JUDICIAL INVOLVEMENT IN AUTHORITARIAN REPRESSION AND TRANSITIONAL JUSTICE: THE SPANISH CASE IN COMPARATIVE PERSPECTIVE

Paloma Aguilar*

Abstract

Why have some democracies made considerable progress in prosecuting dictatorship-era human rights violations or in publicly exposing the truth about repression while others still have amnesty laws that prevent, or at least hinder, even the judicial review of such abuses? This article compares Spain, Chile and Argentina to understand the impact of their contrasting histories of repression on how they have dealt with their violent pasts. I assess whether a greater degree of legal repression and direct judicial involvement in repression explains why there is more resistance to prosecuting those responsible for human rights violations, establishing truth commissions or annulling the political sentences of the past during democratization. Once democracy has been consolidated, different dynamics may emerge, but this history of judicial complicity has proved to be a key factor in understanding the continuous lack of judicial accountability in Spain.

Keywords: legal repression, judiciary, accountability, Francoism, Spain, Chile, Argentina

Introduction

Why have Argentina and Chile gone so far in their search for truth and justice while Spain has not even revised or anulled the thousands of political trials of the Francoist regime of 1936–1975? The systematic violation of human rights under right-wing dictatorships in Spain, Chile and Argentina forced them to deal with this violent past during their democratization processes. These three countries have adopted a wide variety of transitional justice (TJ) measures, particularly as relates to accountability. Argentina has held many trials against perpetrators of human rights violations and repealed the self-amnesty law passed by the junta. In Chile, strong initial resistance gave way to hundreds of trials, and although the 1978 amnesty law is still in force, key stakeholders have called for its repeal.

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1 I thank Juan José del Águila, Cath Collins, Jorge Correa, Alicia Gil, Pablo Gil, Roberto Garretón, Mónica Lanero, Manuel Ortiz and Julio Ríos for providing useful information for this article. I would also like to thank the invaluable help of the anonymous readers and of Hugo van der Merwe, Co-Editor in Chief of this journal. This publication is part of a project entitled ‘Dictatorial Repression and Judicial Systems: The Determinants of Authoritarian Stability and Transitional Justice’ (CSO2012-35664, Spanish Ministry of Economy and Competitiveness).

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Both Chile and Argentina established truth commissions. Spain, in contrast, has not established a judicial accountability process or a truth commission, and its amnesty law remains in force, with virtually no political public debate about whether it should be repealed.\(^2\) Even the politically motivated verdicts of Francoist tribunals have not been annulled. I argue that the presence or absence of the elements of a TJ process most directly related to judicial accountability – trials against perpetrators, the repeal of amnesty laws, a truth commission and annulments of unfair trials\(^3\) – can be better understood by examining the history of judicial involvement in past repression.

Researchers have studied the functioning of judicial systems under authoritarian regimes and analyzed the determinants of TJ in different countries, but, with the exception of Anthony Pereira, they have not linked the two. With respect to the Spanish case, the residual legitimacy of Francoism, fear of conflict and reprisal, the negotiated character of the political transition and the high level of social complicity with the dictatorship account for its particularities.\(^4\) These are crucial variables for understanding the scarcity of TJ measures in the Spanish transition, but they do not shed light on the role of a crucial actor for understanding TJ: the judicial system. They also do not fully account for the situation in the aftermath of the transitional period, in which the weight of these variables has clearly diminished.\(^5\)

According to my main hypothesis, \textit{ceteris paribus}, the more direct the involvement of the judiciary in authoritarian repression, the less likely is the establishment of judicial accountability or truth measures during the democratization period. During the initial democratic consolidation period, judicial involvement impacts on institutional reforms, social agency, political determination, judicial will and receptivity to advances in international law. These ‘intermediary’ variables are, in turn, crucial to explaining developments that occur in post-TJ stages. When liability for repression not only falls on military and police forces but also implicates the judicial system, judges and prosecutors tend to be reluctant to approve punitive measures against repressors. They also tend to be warier of any public review of the past through truth commissions, as the professional reputation and standing of the entire judicial network might be seriously damaged. Subjecting the past to public scrutiny might mean reviewing cases conducted without minimum judicial safeguards, all of which could raise doubts about the rigor and independence of judicial bodies over many years.

\(^2\) Two parliamentary initiatives to repeal the amnesty law were presented in 2010, but they were only supported by minority parties and finally rejected.

\(^3\) Other TJ measures, such as pensions, memorials or vetting, are beyond the scope of this article and are probably less directly influenced by factors related to the judiciary.


Finally, when the judicial system has been implicated in repression, there is greater reluctance to repeal amnesty laws that prevent trials.

This article first details the types of authoritarian repression and the degree of judicial involvement in repression in Chile, Argentina and Spain. It then explains the different TJ outcomes in the three countries during their transitional and democratic consolidation periods and explores the links between these outcomes and the nature of judicial involvement in repression. Finally, it discusses the conclusions and implications of these findings for Spain and for TJ more generally.

**Predominant Repression Tactics**

The dictatorships in the three countries deployed different repressive strategies, from basically legal to mostly clandestine, which had direct consequences on the level of judicial involvement. Many of the courts-martial and executions recorded in Chile and Spain after the military coups were of questionable legality and coexisted with a greater number of illegal killings backed or permitted by the military authorities. In Spain, the failure of the 1936 coup in half the country triggered a civil war in which numerous extrajudicial executions took place. Several months would pass before political repression began to be ‘judicialized.’

Spain’s prison population at the end of the civil war was 270,000. Between 1936 and 1942, nearly 500,000 political prisoners passed through more than 100 concentration camps and hundreds of thousands of Spaniards were court-martialed. The latest rough estimates of deaths caused by Francoist repression stand at 130,000, including some 50,000 executions in the postwar years (Table 1). Despite there being no official figures for the postwar period, a significant number of guerrilla fighters were executed through the beginning of the 1950s. In addition, some sources indicate that the military enforced 13 court-martial death sentences between 1958 and 1975.

In Chile, the ‘caravan of death... deliberately violated the regime’s own legality.’ In the months after the coup, the number of people summarily executed by the army or police (carabineros) seems to have far outweighed those treated in some sort of judicial manner. Those that were prosecuted were tried in military courts composed only of military officers who acted as if the country were at war.

During the regime’s first three years, ‘an estimated six thousand Chileans were tried by these bodies... Approximately two hundred were sentenced to death

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6 Pablo Gil, ‘Derecho y ficción: La represión judicial militar,’ in Violencia roja y azul, ed. Francisco Espinosa (Barcelona: Crítica, 2010).

