutions that privilege peace and stability over justice and accountability against the old regime.

**KEY WORDS:** Spain – Francoism – transitional justice – democratization – Pact of Forgetting

## PECULIAR PERO NO ÚNICA: LA POLÍTICA DEL OLVIDO ESPAÑOLA

**RESUMEN:** El presente análisis pone en tela de juicio la idea predominante de España como infractora de los criterios internacionales relativos al modo en que las naciones deben encarar un pasado sombrío y doloroso. Argumenta que España es “peculiar, pero no única” en lo que se refiere a tratar de superar los horrores de la Guerra Civil Española y la represión franquista con el llamado Pacto del Olvido. En Occidente existe un largo historial de países que se han acogido expresamente al olvido o a la reinención de la historia con el fin de facilitar la consolidación de las instituciones democráticas. Además, no existe ningún consenso en cuanto al modo en que deben comportarse los países con respecto a su pasado. Lo que sí existe, por el contrario, es una tendencia a buscar soluciones pragmáticas que conceden prioridad al afianzamiento de la paz y la estabilidad por encima de hacer justicia y exigir responsabilidades al antiguo régimen.

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**PALABRAS CLAVES:** España – Franquismo – justicia transicional – democratización – Pacto del Olvido

## INTRODUCTION

Among the nations that comprise the “Third Wave of Democratization”, the outburst of democratic transitions that took place during the last quarter of the 20<sup>th</sup> century, Spain stands out as the paradigmatic example of “the politics of forgetting”.<sup>1</sup> Instead of holding the old political regime accountable for its human rights atrocities and political excesses –as was done with Spain’s “sister” rightwing dictatorships, such as Greece’s Colonels’ regime, Portugal’s Salazar dictatorship, and Argentina’s military junta, which were all subjected to some form of judicial accountability– in Spain a starkly different choice was made: to let bygones be bygones, literally. The so-called *Pacto del Olvido* (Pact of Forgetting), an agreement negotiated by the major political parties at the time of the democratic transition, relegated the political crimes of the dictatorship of Generalissimo Francisco Franco, in place from the end of the Spanish Civil War in 1939 until Franco’s death of natural causes in 1975, to the ash heap of history. Accordingly, there would be no political trials for anyone associated with the Franco regime or a truth commission to chronicle the abuses of the dictatorship. Spain even did without “lustration”, or the banning of individuals from the old regime from participating in the new regime.

Ironically, the collective political crimes of the Franco regime, referred to by historian Paul Preston as “The Spanish Holocaust”, eclipse the combined political crimes of all other rightwing dictatorships in Southern Europe and South America.<sup>2</sup> The Franco regime is responsible for some 600,000 Spaniards who perished during the Civil War (either killed in the battlefields or victims of famine and malnutrition), a conflict that Franco triggered in 1936 with his nationalist uprising against the popularly elected Second Republic; as well as some 200,000 extra-judicial executions after the Civil War ended as part of a “cleansing” campaign intended to eradicate all traces of left-wing influence in Spain.<sup>3</sup> Other victims of the Franco regime include an estimated 400,000 people sent to prison and concentration and labor camps, the bulk of them Republicans, those who defended the Republic against Franco; hundreds of

1 Samuel P. HUNTINGTON, *The Third Wave: Democratization in the Late Twentieth Century*, Norman, OK: Oklahoma University Press, 1991. According to Huntington’s analysis, the Third Wave began in Portugal, in 1974, with the collapse of Salazar regime, and concluded in 1991, with the breakdown of the Union of Soviet Socialist Republics (USSR).

2 Paul PRESTON, *The Spanish Holocaust: Inquisition and Extermination in Twentieth Century Spain*, New York: Norton, 2013.

3 Gabriel JACKSON, *The Spanish Republic and the Civil War*, Princeton, NJ: Princeton University Press, 1965, p. 539.

homosexuals committed to mental institutions, where they were subjected to harsh treatments intended to “cure” them of their same-sex attraction; an unknown number of infants stolen by Franco’s social service agency (Auxilio Social) from their “red” parents and given or sold to military and conservative families to raise; and more than 500,000 people forced into exile, mostly to other parts of Europe and Latin America.<sup>4</sup>

It would take some 30 years for Spain to undertake efforts to “recover” the political memory that was so conveniently swept under the rug during the democratic transition, with the Law of Historical Memory. Enacted in 2007 by the Socialist administration of Prime Minister José Luis Rodríguez Zapatero, the law condemned the Franco regime as “illegitimate”; allowed for financial reparation for those victimized by the Civil War and the Franco dictatorship, such as restoring lost pensions and wages resulting from being fired because of political reasons; granted Spanish citizenship to the descendants of the Republican exile; and introduced the possibility for “moral reparation”, or the overturning of sentences handed out by the Franco’s judicial system. The law also called for the removal from public view of monuments to Franco and other members of the authoritarian regime, save for those of “historical significance”, (such as *El Valle de los Caídos*, or The Valley of the Fallen, Franco’s infamous monument to the Civil War), and for the creation of a center for the study of the Civil War.<sup>5</sup>

Despite its good intentions, the Law of Historical Memory did not end the culture of forgetting born with the democratic transition. Much to the chagrin of domestic and foreign human rights activists, the law did not revoke the broad amnesty that followed Franco’s death in 1975 and that underpinned the Pact of Forgetting. This all but foreclosed any remaining possibilities for prosecuting living members of the Franco regime. Nor did the law call for the organization of a truth commission to establish responsibility for the Civil War

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4 On the repression of the Franco regime see Paul PRESTON, *The Spanish Holocaust: Inquisition and Extermination in Twentieth Century Spain*; Ángela CENARRO, “Memories of Repression and Resistance: Narratives of Children Institutionalized by Auxilio Social in Postwar Spain”, *History & Memory* 20/2, Fall/Winter 28, 2008; Santos JULIÁ (ed.), *Memoria de la Guerra y del franquismo*, Madrid: Fundación Pablo Iglesias/Tauros, 2006; Santos JULIÁ (ed.), *Morir, matar, sobrevivir: La violencia en la dictadura de Franco*, Barcelona: Crítica, 1992; José María MARAVALL, *Dictadura y disenso político: obreros y estudiantes bajo el franquismo*, Madrid: Tauros, 1981; Rafael TORRES, *Los esclavos de Franco*, Madrid: Oberón, 2004; Alicia ALTED, *La voz de los vencidos: el exilio Republicano de 1939*, Madrid: Aguilar, 2005; and Julius RUIZ, *Franco’s Justice: Repression in Madrid after the Spanish Civil War*, Clarendon, UK: Oxford University Press, 2005.

5 On the Law of Historical Memory see Stephanie GOLOB, “Volver: The Return of/to Transitional Justice in Spain”, *Journal of Spanish Cultural Studies* 9 (2), July, 2008; Paloma AGUILAR, *Políticas de la memoria y memoria de la política*, Madrid: Alianza, 2008; and Omar G. ENCARNACIÓN, “Reconciliation After Democratization: Coping with the Past in Spain”, *Political Science Quarterly* 123 (3), 2008.

and/or a full accounting of the political excesses of the Franco dictatorship. Additionally, there has been little state assistance to efforts by private groups to unearth the remains of unmarked Civil War Republican graves found throughout Spain. Among those whose remains are believed to remain buried in unmarked graves is the famed poet and dramatist Federico García Lorca, executed by a Francoist squad because of his left-wing politics and homosexuality. Also noteworthy is that state officials have been very reluctant to open military archives, a move that would do a great deal to advance the truth about the Francoist repression.

