Delayed Transitional Justice

Accounting for timing and cross-country variation in Transitional Justice trajectories

Mariana S. Mendes

Thesis submitted for assessment with a view to
obtaining the degree of Doctor of Political and Social Sciences
of the European University Institute

Florence, 10 October 2019

European University Institute
Department of Political and Social Sciences

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Department of Political and Social Sciences - Doctoral Programme

I Mariana Semião Mendes certify that I am the author of the work *Tackling the Past in a Post-Transition Setting: Accounting for the* timing *of implementation of Transitional Justice measures in consolidated democracies and cross-country variation in trajectories* I have presented for examination for the Ph.D. at the European University Institute. I also certify that this is solely my own original work, other than where I have clearly indicated, in this declaration and in the thesis, that it is the work of others.

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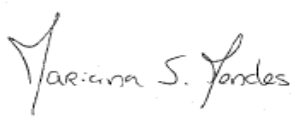

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Thesis abstract

This dissertation aims, first, at accounting for the timing of implementation of Transitional Justice (TJ) policies and, second, at comparing TJ trajectories and outcomes in countries that had negotiated transitions from authoritarianism to democracy. Specifically, it focuses on TJ mechanisms adopted long after the transition to democratic rule and asks *why now?* Furthermore, it explores why states with the same type of transition differed in their TJ trajectories later on, comparing a case of 'robust' implementation (Uruguay), a case where only 'victim-centered' measures were approved (Spain), and a case that sits in between (Brazil).

Combining an agentic approach with a path-dependence theoretical framework, it argues that both supply and demand-side factors matter in understanding the timing of implementation of TJ policies and the type of policy adopted, but that the historical-normative context for dealing with the past in each country – their 'mnemonic regime' – sets different boundaries in each case.

Zooming in into seven cases of 'late' TJ policy implementation and looking at the supply and demand factors at play, it concludes that political opportunities for TJ measures arise when the combination between the preferences of the executive and the levels of external pressure outweigh or match the perceived costs of specific measures. In other words, both (1) agenda-setting pressures and (2) a (usually left-wing) government sympathetic toward TJ measures are necessary, but the choice of policy instrument depends on how strong preferences, pressures, and perceived costs are.

Differences in these dimensions are, in turn, not independent from the 'mnemonic regime' actors have been embedded in, with the historical experience of Uruguay contrasting with the one of Spain and Brazil in the extent to which the political crimes of the dictatorship have been an object of social and political contention over the years. In Spain and Brazil, instead, the 'reconciliation ethos' of the transition complicates the enactment of (robust) TJ policies. Cross-country differences in 'mnemonic regimes' and TJ outcomes are, in turn, also explained by structural differences related to (1) pre-authoritarian democratic experiences, (2) repression's characteristics, (3) correlation of political forces at the transition stage and (4) international influences.

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CHAPTER 1. Introduction

At the time of his death in December 2006, Augusto Pinochet had just been put under house arrest for his involvement in the 'Caravans of Death' case, an episode dating back to 1973 when an army death squad tortured and killed more than seventy Chilean political prisoners. Though he would continue as Commander-in-Chief of the Chilean Army up until 1998 (becoming a 'senator-for-life' when retiring that year), Pinochet would spend the final years of his life fighting the successive legal cases opened against him in Chile and abroad. At the same time of his death, but on the other side of the globe, the government of Cambodia had just agreed with the United Nations to establish the so-called Khmer Rouge Tribunal, charged with bringing to justice the senior leaders of a regime responsible for the genocide of about 25% of the country's population some thirty years before. Meanwhile in Poland the parliament was preparing to pass a series of amendments leading to a radical expansion of lustration legislation, a mechanism widely used in Eastern Europe to screen, exclude, or limit access of former communist agents to public office. This was one year before the Spanish parliament approved the so-called Law on Historical Memory, the only legislative initiative in Spain formally condemning Franco's regime and recognizing the victims of violence – all thirty years after Spain's transition to democracy. Brazil, instead, would take until 2011 to approve a state-sponsored investigatory commission – the *National Truth Commission* – on the most serious violations of human rights committed during the 1964-1985 dictatorship. Two years later, in January 2013, the Guatemalan general Efraín Ríos Montt was convicted of genocide and crimes against humanity targeting the country's indigenous population during his presidency in 1982/83. This list of examples could go on indefinitely, speaking vividly about the spread of efforts to address problematic historical periods or, to use a term that non-coincidentally was coined in Germany, engage in *Vergangenheitsbewältigung* ('coming to terms with the past'). On the one hand, it is most intriguing that all these efforts take place decades after the events they refer to. This goes against Huntington's (1991: 228) prediction that public interest in justice rapidly erodes over time or against O'Donnell and Schmitter's (1986: 29) assertion that time attenuates the bitterness of memories and those involved will be forgotten. On the other hand, not all of them are examples of criminal accountability, and in fact speak to the variety of methods that can be used. This thesis constitutes an effort at explaining the *timing* of this

kind of initiative first and, second, accounting for cross-country variation in the choice of different ways of 'dealing with the past'. It is restricted to countries with negotiated transitions from authoritarianism to democracy, so that variation in outcomes can be more meaningfully accounted for.

1.1. Puzzle and research rationale

The range of possible institutional measures meant to tackle past violations of human rights and provide some form of redress to the victims of a dictatorial regime and/ or a war has become a field of scholarship of its own, commonly known as *Transitional Justice* (TJ). It was initially labeled as such given the prominence of the topic in transition periods – from a dictatorship to a democracy or from a war to a period of peace – and because it was born following the widespread turn to democratic regimes in Europe and in the Americas during the so-called third wave of democratization. At the time, practitioners and scholars were confronted with how to find some measure of justice for victims of repressive state apparatuses, whether to punish those responsible, and how to balance moral imperatives with the desire for political stability (Orentlicher, 1991; Zalaquett, 1992; Arthur, 2009). Even though TJ was initially defined as justice in times of political transition – as in the founding works of Kritz (1995) and Teitel (2000) – and there was a general expectation that transition settlements would lay to rest accountability issues, scholars nowadays recognize that its study goes beyond transition periods and that TJ measures can in fact be implemented at any point in time (Elster, 2006; Roth-Arriaza, 2006; Aguilar, 2008a; Collins, 2010; Skaar et al., 2016).

Jon Elster (2006: 6) distinguishes between (1) *immediate* transitional justice, (2) *protracted* transitional justice, when the process starts immediately after the transition but goes on for a long time, (3) *second-wave* transitional justice, when processes are initiated and concluded and, after a long period of latency, new proceedings are undertaken, and (4) *postponed* transitional justice, when the first actions take place many years after the transition. There are various reasons to expect *immediate* and *protracted* to be the rule and *postponed* to be the exception. Memories of the period of violations become less vivid, investigation of the abuses becomes more difficult, perpetrators grow old and die, victims and families of the victims move on, public interest diminishes, and the past becomes mostly an issue for historians to deal with. Moreover, if is it true, as Méndez (1997) suggests, that new democracies are impelled and invited to draw a thick line under the past to boost their credentials as radical departures from

the past, then the use of TJ measures as a regime legitimation device naturally makes most sense during the foundational stages of a new regime. Elster (2004: 77) himself says that the closest he has come to a 'law' on transitional justice is that the intensity of the demand for retribution decreases with time, though he goes on to add that 'even here, we find that counteracting mechanisms may keep memory and resentment alive for a century or more'. Indeed, and as the examples mentioned above demonstrate, there is plenty of empirical evidence attesting for instances of *postponed* justice. ***What explains the implementation of transitional justice measures long after the transition? Moreover, why have some countries gone as far as to initiate criminal proceedings against former state agents in a post-transition setting while others have opted for more modest measures?***

On the one hand, it is analytically puzzling that state institutions decide to engage with violations of the past regime so long after they occurred – *why not before? Why wait until victims are old (or dead)?* On the other hand, it is empirically interesting to ponder under what conditions are TJ initial settlements likely to change and whether and to what extent this is a result of transnational or domestic processes, supply or demand-side factors, strategic or ideological considerations.

Though it is a field still lacking strong theoretical foundations, much of the initial literature was inspired by the political constraints the transition period could pose for the concretization of accountability measures, as challenges to the previous elites could prove destabilizing for the newly founded regime. As Méndez (1997) has noted, transition-bound theories of accountability are heavy on the political constraint side. Despite the fact that they only occurred in a few instances, a characteristic common to every transition is the 'omnipresent fear that a coup will be attempted and succeed' (O'Donell and Schmitter, 1986: 25). A fundamental and generally accepted hypothesis – dating back to classics such as O'Donnell and Schmitter's *Transitions from Authoritarian Rule* (1986) or Huntigton's *The Third Wave* (1991) –, is that prosecution and punishment are more likely to happen when the old elites have been overthrown and replaced than when they get to negotiate the terms of the transition. The type of transition – ranging from negotiated transitions (voluntary ending) to ruptured ones (regime collapse) – is seen as symptomatic of the balance of power between old and new elites and therefore of how much room there will be for the former's rule to be challenged during the transition period (Huyse, 1995; Sutter, 1995; Barahona de Brito et al., 2001; Elster, 2006). 'The more a transition entails the defeat of the old authoritarian elite and repressors, the wider is the scope for truth

and justice policies' (Barahona de Brito et al., 2001: 11). In Huntigton's words (1991: 228), justice is a function of political power – 'officials of strong authoritarian regimes that voluntarily ended themselves were not prosecuted; officials of weak authoritarian regimes that collapsed were punished, if they were promptly prosecuted by the new democratic government'. In other words, 'what happened was little affected by moral and legal considerations. It was shaped almost exclusively by politics, by the nature of the democratization process, and by the distribution of political power during and after the transition' (Huntington, 1991: 215).

In spite of being sometimes contested, this hypothesis holds true for a large number of countries (Olsen, Payne, Reiter, 2010: 156). While the collapse of the regime in Greece (1975) and Argentina (1983) gave way to trials of the military *juntas* – including its high-ranking members –, in countries such as Brazil (1985) or Uruguay (1985) a controlled transition – in which the military stepped down voluntarily and retained great autonomy – came with the enactment of amnesty laws that retroactively foreclosed the possibility of criminal liability. While in the first set of cases the collapse of the regime was accompanied by its widespread delegitimization, creating much room for accountability demands, in the second the risk of instability and the eventual loyalty to negotiated agreements prevented the enactment of robust TJ measures.[1] Therefore, much of the empirical variation between cases of *immediate* TJ and *postponed* TJ is likely to be accounted for based on the transition type/ relative power hypothesis. While it is true that that 'ruptured' transitions are also not risk-free, the incentives to use TJ measures as a means to draw a thick line under the past and to boost the credentials of the newly-funded regime are much greater. This does not mean that in negotiated transitions the legitimacy of the new regime is necessarily compromised, but only that other legitimacy formulas will have to be found.

But if the type of transition can tell us much about the presence/ absence of TJ measures during transition periods, it tells us little about why countries with roughly the same type of transition experience different transitional justice trajectories later on. Specifically, while *postponed* TJ is more likely in contexts which experienced a negotiated transition, not all democracies which result from negotiated settings will automatically see the implementation of robust TJ measures

[1] This hypothesis is stronger in cases where the military is directly implicated in the violations of the previous regime and where the risk of instability comes from a military insurgency. It is no coincidence that the strongest critiques to Huntington's theory come from scholars of Eastern Europe (such as Grodsky, 2008 and Nadelsky, 2004), where there was no military threat.

later on. The gradual disappearance of the conditions that prevented the implementation of TJ measures during the transition period – the reversal of an unfavorable balance of power/ the disappearance of the perceived risk of instability – certainly provides a window of opportunity, but it is not sufficient, in itself, to account for delayed implementation. At best, it is a necessary condition, but the passage of time does not have to automatically translate into the implementation of TJ policies, especially not the most controversial ones. Instead, the passage of time might as well lead to a diminished interest in a question that is often sensitive and generally a key concern only for a minority.

In other words, if the type of transition/ relative power hypothesis is an integral part of the answer for *why there were no TJ measures at t0* (transition period[2]) in negotiated settings, it does not fully account for *why they are enacted at t1* (post-transition period). If the disappearance of an unfavorable balance of power between old and new elites was sufficient to explain the delayed implementation of TJ measures, one would expect to see their resolute implementation as soon as new elites take over and a potentially favorable balance of power is observed. In practice, progress tends to be slow, uneven, and to vary across countries with similarly stable democratic regimes. Pinochet would die before being convicted in any of the judicial proceedings opened against him. Uruguay would take until 2009 to approve compensation measures and to condemn a former head of the military dictatorship for the first time. Brazil, on the other hand, would never prove as bold as Uruguay in challenging the country's amnesty law and, instead, would take until 2012 to implement a fact-finding body. While the takeover of leftist governments in Latin America – including heads of state who had themselves been persecuted during the previous regime – has raised the hopes of victims/ families of victims, new elites have not often produced the radical changes they would expect. Instead, a conciliatory posture has only allowed for gradual and slow advancements at specific moments in time. In sum, the transformation of the transition's balance of power is a precondition for delayed TJ, but it falls short of a sufficient explanation for the *why*, *when* and *which kind* of transitional justice measures are approved.

[2] O'Donnell and Schmitter (1986: 5) define 'transition' as the 'interval between one political regime and another', which stops at the moment that a new regime is installed, being 'delimited on the one side by the launching of the process of dissolution of the authoritarian regime and, on the other, by the installation of some form of democracy'. It is debatable whether the transition actually ends with the first democratic elections, but it relatively safe to assume that, after two regular elections, one can already speak of a *post-transition period (t1)*.

This is why this dissertation will focus on countries which experienced a negotiated transition to democracy, where some form of *postponed* TJ is expected, but variation in TJ outcomes is predictable too. Explanations for delayed implementation will go beyond the transition setting and look at the specific timing and context in which these measures were approved, in a within-case analysis that will put the conditions at the moment of implementation in contrast with conditions before. A cross-country comparative analysis will, instead, shed light on why some countries have gone further than others in their transitional justice trajectories.

1.2. Situating the Study

As Kovras (2017: 4) has recently pointed out, few longitudinal studies have been carried out to explain why, when, and how societies revisit TJ settlements. Though there is a burgeoning literature on transitional justice, there is little theorization and comparative empirical analysis when it comes to timing (the *when*) and transitional justice trajectories (*which kind* and, if several, *in what sequence*). A good deal has been written on the *why* – or what determines the implementation of TJ measures – but a large part of the literature has focused either on single TJ mechanisms, single case-studies, or static/ snapshot pictures of TJ in time. Single case-studies have the advantage of allowing for an in-depth analysis of the evolution in time of TJ processes, but are not well placed when it comes to the isolation of potentially relevant causes for an outcome. Large-N studies, on the other hand, although invaluable in confirming important correlations between variables (such as the between transition type and the implementation of TJ measures [Olsen, Payne and Reiter, 2010]), have been mainly static and focused on bivariate correlations at frozen moments in time which, taken out of context, tell us little about timing and trajectories. Typical limitations of large-N analyses include conflicting heterogeneous contexts, excluding potentially important variables, and not taking into consideration complex patterns of causation (as conjunctural causation or causal asymmetry).

A methodological problem with many studies in TJ, as Vinjamuri and Snyder (2015) have recently pointed out, is the little attention paid to scope conditions. Often scholars attempt to account for different TJ outcomes in settings that, in violation of Mill's comparative logic, exhibit great contextual differences in potentially important variables. While it is true that real-world cases – and in particular cross-country comparisons – will hardly ever be sufficiently similar to fall into the rules of Mill's method of difference, some cases are naturally more dissimilar than others. Collins (2010), for instance, relies on a comparison between

accountability trajectories in El Salvador and Chile. While a great deal is learnt about each case, the differences in outcomes were to be expected from the start given the extent to which these countries differ in the strength of their institutions and civil society as well as in their repressive context (a civil war vs. an authoritarian experience). Raimundo's (2012) comparison of Portugal, Spain and Poland also appears awkward for relying on Portugal as an outlier when the revolutionary nature of the transition put Portugal on a fundamentally different path from the other two.

This is not to say that a good deal cannot be learnt from the literature on the determinants of TJ and the reasons behind cross-national variation. Though there are few studies that speak directly to the issue of timing, it is still possible to rely on the existing literature if the specified conditions become available at the moment of TJ implementation (and not before) or if they are absent in a context of non-implementation. It should be said, however, that the existing scholarship is skewed towards the analysis of single TJ mechanisms and not TJ policies as a whole (unless focused on single case-studies), meaning that the arguments tend to be tied up to the specific TJ measure under analysis. The one that has received the greatest attention seems to be, by far, criminal accountability (Pion-Berlin, 1994; Collins, 2010; Skaar, 2011; Sikkink, 2011; Kim, 2012; Lessa et al., 2014).

A large amount of the literature on the determinants behind this specific mechanism appears divided between three types of explanations. The first is of the institutionalist type, with an emphasis on the institutional features that facilitate legal action – such as judicial reforms, judicial independence, constitutionalizaiton of international law, and the existence of private prosecution rights (Collins, 2010; Skaar, 2011; Michel and Sikkink, 2013). The second, instead, lays stress on the demand side, focusing on the role of bottom-up legal mobilization by private actors, including victims' relatives and advocacy groups such as NGOs (Collins, 2010; Sikkink, 2011; Kim, 2012; González-Ocantos, 2014; Dancy and Michel, 2016). While these two types are far from incompatible, and can simply be reconciled by indicating that the effects of institutions are conditional on legal mobilization (Dancy and Michel, 2016), some authors go as far as to challenge institutional arguments by pointing to the capacity of legal actors to promote new legal visions and produce changes in legal cultures, emphasizing that criminal accountability for dictatorships' violations is in fact not so much the result of judicial independence as of the politicization of the judiciary by advocacy groups (Gonzaléz Ocantos,

2014). This might as well be the case given that prosecution for past crimes often involves finding creative ways of circumventing Amnesty Laws and going against statutes of limitation.

A third type of explanation, meant to account for the exponential growth in the number of human rights prosecutions all over the globe, focuses on the international diffusion of an accountability norm for the most heinous crimes, or what Lutz and Sikkink (2001) have prominently termed the 'justice cascade'. While these authors have put an emphasis on the work of the human rights movement as early norm entrepreneurs, others have argued that agency-type of explanations need to be put in the context of a liberal and modernist intellectual and cultural environment which privileges individual rights and responsibilities as well as rational-legal authority (Kim and Sharman, 2014). Regardless of the agent-structure debate behind the various accounts on the global diffusion of an accountability norm, the fact is that spatial and temporal clustering patterns speak indeed for a diffusion effect, particularly among culturally similar countries (Kim, 2012). However, diffusion theory in itself tells us little about cross-country variation and, when taken to the extreme, overemphasizes cross-border influences/ imitation to the detriment of the domestic processes through which cross-border examples are incorporated and adapted. If the international diffusion of an accountability norm and the concomitant favorability of the international normative framework are important in accounting for the greater opportunity structures available to pro-accountability actors nowadays – and will surely be a part of the answer behind late implementation –, diffusion/ imitation patterns cannot be taken as the single most important variable in a process that will invariably involve a good degree of conflict at the domestic level.

Literature that has not focused exclusively on criminal accountability – and in particular those who have looked at TJ processes in post-communist states – has instead put the focus on the supply side and, in particular, the strategic considerations of political actors (Welsh, 1996; Nalepa, 2010; Grodsky, 2008, 2010; Raimundo, 2012). This is in line with traditional views of political elites as office-seeking agents whose actions are predominantly determined by political competition and partisan interests. It is not surprising this view has been more often espoused by those studying post-communist states given that lustration processes have been the most widely used TJ mechanism in these settings. By directly affecting the permanence/ removal of state officials, lustration policies are naturally prone to politically motivated manipulation. For Nalepa (2010), the variation in the timing of implementation of lustration policies is intimately linked to whether elites have 'skeletons in the closet', that is, whether they have themselves

collaborated with the previous regime or not. Raimundo (2012) similarly puts an emphasis on parties' colors and their roots in the anti-communist/ anti-fascist struggle and accounts for *timing* based on the parties' institutional capacity and political willingness. For Grodsky (2008, 2010), instead, the decision to implement TJ policies is very much dependent on the favorability of public opinion and whether TJ policies are perceived to further, or at least not interfere with the provision of the goods and services the population expects. Szczerbiak (2015: 61), on the other hand, criticizes all the previous for their excessive emphasis on political strategy and for underestimating the importance of normative factors and the extent to which such policies can be genuinely driven by programmatic and ideological considerations. Nedelsky (2004), though not denying the importance of 'politics of the present' considerations, takes a step back and convincingly argues that the 'politics of the past' matters in shaping present approaches, namely the preceding regime's level of legitimacy and, related to this, the levels of repression.

To the best of my knowledge, Collins (2010) and Raimundo (2012) are the only authors who have explicitly focused on what they both term 'post-transitional justice', a concept they use to refer to TJ measures after the transition period and which they assume is aimed at revisiting initial transition-era settlements. However, Collins (2010) looks exclusively at criminal accountability outcomes in Chile and El Salvador and, as such, her emphasis is on private accountability actors and national courts. Raimundo (2012), on the other hand, looks at legislative initiatives instead and, in contrast with Collins' (2010) emphasis on civil society actors, focuses on the willingness and capacity of political actors only.

Much of these apparent contradictions in emphasis come not only from different case-selection choices, but also from the focus on different TJ mechanisms as well as the different weight different authors give to non-proximate/ structural factors and to proximate/agent-focused ones. My aim is, first, to eliminate some of the noise produced by the inattention to scope conditions and focus exclusively on contexts of negotiated transitions from authoritarianism to democracy in which there was little room for the implementation of TJ measures in the transition period and where they were enacted at a time democracy was already the only game in town. Rather than focusing on a specific TJ mechanism ex-ante, I will look at different countries' trajectories and choices along the TJ scale, asking why countries with similar types of transition followed different TJ paths later on, once democratic consolidation and a favorable international environment created more propitious conditions for TJ measures. Moreover, I will combine supply and demand-side factors – both at the national and international level – as it is logical to

expect that both decision-making actors and pressure-making ones play a role in shaping TJ trajectories. A comparative historical analysis, together with the within-case analysis of the reasons behind the *timing* of implementation, will build on the insights provided by the literature on the determinants of TJ, but with two analytical twists: a focus on (1) the *why of the when* (explaining timing) – contrasting conditions before and during the process of policy formulation within each country – and (2) a cross-country comparative analysis of divergence in TJ *trajectories*. The overall intention is to provide a holistic account of the drivers behind TJ processes and trajectories in *postponed* settings with a negotiated type of transition to democracy.

1.3. Research design & methodology

In light of what has been said, the universe of cases to draw from consists of all the countries that had a top-down negotiated transition from authoritarism to democracy and, for that apparent reason, were heavily constrained in terms of possible transitional justice measures. The exclusive focus on transitions from authoritarian regimes (as opposed to transitions from an armed conflict) and the absence of variation at *t*0 (in the type of transition) [3] are important in order to make sure that initial conditions are similar, so that eventual differences in outcomes can be meaningfully accounted for. As the analysis of post-transition trajectories requires that a considerable amount of time has passed since the transition period, I will delimit my case selection to transitions that have occurred in the 1970s and early 1980s, at the onset of the so-called 'third wave of democratization' (Huntington, 1991). Temporal nearness among cases allows me to keep features of the international environment more or less constant and conveniently restricts my selection pool to Latin America and Southern Europe. This time period also corresponds to the TJ 'norm emergence' period, that is, to the moment in which TJ practices began to be enacted but were still not commonplace (Sikkink, 2011). In addition to (1) belonging to the early stages of the 'third wave of democratization', my other selection criteria – that can also be thought of as scope conditions – consist of: (2) having transitioned from a regime where the authoritarian state carried out systematic and violent repression during at least part of the dictatorial period and (3) having successfully transitioned to democracy and

[3] The classification of regime transitions in two broad types – negotiated vs. ruptured – can obviously be met with the criticism of being a simplistic and reductionist exercise which ignores a much wider range of variation. However, there is a strong qualitative difference between regime transitions which were set in motion and were (at least partially) controlled by agents of the former regime and those in which those same agents were forced to step down or flee, which makes the distinction above a warranted one.

achieved what is generally perceived as a consolidated democratic regime. The latter is important because it is known that a functioning democratic and rule of law systems are critical to the ability of countries to implement transitional justice while in semi-authoritarian states the chances are that TJ is either not implemented or put to perverse political uses (Fletcher et al., 2009; Vinjamuri and Snyder, 2015: 317). Table 1.1 lists the countries that have transitioned to democracy between 1975 and 1985 and, following Papaioannou and Siourounis (2008: 369) classification, achieved full democratization (based on scores in civil rights and political liberties protection).[4]

Table 1.1: Onset of the 'third wave' of democratization (1975-1985)

Country	Year of transition	Type of transition
Argentina	1983	Ruptured
Bolivia	1982	Ruptured
Brazil	1985	Negotiated
Dom. Rep.	1978	Ruptured
Ecuador	1979	Negotiated
Greece	1975	Ruptured
Honduras	1982	Negotiated
Peru	1980	Negotiated
Portugal	1976	Ruptured
Spain	1978	Negotiated
Uruguay	1985	Negotiated

While Spain is the only case in Southern Europe where the transition to democracy was negotiated – in contrast to Portugal and Greece –, there are various examples in Latin America in the first half of the 1980s: Brazil, Uruguay, Ecuador, Honduras and Peru. I will restrict my analysis to the former two, together with Spain, because Ecuador, Honduras and Peru have paradoxically experienced more abuses and instability after the transition. This makes them unfit for our purposes because these countries experienced no actual transition to a state respectful of classical political rights, as a pattern of authoritarian human rights abuses against political opponents continued after the transition. This fundamental difference in political

[4] The transition date these authors assigned corresponds to the year in which there was a *de facto* transfer of power to a democratically elected government (2008: 367).

context naturally complicates the comparative analysis of TJ trajectories, violating the scope conditions outlined above (including temporal nearness among cases given that their *de facto* transition did not occur then) and preventing us from adding a longitudinal dimension to the observation of post-transitional change.

This sample is small enough to allow for an in-depth analysis of the mechanisms at work in each case but also sufficient to provide significant variation in TJ paths. In fact, Spain, Brazil and Uruguay all have different records when it comes to the application of TJ policies. While they all experienced negotiated transition to democracy where TJ measures were either seen as inconceivable or hazardous, Uruguay has nowadays gone as far as to convict various high-profile agents of the dictatorship, whereas Brazil and Spain have kept their amnesty laws intact. Brazil has instead created a so-called 'Truth Commission' in 2011/12, an investigatory body with an important public acknowledgment function, which could be somewhat equated to the 2001 Peace Commission in Uruguay. Spain, on the other hand, has restricted itself mostly to victim-centered measures of the reparatory type, something that both Brazil and Uruguay also have a record on (though not necessarily with the same degree of comprehensiveness) (Table 1.2). In short, although all three countries constitute what Snyder and Vinjamuri (2015) define as 'easy cases' – where democratic institutions, fairly developed legal systems, and a free civil society make the success of TJ policies likely – the reality is that there is still much variation to be accounted for. This makes it all the more pertinent to go beyond the question of what explains TJ measures to the one of variation in TJ choices and paths.

Table 1.2: Most significant Transitional Justice measures

	First significant step	**Second significant step**	**Third significant step**
Brazil (1985)	1995 **Law 9.140/95** (reparations)	2011 **Law 12.528** National Truth Commission	
Uruguay (1985)	2000 **Peace Commission**	2006 – 2009 First **prosecution** (after the executive's 'loophole approach' to the amnesty law)	2011 **Law 18.831** (derogation of the amnesty law)
Spain (1977)	1990 **Law 4/1990** (reparations)	2007 **Law 52/2007** (reparations + limited acknowledgment)	

An in-depth case-oriented analysis is, at a first stage, crucial to understand the unfolding of transitional justice trajectories over time for each of the three countries. Close attention is paid to the sequence of relevant events and actors for each case in order to draw descriptive and possibly explanatory inferences. In particular, and in order to answer the first research question – *what leads to the implementation of TJ measures at t1?* –, careful and thick analysis of the moment leading up to the adoption of specific TJ policies is needed in order to identify relevant actors, interactions, and possible motivations. The cases under study are then the various instances of TJ measures in Table 1.2 (seven in total), and the main method of analysis consists of detailed description of relevant events previous to the implementation of the specific measure under study as the understanding of the *how* is essential in order to capture the *why*. Initially, the analysis is open and somewhat inductive so as not to ignore possible relevant factors. Particular attention is paid to *changes* occurring at the time or not too long before the moment of policy formulation, as it is assumed that a change in a country's TJ approach (that is, a new TJ policy) is preceded by a concomitant contextual change. In this sense, *timing* is of great analytical importance –potentially relevant events that are close to the date of formulation of a TJ policy are given more weight than those taking place long before (though the feeding of precedent events into proximate ones will not be ignored, which makes sequencing crucial too). Although it may appear that this approach exhibits the fundamental weakness of selecting only positive cases – the seven TJ policies above –, the focus in itself is on the *timing* of policy formulation, meaning that for each of the positive cases there are 'controls' corresponding to the time before policy formulation, in which the condition(s) highlighted as important are expected to be absent or only individually present (in case a combination of factors is deemed important). In this sense, the first research question is first and foremost focused on within-case analysis of individual policies aimed at explaining these specific cases. Only at a later stage will the motives behind the implementation of the various TJ policies be put against each other – so as to assess whether some of the same conditions or properties are present across the various cases –, though there are no previous grand expectations in this regard since equifinality is a realistic possibility. However, and as developed in this next chapter, I do expect that TJ policies at *t1* will not be fundamentally different from other policy issues in the extent to which they respond to a varying combination of preferences and pressures and calculations of costs and benefits. The point is to identify, as far as possible, how these changed at the moment of policy formulation (compared to before), and what the factors that drove that change were. Note that, even though the research focus is on the *why of the when,* we will also attempt to make those factors speak to the reasons behind *which kind* of TJ policy is preferred at *t1*.

The analysis of these specific critical junctures – the moment of policy formulation at *t1* – will be embedded in a broader historical analysis of TJ trajectories for each of the three country-cases – going from the transition moment (t0) to the moments of adoption of TJ measures (t1) –, as this is essential in order to tackle the second research question: *what, from a comparative perspective, explains different transitional justice paths and outcomes?* In accordance with Mill's method of difference, the study of the historical evolution of the relationship of state institutions/ key actors with their recent past, across three country-cases with different final outcomes, is expected to bring to the forefront key dissimilarities which will shed light into the reasons why Uruguay managed to go much further than Spain in its TJ policies, and why Brazil appears to be mid-way between the two. A comparative analysis which is *historical* appears essential since, following a historical institutionalist approach, we deem that the choices made during early critical junctures have a cumulative and enduring impact, leading to the establishment of institutions (or ideas, preferences, and behaviors) that generate self-reinforcing and path-dependent processes, capable of resilience and generating an equilibrium that is sometimes only upset by exogenous shocks occurring at new critical junctures (Capoccia and Kelemen, 2007). To put it simply, previous approaches towards the political treatment of the past, from the moment of their inception at *t0*, matter in understanding later approaches, an argument we will develop and substantiate later on.

For these purposes, different types of data are triangulated. First of all, I draw heavily on the existing country-cases literature. Although few studies have focused on the specific questions I am asking – as they tend to be descriptive rather than analytical –, there is plenty of country-specific literature that has helped me to reconstruct in detail the transitional justice trajectories of each country. Paloma Aguilar's work on Spain, Francesca Lessa's research on Uruguay, and Glenda Mezarobba's doctoral dissertation on Brazil are the most comprehensive for each case. Secondly, I have conducted about fifty expert and elite interviews in all three countries, comprising (1) policy-makers who were part or close to the policy circles responsible for TJ-related legislation, (2) individuals engaged in civil society initiatives that issued TJ claims, and (3) academics who are country experts. These were semi-structured interviews, adapted to the different profiles of the interviewees. They were essential in allowing for a greater familiarization with the debates, having actual perspectives 'from the field', and providing rich details and points of view, often adding important dimensions. The full list of interviewees, discriminated by country and category, is available in Annex I. In addition, I also resort to the

analysis of primary documents, most notably legislation that falls into the scope of transitional justice, parliamentary initiatives and debates, judicial decisions and party-associated publications. The most important TJ legislation as well as party programs were scanned in all cases (so as to assess whether there was a previous programmatic commitment to TJ policies or not). Last but not least, I used media sources when lacking a detailed context on a specific event or when assessing the public salience of an issue. *El País* in Spain, *Folha de S. Paulo* in Brazil, and *La República* in Uruguay are the media sources I draw the most from (though not exclusively) as these are quality daily newspapers which are among the most widely read in their respective countries.[5]

It is in the exhaustive combination of all these different methods that this work finds its methodologically strength. For each country-specific TJ trajectory – which includes the seven cases of policy implementation at *t1* –, I used, to the greatest extent possible, a combination of a review of the existing literature, primary documents, media sources detailing the context, and interviews, so as to have a complete and detailed picture of events and the possible factors at hand. This allowed me to obtain the necessary fine-grained knowledge, which is of essence in building a thick narrative, focused not only on the description of relevant moments/ events, but also on the analysis of the possible factors leading to the specific outcomes under study. Obviously, some TJ choices/ policies received greater coverage than others, and therefore the level of detail is not the same for each case. I attempt to be as transparent as possible in terms of the limitations found as well as the various (and sometimes confounding) factors that appear in each moment. I use 'diagnostic pieces of evidence', whenever they are available, to argue why some factor(s) appear to be stronger than other(s). It should also be noted that my analysis is focused on the national/ state level, mostly overlooking local-level dynamics (which, in decentralized states like Spain and Brazil, do not always go hand in hand with the central government), unless these seem to have a national repercussion.

Needless to say that neither the periodization choosen nor what is narrated is independent from the theoretical choices made (developed in the next chapter). Because the main focus is on transitional justice *policies,* my approach is mostly actor-centered, focused on the successive governments and their decisions and debates in terms of transitional justice measures. In

[5] Unfortunately, I did not have the same range of access to all three, which prevented a more systematic and comparatively sound use of media sources. Moreover, a certain (center to left) ideological bias exists in all three and should be acknowledged, though I used them essentially for fact-finding purposes.

assessing the factors that influence their choices, my approach is somewhat rationalistic, that is, I assume that actors behave according to cost-benefits analysis, but I do not consider these to be based on a strict notion of individual self-interest. Weighing on the cost-benefits balance are also subjective orientations about what is appropriate. Moreover, I consider that actors' ideas and preferences are decisively shaped by the historical context in which they are embedded. I devote a considerable amount of attention to the moment of transition from dictatorship to democracy because this is the moment zero of the definition of the relationship of state institutions with past state violence and, thus, it is likely to have a long-lasting impact.

1.4. Thesis structure

This work is structured as follows: in the next chapter (Chapter 2) I introduce the conceptual and theoretical framework this thesis relies upon. First, I make clear how Transitional Justice is defined and operationalized. Secondly, I lay down expectations regarding the determinants of (variation in) late transitional justice, that is (1) which type of factors I will look for when accounting for the timing of implementation and why, and (2) how cross-country variation will be approached. Chapters 3, 4 and 5 are in-depth analyses of the transitional justice trajectories of each individual country, relying heavily on thick description but also on detailed analysis of the reasons behind the (lack of) treatment of the past at *t0* and the implementation of TJ measures later on. I start by contextualizing each case, looking at its history, the characteristics of political repression, and the political context of the transition to democracy, because these are fundamental in understanding where they come from. Next, the focus is on how the violations of the regime were approached during the moment of transition and the reasons why it was so. I then move to the analysis of transitional justice trajectories later on, in a chronological fashion. Chapter 6 and 7 provide more direct answers to the two research questions under study, summarizing the main findings of the previous chapters and putting them under a comparative light.

CHAPTER 2. Conceptual and theoretical framework

2.1. Definition and operationalization of Transitional Justice

The existing literature is not always clear and rigorous when it comes to the definition and operationalization of Transitional Justice. Debates revolve around the kind of mechanisms/ measures that should be included under the TJ heading, what its goals should be and whether the concept of '*transitional* justice' is suitable at all. The field is often vaguely taken as the set of mechanisms to 'deal with the past' or, inversely, restrictively identified with one single mechanism while still speaking of 'transitional justice'. As Roth-Arriaza (2006: 2) puts it, 'transitional justice can be broadly or narrowly defined. At its broadest, it involves anything that a society devises in order to deal with a legacy of conflict and/or widespread human rights violations, from changes in criminal codes to those in high school textbooks, from the creation of memorials, museums and days of mourning, to police and court reform, to tackling the distributional inequality that underlie conflict.' This contrast with the field's initial stages, when TJ referred to the dilemmas involved in achieving accountability for past abuses during transitions from authoritarianism to democracy, being narrowly identified with criminal prosecutions and, at times, with state-led investigatory commissions. Since then, the field has become a victim of its own popularity and is nowadays often used to include broad issues and agendas, to the point that it has been criticized for having been transformed into a 'non-field' which has become 'all things to all people' (Bell, 2009).

Part of this is a result of its enthusiastic adoption among policy circles involved in post-conflict settings. This is visible in the ambitious definition given by the *International Center for Transitional Justice,* which claims that TJ is a 'response to systematic or widespread violation of human rights [which] seeks recognition for victims and promotion of possibilities for peace, reconciliation and democracy'. Academics are often more agnostic about the goals and potential of transitional justice policies. Vinjanuri and Snyder (2015: 305), relying on various definitions used in academic circles, succinctly define it as 'the set of institutions, policies, and practices to deal with atrocities and major politically motivated human rights violations in the process, anticipation, or aftermath of regime change or violent conflict'. They do not explicitly mention its goals, but they are usually related to producing accountability – which Skaar et al. (2016: 4)

define as 'an explicit acknowledgment by the state that grave human rights violations have taken place and that the state was involved in or responsible for them'. Recognizing the victims as equal-rights bearers and rectifying their sense of wrong is implicitly or explicitly assumed as the main purpose of accountability. TJ's relationship to broader and more ambitious goals – such as peace, reconciliation and democracy – is instead (rightly) taken as an empirical question which has been a subject to some debate and not-yet conclusive evidence (Thoms et al., 2010).

The concept's suitability has also been put under scrutiny, namely whether it should be differentiated from ordinary justice at all or whether it makes sense to apply it to non-transition periods or to speak of *transitional* when analyzing TJ mechanisms in non-transition settings (Posner and Vermuele, 2004; Bell, 2009). Winter (2013) has gone against the latter type of arguments, defending that forms of redress in established democracies still deserve to be put under the transitional justice heading given (1) the similarities of practices/measures, (2) the trans-regime context, (3) and the political legitimating function they anyhow perform, something which he argues is part of *transitional* politics given the normative transformation in the way grievous wrongdoing is dealt with when implementing TJ policies. Indeed, if anything, a framework different from ordinary justice makes sense given that, when speaking of transitional justice, we are referring to a concrete political period and to measures which imply a rejection of a certain political order (and the legitimation of a different one). The object is also specific – mass violations of human rights – as well as the targets – which include those at the top echelons of state institutions. It could be moreover argued that, because victims are numerous, accountability and redress are not individual-focused procedures, but perform a societal/ collective function. Collins (2010) and Raimundo (2012) make less of a sophisticated argument, simply proposing to use *post-transitional justice* to refer to the re-introduction of the issues of the past on the agenda and subsequent revisiting of transition-era settlements. Regardless of the suitability of the term, the fact is that it has become widely employed and this dissertation will therefore make a pragmatic use of it.

Grodsky (2009) is right in pointing out that a new methodological and more rigorous approach is needed when it comes to specifying the dependent variable, which tends to be overly restricted or poorly defined. Below I offer one possible avenue for operationalizing and categorizing TJ measures, an essential step for any rigorous cross-national evaluation of TJ trajectories. My classification is different from the one proposed by Grodsky (2009) in that it is at the same time more systematic and open-ended, though similar to his in outlining an

incremental ladder according to the degree of risk of those measures and, I will add, according to their robustness in the different extents to which they contribute to the overall goal of accountability. In an attempt to balance the need for good operationalization with the wish to avoid a rigid and pre-defined 'one-size-fits-all' approach, I first opt to categorize TJ measures according to their most proximate target – (1) victims[6], (2) the broader society, and (3) agents of the former regime.

(1) Victim-centered policies typically consist of what has been broadly defined as reparations, usually in the form of monetary compensations for the damage suffered. Restitution and rehabilitation procedures are usually considered to fall into the category of reparations, the first being understood as steps to restore the victim to the original situation before the violations (restitution of property, employment, computation of retirement pensions so as to include years of prison, etc.), and the second traditionally referring to the provision of medical and psychological assistance to victims.[7] Though usually not included as a transitional justice measure, Kovras (2017) is right when highlighting that the search and recovery of the bodies of those who went missing is one important aspect of 'dealing with the past', being in fact the top priority for most family members, which justifies its inclusion into victim-centered type of policies.

(2) As for measures targeted at the broader society or, to put it in a different way, aimed at producing public awareness and acknowledgment, the most well-known have been what are often called 'Truth Commissions', state-sanctioned investigatory bodies meant to gather and compile systematic evidence of the country's past record in terms of human rights violations and possibly unravel large patterns of conduct, producing a final public report. Publicly visible apologies/ recognition of wrongdoing are also a form of acknowledgment. Memorialization initiatives (including museums, the creation of memorials, changes in street names, etc.) and changes in high school textbooks also fall into this category. However, as it would be

[6] The category of victims is here meant to encompass those who, usually for political reasons, 'disappeared', were murdered, tortured, unlawfully detained, dismissed from their jobs, or forced into exile. According to international jurisprudence, families of a direct victim of disappearance or murder also fall into the category of victim.

[7] Not all measures that fall into the 'reparation' category have the same qualitative value. Measures that simply aim at giving back to the victims the rights they were stripped off during the previous regime or which aim at putting them on an equal footing to other citizens (usually of the restitution type) are more of an obligation of any democratic state than an attempt at producing accountability and rectifying the victims' sense of wrong. That is why, when speaking of *significant* transitional justice steps (Table 1.2), I do not include restitution-type of procedures.

unmanageable to collect data on all of those types of initiatives, the case-study analysis will be restricted only to the most important public acknowledgment measures, judging on the basis of their visibility (public impact) and comprehensiveness.

(3) Finally, when it comes to procedures targeted at the agents of former regimes, they can go all the way from processes of vetting or purges up to trials of the ones responsible for human rights abuses. Vetting and purges refer to the removal from public office either based on prior individual conduct or simply on prior affiliation. These were measures more systematically used in Eastern and Central Europe, where the efforts at de-communization took this particular form (known as *lustration*), probably as a result of the particular type of repression (based on widespread informant networks and an active secret police) (Grodsky, 2010: 58-74). In other contexts, including the ones under study, the absence of vetting policies does not necessarily imply there was absolute continuity in personnel, but makes it unfeasible to attempt to trace the individual fate of those involved in the dictatorship's repressive apparatus[8], which is why the case-study analysis will be restricted to criminal accountability proceedings.

While at first sight these measures might have little in common with each other, they all contribute to the same general purposes of producing accountability, implicitly or explicitly condemning a violent past, and proving some form of recognition and redress for the victims, which explains why I include them in the 'TJ package'.[9] An advantage of this target-based classification system is that any other potential measure which fulfills these goals can be included in this classification a posteriori.

[8] The dissolution of repressive institutions naturally implied the relocation of their members or their early retirement. However, lack of data on this together with the absence of any active, systematic or consistent policy effort invalidates its inclusion in the analysis of country-cases.

[9] I consider that (1) amnesty laws and (2) institutional reforms fall outside this scope and therefore I do not include them as transitional justice measures. Amnesties – a word that comes from the ancient Greek *amnestia*, meaning forgetfulness or oblivion, and nowadays used to refer to official legal measures towards pardoning and prospectively barring criminal prosecution against individuals involved in political crimes (Lessa and Payne, 2012) – are often considered a TJ mechanism in normative-free/ pragmatic accounts of TJ for their usefulness in neutralizing opponents and securing a stable transition. However, they neither produce accountability nor do they provide any form of redress to the victims and therefore are at odds with commonly accepted definitions of TJ. As for institutional reforms, they are not always considered to fall within the umbrella of TJ. This is because the purpose of reforming institutions generally goes well beyond the purposes of TJ. Building an accountable and democratic state apparatus will necessarily involve institutional reforms that tend to be forward-looking rather than backward-looking, in contrast to other TJ measures. In fact, they are better suited as an independent variable since institutional reforms – take the judiciary as an example – are certainly an important condition for the implementation of TJ measures like criminal accountability.

It is logical to think that the greater the institutional effort to confront a violent past, the more likely the implementation of various types of TJ measures is. Even if the specific TJ measures may vary from context to context, it is likely that a comprehensive effort to deal with a violent past will in some way or another target the three types of actors mentioned above, based on the fundamental moral premises that (1) **victims** should be honored (2) **societies** should be aware of their recent history and (3) **perpetrators** should be condemned. A holistic approach to TJ is, in fact, commonly defended in policy circles as the most desirable one since the various TJ mechanisms are said to complement and reinforce each other, working better together than in isolation. This is because while prosecutions send a strong signal to society, they also carry a greater risk of being viewed as a form of scapegoating or political revenge when unaccompanied by other initiatives; in the same vein, public acknowledgment policies in isolation from other measures can be interpreted as 'mere words' with little or no consequences while reparations alone will likely be perceived as an attempt to buy the victims' silence.

In practice, though, TJ policies neither tend to be implemented at the same time (particularly in sensitive contexts as the ones under study) nor are they perceived to be of equal value in the extent to which they contribute to the general purpose of accountability. In fact, their degree of riskiness is proportional to their perceived importance in fulfilling TJ goals, that is, the more relevance they are granted in the literature, the more controversial and difficult their implementation seems to be. Take criminal prosecutions. Because the greatest obstacle to TJ usually lies in the opposition of those that represented or allied with the previous regime, criminal procedures targeted at them will logically be the most sensitive measure. Legalist/ retributive theoretical and normative approaches, however, naturally defend criminal punishment as the only genuine form of justice and thus the optimal method for dealing with past crimes (Vinjamuri and Snyder, 2004; Aukerman, 2002). Even those who argue for non-prosecution alternatives generally do it out of concern for political stability and concede the desirability of prosecution (Aukerman, 2002: 40). Its benefits in terms of trust in the rule of law (demonstrating that all are liable under the same law), deterrence of future abuses, honoring the victims and establishing the wrongfulness of past crimes are commonly deemed to be superior to those of other TJ mechanisms (Vinjamuri and Snyder, 2004). In addition to this, it is often the preferred policy option for the victims too.[10]

[10] The view that criminal prosecution is the most 'robust' TJ measure can certainly be a matter of debate. However, this is more the case for post-conflict societies than post-dictatorship ones (given that individualizing guilt can prove more problematic in the former; and because in poorer societies the priority might be to address the

In the practical impossibility of conducting trials, though, measures directed at public acknowledgment of the events tend to be considered a second-best option in fostering the goals of honoring the victims and producing some form of accountability. Victims themselves have often underlined the importance that public recognition carries for them, perceived as superior to other forms of reparation (Magarrell, 2007: 2). 'Truth commissions' have been particularly praised for their capacity to produce public acknowledgment and help in the construction of a victim-focused narrative. The distinction between knowledge and acknowledgment is important here – and this is why state-sanctioned investigatory mechanisms have been defended as an addition to the work of historians. Acknowledgment, in the words of Thomas Nagel, is 'what happens and can only happen to knowledge when it becomes officially sanctioned, when it is made part of the public cognitive scene' (quoted in Weschler, 1990: 4). Michael Ignatieff (1996: 111) has famously stated that truth commissions can 'reduce the number of lies that can circulate unchallenged in public discourse'. The greater room for politicization of this kind of mechanism (when compared to trials) and their inability to produce the same kind or degree of accountability means that they occupy more of a middle ground in their relative importance.

Victim-centered policies, on the other hand, are the most innocuous ones. Though they seem indispensable in any comprehensive TJ package and have the value of focusing directly on victims, they are perhaps the most fragile mechanism when implemented alone. The fact that reparatory mechanisms have been the least researched in the transitional justice literature already tells a great deal about their perceived importance. It is often argued that reparatory steps should be taken together with policies that foster public acknowledgment given that their implementation alone generally acquires less public visibility than other measures and, particularly in the case of monetary reparations, risks being seen by victims/families as a 'silencing measure' rather than a sincere form of condemnation of past events (although this may well depend on the previous degree of economic marginalization of the victims [Robins, 2011]). As Minow (1998: 93) notes, monetary measures are hardly a remedy for non-monetary

inegalitarian power structures that were at thela basis of a conflict). Ultimately the best means to address past violence is context-dependent and a combination of various types of mechanisms is surely a better formula. However, the benefits of criminal prosecutions are still numerous and in authoritarian contexts (where violence is more restricted and directed towards political opponents) and where western-style understandings of justice predominate – as in the cases under study here –, criminal accountability usually fares as the preferred option for the victims.

harms and risk trivializing suffering. Together with public recognition measures, they do have the potential to turn words into deeds though.

To judge how far a country has gone in 'dealing with its past', it is then fair to assess how much and how far it has moved from the least to the most robust measures – that is, from victim-centered to perpetrator-focused ones –, along what I denominate the 'transitional justice scale' (Figure 1.1). Robustness here is understood in terms of the extent to which these measures contribute to the overall goals of TJ. This hierarchy is quite implicit in most of the TJ literature, but to the best of my knowledge has not been spelled out and operationalized as such so far. This scale is similar to Grodsky's (2010) 'transitional justice spectrum' in categorizing measures according to an incremental degree of risk and severity, but with two specifications. The first is that, rather than proposing a specific set of measures, it focuses on their targets, therefore leaving the door open for the inclusion of unforeseen measures. The second is that it adds that this classification makes sense not only from the point of view of empirical expectations in terms of riskiness/ conflict, but also from a normative perspective since this ladder equally reflects an unacknowledged but very much present hierarchization of TJ measures in terms of their perceived importance to the overall goals of TJ.

Figure 2.1: ***Transitional Justice Scale***

Though it is expected that, empirically speaking, the least antagonistic/ least risky measures will be the ones implemented first in delicate political contexts, such as the ones under study, this scale is not meant to be an empirical representation of how countries actually move along it (they might well start the other way around or not move at all, depending on the context). Moreover, an in-depth assessment of how far a country has gone in meeting TJ goals requires

not only a simple recording of the presence or absence of certain measures, but also a fine-grained qualitative evaluation of the *quality* of those measures, that is, how far they have gone in actually meeting the supposed objectives of each measure. Naturally, policies vary in the quality – for example, reparations can be less or more comprehensive, more or less generous, involve a symbolic recognition, have an explicit fact-finding purpose, etc. Investigatory commissions vary in mandate, resources, civil society involvement, public dissemination, etc. Skaar et al.'s (2016) edited volume does a good job in this regard, providing authors with a comprehensive list of indicators they use to give 'accountability scores' to each of the four TJ dimensions they consider (reparations, truth, trials, and overcoming amnesties).

But while the quality of TJ measures should and will be taken into account, it will not occupy much space in the present dissertation because it is still more pertinent to ask why Uruguay has enacted all types of policies (while Brazil did not, and Spain did even less) than to compare the quality of reparations and acknowledgment for each case. Fortunately for our purposes, Uruguay and Brazil are included in Skaar's et al. (2016) analysis and their scores confirm that these two countries differ radically only on the 'trials' and 'overcoming amnesties' dimensions. In terms of how far they went in pursuing 'truth' and 'reparations', their scores are somewhat similar (Uruguay gets a 6/10 for 'truth' and Brazil 5,5 out of 10; in reparations, Brazil scores 7/10 and Uruguay 5,5/10). Though Spain is not included, it is surely the case that Spain would fare very low on 'truth' (given the absence of an investigatory commission) and would get a modest score on reparations, thus supporting the 'country hierarchy' that was assumed initially.

2.2. Determinants of (variation in) late transitional justice

This dissertation combines an agentic approach with a path dependence theoretical framework. When answering the first research question – what accounts for the *timing* of implementation of certain TJ measures –, the focus will be on the supply and demand side of TJ policies, looking at the preferences of decision-making actors and at external sources of pressure. Contrary to a transition period that is heavy on the political constraint side – particularly in negotiated transitions –, TJ policies in normal times are not radically different from other policy areas in obeying to supply and demand-side factors. In this sense, I follow both Collins (2010) and Raimundo (2012) when putting the emphasis on agents in a post-transition setting, combining

Collins' emphasis on private bottom-up pressures with Raimundo's focus on political elites/ political parties. Hopefully, this will constitute a welcome addition to a literature that tends to privilege one over the other.

However, rather than acting in a vacuum, actors (re)act in accordance with the 'mnemonic regime' they have been embedded in, which is why I combine the focus on agents with a path dependency theoretical approach. I follow Bernhard and Kubik (2014) in defining a 'mnemonic regime' as the dominant pattern of memory politics in reference to the respective dictatorships. The underlying assumption is that one can think of TJ policies as part of an overall 'TJ trajectory' that is path dependent in the sense that earlier approaches towards the political treatment of the past have an influence over future approaches. This is not to say that 'TJ trajectories' follow a deterministic path, but that different 'mnemonic regimes' constrain or create opportunities to different extents and are thus part of the answer to the second research question, focused on the drivers behind cross-national differences in TJ paths and outcomes. Even though all the regime transitions under scrutiny were negotiated, they differed considerably in how political and social agents approached the violations of the outgoing regime. I draw on Berhhard and Kubik's (2014) typology to categorize mnemonic regimes into 'conflictual' and 'unified' regimes and make the innovative argument that the former facilitates the adoption of more robust TJ measures. I then draw on the existing literature on cross-national variation to examine how the most commonly cited variables fit into the case-studies and help account both for cross-national differences in TJ policies and for the different mnemonic regimes.

2.2.1. Accounting for the timing of (late) implementation: An agentic approach

The question of why TJ measures are adopted at *t1*, long after the events, speaks not only to the obvious fact that the transition political context was prohibitive but that the enactment of TJ measures long after this period cannot only be seen as the product of the disappearance of the conditions that made them unwise at *t0* but also of specific contextual features of *t1*, including social and political actors with an intentional TJ-related project. In fact, speaking of prohibitive conditions at *t0* assumes that TJ policies were in the minds of decision-makers back then – and that it was only the external political environment that prevented them from putting such measures forward –, when this was not necessarily the case. As the beginning of the third wave of democratization coincided with the period of 'TJ norm emergence' – when TJ practices had

not yet achieved the internationally recognized status of today –, they were not expected everywhere. In fact, one could go as far as to argue that they started to appear in contexts of 'ruptured transitions' – as in Portugal or in Greece in the mid-1970s – not so much because they were widely perceived as an ethical means to redress past wrongs but because that specific context created incentives for such policies. As the dictatorial regime suffered from an acute crisis of legitimacy and collapsed as a result – in large part due to the involvement in military debacles (the colonial wars for Portugal and Cyprus for Greece) –, strong demands for punishment emerged. These, however, were not as much about criminal accountability as they were a call for old-style political trials resembling the ancient cries of 'death to the King' (Sikkink, 2011: 33).

We thus start from the assumption that there are certain features at the moment of conception of TJ measures at *t1* that speak for why these measures were put forward at a specific timing. Although the first research question is more focused on proximate/ *immediate* factors than on structural ones – as the latter are capable of enabling/facilitating an outcome, but do not provide a satisfying account of the specific timing of TJ policy formation –, there are structural or outcome-enabling factors that ought to be mentioned. As already stated, the first and most obvious is a more conducive political environment at *t1*, given the gradual disappearance of a military threat in concomitance with the process of civilian control over the armed forces. A second structural factor is the transnational diffusion of a 'transitional justice norm'. The idea that states *ought to* confront a problematic past and provide the victims with some form of justice is quite recent in world-historical time and, as developed below, has consolidated itself at the same time as the countries under study went from young to more consolidated democracies. Either via the examples of TJ processes occurring elsewhere or through the adoption of TJ principles by international institutions, this norm has found its ways to penetrate into the language of domestic actors. The transformation of the transnational normative environment is an element which, at the very least, opened up the 'opportunity structure' for interested sectors, able to invoke international principles and international institutions to back up their cause (point (a) below). However, as the decision to make use of it and transform it into specific policies is ultimately in the hands of domestic decision-making actors, an **actor-centered approach** seems more warranted in answering the first research question and will thus constitute the bulk of the analysis as far as the first research question is concerned (point (b) below). The transitional justice norm – understood broadly as the idea that the past should be addressed through various means – can, however, exert a concrete influence over decision-

making actors, via TJ 'norm entrepreneurs' such as international institutions, which will be taken as part of 'sources of pressure'.

a) A more favorable normative environment: The transnational diffusion of a transitional justice norm

In her influential work, Sikkink (2011) traces the evolution of the norm of individual criminal accountability for human rights violations and shows how the prosecution of heads of state went from something virtually unimaginable to an increasing common trend in world politics, a development she refers to as the 'justice cascade'. The most dramatic breakthroughs in this regard occurred throughout the 1990s, with the creation of UN-sponsored international tribunals, the drafting of the Rome Statute giving origin to the International Criminal Court, and the arrest of General Pinochet in London in 1998 after an extradition request from a Spanish judge – following the principle of universal jurisdiction enshrined in the 1984 Convention Against Torture. Sikkink attributes particular importance to the case of Argentina as an early instigator of the accountability norm – with the creation of an investigative commission in 1983 and the Trials of the Juntas in 1985 –, something she connects to a vibrant domestic human rights movement and its insertion and network capacity within the international human rights movement. Even though Olsen, Payne and Reiter (2010: 97-108) find that the 'justice cascade' is overstated – given that, controlling for the growing number of transitions, the rate of trials has not increased since the 1970s –, they nonetheless recognize that there is a discernible increase in the domestic and international demand for justice, with new actors, venues and justice mechanisms.

Golob (2010: 7) speaks more broadly of the transnational diffusion of a 'transitional justice culture', which she defines as a set of beliefs, practices, and norms with an overtly didactic nature, grounded in the rejection of impunity, confrontation of the past, state accountability, and social inclusion of the victims. This relatively new 'culture' – which now ties the quality of transitions to democracy to the process of accountability for the crimes of the past regime – is said to be capable of affecting both the domestic and international legitimacy of the state (Golob, 2010: 14). Key actors in this regard are human rights NGOs, international lawyers and judges, international institutions such as the United Nations, as well as victims' groups. The radical expansion in the number and impact of such advocacy networks over the past two decades has done much to promote the normative view that acknowledging and redressing past

wrongs is a moral necessity, to the point that some speak of a 'global movement for historical justice', concerned not only with the recent past but also with more distant injustices, such as slavery or colonialism (Neumann and Thompson, 2015). Subotic (2012: 107) goes as far as to state that TJ is no longer simply a norm, but has become firmly established as a 'paradigm of the rule of law'.

This is, however, not a contention-free debate. To the view that the past should be remembered and that victims have the right to public recognition, there is a counter-view that forgetting a difficult past is the best means for a society to move forward and avoid conflict. Those who sympathize with this view problematize the possibility of arriving at a fair and single collective memory of contentious events and emphasize that history should be left in the hands of professional historians. Transitional justice advocates will instead politicize the role that public institutions inevitably have in shaping 'collective memory' and their duty to facilitate avenues for society to know and recognize the victims' sense of wrong. To the categorical argument that there is an intrinsic moral duty towards victims of abuses and society at large, they will moreover add the consequentialist claim that TJ has a positive impact in fostering a human rights culture and avoiding future repetitions. While this can turn into a lengthy philosophical discussion, the point here is simply to underline that this is not a normative-free debate, but that the emergence of the *transitional justice* field has been decisively accompanied by a consolidation of the normative view that remembering past violations is a moral necessity.

This development has to be placed within the broader 'human rights revolution', that is, the turn to the protection of individual rights as a core moral principle, including individual protection against the state. Though the 1948 Universal Declaration of Human Rights is often seen as a founding moment, it is only later that the language of human rights begins to resonate with a broader community of people. Moyn (2010) convincingly argues that, as understood today, human rights crystallized throughout the 1970s thanks to a growing human rights movement – including the rise to prominence of Amnesty International, awarded the Nobel Peace Prize in 1977 – and to key political actors – most notably Jimmy Carter –, who moved the human rights rhetoric to the forefront of world politics.[11] The consolidation of the human

[11] What Moyn (2010) defines as a 'new age of internationalist citizen advocacy' is, in his opinion, a result of the failure and disenchantment with earlier political utopias based on collective ideas of revolutionary emancipation, after the death of 'socialism with a human face' in Prague in 1968 and the end of 'the Chilean way to socialism' with Allende's death in 1973.

rights regime is more evident throughout the 1990s, with the UN operating more freely after the end of the Cold War and with a denser network of human rights NGOs benefiting from the possibilities opened by technological advancements and greater mobility. The expansion of human rights advocacy has, in turn, been associated to broader normative shifts in world politics, such as the primacy of the individual and individual rights, reliance on the rule of law as the appropriate model of state practice, and increasing legalization of the international system (Subotic, 2012; Kim and Sharman, 2014).

But if a more favorable international normative environment is a background scenario to have in mind, global norms are ultimately filtered through domestic institutions, which are the ones to decide whether to adopt and adapt the rhetoric and practices being used elsewhere. As Golob (2010: 16) points out, global norms are not the result of the revolutionary overthrow of outdated norms, but play out in the domestic realm through iterative, contentious, and evolutionary processes in which the home state remains the objective. Therefore, when studying the specific timing of implementation of TJ policies and the shape these policies have taken in the three domestic contexts under study, we will first focus on the actors responsible for their conception and, from there, attempt to trace the various proximate factors motivating them in that particular direction. These might well include factors that directly reflect the influence of the TJ norm – such as cross-border influences or the pressure from international institutions and IONGs –, but this is a question subject to empirical enquiry.

b) Preference or Pressure? An agentic approach to the enactment of TJ policies at *t1*

As mentioned above, actors at *t1* benefit from a more favorable environment than they did at *t0* when it comes to the implementation of TJ measures. Whereas in the transition period the incoming political groups have to weigh the potential desire for retribution against the risk of upsetting the transition process, those fears progressively vanish as democracy becomes 'the only game in town'. It is safe to assume that decision-making actors will have 'more space' for action once democracy is consolidated and therefore – in contrast to the focus on 'political constraints' at a time of great political uncertainty –, it makes sense to adopt an actor-centered approach when looking at a 'post-transition' moment. Collins (2010) and Raimundo (2012) – who have explicitly focused on what they term 'post-transitional justice' – seem to share this view, judging by the former's focus on private/ civil society actors and judicial attitudes and the latter's emphasis on political elites and parties.

To be fair, authors who have focused on transition periods had already pointed to the importance of taking into consideration decision-makers' preferences. Pion-Berlin (1994: 115) warned that 'the personal experiences, convictions, and priorities of a head of state influence policymaking'. Likewise, Barahona de Brito et al. (2001: 14) pointed out that 'the attitudes and beliefs of new leaders and political parties' are just as important as more structural factors, even though this is a 'difficult-to-quantify variable'. Together with preferences, Pion-Berlin (1994: 118) also puts an emphasis on strategic calculations, stating that 'how political leaders assess the political costs, benefits, and risks involved in a decision invariably influence their choice of policy instruments.' This is similar to Grodsky's (2008, 2010) more recent work, who assumes that elites weigh pre-formed preferences against costs and benefits, and that leaders tasked with running the country pursue their preferred policies where these pose minimal risk (or are seen as political advantageous) and eschew them when they are seen as potentially costly.

In contrast to the focus on the supply side of transitional justice politics, others have drawn attention to the demand side. While Pion-Berlin (1994) is skeptical about the influence of mass pressures, Lessa et al. (2014) identify widespread agreement in the literature on factors such as the role of civil society demand and international pressure in the pursuit of accountability. Kim (2012) follows others in highlighting the importance of domestic and international human rights networks and Root (2009: 453) cleverly argues that even though 'the capacity of non-state actors to alter state behavior largely depends on their ability to change politicians' sense of their own self-interests, they do so by embracing a discourse of norms and principles.' More recently, Kovras (2017: 233-234) points to the 'courageous efforts of the relatives of the missing in shaping contemporary human rights norms and transitional justice practices' and their ability 'to keep the issue central on the political agenda'.

Even though most authors recognize that there are both supply and demand factors at play, it is striking that there is an obvious tendency to focus on one over the other, when there are good reasons to believe that both matter. With this in mind – and putting aside for a moment the role that the judiciary can play in pushing forward the TJ agenda (considering that all the policies under study [table 1.2] were enacted by the executive) –, one possible way of tackling the first research question is to look at the factors behind the *timing* of the enactment of TJ policies in terms of supply and demand or, to use different terms, **preferences** and **pressures**. Under what configurations of the two are TJ policies enacted? Which of the two played the most part? Is a

combination of both always necessary? What can they say about the type of TJ policy that decision-making actors decide to implement?

One could, of course, argue that preferences are not independent of pressures and that sources of pressure can have an impact in shaping preferences. This is undisputable, but it still makes sense to separate the two given that pressure is not all there is to preferences and that similar amounts of pressure can have a radical different impact on different executives, depending on their preferences. Although there will most likely be a variable degree of the two factors at play, the concern with *timing* means that emphasis will be given to the most significant *changes* occurring shortly before the decision to enact a TJ policy, that is, on the factors that are new and that can logically explain a new TJ step. In this sense, three possible scenarios can be foreseen:

(1)**The preference (supply) turn:** The most significant event is a change in government to new political actors who opt for TJ measures out of a pre-established preference. Preferences can be assessed via previous postures, party programs, and the 'quality' of the specific measure (since low-quality measures are unlikely to reflect a strong preference). If measures are implemented shortly after arriving in office, this is another indicator that preference best explains *timing*. *But…* This does not mean that there are no sources of pressure keeping preference 'alive', only that the *timing* seems to be best explained by a change in office holders. It also does not mean that preference is strictly ideological, but it might be driven by strategic considerations.

(2)**The pressure (demand) turn:** The most significant events prior to policy implementation are new sources of pressure. Pressure can either originate directly from pressure-making actors – ranging from civil society groups up to transnational and international actors – or from events (e.g. military confessions, discovery of bodies) that will boost the 'pressure potential' of non-state actors, increase the salience of the topic and influence decision-makers. If the executive had been in power before and did not take TJ-related steps, this is the best piece of evidence that new sources of pressure are the factor that deserves the most emphasis. The role of the diffusion of the TJ norm in boosting sources of pressure is one dimension to be taken into consideration. *But…* none of this means that an executive with a relatively positive preference is not a necessary condition for policy implementation, only that pressure was needed to transform preferences into policy.

(3)**The preference-pressure (supply-demand) turn:** There are both new political actors and sources of pressure at play and both are equally necessary to understand the *timing* of policy implementation. This is different from the first scenario because their enactment seems to be more the result of sources of pressure rather than a pre-established commitment, and different from the second one because a shift to a sympathetic executive was necessary for pressures to have an effect.

To be clear when it comes to definitions, note that the understandings of *preference* and *pressure* used here are agnostic as to whether policy-makers follow primarily a logic of appropriateness (action determined by what is viewed as appropriate) or a logic of consequences (action determined by the calculation of expected returns). Though *preference* could be equated with the first logic and *pressure* with the second one, it is possible to conceive of both logics at work in each of the two dimensions. For example, positive *preferences* might be a function both of views on what is appropriate and of expected returns associated with TJ policies (such as boosting a leader's image as a human rights defender or serving as a political weapon to delegitimize the adversary). Pressures, on the other hand, might have an impact via a *logic of consequences* – as pressure might come with possible returns (e.g. public reputation) – or via a *logic of appropriateness* – by making decision-makers aware of the *appropriateness* of TJ measures, for instance, via persuasion. It might be possible to find clues as to whether decision-makers are following one logic or the other – depending on whether there are clear expected returns associated with a policy or not –, but the point here is to underscore that the use of these terms does not necessarily imply one logic or the other.