7 Comentario Sociológico 12–13 (October 1975–March 1976).


9 Ibid., 25.
and executed.¹⁰ Both Spain and Chile witnessed a shift toward the ‘judicialization’ of repression, but whereas Spanish courts-martial continued to pass death sentences, albeit at a decreasing rate, their Chilean equivalents ceased to apply capital punishment. Over time, Chilean extrajudicial bodies, mainly the political police and the DINA intelligence agency, became solely responsible for state-sanctioned killings. Repression began to wane after the DINA was replaced by the CNI in 1977, but not without the occasional resurgence, as in the early 1980s.¹¹

In Argentina, neither courts-martial nor ordinary courts enforced a single death sentence. All deaths and disappearances were caused by the extrajudicial machine of repression implemented by the military juntas. Victims were kidnapped by security forces, taken to clandestine detention centers, tortured and, in many cases, murdered.

The relative figures per 100,000 inhabitants in Table 1 allow us to see, first, the important differences among the three countries in terms of their ‘legal’ and ‘illegal’ repressive practices. Trials and imprisonment were far more numerous in Spain than in Argentina, with Chile in between. Second, many more killings occurred in Spain, but the relevant point here is the contrast between Argentina

Table 1. Repression Tactics, Estimated Number of Victims

<table>
<thead>
<tr>
<th></th>
<th>Disappeared or Murdered</th>
<th>Tried by Court-martial for Political Offences</th>
<th>Imprisoned</th>
<th>Tortured</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chile</td>
<td>3,000–5,000</td>
<td>6,000 (46 per 100,000)</td>
<td>60,000</td>
<td>Several tens of thousands</td>
</tr>
<tr>
<td></td>
<td>(23–34 per 100,000)</td>
<td></td>
<td>(461 per 100,000)</td>
<td></td>
</tr>
<tr>
<td>Argentina</td>
<td>20,000–30,000</td>
<td>350 (1 per 100,000)</td>
<td>30,000</td>
<td>Several tens of thousands</td>
</tr>
<tr>
<td></td>
<td>(62–93 per 100,000)</td>
<td></td>
<td>(93 per 100,000)</td>
<td></td>
</tr>
<tr>
<td>Spain</td>
<td>130,000</td>
<td>More than 1 million (3,843 per 100,000)</td>
<td>500,000</td>
<td>No official figure, but torture was a common practice in police stations and prisons until the end</td>
</tr>
<tr>
<td></td>
<td>(500 per 100,000)</td>
<td></td>
<td>(1,900 per 100,000)</td>
<td></td>
</tr>
</tbody>
</table>

¹ I have not included data on the political trials that took place after 1945. Although there are no official figures for the whole period, thousands of people were tried by courts-martial for political offences. Between 1963 and 1977 alone, 8,943 people were tried by the Court of Public Order, a special tribunal devoted to the prosecution of political dissents and composed of ordinary judges and prosecutors.


and Chile, which are easier to compare in this respect because of the absence of civil war.

The three cases feature, albeit in differing proportions, the coexistence of legal and illegal repressive practices, but whereas in Argentina no death sentences were passed and limited courts-martial for political reasons were enforced, Chile experienced significantly higher levels of both and Spain’s experience of such judiciary repression was of a vastly greater degree.

Judiciary Involvement in Repression

The different levels and types of judiciary involvement in repression outlined in this section demonstrate the contrast among the judicial legacies of Chile, Argentina and Spain. The intense political repression carried out by both sides during the Spanish civil war and under Francoism would not have been possible without the participation of the judiciary. Although most of the political repression, especially in the first years, occurred in the field of military justice, it is essential to consider the direct involvement of the ordinary judicial system in the Francoist repressive machine.

The courts-martial chiefly, though not solely, responsible for wartime and postwar repression in Spain had to take on ordinary judiciary personnel because of the huge number of proceedings they initiated, mainly between 1936 and 1944. According to one leading expert, ‘Numerous judges and prosecutors actively participated in military jurisdiction as court-martial examining magistrates, prosecutors or rapporteurs.’

These professionals accepted temporary militarization, often voluntarily, which meant they formed part of the military courts that up until the mid-1940s enforced an estimated 50,000 death sentences. In 1941, owing to the reduced number of trials, militarized judiciary personnel began to be demobilized and sent back to ordinary courts. However, ‘military-legal’ personnel continued to participate in courts-martial until the end of the dictatorship (and even afterward, given that the 1945 Code of Military Justice remained in force until 1980) in the figure of the ‘rapporteur,’ whose presence was compulsory.


13 From late 1936 on, ‘the Honorary Military Legal Corps received a huge influx of not only judicial personnel, but also drafted civil lawyers and law graduates.’ Subsequently, it ‘began to admit not only judges and prosecutors, but . . . all legal professionals and law graduates.’ Ibid., 362. This extraordinary involvement of all types of legal professionals constitutes irrefutable evidence of their direct participation in Francoist repression.

14 A matter not only of ‘compulsory enlistment’ for ‘judges, prosecutors and candidates to both professions’ but also of ‘allowing the voluntary militarization of judges, senior judges and prosecutors who abandon ordinary court service to perform military-legal duties in courts-martial and legal advice departments of military ministries and audit offices.’ Ibid., 363.

15 The rapporteur was the only court-martial member who had to be a law graduate. Following the major demobilization of the mid-1940s, jurists from the university participated in courts-martial, as they were able to combine their teaching duties with Legal Corps work. I thank Pablo Gil for this
The majority of court-martial sentences were the result of summary procedures, which considerably reduced the defense opportunities of the accused. In many cases, even minimal formalities were not observed, and failure to comply with the already repressive prevailing legislation was commonplace. In the case of summary procedures, it was obligatory for the defense lawyer to be not only a military officer, but also the lowest-ranked member of the court-martial. The defense lawyer was barely given time to prepare and, given his or her subordinate position, had little scope to defend the accused.

Though on a lesser scale, courts-martial also operated during peacetime in Chile and Argentina, whose regimes declared a state of war and a state of emergency, respectively, to increase their repressive abilities. Chilean courts-martial only occasionally included civil judges, and prosecutors were always military officers. In contrast with the Spanish case, civil lawyers were allowed to defend the accused. Most of the Chilean judicial system clearly aided the dictatorship’s repressive policies. In Robert Barros’ words, ‘The courts did little to halt the massive human rights violations of the first years of military rule.’ This ‘failure to protect human rights’ was mainly ‘the consequence of methods of repression deliberately designed and implemented to elude judicial control and penal responsibility.’ Despite the well-documented passivity of the Chilean judicial system with regard to abuses, it did not participate in the vast majority of courts-martial that passed death sentences, and there is evidence that some judges tried to remain neutral – which nearly always cost them dearly – and that some lawyers did their utmost to defend their clients before courts-martial.