By choosing not to confront the past during the democratic transition, and by upholding the amnesty process of the transition with the Law of Historical Memory, Spain appears to have flaunted its disregard for the “transitional justice movement”. A core mission of this movement is to promote “coming to terms with the past” as part of the process of democratization. Among its supporters are influential political theorists, legal scholars, human rights activists, and international organizations, such as the International Center for Transitional Justice, or ICTJ.<sup>6</sup> Although the transitional justice movement traces its origins to 1793, when the French parliament deliberated for three agonizing days the fate of King Louis XVI, the last King of France, before sending him to the guillotine on charges of “crimes against the State”, the contemporary roots of the movement are generally attributed to the Nuremberg International Tribunal, the ad hoc court convened by the victorious allies at the end of World War II that convicted major Nazi officials on charges of “crimes against humanity”.<sup>7</sup>

There is, to be sure, no agreement or consensus within the transitional justice movement on what coming to terms with the past actually entails, as well as analogous processes such as “working through the past”, and “mastering the past”. But at least two classical models can be detected in the movement. Both make the case that bringing ethics and the law to confronting past political crimes is an imperative for any democratizing society. The first model is “retribution”, which promotes the criminal prosecution of human rights violators. Advocates of this approach argue that prosecuting the old regime is “necessary to assert the supremacy of democratic values and norms and to encourage the

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<sup>6</sup> On transitional justice see Ruti TEITEL, *Transitional Justice*, Oxford, UK: Oxford University Press, 2000; Neil J. KRITZ, *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, Washington, DC: U.S. Institute of Peace Press, 1995; David CROCKER, “Reckoning with Past Wrongs: A Normative Framework”, *Ethics & International Affairs* 13, 1999; Jamal BENOMAR, “Justice after Transitions”, *Journal of Democracy* 4 (1), 1993; Alexander L. BORAINÉ, “Transitional Justice: A Holistic Interpretation”, *Journal of International Affairs* 60, Fall/Winter, 2006, and Elin SKAAR, Camila Gianella MALCA and Trine EIDE, *After Violence: Transitional Justice, Peace, and Democracy*, New York: Routledge, 2015.

<sup>7</sup> See, for instance, Ann TUSA and John TUSA, *The Nuremberg Trials*, New York: Cooper Square Publishers, 2003.

public to believe in them”.<sup>8</sup> Behind this provocative thinking is the belief that prosecuting human rights abuses can be “a teaching moment” capable of transforming public attitudes. According to Ruti Teitel, a leading transitional justice theorist, transitional justice contributes to the “defining feature” of democratic transitions by grounding within society “a normative shift in the principles underlying and legitimizing the exercise of state power”.<sup>9</sup>

“Reconciliation” is the second model. Its chief concern is full disclosure of all the human rights abuses committed or sponsored by the old regime by convening a truth commission.<sup>10</sup> Because of this emphasis on truth-telling, reconciliation is often seen as at odds with retribution, since prosecuting former oppressors can often encumber or even preclude getting to the truth about the past.<sup>11</sup> To get to the truth, reconciliation advocates have been known to support either partial or absolute amnesty for members of the old regime. Truth-telling reflects a desire by human rights activists to shift attention in dispensing justice against the old regime away from the perpetrators and toward their victims, with political trials often seen as too legalistic to adequately convey the pain and suffering of the victims. But more than anything, the emphasis on truth-telling stems from the belief that only a complete accounting of the horrors of the past can heal the trauma inflicted by these horrors and restore dignity to those individuals whose human rights have been violated. “Documenting the truth about the past, restoring dignity to victims and embarking on the process of reconciliation are vital elements in the creation of a just society”, writes Alexander L. Boraine, the founder of the ICTJ.<sup>12</sup>

Given that Spain clearly does not conform to either retribution or reconciliation, it is not surprising to learn that it has become commonplace to think of the country as either outside or in violation of international norms of how nations should deal with a difficult and painful past. Much of the scholarship on the Pact of Forgetting implicitly makes this point by highlighting how Spain departs from conventional models of retribution, such as Germany, and Argentina, and reconciliation, as embodied by the likes of South Africa.<sup>13</sup> It

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8 HUNTINGTON, *The Third Wave*, p. 213.

9 TEITEL, *Transitional Justice*, p. 3.

10 The world's first truth commission was created in Uganda, in 1974, to investigate accusations of disappearances by the Idi Amin government; since then this type of non-prosecutorial transitional justice has proliferated at a remarkable speed. To date, according to the United States Institute for Peace, more than two-dozen truth commissions have been organized in places as diverse as Argentina, Chile, Uruguay, Brazil, East Timor, Liberia, Sierra Leone, El Salvador, Guatemala, and South Korea.

11 See, BENOMAR, “Justice after Transitions”.

12 BORAINÉ, “Transitional Justice: A Holistic Interpretation”, p. 20.

13 See, for instance, Paloma AGUILAR, *Memoria y olvido de la Guerra Civil Española*, Madrid: Alianza, 1996, and Omar G. ENCARNACIÓN, *Democracy without Justice in Spain: The Politics of Forgetting*, Philadelphia, PA: University of Pennsylvania Press, 2014.

is outside of academic circles, however, that characterizations of Spain as an outlaw and/or a violator of the norms of transitional justice are most pervasive. Ironically, these characterizations have reverberated most intensively since the passage of the Law of Historical Memory, which many human rights organizations have found wanting.

According to Emilio Silva, President of the Association for the Recuperation of the Historical Memory, Spain's leading "memory" NGO, the Law of Historical Memory is "a first, limited step in Spain to forge a collective memory about the horrors of the past".<sup>14</sup> Wilder Tyler, Policy Director for Human Rights Watch, has called upon Spain to remedy the flaws of the law, especially the persistence of impunity toward officials from the old regime. He invokes the country's role as a model for other new democracies: "Spain is an obligatory reference to many countries in the process of democratic transition. I do not understand why Spain does not apply to itself the same standards of justice that it demands of other countries".<sup>15</sup>

A 2013 report by the United Nations based on a visit to Spain by Pablo de Greiff, Special Representative of the United Nations for the Promotion of Truth, Justice and Reparations, urged the Spanish government to nullify the amnesty that prevents the prosecution of former Francoist officials. In his report to the UN Human Rights Commission, de Greiff noted that: "It is regrettable the situation of impunity for cases of enforced disappearances that occurred during the civil war and the dictatorship. There is no ongoing effective criminal investigation nor any person convicted".<sup>16</sup> The report welcomed the 2007 Law of Historical Memory as a "timid step" towards victims' reparation but challenged its limited scope, especially the absence of a truth commission and the possibility prosecuting former Francoist officials.

The rest of this analysis challenges the view of Spain as a transitional justice outlaw. Its purpose is not to argue that Spain has done a great job dealing with its past—by most objective measures it has not. Rather, the intention is to place Spain's politics of forgetting in a historical and comparative perspective to suggest that the case is more conventional than meets the eye. In particular, the analysis reveals that Spain's politics of forgetting are best regarded as "peculiar but not unique". Two factors lead to that conclusion. On the one hand, a sweeping historical look at how nations have coped with an anguished past suggests that Spain is hardly alone in having attempted to forget a dark past. There is, in fact, a long history of nations relying upon forgetting and/or reimagining

14 Author's interview with Mr. Silva, Madrid 9, 2008.

15 "Las ONG afirman que el texto de la ley de memoria no cierra heridas si no que las abre", *El País*, March 23, 2007.

16 UN Tells Spain to Revoke a Franco-era Law", *Reuters*, September 30, 2013; available at <http://www.reuters.com/article/us-spain-franco-idUSBRE98T0YJ20130930>; accessed May 20, 2017.

history for the purpose of facilitating the consolidation of democracy. Indeed, even in the post-Nuremberg era, partial or complete forgetting has been a popular approach for Western nations to cope with an “evil” authoritarian inheritance.

On the other hand, a broad overview of how other Third Wave democracies have addressed questions about the past –including those that have embraced some of the mechanisms of transitional justice, including political trials– belies the point that there is an international consensus on how to handle the political crimes of a departed regime. Indeed, to the extent to which there is such a consensus, this consensus is actually reflected by the Spanish case. Broadly speaking, coping with the past in many (if not most) Third Wave democracies has been driven by the search for pragmatic solutions that respond largely to political rather than legal or ethical imperatives. In most cases this has meant doing what is possible rather than what is right, and, more importantly, perhaps, privileging peace over justice and accountability –just as it was done in Spain.

The analysis is organized in four main parts. Part one examines the architecture of the Pact of Forgetting by suggesting how this pact fits within the scholarship on “political pacts”, especially those pacts constructed during the transition to democracy. It aims to dispel many of the myths and misconceptions about the pact; it also outlines the many reasons underpinning the rise of a political culture of forgetting after the demise of the Franco regime in 1975-1977 and the weakening of this culture some three decades later. Part two reviews the long history of political forgetting in the Western political tradition before and after the Spanish transition. The aim of this broad review is to underscore the seldom-discussed propensity of Western nations toward forgetting rather than confronting a difficult and painful history. As we will see, even nations like the United States, which today are cheerleaders of the transitional justice movement, have been heavy consumers of the politics of forgetting.