Even though it is possible to conceive of two scenarios in which *preference* or *pressure* are the determining factor in understanding *timing* (scenarios (1) and (2)), there are **good reasons to expect a variable degree of preference and pressure to be always at play**. On the one hand, it is difficult to imagine decision-making actors taking a TJ step purely out of preference without any sort of agenda-setting pressures they can point at in order to justify their policy options. On the other hand, pressure obviously works best when sympathetic political actors are in power. This is likely to be the case when it comes to the implementation of TJ policies at *t1* given that the odds are that such policies remain a key concern only for the victims and their families and do not provide obvious electoral returns. In fact, because TJ measures are intimately linked to a politically and ideologically laden view of the country's past political history – vexing for those sectors which were sympathetic to the previous regime and gratifying for those who were

part of the political opposition to the dictatorship –, TJ measures are usually expected to be enacted by the same political sectors that congregate those who were part of the opposition to the dictatorship or who are direct descendants of those victim to the dictatorship's repressive apparatus (Grodsky, 2008, 2010; Raimundo, 2012). This is the case of left-wing groups in right-wing dictatorships, as the ones under study (but it is likely the opposite for left-wing dictatorships).

Preferences and *pressures* are, however, not all there is on a decision-makers' plate when equating the implementation of TJ measures and, in particular, the type of TJ measures to be implemented. Deterring them from taking TJ steps or moving further along the TJ scale are, obviously, the perceived costs associated with such measures. Besides the usual costs that come with most policies (such as financial costs), TJ measures will rarely be free of political conflict, especially with the sectors that were sympathetic to the previous regime – most notably the military, but also conservative political sectors and the conservative media. This is particularly the case for negotiated transitions to democracy, given that (1) these sectors did not go through the same process of 'delegitimation' that they would have otherwise gone through in a 'clean break' setting where TJ measures were implemented early on; and (2) because political actors are to some extent bound to the transition's agreements. There will always be dissenting voices arguing that the past should be left in the past, that it is a matter for historians and not politicians, that it should not consume limited state resources and attention, or that it is a revenge-based exercise, only to mention some of the most commonly used arguments. Assuming that policy-makers are rational actors who weigh costs against benefits, it is not expected that decision-making actors will be willing to put up with conflict, unless there are sufficient incentives arising from preferences and pressure.

Importantly, the degree of conflict differs significantly for different types of TJ policies. **The more conflictual/ costly a policy is perceived to be, the more important the perceived incentives coming from preferences and pressure will have to be**. That is, we do not expect to see the implementation of perpetrator-centered measures at *t1* – the most conflictual – unless decision-makers are faced with strong incentives, arising from the fact that (1) they hold positive preferences in this regard and (2) that there are strong sources of pressure. Victim-centered measures, on the other hand, are the least costly and therefore the ones that expectably need the least incentives for implementation. Acknowledgment-type of measures occupy somewhat of a middle ground and therefore it is estimated that there will be more incentives at

the moment they are implemented than when victim-centered measures were enacted. Incentives are here conceived as a varying combination of preferences and pressure that, when added to each other, trump the costs associated to that specific TJ measure.

Though *preferences* and *pressures* are dimensions which are not easily measurable – and will invariably depend on a qualitative assessment of the cases at hand –, the chapters on specific countries will provide rich narratives that will allow for a strong empirical base for the comparative analysis performed in Chapter 6. Each case-study will go in detail in tracing the demand and supply forces behind each significant TJ step, attempting to weight in their relative weight and providing clues as to what is ultimately motivating decision-making actors. The results of the case studies will be synthesized in Chapter 6, where each of these dimensions will receive a qualitative score (Low, Medium, High), which will be duly justified. This will hopefully provide a rough measure of the relative strength of each factor and confirm the abovementioned expectation that TJ steps, and the choice of more or less costly policy instruments, will depend on how strong preferences and pressures.

A note on the judiciary

All that has been said so far refers to political actors and not to judicial ones. While it is the case that the judiciary can have an active and important role in pushing forward criminal accountability measures, my task is facilitated by the fact that the executive (sometimes with the support of the legislative) was the key actor for all the TJ policies under study, with the courts playing little role. Even in the Uruguayan case, where there were a few criminal convictions, the initiation of prosecutions was dependent on the green light of the executive, in accordance with the text of the country's amnesty law. In Spain and Brazil, the judiciary has limited itself to uphold the amnesty law in the few times it was confronted with the issue, though in both cases throwing the ball at the legislature when stating that it would be the job of the parliament to outlaw the amnesty provisions. This does not mean that judicial actors did not play any role in pushing the accountability issue forward (for instance, a few civil actions in Brazil allowed for the recognition of damages or ordered the military and the state to facilitate access to information), but these were isolated steps that, rather than justifying the inclusion of the judiciary as a separate TJ-making actor, will be taken as part of the agenda-setting/ pressure-building momentum.

This does not imply that the reasons why the judiciary has not taken a more active stance are not worthy of empirical enquiry. In practice, however, this would be the equivalent of asking why the judiciary has followed the law, the answer being perhaps self-evident. Criminal prosecutions for events that occurred decades ago not only imply challenging the countries' amnesty laws, but often go against two cornerstones of criminal law – (1) statutory limitations, that is, prescription periods; and (2) the legality principle, including the non-retroactivity of law (prohibiting criminal sanctions for actions that were not criminal at the time they were committed – which can be the case of 'forced disappearances').

While the Argentinian or Chilean cases have shown that judges can overcome such obstacles based on creative arguments, often derived from international human rights law, this is a controversial move that requires a fundamental shift in legal culture, away from a formalistic/ positivist legal philosophy and towards a view of the courts as '*justice* engineers' rather than 'legal administrators' (Golob, 2010; González-Ocantos, 2016). It is therefore more instructive to ask what allowed for this shift in cases such as Argentina than ask why a formalistic legal culture is still predominant in other cases. While a detailed answer is outside the scope of this work, it suffices to say that Argentina benefited from a combination of favorable conditions that are hardly replicable elsewhere: (1) its 1994 Constitution is quite unique in granting wholesale constitutional status to human rights treaties; (2) it has an exceptionally strong pro-accountability movement which, similarly to Chile, has engaged in sustained and publicly visible litigation for decades; (3) its networks of support involve professionalized legal teams that, through events like seminars and workshops, have promoted what González-Ocantos (2016) defines as 'pedagogical interventions' inside the judiciary, fostering the necessary legal-ideational change needed for a transformation of the legal culture; (4) on top of that, litigation agents have decisively benefited from a favorable political environment, being able to go as a far as to promote the replacement of recalcitrant judges through, for example, strategies of 'naming and shaming' for their association to the dictatorship (González-Ocantos, 2016). In turn, developments in Argentina cannot be disconnected from broader structural factors such as the type of transition to democracy and the exceptionally high levels of political repression, conducted largely extrajudicially (and therefore not implicating the country's judicial system).

As we will see, most of the conditions described above were largely absent in Brazil and Spain. The judiciary of both countries continues to be described as conservative and highly formalistic in this regard, which is unsurprising in the absence of a strong social and political environment

demanding criminal accountability for the dictatorship's crimes. Although the levels of favorability of political decision-making actors do not have to go hand in hand with those inside the judiciary, the support of the former makes a great difference. This was arguably key in fostering the prosecutorial momentum in Argentina, where the Congress passed a law in 2003 declaring the amnesty laws null and void. Political support was hardly independent from the strength of the pro-accountability movement, which was in turn the one ultimately responsible for what Collins (2010: 218) defines as a cumulative and attritional case-by-case litigation approach that brought the issue to the courts in the first place. This is yet another reason to focus on the broader social and political environment in the first place.

2.2.2. Variation in late implementation: The role of mnemonic regimes

If the first research question deals with single TJ policies individually and the drivers behind their implementation at specific moments in time, the second is focused on cross-country differences in how far they went on the TJ scale, looking at each country's TJ trajectory and putting them against one another. Why did Uruguay implement all sorts of TJ mechanisms and went as far as to put former heads of state in jail? Why were TJ policies relatively timid in Spain and why does Brazil stand mid-way between the two?

One logical outcome of what was said above is that, when it comes to accounting for cross-country variation in how far each country went on the TJ scale, differences in overall levels of *preference* and *pressure* can provide an answer. That is, we expect to find that Uruguay has higher scores than Brazil in this regard and that, in turn, Brazil fares somewhat better than Spain. However, while the first question is focused on specific points in time and the proximate factors behind policy implementation, it says nothing about where the different levels of *preference* and *pressure* come from and the specificities of the historical-normative context in which domestic actors are embedded.

As James Jasper (2004: 5) points out, 'strategic choices are made within a complex set of cultural and institutional contexts that shape the players themselves, the options perceived, the choices made from among them, and the outcomes.' Affecting the understandings and perceptions of what is desirable (that is, preferences) and what is possible (that is, the TJ options on the table and the costs involved) are not only present circumstances, but also how the issue at hand had been dealt with before. Particularly in the case of political parties' representatives,

it is expected that the preferences for TJ policies at *t1* will be conditioned by what their previous postures were, either out of genuine preference or rhetorical entrapment. Assuming that one can think analytically about TJ as part of an overall 'TJ trajectory' that starts during the transition period and that follows a path-dependent pattern – and knowing that the issue of 'how to approach the violations of the past regime' was not dealt with in the same way everywhere at *t0* –, I deem that TJ trajectories later on are conditioned by the prior dominant approach toward the political treatment of the past, that is, the **'mnemonic regime'** that has been put in place in each domestic context. This is to say that, when tracing a TJ trajectory at *t1*, relevant actors in different countries are not departing from the same baseline and to understand their present predicaments it is necessary to look at where they came from.

Bernhard and Kubik (2014: 4) define a 'mnemonic regime' as the dominant pattern of memory politics that exists in a given society at a given moment in reference to a specific highly consequential past event or process. To put it simply, it is essentially about *what was there before* in terms of political approaches towards the treatment of the past and, as a consequence, the possible implementation of TJ measures. As the period of transition from dictatorship to democracy is the moment zero of this regime, it is likely that it will be crucial in setting and defining its contours and therefore deserves particular attention. The existence of a particular regime is expected to place the country in a specific TJ path-dependent course within which actors will (re-)act or conform to in the future, influencing their perceived room for action, expectations, and eventual choices at *t1*. In other words, new political actors entering the field of mnemonic politics are influenced by the existing mnemonic regime and will be unlikely to attempt radical breaks with previous repertoires, be it in terms of its form or its content.

Bernhard and Kubik (2014: 16-18) focus on three possible types of mnemonic regimes – *fractured*, *pillarized*, and *unified* –, essentially dependent on how political actors position themselves towards the past. Fractured memory regimes, they say, are populated by 'mnemonic warriors' – those that construe a sharp line between 'us' and 'them', between a 'true' version of the past and others. Pillarized regimes refer to settings where competing versions of the past are widely accepted ('we agree to disagree') whereas in unified regimes there is an agreement over the approach towards the past, either because it is consensually seen or because politicizing the past is perceived as too costly. The authors do not make a clear distinction between versions of the past (in terms of content) and approaches towards the past (in terms of form) and sometimes it is unclear whether their definition of mnemonic regimes refers to one or the other.

For the sake of clarity and simplicity, my definition of 'mnemonic regime' refers to the latter – whether the past should be a political object or not (a proxy for whether TJ measures should be implemented or not) – and I summarize them into two ideal-types: (1) a conflictual regime, where relevant political and social actors see the past as an object of political contention and part of them push for TJ measures; (2) a unified regime, where there is a dominant and more or less consensual approach towards the treatment of the past among relevant political and social actors, which can entail either (2.1) the more or less consensual implementation of TJ measures or (2.2) an explicit or implicit consensus to avoid the politicization of the past ('leave the past behind'). In the context of negotiated transitions and in the period of 'TJ norm emergence', the latter is naturally the most expected sub-type of unified regime. This does not mean dissenting voices are entirely absent, but only that they are mostly unheard of.

If the type of transition to democracy tends to correlate with the difficulty in the implementation of TJ measures at *t0,* it does not say much about the type of mnemonic regime one can expect. The depoliticization of the past might be an integral part of the content of those negotiations, but social and political actors outside the negotiation table might well strive to put the dictatorship's crimes under the public eye. Indeed, and as it will become clear from the in-depth analysis of the cases in hand, there is variation in the extent to which the violent practices of the dictatorial regime became a politicized and salient issue at *t0,* depending (most proximately) on the mobilization capacity of the victims/ families, their networks of support, and the decision of relevant political actors to endorse their claims or, in other words, on pressures and political preferences. While Uruguay comes close to a perfect example of a conflictual mnemonic regime, Spain is the prototype of a unified one. Whereas in Spain a consensual elite agreement to leave divisions behind went virtually unchallenged at the societal level, in Uruguay criminal accountability for the dictatorship's crimes became the flagship issue of the left – to the point that it was the subject of a referendum. Even though the majority in Uruguay voted to keep the Amnesty Law as it was, the fact that it was a highly salient, divisive, and politicized issue sets the Uruguayan case on a different course. In Spain and Brazil, instead, legal provisions covering the crimes of state agents went either entirely unnoticed by most or taken as a natural counterpart, in a setting where the prosecution of members of the past regime was simply perceived as inconceivable.

Therefore, actors who enter the mnemonic field at *t1* naturally operate in very different environments depending on the type of mnemonic regime they and their parties are embedded

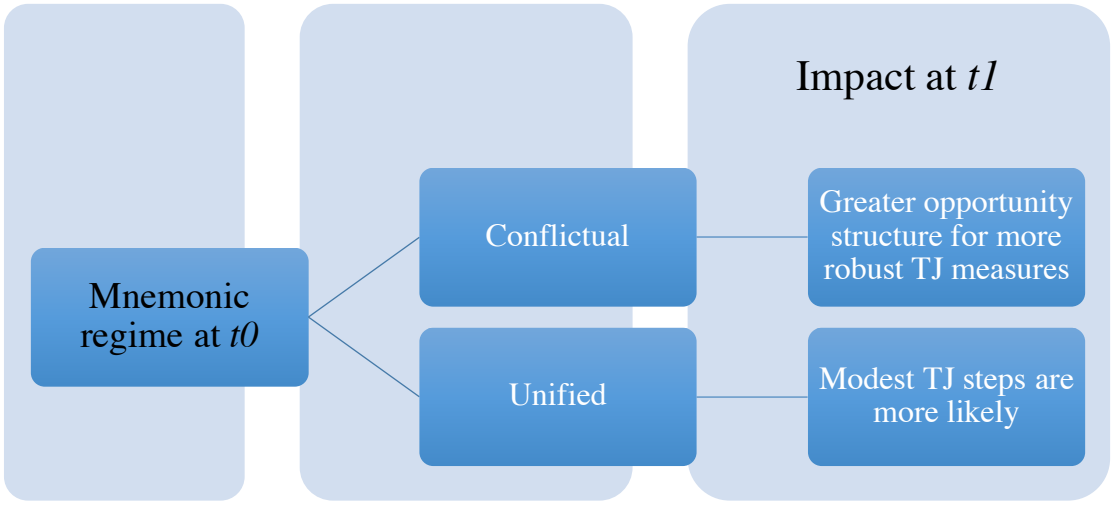
in. In a conflictual one – where the idea has been planted and has become an object of social and political contention in the past –, expectations are that future political and social actors who have an already consolidated preference on the issue will re-introduce the topic in the political agenda once there is a perceived opportunity to do so. Although this is by no means automatic, past conflict on an unresolved issue lays the ground for future conflict when the particular constraints that prevented its resolution in the past have changed, when committed political actors take office, when mnemonic actors do not give up their fight, or when certain events produce salience-increasing effects. The reappearance of the issue in the public and political agenda in these contexts is no surprise, especially if social actors continue to mobilize around the issue and are capable of pressuring a previously committed actor to follow on its words once in office.

On the other hand, in unified mnemonic regimes, where there was a consensus to 'leave the past behind', new political actors will hardly wish to radically reverse the previous state of affairs, not only because this can prove a costly business, but also because radical breaks will simply appear inconceivable, disproportionate, or out of sync with reality. This is the more so if the mnemonic regime is perceived not only as a by-product of the process of regime change, but also as an integral part of the successful transformation of the regime and the concomitant redefinition of collective identities, as in Spain. The transition 'reconciliation ethos' – which, to an extent, was present in Brazil too – is thus an impediment to the adoption of overtly conflictive postures later on. Even if the mnemonic regime undergoes changes (e.g. new sources of pressure), responses will likely be more moderate than in the regimes that have always been conflictual. In sum, preferences, actions and rhetoric at *t1* will be decisively conditioned by past postures. Even if present incentives and expectations lead political actors to take steps that had not been taken before, those steps are likely to be based on ideas that had gained a certain social traction before, rather than positions that will be perceived by most as radical ones.

In this sense, the general expectation is that political actors at *t1* will first opt for the type of TJ measures that is more in accordance with the type of mnemonic regime they have been embedded in. TJ measures that face the least opposition, that are the least visible, and that are more directly focused on victims – reparations – are more likely to rank among the first preferred options in unified mnemonic regimes. In conflictual ones, instead, visibility is more of a desirable goal given that political actors will want to be seen as responsive to the existing demands, likely centered on justice. Responding to visible demands for justice with reparations

might be taken as an insult in conflictual mnemonic settings, whereas the enactment of reparation policies in unified regimes will provide a response to a small and low-key demand for some form of historical justice without necessarily transforming the mnemonic regime into a conflictual one. This does not mean a unified regime stays so forever, as mnemonic activists might find mobilization opportunities that were missing before and political actors might perceive new benefits. However, it is unlikely that these will be strong enough to provoke radical breaks, and a moderate approach will probably be preferred.

Figure 2.2: Types of mnemonic regime and their influence at *t1*



Where do different 'mnemonic regimes' come from?

As stated above, the type of mnemonic regime developed at *t0* is most directly dependent on the mobilization capacity of the victims/ families, their networks of support and, most importantly, the decision of relevant political actors to endorse TJ claims, so as to make them visible and politicized. But why do social and political actors find the strength to mobilize around TJ-related issues in some contexts and not in others? In other words, what explains the different forms that mnemonic regimes can take and, as an extension, cross-country differences in TJ outcomes?

Though one should allow for contingency when it comes to assessing actors' preferences and calculations – particularly at a political time in which interactions, strategies and outcomes are

in flux and are highly indeterminate (O'Donnell and Schmitter, 1986) –, there are cross-country 'structural' differences at *t0* that can help provide answers to these questions. The existing literature has used a good deal of different variables when it comes to account for cross-country differences in TJ outcomes. Olsen, Payne and Reiter (2010) did a good job in summarizing them, dividing them into (1) authoritarian regime factors (regime duration, degree of repression, timing of transition since the height of repression, type of leadership of the regime), (2) transition factors (type of transition, background of new leaders, democratic past, strength of civil society), (3) economic constraints on TJ and (4) international influence.

Though these factors were thought to account for differences in TJ outcomes, they can also be used to help explain cross-country differences in mnemonic regimes since a conflictual mnemonic regime is a necessary condition for the implementation of robust TJ measures, whereas a consensual depoliticization of the past in a 'unified mnemonic regime' is a guarantee that no significant steps will be taken. In fact, the factors that the literature has pointed at are usually thought through (even if only implicitly) in terms of the impact that they have on the willingness and capacity of social and political actors to make TJ a politicized and salient issue (and thus to establish a 'conflictual mnemonic regime'). To give an example, when correlating the degree of repression with TJ measures the underlying assumption is that the higher the level of atrocities, the greater the demand for accountability, and thus the higher the likelihood that TJ measures will be implemented.

Not all factors carry the same explanatory weight, though. In their large-n analysis, Olsen, Payne and Reiter (2010) find that – among the variables they consider in the first two sets of factors (authoritarian regime factors and transition factors) – only the (1) type of transition and (2) democratic history are correlated with the use of trials and truth commissions at a statistically significant level. This does not mean other factors are not relevant in specific cases and this is why I will take the whole pool of factors into consideration, though with modifications, adjusted to my best knowledge of the three cases at hand. Below I take the list of factors used by Olsen, Payne and Reiter (2010) and explain why and how they will be taken into consideration when accounting for variation in the mnemonic regimes of Uruguay, Brazil and Spain.

Table 2.1: List of potentially relevant factors in accounting for TJ outcomes (Olsen, Payne, Reiter, 2010)

Authoritarian regime factors	
Regime duration	The (unconfirmed) expectation is that the longer regimes are, the more institutionalized, authoritarian legacies remain, civil society is weaker and democratic forces are more willing to accommodate authoritarian forces. Because there is significant variation in the three cases at hand, this variable is included in the list of potentially relevant factors.
Degree of repression	Findings in the literature are contradictory, but it is logical to assume that the greater the degree of repression, the higher the demand for accountability. Even though, at first impression, the cases at hand would not fit expectations in this regard (as repression levels were higher in Spain), there are other repression-related variables that should be taken into account, including the (1) context and direction of violence of violence (e.g. the context of civil war in Spain); (2) the type of repressive methods (disappearances, murders, imprisonments); and (3) the previous history of state repression.
Timing of transition since the height of repression	This another important repression-related variable.
Leadership of the old regime	There is not enough variation in the type of leadership of the old regime in order to make it a variable worth taking into account (the assumption is that more 'personalistic' regimes will make robust TJ measures easier).
Transition factors	
Type of transition	Even though there is no variation in the type of transition, there is more to the transition context than a binary categorization of the type of transition. The perceptions of risk, the strength of political parties, the concrete political challenges were not everywhere the same. In particular, the political context in which each country's amnesty law was approved can tell a great deal about the mnemonic regime.

New leaders with a human rights background	None of the new leaders at the time (including left-wing leaders) had such a background and thus this variable will not be included.
Democratic past	Relevant variable. The underlying assumption is that, contrary to authoritarian regimes that have been long entrenched (regime duration variable), countries with a strong democratic history will have an easier time restoring their political and legal systems and their governments will enjoy greater legitimacy, enabling them to stand up to the authoritarian regime.
Strength of civil society / Ethnic fractionalization	The variable 'ethnic fractionalization' is not applicable to the cases at hand. The strength of civil society *per se* is also not a good indicator given that this bears no direct relationship with TJ demands (e.g. despite a strong civil society, TJ demands in Brazil were restricted to a small group of families). What is most relevant is, obviously, the strength of TJ demands. However, this is very *proximate* to the variable of interest of here – the form of the mnemonic regime – given that strong demands for TJ necessarily make for a conflictual mnemonic regime. In fact, most other variables in this list are supposed to help account for the strength of social demands too.
Economic constraints on TJ	
Economic costs	There is not enough variation in the level of economic development between the three countries to make it a variable worth taking into consideration. Plus, contrary to expectations, the most developed country (Spain) has taken the least steps.
International Influence	
International influence	International influence can be thought of in terms of the work of international advocacy networks, norm diffusion, and contagion or learning from the experience of neighbouring countries. This is a potentially relevant variable, though it might be precocious to speak of norm diffusion at the early stages of the third wave of democratization. As the TJ norm was at a nascent stage at the time, and judging by the role Argentina played in this regard, this appears as a relevant variable in accounting for Uruguay's conflictual regime given the cultural affinity with Argentina, together with the country's shared experience in terms of repression.

In Chapter 7, when trying to make sense of cross-country variation in TJ outcomes, I will come back to this list and provide further details on how these potentially relevant variables can help explain variation in mnemonic regimes. While some of these factors have straightforward answers (such as 'regime duration' and 'democratic past'), others require further exploration. This is particularly the case of the (1) characteristics of repression and (2) the transition's political context, and (3) international influences. This is part of the reason why I start each case-study chapter with a 'contextualization' section, exploring the patterns of repression and the transition's general political context. I then look in detail at the political treatment of the violations of the outgoing regime during the transition stage, so as to substantiate my claims on each country's mnemonic regime, providing context-bound tentative explanations for why and in what ways the past became or not an object of contention. These explanations will be systematized and put under a comparative lens only in Chapter 7.

CHAPTER 3. Transitional Justice trajectories in context: The Spanish case

Out of the cases under examination, Spain is the one where the implementation of transitional justice measures has proven the most difficult. In fact, it was not until the twenty-first century that its recent past became an object of intense political debate, culminating in the approval of what became commonly known as the Law on Historical Memory (Law 52/2007 of 26 December). Prior to this, only (timid) rehabilitation and reparation measures had been enacted, in accordance with the transition's reconciliation policy and the tacit decision not to instrumentalize past divisions. Its 'consensual mnemonic regime' – involving the non-politicization of the past – lasted until the conservative Popular Party took over (1996-2004), and was most obviously shaken by the adoption of Law 52/2007 later, an initiative that, despite the unprecedented degree of symbolism, only made Spain advance modestly in the transitional justice scale. To speak of transitional justice in Spain is therefore to speak mostly of its absence, with the added difficulty involved in accounting for non-events over a long period of time. This chapter attempts to answer two main questions: (1) why were there no significant transitional justice measures (besides partial rehabilitation and reparations ones) prior to the 2000s? In other words, why did Spain develop a 'consensual mnemonic regime' and kept it for so long? and (2) what changed in the 2000s, leading to the approval of Law 52/2007? By looking at the trajectory of the Spanish state's relationship with its past, from a historical, political, and social point of view, various cues will also be given as to why Spain has not (yet) advanced more significantly on the TJ scale, making it the case-study that lags the most behind.

Unlike Uruguay, where a 'pacted' transition imposed clear limits on existing accountability demands, in Spain neither the democratic opposition nor civil society showed any firm interest in revisiting the past. If political circumstances looked indeed prohibitive during the transition period (1975-1978/1982)[12], the lack of any significant initiative at the time as well as during the

[12] Spain's transition period is usually considered to start shortly after Franco's death in November 1975. Its termination date is less consensual, with some pointing to the elections of June 1977 or to the approval of the new Constitution at the end of December 1978 while others prefer to mark it with the February 1981 failed coup d'état or even with the 1982 general elections, in which a party with no links to Franco's regime won the elections for the first time.

following twenty years – a large part of which comprised Socialist governments (1982-1996) – makes the Spanish case particularly puzzling. If Spain can be put in parallel with the Brazilian case when it comes to unfavorable political circumstances and the absence of visible TJ demands, it stands out for the fact that not only was there no possibility/interest in revisiting the past, but there was actually an active concern with drawing a line under it. In the name of reconciliation, social peace, and ultimately a successful transition to a consolidated democracy, political elites agreed that the transition constituted a re-foundational moment in which past conflicts were to be left behind and a new historical stage inaugurated. The left was notoriously keen on embracing this discourse, which raises legitimate questions as to why it did so after more than three decades of authoritarian repression over part of its members.

Various explanations have been put forward in the existing literature as to why Spain developed what I call a 'consensual mnemonic regime' at *t0*. I will follow Encarnación (2014) in dividing them between (1) explanations of the psycho-political type, based on the trauma and memories of the civil war experience, and (2) explanations focused on the balance of power and the sensitive context of the transition period. Far from mutually exclusive, these two types actually make most sense when put together. On the one hand, left-wing forces were pushed towards a posture of compromise, in a setting where reformist sectors *within* the regime had the upper hand in the negotiation process and where various destabilizing and challenging elements made the road to democracy all but certain, including the high levels of political violence, the agitation of the military, an economic crisis, and difficult constitutional negotiations. Out of the three-country cases under study, Spain is the one that most struggled with political violence during the transition and with the menace of a coup d'état, which alone are themselves sufficient reasons to understand why the left did not wish to rock the boat by bringing up divisive and potentially destabilizing issues. On the other hand, the emphasis on reconciliation, consensus and moderation – though carrying instrumental benefits – cannot be properly understood without taking into consideration a history of fratricidal ideological divisions and the desire to overcome them. I argue, however, that this desire had less to do with feelings of collective guilt over the war than with the pragmatic wish to build an integrated and all-inclusive democratic polity.

The success of the transition was for many the confirmation that a strategy of moderation and reconciliation worked and that Spain was effectively reconfigured and set on a forward-looking project of peaceful coexistence, integration, democratic consolidation, and modernization. This,

together with the absence of positive sources of pressure – at a time in which the TJ norm was not yet available in Spain – contributes towards accounting for why it would take a new generation for the so-called 'pact of silence' – the tacit agreement not to politicize past divisions – to be broken. The turning point at the social level would occur in the early 2000s, when a few individuals decided to start exhuming mass graves containing the remains of people murdered during the civil war and from there ignited a series of civil society initiatives demanding the 'recovery of historical memory'. At the same time, the Spanish left showed a growing interest on the topic, which could conveniently be used as a political tool to shame the then ruling party, the Popular Party, whose historical links to francoism are well known.

The growing visibility of related topics in the public scene, the exhumations effort, the co-optation of the topic by small left-wing parties, and the fact that the socialist minority government in 2004 needed the parliamentary support of radical left parties all concurred to a process that culminated in the approval of Law 52/2007 (known as the Historical Memory Law) recognizing and amplifying rights and establishing measures in favor of those who had suffered persecution or violence throughout the civil war and the dictatorship. While in practice it is a largely victim-centered law that only timidly goes beyond the reparatory dimension of TJ, its language, symbolism, and the parliamentary and public debate generated by it were unparalleled and far-reaching in a country where political institutions had turned a blind eye on the issue until then.

The degree of controversy sparked by the introduction of the topic on the political agenda, more than 65 years after the end of the civil war and 30 years past Franco's death, revealed the extent to which Spanish elites are still unable to reconcile on a harmonized view of the civil war and francoism. This is most true of the political scene – where the PP has mounted a ferocious opposition – but also of the judiciary, which showed that its doors were fully closed after the backlash against Baltazar Gazón's attempt to open a judicial investigation into the crimes committed between 1936 and 1951. In fact, what proved to be particularly conflictual were not so much the specific measures but the historical interpretations that they implicitly carried. If the same could be said of plenty TJ measures in almost any context, this seems to be particularly accentuated in the Spanish case. Besides the added complexity of having a dictatorship that was the result of a civil war whose origins are still today debated, resuscitating past issues also amounted to questioning the legitimacy of the founding moment of Spain's peaceful and democratic coexistence – the transition – highly cherished by the generation that lived through

it. While virtually no one would take seriously the argument that questioning the past today would endanger Spain's democracy, to speak of the transition's moral cop-out – its continuity with the Franco regime and its oblivion of those who fought against it – is to taint the image of what had been thus far highly regarded as a major success. As one of the most significant and transformative historical periods in Spain's recent past – and unlike a long previous history of conflicts – the Spanish transition came to acquire the status of a quasi- 'founding myth' of contemporary Spain, a moment in which the country decided to break with a divisive history and give birth to the modern and European Spain of today.

3.1. Contextualization

Political disputes were rarely an uncommon phenomenon in Spanish history. Throughout the XIX century continuous cycles of political instability shook Spanish political life to the core – including three civil wars, various military uprisings and a few monarchical abdications. It was only with the founding of the so-called Restauration period (1874-1931) – when an artificial system of rotation between the dynastic Liberal and Conservative Parties was established – that the country experienced relative stability. The system would however undergo a deep crisis in its last years (~1915-1923), culminating in the 1923 coup d'état and the instauration of the Primo de Rivera dictatorship (1923-1930). This would turn out to be a deeply unpopular regime which eventually lost the backing of its allies, including the military. Greatly delegitimized, the Spanish King was forced into exile after republican parties took over some of the most important urban centers in the 1931 municipal elections.

The proclamation of the Spanish Second Republic (1931-1936) would bring radical changes to Spain's political life. As it will become clear throughout this chapter, this still constitutes a controversial historical period in Spanish collective memory, often described by its supporters as an utterly progressive regime (for its time) and by its critics as excessively radical and antagonistic. There is certainly truth in both versions. On the one hand, the 1931 Constitution promoted major innovations in the protection of what are today considered fundamental rights – women suffrage, divorce, free and obligatory education for all, etc. On the other, its drastic stance towards many fracturing themes – in particular church-state relations[13] – granted the regime powerful enemies from the start. Agrarian reform, labor relations, military reform or

[13] Measures included the elimination of all church privileges, imposing strict controls on its property and banning religious orders from education.

Catalonia's Statute of Autonomy were some of the other polarizing themes that would create enormous opposition towards the short-lived republican-socialist coalition (1931-1933). Antagonism came not only from the social groups who saw their positions imperiled, but also from radicalized left-wing sectors that either rejected or were unhappy about the pace and depth of reforms, all in the context of a worsening economic crisis.

Polarization and fragmentation of the ruling elites would be the norm throughout that period. The conservative forces that took over from 1933 to 1935 proved incapable of forming a stable government while the radicalized Socialist Party and labor unions promoted or endorsed the 1934 revolutionary strike movement. Although rapidly suppressed in most of the country, a full-scale insurgency came to life in the Asturias' mining area, with miners taking control of several towns and establishing 'revolutionary councils'. This was the most violent episode of the II Republic and for some a prelude of the upcoming civil war. Anticlerical violence reached disquieting levels and the revolt's brutal suppression by the army resulted in a few thousand deaths and many more arrested. It was, however, the election of the Popular Front in February 1936 – a loose coalition of left-wing republicans from various political persuasions – that made the alarm bells ring more decisively among right-wing sectors and sections within the military, who promptly started organizing the coup d'état that would take place five months later. The ongoing destabilization provoked by strikes, land seizures and violent squads of various political persuasions provided the coup plotters with the right pretext to 'reestablish order' and granted them the support of the Church and much of the conservative, business and landowning elites.

The 17 July 1936 insurrection against the Spanish Second Republic led to a bloody three-year long civil war fought, roughly speaking, between those who stayed loyal to the Republic and those who sided with the rebels, the so-called Nationalists. Whereas the former was ravaged by bitter internal divisions among diverse left-wing groups, the latter proved more disciplined and organized, counting with better prepared sections of the army (including the African troops) and more robust sources of international support (Mussolini's Italy and Nazi Germany). The former, on the other hand, had fewer organizational and material resources and was forced to depend on the Soviet Union's help, after Western powers refused to provide assistance. This led to an exponential growth of the presence of the Communist Party throughout the war who, together with factions of the Socialist Party and moderate republicans, were wary of the bottom-up anarchist revolution that had taken over large parts of the Republican area in 1936. This was

one – though not the only – source of infighting that handicapped the Republican side.

3.1.1. Repression's characteristics

Described at times as an ideological, a religious, or a class conflict, the Spanish Civil War is said to have gone down in history for the way it dehumanized the adversaries and the horrific violence it generated (Casanova, 2014: 168). On top of the 150,000 or 200,000 men who died in the battlefield, it is the equally high number of civilians who died extra-judicially behind battle lines that makes Paul Preston go as far as to speak of the 'Spanish holocaust' (Preston, 2012).[14] Although numbers remain problematic, research conducted by a large number of historians at the local level over recent years suggests that the total number of victims of repression is at least equal to the number of military deaths (Juliá, 1999; Payne, 2012; Preston, 2012). By now it is also known that the death toll in the zone controlled by military rebels was higher than in the Republican controlled areas. While the numbers of those murdered in the Republican zone are known to be around 50,000, the calculation of numbers of victims of rebel violence has faced more obstacles in terms of the existence and access to archival resources, with some areas of Spain still missing rigorous studies (Juliá, 1999; Preston, 2012). Nevertheless, it is considered that this number varies between 100,000 and 150,000, making nationalist repression about two to three times greater than the one that took place in the Republican zone. This difference is nowadays explained by some historians as the result of the deliberate war plan of the rebels to destroy the adversary through mass murder and terror (Preston, 2012; Casanova, 2014). In places where the military uprising was at first unsuccessful – and especially in areas where revolutionary committees and militias of various sorts profited from the initial power vacuum left by the Popular Front government –, repression and retribution were no less cruel. Anticlerical violence, in particular, did much damage to the image of the Republic.

The end of the war on 1 April 1939 did not signal the end of political persecution, though. Violence was now mostly one-sided and vertical[15], confirming the deliberate intention of the newly installed dictatorship to eradicate what was left of the pro-Republic establishment. Rather than a policy of pardon or reconciliation, prosecution and punishment of the vanquished ensured

[14] In a country that at the beginning of the 1930s had 24 million inhabitants.
[15] The exception were the so-called *maquis*, a guerrilla type of movement constituted by a few thousand people who maintained clashes with the Civil Guard in the mountain areas where most of them were hiding, until they were defeated in the late 1940s.

a new period of mass executions, imprisonment and forced labor, particularly harsh in the immediate years after the war. Estimates for the number of postwar executions in the following decade vary between a minimal figure of 28,000 (Payne, 2012: 245) and 50,000 (Casanova, 2014: 220). This comes on top of the hundreds of thousands sent to prison or labor camps, where hunger, diseases and maltreatment were common. The total population of Spain's prisons stood at about 270,000 in 1940, a number that would continuously and significantly drop through the following decade. The proportionate prison population would return to prewar levels only during the 1950s (Payne, 2012: 247). The population exodus was also significant, with almost half a million people leaving the country in 1939, though the majority would return in the following months, leaving a net permanent migration of approximately 170,000 (Payne, 2012: 245).

In addition, the regime was successful in establishing a system of collaboration where informants of all kinds, either out of fear or retribution, insured that Spain was being effectively cleansed from the 'red scum' (Fox, 2010: 36). Stigmatization against anyone associated with the 'red' side forced many to move or to shut themselves in silence. Institutionalized discrimination translated into jobs, pensions, health care and all sorts of benefits being granted to those who fought or sympathized with the Nationalists and refused or taken away from those considered politically or religiously unreliable. Assets and property were also confiscated, including from the families of those who had already perished. Exhuming, mourning or commemorating anyone who had died at the hands of Nationalist troops was naturally unthinkable while sites of remembrance celebrating the nationalist uprising or honoring those who perished for its cause were naturally widespread. This explains why the calculation of the number of Republican-associated victims has been notably more difficult.

Although political dissent was repressed throughout the 36 years of Franco's dictatorial rule (1939-1975), the kind and degree of brutality of the post-civil war period (1939-1945) was unmatched. The successful elimination and silencing of any remaining opposition in this period meant that a disciplined and fearful populace would not create much trouble in the upcoming decades, or at least not until the later stages of the regime. The ferocious repression of the war and postwar years and its contrast with a largely peaceful period in the next decades has meant that historians are still nowadays concentrating their efforts on quantifying the death toll of the former period. Statistics on Franco's repression during the regime's peaceful years (roughly from 1950 to 1975) are significantly more difficult to come across. Portal González (2014) has

recently summarized the challenges in attempting to compile information on this, namely in terms of access to archives (which still need to organize existing information in ways that will make research viable) and data protection laws that prohibit access to records of part of this period. However, there are partial pieces of information available that allow one to conclude with confidence that repression in the war and postwar period deserves indeed a separate treatment given the vast difference in its appalling numbers.

On the one hand, official statistics on prison population show that the number of detainees decreased significantly over the years, despite a considerable increase in total population (by about 10 million people between 1940 and 1975) (Figure 3.1). In fact, if one controls for population growth, Spain presents higher incarceration rates for most of its democratic period than during the 1960s and 1970s. In other words, whereas Spanish prisons definitely presented an abnormal number of prisoners during the 1940s and, to an extent, at the beginning of the 1950s, official numbers suggest this was not the case in the following years. Various pardon decrees were approved throughout the 1940s and sentences were frequently commuted (often in exchange for work), in part to avoid overloading prisons and in part to grant the regime legitimacy abroad, particularly after the eradication of solutions of the fascist type in post-1945 Europe.

Figure 3.1. Evolution of total prison population in Spain

Years	**1945**	**1950**	**1955**	**1960**	**1965**	**1970**	**1974**
Prison population	43 812	30 610	19 695	15 202	10 622	13 890	14 764

Source: Instituto Nacional de Estadística.

In an attempt to compile a list of people who were sentenced to death between 1952 and 1975 – but acknowledging the limits imposed by the unavailability of thorough studies on military justice –, Portal González (2014) comes up with a minimum number of 70 people. The majority – 54 out of 70 – were convicted during the 1950s, usually involving cases of aggravated murder. Among those, there were at least fifteen 'maquis', members of the guerrilla group who tried to continue fighting Franco after the civil war, a number that is not superior because by 1952 the movement had been almost completely wiped out.

Portal González (2014) also makes an impressive effort at collecting the names of those who

died as a result of police violence without a previous judicial procedure. Based on secondary sources and media analysis, the author is able to gather information on 59 cases which occurred between 1952 and 1975, 47 of them concentrated in the period 1970-1975 and 20 in the year 1975 alone. Out of those, at least 12 were killed while participating in protests, 18 for being suspected ETA members and at least 16 in confrontations with the police and police street patrols. This is in line with a context in which ETA emerged as a lethal organization and where strikes grew from about 500 in 1969 to more than 2,000 in 1974 (Powell, 2014: 43).

Juan José del Águila's (2001) study on the Court of Public Order, which dealt with most political crimes – created at the end of 1963, partially replacing military tribunals and the then suppressed Special Court for the Repression of Freemasonry and Communism – shows that between 1964 and 1976 there were a total of 8 943 people indicted, resulting in 3 798 sentences, 74% of which involved criminal convictions (Águila, 2001: 245-260). It should be mentioned that this covers the period of greater protest activity prior to the democratic transition (1969-1976) and this shows in the numbers: while from 1964 to 1968 the number of indicted people varies between 385 and 585, this number goes up to more than one thousand in both 1974 and 1975. Tellingly, one of the reasons why this court was created was to show a legal face that court-martials lacked. This became evident in 1963 with the execution of Julian Grimau, a leader of the Communist Party and one of the most-sought after figures since his participation in the civil war. He was the last person executed for crimes committed during the war and his case created great international pressure and embarrassment for the regime, at a time in which the death penalty was not frequently used anymore.

Ironically, it is after Franco's death in 1975 that lethal political violence becomes most intense. In an attempt to demystify the image of a peaceful transition, Mariano Sanchéz Soler (2010) has recently written on the violent history of the democratic transformation process. The total number of 591 deaths he points the finger at, occurring between 1975 and 1983, includes 54 people victim of police repression, 51 who fell as result of conflicts between the police and armed groups, and 8 who died while under police custody. It should be noted, however, that violence was far from an exclusive top-down affair. The majority of the 591 people mentioned by Sanchéz Soler were actually victims of non-state violence, coming most prominently from ETA – responsible for 344 deaths in this period –, but also other violent groups of opposite political persuasions – 51 victims of the far left group GRAPO and 49 killed by extreme right-wing groups. This adds to the Spanish transition a climate of political violence that should not

be ignored when assessing the elite's preferences for moderation and reconciliation.

As tragic as all these deaths are, there is an obvious difference in the scale of repression between the hundreds of thousands killed during the war, the tens of thousands in the postwar years and the few hundreds who perished as a result of institutional-sponsored violence throughout the following decades of dictatorship. Malefakis (1982: 223) goes as far as to state that the regime went from a *dictadura* (hard dictatorship) to a *dictablanda* (soft dictatorship) where 'opposition to Franco had become something of a parlor sport for upper middle class youth whose risks were minimal'. There are various reasons why it is important to have in mind **the uneven temporal distribution of repression in the context of a civil war and a particularly lengthy dictatorship (1939-1977)**. To start with, the fact that the bulk of the dictatorship's repression is concentrated in the period that follows the civil war and that violence is selected against the 'defeated' camp meant that the civil war logic of neutralization of the adversary still prevailed. The republican camp could be accused of following this logic during the war too and of hypothetically having implemented it in the same fashion if it had won the war instead. Franco's worst repressive period could therefore be associated with the 'excesses' of the fratricidal collective tragedy that constituted the civil war, an argument that serves to exculpate Francoist repression. This is the more so when the transition to a democratic regime would be initiated only three decades later, at a time in which the new generations considered this period to be 'historical past' and its interpretations distorted by thirty-six years of Franco's indoctrination. One should keep in mind that research on the true extent of Franco's repression was not possible during the dictatorship and that, by emphasizing the crimes committed by the 'reds' only, Franco might have been partially successful in exonerating his actions. In fact, whether Franco was a ruthless man or a relatively clement dictator is still far from a settled question in Spain, even among historians.[16]

On the other hand, war and postwar repression most obviously meant that the republic establishment was eliminated early on and that 'passions calmed down' over time. Spain went indeed from a highly polarized society in the 1930s to a largely politically apathetic one throughout the dictatorship. The physical and moral defeat of the republican camp meant that there were little or no voices left capable of speaking out against Franco's atrocities – those that

[16] This is astonishingly evident, for instance, in the two massive biographies of Franco: Paul Preston's (1993) one clearly falls in the first camp while Payne and Palacios (2014) depict the dictator in a benevolent light, arguing that repression was selective and in fact less severe than in other civil war contexts of that time.

managed to escape physical repression and exile shut themselves in the utmost silence, either for fear of repression, stigmatization and/or trauma. This gave the regime more than enough space and time to establish its own version of history, largely anchored in the vilification of the 'reds' and the glorification of the nationalist uprising. In this, Franco counted with the active support of the Catholic Church (a prime socialization vehicle), which never ceased to remember its almost 7,000 clergy martyrs, something that naturally multiplied the emotional impact of war remembrance (Casanova, 2014).

In addition, the length of the dictatorship necessarily meant that a new generation had reached its adult years without directly recollecting the horrors of Francoism's first decade. According to Aguilar (2008b: 175), 73% of elected parliamentarians in 1977 were less than 49 years old and therefore too young to recall the worst period of violations. The so-called 'sons of war' generation lived their key socialization years under Franco and most of what they knew about Spain's recent past was filtered through the dictatorship's schooling system and controlled media. Despite the more moderate historical narratives of what is designated as 'Second Francoism' (1959-1975), there is little doubt that Franco's regime was to an extent successful in taking responsibility out of its hands and delegitimizing the Republic and those that defended it. This is not to say that Franco's narratives were uncritically appropriated, but rather that they left an imprint, as it is shown by the prevalent mental associations between 'the II Republic and chaos' and 'Franco and peace/order' (Molinero, 2006: 241-243). In this, one has to consider that the 'sons of war' generation witnessed the devastating economic, social and psychological consequences of the conflict – visible throughout the 1940s and 1950s – and its contrast with the last 15 years of the dictatorship, a period of impressive economic growth, rapid modernization, and large expansion of an affluent middle-class. Francoist elites took pride in Spain's economic miracle and, interestingly, changed the regime's legitimizing myths accordingly. Whilst its founding myth relied on the victory in the civil war (referred to as a 'patriotic crusade' or a 'glorious uprising' that freed the nation from the chaos that anti-clericalists and communists had plunged it into), economic growth was accompanied by a shift in emphasis from the origins of the regime to its achievements in terms of peace and prosperity (see Aguilar, 2002).

Temporal changes in the quantitative distribution of repression were also accompanied by changes in the type of repression, as extrajudicial executions and the use of the death penalty for the gravest crimes – widespread in the war and postwar period – became a lot less common

over time. The wave of outrage provoked by episodes such as the execution of Grimau in 1963, the Burgos Trial in 1970, or the last five executions for crimes of terrorism in 1975 suggest that these acts were neither acceptable nor recurrent anymore. The crackdown on dissent and protest activity more often involved sanctions and imprisonment rather than outright killing. This is important because, similarly to what has been stated before, the worst violations had happened decades before the transition and were somewhat associated to the war period. While in other cases activism comes mostly from families whose relatives had 'disappeared' – and who still carry the hope of finding their loved ones –, families of those extrajudicially executed in Spain could not realistically hope to find anything but skeletons in the 1970s.

On top of all of this, if it is true that there was a recrudescence of repression in the last stages of the regime, it is first of all not comparable to the postwar period; secondly, it is unevenly distributed geographically, as it is concentrated in the Basque Country; and thirdly, it is not an exclusive top-down phenomenon. Before Franco's death, ETA had already claimed more than 45 victims in the period 1960-1975, including the recently nominated prime minister Carrero Blanco in 1973, meant to be Franco's successor (Powell, 2014: 43). Targeting non-ethnic Basque security forces for the most part, ETA did not manage to unleash the 'action-repression-action' cycle to the extent it wished for, but it was successful in prompting a violent cycle of provocation and retaliation involving both state forces and extreme left and extreme right groups (Encarnación, 2014: 65). Police repression was therefore more intense in the Basque Country, not only because it was the area where ETA was operating the most, but also because it was the area with the most social unrest and radicalization. The reasons why it is important to have this in mind are twofold: first, and in a similar vein to the civil war logic, it blurs the responsibility of the police for disproportionate use of force, particularly in cases where terrorist suspects were claimed to be involved; secondly, as it will be argued below, it strongly reinforced the calls for peace and reconciliation, which in Spain's transition was the equivalent of leaving the past behind. Moreover, because political violence was more intense after Franco's death – with ETA going from less than 20 killings in 1976 to more than 90 in 1980 –, these deaths were hardly associated directly to the dictatorial regime. ETA's goal at the time was in fact to provoke a military backlash that would expose the authoritarian nature of the newly established democracy and in this way facilitate a revolutionary uprising in the Basque region (Muro, 2011: 160).

3.1.2. The transition's political context

Spain is perhaps the prime example of a highly negotiated transition, described by Linz and Stepan (1996) as the paradigmatic case of a pacted democratic transition, and by Higley and Gunther (1992) as the very model of the modern elite-settlement. In exchange for the release of political prisoners, the highly contested legalization of the Communist Party (still seen by the military as an arch-enemy), or the dissolution of francoist institutions, left-wing opposition parties accepted the monarchy, the transformation of Franco's elites into 'democrats', a postponement of the process of territorial devolution, and less progressive economic and social policies than those they would have wished (Maraval and Santamaría, 1986: 83-84). The 1977 Moncloa Pact on economic reforms and the drafting and approval of the Spanish Constitution in 1978 became the definitive embodiment of the so-called 'politics of consensus' (Gunther, 2011). Restraint and compromise between the various political forces became the dominant characteristics of the game (appearing at times as much of a means as a goal in itself), characteristics that were later used to speak of a 'Spanish transition model', which became a source of admiration both domestically and abroad (Alonso and Muro, 2011: 1-3).

This general overview hides, however, what was a more complex, bumpy and in no way previously predictable road towards democracy. Generally speaking, the success of the transition was far from assured given (1) the widely divergent political views held by the hardline sections of the regime and the increasingly present democratic opposition, (2) mounting terrorist violence, (3) the consequent restlessness of some sections of the military, (4) the context of economic crisis and rising levels of unemployment, and (5) the particularly acute institutional challenges Spain was set to face, namely the establishment of a constitutional monarchy, the transformation of church-state relations and, the most explosive of all, a new model of territorial organization. This sensitive context, together with the historical lessons taken from the II Republic experience and a dominant desire to successfully transition to democracy, contributed to the general spirit of moderation and compromise that is said to characterize this period. Note that, unlike Uruguay, the orchestrators of the Spanish transition did not have a living memory of a stable democratic experience in their country, which made the transition stage look all the more uncertain.

To be sure, there were a number of structural conditions that supported the move towards

democracy, including (1) the increasing contrast between the social and economic modernization of Spain and its anachronous political system, and (2) a favorable international situation, with Portugal and Greece already on the democratic road and the European Community offering a powerful incentive to political and economic elites in Spain. Pressure and protest from below had, moreover, given evidence of the public's desire for political change. Working-class opposition had increased substantially between the 1960s and the transition period. This was the more so after Franco's death of old age in November 1975, with the workers' movement greatly intensifying the number of strikes in the early months of 1976. According to Maraval and Santamaría (1986: 82), there were about 17,731 strikes in the first trimester of 1976, six times more than in the whole of 1975, the year of the most widespread working-class militancy under Franco (though protests were geographically concentrated and had little diffusion capacity). This was an additional element contributing to the regime's sense of crisis, the other fundamental one being intra-regime dynamics, most notably divisions within competing francoist elites (Share, 1986; Preston, 1986).

Indeed, it is at the elite level that one can begin to understand the initial stages of the process of transition to democracy. After a failed intent at *apertura* (opening) under the leadership of Carlos Arias Navarro (November 1975 - July 1976) – which neither satisfied the hardliners nor the progressive factions of the regime –, the so-called reformists (*reformistas*) took over and embarked on a quite extraordinary 'political operation' that would seemingly do the impossible: set Spain on the road towards democracy while convincing regime hardliners and reform skeptics – with important positions in state institutions and the military – to approve this move. The first great obstacle to the reformist sectors was therefore the resistance *within* the regime itself and not the pressure of the left-wing democratic opposition. Only after securing the support of the skeptics within the regime at a first stage (July 1976 – December 1976) did the so-called reformists proceed to negotiate with the democratic opposition (even if contacts had already been established before), ahead of the democratic elections that were to take place in June 1977.

King Juan Carlos, who had been handpicked by Franco to be his successor, is generally credited with initiating the process of change and entrusting the young and charismatic Adolfo Suárez with this task. Suárez's impeccable francoist credentials meant no one initially suspected the extent of his transformative intentions. Nominated in July 1976 as prime minister, he was quick to initiate a series of contacts with a wide range of political sectors in order to prepare the

ground for his reform plans. This culminated in the submission of a Law on Political Reform to the Francoist *Cortes* in November 1976, officially presented as an amendment to the Fundamental Laws of the regime, though in practice contravening much of their spirit and opening the door to the holding of democratic elections. Suárez's public speeches at the time made more or less clear that the historical choice the *Cortes* were facing was between opening the democratic road via legal means proposed by the state itself in an orderly and controlled manner or leaving the door open for social conflict (Linz and Stepan, 1996: 94). The (unfulfilled) promise not to legalize the Communist Party, amendments to the initially proposed electoral system – favoring right-wing forces –, and promises of future positions of influence to individual members of the *Cortes* are all said to have been important in securing votes (Share, 1986: 110-111; Preston, 1986: 101). The submission of the Law on Political Reform to a referendum in December 1976 and its approval by 94% of the electorate (with a 78% turnout) invaluably strengthened Suárez's position and put Spain on the path to democracy.

In light of all of this, it is hardly surprising that the opposition to the regime – most notably the Spanish Communist Party (PCE) and the Spanish Socialist Workers' Party (PSOE) – came to adopt a posture of compromise despite the initial calls for a *ruptura* (break with the regime). Notwithstanding the dilemma that a transition controlled by an authoritarian regime initially posed for the opposition, the willingness to negotiate was ultimately a result of the recognition of its lack of capacity to force a more pronounced change in regime type. According to Share (1986: 77), the opposition remained inauspiciously fragmented and weak, with little control over labor unrest. He further adds that the prospects of escalating violence and repression frightened opposition leaders. Fishman (1989) similarly notes that a *ruptura* was not possible because – on top of the lack of capacity of the opposition to lead mobilizations of sufficient magnitude and endurance – the regime continued to enjoy the undivided loyalty of the state's coercive apparatus. This would likely make any bottom-up effort violent and could endanger the transition process altogether. Since the successful establishment of a democratic regime was the opposition's primary goal – after more than three decades of clandestinity –, Suárez's shortcut to democracy naturally offered incentives.

While rhetorically it remained critical of a transition conducted from within the authoritarian regime, the opposition gradually moderated its stance, particularly after the popular approval of Suárez's reform in December 1976 and his demonstrated willingness to enter into dialogue with the opposition, with the first official meeting taking place in early January 1977. Important

in this regard was also Suárez's unremitting commitment to his 'legal reformist' program, despite the wave of terrorist attacks that shook Spain in early 1977. In a cycle of action and reaction, right- and left-wing terrorist activity increased after the December referendum and reached a peak at the end of January. Only in Madrid, during the so-called 'Black Week' (23-28 January), two students, five Communist lawyers, and five policemen were murdered (Maraval and Santamaría, 1986: 84). Fearing these constituted explicit attempts at derailing the undergoing political transformation process, both the opposition and the government were cautious to avoid polarizing the political environment, urging calm and reiterating their commitment to the transition towards democracy (Share, 1986: 122-123). This further inclined the left to moderate its aspirations, dropping many of its hopes of significant social change in order to secure the most immediate goal of political democracy (Preston, 1986: 120).

Its basic demands at this stage were, among others, centered around the dissolution of francoist institutions, the recovery of democratic freedoms, and amnesty for all political prisoners. These were partially and gradually met by Suárez before the June 1977 electoral contest, starting with the dissolution of the Tribunal of Public Order in January, the first wave of legalization of political parties in early February, the legalization of trade unions together with the establishment of the right to strike in March, and the dismantling of the *Movimiento* (Franco's single party) and the *Sindicatos Verticales* (state-controlled labor unions) during the Spring. Suárez's most audacious decision was the unexpected legalization of the Communist Party in April, a move that provoked much hostility within Francoist and military circles. In what were becoming typical behind-doors negotiations, Suárez held a long meeting with the Communist leader Santiago Carrillo beforehand, in which a possible agreement was made. Though the Communists had already given clear signs of moderation, nowhere was their 'submission' more symbolically visible than in their first legal meeting on April 14 when the party accepted the monarchy and appeared with the official Spanish flag, renouncing to the Republican one.

In addition, one should not underestimate the extent to which the opposition reacted to the clues it got from public opinion and the degree to which its general position of moderation was also part of an attempt to maximize its electoral performance. Writing on the Socialist Party in particular, Share (1985: 89) points out that the PSOE elites became aware that a maximalist rhetoric, together with the continued rhetorical insistence on a *ruptura*, would alienate the bulk of the electorate which, as opinion research showed, was mostly located in the center-left of the political spectrum, for which the PSOE had to compete with a well-organized and surprisingly

moderate Communist Party. Besides the evident public support for Suárez reform program, the fact that working-class agitation had not spilled over into the 'great national action' that the Communists had once hoped for were signs that there was a silent majority hoping for a non-turbulent move towards democracy. This is in line with public opinion surveys from 1976 which showed that 'peace' was by far the political value that Spaniards cherished the most (36% said so in 1976, followed by 27% who emphasized 'justice' and only 6% who prioritized 'democracy') (López Pintor, 1981: 22). The results of the first Spanish general elections (June 1977) were the confirmation that a moderate strategy was electorally profitable. The unexpectedly good results of the PSOE (29,4% of the vote) meant that it had no incentives left to oppose the way the process of change was being conducted. Moreover, the victory of the center-right party Union of the Democratic Center (UCD) of Adolfo Suárez (34,6%) confirmed the public's endorsement of his project and the general desire for moderation. The poor electoral scores of both the Communist Party and the People's Alliance (an ex-Francoist right-wing coalition), on the other hand, were largely interpreted as a repudiation of past solutions.

It should be kept in mind that even though the 15 June elections inaugurated a new stage in the transition process, in no way did they signify a definitive transition to democracy. Persistent terrorist attacks, the agitation of the military, the economic crisis, the institutionalization of regional autonomies, and the upcoming constitutional negotiations, were heavy stones that still had to be taken out of the way. All of these factors, together with the fact Suárez's UCD did not reach an absolute majority, further extended and intensified the strategy of compromise and pact-making between the various political forces. This was most clear in the so-called Moncloa Pacts (October 1977) – when parties agreed to share the burden for the economic reform package involving austerity measures – and even more so in the so-called 'Constitution of Consensus', the product of long face-to-face negotiations behind closed doors. As Maraval and Santamaría (1986: 90) put it, the strategy of consensus-building not only made solid parliamentary and popular support for the Constitution possible, but was also highly instrumental in the reciprocal legitimation of parties and leaders, and therefore an important means to counteract the intrinsic fragility of the regime.

Increasing signs of anti-democratic ferment within the army were surely behind this, a problem that would not cease to grow until 1981, at the same time as ETA significantly escalated its activity. Besides often targeting military forces directly, ETA's defense of everything the military abhorred the most – Marxism and separatism – made it a natural archenemy. Talks

among top military elites about a possible *coup d'état* had been known at least since September 1977, with one major coup plot uncovered in the fall of 1978 (*Operación Galaxia*). Lieutenant Colonel Antonio Tejero and others were condemned to a mere seven months' sentence in prison by military courts, only to attempt another more dramatic coup on 23 February 1981, when the entire Spanish parliament was taken hostage for several hours in a powerful demonstration of how fragile the democratic system still was. The televised condemnation of King Juan Carlos (to whom many within the military showed deference) and the consequent inability of the plotters to convince a majority within the military to join in the effort dictated the failure of the coup attempt, without first shocking most Spaniards and sending a powerful warning sign to the political class.

3.2. The transition's unified mnemonic regime: The emphasis on reconciliation

If the above-mentioned political scenario can already tell a great deal about why there were no calls for forms of transitional justice regarding the dictatorship's crimes, there are two contextual features particular to the Spanish case that put it in a more complex level of analysis and that add to the reasons why there were neither political nor civil society calls for transitional justice. The first has to do with the context of civil war that gave birth to the dictatorship, which not only makes issues of liability more problematic, but also leaves a traumatic imprint that is said to have influenced the overall posture of moderation and reconciliation. While in theory one could disentangle the civil war from the dictatorship and focus on demands for retribution for the former, this is impossible in the Spanish case as, in practice, the two periods have been everywhere conflated (including in transitional justice-related legislation), showing the extent to which the Franco regime is perceived as an extension of the war. The second complicating factor is that we are speaking of a violent transition context where violence was far from an exclusive top-down affair and where, besides a left-right ideological confrontation, there was a salient center-periphery cleavage at stake. Demands for retribution in this context would risk further antagonizing parts of the Basque population, from where a large part of the amnesty demands were coming from. This, I argue, made it all the more pertinent for the political class to put an emphasis on moderation and reconciliation.

Indeed, to zoom into the transition process in Spain is not only to realize that there were virtually no calls for retribution, but there was instead a generally accepted call for reconciliation and peaceful coexistence. This has to be understood in light of the perpetuation of the division

between winners and defeated of the civil war for over forty years and the fact that the transition was bringing back left and right to the political arena after such a long interregnum. Moderation and compromise were most obviously a result of the balance of power and the context of the time, but the emphasis put on reconciliation and rejection of past divisions cannot be dissociated from the previous history of fratricidal conflict between left and right and the fact that Franco's dictatorship never ceased to invoke those divisions.[17] Although it is trivially asserted today that amnesty (or forgiving) does not necessarily entail amnesia (or forgetting), reconciliation seems to have been broadly interpreted by the political elite as the equivalent of 'forgetting' or, to put it in a more concrete and perhaps more accurate way, avoiding any political and moral engagement with the past. Nowhere was this posture so clear as during the parliamentary debate on the 1977 Amnesty Law:

> *How could we reconcile, we that have killed each other, if we do not erase this past once and for all? (…) Amnesty is a national and democratic policy, the only capable of sealing off a past of civil wars and crusades. We want to seal off a stage and open a different one. We want to open the way for peace and freedom.* (Communist Party Representative – Amnesty Law debate, 14 October 1977)

This has led many to speak of a 'pact of silence' or a 'pact of forgetting' that allegedly explains why – during the transition and for the years to come – there were neither robust transitional justice measures nor symbolic ones, such as the condemnation of the dictatorship or a memorial to the victims of the regime (Encarnación, 2014: 2). Although there was never any formal 'pact', the October 1977 Amnesty Law (Law 46/1977) is said to be the backbone of the so-called 'pact of forgetting'. The parliamentary debate on this law puts indeed into evidence the general desire of the political elites to leave a tragic past behind and to inaugurate a new historical stage in Spain's history, a discourse that found much echo in the Spanish media at the time. Take the editorial of *El País* on the day of the law's approval as an example:

> *A democratic Spain should, from now onwards, look ahead, forget about the civil war's responsibilities and deeds, put aside the forty years of dictatorship. Looking back to the past must have no other purpose than to reflect on the causes of the catastrophe and avoid its*

[17] Molinero's (2006: 240) argues that the constant specter of the civil war during the transition (and the absence of references to the most immediate francoist period) is the ultimate proof of the success of Franco's memory policy of constant evocation of the civil war and legitimation of the regime through its memory.

repetition. People cannot and should not lack historical memory; but it should only serve the purpose of feeding a forward-looking project of peaceful coexistence and not a backward-looking nourishment of resentments. (El País, 15 October 1977)

Quite some ink has already been spilled on the possible reasons for why the left committed to what in Spanish is commonly termed *hacer borrón y cuenta nueva* (wiping the slate clean) despite having been disproportionally affected by Francoist repression. Encarnación (2014) groups the various explanations into two broad types, which are in no way mutually exclusive: (1) the ones that emphasize the political nature of the transition and the politically constrained environment in which the left operated; and (2) explanations of the psycho-political type focused on the impact of civil war memories which – either via trauma, feelings of shared left-right responsibilities and/ or political learning – prompted the desire not to touch a divisive past.

The first type is quite obvious once one digs into Spain's transition context and is aware that reformist sectors of the regime had the upper hand in the negotiation process, and that threats coming both from the military and terrorist activity could jeopardize the transition process the left had long waited for, making the calls for reconciliation all the more pertinent. In other words, the left had no political margin to make TJ demands that went beyond the most urgent and necessary restitution measures (such as freedom for political prisoners and devolution of rights to those who were deprived of them for political motives). The fact that it was willing to make great compromises on issues that had been of historical importance – such as republicanism – already tells a good deal about its will to avoid conflictual and issues, such as the one of retribution. Take the testimony of a trade union leader at the time, who later became a PSOE high representative:

> *The transition was carefully set, we were very afraid of a coup (…) and there was a strong wave of ETA terrorism, killing military men, therefore the thin equilibrium of a pacted transition – which felt very uncertain – prompted everyone to be prudent (…). Maybe we mistook pardon for forgetting, but it was an intelligent decision of the Spanish people. What mattered was embracing democracy, achieving freedom (…)* (Interview SP12)

The second type of explanation – psycho-political, focused on the impact of the memories of the civil war – has also deserved a good deal of attention in the literature. Paloma Aguilar (2002,

2008b) has been the frontrunner in this regard, arguing that the war trauma and the fear of repetition of a similar conflict, together with feelings of 'collective guilt' over the war, prompted political actors to learn from an excessively radical and divisive past and fostered not only the conciliatory and moderate attitudes that characterized the Spanish transition, but also the more or less tacit decision to 'leave the past behind'. Various authors have argued in the same direction, including Colomer (1995: 3) – who says that 'the determination not to repeat the errors of the past undoubtedly had a sobering impact on both elites and society at large' – and Edles (1998) who states that the 'politics of consensus', though most obviously the result of a sensitive context, was particularly accentuated due to the rejection of what was seen as an excessively confrontational past. It seems indeed that there was a good deal of 'political learning' at stake, judging by the fact that all major institutional choices diverged from the ones implemented during the II Republic, namely the adoption of a parliamentary monarchy, a proportional electoral system, a bicameral legislature, and a uniform territorial structure (in contrast with the former republican, majoritarian, unicameral, and mixed territorial system) (Aguilar, 2002: 166). Maraval and Santamaría (1986: 86) similarly state that 'the experience of the 1930s taught actors to avoid block action and majoritarian principles in making basic decisions about political institutions.'

A similar argument to the one of 'collective guilt', but with a realist twist to it, is the one that the past constitutes a source of embarrassment for the Spanish left given its problematic and painful history during the 1930s, both during the II Republic and the civil war (Encarnación, 2014: 58-59). This is the case not only because of its share of responsibility for political killings during the war – the so-called 'red terror' –, but also because the left can be associated to the levels of radicalization and instability experienced during the II Republic. While the Spanish Communist Party only grew in relevance during the civil war itself – and therefore its greatest 'skeletons in the closet' are episodes such as the infamous 1936 Paracuellos massacre (where an estimated 3,000-5,000 Nationalist prisoners were executed) or the repression of anarchist and non-Stalinist communist groups –, the socialists already had a history of radicalization during the II Republic, which could be used to make the argument that it helped fuel the reaction of conservative sectors interested in 're-establishing order'.