Juan José del Águila has documented the participation in courts-martial of well-known law professors and how they later omitted this fact from their biographies. Juan José del Águila, ‘La jurisdicción de guerra del franquismo’ (presentation at workshop 7 at ‘XI Congreso de Historia Contemporánea,’ Granada, Spain, 12–15 September 2012).

A state of war existed in Spain until 1948, but laws allowing military jurisdiction to use summary proceedings for certain offences continued to be passed thereafter.

Civil lawyers were usually excluded from courts-martial, even if they were not summary, at least until 1963. They were only capable of defending political prisoners once the ordinary justice system recovered its jurisdiction over political crimes, mainly through the creation of the Court of Public Order.

In Chile, ‘the right to habeas corpus was revoked during states of siege.’ Constable and Valenzuela, supra n 10 at 137. Courts-martial continued to operate during the first five years following the military coup, while those held between 1978 and 1989 were of an ordinary nature. In Argentina, the state of siege lasted until October 1983 and summary and secret court-martial trials were held in which civil defense lawyers were not allowed to participate, but these courts were far less active than in the other two countries. See, Pereira, supra n 8.

In Argentina, despite the complicity of a large part of the judicial system, the state essentially used an extrajudicial repressive strategy.\textsuperscript{24} The country thus had ‘the least amount of civil-military cooperation and integration in the judicial realm.’\textsuperscript{25} Also, there was ‘more opposition in the judiciary to military notions of national security in Argentina than in . . . Chile.’\textsuperscript{26} Courts-martial were hardly used to prosecute political dissidents, and unlike in the other two cases, ‘judges and lawyers were also targeted by the regime – over one hundred lawyers for political prisoners disappeared between 1976 and 1983.’\textsuperscript{27}

Members of the Spanish ordinary judicial system also participated in a number of special courts created to repress political dissidence, such as the Political Accountability Jurisdiction,\textsuperscript{28} as well as the ‘Causa General,’\textsuperscript{29} the Special Court for the Repression of Freemasonry and Communism,\textsuperscript{30} the Vagrancy Jurisdiction, the Provincial Tax Collection Agencies and the Labor Jurisdiction.\textsuperscript{31} In several cases, ‘mixed courts’ were set up that consisted of military officers (who normally comprised the majority and occupied only the most important posts), ordinary jurisdiction officials and members of the official party.\textsuperscript{32} The extraordinary expansion of military jurisdiction, which was clearly preeminent over ordinary jurisdiction in the event of conflicts of competence, and, above all, the proliferation of special jurisdictions geared toward political repression in Spain have no equal in the Chilean and Argentine cases.

Francoists persecuted dissidents until the end of the regime. With time, the ordinary judiciary played an increasingly active role in this task. Worth highlighting is its exclusive participation in the special Court of Public Order, in which judges and prosecutors, from 1963 to the end of 1976, took the lead in carrying out ideological and political repression, except in the case of terrorist offences, which continued to fall under military jurisdiction.\textsuperscript{33}

\textsuperscript{24} ‘The Argentine regime stands out for its almost complete disregard for legal conventions. It convicted some 350 people in military courts, but its main response to its political opponents was a fierce “war” . . . conducted largely without judicial constraints.’ Pereira, supra n 8 at 26.

\textsuperscript{25} Ibid., 13.

\textsuperscript{26} Ibid., 119.

\textsuperscript{27} Ibid., 26.

\textsuperscript{28} Between 1939 and 1942, 20% of senior judges and 3% of judges ‘were engaged in demanding political accountability’ and belonging to these bodies was voluntary. This amounted to 9.5% of the legal profession. Lanero, supra n 12 at 373.

\textsuperscript{29} Ordered by a 1940 decree, this process was conducted by the Spanish Attorney General’s Office, subordinate to the Ministry of Justice. The information relating to alleged offences committed by sympathizers of the losing side was compiled by ordinary prosecutors up until the 1960s and led to the opening of tens of thousands of judicial proceedings.

\textsuperscript{30} Assigned three permanent senior judges since 1941, this court was not suppressed until 1963, when the Court of Public Order was established.

\textsuperscript{31} Lanero, supra n 12.


\textsuperscript{33} Juan José del Águila, El TOP: La represión de la libertad (Barcelona: Planeta, 2001). To avoid the delays caused by the backlog of cases in this special court, ‘examining magistrates and prosecutors throughout Spain were forced to conduct preliminary inquiries, making them officers of the Court...
apart from courts-martial, no courts were specifically created for political repres-
sion purposes.
Spain’s ordinary judicial system, even when it acted outside the sphere of special
jurisdictions, collaborated with the dictatorship by exerting social control over
the population and applying Francoist ideology in its sentences. Its close col-
aboration with the regime’s notorious political police, the Political-Social
Brigade, and its refusal to hear cases of torture have been abundantly docu-
mented. The judicial hierarchy has been accused of obstructing the few attempts
to fight torture under Francoism. The most reliable figure for death sentences
enforced by ordinary judges for nonpolitical offences corresponds to the 1947–
1975 period and amounts to 41. For 1936–1946, no official figure exists, but the
prevailing legislation allowed such courts to pass death sentences in a number of
cases.

Not a single death sentence was enforced by the ordinary judiciary in Chile or in
Argentina, notwithstanding evidence of its inhibition in several cases in which
defense lawyers requested an appeal for protection for their clients. In Chile,
‘judges repeatedly rejected petitions to protect prisoners who were likely to face
torture.’ Also, they ‘were especially reluctant to challenge the DINA and other
secret police agencies, which virtually always denied any detentions and refused to
provide further information on national-security grounds.’ Nonetheless, des-
pite the National Commission for Truth and Reconciliation’s criticisms of the
judicial system’s collaboration with the Chilean dictatorship, its final report
acknowledges that ‘the first exhaustive investigations took place in the late
1970s’ and that ‘despite difficulties concerning police assistance, Examining
Magistrates and first-instance judges managed to prove the existence of crimes
and the possible involvement of police officers.’ Precisely because of that, how-
ever, they had to declare themselves incompetent and, once in the hands of
courts-martial, the prosecutions were unsuccessful.

of Public Order.’ Justicia Democrática, Los jueces contra la dictadura (Madrid: Túcar Ediciones,
1978), 46. Thus, the involvement of the ordinary judiciary in the dictatorship’s repressive machine
increased even more.