Part three examines how other Third Wave democracies have confronted the past. It suggests that there is no uniform pattern or widely shared norm for coming to terms with the past. As in Spain, most nations have either abridged or circumvented justice and accountability with the overarching intention of securing peace and stability. And, in almost all cases, some degree of forgetting and moving on has been part of the process of coming to terms with the past. Part four summarizes the key lessons afforded by Spain's politics of forgetting. It highlights the apparent contradiction of Spain succeeding as a democracy despite not conforming to the expectations of the transitional justice movement. This contradiction calls for a more nuanced understanding of the interplay between democratization and justice than that which is presently afforded by the transitional justice scholarship. Above all, it appears that tran-

sitional justice, however noble an enterprise, is not an obligatory element of a successful process of democratization; and that forgetting, an often maligned strategy for coping with the past, can in fact be a foundation for successful democratization.

## THE ARCHITECTURE OF THE PACT OF FORGETTING

Spain's Pact of Forgetting fits the definition of a "political pact" formulated by Guillermo O'Donnell and Philippe Schmitter as "an explicit, but not always explicated or justified, agreement among a select set of actors which seeks to define (or better redefine) rules governing the exercise of power on the basis of mutual guarantees for the vital interest of those entering into it".<sup>17</sup> Such pacts were especially prominent in the transition to democracy of Spain, Uruguay, Brazil, and Chile, which is not surprising given that these countries' transitions were dominated by intense intra-elite bargaining. Some of the "transitional" matters handled by political pacts in these countries included the wrongdoings of the old regime, economic policy, the new democratic constitution, and the organization of the state.<sup>18</sup> Among the bargaining actors were representatives from the old regime and those fronting the democratic opposition, political parties from the Right and the Left, and labor and business organizations.

This all said, at least three features about Spain's Pact of Forgetting are worth highlighting, if only because the structure and intentions of the pact are often mischaracterized. Firstly, the pact is best regarded as an "informal institution", understood as norms that regulate political conduct.<sup>19</sup> More tenuous than formal institutions, informal institutions nonetheless create considerable predictability in the behavior of political actors. Accordingly, unlike other pacts of the Spanish transition, such as the Moncloa Pacts, the landmark set of accords that committed the government, the national parties, the labor movement and employers' associations to a common economic policy, the Pact of Forgetting was never formally institutionalized and/or publicly announced.<sup>20</sup> No text was

17 Guillermo O'DONNELL and Philippe SCHMITTER, *Tentative Conclusions about Uncertain Transitions*, Baltimore, MD: The Johns University Press, 1986, p. 37.

18 On political pacts and democratization in Spain and South America see, Frances HAGOPIAN, "The Compromised Consolidation: The Political Class in the Brazilian Transition", in Guillermo O'DONNELL and J. Samuel VALENZUELA (ed.), *Issues in Democratic Consolidation: The New South American Democracies in Comparative Perspective*, Notre Dame, IN: University of Notre Dame Press, 1992; and Omar G. ENCARNACIÓN, "Do Political Pacts Freeze Democracy?: Spanish and South American Lessons", *West European Politics* 28 (1), 2005.

19 Gretchen HELMKE and Steven LETVISKY (ed.), *Informal Institutions and Democracy: Lessons from Latin America*, Baltimore: Johns Hopkins University Press, 2006.

20 See, especially, Richard GUNTHER, "Spain: The Very Model of an Elite Settlement", in Richard GUNTHER and John HIGLEY (ed.), *Elites and Democratic Consolidation in Latin American and Southern Europe*, New York: Cambridge University Press, 1992.

ever drafted by those entering into the pact, and no mechanisms were stipulated to facilitate its enforcement, including penalties for those choosing to disobey the pact or to walk away from it.

In practice, the “norms” of the Pact of Forgetting dictated that the state would forgo prosecution of anyone responsible for a political crime committed under the old regime. To that end, the 1977 Amnesty Law provided protection from prosecution to both state officials and elements in society that committed acts of terrorism against the state prior to 1977. Undersstandably, this law is often regarded as the legal backbone of the pact. Other norms included forsaking public policies that would awaken the memory of certain historical events, such as commemorating the anniversary of the Civil War or of the Francoist uprising, as well as investigations about the still-sensitive question of what group in society bears ultimate responsibility for the human rights atrocities and political transgressions of the Civil War. Furthermore, the pact committed the political class to not use the past as a political weapon in the usual deliberation of democratic politics. For instance, no one would be disqualified from holding public office because of a previous political affiliation.

Secondly, the Pact of Forgetting was not a byproduct of political amnesia. On the contrary, it was informed by a deep understanding of Spain's long history of political polarization. Its main intention was to create a *tabula rasa* or a blank slate upon which to build a new democratic regime. More specifically, the Pact of Forgetting aimed to “cordon-off” history in order to prevent political polarization. In stressing this point, the political commentator Santos Juliá argues that the decision to *echar al olvido* (cast away the past) was made not as an act of fickle recklessness but rather as a deliberate effort to do what was in the best interest for securing the stability of the new democracy.<sup>21</sup> He contends that well before the democratic transition, all the anti-Francoist forces had come to the realization that a comprehensive amnesty was indispensable for getting democracy off the ground, and that the “disremembering” of the past that the amnesty process ushered in was essential to constructing successful democratic coexistence.<sup>22</sup>

Thirdly, the Pact of Forgetting did not entail censorship, as it is often implied, especially abroad. Ever since the transition to democracy scholars and journalists in Spain have been at liberty to research any aspect of Spanish history, including the Civil War. Juliá has observed that cultural policy under all the political administrations of the post-Franco era has been “unhampered by ideological compromise” and that historians have been given access to new

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<sup>21</sup> Santos JULIÁ, “Acuerdo sobre el pasado”, *El País*, November 24, 2002.

<sup>22</sup> *Ibid.*

sources “to delve into the past as they saw fit”.<sup>23</sup> The Spanish historian Rafael Valls writes that after the democratic transition “historians were able to investigate the civil war and the Franco dictatorship freely, and publications on both periods grew in number and established numerous factual and interpretative approaches that are accepted today by the vast majority of the professional community of historians in Spain”.<sup>24</sup> According to American historian Carolyn Boyd, by 1986, the bibliography of the Civil War in Spanish included some 15,000 titles.<sup>25</sup>

## THE ROOTS OF FORGETTING

There is no shortage of historical, political, and sociological explanations for why Spain would choose to let bygones be bygones during the transition to democracy. Foremost among these explanations is the political dynamics of the democratic transition in Spain, which by and large left very little room for justice and accountability for the Franco regime.<sup>26</sup> Unlike other experiences with democratization, the authoritarian state in Spain was not defeated in a foreign war, as in Portugal; or toppled at home by its enemies in civil society, as in Argentina and Greece; or brought to its knees by its economic failures, as in much of the post-Communist world. Instead, in Spain the authoritarian regime was strong enough to undertake its own reformation –from the inside out– through a complex process of negotiations between the outgoing authoritarian elite and the democratic opposition led by the Socialist and Communist parties.

Key to the success of the reformation of the Franco regime was a commitment by the authoritarian elite to relinquish power in exchange for the opposition agreeing not to hold the old regime accountable for its previous actions and policies. This exchange of “amnesty for democracy” was institutionalized with the Law of Political Reform, enacted in 1976 by the Francoist parliament to swiftly liquidate the authoritarian regime. The law legalized political parties and trade unions and scheduled free elections, Spain’s first in

23 Santos JULIÁ, “Echar al olvido: memoria y amnistía en la transición”, *Claves de Razón Política* 129, 2003, p. 117.

24 Rafael VALLS, “The Spanish Civil War and the Franco Dictatorship: The Challenges of Representing a Conflict Past in Secondary Schools”, in Elizabeth COLE (ed.), *Teaching the Violent Past: History Education and Reconciliation*, Lanham, MD: Rowman and Littlefield, 2007, p. 156.

25 BOYD, “The Politics of History and Memory in Democratic Spain”, p. 135.

26 On the literature on the Spanish transition that emphasizes this theme see Juan LINZ and Alfred STEPAN, *Problems of Democratic Transition and Consolidation*, Baltimore, MD: Johns Hopkins University Press, 1996; Giuseppe DI PALMA, *To Craft Democracies: An Essay on Democratic Transitions*, Berkeley, CA: University of California Press, 1990; and Omar G. ENCARNACIÓN, *Spanish Politics: From Dictatorship to Democracy*, Cambridge, UK: Polity Press, 2008.

four decades. A sweeping amnesty law was enacted soon thereafter, in 1977, endorsed by the Right and the Left. It applied to both the former members of the authoritarian regime and those who had committed “offenses” against the authoritarian regime, such as elements of the radical left and Basque nationalists. This comprehensive amnesty officially closed the door to any form of transitional justice, but especially criminal prosecution of Francoist officials.