Whether it was via trauma, political learning or guilt, the fact is that few analysts would deny that the breakdown of the II Republic and the civil war experience weighted in the choices and discourses of the transition's elites. This, in turn, is often said to be associated to the dominant

cognitive representations of the civil war at the time. Contrary to the black-and-white (good vs. evil) interpretation that Franco initially promoted, the image that emerged during the transition was one painted in 'shades of grey', in which all sides practiced irrational and unjustifiable levels of violence in the great fratricidal collective tragedy that constituted the civil war (Aguilar, 2002: 132-134; Juliá, 2006: 38-41). Regardless of who had committed the most crimes or with which intent, the dominant image was one of senseless suffering and devastation (Edles, 1998). Pérez-Díaz (1990: 22-23) goes in the same direction, pointing out that, in opposition to simple Manichean interpretations, more complex readings of the civil war – in which neither left not right were seen as devoid of responsibility – were already being put forward and debated before the transition. The image of 'two Spains' predisposed to savage discord – which was already a common motif in Spain's historiography before Franco decisively contributed to accentuate it – was subjacent in these representations (Preston, 1990: 30 in Davis, 2005: 876). Even those sectors who rejected Franco's explanations about the origins of the civil war, says Molinero (2010: 45), accepted that radical confrontation had characterized the II Republic and that inexcusable violence was produced in the Republican area too. Though pro-accountability sectors nowadays point towards Franco's greatest responsibilities – by initiating the 1936 coup d'état and victimizing a larger number of people –, this is still a controversial posture in Spain given how widespread the image of two-sided unjustifiable violence is.

3.2.1. The left's relationship with the past

If there is indeed no doubt that the image of a divisive past was in the mind of political elites at the time, it is also the case that readings of history are usually mediated by the context in which they are made and, in the case of political actors, constrained by political considerations, particularly in politically charged contexts as the transition one. This is to say that, rather than two independent types of explanations, the weight and shape of psycho-political factors is best understood within the particular context of the transition. In fact, I am of the opinion that not only is it the case that memories of the past fostered prudence and a general rejection of violence, but that there are also reasons to think that an emphasis on the end of past divisions was fit to the transition context and carried a number of circumstantial benefits.

In other words, the fact that civil war divisions themselves could be drawn upon in order to justify and encourage a position of moderation/negotiation – which was desirable in light of the political circumstances – is, in my view, an additional part of the story. It is probably not

accidental that readings of the past were congruent with the political aims of the transition's crafters – to achieve a quick and peaceful transformation to a democratic regime in the presence of various disturbing elements. Civil war divisions were publically evoked *only* as long as they testified for the tragic results excessive political confrontation and radicalization could bring – and never to discuss how those divisions came about or how they were unjustly used and perpetuated by the authoritarian regime. On the one hand, they served well the posture of moderation of the left – after advocating for a *ruptura* with the regime, but having been incapable of fostering it, having instead to accept and be part of a transition led from within. On the other, they served the reformed-minded sectors of the regime who could claim that civil war divisions had been overcome, therefore tackling the reticence of the non-reformist sectors to bring the left back to the political game and proving Franco's myth of 'Spain's ungovernability' wrong. In this sense, I side with Fishman (2011: 22) who argues that civil war memories – and the pressure towards moderation they induced – not only shaped *but were also shaped by* the dynamics of a transition occurring under challenging circumstances. He points out that, in the absence of an extraordinary crisis of regime failure, the opposition needed to undercut Franco's legitimacy formula, based on the civil war and the polarization which preceded it. Emphasizing that the country had overcome those divisions and forging a broad consensus constituted therefore a powerful way to legitimize the transition process – and the way it was being conducted – and make the argument that authoritarianism suffered from a crisis of obsolescence. Moreover, by breaking with the perpetuation of divisions promoted by Franco, they felt they were standing on a moral higher ground (Juliá, 2011).

More generally, and using counterfactual thinking, it is plausible to assume that if the macropolitical context had been entirely different, political readings of Spain's past history would have been different too. Had the Franco regime suffered a debacle similar to the colonial wars in Portugal, the Falkland war in Argentina, or the Cyprus episode in Greece, dominant representations of the past would have probably been different. The same way that everywhere in Europe representations of Nazi resistance were emphasized over collaborationist ones – something that could be done because Nazism was militarily and morally defeated –, Franco's crimes could hypothetically have been emphasized over the civil war and the II Republic's problematic history had the balance of forces been different. What war scenarios prove time and time again is that the balance of power matters and that dominant representations of history depend as much on the events themselves as on the interpretations that leading actors make out of them and, in this regard, there is some margin for discretion.

To be sure, calls for reconciliation and the concession of amnesties will always be part of post-war scenarios where there is a commitment to building an all-inclusive and democratic polity, regardless of the macropolitical context. However, these are not incompatible with retribution measures for the highest chains of command, for the most serious violations, or with a scenario where there would be a reconciliatory stance towards the civil war and a policy of condemnation of the dictatorship, even if only symbolically. That these options were *not an option* in the Spanish transition is certainly more in line with the delicate political context than with the interpretations the left held of the country's recent history. To put it bluntly, the fact that the left committed to a vision of the past that acknowledged the horrors and shared responsibilities over the civil war – without condemning the dictatorship's repressive actions – cannot be solely interpreted as a natural result of the civil war trauma/ lessons. It has to be put in the specific context of a transition where (1) it had to negotiate with incumbent sectors in order to become part of the political game, (2) it had to make sure the transition would go smoothly, in the presence of various destabilizing elements, and (3) it had to be accountable to a populace that did not appear to wholly reject Franco's regime and prioritized peace, stability and prosperity more than anything else.

This view is in part confirmed by an analysis of pre-1977 party-related documents, which show that the left's interpretation of the war at the time was not as 'grey' as suggested above. When going through the major civil war anniversaries in *El Socialista* – the organ of the Socialist Party executive committee –, the civil war appears commonly depicted as a struggle for freedom against fascism. There was little restraint in classifying the dictatorship as a 'murderous fascist regime' and to speak of 'a fascist uprising that 38 years ago bloodily crushed the great Spanish revolutionary movement' (2H April 1974). The civil war trauma seems to be more about the fact that 'by force of arms, popular sovereignty was taken away from the people, consigning them to terror and obscurantism' (10 April 1976). *El Socialista* speaks of a dictatorship that was born out of the 'crushing of the proletariat' (25 July 1976) and of 'the great advancement the II Republic constituted for the working class and the country in general' (10 August 1976). Moreover, the left was well aware of continuous repressive practices of the state. *El Socialista* frequently dedicated the last page of every edition to reporting the repressive practices of the last days under the header 'official terrorism'.

A closer look at the left's stances on reconciliation prior to the transition shows this posture –

officially adopted by the Communists in 1956 – was a pragmatic recognition that, if Franco's regime was to come to an end, different opposition sectors would have to gather around the wish to reestablish democracy in Spain, including those who had sided on different poles in the war. The emergence of a 'liberal bourgeois opposition' coming from previous bases of support of the regime was, for the leaders of the Communist Party, perceived as an opportunity for 'an agreement on the fight against the dictatorship among political forces that twenty years before had fought on opposite sides' (Ibárruri et al., 1960: 257).[18] It was also a recognition that (2) maintaining civil war divisions made less and less sense in a changing context, which included 'a new generation that did not live the war' and where 'the civil war no longer [was] the main dividing line among Spaniards and, on the forefront, are concerns related to freedom, popular sovereignty and economic development.'[19] Moreover, it was, in the words of Carrillo (2011: 3-4), the recognition that a violent solution would not find echo among the Spanish people.

In what is the most convincing demonstration that calls for reconciliation go hand in hand with parties' strategic postures on alliances, negotiation, and political competition, Muñoz Barrutia (2006) shows how the PSOE's reconciliatory posture oscillated roughly from 1972 to 1975, at the same time that it rejected alliances and radicalized its discourse in an attempt to gain more political space within clandestine political sectors and distinguish itself from the conciliatory posture of the Communists. Interestingly, socialist texts went as far as to speak of justice for the people mistreated and oppressed by the Francoist regime:

> *It is of fundamental value to demand freedom for political prisoners and workers who were put to prison; it is not possible to speak of amnesty because it connotes pardon to a fault that we do not recognize as faulty. On the other hand, when speaking of the necessity to overcome the civil war, we cannot ever forget the responsibilities of those that during so many years oppressed the people. We do not want vengeance, only the strict application of justice. We cannot speak of pardon for torturers and for those who were tortured, as if the latter were criminals*. (XIII Congress – Summary of the Report of the Executive Committee on the

[18] Ironically, the Communist Party was officially excluded from the celebrated meeting of internal and external opposition forces to the regime in Munich in 1962 (on the occasion of the European Movement's IV Congress), which brought together very diverse political forces that shared the aim of joining Europe and establishing democratic institutions in Spain via peaceful means. Symbolically, Salvador de Madariaga declared at the end of the meeting: 'today the civil war is over'.

[19] Comité Central del Partido Comunista de España, 1956. "Declaración del Partido Comunist de España: Por la reconciliación nacional, por una solución democrática y pacífica del problema español." Available at: http://www.filosofia.org/his/h1956rn.htm (accessed 5 December 2016).

Spanish situation and the party policy. *El Socialista,* 1H December 1974)

The more the transition balance pended towards Suárez's reformist program and the more the PSOE was confident in its role as a left-wing protagonist, the more the Socialists were ready to abandon maximalist positions (Barrutia, 2006). This is not to say that the history of past divisions did not play an important role in the adoption of reconciliation postures. However, speaking of the direct impact of civil war memories (independent variable) on the decisions to adopt a posture of compromise and avoid a concrete or symbolic engagement with the past (dependent variables) is to claim a direct association between variables that have been decisively filtered through a sensitive political context that encouraged moderation in the first place.

3.2.2. The case of the 1977 Amnesty Law

Importantly, it has to be noticed that a significant part of the arguments of the 'psycho-political' type draw from the 1977 Amnesty Law and the concomitant parliamentary debate. As mentioned, this law was portrayed as the embodiment of 'wiping the slate clean' and is therefore one of the actual few occasions in which political representatives speak of how the past should (not) be approached. Some of the most notorious quotes do seem to imply a sense of shared responsibilities and learning from the past:

Because it must be remembered, even if – as I would wish – for the last time, that here sitting together there are people who have militated on different sides, people who hated and fought against each other. And this (…) is the image of our society. (…) It is not worth invoking bloodshed because there has been bloodshed on both sides (Catalan and Basque Minorities representative – parliamentary debate of the Amnesty Law, 14 October 1977)

This holds the uncontested value of being an amnesty on which almost all political forces of this room show the will to bury a sad past for Spain's history and build a different one on different grounds, overcoming the divisions that the Spanish people have suffered over the last forty years. (Socialist Party Representative – parliamentary debate of the Amnesty Law, 14 October 1977)

This debate has, however, to be put in a context in which the release of prisoners condemned

for 'blood crimes' was at stake. Although the Amnesty Law of October 1977 acquired a high degree of symbolism – not least because it was debated and approved in a newly inaugurated democratic parliament in which left and right were sitting together for the first time in four decades –, the fact is that other pardons and amnesty decrees had already been approved throughout 1975 and 1976 and had released the majority of political prisoners.[20] What the October 1977 law did, in reality, was to extend the scope of application of the 30 July 1976 amnesty (Royal Law Decree 10/1976), which covered only those who had 'not endangered or injured the life and integrity of other people'. The 1977 Amnesty Law, instead, covered 'all acts committed with a political intention, regardless of their consequences', that is, violent crimes. Many believe this was a required step for the pacification of the Basque Country (a region with exceptional levels of social agitation at the time) and eventually the end of terrorist attacks (a naïve belief, ETA would prove). Amnesty for *all* political prisoners was one, if not the main, popular demand in the Basque Country, something that had already produced countless protests, confrontations with the police, and violent incidents.

Since pardoning 'terrorist crimes' was a sensitive topic among conservative sectors, the discourse on reconciliation, forgiving and forgetting had, obviously, one instrumental dimension that arguably went beyond feelings of trauma or, even the more so, collective guilt for a war in which many had not been involved. Even though the war experience was often invoked during the parliamentary debate, the actual relationship of the 1977 Amnesty Law with civil war-related crimes is not straightforward. If one considers what the most immediate consequence of the Amnesty Law is – the extinction of criminal responsibility –, it actually does not appear to have a clear impact in civil war-related situations for two reasons: (1) there were no war prisoners left in Spanish jails by 1977; (2) the statutes of limitations would already apply by 1977, that is, civil war crimes would already have prescribed. Where the Amnesty Law could have a concrete impact was on the 'reintegration of civil servants who had been sanctioned' and the recovery of their active and passive rights' (art. 7(a)). This provision was in any case similar to art. 9(1) of the 1976 amnesty and, importantly, did not apply to those who fought in the Republican army (due to opposition of the armed forces, military personnel covered by the law were denied active rights – reintegration into service – and had limited

[20] According to official sources cited in Aguilar (2008b: 288-291), **668** political prisoners were set free as a result of the King's General Pardon (November 1975), **287** were released thanks to the 1976 amnesty (30 July 1976), and another **125** left jail after the clemency measures of March 1977 (these numbers do not include those released for non-political motives and those who benefited from these measures but were not released for other reasons).

passive rights).[21]

Regardless of this, it is evident that there was a clear effort at portraying this law as a symbolic and definitive closure of all past divisions and the inauguration of a new historical stage. That the left was particularly insistent on this, and that the People's Alliance was against and called for 'a strict application of law and justice', is however quite revealing of which kind of crimes were specifically at stake at that moment. To invoke the end of civil war divisions, on top of all the other symbolic benefits, was therefore also useful for the specific goal of releasing political prisoners accused of 'blood crimes' and pacifying the Basque region. It is no coincidence that it was a member of the Basque Nationalist Party, Julio de Jauregui (one of the members of the democratic opposition delegation responsible for negotiating with Suárez) who made a plea for an extended amnesty that went back to 18 July 1936 because, in his words, 'we need a great solemn act that will forgive and forget all the crimes and barbarities committed by the two sides in the civil war, before the war, during the war, and after the war, up to this day' (*El País*, 18 May 1977). It is also telling that it was the representative of the Catalan and Basque minorities that, during the parliamentary debate, most insisted on the need for the amnesty to be 'a forgetting from everybody to everybody' because 'there has been bloodshed on both sides'.

It seems clear that, when speaking of 'both sides', the Catalan and Basque representative is not referring only to the civil war as he adds: 'we cannot talk about terrorism, because there has been terrorism on both sides, because if terrorism is the imposition of a policy of terror, the state has done it too'. In fact, the 1977 Law was indeed directed at 'both sides', but rather than the contenders in the civil war, the Law granted an explicit amnesty both to 'all acts committed with a political intention' and to 'offenses committed by officials and law enforcement agents against the exercise of people's rights' as well as offenses 'that resulted from the investigation and prosecution of the acts included in this law' (art. 2(e) and (f)). Oddly, these provisions seem to have escaped everyone's attention at the time as they did not deserve any consideration either by parliamentary representatives or by the media. Though little is known about the negotiations behind the Amnesty Law text, nothing indicates that the inclusion of a provision covering state agents was an object of controversy and there is evidence that the main dispute referred instead

[21] Unlike civil servants covered by the law, military personnel were not recognized 'seniority', that is, the years in which they were separated from service would not count as years of service for purposes such as pensions.

to the limits of the amnesty for military personnel (Aguilar, 2008b: 293-294).[22] The extent to which the opposition was willing to accept an amnesty for state agents in exchange for an amnesty for the remaining political prisoners had already been made clear by the law proposition of the Basque and Catalan parliamentary group, which mentioned an 'amnesty from everyone to everyone' (though it was the law proposition of UCD that clearly spelled out the above-mentioned provisions). The fact that this seems to have escaped everyone's attention and that it was the release of the remaining prisoners that became the trademark of this law is also quite telling of the extent to which abuses committed by state agents were not generally put in the same moral baseline as terrorist acts. To put it plainly, how could the left oppose an amnesty for state agents when it demanded an amnesty for what at the time were considered the most ignominious acts?

In sum, if the 1977 Amnesty Law has symbolically put victors and vanquished of the civil war on an equal footing (Aguilar, 2008b: 297), in practice, and as Juliá (2007) bluntly puts it, it only equates terrorist crimes with police wrongdoings. This complex game between the law's intended symbolic breadth, on the one hand, and its concrete scope of application, on the other, ought to be taken into account when using this law and the concomitant parliamentary debate to extract conclusions on the feelings of political representatives towards the country's history and their impact on elites' choices. This is not to say the opposition was not genuinely interested in a 'great solemn act' symbolizing the end of past divisions, but the reasons why it did so might have to do not only with war memories, but also with the symbolic intent of overcoming all other major sources of division in Spain, the regional-nationalist cleavage being a protuberant one.

3.3. The Socialist period of 'mnemonic consensus' (1982-1996)

While little could be expected from the elected government of 1977 – led by the newly formed Union of the Democratic Center of Adolfo Suárez, whose ranks were filled with senior Francoist civil servants –, the subsequent turn of the electorate to the left in 1982 and the four consecutive terms of the PSOE in power could have provided a window of opportunity for concrete transitional justice steps. While it is true that the PSOE took over only one year after the failed 1981 coup d'état, it is also the case that the opportunity structure for TJ measures

[22] The main case under dispute at the time referred to the 'Democratic Military Union', a clandestine organization of military officers interested in democratization who had its leaders arrested in 1975 and put on trial in 1976.

gradually opened up. If at first the PSOE had to prove particularly careful, by the time it left power in 1996 democracy was fully consolidated and the military under civilian control. In practice, though, Felipe González's governments did little more than give continuity to the reparation procedures initiated by Suárez, enacting (albeit at a slow and gradual pace) a whole body of legislation aimed, first, at complementing the procedures foreseen in the 1977 Amnesty Law and, second, at granting social/economic assistance to those who had fought in the civil war (or to their families in case of death), putting victors and defeated on an equal footing. One had to wait until 1990 for a law provision that went beyond restitution and rehabilitation procedures (mostly for civil-war related situations) and foresaw compensations for political prisoners (Law 4/1990 on the State General Budget). However, the language of this measure was, as with the ones approved before, strikingly apolitical, once again putting into evidence the desire of the PSOE to avoid taking a clear moral stance on the past. As argued in detail below, the PSOE's (lack of) engagement has to be placed within a context in which (1) the transition's principles of reconciliation and coexistence were the dominant frame when it came to the treatment of the past, (2) the construction of a modern and integrated polity were the primary goals, and (3) there were virtually no incentives for the implementation of TJ measures, given the lack of pressures on this issue and its conflictual nature.

3.3.1. Restitution amidst institutional silence

Despite the absence of more robust forms of transitional justice, some reparation measures were approved over time, particularly those that fall into the restitution category, that is, which aim to restore the victims to their original situation as far as possible (different from compensations for a recognized harm). They aimed, above all, at 'overcoming and repairing the discriminatory situations established as a consequence of the civil war' (as stated in Law 18/1984), that is, at integrating the defeated of the civil war as equal citizens, granting them the same rights that those who fought on Franco's side already benefitted from. No one opposed these measures given the 'spirit of reconciliation' of the transition and the incompatibility of Franco's discriminatory system with the new democratic polity. Below is a list of the main reparatory legislation approved since the transition up until the end of the PSOE's four consecutive terms in power in 1996:

Figure 3.2. Main legislative reparation measures (state level)

Date	Measure	Subject matter
25/11/75	Decree 2940/1975	General pardon (King's coronation)
05/12/75	Decree 3357/1975	Nullification of administrative sanctions imposed by the 1939 Law on Political Responsibilities
05/03/76	Decree 670/1976	Pensions to the war mutilated (who were not part of the *Cuerpo de Mutilados de Guerra por la Patria*)
30/07/76	Royal Law Decree 10/1976	Amnesty for political prisoners (except those who endangered the life or integrity of other people)
14/03/77	Royal Law Decree 19/1977 Royal Decree 388/1977	Clemency and pardon measures (to overcome some of the limits of the 1976 amnesty)
15/10/77	Law 46/1977	Amnesty Law
31/01/78	Ministerial Order	Accreditation of bachelor studies in the republican area during the civil war
06/03/78	Royal Law Decree 35/1978	Retirement pension for republican military or policemen (or widows/orphans) who were so before the start of the war
18/09/79	Law 5/1979	Pensions, and social and medical assistance to families of Spanish people who died as a consequence of the war
31/07/80	Royal Decree 1784/1980	Accreditation of studies conducted in exile by exiled for political motives
12/02/82	Royal Decree 391/1982	Integration in the general social security scheme, for medical and social services assistance, of war mutilated
08/06/84	Law 18/1984	Recognition as years of work, for social security effects, of the years spent in prison, for cases contemplated in the 1977 Amnesty Law
22/10/84	Law 37/1984	Pensions and medical assistance to those who were part of the armed forces or the forces of public order during the civil war
08/01/86	Law 4/1986	Restitution of unions' property
24/12/86	Law 24/1986	Rehabilitation of professional military men (can now call for their reintegration into the army)
29/06/90	Law 4/1990	Compensation (1 million pesetas, ~6,000€) for imprisonment for more than three years, for cases covered by the Amnesty Law
19/01/96	Royal Decree 39/1996	Granting of Spanish nationality to members of the International Brigades

Source: Own elaboration based on the recompilation of the Ministry of Justice (2010) and Aguilar (2008b).

In sum, assistance to those who had fought and suffered direct consequences from the war (and who had not died in the meantime) was the main priority, so as to put victors and defeated on equal grounds. One had to wait until 1986, however, for the reintegration of professional military men to be put into law – a demand of the left during the 1977 Amnesty Law debates – , which is telling of the leverage the armed forces enjoyed. It was not until 1990 that reparation measures went beyond restitution and rehabilitation procedures and foresaw compensations. The 1990 State General Budget Law (Law 4/1990), on its 18th additional provision, established a financial compensation for those imprisoned 'as a consequence of the circumstances

contemplated in the Amnesty Law 46/1977', or their spouse in case of death, though it had two important caveats: it only applied to those who had spent more than three years in prison and to cases where the recipient was more than 65 years old by the end of 1990.[23] The number of requests was unexpectedly high, with a total of 103,000 people applying for compensation, out of which 60,479 were accepted.[24]

It is worth noting that there had been previous resistance of the ruling party to compensation for political prisoners, judging by the fact that at least two parliamentary law proposals on the same subject had already been put forward before (BOCG, B-127-I, 9 May 1986; BOCG, B-82-1, 12 September 1987), being either ignored or rejected. When justifying its rejection, the PSOE representative argued that (1) it would be impossible to repair every situation, which would make it unjust to repair some, and that (2) other collectives charged very low pensions and could feel aggrieved by such compensations (DSCD, Num. 118, 7 June 1988). Strikingly, the PSOE representative mentioned that, unlike other compensatory schemes in Europe, the Spanish context was different since there was not a 'radical rupture' with the past, but rather 'a process of transition to democracy, praised and admired all over the world, but which had its own consequences' (ibid.).

The reticence of the PSOE – and the insistence of small left-wing parties (especially the Communists) – is perhaps linked to the parties' own past experiences: while the PSOE suffered mostly from the civil war and the exile experience, its internal opposition after the civil war was feeble, unlike the Communists, who had by far the largest quota of political prisoners. The division of the Spanish left – that is, the fact that the PSOE and the Communists never held much affinity (to put it mildly) – helps account for why, unlike the Uruguayan case, the collectives of ex-prisoners had no obvious links to the ruling party.

The Communist Party, on the other hand, had explicit connections to what was one of the few organized collectives of political prisoners – the Association of Anti-Francoist Ex-Prisoners and Politically Persecuted (AERPA) –, whose members were for the most part militants of the

[23] This was a way to exclude (1) the 'nationalists' who had been arrested in Republican held territory during the war (for less than three years) and who had already benefited from reparation measures and (2) those accused of terrorism in the late years of the dictatorship/ early days of the transition, who were surely younger than 65.
[24] Most of the 41,162 rejected requests were due to the fact that the concerned person did not meet the 3-year in prison requirement. Data available in: *Informe General de la Comición Interministerial para el Estudio de la Situación de las Victimas de la Guerra Civil y del Franquismo*, 2006: 50. Available at: http://www.memoriahistorica.gob.es/es-es/LaLey/Documents/InformeVictimas.pdf (accessed 2 February 2015).

party (though the association declared itself as non-partisan).[25] AERPA was initially formed in 1965 and legalized in 1979, having as one of its aims 'the moral, political and economic reparation of those who fought for freedom and democracy'. Law 18/1984 and the subsequent 18th additional provision of Law 4/1990 were, for the AERPA, a recognition of their struggle and persistence.[26]

Legislators seemed indeed to be well aware of the presence of such groups. Law 18/1984 – the only to focus on the economic needs of ex-political prisoners prior to the 1990 provision (recognizing years of prison as years of work for social security effects) –, made explicit in its text that it 'satisfied the demands of political parties and associations of ex-prisoners', suggesting that their presence was behind the formulation of this law. The same possibly holds true for the decision of the ruling party to incorporate an amendment on compensation for political prisoners into the 1990 State Budget Law, though there is no evidence of that, as very little is known about this collective and the issue seems to have failed to attract media attention at the time. The fact is that the approval of this law, in June 1990, occurred after yet another parliamentary proposition on the matter by the group where the Communists were in (*Izquierda Unida – Inciativa Catalunya*), in March 1990 (BOCG, B-31-1, 21 March 1990). Their willingness not to let the issue die out possibly influenced the ruling party, with one PSOE representative later confirming that the party decided to consider such an option in response to the proposition put forward by IU-IC and to the 50th anniversary of the end of the civil war in the previous year (DSCD, Plenary Session, No. 58, 25 September 1990, p. 2789).

Despite being the measure that most evidently established a compensation for a recognizable damage, the language of Law 4/1990 was, like the reparation measures approved before, strikingly apolitical. Its text did not carry anything resembling a moral or symbolic recognition of the unjust character of the imprisonments it made reference to, let alone any mentioning of the dictatorial regime responsible for them (thus failing to meet what is one of the basic expected standards when the *quality* of reparation programs is assessed). The fact that the issue did not deserve a law of its own, appearing instead as a provision in the State General Budget

[25] The other active organization was the Catalan Association of Ex-Political Prisoners (*Associació Catalana d'Expresos Polítics* – ACEP), created in 1975. This association's connection to political groups is also evident when looking at the profile of its founders, who were or had been members of left-wing political organizations in Catalonia (its president being a deputy in the Catalan Parliament from 1980 to 1992).
[26] Documentary '*Entre la solidariedad y la memoria – Historia de la Asociación de Expresos y Represaliados Políticos'*, 2013.

Law, is already telling of the desire to keep it a low-key issue (being criticized by IU-IC as a strategy to avoid publicization and parliamentary discussion). The only exceptions to this general silence were the timid mentioning of the political prisoners' 'fight for freedom' in Law 18/1984 and, more openly, the recognition of what the International Brigades had done 'in the name of freedom and democracy' in Royal Decree 39/1996 (Aguilar, 2008b: 422). The latter measure – on the concession of Spanish nationality to those who took part in the International Brigades – was indeed the only one that, during the whole of González's terms in office (1982-1996), carried what came closest to a clear message of symbolic recognition. As with Law 18/1984, the Socialist representative in Congress stated that this was a response to an initiative driven by the Association of Friends of the International Brigades (AABI), even if the spokesperson showed the 'utmost satisfaction' for the defense of that proposition (DSCD, Plenary Session, No. 186, 28 November 1995, p. 9876). AABI had been created shortly before in order to push for this initiative and to plan a large tribute to the Brigades on their 60th anniversary in 1996 (having amongst its founders the president of the Association of Anti-Francoist Ex-Prisoners and Politically Persecuted). Over 300 members of the International Brigades visited Spain at the time, receiving various official tributes at the local, regional and state level, in what was the first event of public recognition of this type in Spain.[27]

In short, González's governments enacted some reparatory measures over time – which falsifies the common perception that in Spain there were no transitional justice measures whatsoever – but as Alicia Gil Gil (2012) simply puts it, it still constitutes a case of 'partial rehabilitation with [almost] total oblivion'. Those partially rehabilitating measures were meant to overcome inequalities but did not entail any significant engagement with the past or almost any moral recognition of the individuals who were object of such measures. In other words, there was the will to repair economically some unjust situations, but not to politically engage with the past and grant symbolic types of reparation. A striking example of that was the absence of any official commemoration on the 50th anniversary of the civil war's onset in 1986. On this occasion, the government only issued a written declaration in which it stated that the civil war should not be commemorated because of its fratricidal character, adding that the conflict 'no longer has – and should not have – a living presence in a country whose moral consciousness is based on the principles of freedom and tolerance'. It further stated that:

[27] By the time of the actual tribute González had already lost the 1996 elections to the Popular Party, whose representatives were visibly uncomfortable and left the Congress of Deputies' tribute in the hands of the second vice-president of Congress, a PSOE deputy.

> *Spain has repeatedly demonstrated its willingness to forget the wounds opened by the civil war as well as its will to live in a regime based on tolerance and coexistence, in which the memory of the war is, in any case, a stimulus to peace and understanding among all Spanish people. (…) The government expresses its desire that the 50 anniversary of the civil war seals once and for all the reconciliation of the Spanish and its irreversible integration into the hopeful project that started with the establishment of democracy (…) and that once and for all consecrates peace.* (National Government's Declaration on the Occasion of the 50 Anniversary of the Start of the Civil War, 18 July 1986)

The same dominant discourse of the transition period appears bluntly in here. Spain's democratic period is equated with peace, tolerance, coexistence and reconciliation. Implicit is the idea that the defense of those values requires avoiding any engagement with the past. Though the same declaration states that it wants to 'honor the memory of those that contributed (…) to the defense of freedom and democracy', it goes on to add that 'an impartial government cannot renounce to the history of its people' and therefore should also 'remember those that, from different positions, fought for a different society'.

3.3.2. Accounting for institutional silence

If one had to summarize the broad goals of the period of Socialist uninterrupted governance (1982-1996), these would be 'consolidation of democracy' and 'modernization'. The PSOE came to power only one year after the failed coup d'état and therefore the establishment of a consolidated democracy, in which civil-military relations would be normalized, was a top priority. Modernization, including an extensive program of economic reform and integration of Spain into Europe, was the keystone of Socialist policy and a necessary step in the construction of a developed and consolidated democracy of the Western European type. Antagonizing the military or implementing a program that would be radically different from the premises on which the transition was based was not at all what the Socialist business was about. The key transition years and the strategy of moderation and compromise had proved successful in putting Spain on the right track and the PSOE had no intention of challenging that, especially once its catch-all strategy proved electorally profitable. Nowhere was the PSOE's 'moderation strategy' more visible than in the radical transformation of the Socialist party itself, which went

from being one of the most radicalized socialist parties in Europe prior to the 1977 elections to one of the most conservative by 1982 (Share, 1986: 185).

Felipe González himself – General Secretary of the PSOE from 1974 to 1997 and Spain's Prime Minister from 1982 to 1996 –, is considered one of the key actors of the Spanish transition and therefore one of the figures that, despite the initial rhetorical radicalism, came to represent the consensus-building spirit of the transition. Though this was not the initial preferred policy of the socialists, González recognized that it was imposed on them by the circumstances and that it benefited Spanish society as a whole (quoted in Nash, 1983: 41). He was the one who supervised and often pushed for the radical transformation the Socialist Party went through in the transition years, including the much disputed move to drop references to Marxism from party programs. This was, first of all, a result of electoral considerations – with the PSOE wanting to appeal to a large mass of people and appear as a viable governmental alternative –, but also an outcome of the genuine will to consolidate what was still seen as a fragile democracy in 1982. The 1981 coup attempt and the uncovering of another coup plot scheduled for the eve of the excepted 1982 electoral victory were powerful reminders of that. Plus, the serious internal crisis of the ruling UCD, whose demise was already anticipated in the 1982 elections, could be further interpreted as leaving a power vacuum, enhancing the PSOE's desire to appear as a legitimate and responsible party capable of safeguarding democracy (Share 1985, 1986). In this sense, the 1982 elections were far from an opportunity to implement a radical socialist policy, but they were rather the continuation of a strategy of gradual and cautious transformation that the PSOE had already committed to when becoming an active part of the transition's consensual approach.

When it comes to the treatment of the past, breaking with the transition's premises of reconciliation/ pardon/ coexistence was never an option on the table. Democratic consolidation was naturally equated with peaceful coexistence and, as seen before, the latter came to be interpreted as being best achieved if past divisions were not touched upon. González himself had made clear later on that the primordial goals of democratic coexistence seemed incompatible with 'digging into the past' and that prudence was recommended if the peaceful coexistence premises on which the transition was based were not to be jeopardized. Overcoming the sources of past divisions was exactly what the new Spanish democracy was about and therefore it seemed counterproductive to resurrect them:

> *In accordance with the limits that we thought we had, we wanted to overcome the past without touching the old ashes, under which sparks still flew. We faced the great challenges that had threated our coexistence during a century and a half. (…) We tried to reconfigure the 'we' fundamental to democratic coexistence.* (*El País*, 22 April 2001)

González also made explicit that he did not wish to upset the military, revealing that General Gutiérrez Mellado had advised him, shortly before his coming to power, not to dig into the civil war issue because 'under the ashes, there is still burning ember; Please wait until people like me disappear to discuss these issues again' (*El País*, 24 February 2001). His decision not to commemorate the 50th anniversary of the civil war in 1986, he said, was the result of that. Curiously, these revelations were initially made at a meeting commemorating the failed coup d'état of 1981, during which González stated that this episode could and should be remembered, affirming that 'nothing is learnt from amnesia, only blankness' (*Idem*). Perhaps realizing the oddness of these words, he proceeded to affirm that the episode should be remembered 'because there was no blood involved', in contrast to the civil war.

If one takes González's words for granted, the decision to perpetuate the 'pact of forgetting' seems therefore a result of a conflict avoidance posture, in light of the potential costs for democratic consolidation. As González indicates in the quote above, his governments had to continue dealing with some of the major sources of conflict in Spanish society. He was therefore keen on retaining the consensus-driven approach to policy-making that the previous administration had successfully employed, namely when it came to ETA terrorism, the not always conflict-free relationship within the newly established regional governments, and the implementation of a contentious program of sweeping neoliberal economic reforms meant to 'modernize' the Spanish economy (Encarnación, 2014: 86).

Writing in 1990, Pérez-Díaz (1990: 20) notes how the main business of politics since the transition has consisted of pacts and agreements among competing forces, namely (1) pacts with regional political elites, which have helped channel regional nationalist conflicts, and (2) social pacts involving politicians, public bureaucrats, unions and businesses, which have been instrumental in supporting economic policies and reducing the level of conflict. For the author, this was part of a larger institutional and cultural effort to 'invent' a new identity and tradition: that of a democratic Spain (as opposed to the Francoist Spain), which this time around is

'modern' and 'Europeanized'. Encarnación (2014: 88) argues along similar lines, demonstrating how the PSOE embarked on an ambitious project of national identity building that aimed at debunking the conservative-catholic-culturally homogeneous image of Spain, reimagining it instead as a modern, forward-looking, multicultural European state. Similarly to Balfour and Quiroga (2007), Encarnación defends that the 'pact of forgetting' was instrumental in this regard since it repressed the very same things that made Spain look anachronistic, backward and un-European, providing the government with something of a clean slate on which to project a new vision of Spain (Encarnación, 2014: 79-91). Faber (2005: 211) notes that, if anything, Spain's recent past seemed to be more a source of embarrassment than a source of pride.

Indeed, the more the project of democratic consolidation proved successful, the more the reasons were to take pride in the transition's project of coexistence and reject a divisive past, which was seen as having precluded the construction of a viable democracy up until then. The declarations of the President of Congress (PSOE) on the commemoration of the 10th anniversary of the 1978 Constitution put this into evidence:

> *It is no small matter to see the consolidation of liberties and democracy in light of a consensus in which the compromise of everyone broke with the negative consequences of past constitutions that had been at the service of some against others*. (DSCD, Num. 157, 6 December 1988, p. 9424).

When asked about the (lack of) treatment of the past during this period, representatives of the PSOE invariably argue that frames and priorities were different at the time (Interviews SP9, SP10, SP11, SP12). The dominant mindset in regard to the past was the one adopted during the transition, based on reconciliation and mutual pardon (Interviews SP10 and SP12), and the political agenda was thoroughly forward-looking, focused upon modernization and the economic advancement of Spain (Interviews SP10 and SP11). What today is known as transitional justice – or as 'historical memory' in Spain – was simply 'not a topic which was present' (Interview SP10). In the words of one representative, 'no one would raise this topic, there were no petitions, no social or parliamentary initiatives; the amnesty law did what we thought had to be done' (Interview SP9). Indeed, everything that has been mentioned so far, though accurate, neglects one important variable: the fact that the PSOE not only induced but also seemed to reflect the 'mood of the time'. To put it crudely, why would the PSOE open up

a possible Pandora box for which there were no pressures? Why would it create an issue that was simply not perceived as a political issue?

3.4. The absence of civil society pressure

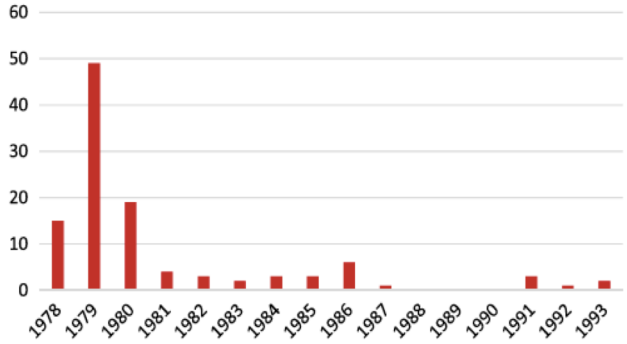
Not only were there no significant social pressures for TJ measures up until the 2000s, but the general perception seemed to equate the political elites' stance that those issues were better left untouched (Interview SP2). A CIRES survey from 1991 revealed that 68% of the enquired agreed with the sentence 'what occurred in the civil war was so terrible that it is best to forget than to talk about it' (Aguilar, 2006: 300). While Aguilar (2006) reiterates that Spanish people's general desire for stability (repeatedly confirmed by various surveys) and the concomitant fear of another civil confrontation are part of the reason why there were no calls for retribution, Julià (2006: 58) simply points out that, by the 1980s, the general perception was that the war belonged in history and that Francoism was residual and therefore simply not conceived as an object of public policy. But rather than delving into the reasons affecting the general public, what is most relevant is to understand the apparent silence of the small segment of the population that could have an interest in TJ, that is, those directly affected by Francoist repression where TJ-related demands were most likely to come from. In-depth and methodologically sound work on this issue is inexistent – and, frankly, quite difficult to conduct –, and therefore the arguments below are explorative.

There is, however, one reason that comes up time and again when speaking to anyone involved in the recent wave of exhumations and who are familiar with the stories of the relatives involved: the fear and trauma of the old generations, greatly aggravated by the 1981 coup d'état (Interviews SP1, SP2, SP3, SP5).[28] Fear of a civil conflict, of the capacity of the military to derail the transition process, or simply of local-level retaliation by right-wing squads might seem exaggerated when looking in retrospective, but this was surely not experienced in the same way by many of those who had living memories of repression and who had learnt to live with trauma, and often silence, for decades. Those who closely accompanied the recent exhumation process speak of the endurance of a regime of silence, fear, self-censorship, shame and humiliation among the civil war defeated, which often times affected or blocked

[28] The general impact of the 1981 coup d'état is confirmed by the 1991 CIRES survey quoted by Aguilar (2006: 301), with 48,5% of respondents stating they feared something akin to a civil confrontation following the coup d'état (whereas only 18,5% said the same about the period following Franco's death).

intergenerational transmission (in part to spare the new generations of the shame of being a 'descendent of the reds') (Férrandiz, 2007, 2008; Labanyi, 2009; Serrano-Moreno, 2012; Río Sánchez, 2008). The director of the Association for the Recovery of Historical Memory (created in 2000), for example, retells how old people still often show a frightened behavior – such as speaking in whispers – out of fear of retaliation (Interview SP3). Note that this is a phenomenon specific to the older generations – the ones with a leaving memory of the worst repressive period – and which also appears to be more prominent in small countryside villages.

Figure 3.3: Number of exhumations per year during the first-wave of exhumations in Extremadura, Navarra, and La Rioja (Aguilar, 2017)



The impact of the 1981 coup d'état on the revival of such fears is confirmed by data on exhumations. Contrary to the recent wave of exhumations (2000-today), there was a first wave during the transition period which did not get media attention at the time (with the exception of one controversial magazine) and whose details scholars are only starting to find out about now. The background to this is that, in line with Franco's policy of commemorating exclusively those victimized by Republicans, only these bodies were recovered and granted a proper funeral whereas tens of thousands of republican bodies were left in unmarked graves (whose approximate location was often known by locals), a situation that the newly founded democracy did not dare to address. Geographically concentrated in certain regions and executed with rudimentary means, this first wave of exhumations was entirely treated as a local and private family affair.[29] Though there is still no definitive data on this, Aguilar (2017) compiles information on three of the autonomous communities most active in this regard and the distribution of the number of exhumations over the years is quite revealing, showing indeed a drop from 1981 onwards (Figure 3.3).

Aguilar's data and comparison between provinces puts into evidence, however, the importance of a different type of factor: the existence of external networks of support. The Navarra example

[29] See Serrano-Moreno (2016) for a detailed account of the 1979 exhumation in Murcia and Aguilar (2017) for a thought-provoking and pertinent comparison of the exhumation process in four provinces: Navarra, La Rioja, Cáceres and Badajoz (the last two part of Extremadura).

(and exception) is particularly telling in this regard given that the exhumation effort was more thorough in this province and benefited from one exceptional source of support – a sector of engaged and well-organized parish priests –, something that is explained by the distinct background and stances of a sector of the Church in Navarra (Aguilar, 2017).[30] Variation in the remaining cases studied by Aguilar seems to be best explained by the electoral results of the 1979 municipal elections (which account for the exhumations peak in 1979), as the presence of supportive (left-wing) local authorities can favor exhumations. Support for this process is, however, uneven – even in provinces dominated by left-wing parties, like Badajoz –, something that can possibly be related to the negative stances of state-wide parties on this matter (Aguilar, 2017). The same way that positive sources of support matter, Davis (2015) shows, in a different study conducted at the local level (in the Catalan city of Santa Coloma de Gramenet) that counter-pressures are important too. He claims that local initiatives of remembrance were thwarted by far-right militants and unreformed institutions (police, judiciary, civil governors) who failed to cooperate and who ultimately led to the demobilization of interested sectors (Davis, 2015).

Incipient studies such as the two just mentioned naturally raise the question of whether the apparent absence of civil society demand was actually not, in part, a result of the absence of networks of support. While it is the case that the 1981 coup d'état was the ultimate reminder of risk – and surely was a major factor in the reinforcement of a regime of fear among 'red families' –, this was certainly not experienced in the same way by everyone and there were various potential actors who could have constituted positive sources of support over the following years and did not (from the media to the church to political parties). This, in turn, is intimately linked to the dominant 'mnemonic regime' of the time – put forward during the transition and reinforced by its success –, based on the premises that the past is better 'left behind' and that the transition period inaugurated a stage of reconciliation in which there should be no room for divisive behavior that could trouble the construction of a unified Spain. The fact that all dominant political elites embraced this discourse left the 'political opportunity structure' closed.

[30] Accoridng to Aguilar (2017: 416), this is linked to the personal biographies of the priests involved (descendants of executed people) and to the different stance of a sector of the Church in Navarra, in favor of apologizing for the role of the Church in the war.

This goes in the direction of Encarnación's (2014: 121) argument that the unanimity of the dominant political elites on the desire to set the past aside dissuaded potential social demands for transitional justice. This decision, Encarnación and others have argued, was wholeheartedly embraced by the Catholic Church and the mainstream media. Others, involved in the family-led exhumation movement, have similarly referred to (1) the perception that nothing could be done given the generalized lack of interest or silence on the past, (2) the lack of public spaces for the articulation of personal memories, (3) the exclusion of the experience of the defeated from dominant war narratives, or (4) the absence of political and cultural frameworks that helped the defeated construct their memories and see/affirm themselves as victims (Férrandiz, 2007, 2008; Labanyi, 2009; Interview SP7). All of these tap into the idea that the absence of networks of support and of a favorable political opportunity structure contributed to the absence of civil society demands.

Of particular importance here is naturally the role of the two dominant left-wing parties – PCE and PSOE – and the fact that they fully embraced (and put forward) the transition's reconciliation rhetoric. This left any potential dissidents without a political interlocutor and served to propagate this rhetoric within the party bases. This is no small matter when considering that they were precisely the ones who were disproportionately affected by repression, which would make them the natural vehicles for channeling TJ type of demands. Instead, there is, for example, evidence that the leadership of the two parties considered that encouraging exhumations would be interpreted as revengeful and possibly jeopardizing the tacit pact of reconciliation (Aguilar and Ferrándiz, 2016: 3; Aguilar, 2017: 414). If this was their stance on what is possibly one of the least controversial TJ measures – the recovery of a relative's body –, it is easy to imagine how inconceivable more robust forms of TJ were.

The extent to which the PCE-PSOE general policy of reconciliation goes hand in hand with the absence of demands for TJ is also made clear by the fact that the only radical TJ initiative during the transition period came from a small group of people disenchanted with the moderation of the Communist Party. This was a symbolic attempt to create an 'international civil tribunal for the investigation of Francoist crimes', in 1978, in reaction to the official 'silence over the 40 years of terror' that was being 'masked as reconciliation' by political elites (*Público*, 2 December 2013). This initiative was promoted by a small group of intellectuals and members of the Marxist-Leninist Communist Party (a splinter of the Communist Party, in favor of armed resistance to the dictatorship and associated to the armed group FRAP), with the inaugural

gathering of its promoters ending up with the intervention of the police. Media coverage of the exhumations effort going on at the time of the transition also tells a great deal about the dynamics of (the lack of) political engagement with the past. As Aguilar and Ferrándiz (2016) develop at length, *Interviú* was the only state-wide media vehicle that covered some of the exhumations, something which is inexorably linked to the extreme-left leaning of its reporters, some of whom had spent time in prison and had links to the most radical opposition groups.

But if the absence of networks of support might be one proximate cause behind the silence of those sectors who could be potentially interested in TJ-related measures, there are inhibiting structural and contextual factors that motivate and help account for both the absence of civil society demand and for the non-mobilization of 'external' networks of support. I highlight two which I consider fundamental: (1) the civil war factor together with the temporal distribution of repression in the context of a lengthy dictatorship; and (2) the absence of an international transitional justice regime at the time or what Golob (2010) calls 'transitional justice culture'. The reason why the latter is important is because scholars (including myself) might be setting the bar too high for a transition in which the international norm of accountability for state agents had not yet reached a 'tipping point', meaning that forms of transitional justice were simply not excepted or even conceived as a possibility in the context of a negotiated transition.

Starting with the first, and as mentioned before, the bulk of the most serious human rights violations occurred during the civil war and the immediate post-civil war period. As violence was widespread and practiced horizontally during the civil war, the identification of a clear victim-perpetrator relationship is more complex than in the context of a dictatorship and tends to raise arguments about shared responsibilities. This, in turn, might dilute the sense of victimhood of those directly or indirectly affected by violence. This is the more so in the context of a particularly lengthy dictatorship in which Franco had more than enough time to apply 'victors' justice' and spread fear and propaganda. The families of the 'reds' (those who had not fled to exile) had been silenced and stigmatized for more than four decades before the transition to democracy took place. Moreover, unlike the families of the 'disappeared' in Latin America, they knew what the fate of their loved ones had been and they had a long time to learn to live with that. There was not the same sense of urgency –as families of the 'disappeared' in Latin America often had hopes they were still found alive – and possibly not the same sense of victimization – since killings in a war context are, to an extent, to be expected and everyone was well aware of how vicious 'red terror' had been. Though these are of course gross

generalizations – as different individuals and families come to terms with their experiences in different ways –, it is common to hear of cases where new generations had either been told to keep silent or were actually spared any details on the families' past (Férrandiz, 2007, 2008; Labanyi, 2009; Moreno, 2012; Río Sánchez, 2008). The passage of such a long period of time between the worst repressive period and the transition also meant that the newest generations had no direct recollection of the worst events. A top-down negotiated transition, which put an emphasis on 'forgive and forget', was hardly seen as an opportunity to reverse a long-lasting state of affairs, particularly when the right-wing threat was still looming.

All that has been mentioned so far, however, concerns the victims of the worst period of repression and not the victims of the subsequent stages of francoism. There are good reasons to focus on those given the changes in the quantitative distribution of repression as well as in the type of repression over the course of the dictatorship. As other cases have shown, families of the disappeared or assassinated will have a greater mobilization impetus than those who were imprisoned for political motives and later released, something naturally associated to the gravity of the crime. Moreover, as Molinero (2010: 43) has pointed out, it is common for anti-francoist activists to see themselves as protagonists (or even heroes) rather than victims, leaving sentiments of injustice to the private sphere, compensated by what is considered the best possible achievement in the public sphere – a democratic regime in which they could finally participate and advance their political views.

This, in turn, touches upon an issue which the recent development of a 'transitional justice culture' has helped to imbue – the construction of a sense of victimhood and the feeling of entitlement to certain rights as a result –, a 'culture' which was not available in Spain either during the transition or during the 1980s. This goes in the direction of Blakeley's (2005: 45) argument that a framework of international human rights norms was far from consolidated then and many of its features were not yet available or widespread, such as a well-established network of human rights NGOs or some of the mechanisms that are part of TJ nowadays. Encarnación (2014: 104) quickly dismisses Blakeley's arguments based on the 'experience of transitional justice in Portugal and Greece, whose transitions virtually coincided with Spain's'. Encarnación is, however, turning a blind eye to the crucial difference that these were non-negotiated transitions in which there were incentives for the condemnation and punishment of the past regime and its members. The sudden loss of their power position and the popular mobilizations that accompanied that process were naturally accompanied by calls for their

punishment, as this was not only a viable but also a legitimacy-enhancing endeavor. However, the Portuguese and Greek transitions did not take place in a world-historical time where the punishment of agents of the past regime was seen as a moral duty towards the victims or where the public accounting of their crimes was perceived as a requirement for the construction of a robust democracy. The language of transitional justice – centered on the respect for human rights and the moral responsibility towards victims – was not what the Portuguese and Greek experiences were about. Whereas measures to distance new regimes from the past one were a welcomed benefit (rather than a duty) in such instances of regime collapse, they were nowhere to be expected in contexts of negotiated transitions in the 1970s or 1980s.

3.5. The Demise of Spain's Consensual Mnemonic Regime

Quite some ink has already been spilled on the so-called process of 'recovery of historical memory' in Spain, though little agreement exists as to what has sparked it. The onset of the demise of the Spanish 'consensual mnemonic regime' cannot be understood, in line with the theoretical predictions, without taking into consideration both social and political forces. The creation of the Association for the Recovery of Historical Memory in December 2000 did much to popularize the term 'historical memory', which was later used in popular and journalistic circles to coin Law 52/2007 as the Law on Historical Memory. Although the PSOE's 2004-2008 government, headed by José Luis Rodriguez Zapatero, was the one responsible for definitely bringing the topic to the political scene, a closer look at parliamentary activity reveals that there was already an outburst of parliamentary initiatives related to the civil war and the dictatorship in the previous legislature (2000-2004), at a time in which the People's Party (PP) governed with an absolute majority. The fact that the opposition parties coalesced in presenting a series of initiatives at the time can hardly be dissociated from an instrumental use of the past aimed at undermining the ruling party, since they were sure to create embarrassment and probably face rejection by the PP (a party born out of the People's Alliance and which can therefore be linked to Francoism).

These initiatives did not come out of thin air though. On the one hand, TJ dynamics at the transnational level – most notably the indictment of Augusto Pinochet by a Spanish judge in 1998 – had already raised obvious and embarrassing parallels between Spaniards' willingness to go after other people's dictators but not their own. That the left-wing opposition forced the issue of the condemnation of the 1936 coup d'état for the first time in September 1999 – at the

same time that the Pinochet case was making headlines – is probably not a coincidence and puts well into evidence the mechanisms through which a major episode in the consolidation of a transitional justice norm had an impact in Spain. On the other hand, circumstantial events and demands of civil society groups were behind several of the parliamentary initiatives put forward between 2000 and 2004. Civil society activity gained a significant boost after the take-off of the Association for the Recovery of Historical Memory, known for engaging in the contentious process of exhuming mass graves dating back to the civil war. Its activities inspired the creation of many other local and nation-wide civil society groups, dedicated not only to exhumations but also to other remembrance-related activities.

This contributed to an environment where, by the time the PSOE took over in 2004, the topic was increasingly salient, with small left-wing and regional nationalist parties bringing it up during Zapatero's investiture debate. Although there is no concrete evidence of a formal agreement, Law 52/2007 (not foreseen in PSOE's electoral program) was most likely a bargaining chip in the process of obtaining the needed support of these parties, given Zapatero's minority government condition. This, in turn, gave a greater boost to the associative movement, with the number of civil society groups growing by the day. Unhappy with the slow and timid developments at the political level, some of them decided to judicialize the process by the end of 2006 when filling a series of complaints with the *Audiencia Nacional,* aimed at unveiling the fate of those buried in mass graves and getting the Spanish state to take responsibility for their exhumation. The case was taken upon by the well-known 'superjudge' Baltasar Garzón in 2008, who launched a bold criminal investigation involving a total of 114,266 cases occurring between 1936 and 1951. His efforts quickly came to a halt, though, with the court deciding it had no jurisdiction over these matters and that, in any case, these crimes had prescribed and had been amnestied in 1977. This naturally attracted a great deal of media attention and controversy – the more so in 2010 when Garzón himself would face charges of distorting the law.

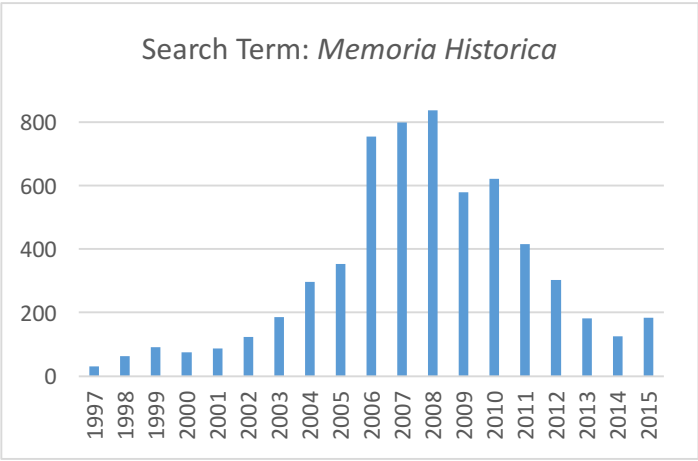
Although the PP governments (2011-2018) have left this issue frozen, opposition left-wing parties – now with the support of *Podemos* – have pushed for demands that were non-existent in the early 2000s, such as the creation of a Truth Commission or the modification/ nullification of the 1977 Amnesty Law. In parallel, various autonomous communities have taken a step forward when it comes to applying Law 52/2007 and/or enacting their own memory laws. Though much can still be done, it is nonetheless remarkable how what is commonly referred to as 'historical memory' went from a non-existing issue in the Spanish political and public scene

to a recurrent one. In what follows, I will shed light on the factors behind the onset of the demise of Spain's consensual mnemonic regime.

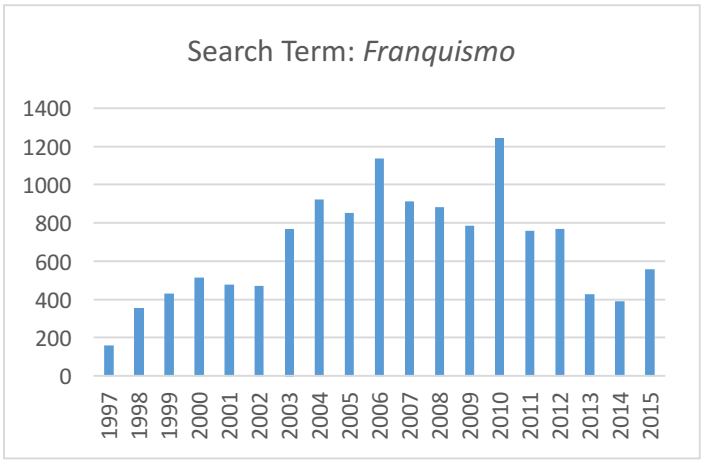
3.5.1. Accounting for the resurgence of the past in the parliamentary scene

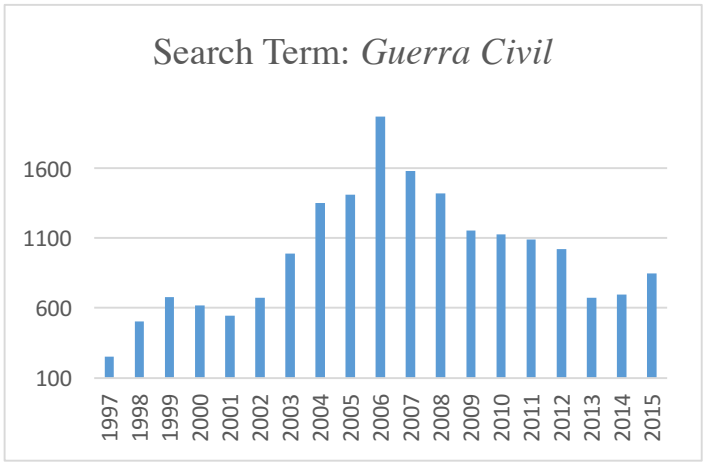
It has become a commonplace to speak of the 'break of the pact of forgetting' (Davis, 2005) or Spain's 'memory boom' (Boyd, 2008). Manifestations of this have occurred in every sphere of public life, from political institutions to civil society associations, from academia to the cultural production industry. The scores of novels, memoirs, television programs, films, documentaries and historical studies on Francoism and the Civil War coincided with the outburst of civil society initiatives at the turn of the century (Faber, 2005; Gálvez Biesca, 2006). The topic made it more decisively to the central government scene with Zapatero's first government (2004-2008), but attentive observers would not fail to notice the many parliamentary initiatives proposed in the previous legislature (2000-2004) by the opposition. Using *El País* as a news source – on the basis of being the most widely circulated daily newspaper in Spain –, and looking up the terms that can most speak to this issue, it is blatant that the number of news pieces mentioning 'historical memory', 'civil war' and 'francoism' increased exponentially throughout the early 2000s, reaching a peak during Zapatero's first legislature (2004-2008) (Figure 3.4).

Figure 3.4: Yearly evolution of the number of news pieces in *El País* that refer to 'Historical Memory', 'Francoism' and 'Civil War'[31]



[31] The search term 'Francoism' was chosen instead of 'Franco' due to the large number of non-related results produced by the latter. On the other hand, 'civil war' was used rather than 'Spanish civil war' because the latter is often referred to using only the former term. To avoid an excessive number of non-related results, all articles containing the name of the forty-five countries where civil wars took place during the 1990s and 2000s were excluded. Retrieved from LexisNexis Academic. The starting point is in 1997 due to the lack of data before.





This is particularly the case for 2006, in part due to the official declaration of 2006 as the 'Year of Historical Memory', the 70th anniversary of the start of the civil war, and the intensification of the debate on what became then popularly known as the 'Law on Historical Memory', approved at the end of 2007 (but in preparation since 2004). What is particularly relevant for the current analysis, though, is that when it comes to 'Francoism' and the 'civil war', their visibility was already on the rise before the 2004 election.

As far as the existing literature goes, there is little consensus regarding the factors that led to the resurgence of public and political interest in the Spanish past. Various events coincide in time, which complicates the task of disentangling multiple dynamics occurring at the political, social, cultural, and international level. At the civil society level, the creation of the Association for the Recovery of Historical Memory (ARMH) at the end of 2000 is considered a milestone. Its efforts to locate and open mass graves started to attract considerable media attention throughout 2002 and 2003, when the exhumations process took off. At the political level, the relationship of state institutions with the country's past is said to have changed from the year 2002, when the Spanish parliament approved a resolution honoring and granting 'moral

recognition to all men and women who were victims of the Spanish Civil War as well as those who later endured repression under Franco's dictatorship' (DSCD, Comisión Constitucional, No. 625, 20 November 2002) (Faber, 2005). However, a motion on the 60 years' anniversary of the Spanish exile – condemning for the first time the 1936 military uprising – had already been approved in September 1999. At the cultural level, the above-mentioned wave of publications, exhibitions, documentaries or TV series is also significant. To give one example, Javier Cercas' novel *Soldados de Salamina*, published in 2001, became a best-selling book. The fact that a lot of these activities coincided with important anniversaries – 60 years of the end of the Spanish civil war (1999), 25 years of the death of Francisco Franco (2000) or the 25th anniversary of the first democratic elections (2002) – is often highlighted (Blakeley, 2005). In addition, demographic and generational dynamics are commonly mentioned as one important factor (Faber, 2005; Blakeley, 2005; Aguilar, 2006; Sumalla, 2011). The rationale behind it is either that (1) there was a sense of urgency in dealing with this topic because the most concerned generation was dying out of old age and/or (2) because new generations were free from the fears and inhibitions of the old generations (and they were the ones putting in motion the associative movement).

When it comes to accounting for the resurgence of the past in the political debate there are, however, two more dominant lines of explanation. The first has to do with changes in the international environment and, in particular, the influence of the Pinochet affair (Davis, 2005; Encarnación, 2008; Blakeley, 2005; Golob, 2008). The second is instead related to internal political dynamics, particularly the election of the PP with an absolute majority in 2000 and the opposition's use of the past as an instrumental political weapon (Humlebaek, 2004, 2010; Aguilar, 2006; Julià, 2009).

a) The Pinochet affair

The Pinochet affair is said to have had an impact in Spain, first and foremost due to the direct involvement of the Spanish judge Baltasar Garzón, who indicted Pinochet in October 1998, asking for his extradition to Spain. This was one of the first times the principle of universal jurisdiction[32] was invoked, resulting in Pinochet's arrest in London on 17 October 1998. The

[32] According to which courts may prosecute any individual (regardless of their nationality or where the crimes were committed) if the crimes under scrutiny are considered serious crimes in international law (such as crimes against humanity or genocide).

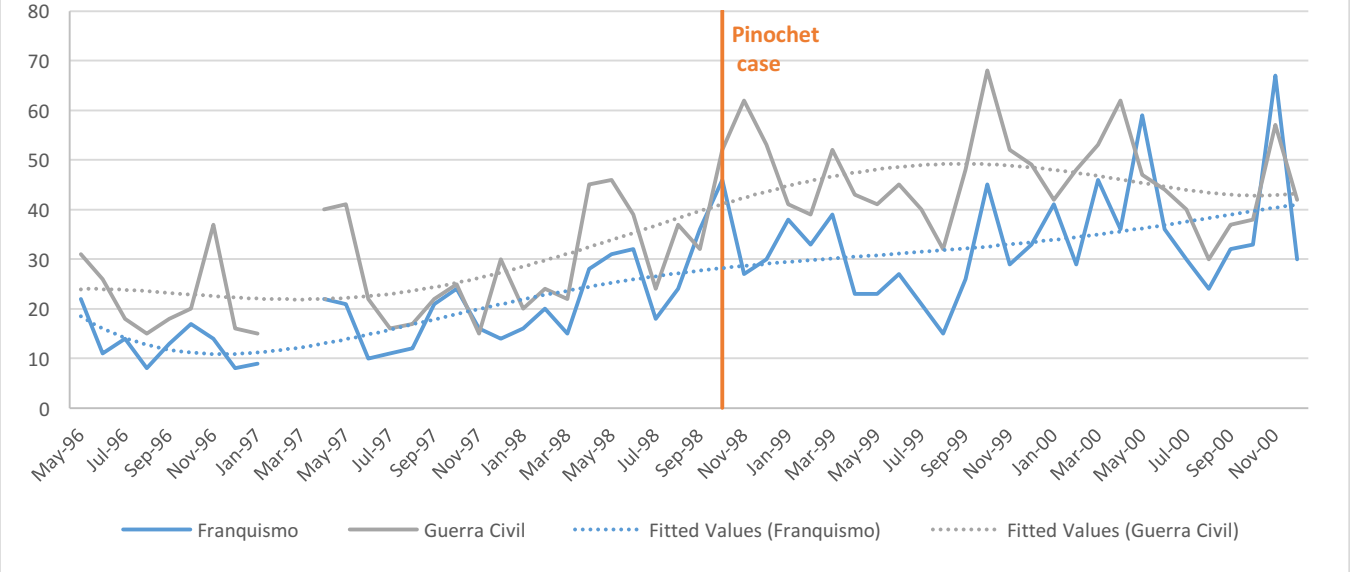
involvement of the Spanish magistrate put the Spanish government under the spotlight, with the Chilean president considering it an illegitimate interference in its domestic affairs and accusing Spain of 'showing signs of poor memory', given that it had not dealt with its past either (*El País*, 20 October, 1998). Authors like Davis (2005: 869) and Encarnación (2014: 133) defend that this case struck a chord in Spain, reminding the political class and the public of Spain's unresolved past and 'generating considerable societal introspection about the limitations of the Pact of Forgetting'. In the words of Davis (2005: 870), the 'whole affair seems to have resensitized Spain to the limitations of its own transition to democracy and created a new environment and space for the articulation of histories and memories hitherto suppressed'. For Encarnación (2006: 146), the debate over Pinochet's arrest 'shattered the political elite's consensus from using the past as a political weapon while awakening the political ghosts of Spain's past in the Spanish population at large'.

These authors base themselves on the case's repercussion in Spain, the willingness of the opposition to use the PP's uncomfortable position as evidence of the government's protection of a dictator, and the parallels that were established between Spain and Chile's recent history. Davis (2005: 869), however, recognizes that 'such a hypothesis can hardly be proven' and there is indeed the possibility these authors exaggerate the impact of the Pinochet affair. They present anedoctical evidence, such as comments in the Spanish press where parallels between Pinochet and Franco are made, drawing heavily on Malamud's (2003) study of public and political opinion's reactions to the Pinochet case and using some of the quotes he extracted from the Spanish press, including a line by a political commentator stating that 'Pinochet's arrest is the vicarious dream of a historical impossibility, that of Franco being arrested in bed' or the reaction of a Socialist spokesman who accused the government of adopting a 'pro-Franco ideological attitude'. Even though Encarnación uses the latter kind of statements to make the case for the break of the 'pact of silence', there are various authors that would disagree with this on the basis that this dynamic was already present prior to 1998 (Julià, 2009; Aguilar, 2006). Malamud (2003: 159) himself notes that 'accusations of something or somebody being 'pro-Franco' are frequently used in political language and in the press when trying to discredit them'.

A thorough media analysis of *El País* puts into evidence that Encarnación or Davis are right in pointing towards a temporal coincidence between the Pinochet affair and an increase in attention towards Spain's past, though the impact is not clear-cut. Zooming into the monthly distribution of news pieces mentioning the civil war and francoism over the course of the years

1996-2000, it is visible how there was already an ascending tendency before October 1998 (Figure 3.5). What the Pinochet affair seems to do is to reinforce a pre-existing trend and help consolidate the growing presence of the past in the public agenda. Although the October-November 1998 peak certainly has a lot to do with the Pinochet case, these values then return to pre-October 1998 levels, only to reach new peaks when the driving issues are different ones. This is the case, for instance, of the death of Rafael Alberti at the end of October 1999 (a major Spanish literary figure who became the voice of the left during the war) or the 25th anniversary of Franco's death in November 2000.