34 Manuel Ortiz, Violencia política en la II República y en el primer franquismo (Madrid: Siglo XXI,
1996); Conxita Mir, Vivir es sobrevivir (Lleida: Milenio, 2000); Francisco Bastida, Jueces y fran-
quismo: El pensamiento político del Tribunal Supremo en la Dictadura (Barcelona: Ariel, 1986).
35 This brigade stemmed from a 1941 law that remained in force until 1978. Judges and prosecutors
guaranteed its impunity, as ‘it was customary for the Court of Public Order “to impede direct
questions” about police brutality.’ Likewise, ‘formal complaints against the Social Brigade were
ignored, without the accused commissioners and inspectors being held to account in any way
whatevsoever.’ Carlos Jiménez Villarejo, ‘Una aproximación a la “policía política” del franquismo:
La Sexta Brigada de Barcelona,’ in Enrique Ruano, ed. Ana Domínguez (Madrid: UCM, 2011). See
also, Justicia Democrática, supra n 33.
36 Pereira, supra n 8.
37 Constable and Valenzuela, supra n 10 at 116.
38 Ibid., 123.
The final report of Argentina’s National Commission on the Disappearance of Persons is critical of judges’ complicit silence, but it also notes that some judges, ‘amid the tremendous pressures generated by the prevailing situation, performed their duties with the dignity and decency expected of them,’ and that ‘legal aid’ was seriously undermined by the ‘banishment or death of defense lawyers.’ In general, Argentine ‘courts were largely uninvolved in the repressive system, except to deny writs of habeas corpus and serve as a cover for state terror.’

As far as supreme courts are concerned, the Spanish one upheld the Francoist ideology in its rulings until the end. Moreover, it contributed ‘to the subordination of ordinary justice by basing its decisions regarding the competence of ordinary and military courts on criteria that were unfailingly favourable to the latter.’ According to a former senior judge of the Spanish Supreme Court, Carlos Jiménez Villarejo, no judge ever brought to court a case of torture under Francoism. The Supreme Court did not intervene in court-martial verdicts because the review power belonged to the Supreme Court of Military Justice. However, although the Supreme Court did have review powers over verdicts of the Court of Public Order, most of the time it simply ratified them.

In Chile, members of the Supreme Court sympathized with Augusto Pinochet’s coup from the outset, refusing to control the executive’s actions and to investigate human rights violations. Between 1973 and 1983, this court ‘rejected all but 10 of 5,400 habeas corpus petitions filed by the [Catholic civil society organization] Vicaría.’ It is true that ‘a few high court justices risked occasional mild, dissenting opinions against repression and manipulation of the law, but most simply deferred to the wishes of the regime.’ Lastly, even though the constitution allowed the Chilean Supreme Court to supervise all courts, it ‘refused to review any military court verdicts.’ In Argentina, in contrast, the military establishment’s mistrust of the judicial system was much greater and, therefore, led to far less collaboration between the institutions.

In sum, the Spanish judiciary’s collaboration in political repression was much more direct than in Chile and Argentina, where certain sectors of the legal profession had a somewhat more combative attitude toward the dictatorships.

40 CONADEP, supra n 11 at 392.
41 Pereira, supra n 8 at 4.
42 Bastida, supra n 34.
43 Lanero, supra n 12 at 325–326.
45 Bastida, supra n 34.
46 Constable and Valenzuela, supra n 10 at 122.
47 Ibid., 130.
48 Pereira, supra n 8 at 4.
49 Ibid.
50 The exception was Justicia Democrática. This clandestine organization spoke out against the judicial system’s submission to the dictatorship, but it received little backing. In fact, ‘the vast majority of judges and prosecutors remained loyal to dictatorial legal standards and not a
The Executive and the Judicial System

Another fundamental variable for analyzing the judiciary’s involvement in repression is the degree of its independence from the executive. It is thus necessary to ascertain whether the dictatorships in the three countries carried out purges in the judiciary and whether institutional mechanisms were created to subjugate judges and limit their capacity to control political power.

In postwar Spain, a sweeping purge of all professions affected, though in minor proportion, the judicial system, where ‘removal from service affected 6% of all judges and 12% of all prosecutors.’ Of those who remained in their posts, some were admitted after being sanctioned. This enabled the Francoist regime to begin securing the loyalty of judges and prosecutors.

During the dictatorship’s early years, access to the legal professions was controlled by reserving positions for Francoist veterans. In addition, judges had to pledge ‘unconditional allegiance to the Caudillo of Spain’ on taking up their position. The Franco regime also created an instrument for selection based on ideological criteria and subsequent indoctrination: the Judicial School, answerable to the Ministry of Justice. The 18-month period of study undergone by all judges, magistrates and prosecutors helps to explain their subsequent conservatism, given the ‘moral’ and ‘religious’ education they received in addition to tuition in legal matters. This school also sought to ‘inculcate in the students esprit de corps and due obedience to their hierarchical superiors.’ The Ministry of Justice acknowledged that it had intended to create ‘a militia of Justice . . . always willing to follow . . . the orders of the leader.’

Other mechanisms used by the regime to limit judicial independence were ‘recruitment, appointment, disciplinary sanctions, promotions, and transfers.’ In fact, the main founding purpose of the clandestine association Justicia Democrática was to express its disapproval of the ‘Executive’s iron grip on the judicial profession through the appointment of the most important posts’ and the ‘widespread use of “special leave,”’ which enabled large numbers of court officials and public prosecution service officers to move into politics.

51 Lanero, supra n 12 at 379.
52 This oath became compulsory from 1938 ‘upon qualifying as a judge or prosecutor and upon taking office.’ Ibid., 273. This means that all judges and prosecutors inherited by the democratic regime had taken this oath.
53 Ibid., 269.
54 Ibid., 272 (emphasis added).
Several judges and prosecutors held important posts in the Ministry of Justice and in other government bodies, the majority having previously performed ‘duties in special jurisdictions.’ In fact, ‘nearly all civil servants holding ministerial posts [had] passed through the military jurisdiction.’ According to Mónica Lanero, participation in repressive activities was a good way to advance in political circles, as those who participated in courts-martial and other repressive special jurisdictions tended to be rewarded with high-ranking positions in the administration. As will be seen, something similar occurred under democracy with judges who had been part of the Court of Public Order.

In Chile, the judicial system was allowed more independence because it was clearly aligned with the dictatorship. By treating judges with moderation and respect, Pinochet sought to secure their collaboration and acquiescence. This explains why the executive did not purge the Supreme Court and barely tampered with the rest of the judicial system. In Argentina, ‘on the day of the coup d’etat, the composition of the Judiciary was changed as regards the Supreme Court, the Attorney General and the Provincial High Courts.’ In addition, ‘in order to be appointed or confirmed, all judges had to pledge loyalty to the Rules and objectives of the “Process” led by the Military Junta.’