Another factor driving the Pact of Forgetting was the political culture that prevailed among the political class during the democratic transition, which was imbued by an overwhelming desire for consensus and compromise. Around the time of the transition, the major political actors from across the political spectrum sought to avoid any situation that could potentially bring them into conflict, especially one as sensitive as a debate over who bore ultimate responsibility for the Civil War. Among the sources of consensus and compromise during the democratic transition was the “political learning” that Spanish politicians are thought to have extracted from Spain’s tortured history with democracy, especially the collapse of the inter-war Second Republic.<sup>27</sup>

After Franco’s passing, there was a broadly based understanding by the political class that the Republic perished because of the failure of the dominant political forces of the time to find common ground on which to compromise. Both the supporters of the Republic (Liberals, Socialists and Communists) and their opposition, an assortment of Fascist, ultra conservative, and nationalist organizations, famously adhered to the view that intransigence is a political virtue and that compromise is a sign of political cowardice. This made the Second Republic synonymous with political polarization. Not surprisingly, the fate of the Republic was a common reference for Spanish politicians throughout the transition. Phrases such as *recuerda la República*, (remember the Republic), and *tenemos que evitar el ejemplo de la República* (we have to avoid the example of the Republic), were frequently invoked in discussions about the need for making the political compromises incorporated into the Law of Political Reform.

Yet another factor accounting for the rise of the Pact of Forgetting is the societal trauma inflicted by the horrific violence of the Civil War and the ensuing repression of the Franco regime. These painful experiences are thought have made the Spanish public quite fearful that any attempt to dispense justice against the Franco regime could veer off into civil strife and result in another dictatorship, perhaps one more violent and repressive than the one that had just ended with Franco’s death. Indeed, talks of post-Civil War Spain as a collective case of “post-traumatic stress disorder”, or PTSD, are quite common.<sup>28</sup> Public opinion polls that show that the Spanish public anticipated the political tran-

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27 See, especially, GUNTHER, “Spain: The Very Model of an Elite Settlement”, *op. cit.*

28 See Enrique GONZÁLEZ DURO, *El miedo en la posguerra*, Madrid: Oberón, 2003.

sition as “a harsh and frightful experience, a sort of ordeal” support the PTSD diagnosis.<sup>29</sup> A poll by the Public Opinion Institute from March 1975 reports that 58 percent of Spaniards awaited the future “with worry”, 39 percent “with tranquility”, and 3 percent “did not know”. Public opinion polls of the time also reveal a marked preference for stability over justice believing that stability provided a surer and safer path toward a consolidated democracy.

Sentiments of fear and anxiety around the time of the transition were exacerbated by the political violence that permeated the democratic transition, courtesy of Basque separatists and right-wing paramilitary organizations. It is worth recalling that the democratic transition in Spain, despite its orderly nature, was especially violent; more violent, in fact, than the transition to democracy in neighboring Portugal, where the Salazar regime, in place since the late 1920s, was uprooted by the “Revolution of the Carnations”. Between 1979 and 1980 there were some 200 political assassinations in Spain, the bulk of them perpetrated by *Euskadi Ta Askatasuna*, or ETA, the terrorist arm of the Basque separatist movement.<sup>30</sup> The most memorable act of violence in the years leading to the democratic transition was the assassination of Franco’s last Prime Minister, Luis Carrero Blanco, whose car was blown to pieces in downtown Madrid by Basque separatists in 1973. Curiously, the wave of political assassinations that preceded the democratic transition echoed the wave of political assassinations that served as a prelude to the advent of the Civil War in 1936.

The Spanish public was also eagerly desirous of moving on with the project of Europeanization, a project long obstructed by the Franco dictatorship. After Franco’s passing, the overriding desire of Spaniards was constructing a liberal state that would allow for Spanish entry into European institutions, such as the European Economic Community, the precursor to the European Union, to which Spain was granted admission in 1986, some ten years after Franco’s death. Not surprisingly, politicians willing to capitalize on the public’s desire for peace, stability, and looking forward were rewarded at the polls. This was most notably the case of Adolfo Suárez, the young and telegenic Francoist bureaucrat who won Spain’s first democratic elections in decades. Acting on orders from King Juan Carlos, who assumed control of Spain following Franco’s death, for an orderly and peaceful democratic transition, Suárez engineered Spain’s “pacted transition”. Suárez convinced the authoritarian elite to commit political suicide in 1976 by agreeing to the Law of Political Reform and secured a commitment from the Left to refrain from excessive mobilization of

29 José Ignacio WERT ORTEGA, “The Transition from Below: Public Opinion among the Spanish Population from 1977 to 1979”, in Howard R. PENNIMAN and Eusebio M. MUJAL-LEÓN (ed.), *Spain at the Polls*, Durham, NC: Duke University Press, 1995, p. 74.

30 On political violence during the transition and its aftermath see, Diego MURO, *Ethnicity and Violence: The Case of Radical Basque Nationalism*, New York: Routledge, 2008.

the public in the months leading to the elections. During the 1977 elections, Suárez ran a campaign that stressed national reconciliation and that resonated with the public's desire for looking forward rather than backwards.

Finally, it is important to note that the field of transitional justice was barely developed around the time of the Spanish transition. Despite the example set by the Nuremberg International Tribunal, after the onset of the Cold War, neither the United States nor the USSR, the dominant international players after World War II, saw fit to promote justice and accountability in international politics. Consequently, as noted by Regina Blakeley, "The Spanish transition to democracy occurred in the 1970s at a time when the Cold War was still in existence, a framework of international human rights legislation was far from consolidated, and human rights themselves were certainly far from being the universal language that they had become by the late 1980s and 1990s".<sup>31</sup> Indeed, around the time of the Spanish transition, the most iconic national experiences of the transitional justice movement, such as the trial of the Argentine military junta and South Africa's Truth and Reconciliation Commission, were years away.

## THE BREAKDOWN OF FORGETTING

By some key indicators, the Pact of Forgetting achieved its goal of keeping a lid on the past as a means of facilitating the transition to a stable democracy. After the democratic transition, the past virtually vanished as a source of political disagreement among the usually contentious Spanish political class. This allowed for the making of the political compromises embedded in the 1978 constitution. Key among these compromises is the creation of a parliamentary Monarchy, a compromise that dashed the dream of many liberals that Spain would restore Republican government; the recognition of a public role for the Catholic Church within the Spanish State, even as the Constitution acknowledged the separation of church and state; and the recognition of a variety of nationalities within the Spanish territory. This last compromise opened the way for the de-centralization of the Spanish state with the creation of seventeen self-governing regions, the so-called *autonomías*.

At times it seemed that the only occasion that warranted making a reference about the past in Spain was to stress the importance of not talking about the past. Yet more surprising is that the Pact of Forgetting succeeded in making discussions of the violence of the Civil War from either side of the conflict and the political repression of the Francoist era inappropriate and unwelcome in

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<sup>31</sup> Giorgina BLAKELEY, "Digging Up Spain's Past: Consequences of Truth and Reconciliation", *Democratization* 12 (1), 2005, p. 45.

almost any social context. According to *The Economist* “The pact of forgetting has meant that mere mention of the Civil War has been kept out of everything, from politics to dinner-party conversations”.<sup>32</sup> This societal silence about the past suggests, above all, a significant degree of compliance of the general public with the political elite’s decision to let bygones be bygones. Remarkably, this has, to some extent, remained the case to this day.

A stunning finding from the survey from the Center for Sociological Investigations (CIS) about the 2007 Law of Historical Memory is that Spain remains split on the issue of whether or not the country should have undertaken some degree of transitional justice after Franco’s death. In 2008, about fifty percent of the public opposed either political trials or a truth commission.<sup>33</sup> This reluctance to embrace trials and a truth commission reflects highly ambiguous sentiments among the general public about the legacy of the Franco regime. Another stunning finding of the CIS survey is that almost 60 percent of the Spanish public credited Franco “with both good and bad things”, a dramatic increase from the evaluation of the Franco regime through the 1980s and 1990s, which generally hovered in the mid-40’s. Clearly, at some level, the Spanish public remains reluctant to view the Franco dictatorship as deserving of a harsh indictment, even as the public acknowledges the need to recognize its victims.