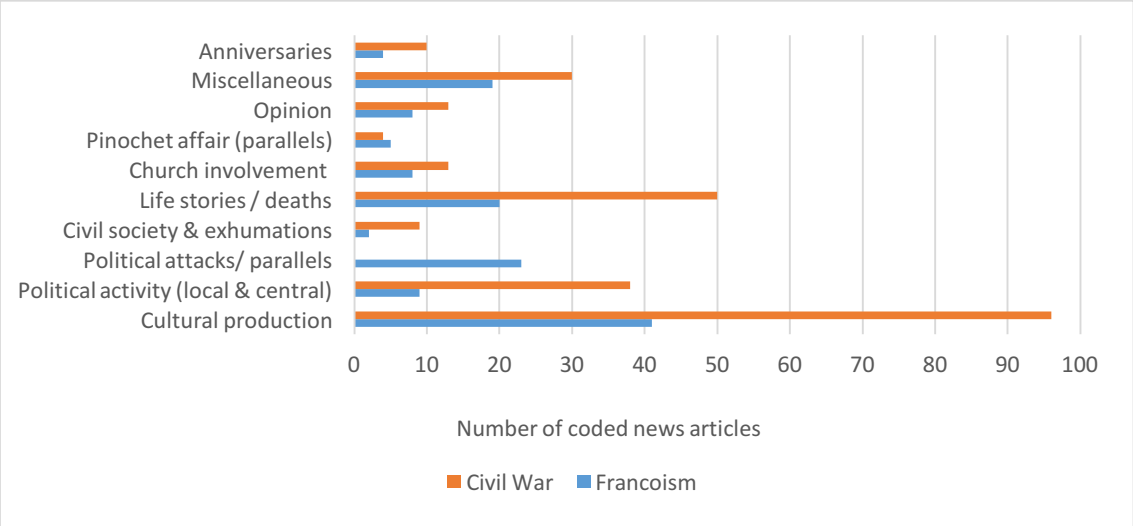
Figure 3.5: Monthly evolution of the number of news pieces in *El País* that refer to 'Francoism' and the 'Civil War' (May 1996 – December 2000)[33]



In addition, a content analysis of these pieces over the years of 1998 and 1999 reveals that, if the Pinochet affair had an impact in the growing interest in the past, it was more of an indirect one. This is because what is actually driving most references to the past is, first of all, the intense cultural production industry (publications, seminars, exhibitions, etc.) and, secondly, life stories of people who lived through/ had some connection to the civil war and/or the francoist regime, stories that are very often motivated by the death of the concerned person (Figure 3.6).

[33] May 1996 was chosen as a starting date due to the unavailability of data before in LexisNexis Academic. February and March 1997 are not covered for the same reason.

Figure 3.6: Categorization of news articles in *El País* that refer to 'Francoism' and the 'Civil War' according to their main subject (1998-1999)[34]



Source: Author's elaboration (see methodology on footnote 31)

That being said, it is nonetheless striking that there is an obvious temporal coincidence between the Pinochet affair and the change in political institutions' relationship with Spain's past. The best piece of evidence in this regard is that the Committee of Foreign Affairs of the Spanish Congress condemned the 1936 coup d'état for the first time on 14 September 1999, the same day that this Committee debated the position of the Spanish government towards the Pinochet affair (DSCD, Comisión Asuntos Exteriores, No. 743, 14 September 1999). This was not a highly symbolic or impactful gesture, consisting of a motion (*proposición no de ley*) approved in a Committee meant to mark the commemoration of the 60th anniversary of the Spanish exile as a result of the end of the civil war. The direct motivation behind this proposition was, according to the speeches of various political representatives, a visit of a Congress delegation to Mexico in which members of Congress were surprised to find out that the Spanish exile was being commemorated there (one of the main exile destinations), contrary to what was happening in Spain. It is, nonetheless, significant that the motion condemns the military uprising of 1936 and goes as far as to speak of a 'fascist military coup against the legal republican regime', sparking a debate with the PP, who opposed this formulation. This was right after the same Committee had debated various issues related to the Pinochet affair, including the position of

[34] The selection of articles was conducted first through a keyword search, featuring the terms 'francoism' or 'civil war'. From the pool of all articles, I used a chronological sampling strategy in which one of every two articles was selected, meaning that 50% of the list of relevant articles were coded. Categories were created inductively. Pieces of news on varied topics that did not fall into any clear category or did not have more than three articles falling into a possible category were put under 'miscellaneous'. Those that did not feature the civil war or Franco's regime among one of the subjects (usually mentioning them only for chronological purposes) were excluded.

the Spanish government regarding Pinochet's possible extradition to Spain (which was a possibility at the time, but never materialized). During this debate, a representative of the Basque Nationalist Party (PNV), Iñaki Anasagasti, mentioned that he 'personally regrets (…) that Francisco Franco was not in the same situation as Pinochet is now'.

There is, however, nothing in the debate that explicitly connects the Pinochet affair to the motion that condemns the 1936 coup, which was in fact presented at the end of May, before the opposition requested a debate on the position of the Spanish government towards the Pinochet affair. Nevertheless, the fact that the tone of the motion constituted quite a radical departure from past propositions suggests there was a transformative event behind it, and the Pinochet case seems indeed like the most impactful event of the time. The PP representative fittingly points out that a proposition signaling the commemoration of the exile did not need to entail judgements on the causes of the civil war. That the opposition chose to do so for the first time in 1999 – at the same time that it was trying to extract political capital from its position in favor of the extradition of Pinochet to Spain – is probably not a coincidence. The possible explanatory mechanisms at work here are: (1) the fact that public opinion was largely in favor of the extradition of Pinochet, signaling to the opposition they could extract political gains from politicizing Spain's own past; (2) the fact that the Pinochet affair contributed to make Spain's own past more salient in the public debate, something the opposition – as the legitimate heirs of the opposition to Franco – could appropriate; and/or, in a similar vein, (3) the fact that the PP's ambiguous position towards the Pinochet case was conveniently used to stigmatize the PP as right-wing, a strategy that could be reinforced by the use of Spain's own past. In all of them, and in all likelihood, the opposition was following a *logic of consequences*.

Note, still, that for all these possible explanations, the Pinochet affair constitutes more of a background factor that opened up the political space to bring the past to the fore, an opening that is more immediately motivated by the opportunity the opposition saw in making political use of the past. In fact, when looking at the media debate and the declarations of the members of the opposition following the motion's discussion, no parallel with Pinochet was ever drawn. Instead, members of the opposition took the opportunity to state that the PP 'is the heir of the old right-wing and therefore unable to condemn the military coup' (PSOE representative) or that the PP's reaction puts into evidence its 'connections with the dark francoist past' (IU representative) (*El País*, 16 September 1999). *El País* itself (16 September 1999), in its editorial, regrets that the PP is still unable to condemn the 1936 military coup, but criticizes the

opposition for wanting to take advantage of this issue to accuse the PP of non-democratic. Tellingly, everyone seemed more concerned with the refusal of the PP to endorse the said motion rather than with the fact that it was actually approved (as the PP had no absolute majority and all other parties endorsed it).

The idea that the Pinochet case was more of a background factor is reinforced by my interviews with political representatives. None of them mentioned the Pinochet debate when asked about the renewed willingness of the opposition to bring the past to the fore of the political debate. When Iñaki Anasagasti (Interview SP13) – the PNV representative in the Foreign Affairs Committee (who intervened both during the Pinochet discussion and the motion on the commemoration of exile) – was explicitly asked about a possible effect, he stated that 'the Pinochet case had no influence, maybe it provided more of an indirect support'. Instead, Anasagasti insisted on his frustration with the governing party, emphasizing the unwillingness of the PP to make concessions and to 'turn the page on the civil war'. Moreover, one should not downplay the actual importance of the visit of the Congress delegation to Mexico as a triggering factor. There is evidence that the encounter with the exiled community did have an impact on political representatives, judging by the fact that it is recalled and invoked several times in the debates that would follow in the next legislature.[35]

b) The past as part of the opposition's strategy

Resorting to symbolic aspects of the past in the political debate – particularly in cases where different political groups can be associated with different past factions – is a relatively common practice, meant either to demarcate political fields or to delegitimize the opponent, as Kovras and Loizides (2011) reports on Cyprus or Igreja (2008) in Mozambique. This is the more so in competitive settings, where the actors who can benefit from an instrumentalization of the past have their relative position in the political game jeopardized, resorting to all the political instruments available to extract political capital. It is in this light that Julià (2009: 6) and Aguilar (2006: 283) interpret the practice of instrumentalization of the past in the political debate in Spain, pointing out that the first time this occurred was in the electoral campaign of 1993, when

[35] In November 2002, for example, the representative of the PSOE, Alfonso Guerra, stated that it was the conversation with the exiled community in Mexico that prompted him to organize a series of cultural events on the theme of exile at the time – including an exhibition in Madrid's *Palacio de Cristal*, sponsored by *Fundación Pablo Iglesias,* which Guerra directed at the time (DSCD, Comisión Constitucional, No. 625, 20 November 2002, p. 20507).

the PSOE feared losing its long-held majority to the PP and used references to the past to discredit the opponent.

Following this logic, it is for many an obvious non-coincidence that the opposition started to make a more explicit use of the past when the PP cast a dominant shadow over Spanish politics (Humlebaek, 2004, 2010; Aguilar, 2006; Río Sánchez, 2008; Julià, 2009). Interestingly, none of these authors mentions or attributes much of an importance to the Pinochet case, focusing instead on the shift in power towards the right and the opposition's instrumental use of the past as a convenient political tool to embarrass or stigmatize the ruling PP, considered a biological and ideological heir of Francoism. Humlebaek (2004: 164), for example, argues that the opposition's use of the past was a win-win strategy: if it managed to force the PP to condemn Franco's regime, some of its most conservative voters would be let down; if not, the opposition had all the tools needed to stigmatize the PP as 'francoist'.

As persuasive as these arguments are, there is however one obvious flaw: the fact that the PP was in power since 1996, but that the opposition took until September 1999 to introduce a controversial initiative involving a value judgement on the past. When it comes to explaining the exact timing of this initiative, the effects of the Pinochet affair provide therefore more explanatory leverage. A possible counterargument is that the timing of this initiative is not independent of the fact that the 2000 elections were approaching and that good results for the PP could already be anticipated, at a time the economy was doing well and the PSOE was struggling to provide an alternative. In addition, the commemoration of the 60th anniversary of the end of the civil war in 1999, together with the 1999 visit of the Congress delegation to the exiled community in Mexico, came as handy justifications to introduce such an initiative.

What the above-mentioned authors tend to emphasize, instead, is the temporal coincidence between the resounding absolute majority of the PP in 2000 and the wave of parliamentary initiatives on the past during its second legislature (2000-2004). Indeed, as developed below, it is during the PP's second legislature that the opposition insistently brings the past to Congress, in contrast to any other legislature before. This raises the question of why the opposition chose to do so when the PP had an absolute majority (2000-2004) rather than when it governed with a simple majority (1996-2000). From a purely instrumentalist point of view, which Julià (2009) represents best, this was simply the outcome of the fact that, under an absolute majority, the PP

had more free room to reject these initiatives, which allowed the opposition to elevate the tone of confrontation and politicize the PP's complicated relationship with Spain's past.

From an ideological perspective, however, the more confrontational stance of the opposition in the second legislature would be justified based on the contrast between the PP attempted 'move to the center' during the first legislature and the drift towards the right in the second one. While in 1996 the PP won the elections by a 1% margin and had to make pacts with three regional nationalist parties to secure its investiture (*Convergencia i Unió* [CiU], *Partido Nacionalista Vasco* [PNV] and *Coalición Canaria* [CC]), these constraints did not apply in 2000 and its centrist image is considered to have died out. In addition, while the 1996 results gave the opposition hopes that the 1996-2000 legislature constituted a parenthesis in Spanish politics, the 2000 elections – when the PP gathered about 45% of the vote (with a 10% difference to its most direct rival) – represented the definitive consolidation of the presence of a strong and dominant right-wing party. According to the historian Gálvez Biesca (Interview SP2), the PP's absolute majority stroke a chord with the left and created much restlessness within leftist and regional nationalist parties, who saw in the PP a reminiscence of the old conservative Spain and feared the permanent return of the right's hegemony. He argues that the new willingness of the left to bring the past to the political scene cannot be solely the result of an attempt at shaming the PP – because everybody was well aware of its francoist roots anyway[36]
–, emphasizing instead that the use of the past served as a good counterweight to what these parties saw as an ill-fated drift towards the right in Spanish politics (Interview SP2). A PSOE representative in Congress (Interview SP10) at the time (2000-2004) similarly points out that, as a reaction to the PP's leadership, left-wing parties were ready to be more radical and started to question the pacts of the transition.

In addition, the fact that the PP no longer needed the parliamentary support of nationalist parties greatly increased the general tone of confrontation between the two, at a time in which the center-periphery cleavage was at the heart of Spanish politics, with ETA ending a 14-month truce at the end of 1999. Relations were particular tense with the PNV, who had its reputation damaged by the failure of its controversial attempt to secure a ceasefire, at a time it had

[36] Aznar himself, the leader of the PP, was a good personification of the permanence of Franco's political elites in Spain. Son of a prominent journalist who had worked for Franco's propaganda machine, he was part of a student movement affiliated with the Falange as a teenager. He joined the Alianza Popular in 1979, although he went through great efforts in order to distance himself and the PP from that legacy.

appropriated ETA's goal of achieving an independent Basque state (Muro, 2008: 167-171). For the PP, moderate and radical nationalism became part of the same problem, while for the PNV Aznar's 'tough approach' to ETA was evidence of his authoritarian tendencies. It is therefore not surprising that, during the second legislature, the PNV was the first to bring a controversial initiative to the Congress of Deputies, pushing for the condemnation of the 1936 military uprising and adopting a strongly antagonist language, speaking of the current presence of 'sociological francoism' and the attempt to impose 'a unique way of thinking' (BOCG, D-123, 22 January 2001). The intention to use this motion as an instrument of delegitimization of the adversary was plainly evident, even because the motion approved in September 1999 was similar in content to this one.

The idea of debating the past in order to tackle the rise of the right was, however, not entirely new. In December 1997, a PSOE member of parliament (Yañez-Barnuevo) had already published an eloquent piece in *El País* (3 December 1997) entitled 'Speak, memory, speak'. In it, he advocates for a recovery of the memory of the dictatorship as a means of 'political pedagogy for the new generations as well as to strengthen the democratic culture of the Spanish people'. He points towards a 'revival of francoism' in various spheres and deems that those nostalgic of Franco feel emboldened since the PP came to power, criticizing the authoritarian tendencies of the ruling party, whom he accuses of sometimes winking at far right fringes. It is thus plausible to assume that the idea of bringing the past to the fore of the political debate was already germinating in opposition circles before the PP's second legislature, receiving an important boost from events such as the Pinochet affair and the consolidation of the PP's rule in 2000.

c) External dynamics and the civil society impulse

Even though the willingness of the opposition to bring the past back to Spanish politics is decisively shaped by the above-mentioned context, the story would be incomplete if it were not for various external dynamics, including a growing societal interest and demands of civil society groups, who were behind several of the propositions put forward by opposition parties between 2000 and 2004. In spite of the fact that dynamics 'from below' were not so visible that they would force the issue into the parliamentary scene, I contend that the parliamentary debate over the past would not have acquired the shape and magnitude that it did if it were not for

specific demands and events taking place outside parliamentary doors, as many of the discussed issues would not 'exist' in the first place if it were not for them.

In order to substantiate this claim, I make a thorough analysis of the propositions and parliamentary debates occurring at that time[37]. In order to make sense of them, I compiled the list of all relevant parliamentary bills (*proposición de ley*) and motions (*proposición no de ley* and *moción consecuencia de interpelación urgente*)[38] presented from 1996 to 2004. The figures below systematize them. Figure 3.7 shows their numerical evolution over time, confirming the above-mentioned difference between the first and second legislature. Figure 3.8 shows which parliamentary groups were more active in this regard, putting into evidence that the large majority of initiatives came from the United Left (*Izquierda Unida* - IU) – which comprises the Communist Party – and the Mixed Group (*Grupo Mixto* - GMX), an ad hoc parliamentary unit formed by deputies belonging to parties unable to form their own parliamentary group. The parities within the Mixed Group who were more active in the matter were left-wing groups representing the Basque and Catalan regions – Basque Solidarity (*Eusko Alkartasuna* - EA), Initiative for Catalonia Greens (*Iniciativa per Catalunya Verds* - ICV) and Republican Left of Catalonia (*Esquerra Republicana de Catalunya* - ERC). This can be a good indicator of the vehicles through which issues entered the Congress of Deputies. On the one hand, given its history of opposition to the dictatorship, the Communist Party is the one that has most direct links to those who advocated for any type of compensation and/or recognition. On the other hand, civil society initiatives have often a greater capacity to have their demands heard at the regional level and it is, in fact, common to find that some of the issues brought up in the Congress of Deputies are already part of the agenda of some regional parliaments. Though this is not exclusive of the Basque and Catalan regions, it is not surprising to find parties from these regions pushing for issues related to the past, given their distinct sense of grievance – related to the suppression of regional nationalisms during the dictatorship – and the crucial role of memory discourses in identity politics. Figure 3.9 categorizes each initiative according to the specific issue under discussion. While some are very specific and circumstantial – such as the backlash against (1) the award given to Melitón Manzanas for being an ETA victim, but a well-known police torturer under Franco or (2) the public subsidies given to the Francisco Franco

[37] The full list is available upon request from the author.
[38] Note that motions (unlike bills or law proposals) are non-binding, serving to urge the government to take action on a specific topic or to make the position of the parliament explicit. Partially as a result of this, and because of parliamentary practice and high numbers, they tend to fall on deaf years.

Foundation –, others seem more structural and do raise the question of why they are being brought up at this moment in time. This is most obviously the case for the various propositions aiming at a general moral recognition of the victims – breaking with the absence of such initiatives before –, but also of the many 'forgotten' collectives that were now an object of attention (guerrilla combatants on the post-civil war period, republicans sent to nazi concentration camps, victims of forced labor, etc.).

Figures on the parliamentary bills and motions on matters related to the Civil War and Franco's regime during the VI and VII legislatures (March 1996 to March 2004):

Figure 3.7: Distribution over time

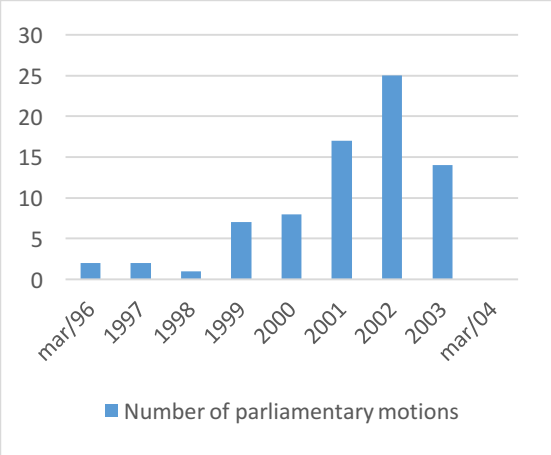


Figure 3.8: Distribution according to parliamentary proponent

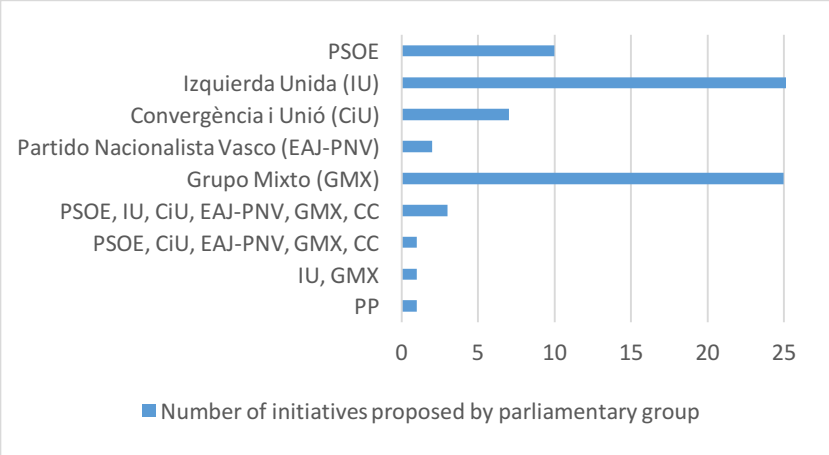
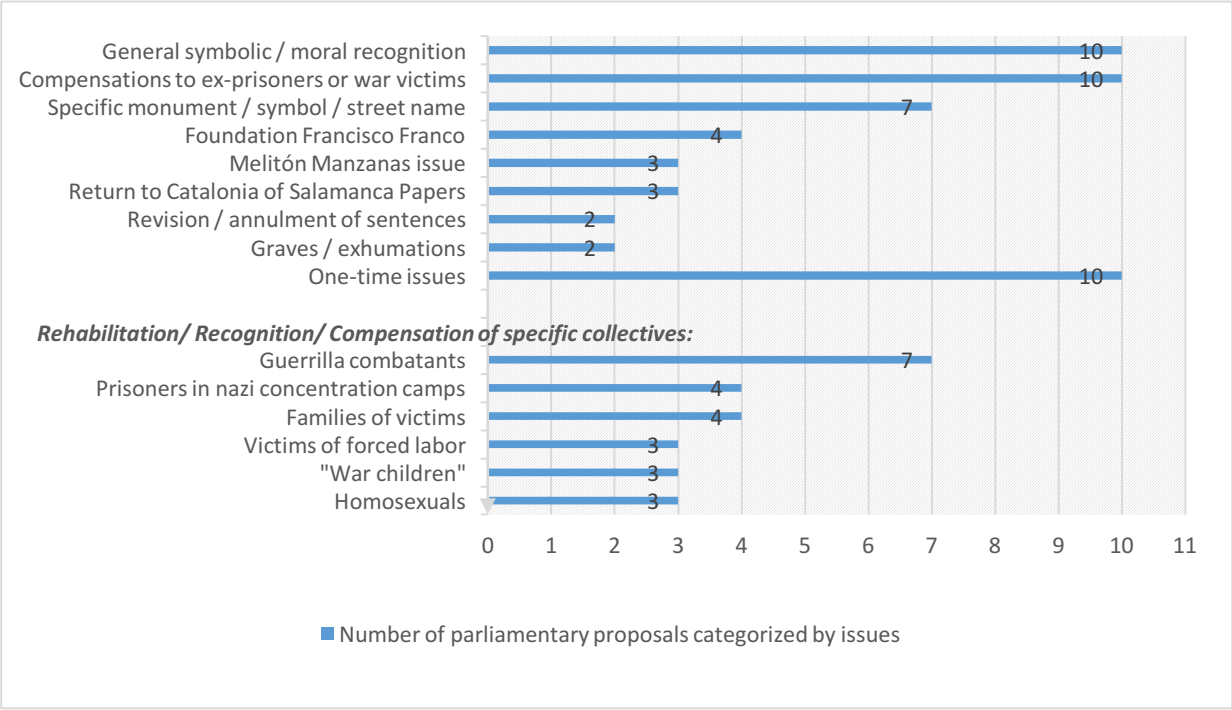


Figure 3.9. Distribution according to subject matter



Though figure 3.7 could indicate that, from 1999 onwards, there is a deliberate effort of the opposition to bring the past to the political debate, one should be careful to avoid ex-post rationalizations of what are often processes that develop in a more haphazard fashion. That is, it might be inaccurate to assume that there was, from the start, a deliberate and premeditated plan to make the past an issue during the PP's second legislature. This is because many of the propositions put forward in the early 2000s actually respond to circumstantial events. In 2000, five out of the eight motions put forward had to do either with (1) ex-prisoners in concentration camps or (2) ex-guerrilla combatants. The first *became an issue* in large part because Germany and Austria were at the time taking measures to compensate those subject to forced labor in concentration camps, measures which could potentially include the Spanish citizens who were sent there (over 8,000 in total, out of which about 2,000 survived). This was something the association Friends of Mauthausen (*Amical de Mauthausen*) was pushing for and political representatives were well aware of that, judging by the texts of the proposed motions (see BOCG, Num. D-61, 22 September 2000, p. 6).[39]

As for the second issue – ex-guerrilla combatants –, IU repeatedly insisted on it in 2000 and 2001, an effort which can be clearly traced back to a grassroots initiative born in 1997, the Archive, War and Exile Association (*Asociación Archivo, Guerra y Exilio* - AGE). Despite receiving much less attention than the ARMH, AGE was actually the first association to speak of the need to recover the memory of civil war-related aspects. Though it was created with broader aims, one of the first issues it focused on was the moral and political rehabilitation of ex-guerrilla combatants. It was behind the creation of an *Organizing Committee of Ex-guerrillas from Spain and the Exile* in May 1999, responsible for preparing a draft proposition that they then submitted to the Congress of Deputies and regional parliaments.[40] The text of this proposition is identical to the various motions submitted by IU to the Congress and therefore the role of the AGE is plainly evident. In an interview, AGE's director recounts how the association established contacts with the spokesperson of various parties and how they were helped by one parliamentary journalist (Interview SP16). After some failed attempts, a motion would be finally approved in May 2001, something the AGE considered a victory and takes all

[39] Coincidently or not, these initiatives appeared shortly after this issue came under the spotlight on Spanish TV, thanks to a three-episode documentary on the Spanish citizens sent to the Mauthausen concentration camp (*El País*, 27 April 2000).
[40] AGE website: https://www.nodo50.org/age/

credit for.[41] Before that, various regional parliaments had already responded to AGE's calls and approved similar texts. This was a direct result of the efforts of the association to spread its message over the territory, organizing the so-called 'memory caravans' in 2000. These consisted of a sizeable representation of ex-guerrilla combatants, members of the International Brigades, and the so-called 'war children', who toured the Spanish territory, telling their stories and exposing their claims. They were received officially in regional parliaments and town halls (with the exception of Galicia and Valencia, where the PP governed). According to AGE's director, this was part of a strategy to gather local and regional support and in this way put pressure at the Congress of Deputies' level (Interview SP16).

A different matter AGE took as its own, after realizing their vulnerable and unknown situation, was the one of 'war children' – children who were sent abroad during the war so as to be spared from its effects. Although the majority went to France, there was a contingent of a few thousands in the then USSR. Because members of the not yet existent AGE visited the Spanish Center in Moscow when organizing the 1996 tribute to the International Brigades (so as to invite the Russian brigadiers), they were confronted with the precarious financial situation of the remaining 'war children', now in their retirement age. This was one of the events that inspired the creation of AGE, which then deepened its contacts with this collective. As a result, AGE asked members of Congress to provide them with a dignified pension and to recognize them as victims of exile rather than simple migrants. These were demands taken up in Congress for the first time in 2003 (on three occasions), and which would be partially addressed in 2005 under Zapatero (Interview SP16).

Another issue which seems to have been conditioned by dynamics occurring outside the Congress of Deputies was the one of compensation and recognition of political prisoners. Because Law 4/1990 had important gaps – including the fact that it did not apply to people who had spent less than three years in jail –, this was an unresolved matter, brought up on several occasions. When reporting on a motion referring to the economic and moral compensation of those imprisoned, *El País* (20 February 2002) states that 'reparations for the victims of the dictatorship is an issue that regularly reaches the opposition given that the PSOE, IU and PNV receive periodically, through their contacts with Workers' Commissions, the demands of the associations of those affected by political persecution during Francoism'. A few days later, the

[41] https://www.nodo50.org/age/aunciosprimera/gerrtriunfa.htm

then president of the Association of Anti-Francoist Ex-Prisoners and Politically Persecuted (AERPA), Gervasio Puerta, wrote a letter to *El País* (27 February 2002) in which he states that the association has kept a personal contact with the spokespeople of all the parties and that the motion they discussed was proposed by AERPA itself. Moreover, it is likely that dynamics occurring at the regional level affected the activity of the Congress of Deputies in this regard. In light of the inaction of the central government, and after a recommendation of the Spanish Ombudsman on the matter in 1996, there were various autonomous communities taking steps to cover (part of) those who had been excluded by Law 4/1990, a situation that created regional discrepancies.[42] This was something IU noted in the motion on compensation to ex-prisoners it presented at the end of 2000 (BOCG, Num. D-115, 22 December 2000), and which was again highlighted in the propositions that followed (DSCD, Num. 139, 19 February 2002). It is likely that here too members of the collective concerned with this matter brought the issue to the attention of regional representatives. This was clear in the case of Catalonia, where there is evidence of interaction between the Catalan Association of Ex-Political Prisoners and representatives in the Catalan Parliament (DSPC, C-414, Num. 42, 18 February 1999, p. 29). The association itself claims that it was the committee it created on the matter which ensured that the discriminations of the 1990 law were partially overcome by the Catalan Parliament.[43]

Last, but not least, the impact of the actions of the Association for the Recovery of Historical Memory (ARMH) is visible from 2002 onwards. Even though it was created at the end of 2000, it is in 2002 that the ARMH definitely makes it to news outlets. One reason behind this is that the ARMH dedicated itself to the emotionally-charged process of exhuming mass graves, attempting to identify the bodies and restitute them to the families. This was a dormant issue in Spanish society despite the fact that Spain is one of the countries in the world with the most mass graves. What started as a one-time exhumation to recover the remains of Emilio Silva's grandfather, in October 2000, rapidly turned into an association meant to respond to the requests Silva would receive from then onwards coming from families wishing to exhume and give a proper burial to their relatives. The association would take off in 2002, when it gathered the means and support to conduct exhumations more systematically, handling more than ten in

[42] The first region to step in was Navarra in 1995 and several others followed from 1999 onwards (Madrid and Asturias in 1999; Aragón and Catalonia in 2000; Andalucía, Castilla y León and Baleares in 2001; and others in the next years).
[43] http://conc.ccoo.cat/exprespol/historia.htm

2002.[44] Notice that its network of support was constituted at the time by volunteers, including archeologists and forensic experts. A second reason behind the ARMH's impact is the decision of its founder to submit the Spanish case to United Nations Working Group on Enforced or Involuntary Disappearances (under the Office of the High Commissioner for Human Rights) in the summer of 2002 (*El País*, 21 August 2002). When making an initial call for families to expose the case of their relatives so that they would be submitted to the UN, the ARMH received more than 1,000 petitions (*El País*, 1 July 2002). Media coverage intensified from then onwards, speaking of 'the earth giv[ing] back its dead' (*El País*, 1 July 2002), '65 years of hidden history' (*El País*, 29 July 2002) or 'Our disappeared' (*El País* Editorial, 8 August 2002). Naturally, this reflected on the propositions presented in the Congress of Deputies in the second half of 2002, with five motions referring either to the issue of exhumations or to the rights of the families. When asked about the wave of parliamentary propositions during the PP's second legislature, a PSOE representative, in an allusion to associations like the ARMH, states that 'they were meant to respond to the requests that were arising from active associations and which demonstrated the lack of state aid' (Interview SP9).

In light of the avalanche of propositions at the time, political representatives decided to take several of those issues to the Constitutional Committee of Congress on 20 November 2002 (the anniversary of Franco's death), where the theme of exhumations and the actions of the ARMH were at the center of various interventions. There, the most significant resolution under the PP's rule was approved, honoring and granting 'moral recognition to all men and women who were victims of the Spanish Civil War as well as those who later endured repression under Franco's dictatorship' (DSCD, Comisión Constitucional, No. 625, 20 November 2002, p. 20511). Despite having already voted in favor of a few of the motions that made reference to specific collectives, this was the first time the PP subscribed to a proposition carrying a general message of moral recognition. The ruling party hoped, in this way, to end the battery of initiatives the opposition had been putting forward and close such debates once and for all, as the party representative explicitly stated. Coincidently or not, this was four days after the UN Group on Enforced Disappearances, in response to the ARMH's request, issued a recommendation to the Spanish government on the investigation of disappearances (*El País*, 16 November 2002). Although the media wrote 'The PP condemns Franco's coup' (*El País*, 21

[44] List of exhumations conducted by the ARMH: http://memoriahistorica.org.es/s4-about-joomla/c25-el-proyecto/exhumaciones/

November 2002), more attentive observers have not failed to notice that what was in fact in the text of the motion was a general condemnation of 'totalitarian regimes opposed to the freedom and dignity of every citizen' rather than a specific condemnation of the 1936 coup. Moreover, the fact that this was approved in a Congress committee, rather than in a solemn act of the plenary, has been criticized for downgrading the importance of the act (Interview SP1).

This is all to say that the renewed willingness of the opposition to bring the past to the political debate is not only an outcome of the attempt to use it as a political weapon, but has to be understood in the context of mutable external dynamics that were putting the past under a new light in Spain's public sphere. Among those, the emergence of civil society initiatives was among the most remarkable and poignant. One could claim, based on social movement theory, that these initiatives would not emerge in the first place if they had not benefited from a favorable political opportunity structure. While this is true for many of the associations that would emerge after the ARMH – especially those created after Zapatero's government released public funds to support exhumations –, it is not entirely the case for pioneering organizations like AGE and ARMH. The question of why these organizations emerge at this specific moment in time is naturally puzzling and so far has not deserved much attention. The next section seeks to start remedying this.

3.5.2. The 'late emergence' of civil society initiatives

The absence of studies on the movement for historical memory in Spain complicates any attempt to delineate a precise map of the development of the associative scene. It is generally known, though, that there were few civil society initiatives before the ARMH and that there was an 'associative explosion' from the early 2000s onwards (Biesca, 2006; Cano, 2006). While Biesca (2006: 34) counted 30 associations at the end of 2003, there were over 100 in 2005, a phenomenon the author links both (1) to the symbolic and media impact of the ARMH and (2) to the public subsidies that would start being granted from 2005. At the end of 2017, the National Registry of Associations had listed over 300 associations dedicated to related themes.[45] The large majority of them are local associations dealing with related topics in a village, city, or region of Spain. Among the state-wide ones, the hegemonic are the ARMH and the *Foro por la Memoria*, both centered on the exhumations process (though with conflicting approaches on

[45] The list of associations (and search criteria used) can be requested from the author. The National Registry of Associations of the Ministry of Interior can be consulted here: https://sede.mir.gob.es/nfrontal/webasocia.html

how and why it should be conducted) (Biesca, 2006: 35). Their predominance is visible in their local ramifications or in the local units that, despite being independent, took their names from these associations. To give an example, there are a total of 88 associations comprising 'recovery of historical memory' in their official denomination, though few of them have actual connections to the ARMH – an astonishing example of the capacity of 'early risers', in Tarrow's words (2011: 167; 205), to create 'master frames' and 'trigger a variety of processes of diffusion, extension, imitation and reaction'. *Foro por la Memoria*, on the other hand, has about 20 local branches.

But while the creation of *Foro por la Memoria* was sponsored by the Communist Party at the end of 2002 – at a time the ARMH had already put the exhumations issue on the agenda –, the latter is a better example of a spontaneous civil society initiative which, rather than reacting to a favorable opportunity structure, contributed to open it. By exposing an issue which was not evident before and demonstrating the possibilities for action, it opened opportunities for other organizations to emerge (including *Foro por la Memoria* itself).[46] The origins of the ARMH go back to 2000 when one of its founders and president, Emilio Silva, put into motion the necessary process to exhume a mass grave where the remains of his grandfather lied, together with those of another dozen people. Silva recounts how, when collecting stories from locals for a civil war-related novel, in the small village where his father's family was from, he learnt about the location of his grandfather's grave (Interview SP3). At the same time that he established contacts with the town hall authorities and families of those believed to be in the same grave, Silva wrote a piece for the local newspaper *Crónica de León,* telling the story of his grandfather and stating his intention to exhume his grave (Silva himself was a journalist). He retells how this made other people contact him and how various locals approached the exhumation site to ask for help with locating and exhuming their family members, which impelled him and others to create the ARMH at the end of 2000. While initially the association did not have the intention of going beyond León, Silva describes how he gradually realized the magnitude of the issue and how the media impact of the ARMH's activities in 2002 prompted families from everywhere to contact the association (Interview SP3).

[46] Interestingly, the director of the ARMH (Interview SP3) recounts how, after his plea to the UN, the Communist Party called him for a meeting in which party representatives proposed to join forces with the ARMH, an offer Silva declined. *Foro* would emerge at the end of that year.

The story behind the formation of the ARMH puts into evidence the transformative role of incidental and contingent events. Had Emilio Silva decided not to collect locals' stories for a book he intended to write and had he not met the person who told him about his grandfather, the ARMH would probably have never come to life. Encarnación (2014: 146) simplistically traces the associative movement back to the Pinochet affair. If it is true that Emilio Silva was perplexed by the attention given to the Pinochet case and the comparative lack of interest in Franco's crimes, it is a stretch to assume that this was what directly motivated him. Instead, it helped him realize that the so-often referred figure of the 'disappeared' in Latin America could be used in Spain too, which made the ARMH the first to speak of the 'Spanish disappeared' (Interview SP3). If one is to mention the various motivations behind Silva's actions – besides the most obvious ones above –, one has also to refer to the inspiration he took from individuals who were at the time working with AGE on the rehabilitation of the guerrilla movement. Silva mentions that, just after he found the location of the grave of his grandfather, he witnessed a tribute to three guerrilla members in a nearby village and met with an ex-guerrilla member, Francisco Martínez (known as Quico), who told him that it was possible to exhume a grave, as he had himself participated in one exhumation in Arganza in February 1998. In the words of Silva, 'Quico infected me with his immense struggle to recover memory'.[47] Martínez was also the one who told Emilio Silva about Santiago Macías – who was investigating the guerrilla movement in that area of León – and who would become the co-founder (and vice-president) of the ARMH.

If the social movement literature has taught us that mobilization depends on grievances, organization and political opportunities, it is true that the emergence of the ARMH benefited from a bit of the three, namely (1) the collaboration of local authorities in the first exhumation (*political opportunity*), (2) the exceptional organizational and networking capacity of Emilio Silva (*organization*), and (3) the emotional process of finding the grave of his grandfather, exhuming it, and receiving similar requests from other families (*grievance*). However, what is most revealing about the very early stages of the ARMH – and possibly of the entire movement on historical memory – is how the actions of a few early entrepreneurs can respond to and activate 'dormant grievances' and how these actions are often the result of contingent events. Rather than carry out a long-held plan to exhume his grandfather's grave, Emilio Silva stumbled

[47] Emilio Silva, 'Mi abuelo también fue un desaparecido', *La Crónica de León,* 8 October 2000.

upon information on it. Only then did he fully realize that the exhumation was a moral necessity (*grievance activation*), being helped in this process by (1) individuals already engaged with the 'struggle to recover memory' and (2) the realization that his grandfather was a 'disappeared', like the Latin American ones who were an object of attention in Spain at the time. His exceptional networking capacity and willingness to work on this issue brought his message to other families who possibly went through a similar process of grievance activation and/ or were provided with the opportunity to act upon that grievance (*opening of horizontal opportunities*) by realizing that exhuming and reburying their relatives was a feasible endeavor.

The creation of AGE, three years before the ARMH, also tells a great deal about contingency, the actions of a few early entrepreneurs, as well as the importance of their organizational and networking capacity. Its emergence can be traced back to the 1996 tribute to the International Brigades (the first massive coordinated effort to bring together disperse individuals or/and collectives), planned by some of the same people who then founded AGE. In the words of its current director and founding member, Dolores Cabra, 'now that we had dealt with the international brigades, I realized it was time to deal with all the other collectives' (Interview SP16). The mastermind behind the idea to organize the 1996 tribute seems to have been Adelina Kondratieva, a Russian brigadier who, after the collapse of the Soviet Union, visited Spain periodically – where she established contacts with numerous circles of people who had been part of the Republican army, ex-exiled, and ex-prisoners – and where she published her memoirs in 1994. Dolores Cabra – who helped in the publication of Kondratieva's memories and who had been arrested in 1975 for being a trade unionist – recounts how one day Adelina asked her why there was never a tribute to the International Brigades in Spain, a question which then made her contact 'friends from clandestine times' with whom she established the Association of Friends of the International Brigades (Interview SP16). That the idea of organizing a tribute came from someone who spent most of her lifetime outside Spain, in a country where official commemoration practices and the articulation of a wartime identity were encouraged, is perhaps not accidental.

AGE carries in fact the more extensive official name of *Association for the Creation of the Archive of the Civil War, the International Brigades, the War Children, the Resistance and the Spanish Exile*, though it has worked mostly on three fronts: (1) archives; (2) ex-guerrilla members; and (3) 'war children'. The concern over the last two collectives was born out of the contacts AGE's founding members established with them. Cabra retells how, when organizing

the 1996 tribute to the International Brigades, she visited the brigadiers left in Russia where she met the 'war-children' who used to gather in the Spanish Center of Moscow and whose situation deeply impressed her. The work on the situation of the ex-guerrilla was also born of an incidental meeting with Quico in 1998 (the same ex-guerrilla member who inspired Emilio Silva), who asked Cabra if AGE would be willing to defend his cause (Interview SP16). AGE was also partially born out of the aspiration to collect the disperse documentation on the civil war defeated outside Spain, including on the international brigades and 'war children'. Its concern with the preservation of documentation abroad is unsurprising when considering that Dolores Cabra is an historian and archivist and that Adelina Kondratieva was someone visibly interested in the preservation of personal memories that, due to advanced age, would soon disappear.

In fact, the sense of urgency over the preservation of testimonies and the remedying of situations considered unjust – which all the initiatives on 'historical memory' in one way or another attempt to do – has to be understood in a context where the civil war generation was rapidly disappearing. The 1996 tribute to the international brigades, to give an example, would not have been possible a couple of years later given the advanced age of all those who participated. This is a point always underscored by those who put the associative movement into motion, who were keenly aware that it was becoming too late for some and the last opportunity for others (Interview SP3, SP16).

3.6. The definitive return of the past to Spanish politics (2004-2008)

If less attentive observers could have easily missed parliamentary discussions on the past prior to 2004, very few could have failed to note that Zapatero's first government (2004-2008) broke with former patterns, bringing the 'historical memory' issue to the front of the political debate. The early decision to create an Inter-Ministerial Commission for the Study of the Situation of Victims of the Civil War and Francoism, announced in July 2004, culminated in the approval of what became known as the Historical Memory Law – which in fact bears a much more extensive title: *Law 52/2007 of 26 December which recognizes and amplifies rights and establishes measures in favor of those who suffered persecution or violence during the civil war and the dictatorship*. In essence, this Commission was in charge (1) of carrying out a study systematizing the rights of victims of the civil war and dictatorship who had been so far recognized by fragmented pieces of legislation, and, based on the identified gaps, (2) drafting

a legislative proposal establishing the necessary measures to grant them appropriate 'recognition and moral satisfaction' (art. 2c, Real Decreto 1891/2004). The then vice-president of the government, Maria Teresa Fernández de Vega, was designated as the head of the Commission, something which was interpreted at the time as a sign of its perceived importance. The fact that it took more than three years between the creation of the Commission and the approval of the final version of the law (at the very end of Zapatero's first legislature in December 2007) already speaks volumes about the difficulties the PSOE faced both in drafting what turned out to be a more complex issue than anticipated and in negotiating it with its parliamentary allies.

Other significant initiatives taken by the central government at the time – some of them victim-centered, and others (timid) acknowledgment steps – included the allocation of public funds for exhumation projects (Orden PRE/3945/2005); the symbolic declaration of 2006 as the 'year of historical memory' (Law 24/2006 of 7 July), following a draft proposal by IU-ICV[48]; and the creation of a Documentation Centre on Historical Memory in Salamanca (Royal Decree 697/2007 of 1 June). Moreover, two pending issues deserved specific laws of their own: (1) economic assistance to 'war children' (Law 3/2005 of 18 March) and (2) the restitution to Catalonia of the documents confiscated from the Catalan Government during the civil war (Law 21/2005 of 17 November), an issue Catalan nationalist parties had been vehemently insisting on for years, including ERC (*Esquerra Republicana de Catalunya* – Republican Left of Catalonia) – a party that, together with IU-ICV, constituted the parliamentary basis of support of Zapatero's minority government. Other issues were addressed through other types of measures throughout 2005 and 2006, sometimes following the recommendation of the Inter-Ministerial Commission, including (1) an upgrade in civil war pensions, (2) the establishment of regulatory bases for awarding financial reparations, (3) the authorization of expenses related to the removal of francoist symbols, and (4) a personal income tax exemption for reparations to victims of repression (Encarnación, 2014: 164).

Law 52/2007 of 26 December, commonly known as Historical Memory Law, was the most significant piece of legislation ever approved in Spain when it comes to the political treatment of the past, though its content is much less ambitious than its common designation would

[48] IU – *Izquierda Unida* (United Left) – and ICV – *Iniciativa per Catalunya Verds* (Initiative for Catalonia Greens) – formed a coalition in 2004-2008.

suggest. As Blakely puts it (2008: 324), symbolism triumphed over substance since, in legal-technical terms, the law was hardly necessary as most of its aims could have been achieved through specific governmental decrees or by amending existing legislation. With a total of 22 articles, a long preamble, and a couple of additional dispositions, the bill touches a wide range of issues, including: (1) a general moral recognition of those affected by any form of violence; (2) a declaration of illegitimacy of judicial condemnations dictated by political, ideological, or religious reasons; (3) improvement of compensation schemes and the creation of new ones for collectives previously uncovered; (4) assistance in the exhumation and identification of remains; (5) the withdrawal of Francoist symbols from the public space; (6) the prohibition of pro-Franco commemorations in the Valley of the Fallen (where Franco is buried); (7) a census on structures built with forced labor; (8) the amelioration of conditions for the extension of citizenship to the International Brigades; (9) measures on the acquisition and protection of documents as well as on the management of the General Archive of the Spanish Civil War; (10) extension of citizenship to descendants of the Republican exile; among others.

Although this bill was highly contentious and criticized on almost every ground, it nonetheless constitutes a radical departure from the manner the past had been dealt with at the institutional level up to then. It was the first time that a government granted visibility to this topic and assumed a compromise to address it, as well as the first time that reparatory and acknowledgment measures were discussed as a whole (rather than through fragmented pieces of legislation on specific subjects) and, as such, the first time they were openly debated in the Parliamentary plenary (rather than in less visible parliamentary committees). Whereas many have criticized Law 52/2007 on the grounds that its contents could have been addressed through less conflictual types of legislation, others defend that it was precisely this that made the law a privileged instrument of moral recognition and, therefore, a public acknowledgment act in itself. As a PSOE representative has put it: 'A law has a symbolic meaning that is especially valuable and pertinent when the content of the norm is one of public reparation' (DSCD, Num. 296, 31 October 2007, p. 14632).

To put it shortly, the law consolidates victim-centered type of measures (by ameliorating benefits and covering previously excluded groups) and improves Spain's record when it comes to public acknowledgment measures (condemning the dictatorship, recognizing victims, and dealing with public symbols), though there was certainly much room to be more radical in this regard. The law proved to be a contentious matter, coming under attack both from the right and

those to the left of the PSOE. The People's Party and more conservative sectors of society ferociously opposed its existence on the simple grounds that it was revanchist, opening old wounds and threatening the spirit of the democratic transition. Civil society associations and parliamentary groups to the left of the PSOE were no less critic, considering that the law fell short of what was expected in many regards. Among them are: (1) only declaring political/ ideological/ religious sentences *illegitimate* (with no legal consequences), instead of actually *nullifying* the sentences issued by Francoist courts[49]; (2) not taking the lead in the exhumations process, limiting itself to providing assistance to the associations and families; (3) putting the civil war and the dictatorship on a par with each other, rather than disentangling them; (4) excluding form the provision on the withdrawal of francoist symbols those with artistic, architectonical or religious value; (5) speaking only of the right to the recovery of personal and family memory and granting an individual certificate of reparation and personal recognition (upon the victims' request), and in this way 'privatizing memory'; and (6) emphasizing the centrality of the transition spirit and, indirectly, being equidistant about the two sides in the civil war and failing to recognize the II Republic as a legitimate regime.

3.6.1. Accounting for the enactment of Law 52/2007 of 26 December

Despite its many detractors, the so-called Historical Memory Law broke with former mnemonic patterns at the political level, including with the way the past had been dealt with under the PSOE's previous terms. To the question of why the PSOE was now ready to address an issue it had not tackled or even considered before, there are various possible answers, though there are good reasons to think some carry significantly more explanatory weight than others. Note that the factors mentioned below are meant to answer the question of why the PSOE was ready to put up with the symbolism of an overall law on 'historical memory' rather than simply address specific issues through separate and one-theme pieces of legislation (something that could be expected given the increasing pressures in this regard and the fact that some regional governments were already taking steps on related matters).

[49] This was one of the major issues of contention. Though there is evidence that the PSOE studied this possibility, it did not do so because of the unforeseen financial and administrative consequences of opening hundreds of thousands of legal cases. This would not only create room for a large number of financial compensation claims, but would also open the Pandora box of property restitution (as the seizure of assets was often part of sentences) (Interviews SP3, SP4, SP10).

Aguilar (2008a) summarizes the different factors put forward in the already quite burgeoning literature, underlining five different explanatory lines: (1) generational changes within the PSOE itself, with the rise of a 'war grandchildren' generation, who had a different outlook on the past compared to the 'transition generation', including Zapatero himself; (2) the idea that the PSOE had to live up to the parliamentary initiatives that it had backed or proposed during the PP's tenure and, similarly, honor the commitments assumed on the 20 November 2002 resolution, which had been left unfulfilled by the PP; (3) the fact that PSOE's term in office coincided with highly significant anniversaries, such as the 70th anniversary of the start of the civil war and the 30th anniversary of Franco's death; (4) the much needed support of parliamentary partners on the left (given that PSOE did not have an absolute majority), who were more strongly in favor of putting such issues on the political agenda; and finally (5) civil society pressure, including groups that were also the outcome of generational changes and who secured the support of international organisms.

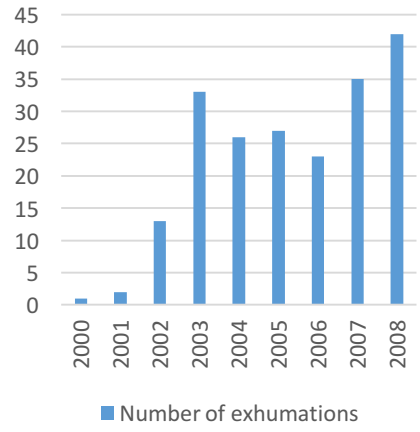
While all these factors are part of a propitious political environment, they differ greatly in their explanatory power. To start with the ones that offer little to no explanatory leverage, I consider that the idea that the PSOE had to honor previous commitments assumed while in opposition is quite naïve when one thinks of the usual gap in the behavior and rhetoric of parties that alternate between the opposition and the government. The fact that it had previously presented a legislative proposal requesting the annulment of politically motivated sentences under Franco, but later dropped this while in the government, is just one example of that. A different factor, which has little explanatory power, is the one referring to anniversaries. The best piece of evidence in this regard is the fact that the 50th or the 60th anniversary of the onset of the civil war (1986-1996) did not prevent the absence of official commemorations. A different factor one should be careful in emphasizing is the importance of generational changes and their different outlooks on the past. I deem that the emphasis should not be on generations *per se* but on the different political environments in which they grow up. Different generational outlooks are naturally endogenous and decisively shaped by the different contexts in which they are embedded. These provide inhibiting or facilitating conditions for the formulation of certain ideas and policies, and there is no doubt the grandchildren generation grew up in an incomparably more favorable setting, free from the political constraints of the transition and at an age when the transitional justice norm had already reached a tipping point. However, by itself, this is not a sufficient condition since political agents must have the motivation to transform an enabling environment into an actual policy. This is the more so in a setting where

a measure/idea had not been previously advocated or formulated as such, and therefore was not simply 'waiting in the oven' for the right political environment.

This is where the remaining two factors considered by Aguilar (2008a) come in. On the one hand, there are sources of positive pressure at the civil society level that raise the salience of the issue and find their different pathways to the political sphere, eventually contributing – even if indirectly – to tipping the political balance of costs *vs*. benefits in favor of policy implementation. In the case of the exhumations' movement, to give an example, such pathways involved the Spanish Ombudsman (*Defensor del Pueblo*) who, after receiving several complaints, included a three page-section on the exhumations of mass graves in its 2003 report (Defensor del Pueblo, Informe de 2003, p. 1352-1354), something that did not go unnoticed in the parliamentary scene. In the plenary debate of 1 June 2004, the PNV representative notes:

> *…we have been witnessing over the last few years a healthy awakening of interest in the recovery of collective memory. Citizens do not stop exploring new ways of casting a critical eye on the past (…). Families and those affected do not stop presenting initiatives and complaints to public powers claiming their full recognition as well as symbolic and economic measures that make justice to them*. (DSCD, Plenary Session, No. 13, 1 June 2004, p. 478).

Figure 3.10: Number of exhumations per year



There are indeed good reasons to think that Spain's recent past would not have become such a salient issue if it were not for the associative scene at the time and, in particular, the symbolically charged phenomenon of exhumations which, as figure 3.10 shows, registered a peak the year before Zapatero took office. However, if it is logical to assert that Law 52/2007 would hardly have materialized without such an impulse (making civil society activity a *necessary condition*), it is naïve to think that this was a sufficient factor on its own, especially in light of the premise that the exhumation issue could have been addressed through other (less visible and less conflictual) means. This is why the remaining factor in Aguilar's list (2008a) proves, in my opinion, crucial. The PSOE's condition of minority government meant that it had to look for parliamentary allies to its left, among

which were parties more strongly in favor of putting the 'historical memory' issue on the political agenda. The parliamentary support of ERC and IU-ICV was, in fact, a replication of the agreement achieved at the autonomous level in Catalonia in December 2003, when the so-called *Tripartito Catalán* took over. Though there is no mentioning of the issue in the latter's joint program, the Catalan government already had a plan to create a Committee on Historical Memory as early as February 2004 (*El País,* 10 February 2004). The support of these parties for this issue, however, did not come out of thin air, and civil society dynamics were certainly relevant in putting it in their agenda (even if their motives went beyond satisfying a bottom-up demand), which reinforces the (indirect) importance of this factor.

An obvious rival explanation to these would be that the PSOE simply had a pre-established preference based on a well-anchored ideological sympathy. This goes in the direction of those who boil it down to a personal preference of Zapatero, who was a grandson of a Republic army officer executed during the war and therefore sensitive to such issues (Raimundo, 2012: 97-98). The fact that Zapatero invoked his Republican grandfather during his investiture speech is often said to be proof of his intentions. Nevertheless, this reasoning is flawed since Zapatero did not mention the 'historical memory' issue at all during his speech (despite being brought up by ERC and ICV during the investiture debate) and the actual quote of his grandfather had little or nothing to do with it – 'my ideals are brief: an infinite craving for peace, love for the good, and social enhancement of the humble' (DSCD, Plenary Session, No. 2, 15 April 2004, p. 24). At best, Zapatero's personal sensibilities can be said to have created a positive predisposition to address this issue. The fact that Zapatero himself is from León and was a representative of this region for many years naturally made him familiar with the exhumations process and the civil society initiatives born there, including the ARMH (Interview SP9).

More importantly, explanations based on pre-established preferences can be ruled out with a good degree of certainty based on the absence of any indication that the PSOE would put forward a legislative piece of this type prior to its election. This is the more so when ones takes into consideration that its 200-pages long electoral program became known as a 'catch-all program', covering a wide variety of issues, of which the 'historical memory' theme was not a part. Instead, the program made a brief reference to three separate issues – (1) expansion of pensions to 'war children', (2) harmonization of pensions between civil war mutilated and military officials, and (3) the creation of a Centre for Documentation and Research on the Civil War and Francoism in the Salamanca Historical Archive – which suggests that, prior to its

election, the PSOE's intention was to continue to address specific issues through fragmented pieces of legislation rather than have a law with the degree of symbolism of Law 52/2007 of 26 December. The fact that the decision to create the Inter-Ministerial Commission for the Study of the Situation of Victims of the Civil War and Francoism was born out of a parliamentary initiative, presented less than two months after the investiture of Zapatero, further supports the proposition that the dynamics of parliamentary alliance-building in the context of a minority government were important in giving shape to the law under study.

Interviews with political representatives at the time partially confirm the assumptions above. Among the PSOE representatives who were in some way involved with the topic, and when asked where the idea of the law had come from, they either pointed towards (1) the demands of people and associations around them, (2) the fact that the law itself was an outcome of parliamentary initiatives, (3) the personal conviction of Zapatero, or (4) the dynamics of pact-making with parliamentary allies in order to get the needed parliamentary support (Interviews SP9, SP10, SP11, SP12). Note that the last point was spelled out by one high-profile representative in a very resolute way, but was not confirmed by the remaining PSOE representatives. ERC deputies, on the other hand, are firmly convinced that the pressure of left-wing parties, and in particular ERC, obliged Zapatero to commit to a Law he had not foreseen, as this was part of the conditions ERC had spelled out in order to support the PSOE's investiture (Interviews SP6, SP14, SP15).

It is unclear, however, if this was indeed part of an exchange currency in the investiture agreement or if only later did Zapatero's government decide to respond to parliamentary initiatives and in this way please its parliamentary partners – while at the same time advancing a topic which fitted well with Zapatero's agenda of civic republicanism and protection of minorities.[50] Though both ERC and ICV mentioned the 'historical memory' issue during Zapatero's investiture, there is little indication in this debate that it was a major priority for these parties and Zapatero, in his various responses, did not address it (DSCD, Plenary Session, No. 2, 15 April 2004). But in a similar vein to what was already taking place under the PP's rule, various parliamentary groups – CiU, ERC, GMX, IU-ICV, EAJ-PNV – started to put forward parliamentary initiatives on related measures as early as April 2004. Zapatero's

[50] Note that Zapatero's term was known for its socially progressive policies, namely when it comes to gender equality, liberalization of divorce, legalization of same-sex marriage, withdrawal of religious symbols from public spaces, etc.

government was quick to respond to them, endorsing a series of propositions on the recognition of victims in June 2004 and deciding on the creation of the Inter-Ministerial Commission for the Study of the Situation of Victims of the Civil War and Francoism at the end of July (materialized in September through Royal Decree 1891/2004).

Although the law would be severely criticized by the PSOE's parliamentary allies for not being radical enough, the content and language of the norm would actually be importantly shaped by them, in particular by IU-ICV. Between the moment a timid draft bill was introduced in parliament in September 2006 and its actual approval in October 2007, more than 350 amendments were introduced, some of which responsible for the most significant (and most controversial) aspects of the law, such as the removal of francoist symbols (Encarnación, 2014: 171; Blakeley, 2008: 319-323).

3.7. Why has Spain not (yet) gone further?

Law 52/2007 of 26 December was the most significant step the Spanish state took up until today when it comes to legislation that falls into the broader aims of the transitional justice discipline. The 2008 economic crisis would dominate Zapatero's second turbulent term (2008-2011), pushing other issues to the margins and dictating the legislature's anticipated end. As expected, the ruling party after 2011, the People's Party, had not demonstrated any concern with the topic. The PP's leader had already announced in the 2008 electoral campaign that no public money would be channeled towards this issue under his rule, thus ensuring that part of Law 52/2007 would become dead letter under the PP's legislatures. The Office for the victims of the Civil War and the Dictatorship, created in 2009 to coordinate exhumations, was suppressed by the PP in 2012. The number of exhumations would go from an all-time high of fifty-five in 2010 to eleven in 2013.[51] Concomitantly, media attention towards this issue has decreased (Figure 3.4).

If progress has occurred since then, it is thanks to the activities of some autonomous communities that have enacted their own dispositions to complement or advance Law 52/2007. This is most notably the case of Navarra in 2013, the Balearic Islands in 2016, and Andalucía and Valencia in 2017, where the approval of such laws tended to go hand-in-hand with left-

[51] http://www.politicasdelamemoria.org/wp-content/uploads/2015/09/Exhumaciones-desde-el-a%C3%B1o-2000-CSIC.pdf

wing parliamentary majorities.[52] The issue seems to have gained somewhat of a new momentum in 2017 with both *Podemos* and the PSOE introducing draft bills in the Congress of Deputies that intend to take the so-called Historical Memory Law much further, with a far bolder language and more radical proposals (BOCG, Num. B-190-1, 22 December 2017). At the moment of writing – and after the PP was ousted by a no confidence vote in June 2018 –, the new PSOE executive has confirmed this intention, going as far as to speak of the possible creation of a Truth Commission. The change of attitude of the PSOE has to be understood in the context of the arrival of a strong and radical left-wing competitor to the parliamentary scene (*Podemos*) with whom the PSOE now has to share a significant part of its political space.

Interestingly, the rise of *Podemos,* and the popular mobilizations and economic/ political crises in which it was embedded, were accompanied by a discourse that questioned the legitimacy of the democratic transition and pointed towards its deficiencies in various respects, linking the shortcomings of the past with the current quality of Spain's democracy. By partially shattering the transition's immaculate image, the recent crises created more room for counter-discourses, thus giving further strength to the premise that Spain's democracy paid insufficient attention to the victims of francoism and the civil war. This might help create greater possibilities for the advancement of TJ measures if one considers that part of what was deterring the PSOE before (at least rhetorically) was its endorsement of the transition pact. This was visible in the Historical Memory Law itself – which starts its preamble by praising the spirit of reconciliation, mutual understanding and integration that characterized the democratic transition –, but also in the declarations of political representatives. Take the following statements by one member of parliament who was often the spokesperson of the PSOE on this matter*:*

> *Is it possible that Spanish society settles its debt with its history without breaking the basis of its current coexistence and the principles of reconciliation and pardoning that guided the democratic transition? – this is the central question produced by the debate on the so-called Historical Memory Law (…) The law goes as far as it can go without undermining the basis of coexistence; it settles the remaining debts with our history without reopening the wounds* (*El País*, 14 October 2006)

[52] Navarra: *Regional Law 33/2013 of 26 December on the recognition and moral reparation to the victims of repression as a result of the 1936 military coup, of Navarra;* Balearic Islands: *Law 10/2016 of 13 June for the recovery of missing people during the civil war and francoism, in the Balearic Islands;* Andalucía: *Law 2/2017 of 28 March of historical and democratic memory of Andalucía;* Valencia: *Law 14/2017 of 10 November of democratic memory and for the coexistence of the Valencian Community*.

While virtually no one would take seriously the argument that questioning the transition pact today would endanger coexistence, to speak of the transition's moral cop-out – its continuities with the Franco regime and its oblivion of those who fought against it – is to put into question what became a quasi- 'founding myth' of contemporary Spain. As one of the most significant and transformative historical periods in Spain's recent past – and unlike a long previous history of conflicts and dictatorships – the Spanish transition came to be regarded by the political elite and the general public as a highly successful moment. By breaking with past divisions and allowing for the construction of the modern and European Spain that the PSOE was so keen on promoting, the transition is one of the very few historical moments most Spaniards are proud of, thus performing an important identitarian function. This is confirmed by a 2008 survey: when asked about Spain's most important historical event, 40% responded it was the transition and 74% confirmed they took pride in Spain's transition process.[53] Though this number has decreased to 67% in 2018, it is still high.[54] Underlying the image of a successful transition is often the rejection of what is seen as a tragic and excessively confrontational past, in a demonstration of how the memory of a fratricidal civil war still weighs heavily over transitional justice debates. The testimony of a different PSOE representative puts this into evidence:

> *I am not going to dishonour the generation of my parents, who made the transition, to honour the generation of my grandparents, who made the war. The generation of my grandparents was not better than the one of my parents, on the contrary. The generation of my grandparents was quite mad. And the generation of my parents sensible. To say they were cowards, or that they were afraid, is unjust and false. They learnt to overcome resentment and fear. (Interview SP11)*

If the mainstream views over the merits of the transition, and the concomitant rejection of past divisions, are part of the reason why Spain has progressed so little and so slowly in the transitional justice scale, one also has to consider the extent to which the Historical Memory Law in itself constituted a stepping stone, breaking new symbolic ground that contributed to the normalization of related issues. Today, speaking of exhumations or the withdrawal of francoist symbols is a far less contentious matter than before. By changing the relationship of

[53] CIS, Estudio nº 2.760, April 2008 http://www.cis.es/cis/export/sites/default/-Archivos/Marginales/2760_2779/2760/Es2760.pdf
[54] CIS, Estudio nº 3223, September 2018, http://datos.cis.es/pdf/Es3223mar_A.pdf

political institutions with the past and altering the general mnemonic regime, the law established some concrete basis that gives actors more space to make claims aimed at taking Spain a step further, following the incremental and stepwise fashion in which transitional justice measures are expected to be put in place.

A different but inter-related matter is the relationship of the Spanish judiciary with this issue. As examples in Latin America have shown, the judiciary might play a significant role in pushing transitional justice measures forward, particularly perpetrator-centered ones. This has not been the case in Spain, with the notable exception of Garzón's failed attempt to launch a criminal investigation of Franco-era crimes in October 2008. In a bold and sweeping resolution, Garzón used the language and legal reasoning that was being practiced elsewhere, arguing that the offenses under investigation constituted cases of enforced disappearances and crimes against humanity which, because of their ongoing (in the case of disappearances) and grave nature, should not be subject either to statutory limitations or to amnesty laws. By claiming jurisdiction over hundreds of thousands of crimes committed between 1936 and 1952, Garzón was considered to have overstretched jurisdictional and procedural principles (Gil Gil, 2012; Guriano, 2010). As expected, this created much controversy, with the chief prosecutor appealing the resolution and Garzón dropping it, shortly before the *Audiencia Nacional* ruled against it. Although a lot could be said about the legal debate that accompanied and followed this episode, there are two crucial aspects to keep in mind when it comes to understanding the (non-)relationship of the Spanish judiciary with transitional justice.

The first is that it is objectively more difficult, from a legal point of view, to use Garzón's reasoning for crimes committed in the 1930s and 1940s than it is in Latin America for crimes committed in the 1970s. This is because, in light of the principle of legality and the general prohibition against retroactive law – according to which no one can be held responsible for an offense which did not constitute a crime at the time it was committed –, crimes against humanity had not been codified as such at the time, neither in national nor in international law. In addition, and as Gil Gil (2012) points out, other international legal instruments that could be used to make Garzón's case (such as the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity [1970] or the International Covenant on Civil and Political Rights [1976]) are also posterior to the crimes at hand and therefore raise issues of retroactive (in)applicability. More obviously, the fact that those responsible for the 1936 uprising are now dead prevents the realization of a regular trial.

The second aspect one should take into account is how bold Garzón's actions and arguments looked like in a context where there were little to no social or political basis of support. As Lisa Hiblink (2014) persuasively argues when comparing the Chilean case to the Spanish one, judicial responsiveness is not simply dependent on judicial attitudes, but it is also significantly shaped by historical, social, and political dynamics. In cases such as that of Chile and others in Latin America, judicial responsiveness was stimulated by sources of support both at the political level – with elites who encouraged legal accountability and judicial reform – and at the civil society level, with the long-term presence of bottom-up sources of legal mobilization, who had since early on filled one legal charge after the other, aided by a network of human rights lawyers, and engaging in promoting legal-ideational pedagogical changes. To assume that judges in Latin America are more progressive than in Spain is to downplay the important fact that the former had been exposed to external sources of pressure for a long time while the latter have not.

In addition, because what is usually at stake are amnesty laws which prevent the prosecution of agents of the former regime, one has to take into consideration the context of approval of such laws and their perceived degree of legitimacy. While in Chile a self-amnesty was sanctioned by the agents of the authoritarian regime themselves in what was a clear self-pardon, the context of the Spanish amnesty law is, as we have seen before, radically different. As in Brazil, questioning the legitimacy of the amnesty law in Spain is more problematic given that it was a demand of the democratic opposition, who enjoyed mass public support. In its case against Garzón's decision, the Chief Prosecutor of *Audiencia Nacional* highlights that it is a 'judicial mistake to question the legitimacy of the origin of this norm and, what is worse, attribute it with the stigma of being a 'law of impunity'' precisely because, unlike the Argentinian or Chilean counterparts, the Spanish Amnesty law was 'an act of democratic political forces, widely supported by Spanish society and approved by (…) the same parliamentary chambers that drafted and approved the Constitution in 1978' (quoted in Chinchón Álvarez, 2012: 31).

Note, however, that the setback produced by the failure of Garzón's initiative actually gave visibility to the cause and prompted the search for alternatives, the most remarkable being the so-called *querella argentina*, a complaint filed in Argentina in 2010, using the principle of universal jurisdiction. Although requests for extradition have been refused by Spain so far, the decision of an Argentinian judge to open a broad case on crimes against humanity committed

in Spain between 1936 and 1977 has given further strength to the pro-accountability movement, with hundreds of other complaints added to the case since then and with new and old collectives uniting under a National Coordination Group in Support of the Argentinian Complaint. Moreover, by requesting the extradition of individuals linked to the last stages of the regime, the investigation is putting the abuses of this period under the spotlight, thus performing an acknowledgment function. This is a vivid example of how the consolidation of a transitional justice norm – anchored on a relatively new legal language – has opened up opportunities for domestic groups and helped individuals resignify their experience of victim (Montoto Ugarte, 2017).