The irrevocability of judicial posts was respected by the Chilean political authorities, since they had faith in the Supreme Court’s control over the rest of the judiciary. This was not the case in Argentina, where the judicial system had a more tense relationship with the military. In Spain, after the initial purges and despite limits to the independence of the judiciary, the relationship between judges and the executive branch was rather fluid.

**TJ during Democratization**

As mentioned above, this article does not cover every possible TJ measure, focusing instead on prosecutions, amnesty laws, the creation of truth commissions and the annulment of unfair sentences. These are the elements of TJ most closely linked to judicial involvement in repression, which is our main independent variable for the democratization period.

In Spain, the amnesty law has been the most resounding demand of anti-Francoist opposition groups in relation to ensuring the release of political

57 Lanero, supra n 12 at 378.
58 Pereira, supra n 8; Constable and Valenzuela, supra n 10.
61 Pereira, supra n 8.
prisoners and redressing the consequences of their imprisonment. When Franco died in 1975, the demands intensified and partial grace measures began to be approved. The most significant precedent is the Amnesty Royal Decree-Law of July 1976, which included offences of a political nature but only ‘provided that they had not endangered or infringed upon the life or integrity of individuals.’ Judges interpreted this clause in a very narrow way, which accounts for the subsequent continuation of pro-amnesty demonstrations.

The amnesty of 15 October 1977 was the first law passed by the democratic parliament. Initial drafts submitted by opposition parties provided for the release of political prisoners, the expunction of their criminal records, reinstatement to their former jobs and the right to receive a pension should they have reached retirement age. During the subsequent negotiations, however, the Union of the Democratic Center, the governing party formed by Franco regime reformists, inserted two clauses that amnestied any authorities responsible for human rights violations.62

The amended act was eventually passed with almost unanimous backing, ensuring that trials would not occur.63 The law also ended up being generous toward terrorists convicted of violent crimes, some committed against state security forces. In the early stages of the transition, the army’s capacity to destabilize the democratic system was considerable, and this helps explain why the impunity of Francoist repressors went unchallenged at the time. The only judicial process that has been celebrated in Spain, the ‘Ruano case,’ has not contributed to the truth nor entailed any judicial sentence.64

In Chile, the 1978 amnesty law was passed by the dictatorship but only covers its most repressive stage: 1973–1978. During its first 15 years in force, the law was applied, barring exceptions, without any investigations being conducted. Although the law states that ‘the judge needs to carry out an investigation before granting amnesty’ in order to establish the type of participation of the accused, the Supreme Court opted for granting amnesty without prior investigation. Judge Carlos Cerda, however, following what came to be known as the ‘Aylwin doctrine,’ went against the Supreme Court and chose to conduct all the

Curiously enough, of all the opposition’s programmatic texts demanding amnesty, only in the one signed by the clandestine association of judges was an amnesty for ‘governmental offences’ included. Justicia Democrática, supra n 33 at 311.

The main right-wing party at the time (Alianza Popular) did not support this law. However, its successor (Partido Popular) is nowadays the law’s main supporter in parliament. This is because the most relevant aspect of this law during the transition was the release of political prisoners, whereas today it is the impossibility of trying dictatorship-era officials and authorities for human rights violations.

Enrique Ruano, a 20-year-old law student, died three days after being detained by the police in 1969 for distributing political propaganda. The official story that he committed suicide contained many contradictions, and crucial forensic evidence eventually disappeared. Most opposition parties considered the Ruano case a political murder. A 1996 trial demonstrated that if judicial proceedings had been initiated earlier (and if the crucial evidence had not been deliberately withheld), it would have been possible to clear up certain political crimes without the need for any convictions, which would anyway have been prevented by the amnesty law. This case demonstrates Spanish legal professionals’ lack of initiative, in contrast to such professionals in contexts where they have provided advice to victims.
necessary inquiries before granting amnesty. In the 1990s, this strategy would eventually prevail and

amnesty could only be applied . . . if an investigation were conducted and if, through the latter, it were confirmed that a homicide had occurred and that the participation of those responsible could be established. 65

The Argentine military, before ceding power to civilians in April 1983, approved an amnesty that covered both acts of ‘subversion’ and the excesses of ‘repression.’ This law was declared invalid in December 1983. President Raúl Alfonsín took measures to prosecute several former military leaders and the seven most important guerrilla leaders. Although they were initially to be tried by the military, when ‘the Supreme Council of the Armed Forces determined that the orders issued in the alleged “fight against subversion” were “unobjectionably legitimate”, civil jurisdiction had to take charge of the case.’ 66 Alfonsín struck a secret deal with military leaders, assuring them that the trials would go no further than the nine junta members and that they would all eventually be pardoned. However, certain judges and human rights organizations lobbied for the proceedings against rights abusers to go ahead, which triggered a series of military revolts.

The ‘full stop’ (December 1986) and ‘due obedience’ (June 1987) laws were passed to put an end to these rebellious acts and stabilize democracy, since in December 1986 there were already some 6,000 judicial proceedings in progress. 67 The judiciary, paying no heed to the executive’s wishes, showed its disapproval of this legislation by speeding up proceedings before the laws entered into force. In October 1989 and January 1991, President Carlos Menem would approve a number of pardons for those tried prior to these laws.

However, crimes involving the appropriation of minors born to pregnant detainees and ‘disappeared’ women were never covered by the aforementioned laws or by Menem’s pardons, which explains why the Argentine judicial system continued to bring high-ranking officials in the dictatorship to account throughout the 1990s. Then, in 1999, a series of ‘truth trials’ began ‘in different federal appeal chambers across the country’ whose ‘purpose [was] not to determine the criminal liability of those involved’ but to protect the ‘right to truth and to mourn.’ 68 This was in line with judicial independence in Argentina, which has been highlighted on several occasions. 69 In 2001, a court ruling on the unconstitutionality of the ‘full stop’ and ‘due obedience’ laws led to the reopening of cases concerning unlawful deprivation of liberty, torture and murder.

66 Patricia Tappatá, ‘El pasado, un tema central del presente,’ in Verdad, justicia y reparación: Desafíos para la democracia y la convivencia social (San Jose: IDEA/IIDH, 2005), 93.
68 Tappatá, supra n 66 at 97.
Finally, unlike Spain, Chile and Argentina established truth commissions as soon as democratization began. The final reports were widely disseminated and helped to shed light on the mechanisms of repression, roundly criticizing the judicial system’s collaboration with the dictatorships in both countries.