As might be expected, the Pact of Forgetting began to unravel once the conditions that gave rise to it began to dissipate. Seen from this perspective, it could be argued that the Pact of Forgetting died as a victim of its own success. By 1995, when the first signs of dissatisfaction with the pact began to appear (which coincided with the twentieth anniversary of Franco’s death) the past was no longer perceived to be a threat to democratic stability. By then the public was already confident in the capacity of the nation to comport itself under democratic rule. Curiously, this point about Spain having overcome the fears of the past as an explanation for the demise of the pact to forget is a recurring theme of the movement for the recovery of the historical memory. According to Antonio Sánchez Marín (2009), a spokesperson for the Forum for Memory, a human rights organization, “The democratic transition did not bring about an end to people’s fear about the past. Everyone was painfully aware of the history of the two Spains... but things are different now, with democracy secure and firmly in place”.<sup>34</sup>

Another compelling explanation behind the collapse of the Pact of Forgetting is the rise of a new generation of left-wing leaders not politically socialized

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32 “Spain’s Civil War: Painful Memories”, *The Economist*, December 23, 2006.

33 “Survey on the Law of Historical Memory”, Madrid: Centro de Investigaciones Sociológicas, 2008.

34 Author’s interview, Madrid, June 16, 2009.

in the struggle against Francoism and not beholden to the political compromises of the democratic transition. Socialist Prime Minister Zapatero, the first politician in the post-Franco era to commit Spain to a policy of recovering the memory of the Civil War and the Franco dictatorship, is the embodiment of the political values of this new generation of left-wing politicians. Zapatero's Second Transition (an effort to confront the unfinished business of the democratic transition) was critical to shifting the Left's position on the past from "forgetting" to "remembrance", a pivotal development in the official unraveling of the Pact of Forgetting.<sup>35</sup> Of course, by 2007 the Left and its allies in civil society were convinced that the Pact of Forgetting had been rendered obsolete by having already accomplished its key political objective: the consolidation of democracy in as non-confrontational a manner as possible.

Lastly, by the early 2000s there was tremendous international pressure on Spain to conform to the norms of the transitional justice movement. Oddly, Spain played a role in fueling the rise of this movement. In 1998, a Spanish court ordered the arrest of Chilean General Augusto Pinochet on charges of crimes against humanity. An event rich in political irony, the "Pinochet affair" saw Spain trying to force Chile to bring justice to its former dictatorial regime while refusing to examine those of its own former dictatorial regime. Pinochet's arrest divided the Spanish political class on the issue of the prosecution of the general: the Right, which controlled the government in Spain at the time, opposed prosecution, and the Left supported it. This division thrust issues of political justice front and center in Spanish policies, invigorated the nascent movement for the recovery of the historical memory, and sensitized the public about the un-reconciled nature of Spain's past. More suggestive still, the Pinochet affair suggested a telling case of "psychological projection" among the Spanish public: the desire to do to Pinochet what was impossible to do to Franco. Numerous editorials and op-ed pages, such as one by the political commentator Francisco Umbral, stressed this very point. He keenly observed that "for the Spanish people, the Pinochet arrest is the vicarious dream of a historical impossibility, that of Franco being arrested in bed".<sup>36</sup>

Whatever the reason for the demise of the Pact of Forgetting, the past is no longer a taboo in Spanish politics, as suggested most vividly by the emergence of so-called memory wars in the last few decades.<sup>37</sup> The first of such wars was the "history war" of the mid-late 1990s, which pitted politicians from the right and the left over the revision of history textbooks. It was launched by the

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<sup>35</sup> See, especially, Omar G. ENCARNACIÓN, "Spain's New Left Turn: Society Driven or Party Instigated?", *South European Society and Politics* 14 (4), 2010.

<sup>36</sup> Carlos MALAMUD, "Spanish Public Opinion and the Pinochet Case", in Madeleine DAVIS, ed., *The Pinochet Case: Origins, Progress and Implications*, London: ILAS, p.157.

<sup>37</sup> ENCARNACIÓN, *Democracy without Justice in Spain*, p. 154.

attempt by the Socialist administration of Felipe González to erase a perceived “Francoist” bias in the way textbooks interpreted the events that led to the Civil War and the Franco dictatorship. Under the old regime, Spanish textbooks depicted the Civil War as a “crusade” to save the nation from the radicalism of the Second Republic and the Franco dictatorship was portrayed as the guarantor of peace and economic progress. These narratives grossly overlook Franco’s violent military coup against a popularly elected government in 1936, which launched the Civil War, to say nothing of the aftermath Francoist repression, which actually resulted in more bloodshed than the Civil War itself. Upon gaining control of the government in 1996, the conservative administration of José María Aznar sought to undermine the Socialist reforms by introducing a new educational curriculum that critics in Catalonia and the Basque Country argued promoted the myth of a culturally homogenous Spain and that the Left contended underplayed the repression of the Franco dictatorship.

More suggestive, perhaps, is *la guerra de las esquelas* (the war of the death notices), in which the relatives of those killed during the Civil War (from both sides of the conflict) appear to be reliving the conflict all over again. A typical Republican death notice, most commonly found in the liberal daily *El País*, tells the story of someone murdered by “Fascist thugs”, a reference to the army of military rebels commanded by General Franco. Death notices from the Nationalist side, generally found in the conservative daily *El Mundo*, memorialize those killed by “Marxist hordes”, a reference to the assortment of anarchist, socialist, and communist organizations that fought Franco and his army from the Republican side. In either case, the overarching point of the overtly partisan death notices is the same: to remind the public of the heinous crimes that one side of Spanish society committed against the other during the Civil War.

Alongside the war of the esquelas came the fight over the material legacy of the Franco regime, especially monuments to the Franco regime and streets named after members associated with the regime. The most high-profile fight over this legacy involved the equestrian statue honoring Franco that stood at the very centric Plaza de San Juan de la Cruz in the neighborhood of Nuevos Ministerios, an area of downtown Madrid that is home to embassies, government offices, and multinationals. Remarkably, the statue, erected in 1959 by the Franco regime to mark the campaign of “Twenty Years of Peace” since the end of the Civil War, had managed to survive the transition to democracy by nearly 30 years. It was ultimately removed from public view on April 17, 2005, in a secret operation conducted by Madrid city officials under the cover of night. The sensitivity of the operation reflected a heated debate between those who argued that removing the statue amounted to “erasing history” and those who felt that the public display of the statue was an affront to the new democracy and Franco’s victims. This debate intensified as the removal of Franco’s

equestrian statue in Madrid triggered a flurry of efforts by officials in other Spanish cities to “rid the country of its fascist debris”, as put to this author by a Spanish human rights activist Miguel A. Muñoz Molina, President of the Forum for Memory.<sup>38</sup>

## THE FORGOTTEN HISTORY OF FORGETTING

Although Spain's politics of forgetting might seem like an affront to prevailing norms about how nations should deal with a “dark” past, this experience is very much in line with a long history of Western nations of forgetting or setting aside their political transgressions. Indeed, Spain's politics of forgetting seems to be a direct heir of this time-honored tradition that goes back to the Roman Empire.

Summarizing the long history of political forgetting in the West, Timothy Garton Ash notes that “just two days after the murder of Caesar, Cicero declared in the Roman senate that all memory of the murderous discord should be consigned to eternal oblivion: *oblivione sempiterna delendam*”.<sup>39</sup> Garton Ash also makes notes of the longstanding practice of European peace treaties, such as the one between Lothar, Ludwig of Germany and Charles of France in 851 and the Treaty of Lausanne in 1923, which explicit call for forgetting. Similarly, the history of European civil wars highlights the role of forgetting as a healing mechanism. A case in point is the English Civil War, which was brought to a close with an Act of Indemnity and Oblivion of 1660. The law entailed a general pardon to everyone who had committed crimes during the Civil War and the interregnum.

Forgetting also underpinned post-war European unification, a process that is often linked to Winston Churchill's 1946 “United States of Europe Speech”. Delivered at the University of Zurich, and fresh from his defeat in the 1945 elections, Churchill urged the Europeans (especially Germany and France) to set the rancor of the past aside by embracing the spirit of forgetting. He noted that:

“Germany must be deprived of the power to rearm and make another aggressive war. But when all this has been done, as it will be done, as it is being done, there must be an end to retribution. There must be what Mr. Gladstone many years ago called a ‘blessed act of oblivion’. We must

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<sup>38</sup> Author's interview, Madrid, July 2, 2009.