3.8. Conclusion

Spain constitutes a prime example of what for a long time was a consensual mnemonic regime, where neither political nor social voices made substantial demands for different forms of public reckoning with the past. In fact, Spain's mnemonic regime at *t0* is not only characterized by the lack of demands, but by a tacit elite agreement to avoid the politicization of past divisions and turn the page on a conflictual past. On the one hand, Spain's transition afforded few alternatives, given the balance of forces at the time and the particularly unstable transition context. Not only was there a fear of regime reversal by the military/ hardline factions, but non-state political violence was giving substance to those fears. On the other hand, Spain's particular fratricidal past and the perpetuation of those divisions over the dictatorship made the emphasis on reconciliation and rejection of the past all the more pertinent, in light of the ultimate goal of building a democratic and integrated polity. The 1981 coup d'état gave further substance to those fears, contributing towards preventing possible bottom-up demands. Meanwhile, the mainstream left embarked on a forward-looking project of democratic consolidation, modernization and Europeanization, a *quasi*-nation-building project compatible with the transition's premises of coexistence and rejection of past divisions; all at a time in which the nascent transitional justice norm had not yet travelled to Spain.

As a result, Spain's transitional justice record is often characterized as 'too little, too late'. Even though there were reparatory measures enacted before the so-called Law on Historical Memory in 2007, this point is still fair when considering that the first compensatory measure did not come until 1990. Moreover, the desire to avoid any sort of political engagement with the past was quite noticeable and only changed significantly from the moment the Popular Party took

over. Thus, the newfangled *preference* of the left to explicitly bring the past to the political debate cannot be dissociated from its relative loss of power and the use of the past as a political and ideological weapon, even if there were important external dynamics contributing to put the past in the political agenda – namely the controversy provoked by the Pinochet affair and growing societal interest in the civil war and the dictatorship, including unprecedented bottom-up initiatives.

In accordance with the emergent visibility of the issue in the public and political scene – and, importantly, with the concomitant interest of the radical left and regional nationalist parties on the issue –, the PSOE of Zapatero decided to take a symbolic step by transforming a conglomerate of different issues into a law which, despite all the controversy, denoted the will to morally engage with the recent past for the first time. The idea that the implementation of TJ measures responds to a combination of (1) external sources of pressure and (2) political decision-making actors with a *positive preference* is therefore well evidenced by the Spanish case.

CHAPTER 4. Transitional Justice trajectories in context: The Uruguayan case

Despite its distinctive history of almost uninterrupted democratic rule during the XX century, Uruguay did not escape the authoritarian tentacles that spread throughout the whole of Latin America during the Cold War. After an already tense decade during the 1960s, a civic-military dictatorship was effectively established in 1973, lasting for approximately twelve years (1973-1985). This period is commonly seen as an unfortunate interruption of an otherwise positive history of democratic rule, anchored on the values of citizenship, civism, political accommodation, strong institutions, and social peace (Roninger, 2012: 53). This did not prevent an increasingly restless military from taking over politics in 1973 and cracking down on dissent. Left-wing sectors were the general target, with Uruguay becoming one of the countries with the highest rates of political incarceration, earning the infamous reputation of 'torture chamber of Latin America'.

Unlike Spain and Brazil, but in line with its most immediate neighbour Argentina, the issue of justice for state-sponsored crimes emerged as a salient concern during the transition to democracy, becoming an object of political conflict. Human rights NGOs, victims, families and their respective political circles were quick to place the issue on the public agenda, benefiting from a social movements' scene that was receptive to the human rights discourse. However, the negotiated nature of the transition and the election of the moderate/conservative Colorado Party determined the hasty approval of the so-called Expiry Law, which would put an end to the criminal complaints families and victims started presenting to courts. The issue gained even larger proportions when, not conformed with the approval of this law, families started a procedure for setting up a referendum. Even though the pro-Expiry Law vote would eventually triumph and the topic would lose much of its salience for the years to come, Uruguay's conflictual mnemonic regime during the transition period puts it on a different path from Brazil and Spain. If it is the case that political contingency also outplayed normative considerations, the bottom-up push for TJ measures was, comparatively speaking, relentless. In this, some meso-level feature of the Uruguayan case are important: rather than coming from an isolated

group of families, TJ-related claims were also espoused by human rights groups, the main trade union confederation (PIT-CNT), as well as left-wing political figures.

With its members and basis of support being the main targets of repression, denunciations often came from left-wing political circles. Notwithstanding the divisions within the heterogeneous *Frente Amplio* (FA) – a coalition of left-wing parties formed in 1971 –, the FA appeared committed to the language of human rights, opposing the Expiry Law and supporting the referendum intended to revoke it. This also sets Uruguay in a different route from other cases since it could be to an extent expected that, as soon as the left would reach power, advancements in TJ policies would follow. This was indeed the case from the moment the FA took office in 2005, though its path was not always smooth, consistent, or determined. Its TJ-related debates show that the rapport of apparently sympathetic parties with such policies is mediated by (1) strategic considerations, namely in terms of electoral support, and (2) different views on how the past should be approached, which in turn depend considerably on whether it is read (2.1) through a human rights lens (repressive regime vs. innocent victim) or (2.2) through a purely political lens (combatant vs. combatant / regime vs. resistance).

Nevertheless, and despite the fact that the left produced more robust TJ measures, the first TJ initiative actually came from a member of the Colorado Party. The decision of President Jorge Batlle to create an investigative commission on the fate of the Uruguayan disappeared in the year 2000, in spite of appearing as a surprise to almost everyone, came after the issue resurfaced in the second half of the 1990s, with various new sources of pressure visibly bringing the topic back to the public scene. Since then, and particularly from the moment the left won the national elections at the end of 2004, the Uruguayan state has taken visible steps in terms of investigations, reparations and, more significantly, criminal prosecutions. Such steps, however, have been slow and incremental rather than fast and resolute. Uruguay has neither engaged in large-scale prosecutions like Argentina, nor made use of international law (which in practice facilitates convictions as it allows for the circumvention of both amnesty laws and statutes of limitations). At first, the executive opted for a strategy of 'interpretative narrowing' of the Expiry Law – effectively excluding *some* cases from its application –, and only at the end of 2011 did it manage to approve an 'interpretative law' that in practice did away with the Expiry Law. This gradual move created a Janus-faced situation whereby Uruguay is, on the one hand, one of the very few countries to have convicted two former heads of state and, on the other, a case where a slow, inefficient and sometimes reluctant judiciary lacks enough state-sponsored

resources, technical assistance, and information in order to deal with the hundreds of criminal cases still pending (Lessa and Skaar, 2016).

4.1. Contextualization

After a relatively troubled XIX century, marked by independence from Spain, foreign intervention, and recurrent infighting between the two dominant political groups – the conservative rural *Blancos* and the liberal urbanized *Colorados* –, a tradition of political negotiation/ power-sharing was progressively forged, culminating in the creation of a Swiss-inspired collegial executive in 1917. The XX century's first three decades would inevitably become associated with one of the (if not *the*) most respected political figure in Uruguay's history – José Batlle y Ordóñez –, responsible not only for the institutionalization of a consensus-based political model, but also for major social and economic reforms that are said to be the basis of the modern Uruguayan state. These included the precocious creation of a modern welfare system, advanced labour rights protection, free education, nationalization of services and enterprises, secularization of the state, among others (Caetano and Rilla, 1994). As Weinstein (2007: 67) points out, Uruguay had free secular education before the British, an eight-hour workday before the Americans, and women enjoyed the right to vote before their French counterparts. Its democratic life – including citizens' noteworthy levels of political consciousness – together with relatively high standards of socio-economic well-being have earned Uruguay the nickname of 'Switzerland of Latin America'.

In large part as a result of this legacy, Uruguay's collective identity has been forged around the values of citizenship, universal entitlements, strong institutions, and democracy itself (Roniger, 2012: 53). The model of consensual resolution of political conflict is said to have lessened the tendencies towards political polarization, and blurred ideological differences between political parties (Roniger and Sznajder, 1999: 10). Nevertheless, the image of a 'civil and civilized' nation prevented neither a first authoritarian interlude (from 1933 to 1938) nor a period of growing social unrest throughout the 1950s and 1960s. Fuelled by an economic downward spiral – including high inflation levels and declining living standards –, social and political tensions arose. Growing labour and students' mobilizations at the bottom were accompanied by a weakened and increasingly fragmented political system at the top. The gradual loss of faith in the political system's representativeness and mounting ideological polarization gave birth to various left-wing manifestations, most prominently the unification of the labour movement into

one large labour union in the mid-1960s – *the Convención Nacional de Trabajadores* (CNT) – and the parallel fusion of various left-wing groups and political sectors into one political party – the *Frente Amplio* – in 1971 (Barahona de Brito, 1997: 40).

Yet, the most radical manifestation of all was the emergence of a revolutionary urban guerrilla movement in the 1960s – the *Movimiento de Liberación Nacional - Tupamaros* (MLN-T) –, initially devoted to redistributive action (robbing banks and businesses and distributing stolen goods among the poor) and later turning to more violent forms of action, perceived as a legitimate means to destitute the political and economic powerholders that upheld a capitalist, unequal, and dependent nation (rather than the desired socialist, egalitarian and self-governing one) (Weinstein, 2007: 70-71). Contrary to the small and socially isolated armed groups that emerged in Brazil during the dictatorship, the MLN-T had a more significant social impact, with estimates placing the number of members between 4,000 and 5,000 (in a country that had a little more than 2,5 million people at the time) (Lessa, 2003). But while it attracted some social sympathy during its first 'Robin Hood' stage, it lost much of its popular support when it turned to more violent actions at the end of the 1960s (*Idem*).

Uruguay took gradual but visible steps towards a non-democratic state from 1968 onwards when, in response to social agitation, the government enacted a limited form of martial law, suspending or restricting various civil rights and legal guarantees. This was followed by an escalating series of actions by the MLN-T (who benefited from a massive influx of new recruits), and the concomitant involvement of the military in increasingly repressive policies, not only towards the MLN-T, but also against forms of social mobilization (Lessa, 2013: 35). The process of 'militarization of the state' made a further qualitative leap, however, from the moment the military was put in complete charge of anti-subversion operations in 1971, after the mass escape of over 100 Tupamaros from prison (Barahona de Brito, 1997: 40). From then onwards the military – given carte blanche and unhampered by judicial constraints – went far beyond any previous administrations in the employment of brutal repressive techniques, applied in a systematic and sustained manner (Weinstein, 2007: 72). A state of 'internal war' was declared in April 1972 and what was left of individual liberties and constitutional guarantees suspended, with military courts being given jurisdiction over a wide range of civilian offenses (Lessa, 2013: 35). This effectively meant that judicial protection and guarantees of due process were eliminated, with the judiciary and the parliament losing all control over arrests, making it virtually impossible to know who had been detained or where (Barahona de Brito, 1997: 41-

42). In the ensuing months, the army would successfully obliterate the guerrillas' infrastructure, capturing hundreds of active supporters and detaining thousands of others (Weinstein, 2007: 72).

This slow-motion move towards authoritarianism was consummated in 1973 in two distinct occasions: the first was in February, when President Bordaberry accepted to put the executive under the supervision of the newly established National Security Council (CONSENA), composed of commanders-in-chief of the armed forces and civilian ministers; the second when the same President decided to dissolve the Parliament in June 1973 in response to its members' refusal to comply with the military's demand of stripping one left-wing representative of parliamentary immunity (Lessa, 2013: 35; Barahona de Brito, 1997: 40). The labour union confederation (CNT) reacted with a two-week strike that culminated in a massive wave of arrests. Bordaberry would then proceed to dissolve the CNT, ban left-wing political organizations, continue to grant leeway to repressive measures, and place army officers at the head of the major state-owned enterprises (Roniger and Sznajder, 1999: 13). It should be noted that, even though inattentive observers sometimes assume that Bordaberry's *autogolpe* was a direct response to the Tupamaros' guerrilla activities, it is common historical knowledge that by June 1973 the military was already in control of the guerrilla movement (Roninger and Sznajder, 1999: 25). The coup was more a result of the pressure of the military for a greater political role in light of the high levels of social agitation and the perceived need to demobilize/ depoliticize workers and re-establish 'order' (Caetano and Rilla, 1987; Lessa, 2013: 36). It was also not a *coup d'état* in the strict sense of the word – i.e. usurpation of civilian power by the military – but rather what many have described as an *autogolpe*, given the connivance of the then ruling president (Rico, 2015: 48).

About 15,000 former politicians were banned from engaging in any political activities (Fourth Institutional Act, 1976). This covered anyone who had stood for office on the left as well as those *Colorados* and *Blancos* who had actually held office (Gillespie, 1986: 177-78). While the left and the large majority of the *Blancos* opposed military rule, the position of the Colorado party was more ambiguous. Its most conservative factions (the *Pachequistas*) promoted and participated in authoritarian rule whereas other members made their opposition clear, though most of this party's members had no actual need to go into exile (Gillespie, 1986: 178). Pro-democracy forces would, however, take over in the 1982 internal party elections, giving renewed credibility to the party.

4.1.1. Repression's characteristics

Having already defeated the most subversive enemy of all, Uruguay's armed forces used repression more as a means of control – rather than physical destruction – of political dissent, in contrast to Franco's first stage, but more in line with Brazil. As one of Roniger and Sznajder's (1999: 26) interviewees eloquently puts it, 'they operated as a social police force that, correcting, disciplining, and cutting the ill branches, are pruning the tree [Uruguay] (…) They wanted a system in which the tree would not get infected anew, but basically they liked the tree they had'. In accordance, and as a way to discipline the ill branches, the regime would make large use of massive arrests, torture and prolonged imprisonment as well as a system of complete 'invigilation of society'. Aided by the geography and demography of the country – with 50% of the less than 3 million inhabitants (2.788,429 in 1975) living in Montevideo –, the monitoring and repressive apparatus of the state thoroughly and deeply penetrated society, to an extent that many considered Uruguay to be the closest approximation of the Orwellian state (Loveman, 1998: 503). The best example of that was the classification of all citizens in an A, B or C category according to levels of political reliability. For that, the state apparatus counted with an increase in police and military personnel that went from 42,000 to 64,000 individuals in the space of eight years (1970-1978) (Weinstein, 1988: 51).

Uruguay is said to have had the highest concentration of political detainees in the world at some point during the dictatorship, gaining the dreadful reputation of 'torture chamber of Latin America' due to its systematic application to all detainees (Loveman, 1998: 505; Lessa, 2013: 39). Estimates say that about 2% of the population was detained and tortured, with about 5,000 to 6,000 people being held as long-term political prisoners (*Idem*). This more or less coincides with the statistics put forward by SERPAJ's *Nunca Más* report (1989), which calculates that about 18 in each 10,000 citizens were prosecuted by military justice and 31 in each 10,000 were incarcerated. The Lawyers Committee for International Human Rights (1985: 52 quoted in Loveman 1998: 505) goes as far as to estimate that one in every 47 Uruguayans suffered some form of repression, whether house arrest, torture, beatings or a house raid. According to SERPAJ's *Nunca Más* report (1989), among those who were prosecuted by military justice, the majority came from two large detention waves: the first went from 1972 to 1974 and targeted mostly the MLN-T while the second occurred between 1975 and 1977 and focused on left-wing political organizations. A survey in the same report confirms that repression was particularly

targeted at politically engaged individuals, with 80% of the detainees declaring themselves to be active political militants (18% of which occupied leadership positions). Furthermore, the report confirms the extensiveness of the use of torture, with 99% of the prisoners interviewed stating they had been tortured. According to an ex-Navy member, torture was not only used as a means to extract confessions, but was also widely perceived as a political instrument of ideological destruction of the opposition (SERPAJ, 1989). In the words of Pion-Berlin (1994: 109-110), 'cycles of physical degradation and recuperation were purposefully and consistently applied with the objective of breaking the will of prisoners in order to acquire information' and 'send a chilling signal to all the political opposition'.

Uruguay had a fair share of 'disappeared'/ secret executions too. These were often a way to cover up deaths as a result of torture rather than a prime repressive method. Numbers are still debated, but the Human Rights Secretariat has recently officially updated them to 123 politically motivated assassinations and 192 cases of forced disappearance (Lessa and Skaar, 2016: 78). These numbers are superior to the ones put forward by the first state-sponsored investigative commission – the Peace Commission –, which pointed to a total of 170 cases. Revealingly, only 26 of them were said to have occurred in Uruguayan territory, with the majority (128) having taken place in Argentina, the country with the largest number of Uruguayan exiles (Lessa, 2013: 41). This was mainly a result of *Operación Condor*, a clandestine US-backed program which allowed the various Latin American security services to share information and coordinate their repressive activities. Sometimes transferred to Uruguay in secret flights, sometimes directly detained, disappeared or assassinated in Argentina, political opposition groups were the evident target of these actions, with the *Partido por la Victoria del Pueblo* (PVP) and the *Grupos de Acción Unificadora* (GAU) registering the largest number of victims, concentrated in the period 1976-1978 (SERPAJ, 1989). It should be noted that, among those whose bodies appeared in Buenos Aires, there were some preeminent political figures that would become the most visible faces of repression for the decades to come. One was Senator Zelmar Michelini – a founding member of *Frente Amplio* who had already been a senator and a minister while in the *Partido Colorado* – and the other was Héctor Gutiérrez Ruiz – a representative of the *Partido Nacional* (the second largest political party) who at the time of the coup was the President of the House of Representatives. They were both amongst the most vocal and respected voices against Uruguay's authoritarian drift.

Finally, a less severe but nonetheless highly impacting result of political repression that should be mentioned – in particular for its large proportions – is exile. Estimates vary from 28,000 to 62,000 exiles on the low end and go as high as 300,000 or 400,000 on the higher one (Skaar, 2015: 76). Markarian's (2005: 68) comprehensive study on the ideas and actions of the exile estimates that between 1964 and 1981 almost 14% of the Uruguayan population left the country either for political or economic reasons, half of whom fled between 1973 and 1977, right after the coup. The community of political exiles was particularly active in denouncing the repressive situation in Uruguay to international organisms, in particular Amnesty International and the US Congress (Markarian, 2005). The latter suspended all military aid to Uruguay in September 1976 and Amnesty International launched an international campaign against the widespread use of torture in Uruguay that same year, classifying the country as 'one of the [world's] worst offenders of human rights' (AI 1977: 158). Although sceptical of the language of human rights at first – among other reasons, for its depoliticized focus on bodily harm rather than on the political experience/ political goals of those harmed –, the exiled community progressively adopted the human rights language as a means to mobilize the international community against the regime (Markarian 2005). They benefited from an international opportunity structure given the prominence that language was acquiring in international circles, with Amnesty International gaining the Nobel Peace Prize in 1977 for its campaign against torture and with Jimmy Carter making human rights a cornerstone of American foreign policy that same year.

4.1.2. The transition's political context

Uruguay's strong democratic tradition is perhaps part of the reason why the regime never entirely abandoned references to democracy and to Uruguay's traditional two-party system, which would supposedly be restored once subversion had been eliminated (Gillespie, 1986: 177). Nowhere was this more visible that in June 1976 and November 1980. In the first occasion, President Bordaberry was removed from office after proposing a controversial constitutional project that foresaw the elimination of all political parties, to which the armed forces responded they did not wish to share 'the historical responsibility of suppressing the traditional political parties' (Lessa, 2013: 45). The second was when the regime started to look for means to legitimize itself, announcing as early as 1977 that a draft of a new constitution would be submitted to a national plebiscite. To be sure, there was nothing very democratic about the proposed constitution, but its submission to a referendum in November 1980 says

something about the regime's desire to legitimize its institutionalization, the same way that the lack of electoral fraud is possibly an indicator of its deference to voting procedures.

The rejection of the constitutional reform by 57,9% of the electorate constituted a major blow for the regime and took almost everyone by surprise (after an intense campaign period in which only the YES camp was given abundant visibility and tried to sell it as a vote for the 'orderly return of democracy'). Uruguayans sent a strong signal of rejection to the dictatorship and therefore initiated what is usually considered the start of the end of the regime – though it would take another four years and a round of failed negotiations for democratic elections to finally take place in November 1984. The military kept in control of the transition process, announcing a three-year transition plan in July 1981 and bringing representatives of traditional political parties to the negotiation table (among those who had not been proscribed). These were allowed to resume their political activities in 1982 and internal party elections were scheduled for November 1982, though left-wing political parties were excluded. Once again, the regime would suffer a major blow via the electoral ballot with the massive victory of the party sectors that opposed any type of continuity with military rule (Caetano and Rilla, 1987: 104). This further strengthened opposition sectors, both inside traditional parties and within civil society.

A round of formal talks between the military and political party representatives would officially start in May 1983 at the *Parque Hotel*, at the same time as loosened restrictions on mobilizations allowed the labour union confederation – now called *Plenario Intersindical de Trabajadores* (PIT) – to organize a massive mobilization on May 1st, after ten years of imposed silence (Caetano and Rilla, 1987: 106). The Parque Hotel negotiations would eventually collapse by July 1983 as the military insisted on keeping the structures of the authoritarian state intact (in particular the National Security Council) while parties, backed by the results of the 1980 plebiscite, disagreed. A climate of confrontation at the top reflected and encouraged a climate of confrontation at the bottom. A new round of protest journeys – in which the PIT, the students' association and human rights groups took the lead – started shortly after, culminating in the largest demonstration in the country's history on 27 November 1983 – the *Acto del Obelisco* – where an estimated 10% of the country's population was present (Caetano and Rilla, 1987: 107; Barahona de Brito, 1997: 70). This encouraged the various political parties (including members of the still illegal left) to form a united inter-party front – the *Multipartidaria* –, which demanded an immediate re-establishment of civil and political rights as well as the lifting of all political proscriptions (Barahona de Brito, 1997: 70).

Although at this point there seemed to be a possibility for Uruguay to move towards a *less negotiated* form of transition – as mobilization and radicalization intensified –, several events would turn the game back in favour of the military and crucially shape the transition's architecture. To start with, the military never stopped showing signs of strength, intensifying press censorship or/and repression at certain times. Secondly, the conservative parties – *Partido Colorado* and the smaller *Unión Cívica* – were sceptical of popular mobilization and, with it, maximalist demands that could jeopardize the transition. Wanting to keep a grip over how the transition process was operated, and having always favoured a conciliatory elite-led approach, these parties broke with the *Intersectorial* – an alliance of parties and social organizations to coordinate social mobilization – after the PIT organized a massive general strike in January 1984 without consulting the parties (Caetano and Rilla, 1987: 114). Finally, and most importantly, mobilizations and the unification of the opposition in the *Multipartidaria* did have an important effect (though not exactly the intended one): pro-negotiating sectors within the armed forces, fearing the consequences of a growing factionalization of the military institution, started taking over the hard-line ones that had been dominant thus far (Barahona de Brito, 1997: 72). In what appeared to be an intelligent move, the armed forces would progressively bring the *Frente Amplio* back to the scene and, due to the latter's conciliatory stance, isolate the radical factions of the traditional *Partido Nacional* (also known as *Blancos*).

As the continued proscription of the *Frente Amplio* would likely entail a transfer of votes from the left to the *Partido Nacional* – as it was the case in the 1982 internal party elections –, both the military and the *Partido Colorado* (*Blancos'* largest rival and the military's favourite interlocutor) had an interest in avoiding this scenario. Enfranchising the first (or at least its more moderate sectors) started to appear as the best possible way to avoid an electorate victory of the *Blancos*. Despite being a traditional conservative party, the *Blancos'* cherished and highly popular leader – Wilson Ferreira Aldunate – had become the number one enemy of the regime, both due to his radical populist-socialist posture as well as his highly critical and internationally visible stance on the dictatorship while in exile (where he escaped a regime-ordered murder attempt). There were grounds to believe he was the strongest presidential candidate had the military accepted to de-proscribe him. It is thus not surprising that the *Blancos* favoured a strategy of radical mobilizations against the regime as long as the armed forces would not accept to bring Ferreira Aldunate back to the political scene. While for some time it was thought that the *Blancos* could count on the *Frente Amplio* for this – and therefore more easily attract the

support of the most mobilized sectors of society, associated with the latter –, the fact is that the *Frente* showed a more conciliatory face from the moment the armed forces gave their first appeasing sign in March 1984: the release of its leader Líber Seregni (an ex-military officer himself) from his more than 10-year-long confinement (though he would continue to be proscribed). Despite internal divisions, the *Frente* would officially accept to join the negotiation table in June, to the surprise and outrage of the *Blancos*, effectively causing the *Multipartidaria* to break apart.

The ensuing Club Naval secret talks lasted for about one month (July-August 1984) and ensured a peaceful and pacted transition to democracy, expected to culminate in the November 1984 elections and the transfer of power in March 1985. Despite the non-participation of the *Partido Nacional*, the presence of the *Colorados*, the *Frente Amplio* and the *Unión Cívica* was enough to grant legitimacy to the so-called Club Naval Pact and to dictate the isolation of the *Blancos*' strategy. On the armed forces' side, the appointment of a new Commander-in-Chief, General Medina, seems to have greatly facilitated the process as he was visibly more eager than his predecessor to find a way out. Rial (1990: 29-30) describes the Club Naval Pact as a simple restauration agreement in which the previous political, constitutional and party systems (in place before the 1973 coup d'état) were recognized and expected to be restored after the elections. Among the transitory dispositions that served to provide some guarantees to the Armed Forces were: (1) the agreement to transform the National Security Council into an advisory body that could only be convened by the President (which in practice never happened); (2) the possibility for the President to declare a 'state of insurrection' in which military justice could take over regular one (which also did not occur); and (3) the regulation of the system of military appointments in a way that the military institution would keep control over it (Rial, 1990: 28).

The armed forces would therefore drop their long-sought demand to have a National Security Council overlooking the actions of the executive, the same way that they would accept to restrict military jurisdiction to military representatives only in times of war (and not for common crimes committed in times of peace, as they first demanded). This constitutes definite evidence that party representatives had a much greater leeway than at the *Parque Hotel* negotiations, in large part due to the shift in military's ambitions, who seemed much more interested in an exit solution than before. In turn, the parties also had to accept the continued proscription of both

Ferreira Aldunate and Líber Seregni, who could not run in the November 1984 elections.[55] This paved the way for the victory of the *Partido Colorado*[56] and the election of the man who was considered the great architect of the Uruguayan transition – Julio M. Sanguinetti –, both for his leading role during the negotiations and his apparent capacity to gain the trust of the military.

Uruguay's transition process is a vivid example of how transitions are more than a dual game between the (1) incumbent camp and the (2) democratic opposition camp, but rather a more complex one where radical and moderate factions within each of those two broad camps adopt and adapt their positions not only in light of the perceived power of the opposite sector, but also as a result of strategic considerations that often relate to their relative positioning within the broad camp they belong to. That is, while the perceived strength of the opposite sector will fundamentally affect the choice for a radical or moderate stance on the way the democratic transition should be achieved, groups will move along the radical-moderate continuum in function of how that position affects them in other regards. This is particularly the case for political parties' strategic concerns with the parties' image and electoral outcomes.

In the Uruguayan case, it is evident that the *Partido Colorado* had everything to gain from a pro-negotiation stance while the *Partido Blanco* had everything to lose. The former was by far the military's favourite interlocutor and could therefore credibly stand behind an image of moderation and pragmatism that was promoted as the safest way to achieve a successful and peaceful transition to democracy. The residual power of the military was instrumental in overlooking the issue of political proscriptions, which conveniently kept the Colorado Party's biggest rival out of the political game. As convinced as the leader of the *Colorados* – Julio M. Sanguinetti – was about the negotiated/ moderate approach being the best one possible, the fact is that it benefited the Colorado Party in more than one way: (1) it boosted the party's image as a credible and trustworthy negotiator capable of achieving democracy via peaceful means; and (2) it kept Ferreira Aldunate out of the political game, opening the way for Sanguinetti to be elected as Uruguay's next president. The *Blancos*, on the other hand, were obviously against proscriptions and therefore against a negotiated solution as long as these were not lifted. Wilson

[55] Despite the legalization of the *Frente* at the end of July, the armed forces never gave up on Seregni's proscription as well as the electoral ban of the most radical sectors of the *Frente,* such as the Communist Party, which nonetheless ran under another designation.
[56] With about 41% of the national vote, the Colorado Party was followed by the *Blancos* with 35% and the *Frente* with 21,3%.

Ferreira Aldunate had already been the most voted candidate twice before, first in the 1971 general elections (not being elected due to Uruguay's peculiar electoral system[57]) and later in the 1982 internal party elections (which were open to the general public's vote). Hence the *Blancos'* belief that, if the military was forced to lift proscriptions (by popular pressure and the parties' unified demand), the way would be open for their party to finally be sworn into office.

The transition's course would therefore depend, ironically, on the *Frente Amplio*, the party most vilified during the dictatorship and the one that suffered the most brutal consequences of repression by far. Knowing that their chances to win the national elections were meagre, FA's considerations had less to do with electoral calculations than with (1) the impending balance of power and (2) the internal and external image of the party. Líber Seregni's posture was from the start less radical than some would expect, though in agreement with the strategy he had already defended while in jail: 'Mobilization – Concertation – Negotiation' were the three axes of his policy, placing him somewhere between the *Partido Colorado*'s strategy of negotiation and the *Partido Nacional*'s mobilization one. Although there was a strong critical current inside the *Frente*, who believed that participating in the Club Naval Talks would be the equivalent to abdicating basic principles, Seregni's position would end up prevailing. This had to do first and most obviously with the desire to terminate the military's dictatorship once and for all, and the perception the military was too strong and cohesive for this to happen in any other way than via a negotiated solution. In the words of Líber Seregni himself:

> *We negotiate because we are strong. Otherwise, solutions would be imposed upon us. But we also negotiate because the enemy is strong and because we are not capable of imposing upon him our solutions. The history of struggles for freedom shows us that dictatorships do not fall on their own (…) A dictatorship that is socially and politically isolated still has the monopoly of armed force. It is inevitable to negotiate*. (in Caetano and Rilla, 1987: 126)

[57] Uruguay had, until 1994, a double simultaneous voting system which allowed each of the parties' sub-factions (well institutionalized in Uruguayan parties) to run with a different candidate. The votes for the factions were naturally counted as votes for the party to which they belonged. The party with the most votes would be the winning party and the presidency given to the candidate of the sub-faction of the winning party that had the most votes. Thus, even if a sub-faction had more votes than any other, it would win only if its party had been the most voted one.

If Seregni was of the opinion that the *Blancos* were misjudging the strength of the military, it also seems to be the case that other type of considerations played out in his decision not to side with the *Blancos*. First and foremost, to accept to negotiate with the military was the equivalent of seeing the *Frente Amplio* included in the formal political arena (De Sierra, 1985 in Barahona de Brito, 1997: 74). It was not until August that the *Frente* was officially legalized and given permission to participate in the November 1984 elections, a clear reward for its negotiating attitude. This was, in turn, crucial for its external and internal image: on the one hand, it allowed the *Frente* to acquire political respectability beyond radicalized left-wing sectors, after a long period in which the image of the left was tainted by its association to violence and disorder; on the other, it gave space for the coalition to rebuild itself internally. Eleven years of exile, imprisonment, persecution and clandestinity naturally raised concerns about the capacity of an already ideologically diverse coalition to rebuild itself, particularly in light of the fear that its electorate would move to the *Blancos'* radicalized sectors (as in the 1982 internal elections) (Barahona de Brito, 1997: 72). To ally with the *Blancos* would be to give substance to those fears and to risk an independent and strong *Frente* for a man and a party that many *Frente Amplistas* did not feel were worth of such a status.

4.2. The transition's conflictual mnemonic regime

Unlike Spain or Brazil, where the absence of TJ measures provoked neither party contestation nor a visible and salient social demand, the topic would emerge in Uruguay throughout 1985 and 1986, culminating in the approval of an Amnesty Law for military actions in 1986 (the so-called Expiry Law) and, more astonishingly, the submission of this law to a referendum in 1989. Families and human rights organizations would be the crucial actors behind this. Although their levels of activism, membership and visibility did not reach anything slightly resembling those of their Argentinian counterparts, they cleverly used Uruguayan institutions in a way that would create much trouble for the ruling Colorado Party. First, by submitting official charges against military officers as early as April 1985, they defied the military institution and created much tension between the military and civil judicial systems as well as between the armed forces and the government. This would turn the topic of military prosecution into a highly charged one at the political level. Secondly, by making use of Uruguay's mechanisms of direct representation, a few family members launched a campaign to collect the signatures of 25% of the population in order to put the Expiry Law through a referendum, a campaign initiated in 1986 that would

reach significant levels of support, culminating in the rejection of the families' claims at the ballot box in April 1989.

In understanding why, comparatively speaking, Uruguay's civil society had a mobilization impetus that Brazilian or Spanish ones did not have, there are not only structural differences in terms of democratic tradition and repression's characteristics (explored in Chapter 7), but also various notable meso-level differences worth taking into consideration. The first and most immediate factor is that families benefited from a broader network of human rights organizations which put them in contact with each other and provided spaces of organization, information, and legal support. In this, the influence of the Argentinian human rights movement is crucial, inspiring the creation of these organizations and groups and decisively influencing their organizational forms, repertoires of action and discourses. Another fundamental aspect is the non-isolation of the human rights movement and the receptiveness of the broader social movement scene to human rights claims. This, in turn, helped open up political opportunities as the *Frente Amplio* (and to a lesser extent the *Partido Nacional*) echoed some of the human rights claims and brought related issues to Parliament, something which is not independent from the *Frente*'s strong and embedded ties to its social constituencies.

In addition, families also benefited from a greater institutional opportunity structure given that an amnesty law was not approved until December 1986, flooding the courts with legal complaints in 1985 and 1986 and later being able to make use of Uruguay's direct democracy mechanisms. Although they would not achieve any of their goals at the time, an overview of this period is essential in highlighting, first, the salience that the issue had during Uruguay's transition period and, second, its intimate connection to the Uruguayan left. This accounts for why the later reemergence of the topic in the public and political scene could, to an extent, be expected, once a political opportunity structure opened up.

Furthermore, the comparatively higher salience of the issue in Uruguay – in contrast to Brazil and Spain – has to be understood in light of a background context that is fundamentally different in terms of civic and political culture and the concomitant (in)tolerance to political violence. As mentioned, Uruguay had been an institutionalized liberal democracy for most of the XX century and the dictatorship was comparatively much shorter. The use of state violence had been an extremely unusual phenomenon before, which makes it plausible to assume that it constituted much more of a shock to Uruguayans (Roniger and Sznajder, 1997: 58). In addition,

and as Roniger and Sznajder (1997) point out, political violence and impunity went very much against the country's self-image. Uruguay not only stands out for its high levels of citizenship participation and interest in politics (Moreira, 2000), but also for the fact that its national identity was constructed based on the same principles of citizenship, republicanism, democracy and associated values. This has to be seen in the context of a country that had long been predominantly educated and urban.[58] This is not to say that Uruguayans are inherently more democratic, but that this rhetoric – consensually endorsed by all political forces – makes it more difficult to escape debates on justice and accountability. It is not surprising that the campaign against the Expiry Law portrayed this instrument as antithetical to the democratic ideals of the Uruguayan people, including justice, equality before the law, and civic consciousness (Roniger and Sznajder, 1997: 67).

4.2.1. The human rights movement: Argentinian influence & networks of support

To start with, it is fairly impossible to ignore the exogenous influence of the Argentinian case in accounting for the emergence of the human rights movement in Uruguay (Interviews UR1 and UR2). As a background, it should be noted that Argentina is perhaps the most cited textbook case in transitional justice for two main reasons: (1) the extent of transitional justice measures implemented right after civilians took office, including a state-sponsored investigative commission and judicial proceedings against the leaders of the military junta (greatly delegitimized after the Falkland debacle in 1982); and (2) an unusually strong and vocal human rights movement (with important links to transnational networks of human rights activism), something that is partially the result of the extraordinary extent of repression and the widespread use of disappearances as the main repressive method.

Besides Uruguayans following events in neighbouring Argentina almost as closely as their own – a country that very much resembles Uruguay culturally speaking and that is just across the river from the most populated areas –, many Uruguayans experienced events themselves in Argentina. As mentioned, Argentina hosted the largest community of Uruguayan exiles[59], to which the majority of the disappeared Uruguayans belonged to. It is no coincidence that it was

[58] By the early 1980s the literacy rate was 96,3% and urbanization stood at around 85% (Gillespie, 1991: 17).

[59] Argentina's military junta would not take over until 1976, three years after Uruguay's coup (1973). The effervescent political situation in Argentina previous to 1976 constituted an additional incentive for many of Uruguay's political exiles.

the Uruguayan community in exile that first made use of the human rights language, which proved an effective means of denunciation of the regime abroad. The first and most visible campaigns against the regime came from key political figures exiled in Argentina like Senator Zelmar Michelini (who denounced the regime's violations before the Russell Tribunal in Rome in 1974) and Ferreira Aldunate (who testified at the US Congress in 1976) (Barahona de Brito, 1997: 83). It was also in Argentinian soil that the first group of families – of those Uruguayans who had meanwhile disappeared in Argentina – started to coordinate, forming the group *Madres y Familiares de Uruguayos Desaparecidos en Argentina* between 1977 and 1979, in a similar fashion to the existing Argentinian family groups (Bucheli et al., 2005). It is telling that, despite gathering various sorts of relatives (wives, siblings, etc.), the group chose to follow the Argentinian emphasis on the *Madres* (mothers) (Alonso, 2010: 32). They trace back the moment of consolidation of the group to the visit of the Inter-American Commission of Human Rights to Buenos Aires in September 1979, to whom they denounced all the cases of missing people they had recorded thus far (Bucheli et al., 2005: 29). The establishment of another relatives' group in Paris in 1978 – *Agrupación de Familiares de Uruguayos Desaparecidos* – was also intimately linked to the Argentinian experience, as it was formed by those who had family members who disappeared in Argentina and who had meanwhile fled to Europe (Bucheli et al., 2005: 37).

The formation of the first – and most important – human rights organism in Uruguayan territory did not happen until 1981 and was also greatly inspired by events on the other side of the La Plata river. The ecumenical *Servicio Justicia y Paz* (SERPAJ) had already been active in Argentinian territory since 1974, assisting victims/ families and denouncing violations. The fact that one of its Argentinian founders won the Nobel Peace Prize in 1980 made SERPAJ known to a few Christian figures in Uruguay who, after establishing contact with SERPAJ in Argentina, decided to create a Uruguayan branch (Interview UR4). SERPAJ-Uruguay was in turn essential in the process of putting families in Uruguay in contact with each other and giving them spaces of reunion and information sharing. SERPAJ played therefore an important role in the creation of the first family groups in Uruguayan territory, most notably the *Movimiento de Madres y Familiares de Procesados por la Justicia Militar* in 1982 and the *Madres y Familiares de Detenidos y Desaparecidos en Uruguay* in 1983, informal and loosely organized groups who nonetheless became the most visible face of repression (Bucheli et al., 2005; Barahona de Brito, 1997: 85). The latter would progressively incorporate the relatives' groups which had been established abroad, namely the *Madres y Familiares* in Argentina. SERPAJ was also

instrumental in establishing the *Instituto de Estudios Legales y Sociales* (IELSUR) in 1984 which, similarly to the Argentinian *Centro de Estudios Legales y Sociales*, provided legal representation and advice to families and victims. Significantly, IELSUR was composed by a group of lawyers who broke away from the Uruguayan Bar Association over disagreements on denunciations of disappearances and the defence of political prisoners (Bucheli et al., 2005: 43). IELSUR, in coordination with SERPAJ, began taking cases to court as early as 1984.

Although the Uruguayan human rights movement is usually considered to be much weaker than its Argentinian or Chilean counterparts (Barahona de Brito, 1997; Alonso, 2010), in part because of its comparatively late emergence, it decisively benefited from the fact that it was not born in isolation from the set of social forces that (re-)emerged in 1983-84 (Amarillo and Serrentino, 1998 in Alonso, 2010: 36). Not only did they emerge at the same time – and sometimes within the same clandestine spaces –, but all major social forces incorporated the human rights claims themselves, judging in particular by the proliferation of 'human rights committees' inside all the major social movements' organizations, including the trade union confederation (PIT-CNT), the students' union (ASCEEP-FEUU) and the federation of housing cooperatives (FUCVAM). Though it is difficult to establish whether this was more the result of the influence of human rights organizations or of an inner sensibility towards human rights claims, the fact is that grassroots mobilizations were quick to associate the dictatorship to human rights violations, which became a *leitmotiv* of the fight against the regime (Bucheli et al., 2005: 46).

This, in turn, cannot be dissociated from what appeared to be a particularly cohesive social movements' scene in 1983 and 1984, with all social forces congregating behind the ultimate goal of deposing the dictatorship. The human rights movement was part of this effort, particularly through SERPAJ, which enjoyed strong links to social organizations. This was most clear in the role it played in the first mass 'cacerolada' against the regime (a form of protest based on banging of pots/pans) on 25 August 1983, when SERPAJ promoted a 'national reflection day' after a two-week hunger strike in reaction to the recrudescence of repression (following the failed Park Hotel talks). SERPAJ would concomitantly become part of the *Intersectorial* – a platform unifying parties and social movements' organizations –, together with the above-mentioned PIT-CNT, ASCEEP and FUCVAM. Although this initiative was short-lived, it was responsible for the massive *Acto del Obelisco* in November 1983. Similarly, SERPAJ would be part of the *Concertación Nacional Programática* (CONAPRO) a year later,

when parties made joint commitments to a vast number of policies ahead of the November 1984 elections. Thanks in large part to SERPAJ's efforts, the CONAPRO agreements included an explicit commitment to truth and justice policies, stating that 'state organs must seek to clear up events' and 'the judiciary must be provided with effective instruments to allow investigation' (Barahona de Brito, 1997: 90). Though these agreements would quickly collapse, SERPAJ's achievement says something about the organization's non-isolation. This had also been made clear that year with the creation of the *Coordinadora de Entidades de Derechos Humanos* (CEDH), gathering all human rights organizations, key social movement organizations, and political parties' representatives (though Barahona de Brito [1997: 88] emphasizes that the latter reflected more individual than party commitments). Despite not much being known about the CEDH, Barahona de Brito (1997: 89) claims that it was important in promoting anti-government demonstrations in 1984 and early 1985.

It should be noted, however, that the notion of human rights was at the time most strongly linked to an unrestricted and general amnesty for political prisoners, a primary and unanimous demand within left-wing sectors and a constant presence in anti-regime demonstrations (de Giorgi, 2014; Bucheli et al., 2005: 46). Truth and justice appeared more as second-order demands in a period in which the situation of the large number of political prisoners, and the condition under which they were detained, were more pressing and extensive concerns. It did not seem to be clear at first what was to be done about those who had disappeared, besides denouncing and asking for information (de Girogi, 2014). Nonetheless, demands for justice and punishment would also progressively appear throughout 1984 and would come to the front in 1985-1986, once elections took place and the question of political prisoners was solved. In bringing the situation of the disappeared to the public scene, the role of *Madres and Familiares* seems to be conspicuous. A member of the group recalls that many of those who were not directly affected did not know about the practice of disappearance until quite late and that it was only once *Familiares* started to show up more systematically in the public scene that the situation progressively changed. She recalls in particular the impact of the May 1 demonstrations in 1984 – where for the first time the group followed the Argentinian repertoire of bringing banners with photos of disappeared – and their subsequent gatherings in Plaza Liberdad (center of Montevideo) every Friday (a clear replication of the Argentinian *Madres* weekly march at *Plaza de Mayo*) (Bucheli et al., 2005: 48-49).

In propagating their message, and similarly to what has been stated above, they counted with a network of support that went beyond those directly affected. The detailed testimonies of family groups collected by Bucheli et al. (2005: 49-52) confirm that they managed to at least publicize the situation of the disappeared among actively engaged political sectors in the months before democratic forces took over. They recall hundreds of information and denunciation 'public' talks hosted by workers' unions, neighbourhood committees, and even political parties (the *Partido Nacional* and *Frente Amplio*) and speak of groups of young people who spontaneously approached them from the moment they started the weekly marches in Plaza Liberdad. In fact, one of their first events – the organization of the 'week of the detained disappeared' at the end of May 1984 – was endorsed both by students and workers' organizations. Though these had meanwhile included disappeared-related demands in their platforms – namely '*aparición con vida de los desaparecidos*' (return of the disappeared alive) – a frame imported from the Argentinian *Madres* – and *'juicio y castigo a los culpables'* (trial and punishment for the guilty) –, it was only once elections took place that the theme of punishment for violations of human rights became conspicuous among social organizations (Demasi, 2011: 87).

4.2.2. Political allies: accounting for the Frente Amplio's commitment

It is with the above-mentioned context in mind that one has to place the relationship of political parties to the human rights issue. Although the transition ended up being much of an elite affair, it was fairly impossible to ignore the topic, even if by omission. There is much speculation about a possible 'gentleman's agreement' between Sanguinetti and the military at the Club Naval talks, involving no prosecution guarantees, though there is no evidence this was the case. Renowned historian Gerardo Caetano, who has done extensive research on this, thinks the issue was not touched upon at the Club Naval talks precisely 'because everyone knew there was no possible agreement on this theme' (Interview UR9). With the *Partido Nacional* excluded from the talks, the military and the *Colorados* could hardly afford to antagonize the left-wing *Frente Amplio* and risk the legitimacy of the pact. The *Frente*'s close links with the social movement scene meant that it echoed, to an extent, the grassroots commitment to the theme of human rights and therefore it would not accept anything short of a 'general and unrestricted' amnesty for political prisoners, the same way that it would not agree on a general amnesty for military crimes. The overall conciliatory and negotiating posture of the *Frente* leaders was already at odds with a considerable part of its members and support basis, with Seregni having to constantly reassure them that the FA would not compromise on any basic principles (Barahona

de Brito, 1997: 79). In fact, it is said that General Medina was under pressure from the military to propose an amnesty at the talks but that Sanguinetti persuaded him not do so precisely because it would have forced the *Frente* to abandon the talks (Barahona de Brito, 1997: 78).

The Uruguayan case is quite unique in that an amnesty for the military was not approved either before or right after the takeover of democratic forces. This is part of the reason why the human rights movement benefited from a greater opportunity structure at the institutional level when compared to cases where the immediate approval of an amnesty law made judicial prosecution unfeasible, as was the case in Brazil or Spain. In Uruguay, a small window of opportunity emerged in 1985 and 1986 (until the approval of the Expiry Law in December 1986), which allowed ordinary courts to claim jurisdiction over military offenses that had meanwhile been denounced by victims and families. Although these efforts would come to a halt with the Expiry Law, they should not be underestimated, first and foremost because they were responsible for making the topic of military prosecution a highly salient and debated one. Although this was of little consolation to the victims in the years to come, it was consequential in the very long run when the *Frente Amplio* came to power in 2005 and started finding loopholes in the Amnesty Law, something few questioned in light of what this issue had meant to the left in the 1980s. In other words, a conflictual mnemonic regime during the transition can be said to have opened the opportunity structure for the issue's later treatment.

The backing of the *Frente Amplio* to what at the time were already defined as *human rights* claims was therefore crucial and sets the Uruguayan case apart. In spite of the general stance of the party being more moderate than that of the human rights movement, and sometimes ambiguous – varying much from sector to sector –, the fact is that the FA was vital in bringing the topic to the political arena. First of all, and as just mentioned above, it was largely because of its opposition to an amnesty for the military that such an agreement was not made at the Club Naval Pact. Secondly, it was the presence of the FA (and initially the *Blancos*) in Parliament that made the topic particularly contested at the political level, contributing to set up parliamentary investigative commissions in 1985 and vehemently opposing the 1986 Expiry Law. Furthermore, the FA supported and mobilized its constituency to vote for the derogation of the Expiry Law in the 1989 referendum, which would in the process become a cause intimately associated to the Uruguayan left. Interestingly enough, and despite the overall defeat, the majority in the country's capital (Montevideo) voted to revoke the law, the same year in which the *Frente* won the Montevideo municipal elections. Although it would take more than

a decade for the *Frente* to achieve similar results at the national level, it could be generally expected that its earlier commitment to the topic would later translate into concrete measures if it were to achieve power. In understanding the overall commitment of the FA, there are two factors worth taking into consideration: (1) the fact that the large majority of the victims of repression were individuals with direct links to parties within the FA family; and (2) the extent to which the *Frente* echoed the grassroots commitment to the theme of human rights, given its close connections to the social movements scene. I am, however, of the opinion that the second factor is more determinant than the first, for the reasons outlined below.

a) Victimhood and TJ advocacy

While it is natural to think that those affected will be the ones demanding retribution – and demands, whenever existent, will certainly come from them –, reality suggests that there is no automatic direct relationship between being a victim and making transitional justice claims. Prominent cases in this regard are Presidents in Brazil and Uruguay (Dilma Rousseff and José Mujica), who were victims of torture but nonetheless did not seek to advance their country's transitional justice agenda (though the latter was eventually forced to). Within *Frente Amplio* itself, not every left-wing group/individual who was a target of violations supported transitional justice measures to the same extent, suggesting that there are other mediating factors in the relationship. This was clear, for example, in the different approaches between the small PVP (*Partido por la Victoria del Pueblo*) and the Uruguayan Communist Party, both of which were top targets of the dictatorship repressive apparatus. While the first was very active in denouncing violations and was intimately linked to *Familiares*, the second did not have a denunciation policy.

If some Communist Party members eventually presented legal complaints, they did it in their personal capacity and not under the guidance of the party. In fact, it was the commitment of specific individuals – who worked on convincing their peers to denounce the violations they had endured – that often made a difference. In the case of the Communist Party, the role of Senator Germán Araújo – a symbol of the fight against the dictatorship and one of the most outspoken voices for justice – seems to have been important in convincing others, as one testimony of a Communist Party member makes clear: 'Human rights were not important to us. We filed complaints, but only because Germán Araújo asked us to do so, otherwise we would have done nothing. The party would not tell you to denounce and therefore we did not question

it' (in de Giorgi, 2014). A member and one of the founders of *Frente Amplio* reports a similar dynamic, stating that it was in fact hard to convince many of her peers to denounce what they had endured: 'It was an internal process within the left to convince them they were victims. The traditional Uruguayan left that comes from the working class struggle mentality and never considered the topic of human rights and human dignity as something important. What mattered was economic redistribution, equality, the class struggle, etc.' (Interview UR5).

In attempting to account for group and individual-level variance in this regard, Percovich (Interview UR5) and de Giorgi (2014) largely coincide on the conception of 'heroic self-sacrifice' for what were the important collective causes and how victimization was at odds with this. Percovich (Interview UR5) states that this was particularly extreme in the case of people associated to the MLN, 'who said they had done things voluntarily, considering themselves combatants to the same extent of the military (…), as if thinking otherwise would diminish the heroic Robin-Hood inspired legend they had built of themselves'. Torture and long-term imprisonment were seen as part of the price paid for their revolutionary struggle (Roniger, 2011: 697). This is largely coincident with Markarian's (2005) extensive inquiry on the adoption of the human rights language by the left-wing exile community and their initial reticence to do so. As the human rights language focuses on the bodily harm of individuals – rather than on the political goals of groups –, it often seemed conflicting with calls for revolutionary action and immolation for the common cause. Adopting the human rights banner required revising the traditional heroic conceptions that made repression and abuses part of their expected political experience (Markarian, 2005: 7). One should keep in mind that repression in Uruguay was targeted against active left-wing opposition groups that could therefore, to some extent, expect reprisal. This is particularly the case for the most combative sectors, who saw the pre-dictatorship polarization period as an indicator of the 'radicalization of the class struggle' and therefore anticipated a strong reaction (Demasi, 2011: 82).

All of this speaks to the importance of the perception of victimhood, that is, the extent to which individuals who were a subject of discretionary state violence perceive themselves as victims of something fundamentally unjust and, to an extent, unexpected. Percovich (Interview UR5) interestingly recounts how she was part of a Christian-inspired political group whose members had a greater sensibility towards the question of individual human dignity than those for whom collective political goals was all it mattered. She adds that inside the *Vertiente Artiguista* (who had its fair share of disappeared members), it was difficult to install such issues because 'the

thinking very often went like: now that we are installed politically, let us focus our energies on doing all we can to change society'. This is similar to Markarian's (2005) point that many within the *Frente* preferred to focus on 'transitional politics' as that was what mattered at the moment. Although any conclusion on this topic is tentative, these cues suggest that politically engaged individuals – who saw their actions as part of a broader collective political struggle – might not automatically perceive what they endured in 'perpetrator vs. victim' terms and might not look at the actions of state agents as regular crimes susceptible to individual criminal responsibility. Instead, because what they endured was part of a collective political struggle, the best form of retribution was the displacement of the dictatorship, the legalization of their respective political parties, and the possibility to participate in the political game (note how similar this is to some points made in the previous chapter, but how in Uruguay the human rights language was becoming available at a much earlier stage than in Spain).

This is congruent with the fact that the most vocal claims recurrently came from family members with little or no political activity themselves and who were therefore 'victims *par excellence*'. This is the more so for those who were permanently deprived of a family member – out of 'disappearance' or death – as this is the most brutal and unexpected type of repression and therefore the one where the perception of injustice/ victimness tends to be the most acute. Raul Olivera (Interview UR3) argues along similar lines, pointing out that 'the degree of acceptance of one's own situation matters' and that what was in fact 'the newest and most brutal and unexplainable phenomenon were disappearances'. This provides one crude but nonetheless convincing indicator for why the degree of human rights activism was more significant in Argentina than anywhere else in the region, given the vastly superior number of disappearances. Importantly, one should take into account the particularly severe psychological strain that disappearances induce on families given that the non-appearance of a body makes them carry, at least for some time, the hope that their family members can still be found alive (see testimony in Allier Montaño, 2010: 42). As Javier Miranda, a human rights lawyer who is himself a son of a disappeared parent, puts it, 'the detention-disappearance of a person leaves his or her loved ones in a state of permanent anxiety and uncertainty' (quoted in Skaar, 2011: 154). This naturally makes denunciation and investigation most pressing in such cases.

Various indicators confirm this. One is the number of judicial denunciations, which is superior for cases of enforced disappearance than for cases of torture (whereas the latter was vastly more common than the former). Although the available data do not comprehensively cover every

legal complaint presented in 1985-86, out of the 37 cases where information on the type of crime is given, 28 refer to enforced disappearances or death (21 to enforced disappearances and 7 to death) while 11 include torture (based on the compilation of data from *Observatorio Luz Ibarburu*). Another potential piece of evidence is the immediate dissolution of a group of family members of political prisoners – *Familiares de Procesados por la Justicia Militar* – as soon as these were released from prison, which suggests that families did not perceive further benefits from collective action besides the obvious primary goal of having their family members back. This contrasts with the *Madres y Familiares de Desaparecidos*, who have kept their activities going until today, similarly to the Argentinian *Madres* and *Abuelas de Plaza de Mayo*. It would not be until much later (2000) that an organization of political prisoners would be created (Crysol – Asociación de Ex-Presos Políticos de Uruguay).

b) The FA's grassroots' ties and its commitment to justice

That being said, the general endorsement of the *Frente Amplio* to human rights claims cannot be solely understood as a result of the direct links between the party and the subjects of repression. While this can be thought of as a necessary condition, it seems insufficient in light of all that has been mentioned above. The *Frente*'s intimate connection to the social movement scene and the eagerness to appear as the 'true representative' of the victims of repression – despite its participation in the Club Naval talks and in light of the *Blancos*' initial attempt to claim ownership on the issue – appear as more relevant factors. In addition, as the salience of the issue increased throughout 1985 and 1986 – in part as a result of the number of complaints that were flooding the courts –, the higher the party image's-related incentives became or the costlier it was to let down many of its constituents and members.

Although it is hard, if not impossible, to quantify support for TJ within the FA at the time, the general perception was that the actively engaged sectors were a minority (Interview UR2 and UR5). This goes in the direction of Mallinder (2009: 22), who points out that, even though some groups within the FA had long campaigned for investigations and punishment, the negotiating sectors – the majority of the left – preferred to avoid a strong position on these matters, out of fear of derailing the transition process and the desire to position the FA as a credible political option. Expectedly, those most vocal about human rights were also the sectors that did not support the negotiating posture of the *Frente* at the Club Naval talks (de Giorgi, 2014). To those, and to many among its basis of support – largely the same that had been taking up to the

streets in the months previous to the elections –, the *Frente* had to prove that participation in the talks was not a sign of softness with the dictatorship (Barahona de Brito, 1997: 79).

In this regard, one should keep in mind that the *Frente* is the closest approximation in Latin America to the mass-organic type of party, with an exceptional grassroots presence, an active membership basis, and close and strong ties to various popular/social constituencies (Levitsky and Roberts, 2011: 13-14). In fact, the embeddedness of the party (and its many branches) in social networks makes it sometimes difficult to point out where civil society ends and the party begins. Already before the first general election, and despite the fact that many leftists remained deprived of their political rights, the FA had a remarkable grassroots presence, with so-called base committees (with a minimum of 50 members) set up in each neighbourhood or ward section, bringing together militants from every party within the FA (Gillespie, 1991: 199). Although its social links are more obvious in the case of labour organizations, the links of human rights groups to certain FA minority sectors are known – most notably the presence of Christian Democrats within *Servicio Justicia y Paz* (SERPAJ) and the close support of the People's Victory Party (PVP) to the groups of families (de Georgi, 2014). In addition, as developed above, the human rights discourse went beyond the single-issue groups concerned with this topic and became diffusely associated with the bottom-up opposition to the dictatorship. As one notable trade union leader puts it, 'Uruguayan unionism has the unique characteristic of greatly transcending the world of work. Every union had a human rights group (…) and we always had an independent and advanced human rights policy' (Interview UR3). The involvement of the national confederations of trade unions (PIT-CNT) – the face of a remarkably strong and organized unionism – is both a symptom and a reflection of how intimately associated to the left the issue of justice was. This was visible, for instance, in the protest it staged outside the legislative palace in October 1986 (gathering about 10,000 people) where a proposal on the punishment of human rights violations was being discussed (Barahona de Brito, 1997: 139).

Despite justice for human rights violations not being a salient issue during the 1984 electoral campaign – with the *Frente* focusing instead on the release of political prisoners and the restauration of civil and political rights –, the theme of justice was not entirely absent and generic declarations on the moral duty to investigate and judge crimes could already be found (Mallinder, 2009: 25). The fact that all leading presidential candidates felt compelled to publicly commit themselves to bringing to justice those responsible for violations already tells a great

deal about the perceived societal expectations on this issue. The topic would become more salient throughout 1985 and 1986 though, when complaints started to clog the courts and the issue became highly contentious at the political level. Dynamics related to party competition and parties' image should also be taken into consideration since, as Barahona de Brito (1997: 129) argues, parties wanted to make a point about the role they played in the transition to democracy. While initially the *Blancos* wanted to make political capital out of their non-participation in the negotiations with the military, the *Frente* had to go to great lengths to avoid the accusations – coming mostly from the *Blancos* – that it had been accomplice to the impunity deal allegedly pacted at the Club Naval. Endorsing calls for justice was an obvious means of doing so, on top of being in accordance with most of its left-wing constituency.

Popular endorsement was confirmed by survey data in mid-1986, when a poll covering the area of Montevideo (where the FA was stronger) showed that an overwhelming 78% agreed that justice should proceed (though most believed that realistically it would not), with 66% opposing an amnesty for the military (Barahona de Brito, 1997: 208). It is, however, plausible to assume that at an initial stage – or at least before this survey was known – the *Frente*'s commitment had less to do with general electoral calculations than with not letting down its own constituents and its most radical sectors. This is substantiated by the fact that, as Gillespie (1991: 230) develops, the party was at the time trying to redefine itself as a real alternative for power, abandoning its role of popular tribune and radical contestation and taking steps towards being a cooperative political force. This was motivated by the results of the 1984 elections – which rewarded those sectors within the *Frente* (and within other parties) that had moved closest to the center – and was noticeable, for example, in the party going along with a 'national accord' on economic policy in 1985, showing an unusual degree of tolerance when abandoning some of its expected demands (Gillespie, 1991: 230). The fact that it was not able or willing to show the same degree of flexibility and moderation when it came to the issue of an amnesty for the military suggests that this was a more fundamental issue for the left. As de Giorgi (2013: 71) argues, this question could carry high costs for the *Frente* because they would not only disappoint human rights organizations but they would also disavow one of the main causes its militants were working on and possibly result in the loss of adherents. In addition, it could prove

costly for the internal unity of the FA since it became clear that its more radical sectors were not willing to accept anything short of full justice.[60]

It is, however, not possible to state with certainty that some groups within the FA would not have committed to the issue of human rights violations if it had not been for civil society activity. The blurriness between the FA's parties and their constituents makes it difficult, if not impossible, to trace who influenced whom. That the families and human rights organizations were the first and most vocal groups can be well established. It is also the case that significant steps taken at the political level had already been preceded by related claims coming from the families. To give an example, in November 1984 families' organizations demanded the set-up of a parliamentary investigative commission on violations of human rights, something which the FA and the *Blancos* attended to in April 1985 (Alfaro, 2016: 4). The fact that these parties took this step early on – following the fierce March debates on the design of the amnesty law for political prisoners – attests, however, for their commitment. It should be said that the mandate of the two commissions created – 1) an Investigative Commission on the Situation of the Disappeared People and its Causes and (2) an Investigative Commission on the Kidnapping and Assassination of National Representatives Zelmar Michelini and Héctor Gutiérrez Ruiz – was severely hampered by the lack of official support from the government as well as insufficient investigative powers (which is why they are not considered to fall into the category of truth mechanisms) (Skaar, 2011: 141).[61] This was due to the obstruction of the ruling party and not to the lack of commitment of its promoters. Bottom-up pressure was not so insurmountable at that point as to force an issue that parties were not sympathetic to, which is why, rather than simply react to civil society activity and to the concomitant salience of an issue, engaged political actors are better seen as part of the overall push that contributed to make this issue one of the most (if not *the most*) controversial and prominent topics in the Uruguayan public and political scene at the time.

[60] Ironically, it is in part because these sectors rejected any type of mid-way compromise on this issue that attempts to forge an inter-party agreement with the *Blancos* on a project establishing some form of limited justice repeatedly failed.

[61] They nonetheless compiled relevant information that was meant to serve in future court proceedings, which is an indicator that their promoters were already anticipating the judicial battles that were to take place throughout 1985 and 1986.

4.2.3. Institutional opportunity structure. The Expiry Law and its discontents

In part thanks to the support of political actors and in part because of the availability of direct democracy mechanisms, families and human rights groups in Uruguay benefited from a relative window of opportunity at the institutional level. The first reason for this is that, unlike in Brazil and Spain, there was not a military amnesty provision in place at the early stages of the transition, meaning that judicial prosecution appeared at the time as a relatively more feasible possibility. Moreover, this was the case not only due to the absence of an amnesty law covering the military (up until December 1986), but also because of (1) the existence of judicial networks of support – such as IELSUR – and (2) what appeared to be a credible judicial apparatus, judging at least by the fact that all the Supreme Court judges who had served during the dictatorship were quickly replaced (Skaar, 2011: 139). In addition, as a human rights activist and founding member of the *Frente* reveals, 'this is a small place, everyone knows everyone, we knew there were democratic-minded judges and, when making denunciations, we were waiting for certain judge's turn to come' (Interview UR5).

It is not entirely clear why the military did not push more forcefully for a self-amnesty. One interpretation is that there were many officers who simply did not regard their actions as crimes and who 'considered an amnesty an insult, given they had received orders to defeat the subversion' (Interview UR9). Note the flood of judicial complaints had not yet started during the Club Naval negotiations and the military might not have seen them coming. However, it is also known there were sectors concerned about the issue and that General Medina was pressured not to leave the Club Naval talks without formal guarantees of no prosecution. Much speculation exits around a secret and possibly tacit 'gentleman's agreement' between General Medina and Sanguinetti, made during or shortly after the Club Naval talks, in which the latter gave guarantees to the former that trials would not occur (Barahona de Brito, 1997: 78). This would explain why Sanguinetti ultimately proved to be against any form of justice and why Medina seemed to have been able to calm military ranks over the lack of guarantees. In any case, the fact that an amnesty covering military actions was neither explicitly agreed at the Club Naval nor incorporated into the amnesty law for political prisoners – unlike in Spain or Brazil – already tells a great deal about the different status of this issue in Uruguay.

Both the apparent absence of this topic at the Club Naval and the exclusion of military and police officers from the first amnesty law can be traced back to the presence of political actors

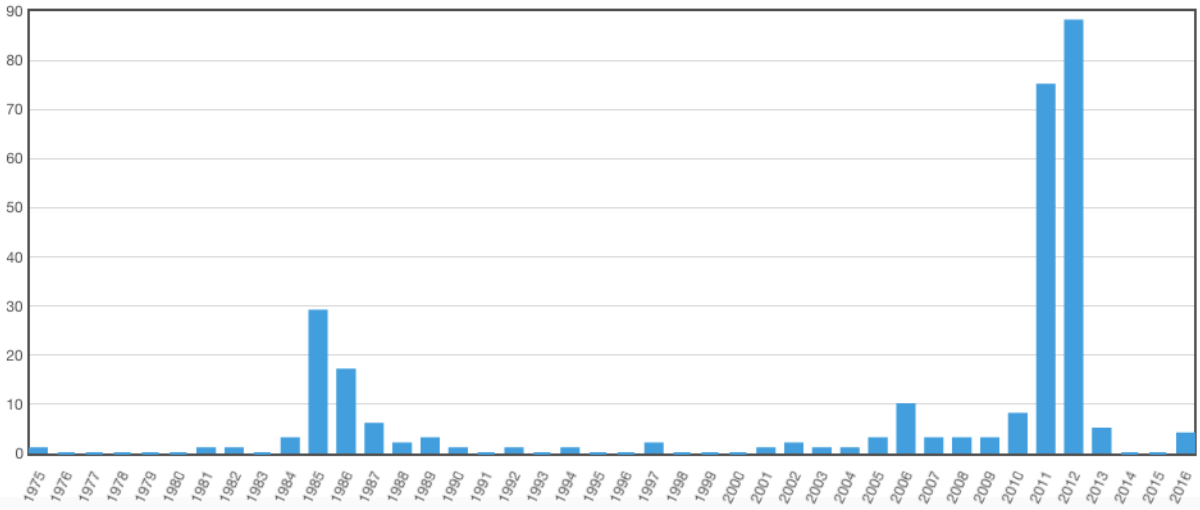
supportive of TJ who, explicitly or implicitly, obstructed such a deal. On the one hand, both Medina and Sanguinetti have made clear that the issue was not discussed at the Club Naval because it would constitute much of an obstacle to a successful negotiation, a reference to the presence of the *Frente* at the talks (Barahona de Brito, 1997: 78). *Frente* representatives at the Club Naval talks similarly stated that the issue was never openly discussed, but that it was indirectly touched upon when the military proposed to keep military jurisdiction over all kinds of crimes committed by military men, a proposition that created much tension and which eventually did not pass – something which speaks for the strength of the opposition at the talks (Lessa, 2009: 252). On the other hand, both the FA and the *Blancos* explicitly excluded the military and the police from their amnesty law proposals covering political prisoners, and they did have much of a say in the formulation of what would become Law 15.737[62] given their joint parliamentary majority (Bardazano, 2013: 147).