A brief review of the judicial systems of the three countries during their transitions provides the necessary context for understanding the TJ measures they chose to adopt. In Spain, ‘it was the legal world that had been most reluctant to come to terms with the changing times.’ 70 The judges who publicly expressed their Francoist ideology were few and far between, but they occupied the highest positions on the judicial ladder and were also stubbornly reluctant to apply the new democratic legislation. 71 There is ample evidence of the judicial system’s conservatism and its fierce resistance to change during the Spanish transition, 72 and even afterward. 73 The first socialist minister for justice (1982–1988), Fernando Ledesma, and his chief of staff (1982–1985), María Teresa Fernández de la Vega, stress the need to democratize the field of justice and note the ‘attacks’ and ‘pressure’ they faced while trying to reform the judicial system. They also mention its strong corporate identity. 74

The judiciary’s involvement in Francoist repression, its ideological conservatism at the highest levels, the annoyance with which it greeted any attempted reform and yet its central role in applying the new democratic legislation – with which it often disagreed – help to explain why successive governments did not even consider the possibility of subjecting actions taken under the dictatorship to public scrutiny (through a truth commission), let alone to judicial review. The democratic authorities ultimately settled on three institutional reforms: the formation of the Constitutional Court, an independent body that acts as a court judgment control mechanism, with the idea being to ‘supervise an institution that entered the democratic system barely purged’; 75 the amendment of Organic Law 6/1985 of the judiciary, whereby the power to elect the General Council of the Judiciary was transferred from judges and senior judges to parliament; and the ‘early retirement of a third of the judicial hierarchy in order to remove the old regime figures from its upper echelons.’ 76

Despite the importance of these reforms, they were a case of ‘too little too late.’ The judiciary remained mainly conservative, 77 and neither its collaboration with
political repression nor the transfer of many of its most conservative members – including direct collaborators, such as Court of Public Order judges – to such important institutions as the territorial courts, the Supreme Court, the National Court and even the Constitutional Court was ever publicly denounced.

The lack of purge was exacerbated by the judicial system’s intrinsic endogamy, its internal socialization and recruitment mechanisms and its deep-rooted *esprit de corps.* Such a system was hardly likely to approve of measures that might raise doubts about its honorable conduct during and after the dictatorship, since many judges were known to have tolerated the brutality of the police and the far-right violence that occurred during the transition.

In Argentina, Alfonsín provoked the resignation of the junta-appointed Supreme Court by publicly announcing his intention to purge it. There was also discussion as to whether the judges should remain in office. In the end, only a few were dismissed. Nonetheless, ‘the purge of the Supreme Court and the modification of military jurisdiction’ would largely account for judges refusing to halt judicial proceedings after the ‘full stop’ and ‘due obedience’ laws and Menem’s pardons.

Chile underwent no Supreme Court purge. The court’s conservatism during the transition is well known, as is its initial reluctance to review the past. A number of President Patricio Aylwin’s advisors ‘believed that Chile’s civilian judiciary, especially the Supreme Court, had been unacceptably complicit in the human rights abuses under the Pinochet regime.’ However, even if political leaders reached the conclusion that

> they could not realistically hope to cleanse the judiciary of all those judges who had collaborated with and covered up repression ... they could reform the procedures and architecture of the judiciary, which is what they did.

In contrast to Chile and Argentina, Spain’s transition did not give rise to discussion even of purging the judicial system. The promotion of members of the judiciary who had collaborated with Francoist repression to the most important
judicial institutions was not widely questioned. Besides, the scope of judicial reform in Spain was very narrow.

**TJ after Democratization (or Post-TJ)**

As new democracies consolidate, different dynamics may emerge as a consequence of generational changes, judicial reforms, political replacements or transformations in the international arena, allowing for changes in TJ arrangements. This was the case in Argentina and Chile, but only in a limited fashion in Spain.

Argentina has seen ongoing investigations and trials. However, the tipping point occurred while Néstor Kirchner was president. From the start of his mandate, in 2003, Kirchner proved willing to improve reparations for victims and to limit impunity. In fact, he urged Supreme Court judges to declare Menem’s pardons unconstitutional. Once the Supreme Court finally repealed the aforementioned laws in June 2005, judicial proceedings gained fresh impetus.

Recently, Argentina has taken unprecedented steps to review the crimes of the past, as evidenced by ongoing efforts to bring former court-martial personnel to trial and proceedings against senior judges who acted as accomplices both during and after the dictatorship. In April 2011, the Judicial Council decided to ‘clarify the role played by judges in State terrorism and how they acted years later when called upon to judge the repressors.’ The priority of the council, which can suggest the dismissal of senior judges, is to find out what judges did in response to kidnappings, torture and disappearances or when they received a habeas corpus. Also, a special unit has been created within the General Attorney’s Office for the continuous monitoring and coordination of all judicial cases related to human rights violations under the junta, in order to facilitate the progress of judicial cases.

Several interesting developments have recently taken place in Chile and Spain, leading some authors to claim that both countries have entered a post-TJ phase. In Chile, the late 1990s saw a ‘prosecutorial turn.’ Since then, ‘judges have sentenced more former officials of the military regime than judges of any other country in Latin America.’ Some factors need to be taken into account to understand this post-TJ process. First, reforms and the appointment of new judges meant that between 1997 and 1998 the Supreme Court started changing its decisions, maintaining that international law was superior to the amnesty law and that a disappearance remains a crime until the body is found, which means that it cannot be subject to amnesty until it is resolved.

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83 Tappatá, supra n 66.
84 Irina Hauser, ‘Los magistrados que fueron cómplices de los represores,’ *Página 12*, 18 April 2011.
85 Aguilar, supra n 5; Collins, supra n 5.
86 Huneeus, supra n 59 at 100.
87 Brito, supra n 67 at 148.
Second, many have stressed the positive impact of Pinochet’s arrest in London in 1998, requested by Judge Baltasar Garzón.\textsuperscript{88} Third, as emphasized by Cath Collins, a decisive role has been played by ‘strategic action by legally literate, domestic, pro-accountability actors,’\textsuperscript{89} ‘domestic judicial change over time’ and an ‘improved judicial receptivity to accountability claims.’\textsuperscript{90} Finally, President Michelle Bachelet’s personal background as a victim and an opponent of the dictatorship helps to explain the support she gave to victims’ associations and her strong commitment to accountability during her presidency of 2006 to 2010.

Although Spanish TJ policies have also undergone recent changes, the situation has not altered in terms of justice and truth. Although the amnesty law has acquired some public attention of late, its repeal seems far from likely. In contrast with other countries, ‘none of the prime ministers in Spain . . . demonstrate[s] a resolute political will to promote accountability.’\textsuperscript{91} Also, no relevant judicial reform has taken place in recent times.