<sup>39</sup> Timothy GARTON ASH, “Trials, Purges and History Lessons: Treating a Difficult Past in Post-Communist Europe”, in Jan-Werner MÜLLER (ed.), *Memory & Power in Post-War Europe*, New York: Cambridge University Press, 2002, p. 267.

all turn our backs upon the horrors of the past and look to the future. We cannot afford to drag forward across the years to come hatreds and revenges which have sprung from the injuries of the past. If Europe is to be saved from infinite misery, and indeed from final doom, there must be this act of faith in the European family, this act of oblivion against all crimes and follies of the past".<sup>40</sup>

Individual national experiences also show a long history of nations indulging in wholesale forgetting including, ironically enough, some of the world's leading democracies. A case in point is the United States, one of the chief global promoters of transitional justice. As critics of American democracy have pointed out, the American government "has not seen fit to consider slavery in a way that could lead to the reconciliation that other nations are intent on ensuring for their people; not even reparations have been part of the American experience of coping with the past".<sup>41</sup> It is telling that it is only in the last few years that a handful of monuments to the Confederacy have been removed from public view in the South, after years of complaints by the African-American community that these monuments were a direct affront to American democracy. Genocide and continued marginalization of Indigenous Americans is another stain in America's past has gone for the most part unaddressed.

Curiously, this convenient neglect of some of the darkest chapters in American history has not stopped the American government from insisting that other countries confront their difficult histories. In Germany, after World War II, the Americans overruled the British in how to deal with the political crimes of Nazi officers after the War ended. The British would have happily killed the officers without any pretense at prosecution, but the Americans insisted on putting the Nazi regime on trial for which the Americans "invented" the charge of "crimes against humanity". After invading Iraq, in 2003, American forces yielded transitional justice as something akin to a colonial instrument by making prosecuting Saddam Hussein and other members of his Baathist regime one of the necessary steps of an ill-fated process of democratization.

In more recent times, the American government has pointedly declined to confront the political excesses of the War on Terror that the George W. Bush administration embarked on following the terrorist attacks of 9/11, such as torturing persons suspected of being terrorists. That decision to endorse tortu-

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<sup>40</sup> Winston CHURCHILL, "The Zurich Speech", available at the website of the Churchill Society at <http://churchill-society-london.org.uk/astonish.html>; accessed May 15, 2011.

<sup>41</sup> Robert S. CAPERS, "First the Truth, Then Reconciliation: An American Perspective", *Global Dialogue* 8 (Autumn), 2006, p. 123; and Ta-Nehesi COATES, "The Case for Reparations", *The Atlantic*, June 2014.

re, most notably water boarding, according to human rights activists and legal scholars, has done lasting damage to the human rights movement and to the image of the United States and a global human rights leader. University of Chicago Law School professor Eric Posner has noted that “the prohibition of torture is at the core of the human rights regime; if that right is less than absolute, then surely other rights are as well”.<sup>42</sup> Upon entering office, in 2009, President Barack Obama decried the human rights abuses of the Bush administration, but he pointedly decided against prosecution for Bush officials. To his credit, Obama released the set of memos that authorized the use of torture in the global war on terror, and reaffirmed American commitment to banning torture.

More closely in line with Spain's experience is that of post-war Europe. Garton Ash reminds us that much of postwar West European democracy was constructed “on a foundation of forgetting”.<sup>43</sup> He adds that “the postwar French Republic was built, after the first frenzy of the *épuration*, upon more or less a policy of supplanting the painful memory of collaboration in Vichy and occupied France with de Gaulle's unifying national myth of a single, eternally resistant, fighting France”. Of Austria, Garton Ash notes that under Kurt Waldheim the country was “happily restyled, with the help of the allies, as the innocent victim of Nazi aggression”. The “new Italy”, as Ilaria Poggiolini has argued, emerged from “the tunnel of poverty and destruction”, determined to secure “its security, stability and wealth” anchored upon “a regime of national amnesia”.<sup>44</sup>

Even in Germany, the quintessential example of transitional justice in the twentieth century, given the example set by the Nuremberg International Tribunal and efforts by the German people in the post-Nazi era to “master the past”, determined efforts were made during the postwar period to ignore the Nazi past. It is worth remembering that the Nuremberg trials were hastily and conveniently concluded, in no small measure because German officials regarded the trials as “victors' justice”.<sup>45</sup> For many Germans, the Americans had convened the Tribunal not to seek justice but rather to punish Germany. After the onset of the Cold War, the U.S. and other Western allies also came to view the Nuremberg Tribunal, which was originally intended to examine all crimes committed during World War II, including those of the Western allies, such as the bombing of the City of Dresden, as a threat to the consolidation of

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<sup>42</sup> Eric POSNER, “The Case against Human Rights”, *The Guardian*, December 4, 2014. Available at <https://www.theguardian.com/news/2014/dec/04/-sp-case-against-human-rights>; accessed June 1, 2017.

<sup>43</sup> GARTON ASH, “Trials, Purges and History Lessons: Treating a Difficult Past in Post-Communist Europe”, p. 267.

<sup>44</sup> Ilaria POGGIOLINI, “Translating Memories of War and Co-belligerency into Politics: The Italian Post-war Experience”, in Jan-Werner MÜLLER (ed.), *Memory & Power in Post-War Europe*, New York: Cambridge University Press, 2002, p. 232.

<sup>45</sup> See Jeremy RABKIN, “Nuremberg Misremembered”, *SAIS Review* 19 (2), Summer-Fall, 1999.

democracy in West Germany. Curiously, East Germany continued to prosecute Nazi officials until the very end of the collapse of Communism, in 1989. Yet, according to historian Devin Pendas, Nazi prosecutions in East Germany did little to advance democracy and the rule of law; instead, they aided in consolidating East Germany's "Stalinist dictatorship".<sup>46</sup>

During the Adenauer era, 1949 through 1963, which encompasses West Germany's first post-war government under the helm of Chancellor Konrad Adenauer, as well as the most intense period of democratization and economic expansion, the German political class engaged in a radical re-imagining of the Nazi past deemed by some "a moral black mark on the country".<sup>47</sup> For much of the postwar period, some German politicians have argued that the rise of the Nazi regime was somewhat detached from the real Germany of ordinary Germans. Explaining the logic behind this bizarre whitewashing of history, Langenbacher writes that:<sup>48</sup>

"The responsible and rabid Nazi elite, most of whom were conveniently dead, were contrasted with innocent 'ordinary Germans' and honourable Wehrmacht soldiers. Abstract, agent-less historical conceptions implied that the 'German catastrophe' fell out of thin air and portrayed the Nazi period as an aberration from 'real' German traditions. Theories of totalitarianism compounded the problem by stressing the affinities between Nazi Germany and Soviet Russia, relativising German crimes in the process. Moreover, this willed gap with the past 'was, to a certain extent filled by the manic achievements of the 'economic miracle' –that has been responsible for much of the psychic and political immobility of large segments of the German population".

## TRANSITIONAL JUSTICE DURING THE THIRD WAVE

It is when contrasted to other Third Wave democracies, however, that the point about Spain being less outside of the norms of transitional justice than it appears is most compellingly suggested. The point stressed here is not that other nations have deliberately chosen to forget the past, as was done in Spain,

<sup>46</sup> Davin PENDAS, "Transitional Justice and Just Transitions: The German Case, 1945-1950", *European Studies Forum*, 2008.

<sup>47</sup> Eric LANGENBACHER, "Is Still the Unmasterable Past? The Impact of History and Memory in the Federal Republic of Germany", *German Politics* 19, 2010, p. 28.

<sup>48</sup> *Ibid.*

although some have. Rather, the aim is to underscore the point about the triumph of peace over justice in how the past was handled. For starters, across Third Wave democracies, amnesty and justice have coexisted in an effort to reconcile the public's desire for justice and accountability and the government's need to advance and protect political stability. Indeed, most Third Wave democracies have been willing to skirt ethics and the law when confronting the crimes of the old regime, much like Spain did.

In Portugal, the transition to democracy included a massive policy of purging intended to cleanse Portuguese society of any vestige of authoritarianism. Aiming for a comprehensive effort to rid Portuguese society of all collaborators with the previous regime, the purges included state agencies, the Catholic Church, the education system, and even the business community. But the purging committees, usually headed by members of the Portuguese Communist Party, turned "wild" and vengeful, convicting people because of their beliefs rather than because of their actions. Convinced that the purging was putting the fragile transition to democracy at risk, the military halted the purges and overturned all the sentences handed out by the purging committees.<sup>49</sup> That was the extent to which Portugal endeavored to enact a process of transitional justice.