It is in the context of intense political discussion surrounding the design of Law 15.737, the immediate release of all political prisoners in March 1985, and the press' extensive coverage of the abuses of the dictatorship that legal complaints started to clog Uruguayan courts, curiously at the same time as the Junta Trials were taking place in neighbouring Argentina. Barahona de Brito (1997: 126) and Allier Montaño (2010: 54) estimate at more than 700 the number of cases that were being investigated in courts by the end of 1986, though none of them states where those estimates come from. The *Observatorio Luz Ibarburu* – which has done the most extensive job in compiling information and following or sponsoring legal actions in recent years – registers a much more modest number of cases in those years (Figure 4.1). Even though a case can cover several victims – the largest appearing to be case 519/1985, submitted by members of *Madres y Familiares*, covering 25 different victims –, those reported by the *Observatorio* do not go much beyond the one hundred victims' figure. In spite of the available data being insufficient to estimate precisely how many of those legal cases were brought to court by families and their networks of legal support, the cases of forced disappearances where the name of the denouncer is available were invariably presented by individuals with the same

[62] Note that Law 15.737, though commonly regarded as an amnesty law, does not fully fall into this category because it does not pardon 'blood crimes' but instead establishes a system of commutation of sentences through which every day already spent in prison would count as three days. This, in practice, meant that all those condemned for 'blood crimes' were effectively released as they all had already spent ten years in prison (and 30 was the maximum allowed in Uruguayan legislation) (Interview UR8). This was a means of reconciling the calls for a full-fledged amnesty coming from most of the opposition with the government's disapproval. In addition to this, Law 15.737 (March 1985) included provisions to facilitate the return and social reintegration of returning exiles, the restitution of confiscated property, and the restoration of public jobs to employees unfairly dismissed during the dictatorship (Lessa, 2013: 135).

last name as the victims. There were also a few cases of torture and illegitimate detention presented by the victims themselves, but these are a minority.[63]

Figure 4.1: Number of legal cases by date of initiation



Source: Observatorio Luz Ibarburu[64]

Regardless of the exact numbers, the fact is that these denunciations were sufficient to transform the topic of military prosecution into the most contested issue of the time and eventually culminate in the approval of an amnesty law covering the military in December 1986, known as the Expiry Law (Law 15.848). President Sanguinetti seems to have been caught by surprise as he later declared that an amnesty for the military had not been approved before because 'it did not seem that denunciation of their crimes would become so important. There might be a few accusations, but it was not going to be a big deal. Then things began to grow (…) Great numbers of accusations began rolling in, and we proposed an amnesty' (interview in Weschler, 1990: 188).

The road to Law 15.848 was, however, far from straight. It was not until August 1986 that the *Colorado* Party first presented an amnesty proposal. Before, the ruling party had in fact been ambiguous about its position on the matter, though there were clear signs that the more denunciations started coming in, the warier the party became. This was visible as early as April 1985 when President Sanguinetti asserted that the military courts should have jurisdiction over

[63] http://www.observatorioluzibarburu.org/causas/
[64] http://www.observatorioluzibarburu.org/reportes/

the matter (Barahona de Brito, 1997: 130).[65] In accounting for the wariness of the ruling party, there are various factors worth taking into account. First of all, it would be odd to see the *Colorado* Party take steps towards justice given its partial connivance with the dictatorship. Although this is clearer for the conservative sectors than for Sanguinetti's party-wing, it would surely be uncomfortable to implicate some of its right-wing colleagues. Secondly, as mentioned above, it is widely believed that Sanguinetti made an explicit or implicit commitment to Medina. Thirdly, the threat of disobedience of some sectors within the military – with an officer declaring that they would not show up before civil courts – created a potentially unstable situation that further pushed Sanguinetti towards an amnesty. This is also the opinion of Barahona de Brito (1997: 136), who states that Sanguinetti feared that Medina would be unable to contain the insubordination of the hard-line, which had increased significantly as accusations proliferated in the press, the parliament, and the courts. Finally, this position was very much in line with the image of pragmatism Sanguinetti had always represented. His electoral campaign revolved around the desire for a '*cambio en paz*', a process of peaceful and orderly change in which avoiding confrontation was seen as an essential step or as a goal in itself. In line with the Spanish transition model – which Sanguinetti showed a prodigious knowledge of –, Uruguay's President recurrently stated that a climate of stability was essential and therefore an amnesty was a legitimate means to deal with a destabilizing issue.[66]

The problem for the ruling party was that the absence of a parliamentary majority meant that a deal with one of the opposition parties would have to be struck. As the left appeared strongly committed to the issue, the *Partido Nacional* was the only viable option for President Sanguinetti. Nevertheless, this was far from an obvious endeavour at first as the *Blancos* appeared mildly committed to justice, in line with the party's strong opposition to the orchestrated transition and to the electoral prescription of its leader. On more than one occasion,

[65] Indeed, the Supreme Military Court would interpose a jurisdictional claim in August – at the same time as civil courts called for the arrest of three military officers –, which would serve to held up judicial action for some months.

[66] Interestingly, though, Sanguinetti's rhetoric on the justification of the Expiry Law would evolve over the years, as Alvaro de Giorgi (2014) brilliantly demonstrates in a book entirely dedicated to this subject. If at first the Expiry Law was framed as a 'sacrifice in the name of peace' – a lesser evil to avoid a military insurrection –, it would later be put within the 'two demons' framework, that is, granting moral equivalency to violence of the guerrillas and the repressive activities of the military. This allowed Sanguinetti to defend that the process of settling accounts for the military should involve settling accounts for the left too, as it is visible in his interview with Weschler (1990: 188). De Giorgi's 2014 book subtly but clearly demonstrates this is much more of an exercise in rhetoric than anything else, since Sanguinetti is well aware that (1) the guerrilla had been dismantled before the 1973 coup, (2) political prisoners is a more extensive category than guerrilla members, and (3) there was never an amnesty for the guerrillas since instead their sentences were commuted to 1/3 of the time.

representatives of the PN and the FA negotiated a project on a form of limited justice (restricting prosecution to certain cases), but the opposition of the most radical sectors within the *Frente* and the ambiguity of the *Blancos* – whose leader was found to be secretly negotiating with Sanguinetti – prevented an agreement (which in any case could be met with a presidential veto). After having its first amnesty law proposal rejected in August 1986, the *Colorados* would manage to get most of the *Blancos* on board in December, after intense behind-the-scenes negotiations and heated political debates. As military officers had threatened to disobey judicial summons, a climate of a looming institutional crisis (or, for the most alarming voices, military insurrection) pushed a sufficient number of PN deputies to endorse an amnesty law for military and police crimes. Officially designated as Law on the Expiry of the Punitive Claims of the State (*Ley de Caducidad de la Pretensión Punitiva del Estado*), it was signed just hours before military officers were due to appear in court, on 22 December 1986.

Yet, this was not the end of the road for families and human rights activists. The second reason why they benefited from an institutional window of opportunity is that Uruguay's Constitution allows for laws to be submitted to a referendum in case twenty-five per cent of the electorate requests it. In light of the prominence the debate had meanwhile acquired, a few family figures and ex-Tupamaros announced the intention of holding a referendum on the Expiry Law the day after it was approved, in what was the first attempt in the country's history to use this constitutional right to overturn a law. The FA announced its support to this initiative on 5 January 1987, shortly after all major social organizations had done so (PIT-CNT, ASCEEP-FEUU, FUCVAM and SERPAJ) (Allier Montaño, 2010: 72). Several *Blanco* politicians would also declare their support. Displaying an impressive organizational capacity, the organizers first set up an umbrella organization – the National Pro-Referendum Commission (CNR) – and then proceeded to create over three hundred 'neighbourhood committees' in order to make the signature collection process feasible (Allier Montaño, 2010: 74). This involved a great deal of popular gatherings and door-to-door visits, a mass mobilization effort that once again put the issue at the center of public debates (Roniger and Sznajder, 1999: 83).

The CNR, composed of many Uruguayan notables (such as Eduardo Galeano and Mario Benedetti), was led by three emblematic victims' relatives – Elisa Dellepiane (widow of Zelmar Michelini), Matilde Rodríguez (widow of Héctor Gutiérrez Ruiz) and María Ester Gatti (grandmother of a missing child) – and did its best to appear non-partisan, focusing on ethics, truth, justice and the re-affirmation of basic principles such as the people's right to decide and

equality before the law (Roniger and Sznajder, 1999: 84). Whereas the FA kept a low profile in order to avoid politicizing the initiative, Buriano (2011: 177) is right to point out that its impulse, structures, and militant experience were fundamental in making this a viable endeavour. By December 1987, the CNR submitted over 630,000 signatures to the Electoral Court which, after a long and dubious process of signature verification, eventually allowed for the realization of the referendum in April 1989.

In the meantime, the association *Madres y Familiares* together with some legislators had also filed an unconstitutionality appeal against the Expiry Law, which the Supreme Court rejected in a split three-two sentence in May 1988 (Lessa and Burt, 2013: 8). SERPAJ also proved active, most notably when putting into place a truth project with the goal of documenting the regime's repression in detail. Starting in March 1986, the *Nunca Más* project – inspired by similar reports in neighbouring countries – used hundreds of testimonies and a survey of over 300 political prisoners to produce a more than 300 pages long report, released just before the referendum, in March 1989.

The referendum campaign was naturally met with much opposition, coming from the government, the military, and other conservative sectors. The initiative was often portrayed as a threat to stabilization and democratic consolidation, going against the spirit of pacification and reconciliation of the transition. President Sanguinetti adopted a 'moral equivalency' discourse, whereby the subversive elements that were allegedly behind the organization of the referendum had already been amnestied to the same extent as the military and were now leading a campaign motivated by rancour and revenge (Barahona de Brito, 1997: 148-149; Roniger and Sznajder, 1999: 85-87). General Medina warned shortly before the referendum that the vote would provoke 'bitter and unfortunate moments' and a 'strong confrontation' (Barahona de Brito, 1997: 149).

Pragmatism and fear of destabilization would eventually win, with 55,95% of the voters deciding to retain the law, against 41,3% who voted to repeal it. As devastating as these results were for the human rights movement, and despite symbolizing the defeat and end of a hard-fought battle, the referendum campaign stands out for being unique in the extent to which it used the wide mobilization of civil society and put impunity for dictatorship-sponsored crimes at the heart of the public sphere (Roniger and Sznajder, 1999: 90). Although the *Frente Amplio* kept a low profile in order to avoid politicization, the issue would inevitably become linked to

the Uruguayan left as most of the organizers of the referendum were members or supporters of the party and its bases were deeply involved in the campaign process from its inception. Groups associated to the FA, such as the student union, were particularly active, in what constituted the first political mobilization experience for many among the youngest generations (Interview UR2). All of this is important because, despite the few positive results at the time, the salience and conflictual nature of the issue during this period – which contrasts enormously with its absence in Brazil or Spain – meant that its reappearance years later was not devoid of a previous history of mobilization, awareness and familiarity with the human rights frame.

4.3. From blockage to state acknowledgment

4.3.1. The post-referendum interregnum and the resurgence of civil society

The results of the 1989 referendum were at the time generally perceived as sealing the issue of accountability for the dictatorship's crimes. As citizens had spoken through the most democratic of means, the human rights movement naturally took time to recover and civil society activity fell remarkably in the following years (Skaar, 2011: 149). Though family groups would not disappear, their concerns logically faded from the public and political scene and it would not be until 1996 that they would make a comeback. With the exception of marginal sectors within the left, related demands would also disappear from political parties' platforms. The only advancement produced in the first half of the 1990s would take place at the international level, when the Inter-American Court of Human Rights (IACHR) responded to various petitions that had been filed by IELSUR, declaring in October 1992 that the Expiry Law was incompatible with Uruguay's international obligations to respect the victims' rights to a fair trial and judicial protection (Burt et al., 2013: 9). This position would be endorsed by the United Nations Human Rights Committee (UNHRC) too, but the fact is that this would have no concrete impact in Uruguay at the time. Uruguay's Presidency had meanwhile changed to the *Partido Nacional*'s leader Luis Alberto Lacalle (1990-1995) – only to return to Sanguinetti in the following five years (1995-2000) –, but the referendum results and the loss of salience of the topic during the first half of the 1990s meant that Lacalle did not have to deal with the issue.

Once more, events in Argentina would prove highly influential in changing the tide in Uruguay. In March 1995, the public confessions of an Argentinian retired navy officer, Adolfo Scilingo, would not only have a profound impact in the debate in Argentina, but would also reverberate

in the Uruguay's public scene (Roniger and Sznajder, 1999: 119). Scilingo became the first military man to acknowledge the existence of the so-called 'death flights', providing details on how the Argentinian armed forces dumped hundreds of victims from planes into the ocean, after sedating them, usually following torture sessions. The commander-in-chief of the Argentinian army, General Balza, followed suit by recognizing for the first time the mistaken use of unjust and immoral means by the armed forces (Allier Montaño, 2010: 150; Roniger and Sznajder, 1999: 114-116). This naturally had much of a repercussion in Uruguay given that most of the Uruguayan disappeared had last been seen in Argentina.

This event prompted renewed calls for actions in Uruguay (Lessa, 2013: 143). In a joint effort with *Familiares* and other human rights and social movement organizations, Senator Rafael Michelini called for the first *marcha del silencio* (march of silence) or *marcha por la verdad, memoria y nunca más* (march for truth, memory and never again), on the anniversary of the four most emblematic murders, including that of Senator Michelini's father (Zelmar Michelini). On 20 May 1996, between 30,000 and 50,000 people flooded Montevideo's main streets in silent protest, carrying banners with photos of the disappeared (Skaar, 2011: 150). Since then, the march has become a yearly tradition in Uruguay, drawing thousands of people and sending a powerful reminder of how unresolved this issue still was. Importantly, these marches provided clear evidence of how demands had (strategically) shifted from justice to *truth*. The main mottos of the marches that followed would be 'We want the truth' (1997), 'Truth will set us free' (1998), 'What is missing in our democracy? Truth!' (1999), 'Truth is possible and necessary' (2000) (Roniger, 2012: 66). In light of the 1989 popular upholding of the Expiry Law, and because – in the words of a member of *Familiares* – 'we did not want people to repudiate the theme but rather to understand what had happened', the main public demand shifted to investigation and acknowledgment (quoted in Allier Montaño, 2010: 154-155), in what appears to be a clear case of strategic adaptation of civil society demands. Perhaps encouraged by this renewed activism, new victim organizations started popping up, including HIJOS in 1996 (formed by children of the disappeared) *Memoria para Armar* in 1997 (composed by female ex-political prisoners), CRYSOL in 2000 (an association of ex-political prisoners) and *Familiares de Asesinados por Razones Políticas* the same year (constituted by relatives of the victims) (Lessa, 2013: 143). It is in this context that several proposals for the creation of an investigative commission were presented, coming from left-wing representatives, family members, or even from a bishop who offered to act as mediator, though they were invariably rejected by Sanguinetti's executive (Skaar, 2011: 153-154; Allier Montaño, 2010: 199).

Another event which is unanimously agreed to have had an impact on discussions about the past in Uruguay is the so-called Gelman case, perhaps one of the most emblematic cases involving a missing child in the region (Allier Montaño, 2010: 185-187; Skaar, 2011: 155-156). It resurfaced at the end of the 1990s when the renowned Argentinian poet Juan Gelman made a request to President Sanguinetti to help him find his missing granddaughter, after receiving indications she had been handed to a policeman's family in Uruguay. Both the poet's son and his daughter-in-law had been kidnapped in Buenos Aires in 1976, with the latter giving birth to a child right before her disappearance. First met with a lack of response, Juan Gelman would then write an open letter and mount a worldwide campaign, as intellectuals from all over the world – including Günter Grass and José Saramago – joined in a petition to Sanguinetti, creating much embarrassment for the incumbent President and helping to reignite the national debate on the need to investigate past crimes. Sanguinetti would infamously declare that cases of disappeared children had never taken place in Uruguayan territory, only to be disproven a few months later when President Batlle took over and announced Macarena Gelman had been found.

4.3.2. Batlle's acknowledgment policy (2000)

Despite being part of the same party as Sanguinetti, Jorge Batlle – President of Uruguay from 2000 to 2005 – was keen on differentiating himself from his predecessor when it came to the official recognition of the dictatorship's crimes. This was most clear at the very start of his mandate. Batlle took everyone by surprise when, on the day of his presidency's inauguration (1 March 2000), he waved to a group of *Familiares* during the presidential parade – the first time a president acknowledged their presence – and spoke of 'sealing peace forever between Uruguayans' in his inauguration speech, in what was widely understood as a reference to the issue of the disappeared. Shortly after taking over, he met with a delegation of *Madres y Familiares* (April 2000) – an event of great symbolic importance given this was the first time a Uruguayan president received them –, after the group had sent the President an open letter in which they asked for a serious investigation that would answer four questions regarding the disappeared and the missing children – *when*, *where*, *how* and *why*?, leaving the *whom* aside (Allier Montaño, 2010: 200). Batlle would take steps in this direction when deciding to create the so-called Peace Commission (*Comisión para la Paz*) – established by presidential Decree No. 858/2000 in August 2000 – with the task of gathering information on the disappearances and preparing a final report which would include suggestions in terms of reparatory policies.

The Commission's mandate and ambitions were, however, quite restricted and conservative. It had limited powers and resources – relying on voluntary testimonies – and it failed to secure access to state archives (Lessa, 2013: 146). Moreover, rather than producing a public accounting of the details of disappearances, it normally disclosed information to individual family members only (Burt et al., 2013: 10). In the preamble of Decree No. 858/2000, the focus was on national pacification – as the name of the Commission itself reveals –, something which was criticized for falling into the assumption that there was ever a war or conflict rather than a top-down and unidirectional repressive apparatus. Batlle was clear in emphasizing that the commission was above all aimed at 'consolidating national pacification and sealing peace once and for all among Uruguayans', only aiming at a 'possible truth' (*Informe Final*, 10 April 2003). The Commission's exclusive focus on disappearances – and not on other crimes, such as torture and unjust imprisonment – also accounts for why its mandate was considered limited. In a more optimistic tone, Skaar (2011: 161) notes that the fact that sources of information were to be kept confidential encouraged some people to talk, including military men who volunteered important information on the *where* and *when* of disappearances, thus helping to clarify some cases. This proved nonetheless a double-edged sword, given that some information later turned out to be incorrect.

Composed of several notable political, religious, and civil society figures, the Peace Commission worked for almost three years, releasing its final report in April 2003. Out of the 299 cases denunciated, the Commission was able to corroborate the disappearance of 170 people (89 confirmed and 81 partially confirmed). Out of those, 26 were Uruguayan citizens who died in Uruguayan soil – mostly as a result of torture – while the vast majority (128) was confirmed to have disappeared in Argentina.[67] Resolution 448/2003 adopted the commission's conclusions and created a secretariat to continue its work (as there were still pending cases). Though the report's recommendations included compensations to relatives, Batlle's government would not follow through on this, at a time when the financial crisis absorbed most of the government and the public's energy and attention. Nonetheless, the Peace Commission had the merit of being the first ever official initiative to acknowledge that crimes had been committed by state agents during the dictatorship. Moreover, and contrary to the idea that there

[67] Comisión para la Paz (2003). *Informe Final de la Comisión para la Paz*. Montevideo: Presidencia de la República.

was a war or conflict during the dictatorship (as the name *Peace* Commission could suggest), the final report acknowledges that the vast majority of victims neither committed acts of violence nor participated in 'subversive organizations' and that their deaths occurred after the insurrection groups had been disarticulated and defeated (Montaño Allier, 2006: 90).

4.3.3. Accounting for the creation of the Peace Commission

In understanding why Jorge Batlle signaled his willingness to break with Sanguinetti's policy and acknowledge the issue of the disappeared, there are various factors worth taking into account, though they can all essentially be summed up in terms of the personal and political benefits Batlle could collect for himself. First of all, the recently inaugurated President would most likely not take up the issue if it had not been a salient topic on the public agenda in the years prior to his takeover, most notably because of the above-mentioned Marches of Silence and, in particular, the Gelman case. The general public empathy towards the issue of the disappeared was well-known, with various opinion polls from 1997 showing that between 54% and 59% of the respondents agreed that an investigation on the fate of the disappeared was imperative (Montaño Allier, 2010: 199-200). The families, human rights organizations, the PIT-CNT and specific legislators within the FA had been mounting up pressure throughout Sanguinetti's legislature, not only on the streets but also in judicial forums outside and inside Uruguay. Though in 1998 the feeling was that 'despite internal mobilizations and external pressures (…) the Uruguayan government remains immovable' (Reuters, 3 April 1998), the press would highlight the importance of the issue by noting, when taking stock of the president's mandate, that 'Sanguinetti leaves sound reforms and public finances, but the persistent claims for the dictatorship's disappeared are left for the next government to resolve' (Reuters, 30 October 1999).

Even if it was not a central issue during the electoral campaign – focused on economic issues given the impending recession –, it was an issue candidates responded to, with the FA most clearly committed to the topic, but also with Jorge Batlle already declaring that there was the possibility of opening up an investigation (Reuters, 30 October 1999). The electoral program of the FA not only stated that an investigation on the fate of the disappeared was a priority for the party, but also spoke of fighting impunity, quoting various international instruments on

criminal accountability for human rights violations.[68] The fact that the FA was the strongest competitor in the 1999 elections – winning the first round of the presidential election – furthermore meant that the Colorado candidate could perceive potential benefits when addressing a topic that was most dear to the left-wing electorate. The attempt to establish cordial relations with the FA was visible at the start of Batlle's mandate, when he met with the FA leader to discuss the issue of the disappeared (*El Mundo,* 29 March 2000). At a time when the state of the economy and Batlle's staunch liberal solutions could do much to erode the president's popularity, dealing with the human rights issue gave Batlle a humanist face that might have very well contributed to the high levels of public opinion approval registered in the first couple of months of his mandate (Allier Montaño, 2010: 206).

Although Batlle's attitude constituted much of a break with Sanguinetti's policy, there are good reasons that account for his willingness to do so. The first is that Batlle probably had a different sensibility towards the dictatorship's crimes as a result of his different personal experience: he had been briefly imprisoned, barred from political activity (including in the 1984 elections), and lived in exile in Brazil during part of the dictatorship. The second – perhaps more important – is the well-known rivalry between Batlle and Sanguinetti, the two major figures of the Colorado Party. It seems to be accepted wisdom among Uruguayan circles that Batlle's acknowledgment policy had something to do with the attempt to distance himself from Sanguinetti or even use it as a 'political vendetta' against him (Lessa, 2013: 146). The rivalry between the two is known to date back to the late 1980s, when Sanguinetti endorsed a different candidate for the presidency and the party group to which they both belonged split in two as a result of related internal struggles (Sanguinetti creating the *Foro Batllista* and Batlle remaining within the *Lista 15*). They would both run for the 1994 presidential elections (when the electoral system still allowed for various candidates from the same party) and in 1999 Sanguinetti would endorse a rival candidate. The fact that the Gelman case had contributed to taint Sanguinetti's image right at the end of his presidential mandate and that Batlle took less than one month to announce Macarena Gelman had been found is a strong indication that Batlle was keen on differentiating himself on this issue. Batlle was not at all deterred by the fact that this would create much embarrassment for his predecessor – as it would prove that Sanguinetti's assertion on the non-existence of missing children was false.

[68] *Grandes Lineas Programaticas y Propuestas de Planes de Gobierno. Aprobadas por el III Congreso Extraordinario del Frente Amplio 'Alfredo Zitarrosa'*. Montevideo, 20, 21 and 22 November 1998.

4.4. Challenges to the Expiry Law & Criminal Accountability

The approval of the Expiry Law and the results of the 1989 referendum naturally stalled judicial activity, including bottom-up demands for judicial investigation. Although judges could in theory open investigations in criminal cases without such demands, they generally relied on citizens to bring cases before them and very few would be presented during the 1990s (Skaar, 2011: 170).

Moreover, when it comes to the Uruguayan Expiry Law, it has the particularity of putting much of the decision-making power in the hands of the executive, effectively undermining the principles of separation of powers and judicial independence. Indeed, Law 15.848 has been commonly considered an extremely controversial legal instrument, in large part because article 3 establishes that it is up to the executive to decide whether a case falls within the scope of the Expiry Law or not. Judges are required to send denunciations to the executive and to dismiss them in case the latter considers they are covered by article 1 – whereby the state relinquishes its punitive capacity for crimes committed until 1 March 1985 by military and police officials either for political reasons or in fulfilment of their functions. In practice, this meant that the Uruguayan President had much discretionary power to close down investigations at his own will. In addition, article 4 of the same law also placed the investigation of disappearances in the hands of the government, establishing that the court is to remit all testimony to the executive, who is responsible for launching an investigation and informing the plaintiffs of the results of these investigations (Mallinder, 2009: 51-52).

According to Skaar (2011: 152), one of the first cases in which the judicial apparatus presented evidence to the executive – so that the latter could determine whether or not it was covered by the Expiry Law – was the so-called Zanahoria Case, presented by Senator Rafael Michelini in 1997 on the basis of new information regarding the clandestine burial site of the bodies of the disappeared. Although the responsible judge ordered an investigation and stated that its aim was only to return the bodies to the families (and not to instigate punitive action), his decision provoked much backlash. Military officials refused entry into military headquarters, the public prosecutor appealed from the decision, and the Court of Appeals determined that the responsibility of investigation lied with the executive, who promptly proceeded to close down

the case. Furthermore, the first-instance judge who opened the investigation was transferred to a civil court, in what was perceived as a sanction for his actions (Mallinder, 2009: 61-62).

The tide would start to change in the early 2000s, when victims and their lawyers followed strategies that had already been successfully employed in Argentina and Chile, seeking ways of circumventing the Expiry Law (Burt et al., 2013: 10). This was essentially done by finding loopholes in the text of the law, therefore excluding certain cases from its application. Since article 1 spoke only of military and police officials, one of the first innovative arguments was that the Amnesty Law did not apply to civilians and so non-military state officials could be charged. This was one of the drivers behind the path-breaking case of Elena Quinteros, a schoolteacher who had been abducted from the Venezuelan embassy (where she had taken refuge) in 1976 and then disappeared. Quintero's mother and her lawyer (PIT-CNT lawyer) requested the reopening of the criminal investigation in the late 2000s – after receiving new information on the case and facing much obstruction from the executive in the attempt to launch an investigation –, subsequently bringing charges against the dictatorship's foreign minister and Colorado deputy Juan Carlos Blanco. In October 2002, a judge would accept this reasoning and charge Juan Carlos Blanco with Elena Quinteros' unlawful imprisonment, in what constituted the first case of indictment for the dictatorship's human rights violations. The exclusion of civilians from the Amnesty Law would then be used as an argument to (re)open other cases – at the request of families and their networks of support at the political and civil society level –, most notably against Juan María Bordaberry, head of state from 1972 to 1976 (Allier Montaño, 2010: 234-236). In June 2005, Bordaberry and Juan Carlos Blanco would be charged with involvement in the infamous murders of legislators Michelini and Gutiérrez Ruiz and two other individuals (Amnesty International Report 2006).

It could be hypothesized that one of the reasons behind these first bold judicial steps had to do with the presence of an executive who appeared more sympathetic to transitional justice than the previous one. However, there is concrete evidence this was not the case under the Batlle administration. Although he was certainly more receptive than Sanguinetti, this was only when it came to demands for clarification of the facts and not for judicial prosecutions. This was visible in Batlle's endorsement of the Expiry Law as well as in the existence of counter-pressures coming from his government to make judges drop cases like the above-mentioned ones (Amnesty International Report 2004; Skaar, 2011: 168). Though the indictment of Juan Carlos Blanco was an indication there were judicial actors ready to challenge an unfavorable

executive – who was supposedly the one responsible for launching investigations and deciding on the application of the Expiry Law –, it is unclear whether the remaining judicial apparatus would follow these steps. This did not need to be the case, however, since the *Frente Amplio* was elected before any trials commenced and the new executive would quickly proceed to give judges explicit authorization to exclude certain cases from the Expiry Law.

4.4.1. Transitional justice measures under the *Frente Amplio*'s first government

The victory of the left in the October 2004 election was expected to bring changes in the executive's approach to transitional justice policies. This was already clear from the 2003 governmental program, where the FA spoke of its compromise to truth and justice in regard to the crimes against humanity perpetrated during the dictatorship. If, on the one hand, the program referred to the need to abide by article 4 of the Expiry Law – which suggested the FA was not going to attempt to revoke the law –, on the other hand, it also spoke of adapting domestic legislation to international human rights treaties, stating that 'impunity constitutes a real obstacle to democratic normalcy and to the overcoming of the traumas of the recent past'.[69] In fact, the internal debate on how to deal with the Expiry Law was known to divide the party. This was most clear in the 2003 Congress, when two opposing motions were debated, one from a representative of the *Partido por la Victoria del Pueblo*, advocating for the nullification of national norms that went against international law, and a rival one from a representative of the *Movimiento de Participación Popular*, arguing this was not a strategically smart move from an electoral point of view. The latter position would win by 746 votes against 569, in what was perceived as yet another moderation step in the FA's attempt to win the presidency (de Giorgi, 2014b).

The importance of this issue was clear from the very start, with the new president, Tabaré Vásquez, devoting the final paragraphs of his inauguration speech to the need to settle pending accounts on human rights. Emphasizing the various steps he intended to take towards the conduction of further investigations, Vásquez also makes an explicit commitment towards a reparation policy in his first speech. Furthermore, he states that the cases of Zelmar Michelini, Gutiérrez Ruiz, and Juan Gelman's daughter-in-law do not fall within the scope of the Expiry

[69] *Grandes Lineamentos Programaticos para el Gobierno 2005-2009*. IV Congreso Extraordinario del Frente Amplio. 20-21 December 2003. https://frenteamplio.uy/nuestra-voz/declaraciones-y-documentos/item/download/182_1c4cd23a669d80fcb96a9f03f112f164

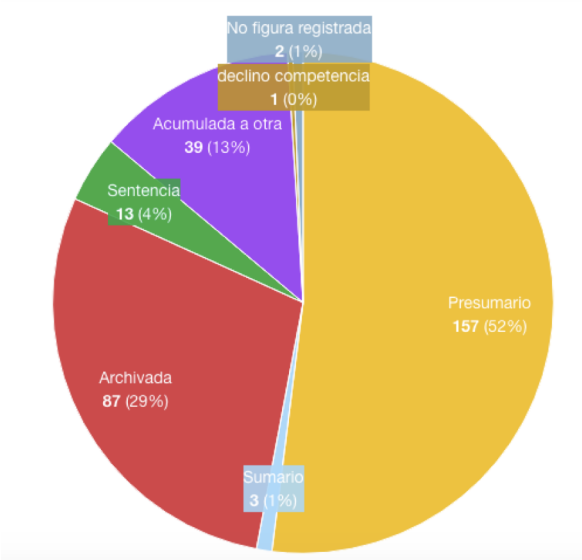
Law.[70] The exclusion of emblematic cases naturally raised the long-held criticism that there are different categories of victims in Uruguay, though Vásquez would later proceed to enlarge the scope of exceptions. Following a literal interpretation of article 1, the executive would allow for judicial proceedings in cases that could be interpreted as falling outside the law's remit – crimes committed by civilians or by military/ police high-ranking officers (given that the law spoke of those who followed orders); as well as offences that took place outside Uruguay's territory or before the June 1973 coup. According to Amnesty International (2008), by the end of 2007 a total of 47 cases of human rights violations had been excluded from the Expiry Law by the Vázquez administration.

For families and human rights groups this approach was insufficient and, in the words of a preeminent human rights lawyer, based on aberrant ethical and juridical criteria (Interview UR10). For Vázquez's chief advisor (*Secretario de la Presidencia*), instead, it was the most pragmatic and quickest way of changing the interpretation of the law and producing significant advances on judicial proceedings, without having to go through the political scandal that the law's derogation would create (Interview UR11). Indeed, Vászquez's conduct seems to have been guided, on the one hand, by the will to produce some advancements on the issue and, on the other, by the desire not to stir too much opposition. This was evident in November 2005, when the government sought to enact an Interpretative Law which would code the exceptions to the law's applicability and transfer the decision-making power to the judicial realm, but ended up withdrawing the bill after facing much opposition from the military, opposition parties, and even human rights groups (who considered that the bill granted legitimacy to an illegitimate law) (Mallinder, 2009: 65-67; Erradonea, 2008: 29).

[70] Speech by the President of the Republic, Tabaré Vázquez, in the Legislative Palace Act. 1 March 2005. http://archivo.presidencia.gub.uy/_web/noticias/2005/03/2005030111.htm

Regardless of ethical objections to the government's approach, the fact is that it allowed for the unprecedented conviction of crimes perpetrated by agents of the dictatorship. These included high-profile figures of the regime, such as former President Juan María Bordaberry and former Foreign Minister Juan Carlos Blanco – both arrested in November 2007 and sentenced to 30 and 20 years' imprisonment in 2010 – as well as former President General Gregorio Álvarez (1981-1985), arrested in 2007 and sentenced to 25 years in prison in October 2009. Most judicial proceedings have not been this fast, though. According to data compiled by the *Observatorio Luz Ibarburu* , the large majority of the cases presented to the courts are still at the pre-indictment stage (52%) and only 13 have resulted in sentences (4%) (Figure 4.2).

Figure 4.2: State of Law Suits in 2018



Source: Observatorio Luz Ibarburu

Other types of transitional justice steps were also taken during Vázquez's first presidential term, both in terms of investigations (acknowledgment) and reparations. As far as the first is concerned, the executive ordered excavations at military sites (in the search for human remains), requested the military to produce an investigation into the fate of the disappeared detainees – in which the military acknowledged the use of torture and the clandestine burial of 22 people –, and officially released two publication elaborated by prestigious academics – one entitled *Historical Investigation on Disappeared-Detainees,* gathering a wealth of material on disappearances, and another entitled *Historical Investigation on the Dictatorship and State Terrorism in Uruguay (1973-1985),* which dealt with executions, torture, political imprisonment, the repression of the left and the trade unions, and the general impact on society (Lessa, 2013: 149-150).

When it comes to reparation-type of policies, Uruguay has been particularly slow and irresolute. Law 18.033 (October 2006) significantly expanded the scope of Law 17.449 (January 2002), on the restauration of pension rights to those who, for political reasons, could not work during the dictatorship (Erradonea, 2008: 49). It granted a special reparatory pension for those who were imprisoned, but only in (the unlikely) cases where the beneficiaries did not already receive

other pensions. In September 2009, Law 18.596 finally set up a special commission to pay compensations to victims, including political prisoners, minors born in detention or disappeared, exiles, and torture victims (Lessa, 2013: 150). According to Crysol's president – the association congregating Uruguay's ex-political prisoners – these laws were fundamentally 'a conquest of Crysol', who found in the Vázquez's progressive executive a better interlocutor than 'the conservative and right-wing Batlle' (Interview UR14). It is curious to note that, unlike Spain and Brazil, reparatory policies were not the first type of transitional justice measure enacted in Uruguay. Being the least confrontational, least visible, and more victim-centered kind of measure, they were the natural first step in contexts where the dictatorship's violations were not a salient public issue and where other kinds of measures appeared unthinkable at the time. In Uruguay, instead, the salience of criminal prosecution since the early stages of the transition – and the importance of this measure for the families and support groups – overshadowed possible reparations policy, which would surely be interpreted as 'silence money' if unaccompanied by other kinds of measures.

4.4.2. Political and judicial challenges to the Expiry Law

Vázquez' 'perforation approach' to the Expiry Law was far from the only legal and political challenge this law would face after the takeover of the *Frente* over national politics. Unhappy with how partial and unequal the accountability policy was, some of the usual critics – human rights groups, PIT-CNT, the students' federation, some FA legislators – created the National Coordinating Committee for the Nullification of the Expiry Law in November 2006. The goal was, once again, to launch a plebiscite initiative aimed at overturning the core articles of the law. In a sense, it was a more divisive campaign than the one in 1989 since it was not unanimously supported by left-wing sectors. Among other considerations, voting yet again on a law that had been previously confirmed by popular consultation was an obvious source of controversy. The pro-referendum committee argued, nonetheless, that the law continued to prevent justice in hundreds of cases and that it violated fundamental principles of constitutional and international law, not to mention the ethical duty towards families (Burt et al., 2013: 12). The strength of the pro-accountability movement was once again confirmed by its capacity to collect the necessary signatures for another plebiscite, due to take place in the same day as the October 2009 national elections. Once again, it fell short of the organizers' expectations, with 48% voting in favor. The unusual voting procedure – whereby those in favor had to include a

'yes' slip while those opposed or undecided had to do nothing – is often partially blamed for the inability to reach the needed 50% quorum (Burt et al., 2013: 13).

Legal challenges to the Expiry Law were, nevertheless, moving forward at the same time. Just one week before the realization of the second referendum, the law was dealt a further blow when the Supreme Court issued a ruling declaring its unconstitutionality, following an appeal put forward by a public prosecutor in the *Nibia Sabalsagaray* case. This verdict allowed for the prosecution of military officials that had been previously covered by article one of the law, though the court can only declare a law's unconstitutionality on a case by case basis and therefore the above-mentioned verdict had limited applicability, even if it could serve as a precedent (Lessa, 2013: 154). International legal challenges would also produce results less than two years later (February 2011), when the Inter-American Court of Human Rights – following a complaint lodged by Juan Gelman and his granddaughter – issued a ruling declaring the incompatibility of the Expiry Law with the American Convention on Human Rights, ordering the Uruguayan state to guarantee that such legal instrument would no longer constitute an obstacle to investigations and prosecutions (Burt et al., 2013: 14).

This would help pro-accountability groups strengthen their case and prevent the results of the second referendum from discouraging them (Interview UR7). They argued that the failure to overturn the law did not necessarily mean people endorsed it and that, in line with the ruling of the IACHR, direct democracy instruments do not automatically make a law legitimate, not least from an international law point of view. Moreover, the IACHR case *Gelman vs. Uruguay* had a visible impact on the re-opening of the debate within the ruling party, after the setback of the 2009 plebiscite (de Giorgi, 2013: 100). Though there were already pro-accountability sectors within the FA who pushed for a revocation of the law, it is the decision of the Inter-American Commission of Human Rights to send the Gelman case to the Inter-American Court in February 2010 that made the clock start ticking for those who were interested in preventing a condemnation of the Uruguayan state. Anticipating what the court decision would be – judging by the previous jurisprudence of the IACHR on amnesty laws –, sectors within Mujica's government (President from 2010 to 2015) worked on a draft bill proposing a new interpretation of the law which, in practice, would do away with it (Lessa, 2013: 156).

Foreign Minister Luis Almagro was the key figure behind the initial impulse to promote this bill, emphasizing on various occasions that he was working towards a solution to offset the

negative impact of the Expiry Law on Uruguay's international image (*La República*, 25 July 2010). Almargo is indeed said to have had a significant role in making his governmental peers sensitive towards the importance of avoiding the discredit that a condemnation of the Inter-American system would carry (Buriano, 2011: 196). In addition to reputation concerns, Almargo highlighted that a condemnation of the IACHR would include a compensation clause to the Gelman family that could go up to one million dollars (*La Nación,* 27 October 2010). This debate occurred at the same time that Uruguay was preparing its candidacy to the presidency of the Human Rights Council of the United Nations (which it would assume in June 2011), something that perhaps contributed to further enhance concerns vis-à-vis the country's international image. Declarations by an FA lawyer (who was part of the committee responsible for drafting the bill) went into the same direction, stressing the economic, political, ethical, and image-related consequences of the expected IACHR's condemnation. His remarks denote the apparent sensibility towards the country's reputation at the international level, something which seemed to matter in particular because of the self-perceived high reputation of the Uruguayan state:

> *Uruguay is a country internationally respected for its democratic tradition and for its respect of human rights, with the exception of the dictatorship's period. For Uruguay, it affects us deeply to be condemned for the violation of a pact of which our country was one of the main promoters. Our jurists were the ones who carried forward and pushed for the acceptance of human rights guarantees. As for the political consequences, if we are condemned and do not act in accordance with the condemnation – which is to leave the Expiry law with no legal effect –, we would be incurring into permanent non-compliance and that could have consequences for our relationship with other countries. (*Daoiz Uriarte*, Portal 180,* 4 October 2010)

However, this sort of concerns did not prevent the bill from being an extremely controversial instrument, with political debates raging for months, and receiving wide media coverage (Skaar, 2015: 85). They painfully exposed the fissures the issue created within the *Frente* itself. The strongest objection was, expectedly, that it went against two popular pronouncements. The discomfort was such that three FA senators disregarded party discipline and refused to endorse the bill in late 2010. Mujica himself made his uneasiness obvious on several occasions, namely when he interrupted a parliamentary debate to warn the FA parliamentarians of the political costs the bill could carry or when he declared he had lost control over his Foreign Minister

(Burt et al., 2013: 15; Lessa, 2013: 156). After much discussion and modifications to the text of the draft law, and already following the February condemnation of the IACHR, the abstention of one FA deputy would prevent the bill's parliamentary approval on 19 May 2011. This was one day before the annual March of Silence, which gathered about 100,000 people that year, in another demonstration of the strength and transversality of the pro-accountability movement.

Despite being significantly weakened by this, the executive would quickly proceed to follow the recommendations of jurist circles who argued that the best and most practical way of dealing with the issue was to retrospectively revoke all the executive decisions who used the Expiry Law to archive cases, on the grounds of the law's incompatibility with human rights treaties and international sentences. Executive Decree 33 did just that and was justified by the president's chief advisor as a result of the IACHR's sentence which, in his words, 'obliged the Uruguayan state to leave the Expiry Law with no effect' (*La República*, 28 June 2011). This was in line with decisions already taken before on a case-by-case basis, following the petitions of human rights lawyers.

Nevertheless, there was still one major obstacle to the continuation of judicial proceedings – the looming statute of limitations. Crimes perpetrated during the dictatorship, if typified as common crimes, had a prescription period of 26 years and 8 months, meaning that judicial proceedings would have to come to a halt in November 2011. The Uruguayan judiciary had resisted the application of international human rights law in the way Chilean and Argentinian judges had done, which allowed the latter to bypass the statutes of limitations – given their non-applicability to crimes against humanity or because enforced disappearances were considered 'continuous' crimes (given the continuing uncertainty as to the fate of the missing person). Although similar arguments had been tried in Uruguay, judges had mainly invoked national law and categorized disappearances as aggravated homicides. The July 2011 decision of the Supreme Court of Justice rejecting the use of the category of enforced disappearances – on the grounds it had been incorporated into national legislation only in 2006 and could not be applied retroactively – generated further concern among human rights groups (Lessa, 2013: 158). In late September, the human rights secretariat of the trade union confederation PIT-CNT, with the support of various human rights and social movement organizations (SERPAJ, *Madres y Familiares,* HIJOS, FUCVAM, FEUU and others) presented a draft bill meant to overcome the prescription obstacle. The leader of PIT-CNT subsequently held meetings with the General Assembly's president and all the political parties, though he reveals that a series of meetings

with the leaders of the main parties had already been held before the presentation of the proposal (*La República,* 22 September 2011).

The various possible avenues to codify the non-prescription of the crimes were an object of debate within the *Frente*, with as many as six different legislative proposals being presented to the FA's Special Committee on the Expiry Law. Deputy Orrico's proposal, reestablishing the state's punitive capacity and considering the crimes of the dictatorship as crimes against humanity, was the one which would quickly turn into Law 18.831, enacted on 27 October 2011. SERPAJ notes that, even though the FA chose not to endorse the proposal put forward by the human rights movement, the latter had a positive influence given that the final law does not limit itself to a narrower type of legal solution but actually recognizes, in line with the demands of the human rights movement, the crimes of the dictatorship as crimes subject to international law (SERPAJ, 2011: 33). This is not entirely surprising if one considers that deputy Felipe Michelini and the Director of the Division on Human Rights at the Ministry of Education and Culture, Javier Miranda, were said to be involved in drafting the bill (Lessa, 2013: 159). Both are known for being among the most active and visible voices within the pro-accountability movement. It is telling that the FA chose to quickly move forward with this proposal despite the serious doubts raised by well-known jurists on the actual need and constitutionality of the bill (*El País,* 21 October 2011).

4.4.3. Accounting for the FA's commitment

In understanding why the FA took such steps, various factors seem to have an obvious importance. One is the sentence of the IACHR and the fact that it strengthened the position of pro-accountability sectors. It is difficult to tell whether the Gelman case was instrumentally used by the FA to advance an agenda it favored all along or, instead, if it genuinely reinforced the party's previous commitment to accountability. In either case, the fact is that it could be used to make the case for human rights prosecutions. Even opposition parties, who criticized the FA legislative initiatives, recognize the need to abide by at least part of the court's sentence. According to a high representative of the *Partido Nacional,* 'small countries are clinging to international law like no one else is, and having a stain would weaken us when the time comes to claim our rights' (*El País,* 13 October 2011). This statement provides interesting grounds for conjecturing why international legal institutions seem to be taken particularly seriously in Uruguay.

But if the Gelman sentence served as a catalyzing factor – together with the looming statute of limitations –, it would have little effect if it was not for the strength of the pro-accountability movement and its presence within left-wing political sectors. This goes in the direction of Burt et al. (2013: 17), who claim that 'key to getting this new legislation passed was the ability of civil society activists to connect with actors within the legislative and executive branches who themselves had long participated in civil society organizing against impunity'. Social movement studies have long pointed towards the importance of political allies in making the demands of the grassroots heard at the political level, and the anti-impunity movement in Uruguay is another example of that. However, I deem that the focus should not be simply on its capacity to establish connections to favorable political actors, but also on the extent to which the parties' social bases and certain political actors within the *Frente Amplio* have themselves been an integrative and constitutive part of this movement. In fact, one could go as far as to state that this theme has become a part of the left's identity in Uruguay, even if this would hardly be the case if it was not for the presence of a family and human rights movement that operated outside the orbit of the FA. The opposition to the Expiry Law was one, if not the most, significant political battle of the left during the transition period and therefore a constitutive part of the party's history at such a defining time.

The annual marches of silence – gathering thousands of people every year since 1996 – were a reminder of the capacity of this theme to mobilize broad sectors of society, including the same social movement organizations that are part of the social bases of the party. Indeed, part of the strength of the pro-accountability movement comes from the fact that it goes far beyond the families of the disappeared or the direct victims of repression. From the start, the strongest labor and social organizations in Uruguay – PIT-CNT (trade union confederations), FUCVAM (federation of housing cooperatives), and FEUU (the students' union) – have endorsed anti-impunity claims and offered their support to the families. A prominent example is PIT-CNT lawyer Pablo Chargoñia, who has been a key legal actor in bringing cases to courts and who was behind the first judicial advancements produced in the early 2000s. Though these organizations are formally independent from the FA, the close links between them and the party are well known. Even if they are usually more radicalized and are said to have gained more autonomy in recent years, the extent to which they are still capable of shaping and influencing the party's agenda is part of the reason why the FA continues to be considered a primary example of a movement-based party in Latin America (Anria, 2015).

Although the exact bargaining process behind the above-mentioned legislative initiatives is not known, opposition parties were fast on branding these initiatives as another example of the FA succumbing to its more radical sectors. One deputy from the *Partido Nacional* goes as far as to state that 'the government has kept its promise to revoke the Expiry Law in exchange for having its most radical left-wing sectors – those who control social organizations as the PIT-CNT – accept its economic policies' (*La República*, 8 May 2011). Even though there is no concrete indication of such an agreement, it is obvious that there were internal pressures within the FA (as in any other policy matter). It should also be mentioned that Mujica and his vice-president, Danilo Astori, were coming from more radical FA fractions than their predecessors, which might have made them more vulnerable to within-group pressure.

Nevertheless, if the pressure of certain sectors was an important element, one should not fall into the temptation of putting the focus exclusively on grassroots struggles and their connections to minority sectors within the FA, as Burt et al. (2913) do. That the party was ready to take the above-mentioned steps – after two referendums that went against them – puts into evidence that it was willing to bear political costs in order to produce advances on this issue. This would hardly be the case if this was not a topic which was important or, at least, morally binding within the Uruguayan left. As one Uruguayan political scientist puts it, 'besides internal pressures, the FA has the pressure of looking itself in the mirror and feeling uncomfortable for having a parliamentary majority and still abiding by a law that has always been experienced as a tragedy by the left' (*AFP*, 26 October 2010). An FA senator points in the same direction, going as far as to state that 'I do not think there is a topic that generates more sensitivity for the left's identity than this one' (*La República*, 9 October 2011). Both statements point to the temporal longevity of the FA's relationship with this topic, in an implicit reference to what this issue meant to the left at such a significant and constitutive moment as the democratic transition period. Then, as twenty years earlier, one has to place the FA's commitment in the context of a constant interplay between (1) the relentless struggle of the families and the human rights movement, (2) the support of broader social movement organizations, and (3) the party's grassroots embeddedness; with the difference that twenty years later there was (1) a previous and long history of engagement with the topic and (2) two circumstantial events – the Gelman sentence and an upcoming statute of limitations – that provided opportunities and made the topic urgent.

4.5. Conclusion

The case of Uruguay is particularly instructive for the purposes of this dissertation, as it puts into evidence that a negotiated transition to democracy does not necessarily have to be accompanied by a consensual mnemonic regime. To be sure, the 1980 plebiscite and the results of the 1982 internal elections had already put the military in a more fragile position than in the other two country cases explored. The unwillingness of the *Partido Nacional* to sit at the negotiation table also speaks for a context of greater radicalization in Uruguay, and possibly ended up putting the *Frente Amplio* in a position of greater strength given that it became an indispensable actor at the Club Naval talks. The key difference, however, resides with the social and political actors on the left, who were unwilling to give a *carte blanche* to the military and who took advantage of institutional mechanisms to make the theme a salient one.

In understanding why social and political actors were sensible towards this issue, there are various factors worth taking into account. At a macro/structural level, the geopolitical context is important given that the influence of the Argentinian case is notorious, especially in the constitution and frames of reference of the human rights movement. The extent of political repression in a country that had been largely unused to violence before also speaks for why many Uruguayans were not willing to let violations go unpunished. At the meso/organizational level, the constitution of human rights and family groups, the receptiveness of a cohesive social movement scene to human rights claims, and the *Frente*'s strong and embedded ties to its social constituencies, are important in understanding how the above-mentioned structural factors translated into actual demands and why the families of the victims did not find themselves isolated. Moreover, pro-accountability actors in Uruguay benefited from a few windows of opportunity at the institutional level. On the one hand, the absence of an amnesty for the military up until December 1986 allowed for the opening of judicial investigations during 1985 and 1986, with apparent levels of trust in the judiciary translating into a flood of legal complaints. On the other hand, pro-accountability actors were able to make use of Uruguay's direct democracy mechanisms by promoting a referendum on the Expiry Law of December 1986.

Although the majority of Uruguay's population would vote to keep the law, the salience of this issue and the levels of conflict generated at *t0* make the transitional justice trajectory of Uruguay radically different from the two other country cases. It is my contention that this later affects transitional justice choices at *t1*. This is first of all because the theme became intimately

associated to the Uruguayan left and therefore the *Frente* was bound to take steps on the issue if it could, out of commitment and/or because of the sustained pressure of pro-accountability factions. Secondly, unlike consensual settings where state actors are expected to opt for the least conflictual TJ measures at *t1*, a conflictual mnemonic regime at *t0* makes the enactment of conflictual measures at *t1* less of a surprise (and less costly for a party that had previously explicitly committed to this).

The fact that Uruguay's transitional justice trajectory at *t1* starts off with the Peace Commission – rather than reparations – and that this measure is enacted by a representative of the Colorado party – rather than a left-wing politician –, speaks for the peculiarity of Uruguay's TJ trajectory, when compared to Spain and Brazil. This, I argue, is not independent from the comparatively higher levels of pressure in Uruguay and the concomitant salience of the issue, following the resurgence of the topic in the late 1990s – the Marches of Salience being the most visible face of this. The enactment of an acknowledgment type of policy that is more visible than reparations to victims – but that did not antagonize the military to a significant extent (in part because it was a timid one) –, brought widely perceived reputation benefits to Battle's administration. Moreover, the enactment of the first criminal accountability steps as soon as the *Frente* comes to office speaks not only for the comparatively higher degree of commitment of this party but also for the different status of perpetrator-centered measures in Uruguay, with its early salience opening up the political space for its later treatment. This does not mean, however, that sources of pressure matter less in the case of a party that has a pre-established positive preference. This is first of all because the party's commitment comes in large part from its connection to the pro-accountability movement, but also because the move from the 'loophole approach' to Law 18.831 cannot be dissociated from the continuous pressure of the pro-accountability movement and their endorsement by the IACHR ruling.

CHAPTER 5. Transitional Justice trajectories in context: The Brazilian case

When speaking of transitional justice measures in the context of the American Southern Cone, Brazil is often singled out as the country that lags the most behind, in light of the absence of criminal accountability measures up to this day. Its transitional justice trajectory has been often described as 'reparations-driven' in light of the emphasis that has been given to compensatory or reparatory measures (Abrão and Torelly, 2012). This trend started under the Cardoso administration (1995-2002), which implemented an extensive reparations program, covering both the families of the dead and disappeared and those who were subjected to various forms of political persecution. The creation of two organs responsible for the administration of reparations – the Special Commission on Political Deaths and Disappearances and the Amnesty Commission later – ended up performing a modest 'truth-collecting' function, as victims and their families told their stories in the process of requesting reparations. This later facilitated the work of the National Truth Commission (2012-2014), an investigatory body which systematized the available information and produced a detailed and authoritative account of the repressive apparatus, naming both victims and perpetrators. This chapter constitutes, first and foremost, an effort at understanding what was behind the enactment of these measures, looking at the political context in which they were approved and identifying the relevant actions and actors. It also seeks explanations for the absence of criminal accountability measures, and puts Brazil's transitional justice trajectory in the context of a highly top-down transition in which pro-TJ voices were few, weak, and isolated.

If it is true that Brazil's mnemonic regime during the transition period appears to be much closer to the Spanish than the Uruguayan one when it comes to the absence of a salient demand for accountability, the degree of consensus is not as striking as in Spain. Despite their isolation, a few families made their demands heard within the amnesty movement and opened a few judicial cases. They faced, however, a very adverse political and institutional context, not only because they lacked the social and political basis of support the Uruguayan families enjoyed, but also because the regime kept a high degree of control over the transition process. Out of the three country-studies, Brazil's amnesty law was the one negotiated under the strictest conditions,

approved by a regime's controlled parliament in 1979, six years before the takeover of a civilian president. Not only did this mean that the amnesty law contained a hardly noticeable provision covering the crimes of state agents (just as in Spain), but also that it was not fully bilateral (as the opposition's 'blood crimes' were not covered). It is striking, though, that the amnesty law is still widely regarded as an achievement of the democratic opposition, since it followed a highly visible popular mobilization effort which had the amnesty demand at its core and because, besides the release of some political prisoners, it allowed for the return of thousands who had been exiled and banished both from their jobs and political life. It is therefore a major stepping stone in the process of 'slow, gradual, and careful' political liberalization that the regime itself had announced. The fact that the amnesty law covered state agents was not entirely unnoticed by the regime's opposition, but taken as an inevitable counterpart, given the correlation of forces at the time.

Thus, the lack of social and political support for accountability has to be put in the context of a particularly unfavorable political environment, which, as in Spain, precluded potentially relevant actors from even perceiving it as a possibility. But while in Spain there was a deliberate political commitment to reconciliation and moderation underlying the decision to leave the past behind, in Brazil there was no equivalent amnesty negotiation process. To the extent that 'pacts' were made, they were agreed upon by the political forces allowed by the regime and the left was largely excluded. Therefore, the absence of left-wing political support for accountability in Brazil should not be understood as a result of an implicit agreement, but rather of a social and political context in which accountability was neither perceived as possible nor taken as a priority.

In understanding this, there are a number of potentially relevant factors. The first has to do with the characteristics of repression. Because it made less lethal victims (in proportion to the population) and was more targeted at violent left-wing groups – who were small, fragmented and largely isolated –, the number of potential claimants (that is, families) is comparatively smaller and the degree of solidarity coming from external actors is expectedly less strong. Contrary to Uruguay, which had a stronger and significantly more unified left, Brazil's moribund left had been torn by divisions and the moment of transition to democracy is not as much one of 're-organization of the old' as 'creation of the new'. Although the newly founded Workers' Party attracted some of those who had been imprisoned and tortured, it emerged out of a 'new syndicalism' movement, which was different and keen on distinguishing itself from

the ‘old left’. Its focus was on the working class and the marginalized sectors of society, in an attempt to become the first mass-based party in Brazil. Similarly, an incipient human rights movement – which had been born in association to the defense of political prisoners throughout the 1970s –, turned its attention to social and economic rights, in concomitance with the growing mobilization of the working class, and in response to Brazil’s massive socioeconomic inequalities.

The families of the hundreds who had died or disappeared for political reasons had therefore to wait for an administration that was sympathetic to their cause in order to have some of their demands heard. The approval of the first reparatory measures at the start of Cardoso’s mandate (1995-2002) cannot be dissociated from the fact that he was the first president coming from the dictatorship’s opposition circles, having among his key advisors people who had been active in the denunciation of state abuses back in the 1970s. However, credit has also to be granted to various sources of external pressure who played an agenda-setting role and who had their case strengthened by the discovery of a mass grave in S. Paulo in the early 1990s.

The creation of the two reparatory commissions mentioned above – and their continuous work up to now –, together with the establishment of a Special Secretariat for Human Rights during Cardoso’s presidency, meant that the Brazilian state itself created institutions which would later serve to push for an advancement of the transitional justice agenda from within the state. The ‘truth and memory’ agenda would be adopted during Lula’s second mandate (2007-2010), shortly after Paulo Vannuchi took over the presidency of the Secretariat for Human Rights (an ex-prisoner and victim of torture known for his sensibility towards the issue). He is said to have been important in pushing for this issue from within the government, eventually culminating in the decision to create a National Truth Commission at the end of Lula’s mandate. However, and as I will develop in detail, external sources of pressure also increased over this period. The families, which had been largely isolated before, managed to open a few judicial doors during the 2000s and gain the support of various legal actors within the Federal Public Prosecutor’s Office, the Brazilian Bar Association, and the Interamerican Commission on Human Rights, in concomitance with the growing prominence of the transitional justice agenda in Latin America.

5.1. Contextualization

If at the start of the XX century Brazil was predominantly rural and dominated by regionally-based oligarchical elites, much of what came in the following decades resulted from efforts at centralization and creation of a strong and paternalistic central state capable of regulating the economy and co-opting corporate interests. This was not without resistance (as with the Paulista war in 1932) and certainly not without the recurring interference of the military in politics, widely seen as a legitimate player of the political game. Its 'moderator' role is best described by Stepan (1971), intervening in politics whenever part of the civilian elite deemed that an executive had to be removed or barred from taking over. If military officers had significantly contributed to put an end to the *coronelismo* era (1889-1930) – characterized by the concentration of power in the hands of a few rural oligarchs –, as well as to oust the Getúlio Vargas's dictatorship (1937-1945), they have also not hesitated to intervene repeatedly during Brazil's quasi-democratic experiment (1945-1964) whenever the conservative camp deemed that political representatives were going too far in their socio-economic reforms. This was the case in 1954, 1955, 1961 and finally with the coup d'état of 1964, when rather than a 'moderator' – who steps aside after securing a shift in power –, the military becomes the agent of transformation itself and installs a military dictatorship that would last for over twenty years (1964-1985).

The social and political dynamics leading up to the 1964 coup fall neatly within a Cold War logic, with a populist left-wing government raising the suspicion among part of the established elite that Brazil was on the road toward a socialist state. Goulart's government (1961-1964) turned sceptics into die-hard enemies when proposing a comprehensive socio-economic plan that involved landholding reforms. Polarization was aggravated by a fragile economic situation and Goulart's turn to radical-left allies at the end of 1963, whose strategy of collecting support through mass popular rallies further intensified the 'red scare' among the upper and middle classes. Goulart's endorsement of the unionization of enlisted men further inflamed tensions with the military hierarchy, which had long feared a left-wing infiltration among its lower-ranks, a fear substantiated five days before the coup when more than 2,000 low-rank sailors staged a mutiny in Rio. Skidmore (1988: 17) goes as far as to consider that the climate of social agitation came close to a 'proto civil war', with 'anticommunist paramilitary groups in S. Paulo terrorizing leftist student leaders, and with landowning elites paying gunmen to kill peasant organizers.'

The 1 April 1964 coup d'état and the bureaucratic authoritarian regime that followed are therefore commonly interpreted through a class-based lens, as a 'reaction to the extended political activation of the popular sector (…), perceived by other classes and sectors as a threat' (O'Donnell, 1978: 7), as a way to 'arrest the shift of power to the urban working class' (Love, 1970: 23), or as a result of the 'fear that a rising proletariat and an awakening peasantry would seize power and change the internal distribution of wealth' (Moreira Alves, 1972 quoted in Flynn, 1974: 322). The rapid industrialization and urbanization Brazil went through at the time, together with rising literacy rates (literacy being a requirement for suffrage), brought a new mass of voters to the political scene, disrupting the traditional patronage-based electoral deals. If in the 1945 presidential election 6 million people had gone to the polls (in a country of 46 million), this number increased to 12,6 million in 1960 (that is, 19% of the population) (Love, 1970: 17). This happened at the same time as the Brazilian Labor Party (PTB) made significant electoral gains and the working class became increasingly militant. It is worth noting, however, that the creation of the PTB in 1945 was an anticipatory elite-led move – rather than an effort from below – and was in part aimed at preventing a growing influence of the Communist Party and like-minded organizations. In fact, the dominant parties of the time, far from anchored on social roots and cleavages, still operated largely within the logic of 'traditional politics', defined by Hagopian (1996: 16) as a system where 'political power is narrowly concentrated, access to decision making is restricted, channels of political representation are arranged hierarchically, and political competition is strictly regulated' with parties being 'vehicles of oligarchical control' and interests being 'mediated by patron-client relationships'.

The regulation of political competition is perhaps best evidenced by the fact that the Communist Party was outlawed as early as 1947, after a brief period of legality between 1945 and 1947, and following a decade (1935-1945) where it had been severely repressed. Militant anticommunism had already been at the origin of the Vargas' dictatorship (1937-1945), after a rapidly suppressed 'Communist uprising' in 1935 (led by low-rank military men) and the discovery of an alleged communist plot in 1937 (later proved to be false). The anticommunist imaginary was again at the origin of the 1964 coup – or, at least, used as a rhetorical legitimizing tool –, something sure to resonate well with public opinion as surveys at the time revealed that over 60% of respondents in S. Paulo considered it a danger and as much as 80% supported the illegalization of the Communist Party (Sá Motta, 2015: 9).

Besides forestalling the 'communist conspiracy', the broad goals of the military involved sweeping economic and political change, including (1) economic stabilization, that is, control of inflation and attraction of foreign investment and (2) demobilization of popular classes so as to control wage demands, on top of the eradication of political clientelism, corruption, and inefficient allocation of public resources (Hagopian, 1996: 2). But while some military factions wanted to impose hardline authoritarian rule, others sought to maintain some institutional characteristics of a restricted democracy, as a means of obtaining support for the regime (Mainwaring, 1995: 181). The moderate faction would prevail for most of the time, and the Brazilian Congress would keep on functioning for most of the authoritarian period (after having part of its members purged), with two parties allowed – a pro-regime party (ARENA – National Renewal Alliance) and a party conglomerating the opposition, the Brazilian Democratic Movement (MDB). The Brazilian military dictatorship was therefore quite unique in the extent to which it welcomed the cooperation of right-wing civilian professional politicians and preserved an institutional framework in which political careers were maintained and a margin of dissent was allowed (Power, 2016: 17). If the MDB struggled to survive in the first years, with outspoken critics risking their mandates, it gained traction (and votes) in the first half of the 1970s, benefiting from political liberalization and eventually contributing to the political dynamics leading to the restauration of democracy in 1985 (Mainwaring, 1995: 183).

5.1.1. Repression's characteristics

In order to 'restore internal order and the international prestige of the country', the military leaders were quick to enact legislation expanding the power of the executive, including the power to suspend the political rights of any citizen, to cancel the mandate of legislators, and to suspend job stability for civil servants (Skidmore, 1988: 20). According to Pereira (2005: 67), in the years between 1964 and 1973, about 517 people were deprived of the right to vote and to run for office, 541 elected officials were stripped of their mandates, 1,968 government workers were forced to retire, and another 1,815 were fired. This was part of 'Operation Clean-Up', aimed at rooting out eventual threats to national security. In the immediate aftermath of the coup, between 10,000 and 50,000 people were detained, many of whom were released within days and most within weeks (Skidmore, 1988: 25). This first wave of repression targeted supporters of the deposed government and left-leaning organizations, including communists and their alleged collaborators in the civil service, universities, trade unions, state-owned firms, and the military itself (Pereira, 2005: 67). Some of the detainees were picked up for tortures –

the kind of torture that in Brazil had been long used on ordinary criminal suspects – in order to extract information on 'Russian contacts' and the like (Skidmore, 1988: 24).

Contrary to most dictatorships, in which the initial wave of repression tends to be more extensive and violent, Brazil's security apparatus would turn more ruthless from 1969 until the mid-1970s. As an armed left emerged at the time – though small, fragmented and lacking any sort of mass base –, this second wave of repression was more brutal, widespread, and centralized, targeted at 'shadowy groups within the armed left and their presumed support base, including students, academics, journalists, and clerics' (Pereira, 2005: 20-21). If up until 1968 there is a record of 45 deaths at the hands of state agents and 4 disappearances, between 1969 and 1974 there is a total of 297 cases of deaths and disappearances (94 deaths and 203 disappearances), in accordance with the lists of victims provided by the recent report of the National Truth Commission (CNV, 2014: 487-489; 577-582). In total, the Commission is able to gather information on 434 lethal victims of state violence (though it includes 11 cases that occurred before 1964). About 70 of those victims were killed or disappeared as a result of the annihilation of the Araguaia guerrilla – an armed movement formed by militants of the Communist Party of Brazil (PCdoB – a splinter group from the Brazilian Communist Party [PCB]) who had established themselves in a remote jungle-like region in preparation for what they hoped would be a focus of rural guerrilla activity. Their early discovery by the regime culminated in a brutal extermination campaign before they could gain any momentum.

The dictatorship's death toll puts into evidence that widespread extrajudicial killings were not the regime's preferred repressive method. Repression in Brazil, as Pereira (2005) develops at length, was more judicialized and gradualist than in the other two countries the author analyzes (Argentina and Chile), in the sense that the regime slowly modified aspects of traditional legality and subjected political dissent to the military legal system (which was not entirely isolated from the civil one), giving the process an appearance of legality. The ratio of those prosecuted in courts to those killed is telling: while in Brazil for every 23 people put on trial, one was killed, in Chile this ratio is of 1,5: 1 and in Argentina 1: 27, meaning that 27 people were extrajudicially killed for every person put on trial (Pereira, 2005: 23). The *Brasil Nunca Mais* project (1985) – an impressive civil society initiative which clandestinely photocopied all the court proceedings of the Supreme Military Tribunal between 1964 and 1979 –, documents in detail the cases of a total of 7,367 defendants. Out of the more than 11,000 criminal charges presented, more than half were due to membership in groups or movements opposed to the

regime and only 12,5% of all the charges referred to violent or armed action, much in contrast to the claim that repression was a response to terrorist violence (*Brasil: Nunca Mais*, 1988 quoted in Pereira, 2005: 76-77). Pereira's (2005: 77) in-depth study on the judicialization of repression further reveals that one remarkable feature of political trials is the relatively high acquittal rates of military courts (over 50%) which, together with sentences that were relatively light, constitute evidence that the courts were not blindly sanctioning the regime's repression, but following a conservative legalistic path.