The most important qualitative step took place during Rodríguez Zapatero’s first term as president (2004–2008). On the one hand, Zapatero was not interested in accountability. On the other, he was the president of a minority government, so he had to negotiate this thorny issue. The so-called ‘historical memory law,’ passed in October 2007, improves reparations for victims, grants aid to memory associations, orders the removal of Francoist symbols and facilitates access to dictatorship-era documentation. However, the law does not provide for the possibility of annulling dictatorship-era political sentences. Although the government initially thought the law would satisfy this demand, the State Attorney’s Office announced its categorical opposition to such a measure. As the majority of parliament adopted this view, the law it eventually passed merely declared certain Francoist courts and sentences ‘illegitimate,’ as opposed to unlawful, offering those who suffered certain court judgments based on ideologically or religiously motivated laws the possibility of obtaining a ‘declaration of reparation and personal recognition.’

Despite the violations of judicial procedures committed in courts-martial, only on one occasion has the Supreme Court declared void a Francoist sentence, rejecting this possibility in more than 40 other cases.\textsuperscript{92} The Military Chamber of the Supreme Court is the one in charge of reviewing court-martial sentences. The creation of this chamber by Organic Law 4/1987 was accompanied by the elimination of the Supreme Court of Military Justice, created just after the civil war. Half of the members of the Military Chamber once belonged to

\textsuperscript{88} ‘Many judges view prosecution of Pinochet-era cases as the means to redeem the judiciary from its perceived past complicity and from its low public ratings.’ Huneeus, supra n 59 at 101.
\textsuperscript{89} Collins, supra n 5 at 2–3.
\textsuperscript{90} Ibid., 220.
\textsuperscript{92} Alicia Gil, La justicia de transición en España (Barcelona: Atelier, 2009).
the Juridical-Military Corps. As we have seen, in all the courts-martial of the Francoist period, at least one member of the Juridical-Military Corps had to participate. The members of this corps are likely to be reluctant to declare void sentences handed down during trials in which the corps participated.

The decision not to annul sentences passed by Francoist courts-martial goes against the European Council’s opinion and that of most Spaniards. It also ignores international precedents. The government’s position is supported by various Supreme Court rulings and the opinion of the Constitutional Court, which invoke ‘legal certainty’ and underline the absence of ‘new facts’ as the main reasons for objecting to the review of Francoist trials. This position has been challenged by legal experts such as Joan Queralt and José Antonio Martín Pallín, minority political parties and victims’ associations. Some experts have proposed legal reforms to make the procedures for reviewing sentences more flexible. Some have called for a special procedure for declaring void the political sentences of the Francoist period. Finally, some have suggested the application of the amnesty law only after an investigation is launched and the facts proven. It seems that no judicial or political will exists to explore these alternatives. In fact, as Juan José del Águila has noted, not even the highly contested trial and execution of communist activist Julián Grimau in 1963 has been retracted, despite evidence that one of the members of the court-martial responsible was an imposter who was not even a law graduate.

As regards the validity of the Spanish amnesty law, the truth is that for many years it went unnoticed. In December 2006, memory associations filed the first of several formal complaints with the National Court regarding illegal detentions and forced disappearances that occurred after Franco’s 1936 coup. These were the first formal complaints concerning the restrictions imposed by the amnesty law. But what finally thrust this law into the limelight was a ruling issued by Judge

93 Chamber President Ángel Calderón belongs to the above-mentioned conservative association of judges. He is considered to be ‘a very conservative senior judge and he has invariably resisted the review of death sentences dictated by war councils under Francoism’ (El País, 2 June 2011).
95 In a CIS survey conducted in April 2008 (no. 2,760), the majority of Spaniards (50.4%, as compared with 19.3% against) agree that ‘democracy should annul the political trials that took place under Francoism’.
96 In 1998, the German parliament passed a federal law to annul unjust sentences passed under Nazism. Austria has also passed laws that annul unjust sentences passed during the German occupation.
97 Gil, supra n 92.
99 Gil, supra n 92.
100 Águila, supra n 15.
101 Javier Chinchón, El tratamiento judicial de los crímenes de la Guerra Civil y el franquismo en España: Una visión de conjunto desde el Derecho Internacional (Bilbao: Universidad de Deusto, 2012).
Garzón on 17 October 2008 that the dictatorship’s most notorious repressive acts were crimes against humanity.

Initially, Garzón was declared competent to investigate the complaints filed by memory associations. Although he declared himself incompetent once it was proven that the main perpetrators of the aforementioned crimes were no longer alive, a significant portion of the judiciary was highly critical of his initial ruling.\(^\text{102}\) Also, two private criminal lawsuits were filed against Garzón claiming that his decision to declare himself competent could be classified as ‘prevarication’ given that he should have known that the amnesty law does not allow investigation.\(^\text{103}\) It is particularly significant that the plaintiffs were organizations with political right-wing links. In May 2010, Garzón was temporarily suspended from his duties on the grounds that he may have ‘prevaricated.’\(^\text{104}\) Finally, in February 2012, the Supreme Court cleared Garzón of these charges\(^\text{105}\) but decided that he had committed a mistake when interpreting the law, closing the possibility of investigating the crimes of the civil war and the dictatorship.

**Conclusions**

This article has aimed to explain variations in TJ outcomes during democratization periods and once democracies are consolidated. It has focused on trials against perpetrators, repeal of amnesty laws, establishment of truth commissions and annulment of unfair trials. By examining these aspects of TJ most directly related to the judiciary’s realm, I have sought to establish a relationship between the type of repression during the dictatorship, the judiciary’s involvement in it and its impact on TJ policies in transitions. Once democracy is consolidated, other dynamics explain why Argentina has adopted several accountability measures, while Chile has supported trials and created a second truth commission and Spain has not even undertaken the annulment of unfair trials and sentences.

I have provided empirical evidence of the Spanish judicial system’s direct involvement in Francoist repression and described the mechanisms created by the executive to ensure the loyalty of the judiciary. In Chile and Argentina, despite the ideological sympathy and complicit silence of judges, only a few judges took part

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102 Jiménez Villarejo has denounced the ‘Francoist bias’ of the Supreme Court (Diario SigloXXI.com, 15 November 2010).

103 Prevarication is a crime committed by a public servant or a judge when he or she enacts an order knowing in advance that it is unjust.