Across Latin America, where the contemporary transitional justice movement was launched in the mid-1980s, after decades of civil wars, leftwing revolutions, and rightwing military coups, amnesty and forgetting have been more pronounced than is normally recognized. A case in point is Argentina, which made history in the mid-1980s by staging Latin America's first ever military trials on charges of crimes against humanity linked to the "dirty war" waged by the military against political dissidents. At the onset of democracy in Argentina, in 1983, there was an intense impulse to pursue vigorous retributive policies. But this rapidly gave way to a more pragmatic approach. For starters, as a way to get political consensus across the political class to organize the military trials, the government of Raúl Alfonsín, whose center-right Radical Party made human rights the cornerstone of its political program, was forced to overlook many of the human rights abuses that haunted the opposition party: the Peronist Party.

Under the administration of Perón's third wife, Isabel Martínez de Perón, in office from July 1974 to March 1976, hundreds of disappearances and murders took place. Most of these disappearances and murders are generally attributed to the Argentine Anti-Communist Alliance, otherwise known as the Triple A, a "shadowy rightwing paramilitary death squad" founded by José López Rega,

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<sup>49</sup> Antonio COSTA PINTO, "Political Purges and State Crisis in Portugal's Transition to Democracy", *Journal of Contemporary History* 43, 2008.

Minister of Social Welfare and personal secretary of General Perón. Rega is accused by human rights activists of killing at least 1,500 political opponents, most of them under the Martínez de Perón government.<sup>50</sup> Some of the victims were members of the *Movimiento Peronista Montonero*, or MPM, a leftist urban guerrilla organization active during the 1960s and 1970s, also linked to the Peronist party. In 1983, the Alfonsín administration issued a pardon to Martínez de Perón to allow her to return to Argentina in 1983 in time for Alfonsín's inauguration and to facilitate negotiations between the Radical Party and the Peronist party about the country's return to democracy. Attempts to prosecute Martínez de Perón proved futile.

While popular with the public, the military trials of the Argentine transition had a destabilizing effect on the new democracy. Between 1987 and 1990, Argentina experienced four major military uprisings, forcing Alfonsín to dramatically reverse course by enacting a set of amnesty laws in 1986-87, including the *Ley de Punto Final* (the Full Stop Law), which abruptly ended all investigations and prosecutions of people accused of political crimes during the military dictatorship. The law served as a prelude for a full pardon of the military in 1990 by President Carlos Menem. In rationalizing an amnesty process, Alfonsín cited the need for a more cautious approach to handling the military for the sake of protecting the new democracy: "It should be irrational to impose a punishment when the consequences of doing so, far from preventing future crimes, might cause greater social harm than that caused by the crime itself or by the absence of punishment".<sup>51</sup> Those yearning for justice would have to wait until 2005, when the Argentine Supreme Court annulled the amnesty laws enacted in the 1980s, allowing for the continued trials of military and police officers accused of human rights violations. By then, the threat of a military coup in Argentina had all but disappeared and the new democracy had achieved consolidation.

Elsewhere in Latin America, political pragmatism prevailed as well, in no small measure due to Argentina's travails. In Uruguay, support for punishment for those convicted of human rights abuses was very high (a whopping 73 percent) by the time the military retreated from governing in 1984. This enthusiasm for retribution was hardly a surprise considering that Uruguay had endured a military regime that according to one study detained one out of every 50 Uruguayans, giving the country the ugly distinction of having the world's highest proportion of political prisoners.<sup>52</sup> In 1987 the newly democratically elected president, Julio María Sanguinetti, proposed a blanket amnesty for the

50 "Argentine Ex-President Charged with Rights Abuses", *The New York Times*, January 13, 2007.

51 Raúl ALFONSÍN, "Never Again in Argentina", *Journal of Democracy* 4 (1), 1993, p. 18.

52 HUNTINGTON, *The Third Wave*, p. 211.

military after the military threatened to ignore summonses issued by civilian courts investigating charges of murder and disappearances by the military. In making the case for amnesty for the military the president argued that the political stability of the new democracy had to be considered, as well as the fact that terrorists groups were also covered by the amnesty. The amnesty law was later endorsed by a popular referendum.

Chilean President Patricio Aylwin entered office in the early 1990s embracing what his government called a policy of “justice within the limits of the possible”. This, in essence, meant establishing clear boundaries on how far the government would go in its pursuit of justice against the old authoritarian regime.<sup>53</sup> In words meant to assure military officers that his government posed no threat to them, shortly after assuming the presidency, on March 11, 1990, Aylwin announced, “The idea of trials is not in my mind... I am not in the mood to persecute or to antagonize General Pinochet or anyone else”.<sup>54</sup> Aylwin did little to undermine the infamous *leyes de amarre* (literally, the binding laws) that were purposely designed by Pinochet to limit the discretionary power of the incoming democratic regime to prosecute human rights abuses. Among other things, these nefarious laws granted Pinochet and his henchmen lifetime tenure as military officers (Pinochet himself retained the title of commander in chief of the armed forces until 1998), prevented the new congress from investigating the crimes of the previous regime, and set limits on how far the new government could reform state institutions (including the judiciary). Not until the Spaniards’ very ironic decision to indict Pinochet on crimes against humanity in 1996, followed by the general’s arrest in London in 1998, were the Chileans emboldened to begin the process of freeing themselves from the grip of Pinochet’s political legacy.

Across post-communist Europe, a grab bag of approaches for dealing with the past has prevailed, from political trials, to “lustration”, or disqualifying people from serving in public office, to Spanish-style forgetting. Given the Nuremberg precedent, it is hardly surprising that the former East Germany has had the most extensive experience in prosecuting former communist leaders. But politics, not ethics and the law, have informed the actions of public officials given the “radical, arbitrary and political selection of the accused”.<sup>55</sup> When charges were brought against members of the old regime, it was not for the crimes that the world knows about, such as the shoot-to-kill policy at the Berlin Wall, but for crimes often unrelated to communist rule that are easier to

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53 José ZALAQUETT, “Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations”, *Hastings Law Journal* 43, 1992.

54 HUNTINGTON, *The Third Wave*, p. 217.

55 GARTON ASH, “Trials, Purges and History Lessons: Treating a Difficult Past in Post-Communist Europe”, p. 272.

prosecute and gain a conviction. Erich Mielke, former director of the infamous Stasi secret police, was prosecuted not for his role in spying and repressing his countrymen (which was legal and in fact lauded under communist rule), but rather for the murder of a policeman in 1931, years before the rise of communism in East Germany.

In Poland, we find the closest analogy to the Spanish experience. Tadeusz Mazowiecki, Poland's first noncommunist leader in more than forty years, famously declared in his first speech to parliament that "we draw a thick line [*gruba linia*] under the past", which was widely interpreted to stand "for a whole Spanish approach to the past".<sup>56</sup> The general attitude at the time was "let bygones be bygones, look to the future, to democracy and Europe, as Spain had done". Political leaders in the former Czechoslovakia deemed political trials too difficult to organize, and potentially destabilizing. Instead, they settled on a policy of purges (lustration) that banned high functionaries of the Communist Party, members of the state security agency (StB), the People's Militia (the party's private army, as well as their collaborators) from holding senior administrative positions in government, the state-owned media, and state-owned enterprises for five years.<sup>57</sup>

In South Africa, the best-known case of reconciliation, justice was abridged for the sake of political stability and advancing democratization. Full-scale prosecution of human rights abuses by the Apartheid regime was the preferred option of many South Africans, after decades of brutal oppression by a white minority. But in the end, this goal had to be abandoned for the more pragmatic one of moving on with the new democracy. According to one analysis: "State military and security forces posed a considerable threat to peaceful elections and there was a very real risk to civil war. Thus, there was a compromise between the outgoing National Party's demand for blanket amnesty and the African National Congress' desire for Nuremberg-style trials: limited amnesty, partial accountability, and the fullest truth possible".<sup>58</sup>

## THE LESSONS FROM SPAIN

This analysis has used the tools of historical and comparative analysis to challenge the view that Spain's politics of forgetting stand outside or in violation of international norms regarding how nations confront a difficult and painful past. A broad review of how Western nations over the course of the years have

<sup>56</sup> Ibid., p. 268.

<sup>57</sup> See Luc HUYSE, "Justice After Transition: On the Choices Successor Elites Make in Dealing with the Past", *Law and Social Inquiry* 20 (1), Winter 1995.