Importantly, the *Nunca Mais* project became the best source of evidence on the widespread practice of torture by state agents. About 25% of the cases in the reviewed files included denunciations of torture, meaning that, at a minimum, 1,800 people were affected (Weschler, 1990: 45). Note that this is surely only a fraction of those subject to torture as it only encompasses those who were sent to court, who appealed to the Supreme Military Court, and who were courageous enough to denounce the practice while still under the custody of the repressive apparatus. The detailed description of multiple and horrifying instances of torture – with a wide variety of methods – reinforces the point made by the authors of the *Nunca Mais* book that, despite the deep roots of the use of torture in Brazil, what happened after 1964 was of a different kind in that torture was administered on a systematic basis and 'was an essential component of the semi-autonomous repressive system' (Weschler, 1990: 58). More than half of the denunciations of torture occurred during the regime's most repressive stage (1968-1974), corresponding to the period in which military hardliners are said to have taken over and where the most infamous 'institutional act' was approved. Institutional Act Number 5 (AI-5, issued in December 1968), besides enacting various measures strengthening the executive's authoritarian power, eliminates the legal right to habeas corpus for 'national security crimes' – something which is commonly considered the equivalent of 'institutionalizing the use of confessions extracted under torture as a basis for the repression and prosecution of opponents and dissidents' (Pereira, 2005: 72). As restrictions on freedom of expression and reunion were severely tightened up, and the executive was given greater arbitrary power – including when it came to sacking any public servants –, the number of those forced into exile increased during this period too. Though there are no precise estimates, it is usually considered that between 5,000 and 10,000 people left the country for political reasons.

In sum, if the recent report of the National Truth Commission updated the number of lethal victims to over 400, the ongoing work of the Amnesty Commission – created in 2002 to manage

the attribution of economic and moral reparations to those who had suffered from non-lethal forms of political persecution – has recently placed at 45,000 the number of cases that were reviewed positively (Torelly, 2018: 6). To the best of my knowledge, there is no publically available source discriminating this number according to the type of violations, but it includes not only torture and imprisonment, but also due process violations and ill treatment, including job loss and forced retirement.

5.1.2. The transition's political context

The peculiarity of Brazil's top-down transition to democracy lies in its lengthy and protracted nature. In 1974, the then President, Ernesto Geisel, announced the start of the so-called period of *distensão* (decompression) and *abertura* (opening), a 'slow, gradual and careful' process of political liberalization that would eventually lead to the return of a civilian government. This period of regime-led liberalization – involving loosening press censorship, decelerating repression, and the gradual revocation of draconian legal measures – would last as long as the dictatorship that had been in place thus far. As the general intention of the military had been to restore order (rather than stay permanently in power), the *raison d'être* of the regime had largely disappeared by 1974 – the most radical left-wing sectors had been annihilated and an 'economic miracle' had been performed. According to Mainwaring (1986: 153), the regime chose to liberalize 'not because of its weakness but because of its strength', as the good economic performance and the absence of a strong opposition fostered the regime's belief that it could withdraw at a minimal cost and liberalize at its own and controlled pace. Moreover, the author traces the liberalization impulse to the tensions between the military as an institution and the military as government, as the politicization of the institution and concomitant internal divisions – especially during presidential successions – damaged the institution's discipline and unity (Mainwaring, 1986: 152-153). The growing autonomy of the security apparatus within the military establishment itself, together with the former's ideological radicalization, was also seen as dangerous by Geisel and his key advisors (Stepan, 1988: 33). In addition, others highlight that the political opening was not independent from the loss of support of the bourgeoisie, as part of the business community started to criticize the preferential treatment given to state enterprises, Geisel's economic plan, and his centralized style of policy-making (Bresser Pereira, 1978, Faucher 1981 and Martins, 1986, quoted in Hagopian, 1996: 11).

Geisel's time in office (1974-1979) was spent juggling between the effort to contain an increasingly strong opposition within the Congress and out of it, and placate the hardline opposition within the military (to whom he had to continuously demonstrate he was in control of the opening process) (Bruneau, 1992: 260). As the MDB electoral performance was significantly better than expected in 1974, electoral rules would be manipulatively changed ahead of the 1978 and 1982 elections in order to prevent the opposition party from controlling Congress and, crucially, the electoral college. Civil society opposition would show renewed strength from 1978, with the appearance of various types of voluntary associations and social movements, such as neighboring groups, Ecclesiastic Base Communists, women and black organizations, the environmentalist movement, etc. The Catholic Church, renowned associations of lawyers and journalists, and the student movement were also increasingly vocal. Particularly challenging was the reemergence of the labor movement, staging a wave of major strikes between 1978 and 1980 – mostly centered around wage demands – and launching the so-called 'new unionism', critical of government corporatist tutelage (Roett, 1986: 375-376). The government would respond with a mix of 'repression, cooptation and concessions', including a wage policy reform in 1979 (Mainwaring, 1986: 156). This was part of what Stepan (1988: 39) has described as a 'complex dialectic between regime concession and societal conquest', with the regime initially creating the conditions for civil society to sprout (with the Geisel administration purposefully using civil society to curb military extremists, the author suggests), while at the same time creating an opposition pole that could force concessions in unanticipated directions. This was what happened with the 1979 Amnesty Law which, as developed below, resulted from social mobilizations, though largely dictated in the regime's own terms. However, this first wave of popular mobilizations would not prove threatening to the regime and would decline after 1980, something that Viola and Mainwaring (1985: 205) connect to the regime's flexibility and capacity to use the traditional Brazilian system of accommodation and cooptation of some parts while controlling and excluding the most combative ones, using repression if needed.

Apart from the 1979 Amnesty Law, the abolishment of Institutional Act Number 5, the 1979 reform of the party system – abolishing the existing two parties and allowing for the creation of new ones –, and the 1982 direct elections for state governors were visible and important steps in the process of opening up the political arena, despite the manipulative fashion in which they were enforced. Although the not-so-veiled intention of the 1979 party reform was the (successful) splitting of the opposition into various parties, it also had the unintended

consequence of generating more opposition than anticipated, namely with the creation of the Workers' Party (*Partido dos Trabalhadores* – PT) in 1980, born out of the 'new unionism' movement and challenging Brazil's tradition of elitist 'non-programmatic parties and pork-oriented politicians' (Nylen, 2000: 127).

It was not until mid-1983 that the regime gave the first signs of political crisis and started to visibly lose its capacity to control the political process. This was first and foremost a result of divisions within the government's party which, breaking with the previous pattern of submission to the executive and in the context of a deep economic crisis, had sectors clashing with the government over matters such as wage policy. With the president abdicating from coordinating the party campaign for the next presidential candidate, divisions over the choice of his successor were further exacerbated. It was in this context that the opposition-led campaign for direct presidential elections took over, demanding the elimination of the congressional electoral college (in which the government's party had an absolute majority) ahead of the 1985 presidential elections. The *diretas já!* movement swept Brazil's largest cities in the first months of 1984, in what was the largest wave of public demonstrations ever seen, in a rare (or perhaps unique) moment of unification of the various political and social opposition forces. Although the campaign would fail in its ultimate objective, it contributed to further erode the legitimacy of the regime and to accentuate internal divisions (with members of the governing party supporting direct elections). The straw that broke the camel's back was the government's party endorsement of a presidential candidate despised by the more moderate party factions. These would defect and form the so-called *Liberal Front,* which would enter into an agreement with the largest party in the opposition – the successor of the MDB, now called PMDB (Brazilian Democratic Movement Party) – and support the opposition's presidential candidate (Tancredo Neves). In exchange, the defectors of the government's party would get to nominate the vice-president (José Sarney) and benefit from an 'equitable distribution' of government and administrative posts (Hagopian, 1990: 158). This agreement was crucial in changing the correlation of forces in the electoral college, paving the way for the takeover of a civilian president in January 1985.

Note that Tancredo Neves was coming from the moderate opposition to the regime and was generally seen as a reasonable and flexible politician, gaining the support of most of the political spectrum and proving to be an acceptable candidate to a large part of the military hierarchy. He worked hard towards persuading the military not to intervene, namely when it came to

providing the assurance that there would be no persecution of military leaders (Mainwaring, 1986: 168). This was one of the top concerns of the military, at a time in which prosecutions had already been initiated in Argentina. Neves's commitment in this regard appears to have been enough to earn him the support of important military figures linked to ex-president Geisel as early as September 1984, including Geisel himself (Dimenstein, 1985 quoted in Maciel, 1999: 373). There are reports of various meetings between Tancredo and several military ministers in the months preceding the January 1985 electoral college, including the minister of the Army, who took concrete steps to prevent an attempt of coup when sidelining a few hardliners (*Veja*, 16 January 1985, quoted in Maciel, 1999: 382). In a dramatic twist of events, Tancredo's death (out of illness) in April 1985 meant that his vice-President José Sarney would take over, an unfortunate event for those who desired a greater break with the past since, contrary to Tancredo, Sarney had been a supporter of the military regime and a member of the regime's party until 1984.

Linz and Stepan (1996: 168-169) are right to point out that the military organization was 'able to extract a high price for extrication', best visible in the fact that there were six military ministers in the cabinet of the first civilian president (1985-1990), and in the clear interference of the military on a whole range of issues at the time, for instance playing 'a major role in setting the boundaries of agrarian reform' and unilaterally deciding 'whether or not to send military units to quell strikes'. Moreover, the armed forces kept control over the Intelligence Service and defense issues, as well as autonomy in regulating its own affairs (such as military modernization and internal promotions) (Hagopian, 1990: 155-156). Military influence over the 1987-1988 Constituent Assembly was also significant, succeeding in 'subverting most of the proposed constitutional clauses that would have curtailed military autonomy' and joining forces with President Sarney in preventing the move from presidentialism to a parliamentary or semi-parliamentary political system, in another sad demonstration of what a mix of 'pork-barrel payoffs and threats' can achieve in Brazil (Linz and Stepan, 1996: 169). Fortunately for Brazil's democracy, and as Hunter (2000) develops at length, civilian authority over the military has increased considerably since the end of Sarney's presidency and throughout the 1990s, with President Cardoso in 1999 finally creating a unified and civilian-led ministry of defense. The armed forces' tutelage over Sarney's presidency is yet another reason to endorse the claim that the transition in Brazil was not complete until 1990, when the first directly elected president assumed office.

5.2. The transition's (mostly) unified mnemonic regime

Brazil's mnemonic regime during the transition period was neither as conflictual as the Uruguayan nor as consensual as the Spanish. If it definitely comes closer to the latter – given that accountability was far from a salient concern both at the social and political levels –, there were nonetheless a few dissenting voices, to a greater extent than in Spain. This was especially the case during the period of greater strength of the amnesty movement (1978-79) and the political debates on the amnesty law (1979). Brazil's mnemonic context was, however, shaped by the peculiarity of having an amnesty law approved at a much earlier point in time during the transition – when the military regime was still fully in control –, and thus the unfavorable balance of the time is clear in taking its toll on pro-accountability demands. This meant not only that there was little political space for dissenting voices, but that the subsequent dissolution of the amnesty movement left the remaining pro-accountability voices largely isolated. Both social and political actors moved on to focus on other businesses, at a time the democratic transition was not yet guaranteed and political parties were in a process of construction.

In understanding the social and political isolation of the few pro-accountability voices in Brazil, the highly top-down nature of the transition to democracy – and the overall weakness and fragmentation of the left-wing opposition – is the primary and most obvious factor, though not the only one. The fact that (1) levels of lethal repression were comparatively smaller in Brazil, (2) the radical left groups targeted by repression were weak, fragmented, socially isolated, and largely stigmatized for their engagement in violent actions, and (3) the abundance of other serious human rights concerns, also help account for the lack of social and political salience of the issue in Brazil. These and other aspects are developed below.

5.2.1. The 1979 Amnesty Law

It was in the context of Brazil's 'slow, gradual, and careful' opening, and at a time when a variety of social movements and voluntary associations were emerging, that the Amnesty movement appeared and took off. The timing of this movement – and of the 1979 amnesty law – is crucial in placing the debate over transitional justice in Brazil in context because, unlike Uruguay and Spain, the amnesty bill would not be approved by a legitimately elected democratic parliament, and the amnesty movement would lose its strength long before the transition to a civilian presidency. The regime's leaders would get their way and approve a half-

hearted amnesty law, in which those who had been convicted for 'blood crimes' were excluded, going against the amnesty movement's call for a 'broad, general, and unrestricted amnesty'. Moreover, the law included a clause which, despite the relatively ambiguous wording, provided a cover for the crimes of state agents, going against the movement's expressed desire for a non-reciprocal amnesty. Nonetheless, by allowing for the return of thousands of persons who had been exiled – including preeminent politicians and intellectuals –, the reintegration of those who had been banished, and the release of those condemned for non-violent political crimes, Law 6.683 (28 August 1979) was commemorated as a victory of the opposition and proved sufficient to produce a demobilization effect, in yet another example of how the 'dialectic between regime concession and societal conquest' has been used by Brazilian elites to accommodate *some* social demands and in this way break or weaken a movement. The demands of the families of the dead or disappeared – which had been incorporated by the amnesty movement – were left unfulfilled, with the demobilization of the movement taking its toll on the families who still hoped for some form of *truth* and *justice*, leaving them feeling largely isolated.

Although the calls for amnesty were not a novelty, it was in the second-half of the 1970s that the amnesty movement gained strength, initially motivated by the families of political prisoners. Pro-amnesty associations would start popping up throughout Brazil as well as in countries where the exiled community was present. Some events would contribute to make political repression a more salient issue, namely (1) the brutal death of the then head of journalism of *TV Cultura*, Vladimir Herzog, at the end of 1975, victim of torture – with thousands of people gathereing in a mass at S. Paulo's cathedral as a result – and (2) the international condemnation of human rights violations in Brazil, most notably by the Carter administration in 1977. The amnesty issue became a demand of other social movements too, as in the student demonstrations of 1977 (Mezarobba, 2003: 18). It was in the following year that the movement gained organizational strength with the creation of the Brazilian Amnesty Committees (CBA), meant to coordinate pro-amnesty actions in the various states where CBAs were formed. The First National Congress for Amnesty took place in November 1978, gathering 21 amnesty groups; by the time of their third national meeting in June 1979, there were a total of 45 regional entities (Greco, 2003: 90; 166). The amnesty demand became highly visible, with public rallies, posters, banners, stickers, and pamphlets appearing in Brazil's streets and in highly visible places such as football stadiums (Mezarobba, 2010: 10). Prisoners' hunger strikes would also be used to raise public attention and increase the pressure over the regime. Moreover, and

important in giving the movement political access and visibility, it attracted the support of notable social and political segments, such as high-profile intellectuals and political figures – including the president of the MDB and various opposition representatives –, as well as the National Conference of Bishops of Brazil, the Brazilian Press Association, the Brazilian Bar Association, and the Brazilian Society for the Advancement of Science (Mezarobba, 2003: 21). In fact, there is a visible class dimension associated to the amnesty struggle. In a country where less than 2% of young people had access to higher education at the time, estimates indicate that over half of political prisoners had a complete or incomplete university degree (Greco, 2003: 234). This is probably why, as Greco (2003) recounts, the movement had a hard time connecting to more 'popular movements', whose demands were less political. The testimony of Lula da Silva, at the time president of one of the most vocal Workers' Union, is illuminating in this regard. Speaking of his first reaction to the contact of a movement representative, he recalls saying: 'Amnesty does not fill the workers' bellies (…), that is not a priority for us.'[71] Lula furthermore recounts how before he thought the prisoners were common criminals, in accordance with the regime's rhetoric. Though his union would end up supporting the amnesty banner, Lula's reaction is indicative of the reasons why the amnesty movement did not penetrate the popular sectors to a greater extent.

As mentioned, the movement's recurring call was for a 'broad, general, and unrestricted amnesty': broad, meaning that it would cover 'all who had been punished by the repressive acts passed and enforced by the regime'; general, in that it would be 'applied without examination of the merit of the crimes committed'; and unrestricted because it would not impose 'any conditions upon the beneficiaries' (Ferreira, 1979: 72 quoted in Schneider, 2018: 19). Besides the release of political prisoners and the return and reintegration of those who had been banished or who had fled, the movement's demands gravitated around putting an end to the repressive apparatus – including the end of the use of torture and the revocation of the National Security Law –, a banner which was intimately linked to the return of 'democratic freedoms', as the movement often claimed. Moreover, and when it comes to the specific cases of those who had died or disappeared at the hands of state agents, the (1) clarification of the circumstances under which they occurred and (2) judicial accountability for such crimes were demands which were also part of the written resolutions and the 'minimum action program' of the movement's national congress (Greco, 2003: 99). However, as these were the most maximalist demands and

[71] http://csbh.fpabramo.org.br/o-que-fazemos/memoria-e-historia/exposicoes-virtuais/luiz-inacio-lula-da-silva

the ones that, pragmatically speaking, were the least likely to be taken into account, many within the amnesty movement – including those within the opposition party in Congress – were keen on dropping these in exchange for a compromise solution (Schneider, 2010: 3; Fico, 2009). Others were openly critical: a preeminent political prisoners' lawyer and MDB congressman was caught saying 'one does not speak of a Nuremberg Tribunal while the Gestapo is in power' (Alves, 1983: 186 quoted in Teles, 2011: 443).

Unsurprisingly, the government's proposed bill, submitted to Congress at the end of June 1979, did not meet the main movement's call and had a clause specifically excluding those who were convicted for crimes of 'terrorism, robbery, kidnapping and physical attack' (Art.1 §2). President Figueiredo justified the amnesty's scope with the reasoning that terrorism is not a political crime, though at the same time declaring that ongoing judicial procedures for those same crimes would come to a halt. The initiative was framed by the President in a language of 'pacification', 'disarmament of spirits', and 'democratic coexistence' (Message Nº 59 of 1979 in Congresso Nacional, 1982: 21-23).

Moreover, art. 1 of the proposed bill conceded an amnesty to 'political crimes or connected to them' (*crimes conexos*), defined as 'crimes of any nature related to political crimes or practiced for political motives' (Art.1 §1). Although this formulation was ambiguous, attentive observers did not fail to notice that the veiled intent of this clause was to provide a cover for the crimes of state agents. Even though this was not the main focus of the debates at the time – which were rather centered on the inclusion or exclusion of the crimes mentioned in Art.1 §2 –, this was nonetheless an object of discussion at the time, most notably within the bi-partisan Amnesty Committee (*Comissão Mista sobre Anistia*), created in Congress to discuss and review the amnesty bill and the hundreds of proposed amendments submitted by members of Congress (Fico, 2009 and Schneider, 2018).

Debates on who was to be included or excluded from the law gave origin to a matrix of possible combinations, including: (1) a general amnesty for political prisoners, which was non-reciprocal, that is, which did not include state agents – the preferred outcome of the amnesty movement; (2) a general and reciprocal amnesty – which, in the eyes of many in the opposition, would already be a great achievement given the political circumstances; (3) a partial amnesty for political prisoners (not covering 'blood crimes') in which state agents would not be covered either – a possibility which was equated, but did not receive much support given that the scope

of the amnesty for political prisoners was the primary concern, more than the inclusion or exclusion of state agents; (4) a partial amnesty for political prisoners which would cover state agents – the preferred option of the regime and the one that would triumph. It is, however, quite remarkable that the Congress vote on two amendments – one making amnesty general and non-reciprocal (option 1) and the other general and reciprocal (option 2) – came surprisingly close, with some ARENA deputies defecting (Schneider, 2018: 30).

The discussions within the Congress' Amnesty Committee (responsible for reviewing the amendments to the amnesty law) are one of the best sources when it comes to assessing the terms of the political debate at the time on the matters of concern here. Though there was much of a rhetorical emphasis on 'pardoning', 'pacification', 'disarming the spirits', and 'unifying Brazilians' (which was a rhetorically wise position in light of the opposition's desire to have all types of political crimes included), several MDB representatives were not only outraged at the exclusion of crimes of terrorism and others in Art.1 §2, but also at the inclusion of the crimes of state agents. Take as one of the boldest examples the justification given to amendment no. 8, which was undersigned by a total of 19 congressmen:

> *We defend an amnesty for every prisoner, pensioner, banished person (…), exiled, those who rebelled and reacted against the terrorism of repression. Before 1964 there was no terrorism in Brazil. This is a historical truth that will be studied in the future, the causes of what has been so often called subversive terrorism.* ***(…) But the law aims to give to the executioners, the torturers, those who unleashed the storm, those who provoked despair and revolt*** *– the sacred revolt of so many* ***– an amnesty they do not deserve, and this would be a mockery of justice and human dignity.*** *Those who should be sitting in the dock cannot be the judges. Amnesty has to be broad, general and unrestricted, for all the victims of the dictatorship and the crimes of repression.* (Congresso Nacional, 1982: 77)

It is striking to see a group of 19 congressmen undersigning this statement, which not only directly blamed the regime for the actions of the armed opposition, but went as far as to suggests that those dictating the terms of the amnesty should be facing criminal justice. This was far from a majoritarian position, but it is illustrative of the fact that Brazil's mnemonic regime was not as consensual as it appears on the surface. A few other representatives within the Congress' Amnesty Committee went in similar directions:

> *Society has spoken on behalf of the investigation of those crimes. And not with an intent of revenge; not with an intent of torturing the torturer, murder the murderer, kidnap the kidnapper, or disappear the ones who it made disappear. But investigation of those crimes will allow society to, knowing the depth of such horrors, not permit their repetition ever again in our country.* (Marcelo Cerqueira and Modesto Silveira in Congresso Nacional, 1982: 134)

> *To the error of wanting a half amnesty, (…) the government adds the one of not mentioning an explicit exclusion of torturers. It's an attack on peace and national reconciliation. How could it be allowed that those who persecuted, tortured, and killed coldly and perversely go unpunished? (…) National consciousness claims for the punishment of common criminals.* (José Carlos Vasconcellos in Congresso Nacional, 1982: 151)

A glimpse over the Brazilian press at the time suggests this debate was not confined to the walls of Congress and the media were openly covering it. Two leading figures of the MDB at the time openly stated, for example, that 'torture is a problem subject to common justice, amnesty for political crimes and impunity for common crimes should not be confounded' (Franco Montoro in *Folha de S. Paulo,* 6 August 1979) or that 'torturers are public agents who committed abuses, there is no political motive in their actions' (Ulysses Guimarães in *Folha de S. Paulo,* 7 August 1979).

Nevertheless, given the correlation of forces at the time, everyone was realistically aware that the government would get its way when approving the amnesty bill, despite the intensification of the pressure of the amnesty movement in August 1979. Representatives of the MDB had said themselves that, realistically speaking, a partial amnesty would already be a great achievement (Greco, 2003: 121). Even those actively engaged in civil society initiatives dealing with the denunciation of repression and the protection of human rights were ready to accept concessions in exchange for a greater good:

> *We knew it would be inevitable to accept limitations and admit that criminals within the government, or protected by it, escaped the punishment they justly deserved, but we considered that it was convenient to accept this, given the ensuing benefits for the*

> *political prosecuted and their families and the fact that we would have back our companions (…).* (Dalmo Dallari – member of the Justice and Peace Commission – quoted in Fico, 2009: 332)

Despite a highly heated debate in Congress (with both military men and pro-amnesty activists in the audience), most MDB representatives would end up voting in favor of the government's amnesty proposal – thus contributing to the perceived legitimacy of this law and, in the words of Fico (2009: 333) 'sealing the foundational pact of the transition'. MDB representatives underlined, nonetheless, that they would keep on fighting for a general, broad and unrestricted amnesty (*Folha de S. Paulo*, 23 August 1979). The topic would indeed remain on the agenda for some time, though it would inevitably die out as the revision of the National Security Law the year before, together with presidential pardons (*indultos*) in November and December of 1979, would end up benefiting those who had been punished for the gravest crimes too (Mezarobba, 2003: 46). In total, the amnesty law is said to have benefited around 5,300 people, excluding 200 political prisoners (out of whom only 50 were still in prison in August 1979, being released in subsequent months) (*O Globo,* 31 August 2013). As President Figueiredo himself announced, his project 'reopen[ed] the field of political action', allowing for the return of political militants to political life – including major figures of the opposition –, in concomitance with the announced party reform (and with the regime's self-interested intent of fragmenting the opposition). For this reason, many would surely share the opinion, written in the editorial page of *Folha de S. Paulo* (24 August 1979) after the law's approval, that *'a cold and unpassionate analysis shows an overall positive balance, with the reintegration of new national forces in the political bodies deciding the future of the country. In this sense, popular pressure (…) had a highly constructive impact.'*

5.2.2. The families of the dead and disappeared: an isolated and marginal struggle

Although the Amnesty movement would still organize a National Congress in November 1979 – in which, among other things, there were talks of creating a tribunal for denouncing the crimes of the dictatorship –, there were already signs and concern over what would quickly become a reality: the demobilization and 'atomization' of the movement. There was for many a sense that their mission had been largely accomplished. Those who did not feel this was the case – in essence some of the families of those who had died or disappeared (hereafter referred to as 'families') – complained, in one of the last amnesty meetings in 1980, that the issue of 'crimes

of the dictatorship and their direct executioners has been treated, at the very least, in a careless manner by the amnesty movement' (Greco, 2003: 349). The blow the amnesty law caused on the families is visible when looking at the emotive reaction of Suzana Lisbôa in Congress on the day of the law's approval, where she defiantly shouted she wanted the body of her husband back (Mezarobba, 2003: 64). As Lisbôa herself recounts: 'the impact of the amnesty law on the cause of the families was very strong. (…) A lot of people demobilized. (…) We felt very abandoned at the time' (Interview quoted in Gallo, 2012: 334). Similar feelings were conveyed by another family member:

> *In 1979, with the amnesty, the exiled come back, some prisoners are released (…) and the amnesty movement is over, because the only people that did not come back were the disappeared. We [the families] kept on fighting, but without an organization that would allow us to go after information. In the meantime, we were 'shooting in every direction', but without an organization.* (Interview BR1)

Although some families would still count on the support of CBAs and members of the Catholic Church to organize a first expedition to the Araguaia region in 1980 – in search of the bodies of the disappeared there –, most other doors seemed closed at the time. Not only did they lack a unified organization that would speak for their cause – at least up until the constitution of the group *Tortura Nunca Mais* in 1985[72] –, but it was also unclear what could be done besides claiming for an investigation, given the political context of the time.

Letters to Figueiredo's administration were invariably left without an answer. Families of the Araguaia guerrilla would open a legal case against the Federal Union in 1982 – to locate the bodies, clarify the circumstances, and provide access to information held by the armed forces – , but the first (negative) verdict would not come out until 1989 and, after various stages of appeal, the families would have to wait until 2003 for a first favorable verdict (Santos, 2010).

[72] In 1985 the group *Tortura Nunca Mais* [Torture Never Again] was founded in Rio de Janeiro by a group of families and ex-prisoners. It was brought together by the need to identify the agents of the dictatorship who had practiced or been directly involved in repression and who now occupied publically visible positions, using typical strategies of 'naming and shaming' in the press (Coimbra, 1996: 168). They succeeded in removing or preventing the nomination of a few individuals, as well as in suspending the medical license of a few medical practitioners denounced for their collaboration in the torture sessions (Mezarobba, 2003: 67-68). Similar groups would be created in other cities too, unified by the common goals of (1) denouncing the practice of torture and contributing to raise public consciousness on the issue; (2) fight against the impunity of the perpetrators, and (3) clarify the cases of death and disappearance (Bazílio, 1996: 7).

One family member recounts how at the time she wanted to open a legal action against one specific torturer, but that she could not find a lawyer that would support her case because 'they all said we would lose, it would be a waste of time'; she further recalls that a different lawyer refused to take up her case, accusing her of being a 'terrorist' (Interview BR18). In a testimony to the National Truth Commission, a former judge who was interrogated about judicial inertia similarly stated 'do you genuinely believe there was any possibility of trying to open a legal case against a police or military authority at the time?' (CNV, 2014: 949). Besides the early approval of the amnesty law, families were faced with other legal barriers. Suzana Lisbôa describes how lawyers pointed out to her that the prescription period for illicit acts committed while on public duty was of five years only (quoted in Mezarobba, 2007: 343).

It is, however, striking to note that not all judicial doors were closed during the dictatorship – a few families and their lawyers, aware of the impossibility of conducting criminal processes, opted instead for filing civil declaratory actions of responsibility of the Federal Union. The first instance in which a judge was bold enough to rule in favor of a family was in 1978 in a case opened by the Herzog family, who sought to disconfirm the official version of suicide and hold the Federal Union responsible for Herzog's illegal imprisonment, torture and death, with the concomitant recognition of the duty to repair the family (CNV, 2014: 950). This was, however, not enough to create a wave of denunciations or judicial proceedings that could cause great embarrassment to the regime. The fact that the amnesty law came as early as 1979 meant that judicial doors were closed before any realistic attempt at opening criminal processes could be made, in contrast to what happened in Uruguay.

Moreover, families of the dead and disappeared in Brazil did not benefit much from an emerging network of human rights activism. Although Brazil is not radically different from other Latin American cases in the initial stages – where church-based groups engaged in helping out the families and political prisoners during the harshest repressive period –, this did not translate into support for accountability demands later on. While in Uruguay or Argentina the human rights banner became intimately associated to the issue of the dead and disappeared, the same did not happen in Brazil, where a growing and diversified human rights network took advantage of the climate of political liberalization in the early 1980s to make other human rights concerns come to the fore, especially focused on the most marginalized sectors of society. This has naturally to be put in the context of a country with a hugely inegalitarian economic system, where large segments of the population did not enjoy the most basic social and economic rights.

Poverty, rising crime and police violence, treatment of common prisoners, basic sanitation, housing or health care were among the many concerns of the existing and emerging human rights groups. Note that the human rights agenda in Brazil accompanied, to an extent, the existing waves of mobilization. While the amnesty movement was in line with the existing concern over the situation of political prisoners and the recovery of civil and political liberties, the demobilization of this movement in 1979 occurred at the same time as a growing working class movement put an emphasis on economic and social rights instead.

This shift was noticeable not only at a general level, but also within the church-based groups that had engaged in the defense of political prisoners. The Justice and Peace Commission of the S. Paulo Archdiocese had been the most active in this regard, created in 1972 by Archbishop Dom Paulo Evaristo Arns – one of the most outspoken critics of repression –, to give a response to the growing numbers of families and friends that sought his help. Recording testimonies, denouncing abuses in the press, and assisting the families in a number of ways (such as helping locate prisoners or offering legal advice) were the Commission's main activities (Pope, 1985: 436). As Amanda Pope (1985: 441) recounts in detail, from 1978 onwards, 'the Justice and Peace Commission felt compelled to reorient its dialogue and scope of activity' in light of a changing sociopolitical context, the growing working class movement, and an expanding network of human rights activism where church or church-affiliated entities that focused on the marginalized sectors became more prominent. In this context, the Justice and Peace Commission said it would 'give special emphasis to working with the periphery and the base communities' and assumed as its most urgent task the 'verticalization of the *abertura*, in the sense of extending its gains to the marginalized sectors also' (*Folha de São Paulo*, 14 June 1978 and 1 February 1981, quoted in Pope, 1985: 444). Despite this, it is worth noting that the S. Paulo Archdiocese was behind the most significant investigative effort at the time – the *Brasil Nunca Mais* [Brazil Never Again] report, published in 1985.[73]

[73] This large and impressive project was a result of several years of clandestine work, with Dom Paulo Evaristo Arns and the Presbyterian pastor Jaime Wright putting together a team who secretly photocopied more than 1 million pages of court proceedings of the Supreme Military Tribunal (for a fascinating account on this see Weschler, 1990). This resulted in an extensive and detailed publication which came out right after the 1985 election, listing, among other things, the name of the 17.420 individuals who faced the military justice system, the 1.843 cases of those who had the courage to denounce the use of torture, the 144 times someone testified for the death of an activist or political prisoner as well as a list of 125 disappearances (Mezarobba, 2003: 57-58).

The lack of engagement of the human rights community with the issue of investigation and accountability for the crimes of the dictatorship has therefore to be understood both in light of (1) a feeble family movement whose demands appeared unrealistic at the time and (2) the prominence of other major human rights concerns. Note that this is a context in which torture in police stations, maltreatment of common prisoners, and police violence towards the marginalized sectors were common and widespread practices in Brazil.

Moreover, the general social isolation of the families in Brazil – in comparison to other Latin American contexts – cannot be dissociated from (1) the characteristics of repression as well as (2) the characteristics of the radical left groups most affected by lethal repression, namely their weakness, fragmentation and social isolation. To begin with, severe forms of repression were highly selective and in part judicialized, which meant that, in a country of continental dimensions as Brazil, the killings and disappearances of a few hundred were not enough to prompt either a large and unified family movement or to attract the sympathy of large social segments. The fact that non-lethal violations were highly superior in number to lethal ones meant that the early approval of the amnesty law – with its release of prisoners and reintegration of those banished or in exile – produced the demobilization of most sectors who had come together to denounce the repressive apparatus and demand an amnesty law. As in other cases where disappearances were used as a repressive tool, the families of the disappeared were the ones that attempted to keep the issue alive as, 'back in the early 1980s, many families still carried hopes a disappeared person could be found alive' (Interview BR11). However, the fact that the number of disappearances revolved around 200 precludes from the start the appearance of a strong and unified family movement, on top of a political and social context that was entirely unfavorable.

In addition, apart from a few cases that attracted more attention and created greater embarrassment for the regime, such as the one of Vladimir Herzog, a large portion of the remaining lethal victims were associated to radical and violent left-wing groups – catalogued by the regime as terrorists –, who were themselves highly fragmented and socially isolated. Rather than one large guerrilla group (as the Tupamaros in Uruguay or the Montoneros in Argentina), the leftist guerrilla movement in Brazil was 'composed of dozens of revolutionary groups, the majority being small organizations with a few hundred militants with no real firepower' (Napolitano, 2018). These were mostly splinter groups from the Brazilian Communist Party (PCB), who had decided against using violent tactics (as the situation was

not deemed propitious). They had very meager social basis of support, largely 'concentrated in the more radical segments of the student movement' and with little or no support among the workers and peasants they aimed to speak for (*Idem*). As Reis (2004 quoted in Schneider 2011: 46) puts it, 'most victims came from a minority of largely young, urban, middle-class Brazilians with social-revolutionary aims' who 'have never enjoyed much popular sympathy'. The consequence of this is that not only did they lack a significant social and political basis of support that would vindicate their memory later on, but their families would have to deal with the social stigma associated to the armed struggle.

> *Many people within the left itself thought in the way the military did: 'blood crimes' are absurd, those who engaged in the armed struggle are terrorists. Repression separated between terrorists and subversive*. (Interview BR1)

A paradigmatic case in this regard was the one of the Araguaia guerrilla, the most consequent attempt at armed struggle in Brazil (led by the PCdoB, which had split with the PCB before) and the group that holds the most significant share of those who disappeared. Its (literal) isolation meant that the families would first of all have trouble in proving the guerrilla actually existed; and second, that the 'families of the Araguaia' appeared very often as a separate group rather than part of a broader and unified family movement. In the words of one of them, when referring to her time as a militant of the amnesty movement:

> *No one believed there had been a guerrilla in Araguaia, we were very isolated, it seemed like a conversation of fools (…) The left did not know there was an Araguaia, they thought we were crazy. I had all my companions dead and missing*. (Interview BR18)

Political isolation

The isolation of the families of the dead and disappeared from political organizations – including the ones they or their family members had once fought for – cannot be dissociated from the unfavorable political context at the time. Not only was it entirely unrealistic to make accountability demands, but the opposition was too busy re-organizing itself. An emerging 'new left' was in a process of creation – and was keen on distinguishing itself from the 'old left' –

whereas the surviving left-wing political groups were weak and fragmented, and seemed eager to avoid the stigma associated to armed action and social revolutionary goals.

As mentioned above, the fact that the existing radical left groups were small, fragmented and socially isolated – contrary to stronger and more deeply socially rooted left-wing movements in Uruguay, Chile or Argentina –, meant that the dictatorship was successful in eliminating or disarticulating many of them. This was not the case of the two communist parties, but they too kept divided and weak, having to deal with the decimation of part of their ranks and a continuous clandestine activity up until 1985. The period of transition to democracy in Brazil was for them a period of soul-searching and identity crisis, as their ideological and social isolation became evident. Their strategy was rather one of moderation, institutionalization, and integration into political life, and those who had engaged in armed struggle – as the PCdoB in Araguaia – were keen on avoiding the social stigmatization that came with it, at a time in which social revolutionary ideas were in crisis (Greco, 2003: 382). Even those who had not engaged in armed struggle, as the PCB, positioned themselves against 'revanchism', which, in the words of the party's leader at the time, 'would complicate the democratic process' (Maciel, 1999: 373). In the words of one family member:

> *The party which we fought for [Partido Comunista do Brasil – PCdoB] changed its politics completely – they wanted to ignore what they had done, they did not want to discuss their participation in the armed struggle, they were already trying to articulate themselves in order to participate in political life and get elected.* (Interview BR18)

The social isolation and identity crisis of the 'old left' – to which many ex-political prisoners refer to in Teles' (2011: 447) oral history project – is visible and perhaps further aggravated in the drain of intellectuals and militants to other party formations, including the newly founded Workers' Party (PT), whom the communist parties were largely antagonistic to. Note that, even though the PT attracted and incorporated some of the old left-wing militants, it was born out of a vacant political space within the labor movement and was keen on creating its own new brand of politics. The reason why the PT attracted considerable attention at the time was not so much because of its initial results (electing 16 out of 559 federal representatives in 1986), but because it was such an anomaly in Brazilian politics, being born out of union activism and focusing on a 'democratic socialist' approach to bring the excluded to a highly elitist political scene. The

popular sectors the PT was coming from, and whom it intended to represent, were in turn distant from the social revolutionary/ middle-class left most affected by repression during the dictatorship. Though it is possible to spot a reference to the 'investigation of torture, political persecutions and police arbitrariness, and punishment of those responsible' in one of its founding documents, this appears to be an isolated demand.[74] Its focus on the working class and the marginalized sectors of society meant that, when speaking of the dictatorship's oppressive treatment, its emphasis was on the violations of workers' rights (related to strikes, wages, labor conditions, unions' freedoms, etc.) and their concomitant social and economic exploitation by the business classes, in alliance with the military dictatorship.[75]

Moreover, whereas in other countries the transition to a democratic regime brought back the same old party formations – who kept some form of organization during clandestine times and who had already strong identities and social ties before –, the same cannot be said about Brazil. Brazil's tradition had been one of underdeveloped parties, mostly created from above, and with weak and malleable identities (Mainwaring, 1988). The consequence of this, and of the maintenance of a restricted party system during the dictatorship, was first of all that the major players of the transition were essentially those who had been either an integral part of the dictatorial regime or who were allowed by it, and second, that this was a period of creation and definition of party identities, namely for the left, who was still dealing with the same old problems of fragmentation and weakness, and was focused on becoming a relevant player of the political game.

As Keck (2010) notes, the transition period was one of ambiguity and lack of clear political projects, characterized by a state of flux in which there were not well defined organizational agents who, more than occupying a political space, had to actually create it. Writing in 1988, Mainwaring (1988: 98-99) was still apprehensive about whether truly competitive parties 'can and are being constructed' in Brazil, noting that the rapid growth of a party like the PT is hindered by 'Brazil's highly elitist political culture, the difficulties of the labor movement in overcoming corporatist mechanisms (…), the fact that the industrial labor force is a smaller percentage of the economically active population than was the case in the European countries

[74] Available at: https://fpabramo.org.br/csbh/wp-content/uploads/sites/3/2017/04/02-programa_0.pdf (accessed 10 October 2018).
[75] See, for instance, its national electoral platform (1982). Available at: https://fpabramo.org.br/csbh/wp-content/uploads/sites/3/2017/04/02-plataformaeleitoral.pdf (accessed 10 October 2018).

during the formation of mass labor parties, and the profoundly conservative nature of Brazil's transition to democracy.' Though his concerns would later prove mostly unwarranted, the fact is that conditions in the 1980s were not propitious to the cause of the families. This is, first of all, because of the more obvious facts that the families were few and political players were not interested in adopting a confrontational position towards the military at a delicate time, but also because the left was weak and in a process of construction. Its priorities were their (re-)organization, integration into political life, and establishment of social ties with constituencies for whom the dictatorship's repressive apparatus was far from being a concern.

> *Left wing forces were focused on trying to re-organize themselves, a lot of us were involved in forming the Workers' Party at the time. We did not speak much about punishment for the armed forces, it was a bit of a forgotten issue.* (Interview BR3)

> *The left went to take care of its business, organize political parties. No political party ever dared to raise the issue of the disappeared, it's an 'indigestible' issue because it involves directly the military. (*Interview BR1)

It is nonetheless relevant to point out that Tancredo Neves, the indirectly elected president who would die before taking office, had shown some sympathy towards the families' cause and had in fact received a delegation of the Araguaia families in his office in 1984. Already during the amnesty discussions, he had presented one amendment to the amnesty bill in which a police investigation on the disappearances was proposed (Mezarobba, 2003: 63). Although it is obviously unclear how much margin of maneuver he would actually have, the families naturally considered his death and replacement for Sarney an unfortunate event. In an interview to Mezarobba (2007: 337), Sarney would state 'I can assure you that the transition negotiated by Dr. Tancredo (…) was very careful in not allowing for any type of revanchism – either on the left or on the right. (…) Tancredo would surely not take any radical position, he was very afraid of a reversal'. When asked about his administration stance, Sarney states that 'it was not an issue on the political agenda', though he also mentions that 'it would not be prudent at the moment' and that the 'military hid the issue, there was no information' (Mezarobba, 2007: 337-338).

5.3. From bones to reparations

It often takes an external and accidental event to put an issue in the public and political agenda and/or to give interested sectors the necessary impulse to force an issue (back) into the public scene. In the case of the disappeared and their relatives, the recovery of bodies is usually one of such events. This is what happened in Brazil, where the discovery of a mass grave in September 1990 would contribute to the first (timid) investigative steps at the municipal level and in the Chamber of Deputies, where the families were able to find and count on the support of a few key political allies. The initial impulse came from a journalistic investigation on police violence in the city of S. Paulo, when a reporter found out about a clandestine mass grave dating back to the 1970s in a cemetery in S. Paulo's periphery (Perus), where a few political prisoners had been buried together with thousands of indigents. In the words of a family member, 'there was a political advancement with the opening of the Perus grave; people started to believe that our claims were true, that there were indeed political disappearances' (Interview BR18). The discovery attracted media attention and the then mayor of the city of S. Paulo, a PT representative – Luiza Erundina – showed critical support to the families, creating a Special Commission for the Investigation of the Remains together with a Commission of Inquiry, stimulating similar investigations in other cemeteries and cities (Cano & Ferreira, 2006: 107-108; Gallo, 2012: 337). The group *Tortura Nunca Mais* would be behind similar efforts to open other clandestine graves, leading to the discovery of another fourteen bodies of political prisoners in a cemetery in Rio and six in Recife (Mezarroba, 2003: 74). It was in the sequence of these events that a PT representative in Congress, deputy Nilmário Miranda (who had himself been a political prisoner for over three years), proposed the creation of an External Commission for the Search of the Disappeared. Its goal was to follow the ongoing investigations and help the families in their search for information. This commission would function from 1991 until 1994 and, despite lacking biding powers, it would carry out investigations that allowed for the discovery of the fate of a few disappeared. It also managed to get hold of documents from the Armed Forces that led to the first official recognition of the existence of the Araguaia guerrilla group (Cano & Ferreira, 2006: 107).

The opening of the Perus grave also prompted the families to exercise greater pressure toward the opening of military and police archives, a request they made directly to the President at the time, Fernando Collor (Teles, 2001: 170). He would follow on his promise, and order the transfer of the archives of the extinct Department of Political and Social Order (the main

repressive agency of the dictatorship) to the respective state governments, where they would then become public. This would be the most significant step taken by Collor's government (1990-1992) – from whom the families did not expect much given his conservative past (namely as member of the military regime's party up until 1985) –, in what was otherwise a very eventful presidency, marked by radical measures to fight Brazil's extreme hyperinflation crisis and ridden by corruption scandals that would lead to Collor's impeachment. He would be replaced in 1993 and 1994 by his vice-president, Itamar Franco, who would put in place a grand stabilization plan (*Plano Real*) that in 1994 would finally put an end to the chronic hyperinflation crisis.

In 1993, the families – now officially organized in the Commission of Families of the Dead and Disappeared – together with human rights groups and the External Commission for the Search of the Disappeared, held a national meeting in which they drafted a bill proposing the creation of a commission to study the deaths and disappearances on a case-by-case basis (Teles, 2001: 180). The proposal seems to have been accepted by the then Minister of Justice, but did not obtain an answer from President Itamar Franco. Nilmário Miranda would try to renegotiate a different law with the executive, foreseeing the payment of pensions to the victims' relatives. The President conceded at first, only to go back on his word after facing some resistance on the part of the military (Mezarobba, 2003: 78). The fact that his successor, Fernando Henrique Cardoso, showed greater openness towards the cause and a greater determination to go against an unfavorable opinion coming from military agents shows (once again) that political representatives do matter. His past as an opponent of the dictatorial regime and renowned social sciences' academic, who had been banished from teaching in Brazil and who had spent time in exile, also placed greater expectations on him than in any previous president. The families and other external sources of pressure would, once again, make sure the issue was part of his agenda.

5.3.1. The reparations program and its antecedents

Nothing in Cardoso's electoral program could let one foresee what would become informally known as the Law on the Dead and Disappeared (Law 9,140/95), establishing a reparations program for their relatives. Though Cardoso would later assure that he was personally committed to the question, there were also a series of events in early 1995 (before the first announcement at the end of May that the government was studying a draft bill) that sent Cardoso constant reminders about this issue and that, in all likelihood, played an important

agenda-setting role. To begin with, the families would make sure that presidential candidates would not forget about them during the electoral campaign, delivering a 'letter of intent' (*Carta Compromisso*) in which they asked for some of the same things they and Nilmário Miranda had already proposed to Itamar Franco, namely the official recognition of the state's responsibility for the imprisonment, death and disappearance of political opponents and the creation of a special investigative and reparatory commission (Mezarobba, 2007: 48). The first sign of encouragement came in August 1994, when a representative of the President signed the family's letter. Secondly, pressure would also come from the newly created Permanent Commission of Human Rights in the Chamber of Deputies, presided by Nilmário Miranda. Miranda himself recounts how in their second meeting, on 8 March 1995, they met the then minister of justice, Nelson Jobim (who had himself been a part of the External Commission for the Search of the Disappeared) and presented a human rights agenda, in which the recognition of the state responsibility for the political deaths and disappearances was the top issue (Miranda, 2007). By the beginning of April, the press was already announcing that the Human Rights Commission was preparing a draft bill (*Folha de S. Paulo,* 5 April 1995).

Thirdly, Cardoso would be confronted with international pressures in at least two other instances. One was at the end of March when meeting the president of Amnesty International, Pierre Sané, who declared himself 'extremely disappointed' with the attitude of the President on the issue of the disappeared, adding that Cardoso did not show 'enthusiasm' when declaring the issue 'too complicated' (*Folha de S. Paulo,* 12 April 1995). Sané also stated that 'one cannot declare to have a compromise with an issue and not attempt to resolve it'. These declarations would suggest that at that point Cardoso did not have a clear policy plan yet, though it is also possible that Sané was referring to the position of the president on the issue of criminal responsibility for the perpetrators, which was a top demand of Amnesty International. The office's president would promptly reply to these declarations saying that Cardoso had been misunderstood by Sané, perhaps because of a language issue (doubtful in light of Cardoso's reputation in English-speaking academic circles) (*Folha de S. Paulo,* 12 April 1995). The fact that the president was clearly irritated by Sané's declarations shows he was not indifferent to the issue, though.

Another instance causing embarrassment to Cardoso was in a meeting with intellectuals and academics in Washington, when later in April a Brazilian professor at George Mason University confronted him with the case of her disappeared brother, asking emotionally about the

whereabouts of his body and the circumstances of his death. Cardoso replied the relatives had the right to information and compensation, but that such information was not in his hands, though he would try to investigate her brother's case (*Folha de S. Paulo,* 22 April 1995). A new family/ human rights campaign would start just a few weeks later (*Folha de S. Paulo,* 10 May 1995), on the same day that the well-known writer/journalist Marcelo Rubens Paiva – son of a disappeared congressman who had been a personal friend of Cardoso – published an article in a widely circulated magazine (*Veja*), which is said to have struck a chord with Cardoso (Mezarobba, 2007: 54). In this article, he questioned the president's apparent lack of commitment and recalled the fond words of the 'friend, professor and sociologist Fernando Henrique Cardoso', who had written about Rubens Paiva in 1981, in a text in which he made a plea to 'never forget'. The fact that Rubens Paiva's widow was the one family member chosen to be present in his cabinet on the day of the approval of Law 9,140/95 is perhaps not a coincidence.

It was after these events that, on 23 May 1995, the minister of Justice received a delegation of the families, who handed him a publication they had just edited compiling all the information gathered over the years on each case of death and disappearance. In addition, they presented a project for a draft bill, inspired by the steps the Chilean government had taken, proposing the official acknowledgment of the disappeared and the creation of a special commission of investigation and reparation. On that same day, the press reported that the government 'agreed to recognize the list of the disappeared, though there is still resistance concerning reparations and official acknowledgement of the responsibility of the state' (*Folha de S. Paulo,* 23 May 1995). The day after, though, it was announced that the Ministry of Justice was studying a compensation scheme for the families, as this was a 'reasonable solution' that would 'not go against the military', said one representative (*Folha de S. Paulo,* 24 May 1995). Note also that this issue was being discussed at the same time that the first 'National Human Rights Plan' was being prepared, under the coordination of the Ministry of Justice's chief of staff (José Gregori), who was also the one in charge of drafting the bill on the dead and disappeared. In an interview Gregori recalls how he pointed out to the President that 'the credibility of the human rights plan needed a solution for the historical question of the disappeared, something the President agreed with' (quoted in Mezarobba, 2007: 59). It is worth mentioning that José Gregori had himself been a preeminent lawyer of political prisoners during the dictatorship, integrating the church-based groups engaged in denouncing human rights abuses. His sensitivity to this question was well-known, as well as his close links with Cardoso.

Cardoso would later write in his political biography ‘‘my life story prompts me to repair, in one of my first governmental acts, what I always considered unjust: the lack of recognition of the Brazilian State for the death and disappearance of political prisoners’ (Cardoso, 2006: 548-49). He also narrates in detail that, being aware of how delicate the question was, he had had a frank conversation over dinner with his military ministers, at the beginning of his legislature, in which he told them about his intention to grant reparations for the regime’s worst violations. On that occasion, he disclosed his personal story of imprisonment and intimidation and how he clearly saw signs of torture in some of his prison-mates, also recalling the times when he met with security forces to protest against the imprisonment and physical mistreatment of fellow academics (Cardoso, 2006: 254-56). Unfortunately, no information is provided on the exact date of the dinner Cardoso refers to and therefore it is not possible to know how it fits chronologically with the events mentioned above. In an interview to Mezarobba (2007: 54), Cardoso insists ‘there was a lot of pressure, it is true, but there was an intimate motivation, mine and from the people around me. It was my experience, with or without pressure we would have done it.’

Law 9,140/95, approved in December 1995, officially recognized the death of 136 people who had disappeared after having been detained by state agents for their alleged participation in political activities (art. 1) and established a monetary compensation scheme for the relatives of the dead and disappeared (art. 10), which in no circumstance was to be inferior to R$ 100,000 per case[76] (art. 11 §1). Moreover, the law created a Special Commission on Political Deaths and Disappearances (CEMDP) that would decide on the incorporation of other cases and be responsible for the management of petitions for compensation, on top of making its best efforts to locate the bodies of the disappeared in case there was an indication of their possible location (art. 4). Although this commission exists up to this day, it was during the first few years that it worked more intensively so as to process the hundreds of requests it received. The most militant families were important in this regard, encouraging other relatives to present their petitions. In total, the Special Commission reviewed 475 cases. On top of the 136 people already recognized as dead-disappeared in Law 9,140/95, it reviewed the cases of another 221 people positively, based on testimonies and documents the relatives themselves would present (CEMDP, 2007: 48).

[76] This was about US$100,000 at the time, 1,250 times the national minimum wage (Cano & Ferreira, 2006: 152).

Despite being an active part of the process – with one representative in the CEMDP –, the families criticized the law on several grounds, including: (1) the fact that the burden of proof lay with them; (2) the inability to access all possible sources of information, as certain documents/ archives remained secret; (3) the exclusion of cases due to the lack of evidence; (4) the inability of the CEMDP to uncover the circumstances of many deaths, as well as to find the bodies of the disappeared; and (5) the fact that only the families could request the acknowledgment of the deaths or disappearances, which made it a private rather than a public issue (Gallo, 2012: 340; Mezarobba, 2010: 13). Nonetheless, the final and overall evaluation of Law 9,140/95 and the work of the CEMDP has been perceived as quite positive. Despite its limitations, the whole process of submission, discussion and approval of cases in the Commission ended up serving a truth-telling purpose, and performing a symbolic reparative function the families did not quite anticipate at the beginning. In the words of Cano & Ferreira (2006: 134), who have done extensive research on this issue, 'the work of the Commission was able to prove that most of the official versions given at the time of the deaths were false and most victims were either summarily executed or died as a result of brutal tortures. This recognition enabled the relatives to vindicate the memory of their loved ones and to deny the claim that they had been criminals or that they had simply run away from home.' In sum, the families' version of the repressive past (radically opposed to the one of the military) was, for the first time, recognized officially as legitimate, though there are doubts as to the extent that this message was effectively carried beyond interested circles.

It was also under the government of Fernando Henrique Cardoso that non-lethal victims of the regime's discretionary power managed to further their demands for compensation. The 1979 amnesty law had been extremely limited in terms of restitution provisions for those who had lost their jobs or who had their professional status affected for political reasons. Since then, many had been trying to regulate their situation, be it in terms of reintegration into active service or recognition of the time affected as years of work, for job promotion and retirement purposes. A series of constitutional amendments, decrees and other type of measures had been enacted in this regard, but in a disorderly, fragmented, and partial fashion. Demands for compensation had been discussed too, but it was not until 1991, under Collor's government, that a law regulating social security benefits (law 8,213) foresaw a 'special retirement pension' for those covered by the amnesty law. The situation was, however, far from clearly regulated, even because there were still many cases pending the recognition of the status of amnesty recipient. Under

Cardoso's government, the initial decision to revise these pensions (in light of denunciations relative to frauds and excessive amounts), and the slowness in the procedures regarding the recognition of amnesty recipients led to increasing contestation and pressure coming from civil society organizations representing those affected, including labor unions. It was during the 20th anniversary of the 1979 amnesty law that their demands were discussed in Congress and that the President received a committee of representatives, though it would take until 2001 for a bill to be finalized and sent to Congress, and until 2002 to be transformed into law (Mezarobba, 2007: 124-132).

Law 10,559/2002 is the first to deal comprehensively with reparation measures – including financial compensation – directed at those affected by torture, arbitrary arrests, dismissals and transfers for political reasons, kidnapping, forced exile, banishment, student purges, and illegal monitoring (Abrão & Torelly, 2012: 154). Besides the right to financial compensation, the law secured other restitution rights, such as (1) recognition as valid, for all purposes, of the period in which the individual was forced to stop working; (2) the right to job reinstatement for public employees; (3) the right to conclude unfinished education, and (4) the recognition of foreign university diplomas (Chapter I). Among other things, law 10,559/2002 specified in detail who could be declared an amnesty recipient (*anistiado politico*) (Chapter II) and established an 'Amnesty Commission' within the Ministry of Justice to review and evaluate requests for political amnesty and reparations (Chapter IV). Up until 2009, the Amnesty Commission received almost 65,000 requests; out of the almost 48,000 assessed by then, about 31,000 were reviewed positively – that is, recognized as amnesty recipients –, 10,578 of which were granted economic compensation (Abrão et al., 2009: 17). The criteria for determining the type and amount of compensation varied, depending not only on how long the punishment had lasted, but also on whether it had involved or not job loss (as per Chapter III) as, in the latter case, the individuals (or their dependents, in case of death) were to be retroactively compensated according to what their earnings would have been if they had kept their job, also taking into account hypothetical job promotions. The focus on the professional consequences of repression, rather than on how intense it had been, has received quite some criticism, namely because many who were professionally affected ended up with compensations superior to those received by the families of the dead and disappeared. This is possibly the result of the fact that the pressure for the enactment of Law 10,559/2002 came mostly from labor unions (Interview BR16).

5.4. From the 'right to truth and memory' to the National Truth Commission

Although there were legitimate reasons to place great expectations on a government led by the Workers' Party, it would take until its second mandate for the topic of 'truth and memory' to appear on its agenda, and until the third one for the National Truth Commission (CNV – *Comissão Nacional de Verdade*) to be installed. This is surely not independent from the fact that the normative environment had changed between 2003, when Lula first took office, and 2010, when the bill on the creation of the CNV started being drafted. By 2010, the topic had expanded beyond the families and had become a concern within other circles (often activated by the families), such as few members of the Federal Public Prosecutor's Office, the Brazilian Bar Association, the Interamerican Commission on Human Rights. It is worth noting, however, that Brazil contrasts with Spain and Uruguay in that the topic never attracted much public attention prior to the creation of the National Truth Commission and that the job that is being done is coming from relatively small 'epistemic circles'. Moreover, it is a case in which governmental agents themselves played a role in pushing for the TJ agenda *from within* the state, judging by the importance that the head of the Special Secretariat for Human Rights, Paulo Vannuchi, is said to have played. He is the first to recognize, however, that a momentum had to be gradually built within state institutions themselves, and that demands had to come from below (Interview BR15).

5.4.1. The recognition of the 'right to truth and memory'

It is not entirely clear why the Workers' Party 2002 electoral program was silent on the issue, while the 2006 one has a passage dedicated to 'furthering the work on the Right to Truth and Memory and the official reparation by the Brazilian state to the dead and disappeared'. One possible reason has to do with Vannuchi himself, who took over as Human Rights Minister in late December 2005. His sensibility towards the topic was well-known, as he was one of the heads and authors of *Brasil Nunca Mais*. Shot and imprisoned at the age of twenty for his involvement in an opposition armed group, he spent five years in jail, where he was a victim of abuses and torture. The fact that the Special Secretariat for Human Rights took various initiatives on the theme of 'Truth and Memory' during Vannuchi's mandate (2006-2010) is hardly independent of his figure. However, Vannuchi himself stated that Lula was not happy with the treatment given to the topic, explicitly asking him to work on it when nominating him head of the Special Secretariat for Human Rights (Interview BR15). Other sources similarly

reported that Lula told Vannuchi 'he did not want to be remembered by history as someone who suppressed the military past' (Pimentel, 2008 quoted in Schneider, 2010: 11).

Sending reminders to Lula's government during his first mandate were again actions moved by the families, this time thanks to the powerful aid of a favorable judicial decision. The legal case opened by the families of the Araguaia guerrilla against the Federal Union in 1982 had finally resulted in a favorable verdict in July 2003 (!), with a federal judge ordering (1) the disclosure of all secret military information regarding the military operations against the Araguaia guerrilla and (2) the handover of the remains of the victims to the relatives, together with information on the circumstances of the death (Santos, 2010). This decision came two years after the families had found allies within the Public Prosecutor's Office, who opened inquiries and public civil actions related to the Araguaia case and organized a visit to the region in 2001, carrying out excavations, and collecting testimonies from locals, discovering, among other things, that the army still monitored the region. The public prosecutor in charge at the time recalls, however, the setbacks and retaliation suffered because, in his words, 'there was a complete lack of support, coming from the government, the defense ministry, the solicitor general's office, etc., which made me step back on this issue for a while' (Interview BR16).

Although the 2003 verdict did not make federal institutions go as far as the families wished, it nonetheless obliged the government to take concrete steps (at the same time that the Solicitor General's Office [*Adovacia Geral da União* - AGU] appealed against parts of the decision). An inter-ministerial commission was created to work on the identification of the disappeared in Araguaia and an expedition to the region was organized by the Secretariat for Human Rights in 2004, but with no results. Furthermore, the issue of information secrecy became a topic of contention, with the government sanctioning a new law establishing the rules for accessing secret documents in May 2005 (law 11.111), and ordering the transfer of some of the archives under the control of the Brazilian Intelligence Agency to the National Archives that same year. The army would, however, insist that all of its documents related to the Araguaia guerrilla had been destroyed, something many did not believe in.

In addition, Lula's first government showed some goodwill towards the families' demands when reformulating the 1995 Law on the Dead and Disappeared in June 2004 (law 10,875) so as to expand the scope of application beyond those who had died under custody and include (1) deaths during public demonstrations and armed conflict with public agents, as well as (2) those

whose suicide could be linked to the psychological damages caused by repression (Cano and Ferreira, 2006: 141). This led to the re-activation of the CEMDP, whose work of reviewing the cases eligible for compensation lasted until 2006. In spite of the idea of producing a publication documenting the work and findings of this body having already been suggested by Nilmário Miranda in 2004 (the then head of the Special Secretariat for Human Rights), it was his successor, Paulo Vannuchi, that gave this project a definitive impulse, already during Lula's second mandate.

In accordance with the above-mentioned electoral promise, the 500-page book/report *Direito à Memória e à Verdade* (Right to Memory and Truth) was released in August 2007, in an official ceremony in the presidential palace. The publication was a sort of updated version of *Brasil Nunca Mais*, documenting in detail the case of every victim that went through the CEMDP, with the significant difference that it was now an official state publication, produced by the Special Secretariat for Human Rights, together with the CEMDP.[77] Strikingly enough, the report adopted a position and language unlike any other official document before, speaking of 'state terror' and accusing the repressive apparatus of imprisoning, torturing, and killing its opponents (thus going against the thesis of a few 'rotten apples' that had escaped the regime's control[78]). Furthermore, and even more surprisingly, a critique to the amnesty law could be spotted when the report made reference to the 'continuous crime thesis', stating that 'to the extent a state agent knows where the bodies were taken and does not reveal anything, the crime of concealment continues to be practiced up to this day' (CEMDP, 2007: 50). Vannuchi, together with the president of the CEMDP, were nonetheless keen on emphasizing that there was 'no spirit of revanchism' and that the release of the book signaled 'the search for agreement, the sentiment of reconciliation, and the humanitarian goals that drove the 11 years of work of the Special Commission' (CEMDP, 2007: 8). The report, together with a warning of the Minister

[77] Note that this report, together with the work of the Special Commission, holds some similarities to the work performed by 'Truth Commissions' and thus, depending on how loose the definition adopted is, it could already be considered as such. Here, I chose to side with Schneider (2013: 152) in considering that the work of the Special Commission falls short of what is usually expected from such investigatory organs, in essence because, rather than a pro-active investigatory stance, the burden of proof was placed upon the families, not to mention that its sessions were kept private and had little to no public visibility.

[78] This thesis was defended, for example, by General Oswaldo Pereira Gomes – the armed forces' representative within the CEMDP –, who wrote a piece for *Folha de S. Paulo* (26 March 1998) stating that 'the revanchists are wisely taking advantage of the running sore left by a small minority who, going against the tradition of the armed forces and without the support of military commanders, yielded to the temptation of torture, in order to obtain faster and more effective results'; he defends the armed forces' tradition in Brazilian politics is one of 'strong social orientation, respect for national sovereignty and, above all, moralization of public life.'

of Defense against possible negative reactions, created some tensions with the armed forces, who made clear they did not accept a revision of the amnesty law and criticized the one-sidedness of a report produced by someone as biased as Vannuchi (*Folha de São Paulo,* 2 September 2007).

Together with this publication, the Human Rights Secretariat took other parallel initiatives aimed at fulfilling its mandate on 'truth and memory', namely the promotion of a touring photographic exhibition entitled 'The Dictatorship in Brazil 1964-1985', and the inauguration of various monuments/ memorials honoring the 'Indispensable People' victimized by the regime (Mezarobba, 2010: 20; Schneider, 2010: 9). In the same vein, in May 2009 the executive launched the project *Memórias Reveladas* (Revealed Memories), also known as Reference Centre on Political Struggles (1964-1985) so as to store and make available online a variety of archives and documents from multiple sources, in a network supervised by the National Archives. The task of promoting 'truth and memory' with a broader educational purpose was also assumed by the Amnesty Commission, materialized through the so-called 'Amnesty Caravans', which toured the country beginning in April 2008. Besides taking the appreciation of amnesty requests out of the walls of the Ministry of Justice, these itinerant public sessions put an emphasis on victims' testimonies and public tributes, in an attempt to perform an acknowledgment function. This transformation within the Amnesty Commission is often credited to the figures of Tarso Genro (Minister of Justice from 2007) and Paulo Abrão (the new head of the Amnesty Commission from 2007), both of whom showed great receptiveness to the nascent debate on (criminal) accountability.

5.4.2. The immediate antecedents of the National Truth Commission

The above-mentioned steps suggest that the proposal for the creation of a 'truth commission' – which first appeared in the Third National Human Rights Program, signed by Lula in December 2009 – did not come out of nowhere. Concrete steps in terms of the 'truth' and 'acknowledgment' functions a 'truth commission' is supposed to perform were already being taken, though in a significantly more modest and piecemeal fashion. Up until December 2009, these various steps, besides being easy to miss by less attentive observers, could be interpreted as isolated actions by the few bodies that were sympathetic to the cause – in essence, the Secretariat for Human Rights and the Ministry of Justice (where the Amnesty Commission was). The extent to which these bodies were themselves autonomous actors, who contributed

to open up the debate on transitional justice from *within* the state and to channel some of the demands from civil society, attests for the peculiar non-monolithic character of the Brazilian state and thus adds another layer of complexity to this case-study. Nowhere was this more visible than in the fact that the Ministry of Justice organized a public hearing in July 2008 on the 'Limits and Possibilities for Judicial Accountability of the Agents who violated Human Rights during Brazil's State of Exception'. During this event, individuals such as the Minister of Justice (Tarso Genro), the head of the Human Rights' Secretariat (Paulo Vannuchi), and the president of the Amnesty Commission (Paulo Abrão), were critical of the Amnesty Law and its application to crimes such as torture, a position that the Brazilian government would surely not dare to take officially (*Folha de São Paulo,* 31 July 2008; 1 August 2008).

Note that this event came almost two years after a judge had accepted a family's plea to put Coronel Carlos Alberto Brilhante Ustra on trial for the crimes of kidnapping and torture back when he was the head of S. Paulo's most notorious repressive body, using the innovative legal argument (already in use elsewhere) that such crimes do not prescribe. Though this was a civil suit (*ação civil declaratória*) – asking solely for the recognition of moral and physical damages –, it served to reignite the debate on impunity for the crimes of the dictatorship (*Folha de São Paulo,* 10 September 2006). While his trial was under way, a few public prosecutors became involved in this debate and, in May 2008, opened an additional public civil action against Ustra and another former top military chief (Audir Maciel), this time speaking for 64 victims (*Folha de São Paulo,* 16 May 2008).

The activation of a few allies within the Federal Public Prosecutor's Office at this specific time had not only to do with the actions of the families but, as the leading public prosecutor reveals, was also the outcome of legal changes occurring elsewhere in Latin America, with the Argentine Supreme Court declaring the unconstitutionality of the country's amnesty laws and the Inter-American Court of Human Rights deciding in the *Almonacid-Arellano et al. v. Chile* case that amnesties are unlawful when used to protect crimes against humanity (Interview BR16). The two public prosecutors who first became involve with this issue recall how they only got acquainted with the field of Transitional Justice at the time and helped promote a seminar in 2007 – with the support of the Human Rights Secretariat and other institutions – where the International Center for Transitional Justice was first invited to Brazil and where legal innovations on human rights accountability were discussed and endorsed (Interviews BR7 and BR16).

These same public prosecutors were part of the above-mentioned public hearing of July 2008, which was in part motivated by the legal actions they had opened. This public hearing, in turn, motivated the Brazilian Bar Association to fill a motion with the Supreme Court that same year (the so-called ADPF 153), questioning the application of the amnesty law to public agents who had engaged in grave common crimes. As the Solicitor General's Office (AGU) was due to take a position in this case, the tensions and distinct positions within Lula's government became more visible than ever, with the AGU opting to endorse the application of the amnesty law, but with five other governmental ministries submitting their own briefs (the Ministries of Defense and Foreign Relations in favor of the amnesty law, while the Ministry of Justice, the Special Secretariat for Human Rights, and the Chief of Staff positioned themselves against) (Cavallaro and Delgado, 2012: 98). Virtually at the same time, in October 2008, a court in S. Paulo issued a ruling favorable to the Almeida Teles family, 'morally' and symbolically condemning Carlos Alberto Brilhante Ustra for kidnapping and torture.