104 In May 2009, an ultraconservative magistrate of the Supreme Court, Adolfo Prego, admitted the lawsuit against Garzón. This magistrate had signed a text in 2007 against the ‘law of historical memory’ and had never concealed his sympathies toward Francoism. Together with the conservative majority of the General Council of the Judiciary, he also voted against a proposal in recognition of public servants who were victims of the civil war and/or Francoism. Jiménez Villarejo and Doñate, supra n 73.

105 One of the magistrates, José Manuel Maza, cast a dissenting vote in favor of declaring Garzón guilty of the charges. He used to be the president of the disbanded Unión Judicial Independiente, even more conservative than the hegemonic Asociación Profesional de la Magistratura.
in courts-martial, and, apparently, none of them passed death sentences, in sharp contrast with their Spanish counterparts. They also did not participate in special jurisdictions devoted to repression. The very nature of repression proved to be an insurmountable obstacle. As Barros puts it, ‘The judiciary proved largely incapable of limiting extralegal acts.' On the other hand, both in Argentina and Chile there were judges who were resolute in their pursuit of justice even when deference appeared to be the only rational strategy for judges interested in their careers. In a number of cases, this independence cost judges their jobs.

Although the Spanish and Chilean amnesties remain in force, Chilean judges have helped to clarify the facts without breaking the law. The restrictive interpretation of the Spanish amnesty and the absence of alternative accountability mechanisms make Spain a model of ‘absolute oblivion.' The fact that the amnesty law precedes the constitution and that the Spanish ratification of the International Covenant on Civil and Political Rights precedes the amnesty law has not been successfully exploited by activists of the judicial realm (whether judges or lawyers’ associations) either to propose the law’s review or to give prevalence to the international treaty.

Although the Spanish judicial system’s repressive collaboration was far greater and longer-lasting than in other contexts, the approval of TJ measures beyond material reparations is still quite unthinkable. And although resistance to accountability during the transition may well have been political (due to the negotiated character of the transition) and institutional (given the absence of purges and reforms), as well as social (involving complicity and fear of conflict and reprisal), the available data shows that Spanish society today is in favor of accountability measures. Despite the persistence of an ambivalent view of Francoism, the majority of Spaniards agree with the following statement: ‘The authorities that violated human rights under Francoism should be brought to trial’ (48.7% in favor, as compared with 26.7% against).

Despite generational change having helped overcome the trauma of the civil war and the fear of political instability, it seems that the ‘pact of silence’ of the

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106 It is significant that one of the few Chilean judges who participated in courts-martial, Rubén Ballesteros (since 2005, minister of the Chilean Supreme Court, and, since 2012, also its president), has refused to support most cases related to human rights that have been debated in the Supreme Court since 2006. On most of these occasions (85 out of 90), his negative vote has not been shared by his colleagues. Data from Observatorio de Derechos Humanos, Universidad Diego Portales, Chile.

107 Barros, 2002, supra n 20 at 150.

108 Barros, 2008, supra n 20 at 177.

109 Gil, supra n 92.


111 CIS survey conducted in April 2008 (no. 2,760).
transition has favored a culture of impunity in Spain. The Francoist regime tried to involve as many sectors as possible in political repression. This gave rise to widespread and solid networks of complicity, which explains why so many benefited from a generously forward-looking democratic transition. Few people had incentive to subject the past to scrutiny, and those who did, especially those who suffered repression, lodged barely any formal complaints out of mistrust of the judicial system, because they felt that other priorities prevailed or because they did not receive legal advice.

Those who benefited most from the agreement not to review the past judicially, or even to expose publicly the workings of the repressive machine through a truth commission, have been those most directly involved in the repression. Spain’s intense wartime and postwar repression would not have been possible without the judicial system’s active involvement. Moreover, the Francoist dictatorship, being the longest of the three discussed, had more time to indoctrinate and perpetuate habits of ideological dependence, which explains the judicial system’s conservatism, particularly in the transition. It also explains the judiciary’s reluctance to review the past, as this would involve not only publicly exposing its repressive collaboration but also subjecting to criticism bad judicial practices and the lack of safeguards in most of the political trials held under the dictatorship.

Related but somewhat different dynamics account for the current limits of TJ in Spain. The lack of political will for demanding accountability, the weakness of social agency (scarcely supported by legal professionals, in contrast with other country contexts) and the lack of judicial responsiveness to international law proved to be crucial once democracy was consolidated. Although resistance is expected, the reform of the judicial realm is one of Spain’s most important pending issues. It requires the reform of law schools and of the process for becoming a judge, which have been abundantly criticized. The truth is that Spain has few lawyers who specialize in international law, as little attention is paid to this field in law schools and in the Judicial School. This could go some way toward explaining the lack of sensibility among current judges toward these issues.

In any case, when the judicial system has not been purged and is characterized by a strong *esprit de corps* that transcends ideological boundaries, reinforced by a

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112 It is worth mentioning that: (1) on the Supreme Court’s website, the periods of the civil war and Francoism are omitted when the institution addresses its own history; (2) in newspaper obituaries, the past collaboration of judges, attorneys in special jurisdictions like the Court of Public Order and university professors is often omitted; and (3) although local judges are obliged to assist with exhumations of mass graves, their resistance is notorious, as they are not even claiming forensic reports (*El País*, 20 April 2012).

113 According to recent research, after democratization, domestic and international human rights advocacy are the most important variables accounting for TJ measures. Hun Joon Kim, ‘Structural Determinants of Human Rights Prosecutions after Democratic Transition,’ *Journal of Peace Research* 49(2) (2012): 305–320.

114 According to former Prime Minister Felipe González, the most important pending task of Spanish democracy is the renewal of the judiciary and ‘the most deficient aspect of Spanish democracy is justice’ (*Público*, 28 October 2012).

certain level of endogamy, judges tend to close ranks and boycott any measure that could call their past integrity into question. The harsh criticism of judges’ behavior in several truth commission final reports may allow us to understand the resistance of Spanish judges to digging into the past and submitting to public scrutiny their behavior or that of their elders. Both endogamy and esprit de corps are likely to reinforce intergenerational solidarity among judges for many years.

The extensive literature on democratization processes in general and the Spanish transition in particular has paid little attention to the role played by the inherited judicial system. I argue that this is a fundamental variable for understanding the trade-offs between the legacies of the past and new rules, institutions and actors. The literature on TJ has also not attached due importance to how an unpurged judicial system involved in political repression might hinder the field’s efforts. The main contribution of this article is to show that, ceteris paribus, the more legal the repression and the more direct judicial involvement in repression, the more resistance to TJ policies will come from the judiciary, particularly during democratization. In consolidation periods, legal actors can play a crucial role in either hindering or promoting accountability. In sum, the judiciary can be a central determinant of TJ measures.