<sup>58</sup> Rosemary NAGY, "Reconciliation in Post-Commission South Africa: Thick and Thin Accounts of Solidarity", *Canadian Journal of Political Science* 35 (2), June 2002, p. 323-46.

faced difficult questions about the past shows a long history of forgetting the past or reinventing history, especially as they navigated the complexities of consolidating democracy. For their part, most Third Wave democracies, have, like Spain, treated the past in a highly pragmatic fashion. Across virtually all cases, even those that have vigorously embraced transitional justice, such as Argentina and South Africa, the desire for peace and stability has trumped accountability and justice. This pragmatism about coping with the past should not be that surprising given that transitional justice processes, such as political trials and truth commissions, have not always lived up to expectations about their capacity to further the cause of democratization.

Quite the contrary, transitional justice appears to have a very ambivalent relationship to democracy. Although often posited as an unqualified blessing for democracy, in some cases transitional justice has actually undermined the transition to democracy by encouraging “retroactive justice”, rekindling old feuds and grievances, and taking nations down the path of revenge. Iraq is the latest and most dramatic example of all of this. The attempt to hold the Saddam Hussein regime accountable for its political crimes, which included the prosecution of Hussein on crimes against humanity, extensive purging of the civil service and the military, and a series of attempts at reconciliation, was not the teaching moment that many, including the occupying American forces, had hoped it would be. In particular, Hussein’s conviction and execution was expected to launch a new democratic era by, among other things, creating an independent judiciary.<sup>59</sup> But that clearly has not been the case, since Iraqi leaders have shown very little interest in respecting the independence of judges. Worse yet, the trial deepened sectarian divides within Iraq, bringing the country to the brink of civil war, thereby helping squander the prospects for the emergence of a viable democracy.

Ultimately, however, whether Spain violates the international norms about dealing with the past is less important than what the country has to say about the interaction between justice and democratization. At least three lessons about this interaction are worth highlighting. First, and arguably foremost, the Spanish experience pointedly cautions about making confronting the past through any of the established means into a requirement or a prerequisite for successful democratization. Contrary to the conventional wisdom promoted by the transitional justice movement, the failure to confront the past during the transition to democracy does not condemn any nation to an imperfect or weak democracy. A multi-layered process, democratization is apparently compatible with a wide variety of approaches for dealing with a difficult and

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<sup>59</sup> See Erin DALY, “Transitional Justice in Iraq: Learning the Hard Way”, *Israel Law Review* 47 (91), 2014.

painful past, including forgetting and moving on. And its success hinges not on whether the old authoritarian regime is held accountable for its misdeeds or not, but rather on how the new democratic leaders respond to other challenges, such as securing free and contested elections, respecting civil and political freedoms, furthering the rule of law, and meeting the social and economic expectations of the citizenry.

Critics of the Spanish transition (usually Spaniards) have decried the “erasure of memory” occasioned by the Pact of Forgetting as constituting an “impure genesis” for democracy in Spain. But the evidence pointing to democracy’s success following the demise of the Franco regime is overwhelming.<sup>60</sup> It is worth emphasizing that the democratic regime inaugurated in Spain in 1977 is the first one to enjoy any significant degree of stability in the country’s tumultuous history. All previous attempts at democratization had been derailed; and in the case of the Second Republic had descended into Civil War. More remarkable yet is Spain’s reputation as the very model of successful democratization. According to Juan Linz and Alfred Stepan, the deans of the democratization literature, Spain is the paradigmatic example of “democratic consolidation”, just like interwar Germany can be regarded as the paradigmatic example of “democratic breakdown”.<sup>61</sup> “Democratic consolidation” is understood as that point when democracy becomes “the only game in town”, and all significant opposition to democracy ceases to matter to the stability of the democratic regime.

Signs of democratic consolidation in Spain abound. Since 1977, the country has produced multiple peaceful elections, including several that have entailed a significant shift in political power, such as the 1982 general elections, which returned the Left to power for the first time since the end of the Civil War. Spain has also managed to deepen the quality of its democracy, often in remarkable and surprising ways. It successfully de-centralized itself by creating a system of seventeen “autonomous communities” that has granted culturally distinct regions like Catalonia and the Basque Country an extraordinary degree of home rule. Spain has also done more than its share among the world’s nations to advance human rights.

Oddly enough, it was Spanish courts that established the legal principle of “universal jurisdiction”. It permits governments to claim criminal jurisdiction over an individual accused of human rights violations regardless of where the alleged violations were committed. This controversial principle got started in Spain, in 1997, when a Spanish court indicted General Pinochet on crimes

60 Salvador CARDUS I ROS, “Politics and the Invention of Memory: For a Sociology of the Transition to Democracy in Spain”, in *Disremembering the Dictatorship: The Politics of Memory in the Spanish Transition to Democracy*, Amsterdam: Rodopi, 2000.

61 LINZ and STEPAN, *Problems of Democratic Transition and Consolidation*, p. 5.

against humanity. In 2005, Spain cemented its status as a gay rights pioneer by becoming the first Catholic-majority nation to legislate same-sex marriage. The country achieved this gay rights milestone ahead of more mature, and presumably more liberal, democracies, like the U.S., Britain, and France.

The second lesson posed by Spain is that a capacity for forgetting is probably necessary for the making of any successful democracy. Indeed, it is hard to imagine any country, but especially one like Spain, with a long history of bloodshed, civil wars, and military coups, succeeding as a democracy without some degree of letting bygones be bygones. As seen throughout this analysis, a compelling point can be that democracy succeeded in Spain not despite the politics of forgetting, but because of them. Setting the past aside during the transition allowed for the making of the constitutional compromises upon which democracy was built, such as the separation of Church and State and the restoration of the Monarchy. It also facilitated the de-centralization of the country and launched the project of Europeanization.

Although rarely recognized by the transitional justice movement and the human rights community, the virtues of forgetting suggested by the Spanish experience are broadly reflected in mainstream Western political thought. Friedrich Nietzsche theorized about the virtues of what he called “active forgetting”, the kind of forgetting that enables humans to step outside of history and go about their business unburdened by the past.<sup>62</sup> In a sharp critique of those who emphasize the importance of memory in politics, Nietzsche contended that the future of politics rests not only on the ability of any society to remember the past, but also on its capacity to forget.

More recently, the political commentator David Rieff has criticized the human rights movement and the transitional justice scholarship for “fetishizing” remembrance, much to the detriment of advancing peace and reconciliation. He notes that remembering the horrors of the past in the hope of preventing them from happening again is akin to “magical thinking”. He supports this idea by recalling the fact that since the horrors of the Jewish genocide, which launched the politics of remembrance, the world has witnessed the rise of genocide in places as diverse as Bosnia, Guatemala, and Rwanda. On a related note, Rieff contends that “official narratives” about past human rights abuses are generally self-serving, frequently of suspect-veracity, and often quite damaging to society by dwelling on revenge rather than committing society to the hard work of reconciliation. In an observation that may as well have been written particularly for the Spanish experience, Rieff notes that: “remembrance may be the ally of justice, but despite the conventional wisdom of the human

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<sup>62</sup> Daniel BREAZEALE (ed.), *Nietzsche: Untimely Meditations*, translated by R. J. Hollingdale, New York: Cambridge University Press, 2003.

rights movement, it is not a reliable friend to peace, whereas forgetting can and at times has played such a role”.<sup>63</sup>

The third and final lesson is that while no moral or ethical argument can be made for forgetting the political crimes of a departed authoritarian regime, it is a folly to demand that all nations conform to a universal standard of transitional justice. This falsely presumes that ethical judgment and politics operate in mutually exclusive universes, when, in fact, ethical judgment can incorporate pragmatic considerations. It is difficult to see how transitional justice, in almost any form, could have proceeded in Spain. In the aftermath of Franco’s death, the configuration of political forces that emerged from a state-guided transition, the residual authoritarian power left behind by the transition, and the public’s keen discomfort with revising the past for fear of repeating it all helped solidify the pact to forget and a “blank slate”.

In sum, the Spanish experience pointedly calls for a more pragmatic understanding of how the past should be handled during the transition to democracy than the one-size-fits-all prescription currently being promoted by the transitional justice movement. Scholars concerned about the past would do well to consider the possibility that different national circumstances might demand divergent approaches for coping with the past. For their part, policy-makers in newly democratic societies should train their energies on the future, instead of dwelling on the past, and prioritize what actually makes democracy work, such as institutionalizing elections, building a sound economy, and consolidating the rule of law.

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<sup>63</sup> David RIEFF, *In Praise of Forgetting: Historical Memories and its Ironies*, New Haven: Yale University Press, 2016, p. 122.

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