This is all to say that, by the time the government decided on the creation of a 'truth commission', at the very end of Lula's third and final mandate, the debate on how to address the crimes of the past and the collection of actors who supported forceful measures had been amplified. This is surely part of the reason why the creation of a 'truth commission' was not equated back in 2003, but only at the end of 2009. Vannuchi himself stated that the report *Direito à Memória e à Verdade* was an initial step in 'unblocking the issue (…), the Ministry of Justice starts working with us, the Chief of staff starts working with us, in a correlation of forces that advanced significantly until 2010' (Interview BR15). He pointed out, though, that the original proposal for the creation of a 'truth commission' came from family requests put forward during the human rights conferences that were at the basis of the Third National Human Rights Program (*Programa Nacional de Direitos Humanos* – PNDH-3). He added that the idea of creating such a body was not new to him, but that 'as a state agent, as part of a coalition government[79] in which there are right-wing members, I have to take certain precautions the families do not and should not have. When civil society proposals start to appear in the regional and national human rights conferences, that's when the best scenario starts to be configured. It

[79] This is not a specificity of Lula's government. The extreme party fragmentation of Brazil's Congress means that the President has to rely on multiparty coalitions in order to secure a majority of Congress seats. This usually involves the allocation of a few cabinet seats to other parties.

was not me as an ex-prisoner who wanted personal revenge; it was civil society, in democratic conferences, that approved such issues' (Interview BR15).

Such conferences are one of the various participatory mechanisms the Workers' Party had been keen on developing at the national level and which, for our purposes, can be considered as an institutional channel opening up the opportunity structure for civil society participation, including the families. These conferences are best described by Pogrebinschi and Tanscheit (2017) as 'multi-level deliberative processes' dealing with specific policy areas and gathering 'ordinary citizens, civil society organizations, private stakeholders, elected representatives, public administrators, and other social and political actors', and culminating 'with the drafting of a final set of policy recommendations' voted for by the participants. Before the final national conference, meetings at the local and state level were organized in preparation for the former. In the specific case at hand, the intention of updating the last PNDH (dating back to Cardoso's presidency) was announced by Lula at the beginning of 2008, with a series of local and state conferences being organized after that, and culminating in a final national conference on human rights in Brasília in December 2008. Gathering more than one thousand participants, a wide range of human rights issues were discussed and integrated into seven broad 'thematic axes', the last one referring to the 'right to truth and memory'. Note that the other six thematic axes were already part of a proposal put forward by the conference's executive secretariat in April 2008, before the state-level conferences. The incorporation of the axis 'right to truth and memory' occurs only later. This was a result of the families' mobilization in the state conference of Minas Gerais (and the subsequent endorsement of their proposals by most participants) (Interviews BR1, BR18), though others also point to the important role played by Vannuchi himself in encouraging the creation of a specific thematic group on 'truth and memory' (Interview BR4). The establishment of a 'National Truth and Justice Commission' was among the various proposals presented, with the others referring mostly to issues such as (1) the opening of archives and access to information, (2) educative and cultural type of initiatives, and (3) the naming or re-naming of public spaces.[80] The PNDH-3, elaborated by the Human Rights Secretariat, is faithful to the thematic axes of the National Conference and incorporates many of its proposals, though often taming them down. This is clear in the case of the National Truth Commission itself, as the initial proposal was for a Truth and *Justice* Commission, capable of

[80] The resolutions of the 11th National Conference on Human Rights can be consulted here: http://www.ipea.gov.br/participacao/images/pdfs/conferencias/Direitos_humanos_XI/deliberacoes_11_conferencia_direitos_humanos.pdf. (accessed 20 August 2018).

forwarding its findings to the competent judicial organs, a prerogative that was quickly withdrawn.

The first version of the PNDH-3, approved by President Lula in December 2009, would however be subjected to revisions, resulting in a newly updated and more moderate version in May 2010. This was a consequence of the intense *negative* pressure the government was subjected to after the PNDH-3 was first signed. On top of the tensions provoked by the proposal to create a 'truth commission', the PNDH-3 touched upon a number of other controversial issues that infuriated some of the most powerful lobbies in Brazil. This was the case of the church or the agro-business, as the initial version of the PNDH-3 supported the decriminalization of abortion, same-sex civil union and adoption rights, the withdrawal of religious symbols from public spaces, new forms of mediation of land conflicts, etc. (Adorno, 2010). The government would end up taking a step back on some of these issues, to the dismay of the human rights community. As for the axis on 'truth and memory', among the various revisions the most significant one was the withdrawal of the proposal to outlaw the naming of public spaces after people who had committed human rights violations, in a clear concession to the irritation this provision provoked among military circles. It is nonetheless significant that the government remained keen on maintaining the 'truth commission' proposal, despite the crisis it created within Lula's cabinet (not to mention the ferocious attacks from segments of Brazil's mainstream media, known for its conservatism). Once again, Vannuchi seems to have been a key governmental player. As the Defense Minister and three leading military officials threatened to resign – alleging the text of the PNDH-3 was 'insulting, aggressive and revanchist' –, Vannuchi responded in the same way, suggesting he would leave his post in case major concessions were made (*Folha de São Paulo,* 30 December 2009). Lula managed to pacify the situation after a crisis meeting in which a few revisions to the original text of the PNDH-3 were agreed upon. Meanwhile, proceedings for the instauration of a National Truth Commission (hereafter CNV) started to be taken, with a law proposal reaching the Chamber of Deputies as early as May 2010.

Besides the most obvious role played by the PNDH-3 and the conferences that backed it, there was an additional source of pressure looming over the head of the Brazilian government – the anticipation of a condemnation by the Inter-American Court of Human Rights (IACHR) in the case of *Gomes Lund et al. v. Brazil* (also known as the Araguaia guerrilla case). For some within the pro-accountability movement, the sudden determination of the Brazilian government to

implement the CNV was a strategic response to the impending condemnation, either in an attempt to prevent it altogether or to save face and demonstrate that the Brazilian state was taking concrete transitional justice steps (Interview BR15). The timing of events suggests this is indeed a credible hypothesis. Though the case had been submitted to the Inter-American Commission on Human Rights back in 1995 and admitted in 2001, it was not until October 2008 that the Commission produced the Report on the Merits No. 91/08[81], submitting the case to the Inter-American Court in March 2009. Based on that report and on the court's previous case law, the condemnation of the Brazilian state could be anticipated with a good degree of certainty by the time the PNDH-3 was being drafted and signed, even if it would take until November 2010 for the court to actually issue its ruling. In the text of verdict, the court notes that 'Brazil highlighted the future constitutions of a National Truth Commission (…)', but that 'the activities and information that this commission will eventually obtain do not substitute the obligation of the State to (…) ensure the legal determination of individual responsibility by means of criminal legal procedures.'[82]

Some families and their allies correctly point out that the Brazilian government had not shown the willingness to create a 'truth commission' until the IACHR condemnation was looming on the horizon. They point, for example, to the astonishing coincidence between the fact that the project to create the commission was sent to Congress on the same day that they were at an IACHR court hearing (Interview BR1, BR18). However, it is possible that, as direct litigants in the case, they overstate its causal impact. A slightly different but plausible line of reasoning is that the IACHR ruling (together with the PNDH-3 conferences) – rather than pushing the government to do something it would otherwise not wish to do – created an opportunity for favorable governmental agents to push for and justify a policy that was already somewhat aligned with the governmental agenda. This is plausible not only because there had already been concrete governmental steps in the field of 'truth and memory' before, but also because other IACHR cases (most notably the rift caused by the Belo Monte dam case in 2011) show that IACHR decisions that went against governmental interests were met with a backlash rather than a change in policy.

[81] The Commission produced this report shortly after organizing a debate (or 'thematic audience') on 'the amnesty law as an obstacle to justice in Brazil' which, not coincidently, took place shortly after (and with some of the same participants) as the public hearing on judicial accountability organized by the Ministry of Justice in July 2008.
[82] Gomes-Lund et al. ('Guerrilha do Araguaia') v. Brazil, Preliminary Objections, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 219, ¶¶ 295-297 (24 November 2010)

Although the bill predicting the establishment of the CNV reached the Congress in May 2010, it would take until November 2011 to be converted into Law 12,528, and until May 2012 to be formally installed in an official ceremony where president Dilma Rousseff (2011-2016) designated the CNV's seven independent commissioners, in the presence of an audience that included all of Brazil's ex-presidents since 1985. Law 12,528 established the CNV with the aim of 'examining and shedding light on the grave human rights violations' perpetrated in the period between 1946 and 1988, 'in order to ensure the right to memory and historical truth and promote national reconciliation' (art. 1). Unlike previous bodies which ended up serving a fact-finding function as a result of an extensive reparations policy (the CEMDP and the Amnesty Commission), the CNV was allowed greater powers, such as the prerogatives to request classified documents, convene witnesses and testimonies, hold secret hearings, ask for witness protection or request technical exams, not to mention the capacity to name individuals and institutions responsible for human rights violations and to make official recommendations (Torelly, 2018: 10).

Its loose mandate, however, meant that its first year of work was characterized by much tension and conflicting pressures, resulting in its virtual paralysis. Many of the broader conflicts related to what the CNV should represent and aim for were present within the Commission itself, including opposing views on whether it was meant to 'close the books' on the past (conciliatory approach) or be an additional stepping stone in the process of furthering historical and legal accountability (conflictual approach). Its links to civil society were also an object of debate. Though the CNV opted to work mostly behind closed doors, the unexpected dissemination of local independent commissions (set up by local governments, civil society groups, universities, etc.) meant that some of the CNV's members would end up liaising with these (Torelly, 2018: 14). This connection, together with the refusal of the military to cooperate with the CNV, helped tipping the balance towards a non-conciliatory approach, which became evident in its final report, released in December 2014. Although families and activists were highly critical of the CNV – for its size, duration, lack of grassroots connection, closed-door policy, and, importantly, for not adding much in terms of what was already known –, they welcomed its official acknowledgment function as well as some of its most provocative recommendations (Interview BR1).

According to Torelly (2018: 18), the CNV's main accomplishment was not so much in terms of reporting new facts, but rather of assembling everything in a systematic way, 'thickening the

narrative with testimonial evidence', and making the indisputable case that violations did not take place in an isolated way (as the military claimed), but were coordinated and performed with the knowledge of high-ranking officers. As such, the CNV's (2014: 964) first recommendation was the acknowledgment by the armed forces of its institutional responsibility in the serious violations of human rights that took place during the military dictatorship. Its three-volume report, with over 3,000 pages, constitutes an updated, detailed, and authoritative account of the repressive apparatus, its functioning, and consequences. Besides updating the number of deaths and disappearances from the 357 recognized by the 2007 CEMDP's report to 434 cases, the CNV was bold enough to name 337 public officials responsible for serious violations of human rights, not only based on direct authorship but also on the 'political-institutional responsibility' of the chains of command (CNV, 2014: 846-931). Moreover, it extended the range of research themes beyond the traditional ones and dedicated its second volume to previously neglected 'thematic issues' such as the violations practiced against peasants, indigenous communities, LGBT, and others. Though the report opts to put an emphasis only on those who died for strict political reasons, it is striking that it points out that more than 8,000 indigenous people were killed during military rule! Among its 29 recommendations, the most controversial one was surely its stance on criminal accountability, adopting the view that the scale and systematic manner in which crimes were committed amounted to crimes against humanity which, in accordance with international jurisprudence, should not be subject to statute of limitations and to the application of amnesty laws (CNV, 2014: 965).

Despite this, President Dilma Rousseff was keen on emphasizing, during the ceremony in which she received the CNV's final report, that democracy was built 'through pacts and national agreements' and that 'truth does not mean revanchism; truth should not be a reason for hatred or for the settling of accounts' (*Folha de S. Paulo,* 11 December 2014). Though Rousseff's personal preference for the revision of the amnesty law had been made clear before (mot least because she was a victim of torture herself), she is said to have adopted this posture in order to avoid problems with the armed forces (*Idem*). Note that the CNV's report came at a time in which the deterioration of the political situation in Brazil was already perceptible, as a result of an economic crisis and major corruption scandals. The election that had taken place two months before had been the most disputed and polarized of Brazil's democracy and conservative forces were taking advantage of the situation to question the legitimacy of Rousseff's government. The year 2015 was characterized by massive anti-government/ anti-corruption protests and

impeachment requests, which eventually materialized in 2016. This scenario is possibly part of the reason why the recommendations of the CNV were largely ignored and TJ-related topics vanished from the political scene.

5.5. The lack of criminal accountability

Rousseff's view on the pacted nature of Brazilian democracy, and the implicit acknowledgment that such pacts prevent(ed) any form of account settling, did not entirely come as a surprise. Although her main motivation was surely averting a backlash from conservative sectors and the military, she was also aware that there was a widespread perception in Brazil that the amnesty law was a major stepping stone in the process of democratization in Brazil – 'the birthplace of Brazilian democracy, the moment in which a new order is found' (Interview BR11). Take the editorial of *Folha de São Paulo* (12 December 2014) following the release of the CNV's report:

> *The period of political violence needs to be known and debated, but it was the amnesty that enabled [the country] to overcome it. (…) The unrestricted amnesty given by the Brazilian dictatorship in 1979 was a decisive step for peacefully overcoming the nefarious situation (…) [and] it is one of the pillars on which Brazilian democracy is based. It was its acceptance by political forces that broke the cycle of retaliations inaugurated in 1964. It is neither reasonable nor desirable that international commitments, determining that torture is an imprescriptible crime, override juridical national sovereignty.*

It is noteworthy that the text speaks of an 'unrestricted amnesty', something which is factually incorrect but often perceived as true. Moreover, it seems to equate 'unrestricted' with 'bilateral', subverting the reason why the amnesty movement spoke of an 'unrestricted amnesty' back in the late 1970s. The 'two-demons' narrative is also somewhat present (and it is often what justifies pro-amnesty positions). Even though the editorial recognizes that military repression was 'disproportional and abusive', it speaks of a 'cycle of retaliations' and of 'right and left-wing factions that recurred to violence and that led to the collapse of democratic regimes in various countries, including Brazil' (*Idem*). The assertions that left and right-wing violence led to the 1964 *coup d'état* and that the amnesty law put an end to a 'cycle of retaliations' (when the small armed left-wing opposition appeared only after 1964 and had been destroyed long before the amnesy law) are not rigorous from a historiographical point of view, but once again

reflect what the dominant perception in Brazil is. In fact, a commonly held critique against the CNV – which is far from coming only from military circles – was that it did not investigate 'both sides', silencing the violence and political project of the radical left.[83]

Similar views on the historical significance of the amnesty law had been espoused by the judges of the Federal Supreme Court (*Supremo Tribunal Federal* - STF) back in April 2010, when responding to the challenges posed by the Brazilian Bar Association in ADPF 153[84]. By a vote of seven to two, the STF decided to uphold the amnesty law. The central argument was that, rather than a regime-imposed self-amnesty, 'the amnesty law resulted from a political agreement generally supported by Brazilian civil society (…) being recognized as a necessary and desired measure for a peaceful transition to the rule of law, (…) a fundamental underpinning for the current democratic constitutional order.'[85] On a more technical note, the STF defended that the amnesty law is part of Brazil's constitutional order via constitutional amendment no. 26/1985 which, besides calling for the Constitutional Assembly responsible for the 1988 Constitution, reiterated the amnesty law provisions, in another proof of the intimate connection between the latter and the birth of the democratic constitutional order. The STF notes, however, that its duty is purely to interpret the law – according to its historical context and apparent intention of the legislators – and that changes to its wording fall within the competence of the organ that enacted the law in the first place, that is, the legislative power.[86]

Interestingly (and perhaps not coincidentally), the STF decision came only a few months before the ruling of the IACHR in the *Gomes Lund et al. v Brazil* case, which took a very different stance. In its defense, the Brazilian state similarly emphasized that 'to understand the merits of the amnesty law it is necessary to take into account that this law functions in a broad and gradual process of political change and redemocratization of the country', further highlighting that the 'the amnesty was preceded by a public debate' and was commonly considered 'an important

[83] The usual (and valid) counter-argument is that left-wing violence had already been prosecuted and punished by the dictatorship's repressive apparatus. Moreover, to focus on left-wing violence is to run the risk of falling into the regime's narrative that there was a war being waged by subversive elements and that this justifies the regime's counter-actions. Instead, the moral and legal duty of state agents not to practice torture and not to kill the 'subversives' – provided these do not pose a direct threat to the life of the public agent – is what is behind the focus on state violence.

[84] ADPF (*Arguição de Descumprimento de Preceito Fundamental* – Claim of Breach of Fundamental Percept), a mechanism of 'constitutionality control'.

[85] Case ADPF No. 153/DF, Supremo Tribunal Federal, Relator Min. Eros Grau (April 2010) quoted in Tang, 2015: 262-263.

[86] Case ADPF No. 153/DF, Supremo Tribunal Federal, Relator Min. Eros Grau (April 2010)

step in the national reconciliation process.'[87] The IACHR, instead, argued that regardless of the type of amnesty or historical circumstances, Brazil's amnesty law was not compatible with the American Convention on Human Rights and with the court's jurisprudence on instruments that restrict the duty to investigate and sanction grave violations of human rights. Thus, it held the Brazilian state 'responsible for the forced disappearance of 62 people between the years 1972 and 1974 in the Araguaia region', using the doctrine of continuous violations to justify its say over events that had occurred prior to Brazil's recognition of the court's jurisdiction (Cavallaro and Delgado, 2012: 99-100). The apparent incompatibility of these two decisions puts Brazil in a legal conundrum as the relationship between the domestic constitutional order and international obligations has not been clearly defined. Though there are sound legal arguments that can be made to overcome this challenge – as in Tang (2015) –, the highest judicial authorities in Brazil have so far maintained a 'nationalist' view of judicial matters, privileging domestic decisions over international ones.

This was, at least, the point of view of some of the STF's judges on the aftermath of the IACHR ruling, publicly stating that 'the decision can have moral effects, but does not imply an annulment of the STF's decision' or that, despite international embarrassment, 'the decision of the STF prevails over the IACHR's ruling' (*Estadão*, 15 December 2010). The Minister of Defense similarly stated that 'the decision would not produce any legal effects', as the Brazilian Supreme Court's decision 'was the final word on the matter' (Cavallaro and Delgado, 2012: 100). Though federal prosecutors have opened a series of criminal lawsuits since the IACHR's ruling – which was fundamental in changing the power balance within the MPF (as pro-accountability prosecutors are no longer a minority) –, the Brazilian judiciary has continued to close all doors (Bernardi, 2017). Either the lawsuits are struck down from the start, as judges invoke the amnesty law and the STF decision, or they are later blocked by the STF as the defendant can file a 'complaint' to the STF when the latter's authority is deemed to be under challenge (Interview BR16). However, the STF will be forced to reanalyze its view on the matter, as other legal challenges have been presented since the IACHR ruling, namely a 'clarification motion' (*embargo de declaração*) regarding ADPF 153 and an additional ADPF (ADPF 320), using some of the IACHR's arguments and defending the ruling's biding nature.

[87] Gomes-Lund et al. ('Guerrilha do Araguaia') v. Brazil, Preliminary Objections, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 219, ¶¶ 130-133 (24 November 2010)

The STF has been awfully slow in responding to these challenges, though, perhaps as a result of the legal conundrum in which it finds itself.

If much can be said about the conservative nature of the higher echelons of Brazil's judiciary, the lack of training and receptiveness towards international law, or the dominance of a formalistic/ positivist legal culture, it should also be noted that judicial activism on this matter is a relatively recent phenomenon in Brazil. It wasn't until the IACHR ruling, and the subsequent change of heart within the MPF, that one can speak of judicial activism regarding the crimes of the dictatorship. Either because of the previous lack of allies and/or the perception that the judiciary's doors were closed, the fact is that the families in Brazil did not or could not mount a sustained litigation effort before, as family movements in Latin America had done elsewhere.

Finally, and on a different note, the absence of criminal accountability for the crimes of the dictatorship comes as no surprise if one zooms out of the issue of political crimes under the dictatorship and looks at Brazil's broader and deeply problematic relationship between top-down violence and impunity. If a transition from an authoritarian to a democratic regime is generally expected to be accompanied by basic guarantees involving (1) the protection from arbitrary violence from the state and (2) equal and fair treatment under the law, the fact is that Brazil is still a very 'ugly democracy' in this regard (Pereira, 2000). Although targets have changed away from political opponents and the state no longer deliberately perpetrates violent abuses, the fact is that the sharp increase in crime rates during the 1980s and 1990s were accompanied by growing police violence, be it in the form of torture of suspects, maltreatment of prisoners, deliberate executions, or death squads in which state officials are active participants (Pinheiro, 1998). Public support for brutal policing methods and harsh order laws is high and often comes in combination with the rejection of the human rights discourse, which in Brazil is commonly associated to the 'rights of criminals' and to policies that allegedly cripple the effort to fight crime (Cavallaro and Delgado, 2012: 93-94). This, together with the fact that those victimized almost always come from the poorest and most marginalized sectors of society, contributes to widespread impunity for the abuses committed by state officials. In his impressive comparative study on judicial responses to police killings throughout the 1990s, Daniel Brinks (2008) depicts the grimmest picture for the two Brazilian cities he includes in his study – S. Paulo and Salvador –, where conviction rates for police officers are well below 5%, compared to 20% in Buenos Aires or 50% in Uruguay.

This is all to say that, apart from the most obvious political and legal barriers to accountability for the crimes of the dictatorship, pro-accountability actors operate in a broader social and normative environment that is not favorable to their cause, given the widespread *normalization* of violence and impunity in Brazilian society. Note that the point here is not to draw unwarranted causal relationships between the lack of accountability for past violations and present ones (as many tend to do). It is simply to state that families and their allies face an additional obstacle in Brazil – in comparison to settings where accountability is the norm and violence is overwhelmingly rejected as a tool of social control –, in essence because this scenario inevitably reduces the visibility of their claims and their pool of support. It is no coincidence that they are commonly accused of being 'fixated on the past' rather than on the all too pressing current situation (Interview BR15).

5.6. Conclusion

Brazil is a textbook case when it comes to the impact of a highly top-down transition to democracy on transitional justice trajectories. Besides precluding the treatment and general interest in the topic during the transition period, it meant potentially favorable state agents would take careful and progressive steps, going from the most victim-centered and least confrontational type of measure – monetary reparations – to those which occupy a middle space in the 'transitional justice scale' – investigative and acknowledgment measures –, without yet daring to take further steps. Its largely consensual mnemonic regime at *t0,* and the fact there had been no sustained litigation effort until recently, complicates the task of challenging the country's amnesty law. The idea that this law was largely a victory of the opposition to the regime and part of a successful move towards democracy is still widespread, and can be mobilized both by conservative sectors and governmental actors who do not wish to generate conflict with the armed forces. Though families have come a long way in gaining support for their cause over the past decade or so – at the same time that the transitional justice agenda became more established internationally and progressive legal actors in Brazil (belatedly) mobilized –, the lack of accountability for the crimes of the past does not appear all too surprising in a country where violence and impunity are still widespread.

Moreover, and when it comes to accounting for the implementation of TJ measures at *t1*, Brazil's case largely confirms the initial expectations regarding the combined effect of positive

political actors and sources of external pressure. To begin with, the first appear indispensable in a setting where demands come from a small and isolated group, as it was the case in Brazil during the 1990s. If they surely played an agenda-setting role, by sending constant reminders to political actors, the early decision of the Cardoso administration to give a response to the families of the dead and disappeared says something about a positive predisposition that Cardoso himself insists he had. The choice for a reparations policy is in accordance with the perceived need to attend to a small group on an issue that was salient only for them, with the added benefit that reparations are the least conflictual type of measure (as the recognition of the existence of victims leaves the thesis of a 'few rotten apples' within the military largely unchallenged). By the time the PT decided to take a bigger TJ step, with the implementation of the National Truth Commission, the situation for the families had changed, with increased institutional opportunities (participation in the national human rights conference) and a wider network of support, benefiting from a favorable decision of the IACHR. If it is true that a few key governmental agents appeared fundamental in pushing for an advancement of the TJ agenda from within the state, those same agents recognize that a policy of that type – surely more visible and conflictual than reparations – could only be implemented if there were external demands to back them.

CHAPTER 6. Making sense of TJ implementation at *t1*

The first research question this study focused upon referred to the drivers behind the implementation of TJ measures at *t1*, that is, once a significant amount of time has passed since the period of transition to democracy. Though TJ measures would perhaps make the most sense during the transition period, this context proved sensitive in cases of negotiated transitions to democracy, where the balance of power either prevented or made TJ measures unthinkable. Their implementation at *t1* responded not only to a more favorable political environment, but also to specific changes and incentives at *t1*, which shaped both the timing and the decision to implement TJ policies and the kind of TJ policies. In the theoretical framework I opted to focus on proximate factors related to the interplay between political decision-making actors' preferences and the existence of sources of pressure, taking also into account the potential costs associated to the specific types of TJ policies.

Below I make a summary of the main empirical findings for each of the main policies under study, synthetizing at the end of each section the qualitative scores attributed to each dimension and providing a justification for why is that so[88]. The available evidence is also used to postulate which factor best accounts for timing (in accordance with the three scenarios anticipated in the theoretical framework). Those scores and scenarios are put together at a second stage so as to make a cross-country comparative assessment that can tells us about the relative strength of *preference* vs. *pressure* and whether the choice of a specific policy instrument (which vary greatly in their associated costs) matches the strength of preferences and pressures.

6.1. Spain 1 (SP1). Reparations (Law 4/1990)

The 18th additional provision of the State General Budget Law of 1990 (Law 4/1990) established a financial compensation scheme for those imprisoned 'as a consequence of the circumstances contemplated in the Amnesty Law 46/1977', or to their spouse in case of death (though with two caveats – it only applied to those who had spent more than three years in prison and to

[88] To be clear, 'preference' scores are based on previous postures, party programs, and the quality of the measure. 'Pressures' are obviously related to the level of demand, but also how 'powerful' that pressure is deemed to be on the executive. The scores for 'costs' are based on the type of policy and how conflictual it was expected to be in that specific context.

cases where the recipient was more than 65 years old by the end of 1990).[89] Out of all the TJ policies under study, this was the least politicized and the one that had enjoyed the least visibility, thus complicating our task of tracing the factors behind its implementation. The language of the law was strikingly apolitical, its text did not carry anything resembling a moral or symbolic recognition of the unjust character of the imprisonments it made reference to, and the issue did not even deserve a law of its own, appearing instead as a provision in the State General Budget Law.

The reticence of the ruling party to approve this measure was evident, given that parliamentary proposals for reparatory measures of this type had already been put forward before but had been either ignored or outrightly rejected by the ruling Socialist Party (PSOE). Various small left-wing parliamentary groups had been responsible for such proposals in 1986, 1987 and then again at the beginning of 1990. The fact that the PSOE had been ruling with absolute majorities since 1982 and that it took until 1990 to approve a law foreseeing reparations is another solid indicator of the unimportance of this topic for the Socialists. It is striking that parties to the right of the PSOE (first the Social and Democratic Center and later the Popular Party) had shown to be supportive of such measures – parties whose francoist origins could compromise them –, suggesting that the political costs of implementing them were low. The benefits were, however, also not entirely evident given that this was a low-key issue that seemed to concern only the small parliamentary groups that put forward proposals on this issue, possibly motivated by the collective of ex-prisoners they had connections to. The financial and administrative burden of a measure that was likely to affect tens of thousands of people is possibly what deterred the PSOE for some time, together with the fact that there was no visible demand on this issue.

It is not clear what led the Socialist Party to change its mind in June 1990, when incorporating a monetary compensation scheme into the yearly State Budget Law, but the fact that this took place shortly after another parliamentary proposal by IU-IC (United Left- Initiative for Catalonia) in February 1990 suggests that these parliamentary groups played an agenda-setting role. It is possible that, by repeatedly alerting to the financial needs of ex-political prisoners,

[89] Complementary legislation to the 1977 Amnesty Law had already been approved on various occasions by different governments, but I do not qualify it here as falling under the category of 'reparations' as their aim was to overcome discriminatory situations established under Franco, integrating all the affected as equal citizens. In other words, they were more of a rehabilitation procedure – intending to provide the affected with what they would normally have in case they had not been affected – rather than a compensation/ recognition of the damages.

these groups influenced the ruling party's considerations on the appropriateness on this type of measure. Another plausible hypothesis is that, almost having lost their absolute majority in 1989, the PSOE was trying to please possible future parliamentary allies (in light of IU's good results in 1989). The choice for a victim-centered measure (rather than a more conflictual type of TJ policy) is obvious in a context where the consensual mnemonic regime of the transition was still in place and where providing forms of reparation to the victims was an acceptable and expected practice, but morally engaging with the past was not.

Table 6.1. Qualitative scores of SP1

SP1	**Score**	**Evidence**
Preference	**Low**	The same government had rejected similar proposals before (though it had already approved restitution measures) and it was a 'timid' measure.
Pressure	**Low**	The few legislative initiatives presented by small left-wing parliamentary groups are the only evidence of sources of pressure.
Costs	**Low**	Reparations measures are considered the least costly measure in the TJ scale. This is particularly the case for this specific one given how timid it was and the support of the opposition for the measure.
Type of 'turn' *(reason behind timing)*	**Pressure turn.** The legislative initiatives presented by small left-wing groups are the only evidence of a significant proximate change, given that the executive had been in power before.	

6.2. Spain 2 (SP2). Historical Memory Law (Law 52/2007)

Law 52/2007, which became popularly known as 'Historical Memory Law', carries in fact the more extensive title 'Law 52/2007 of 26 December recognizing and amplifying rights and establishing measures in favor of those who suffered persecution or violence during the civil war and the dictatorship'. This is already a good reflection of the controversies surrounding the formulation of this law, with quite a symbolic breadth on the one hand, but being mostly victim-centered on the other. Thinking in terms of the transitional justice scale, I however consider that this law performs somewhat of an (limited) acknowledgment function given that it goes beyond typical victim-centered measures, touching upon issues such as the withdrawal of Francoist symbols from public spaces. The law in itself, by conglomerating a vast number of issues,

performed an acknowledgment function, even if it was more timid than many of its advocates had wished for. This is the more so if one considers the extent to which it broke with previous patterns of political (dis)engagement with the recent past.

In accounting for the timing of implementation of this measure, it seems clear this law would not have been conceived in the first place if there had not been a break with Spain's consensual mnemonic regime in the years preceding the PSOE's takeover in 2004. As developed at length, Spain's treatment of its recent past was being questioned at the political and societal level during the PP's second mandate (2000-2004), in a way it had not been before. To put it in terms that speak to the theoretical framework, there were a series of pressures at the international and national level – including the Pinochet case and new civil society initiatives – that were putting the topic on the public and political agenda. Discussions on the Spanish past permeated the media and cultural life at a much more visible pace than before, and the emergence of an exhumation wave powerfully illustrated the extent to which Spain had not dealt with its past, using the symbolic capital of dead bodies. The fact that the issue could moreover be used as a political (de)legitimation tool, at a time the right was particularly strong, created incentives for the parliamentary opposition to bring the issue to the political scene. This new mnemonic context is in great contrast to the one of Law 4/1990 and, in my view, is essential in understanding why the PSOE of 2004 was ready to take more controversial and visible steps than the PSOE of 1990.

If it is true this would hardly be the case if there was not some degree of positive preferences within Zapatero's executive, there are a series of good indicators that this preference would not have been activated in the first place if there were no sources of external pressure placing the issue on the agenda. The most immediate one was, as we have seen, PSOE's parliamentary allies, who brought up the issue of 'historical memory' during Zapatero's investiture debate and who, given the PSOE's condition of minority government, enjoyed some leverage. The fact that Law 52/2007 had not been foreseen in the electoral program – and that this particular program became known as a 'catch-all' program, touching upon all sorts of controversial progressive social policies – is the best 'diagnostic piece of evidence' confirming that the law responded to other considerations besides preference. In turn, the commitment of small left-wing and regional nationalist groups cannot be understood outside the broader dynamics that were putting the issue on the public agenda.

As seen in detail, there was a conjuncture of different types of events in the late 1990s and early 2000s which contributed to increase the overall interest in Spain's past. At the supranational level, the Pinochet affair created embarrassing parallels with Spain's way of dealing with its past. At the domestic political level, the rule of the PP generated incentives for the left-wing opposition to use the past as a political weapon. At the civil society level, nascent initiatives were pointing towards 'forgotten issues', most poignantly the one of exhumations. Thinking in counterfactual terms, it is highly unlikely Zapatero's parliamentary allies and Zapatero's own government would nurture an interest in the topic if it was not for this changing mnemonic context.

Therefore, while the change from the PP to the PSOE government was necessary for Law 52/2007 to come about, it is reductionist to focus on a change in party colors. The contrast between the PSOE of González (1982-1996) and the one of Zapatero shows that, more than a matter of different preferences, they operated in radically different mnemonic environments. While in the 1980s almost no one would question the legitimacy of Spain's way of dealing with the past, the same did not happen in the early 2000s, when the transitional justice norm was more readily available and when beliefs about the appropriate way of dealing with the past were undergoing change and contestation.

Table 6.2. Qualitative scores of SP2

SP2	**Score**	**Evidence**
Preference	**Low-Medium**	The PSOE had presented legislative initiatives on related issues during the previous legislature while in opposition; however, it did not foresee this specific measure in its electoral program. Plus, this measure was quite 'timid' in quality.
Pressure	**Medium**	The minority government condition of the executive gave some leverage to its parliamentary allies, keen on putting this topic on the agenda.
Costs	**Low-Medium**	This law was opposed by conservative sectors and generated a good deal of political conflict with the opposition, but it was mostly a 'victim-centered' measure.
Type of 'turn' *(reason behind timing)*	**Preference-pressure turn.** A shift in the executive from the PP to the PSOE was necessary, but evidence suggests the PSOE would not have taken this step (at least not in this form) without pressure from its allies.	

6.3. Brazil 1 (BR1). Reparations (Law 9.140/1995)

Law 9.140/95 established one of the most generous compensation schemes in Latin America and created a Special Commission on Political Deaths and Disappearances, responsible for the management of reparatory petitions. To begin with, it is clear the timing of implementation of this law cannot be dissociated from Fernando Henrique Cardoso's figure. He was the first president of Brazil coming from the social democratic opposition to the dictatorship, and his profile as a highly renowned academic who had spent part of the dictatorship in exile placed greater expectations on him. Cardoso himself has posteriorly stated that he was personally committed to the issue and that he would have taken measures in that respect regardless of sources of pressure (interview to Mezarobba, 2007). In his political biography, he states that 'my life story prompts me to repair, in one of my first governmental acts, what I always considered unjust: the lack of recognition of the Brazilian State for the death and disappearance of political prisoners' (Cardoso, 2006: 548-49). The fact that he had signed a 'compromise letter' with the families before and the 'quality' of the reparations program that was implemented speaks for the executive's preferences in this regard.

On the other hand, Cardoso was subject to agenda-setting pressures that the PSOE of Felipe González was not. Though these were not so strong as to force Cardoso to take a step he would not wish to take, they surely played an agenda-setting role and were resilient enough to create 'embarrassment' if Cardoso would not address this issue. As developed at length in the chapter on Brazil's case, these include a small family movement, a few political allies, and organizations like Amnesty International. A series of small circumstantial pressure-building events in early 1995 sent constant reminders about the issue – before the government announced in May that it was studying a bill –, and thus the 'pressure' side of the coin deserves emphasis in this case too.

Although the families' demands went beyond reparations and focused on the creation of an investigative commission and acknowledgment of the state's responsibility, the choice of the executive to focus on a victim-centered compensation scheme is obviously not independent from the attempt to keep it a low-conflict issue, as the declarations of one government representative made clear: it was a 'reasonable solution' that would 'not go against the military' (*Folha de S. Paulo,* 24 May 1995). The fact that this was an issue that had not gained much visibility outside the directly interested circles explains why the government did not find the

necessary incentives to go beyond victim-centered measures. The establishment of an Amnesty Commission later on – broadening the governmental reparatory program to all of those affected by other types of repression such as torture, arbitrary arrests, dismissals/transfers for political reasons, etc. –, also seems the outcome of the claims of interested circles.

Table 6.3. Qualitative scores of BR1

BR1	**Score**	**Evidence**
Preference	**Low-Medium**	Though this measure was not foreseen in Cardoso's electoral program, he signed a 'compromise letter' with the families before. The quality of the measure adds to this.
Pressure	**Low-Medium**	There were various (relatively small) sources of pressure, who seemed to have played an agenda-setting role.
Costs	**Low-Medium**	Reparations are the least costly measure, but this program also performed an acknowledgment function the military was not conformable with.
Type of 'turn' *(reason behind timing)*	**Preference-pressure turn.** At first sight this case might be one of a 'preference turn' given the shift in executive and quick implementation. However, a detailed look at the months that preceded this measure shows that the government seemed initially reticent and that agenda-setting pressures were necessary, even if their capacity to strike a chord with this particular executive speaks for the 'preference' side too.	

6.4. Brazil 2 (BR2). National Truth Commission (Law 12.528)

The fact that the proposal to create the CNV (*Comissão Nacional de Verdade*) does not appear until the end of the Workers Party's second mandate is a strong indicator that this measure was not purely a result of a positive preference of the executive. However, the fact that a positive preference is a *necessary* condition is put well into evidence in this case given that, despite the backlash coming from the military and the Minister of Defense himself, the government decided to keep the proposal, unlike some of the other controversial issues that had also been put forward by the PNDH-3 (Third National Human Rights Program, December 2009). Moreover, it was a governmental institution itself that created the necessary institutional opportunities for civil society to shape the human rights agenda through the establishment of multi-level participatory mechanisms (the local and national human rights conferences). The initiatives that had been put

forward before by the Human Rights Secretariat (a ministry-like institution) on the field of 'truth and memory' shows, furthermore, that this institution was not indifferent to the issue and puts well into evidence how state institutions themselves can play a role in furthering the transitional justice agenda from within the state.

The fact that the government found the necessary resolve to put forward the proposal to create the CNV in 2010 and not before is surely not independent from the changes that occurred between the moment the Workers Party took over in 2003 and the end of its second mandate, most notably the expansion of the concern for TJ measures beyond a small and largely isolated group of families. On the one hand, the families benefited from the first favorable judicial (non-criminal) decisions – most notably the one issuing a moral condemnation of the practice of torture by Coronel Ustra in 2008 – and the activation of a few epistemic circles, such as public prosecutors within the Federal Public Prosecutor's Office, who at the time became aware of the discrepancy between Brazil's transitional justice record and what was done elsewhere in Latin America. On the other hand, this resonated with favorable political actors, such as the Minister of Justice, responsible for organizing a public hearing to discuss judicial accountability for the crimes of the dictatorship in July 2008, and giving further visibility to the question. The Inter-American Commission on Human Rights would join this debate the same year, finally producing a Report on the Merits of the *Gomes Lund* case in October 2008, and submitting the case to the Inter-American Court of Human Rights (IACHR) in March 2009. The anticipation of an international condemnation is, in turn, said to have influenced the decision of the government to move forward with the Truth Commission proposal, either in an attempt to avoid the IACHR condemnation altogether or by providing an opportunity for favorable governmental agents to push for the creation of the CNV.

In sum, *internal* and *external* sources of pressure became more vocal, thus encouraging the government to stand up to the conflict that this would create with the military and conservative circles. In understanding why they became more vocal at the time, the consolidation of the transitional justice norm at the transnational level is one important factor, most visible in the consolidation of the IACHR jurisprudence on the matter, but also influencing epistemic groups in Brazil as well as the language of the family movement.

Table 6.4. Qualitative scores of BR2

BR2	Score	Evidence
Preference	**Medium**	Initiatives on 'truth and memory' had been put forward before, but a 'Truth Commission' could not be anticipated.
Pressure	**Medium**	The anticipation of the IACHR condemnation was a source of pressure. The families gained some new allies. State institutions played a role in pushing the TJ agenda 'from within'.
Costs	**Medium**	Opposed by conservative sectors, to the point of creating an internal governmental crisis.
Type of 'turn' *(reason behind timing)*	**The pressure turn.** It is the expansion of the circles of pressure that best explains *timing* because the ruling party had been in power before. However, the fact that sources of pressure can come from *within* the state too complicates the distinction between top-down preferences and bottom-up pressures.	

6.5. Uruguay 1 (UR1). Peace Commission (Presidential Resolution, August 2000)

The decision of President Batlle to create an investigative commission came as surprise to many since Batlle was coming from a party with an ambiguous relationship with the dictatorship (though he was not coming from the most conservative *sub-lema* [official faction] and had in fact been temporarily arrested, living for a large part of the dictatorship in exile). Out of the various TJ measures under study, this is the only that did not come from a party whose colors denoted a possible positive ideological predisposition towards the issue. This, together with the choice for an acknowledgment-type of mechanism, cannot be dissociated from the peculiar salience of the issue in Uruguay (when compared to first-time TJ measures in Brazil and Spain). If in the theoretical framework I predicted that TJ would remain a key concern only for the victims and families and therefore did not provide obvious political incentives to political circles outside the typical sympathetic ones (left-wing), this case puts into evidence that, in fact, the issue can enjoy a higher salience than anticipated and can bring political benefits.

Whereas in Spain and Brazil the first TJ measures came at a time in which the mnemonic regime was still largely consensual – and thus the choice of victim-centered measures made the most sense –, Uruguay's transitional justice trajectory was, as we have seen, conflictual from the start. Though it is the case that the issue lost much of its salience after the 1989 referendum, there were a series of events in the second-half of the 1990s that would put the issue back on

the public agenda. The first were military confessions in Argentina in 1995 (where many Uruguayan had disappeared) revealing the existence of the 'death flights' (bodies thrown into *La Plata* river). This had an impact on the families and their allies in Uruguay, who organized the first March of Silence in 1996 (which became a yearly event), one of the largest civil mobilization moments gathering between 30,000 and 50,000 people in the streets of Montevideo. An additional event was the international campaign led by renowned poet Juan Gelman, in search of his missing granddaughter in Uruguay in 1998/99. The president at the time, Sanguinetti, was known for his antagonism towards the issue (having been the main orchestrator of the transition pacts), which explains why one had to wait until a different president's take-over to see a response to the families' claims, now focused on investigation and search for the bodies of the disappeared.

The salience of this issue is proven not only by the yearly realization of the Marches of Silence, drawing thousands of people every time, but also by the fact that polling agencies actually cared to ask the electorate about this issue, showing that the majority of the respondents were in favor of investigating the whereabouts of the disappeared (Allier, 2006: 89). The public image benefits proved true judging by a 2002 survey showing that the electorate considered the creation of the Peace Commission as the second most positive aspect of Batlle's administration (Interconsult, February 2002).[90] In light of the public salience of the issue, and because the families' demands were focused on truth, it made more sense for the Batlle administration to opt for an acknowledgment type of mechanism than victim-centered policies. Moreover, because the Peace Commission had, in fact, limited investigatory powers and the rhetorical focus was on 'national pacification' and 'sealing peace once and for all', it did not prove costly for civil-military relations.

Table 6.5. Qualitative scores of UR1

UR1	Score	Evidence
Preference	**Low-Medium**	There is little evidence that Uruguay's president held preferences in this regard before. However, pundits assume he had a politically motivated preference (shame Sanguinetti). The limited mandate and powers of the Commission add to this.

[90] http://www.interconsult.com.uy/elpais02/021002f/ep021002.htm

Pressure	**High**	The 'Marches of Silence' drew thousands of people. The international campaign led by Juan Gelman was a source of embarrassment. It was a salient issue in the public scene.
Costs	**Low-Medium**	As an acknowledgment type of measure, it represented a significant rupture with the TJ trajectory before, but there was not significant opposition and there was a considerable demand.
Type of 'turn' *(reason behind timing)*	**The preference-pressure turn.** A shift in the executive was necessary, but the absence of previous commitment and the considerable levels of pressure speak for the role of the latter.	

6.6. Uruguay 2. (UR2) 'Loophole approach' to the Expiry Law (2005)

Out of the parties under study, the Frente Amplio was the only to take a favorable stance on criminal accountability from early on, decisively contributing to make the Uruguayan mnemonic regime a conflictual one at *t0*. The 1989 referendum on the validity of the Expiry Law, and the preceding signature collection process and campaign, were one of the most significant political events of that time and, as such, became intimately associated to the Uruguayan left, both to the party and to grassroots left-wing groups. The annual Marches of Silence – congregating families, their supporters, and political representatives, most often from the FA –, provide evidence that this was not a forgotten or resolved issue. The party programs for the 1999 and 2004 elections reflected this, with the FA making specific references to 'truth and justice' for the crimes of the dictatorship. Consequently, if there is one case where preference comes close to a sufficient condition for the implementation of TJ measures at *t1*, it is this one. This is the more so if one considers that challenging the results of the 1989 referendum was considered costly from an electoral point of view, as the debate in the 2003 Congress demonstrated. This is why the first FA executive initially opted for a 'loophole approach' to the Expiry Law rather than its outright revocation.

However, commitment does not come out of nowhere, and has to be understood in light of a party that comes closest to the mass-organic ideal type of political party, with the most interested circles – families and the various social organizations that support them – being part of the party's constituencies and membership basis (and with a few of them actually being FA representatives). Moreover, the decision to adopt perpetrator-centered measures – the most conflictual one on the TJ scale – has to be placed in a context where the Expiry Law had always

been the object of contention *par excellence*, being already under challenge in courts by the time the FA took over, based on a 'loophole approach' imported from neighboring countries. That is, while in Spain or Brazil it would come as a shock to see the executive challenging the country's amnesty law, in Uruguay it could be expected that the FA would take steps in this regard once/if in office.

Table 6.6. Qualitative scores of UR2

UR2	Score	Evidence
Preference	**High**	The historical support for this issue and the party programs speak for this, together with its quick implementation.
Pressure	**High**	Civil society groups continued to exert pressure in this regard, namely when it came seeking new ways of circumventing the Amnesty Law in courts.
Costs	**Medium-High**	Criminal prosecutions are the most conflictual TJ measure in light of the opposition they spark. Going against the Expiry Law was also considered costly because of the results of the 1989 referendum. However, in this case one has to consider that costs would also arise for the FA if it did nothing, given the historic relationship of the left with this issue.
Type of 'turn' *(reason behind timing)*	**The preference turn.** The shift to a left-wing executive was the decisive factor behind the timing of implementation of the 'loophole approach' to the Expiry Law, which the executive adopted from the start.	

6.7. Uruguay 3 (UR3). Law 18.831 (2011)

If at first the FA executive decided to abide by the text of the Amnesty Law, following a 'loophole approach' – certainly in the hope of satisfying pro-accountability sectors while not going against the 1989 popular pronouncement –, the former objective was far from met. The pro-accountability movement gained new resolve, and even though they were faced with another setback in a second referendum, the IACHR ruling of 2011 and the upcoming statute of limitations the same year were used to put further pressure upon the FA to do away with the Expiry Law. The movement showed its strength in the annual March of Silence of 2011, gathering about 100,000, at the same time that debates raged within the FA on how to comply with the IACHR ruling, seen as damaging to the country's good international reputation. Sources of pressure seem therefore to have been decisive in pushing the FA to approve Law

18.831 in October 2011, going against the Expiry Law and reestablishing the state's punitive capacity.

Table 6.7. Qualitative scores of UR3

UR3	Score	Evidence
Preference	**Medium**	The ruling party was highly divided on this issue.
Pressure	**High**	Judging by the IACHR condemnation, the looming statute of limitations, and the pressure of pro-accountability sectors.
Costs	**Medium-High**	On the one hand, the FA was going against (another) popular pronouncement. On the other, international reputation seems to matter greatly.
Type of 'turn' *(reason behind timing)*	**The pressure turn.** New sources of pressure (e.g. IACHR) best explain *timing*, given that the ruling party could have taken such steps before.	

6.8. Comparative conclusions

Based on all of the above, and thinking firstly about the most immediate changes propelling the implementation of TJ measures at a specific moment in time, the cases at hand fit the **three pathways to TJ implementation** identified in the theoretical framework, even if it is possible to identify a varying combination of *preferences* and *pressures* at work *always* for all cases.

The preference (supply) turn: Only one case fits neatly into this scenario – UR2. Here, an actor who had given signs of a positive preference before takes the oath of office for the first time and proceeds to implement TJ measures immediately after. The shift to a more sympathetic government is thus crucial in explaining timing. However, this does not mean demand is not important in activating preferences or in keeping preferences 'alive'. Would the FA have adopted a 'loophole approach' to the Expiry Law if it had not been so intimately linked to the pro-accountability movement and if legal challenges were not being presented in courts at the time? It is notable that this type of 'turn' only occurs clearly in the Uruguayan case, where a conflictual mnemonic regime already existed before and, thus, where more significant TJ steps were only dependent on a more favourable opportunity structure at the political level.

The pressure (demand) turn: If a party has been in power for a number of years before and does not take certain TJ steps until there are new agenda-settings pressures, it is fair to assume that this factor deserves special emphasis, even if all they did was activating a latent preference. This was possibly the case for SP1 and was more clear in the cases of BR2 and UR3, which curiously coincide in the fact that the condemnation of the IACHR was among the main sources of pressures, speaking for the importance of the consolidation of the TJ norm at the transnational level. However, the same way that one cannot speak of a *preference turn* without taking into consideration agenda-setting pressures, it is also difficult to speak of a *pressure turn* without considering that pressures would surely not have had the same influence if they did not have a relatively receptive interlocutor in power. Thinking counterfactually, it is hard to imagine a conservative government taking the kind of steps that Brazil took at BR2 and Uruguay at UR3. The case of Brazil, in particular, puts into perspective the distinction between *preferences* and *pressures* given that certain actors *within* the government itself played a *pressure* role in putting forward the TJ agenda.

The preference-pressure (supply-demand) turn: The cases UR1 and SP2 fall most obviously in here. In this scenario, a shift in decision-making is necessary to open up the opportunity structure for TJ measures, as the previous incumbent was largely against TJ measures (Sanguinetti in Uruguay and the PP in Spain). However, it is different from the first scenario in that, rather than in line with a previous commitment, policy implementation is most obviously the result of sources of pressure and, with them, the increasing salience of the issue in the public scene. This was the case of the pressure of parliamentary allies upon the PSOE of Zapatero in Spain – propelled by the preceding change in mnemonic context that the 'movement for the recovery of historical memory' helped create –, and the Marches of Silence and the Gelman case in Uruguay, before Batlle's election in 1999. While in the Spanish case these events/ pressures helped create an issue that was simply not perceived as a political issue before, in the Uruguayan one they contributed to the renewed salience of an issue that had almost disappeared from the public agenda in the early 1990s.

All in all, regardless of which factor played the greatest role in understanding the *timing* of implementation, the empirical analysis of the case studies confirms that both *preferences* and *pressures* are necessary for the implementation of TJ measures and, thus, that there are good reasons to look both at the supply and demand side of the equation. When putting the scores of all case-studies together in the table below, the only striking case in this regard is SP1, where

despite 'low preference' and 'low pressure' the executive decided to pay reparations to ex-political prisoners. However, 'low' does not mean inexistent and, as seen before, there were agenda-setting pressures coming from parliamentary allies and the ruling party had already approved restitution measures before. Moreover, this measure was quite timid in various regards and thus 'low cost', which is congruent with the initial predictions that costs will not trump benefits.

Table 6.8: Levels of preference, pressure and costs compared

	SP1	SP2	BR1	BR2	UR1	UR2	UR3
Preference	L	L-M	L-M	M	L-M	H	M
Pressure	L	M	L-M	M	H	H	H
Costs	L	L-M	L-M	M	L-M	M-H	M-H

L=Low; M=Medium; H=High
Reparations Acknowledgment Criminal Accountability

In fact, what is perhaps the most interesting result coming out of the comparative analysis is that, in line with initial predictions, costs are not generally superior to the average of preference + pressure (which could be taken as benefits). In other words, the costlier a policy is, the stronger *preferences* and p*ressures* have to be. What this means is that the choice of policy instrument – which differ greatly in their 'costs' – is adjusted to the level of *preferences* and *pressures* and to cost-benefit analysis.

In contexts where TJ was an issue that did not generate a great deal of pressure – being a demand only of a small group of directly interest people – and where policy-makers did not seem to have strong preferences in this regard, decision-makers opted for a low-cost measure – victim-centered ones – so as to respond to this specific demand while keeping conflict low or inexistent (SP1, BR1). Not coincidently, these two victim-centered policies actually differed considerably in their quality – with Brazil (BR1) having a more robust and comprehensive reparations program than Spain (SP1) –, which is probably an outcome of the fact that *pressures* and *preferences* were more evident in Brazil than in Spain.

On the other hand, acknowledgment measures (UR1, SP2, BR2) were enacted at a moment in which TJ measures were not (or no longer were) a concern of a small and isolated group only. In SP2, the 'mnemonic regime' was clearly undergoing changes previous to the takeover of the PSOE in 2004 and the 'historical memory' issue was gaining an unprecedented salience at the social and political level, which explains why the PSOE's parliamentary allies were keen on putting it in the agenda. In Brazil (BR2), the families were no longer entirely isolated and epistemic circles *within* and *outside* the state were pushing forward the TJ agenda, in a scenario where the ruling party had already shown its interest in the 'truth and memory' agenda and where the anticipation of the IACHR condemnation created further pressure.

However, neither Brazil nor Spain have ever experienced the levels of activism in the TJ issue that Uruguay has experienced (judging by the 'Marches of Silence') and, not coincidently, none of the two countries has a party with a historical commitment to the issue in the same way as the *Frente Amplio* in Uruguay. It is no coincide that the most conflictual type of TJ measure has only been enacted in this context (UR2 and UR3), where the issue of criminal accountability had been politicized for a long time and where the pro-accountability movement continued to exert continuous pressure in this direction. Uruguay's distinctive 'mnemonic regime' actually means that the potential high costs of criminal accountability measures cannot be conceived in the same way that they would in Brazil and Spain, given that there would also be costs for the *Frente Amplio* if it did not keep faithful to its word and to its grassroots and did nothing about the Expiry Law.

What is also peculiar to the Uruguayan context is that, contrary to the initial prediction that TJ measures are usually enacted by the same political sectors that congregate those who were part of the opposition to the dictatorship (that is, the left), this case registers one instance (UR1) in which a President coming from the more conservative *Partido Colarado* took a TJ step. However, the President's personal trajectory was one of opposition to the dictatorship and his decision to take a TJ step is not independent from a context where there were significant sources of pressure and the issue had more public visibility that anticipated, thus creating political incentives (based on a logic of consequences). Aside from this instance, all the remaining cases fall into the proposition that TJ measures for right-wing dictatorships, when implemented, come

at the hands of left-wing parties.[91] The 'left wave' that swept Latin America in the 2000s – with the Workers' Party in Brazil and the *Frente Amplio* taking over for the first time – and the 'left turn' of the PSOE of Zapatero – whose first legislature became known for its progressive policies in various fronts – is thus one additional dimension to have in consideration when accounting for the (late) *timing* of TJ policies at *t1*.

Another interesting result coming out of comparative analysis (Table 6.8) is that, if costs are not superior to benefits (preference + pressure), they often only *match* them in score rather than clearly *outweighing* them. This can be taken as an (admittedly rough) indicator that decision-makers are frequently following a logic of appropriateness rather than a logic of consequence, given that the benefits of implementing of TJ policy are not bluntly obvious. This goes against the typical emphasis given to the strategic intentions behind the supply side of politics.

It is also important to mention at this stage that the consolidation of the transitional justice norm at the transnational level produced a direct or indirect impact in all the three countries, especially at later stages – which speaks about its importance in understanding *late* implementation. Although this work has focused more on proximate factors and their 'form' – that is, the relevant actors and actions rather than the content and substance of their discourse (which would have made the impact of the TJ norm more obvious) –, the impact of the transformation of the transnational normative environment is most evident in the cases of UR3 and BR2, given the influence of the IACHR rulings (propelled by the actions of families and their legal support groups) and the fact that its jurisprudence is at the forefront of the promotion and definition of this norm. In Spain, the impact of the transitional justice norm was for the first time visible through the Pinochet case – which questioned the ethics of persecuting former heads of state for grave crimes –, and the alleged influence it had in bringing the past to the political and public scene in Spain. If one accepts that SP2 would not have occurred in the first place if it had not been for the previous salience of the issue, then the Pinochet case is one part of the (bigger) puzzle.

In addition, in all three cases the language of human rights and transitional justice – with its emphasis on the victims and their right to varied forms of redress – provided a form of

[91] This proposition could be contested in the case of BR1, given the ideological heterogeneity within Cardoso's party, the Brazilian Social Democracy Party (PSDB). However, its origins go back to the (moderate) opposition to the dictatorship and to center-left positions.

empowerment for domestic accountability movements. It contributed to the adoption of new legal strategies and to attract the support of progressive-minded individuals, including lawyers in tune with international legal developments on the field. In Brazil this was clearly the case for a few public prosecutors from 2006/2007 onwards (who are no longer 'a few' since the IACHR ruling). In Spain, this was most evident in Garzón's (failed) attempt to launch a criminal investigation in 2008, making use of the legal reasoning most often used in Latin America. The recent *querella argentina* is a reflection of the impossibility of using domestic legal avenues, similarly to what occurred in Uruguay and Brazil when victims recurred to the IACHR. In Uruguay, legal strategies in use in Argentina and Chile were already being tried since at least the year 2000. In fact, because of its geopolitical neighborhood, Uruguay has been exposed to the core ideas underlying the transitional justice norm from early on. In Spain, instead, the founder of the ARMH recounts how there was a learning process involved in using the language of human rights for the cases at hand, which he only got acquainted with from the moment he recurred to the UN group on enforced disappearances in 2002 (Interview SP3). The importance of this language in helping victims and families resignifying their experience and its unavailability before should not be underestimated when looking at *late* social initiatives in Spain.

In sum, when speaking of the role of sources of pressure, these will often be associated to the concomitant consolidation of a transitional justice norm, not only contributing to empower pro-accountability movements – shaping their discourses and actions, and attracting new allies – but also having a broader and more direct impact if those events (like the IACHR condemnations) are the ultimate manifestation of the consolidation of this norm.

CHAPTER 7. Making sense of cross-country variation in TJ outcomes

When accounting for the factors behind the implementation of TJ measures at *t1*, we focused on the proximate factor behind the choices of decision-makers. It is noticeable, though, that political and social actors at *t1* in different countries were not starting from the same baseline and that their perception of what was possible or desirable varied from context to context and was shaped by the historical context in which they were embedded. That is why the country chapters paid special attention to the transition moment and to the 'mnemonic regime' that was put in place back then. Below we develop why and in which ways the type of mnemonic regime at *t0* is a useful analytical tool in understanding TJ outcomes at *t1*, that is, in accounting for cross-country differences in how far each one of them went on TJ scale. In a second part, we highlight the structural factors that influenced the type of mnemonic regime at *t0* and which continued to play a role in the definition of TJ trajectories later on.

7.1. Type of mnemonic regime

In the theoretical framework we argued that the moment of transition was important in shaping the type of 'mnemonic regime' – that is, the dominant pattern of how society and institutions approach their recent past –, and that this places the country in a path-dependent course that will influence the actors' perceived room for action and expectations later on. This is not to say that actors are forever locked-in in a deterministic path and that there is no room for (re)action or (r)evolution, but that these will occur relative to what was there before and will be shaped by it. Drastic breaks are, however, not expected, given that political actors tend to be conflict-averse. For the sake of simplicity, we distinguished between unified and conflictual regimes, depending on whether relevant political and social actors have a consensual or non-consensual approach towards the treatment of the past. If non-consensual or conflictual, the past is an object of visible political contention as there is a significant group of actors pushing for TJ measures. If consensual or unified, and in the context of negotiated transitions, the past is left largely unpoliticized.

As seen in detail, Uruguay had a clearly conflictual mnemonic regime at *t0,* in total contrast to Spain and to some extent Brazil, where there was a conscious or unconscious political consensus not to address the past in order not to destabilize the present. In Uruguay, the efforts of the families and human rights groups and the support of broader segments of society, including a large part of the social movement scene and the *Frente Amplio*, transformed the issue of criminal accountability for the violations perpetrated during the dictatorship into one (if not the most) controversial topic of the time, to the point of being subject to a referendum in 1989. Although the negative result of the referendum would take its toll on the pro-accountability movement, the issue became a defining political battle of those years and, for a large segment of society, the Expiry Law would forever become shamefully associated to impunity for grave human rights violations.

This is in complete contrast to the Spanish case, the archetype of what a consensual mnemonic regime looks like. Not only were there no political and social voices making demands for forms of public reckoning with the past, but there is actually the aggravating circumstance that there was a tacit elite agreement to avoid the politicization of past divisions and turn the page on a conflictual past. Brazil's mnemonic regime comes closer to the Spanish one – in the sense that TJ measures were not a salient issue, either at the political or at the social level –, but with some important differences. The first is that there were more dissenting voices in Brazil, coming in particular from families of those who had died or disappeared. They were a small but noticeable part of the Amnesty movement, opening a few legal cases and gaining some political interlocutors during the amnesty debates. Unlike the Uruguayan families, however, they ended up significantly more isolated at the social and political level, especially after the dissolution of the Amnesty movement. This difference is important because, as soon as political opportunities arose at *t1* – with the opening of a mass grave in S. Paulo in the early 1990s and the arrival of Cardoso to the presidency in 1995 –, the group of families already had their networks established and the issue was known to Cardoso. The second notable difference to the Spanish case is that there was no tacit elite agreement to avoid politicizing the past in overall terms (an agreement the left was keen on embracing in Spain). To the extent that there was a 'transition pact' in Brazil, it referred to criminal prosecutions only. This is why in Spain any TJ measure that goes beyond the most victim-centered ones is met with accusations of violating the transition spirit, while the same cannot be said of Brazil. In Brazil, the highly top-down transition most obviously dictated the terms of the amnesty debate, and the provision to extend

the law to state agents was a pragmatic result of that, rather than the result of a broad and consensual agreement to 'leave the past behind'.

But how exactly do these differences in mnemonic regimes at *t0* have an impact at *t1* and how can they help account for cross-country differences in TJ outcomes overall? Simply put, I deem that it is no coincidence that the only country with a conflictual mnemonic regime at *t0* is the only one where perpetrator-focused measures were enacted – thus being the one that went furthest on the TJ scale –, the same way that it is no accident that the country with the most consensual regime is the one that lags the most behind.

The impact of the transition's mnemonic regime is perhaps most evident in Spain, where political actors have shown themselves to be decisively constrained by the view that the decision to 'leave the past behind' was one of the crucial anchors that made the highly-cherished transition to democracy a successful endeavor. This was clear in the text of Law 52/2007 – popularly known as 'Historical Memory Law' – where the praise for the transition's 'spirit of reconciliation and consensus' is revealing of the extent to which its drafters felt they were walking on eggshells. This is the more so when one considers that this law was mostly victim-centered and only took timid acknowledgment steps which, nevertheless, were met with widespread accusations of breaking the transition's consensus, something that the ruling party constantly tried to refute. The Spanish case puts into evidence that the extent to which actors at *t1* are constrained by the mnemonic regime at *t0* has to do not only with the weight of past postures *per se* but with the perceived benefits of this posture to a higher good – a functioning and widely praised democracy. This is why I deem that it is no coincidence that the recent discussion of new TJ steps comes at the same time (and often from the same circles) as the legitimacy of the transition's pacts is put into question by new challenger parties.

Brazil is somewhat similar to Spain in the way the transition's agreements are used to justify the absence of TJ steps, though this is more clearly the case for criminal accountability measures only. Its amnesty law – which actually found inspiration in the Spanish one – is similarly perceived as a major stepping stone on the road to democracy, and continues to be used today to preclude prosecutorial attempts. This does not mean that political actors genuinely empathize with this view – as opposed to using it as a rhetorical device to avoid conflictual and costly businesses –, but the fact that they speak of the 'transition's pacts' tells much about the environment in which they operate. In fact, the perception of cost is not independent from the

broader mnemonic environment, that is, from the fact that political challenges to the amnesty law would go against the view that the amnesty is a pillar of Brazilian democracy. However, Brazil is different from Spain in that the left was practically not a part of the transition deals and that Brazil's transition was the one most strictly conducted from above, meaning that the Brazilian left has at least more internal space for challenge(r)s.

Finally, I argued that Uruguay's conflictual mnemonic regime at *t0* put Uruguay down a transitional justice path-dependent trajectory that is entirely distinct from the one of the other two cases. This is first of all because the theme became intimately associated to the Uruguayan left – to the point of having been the defining political battle of the transition period – and thus the *Frente Amplio* was bound to take steps on the issue when/if it had the opportunity to do so. Secondly, the fact that it was a highly conflictual issue before actually opened up the political space of opportunity for its later treatment, in the sense that TJ measures could to an extent be expected. That is, in line with the proposition that costs are not independent from the mnemonic environment, bolder TJ steps will actually not be as costly in conflictual mnemonic regimes as in consensual ones. They will come as less of a surprise to sectors that opposed them, while being a legitimate expectation of at least part of the party's constituency. This has also to be understood in an entirely different discursive environment, which is heavily shaped by the mnemonic regime at *t0* too. In Uruguay, the issue of criminal accountability for the dictatorship's crimes has always been framed as a human rights issue, and the Expiry Law has been widely perceived as an impunity instrument, very much in contrast to the other two country-cases.

7.2. Factors conditioning the type of mnemonic regime & TJ outcomes

The fact that relevant social and political actors in Uruguay found the means and motives to build a conflictual mnemonic regime and that the same did not occur in Spain and Brazil is a puzzle that begs an answer. Why did victims/ families in Uruguay found the means to mobilize and why did the left endorse their claims, whereas the same did not occur in Spain and Brazil during the transition period? While a significant amount of detail has been given on the intricacies of each transition context in the case-study chapters, the goal here is to zoom out and highlight the cross-country 'structural' differences that can facilitate or hinder the position of social and political actors in putting forward TJ claims.

As stated in Chapter 2, the existing comparative literature on TJ outcomes has pointed to various potentially relevant variables. While these variables are meant to account for cross-country differences in *outcomes,* in practice they can help account both for *mnemonic regimes* and *outcomes* because, for a TJ outcome to happen, social and political actors necessarily have to make TJ a politicized and salient issue, that is, enact a 'conflictual mnemonic regime'. In this sense, the variables outlined below should be taken not only as factors that are relevant in understanding mnemonic postures at *t0* but also as features that, in addition to the 'mnemonic regime' established at *t0,* play a role in accounting for cross-country differences in TJ outcomes. In Chapter 2, I set to use the list of factors provided by Olsen, Payne and Reiter (2010) in their large-n study, slightly adjusting them to the cases at hand. Compiling them into variables that are proximate to another, I arrive at a list of four sets of relevant variables (below) and proceed to develop how and in what ways they can help account for cross-country differences in mnemonic regimes and TJ outcomes.

- Regime duration & Democratic Past
- Characteristics of repression (including 'degree of repression' and 'timing of transition since the height of repression')
- The transition's political context
- International influence

7.2.1. Regime duration & democratic past

While Olsen, Payne and Reiter (2010) do not find a correlation between regime duration and the implementation of TJ measures, they do find one as far as the 'democratic past' is concerned. In practice, these two variables can be approached jointly in the cases at hand because the countries with the longest authoritarian regimes are the ones that have the least previous democratic experiences and vice-versa. Uruguay is the only of the three countries that has a solid democratic tradition prior to the dictatorship and it is also the country that has experienced the shortest dictatorship (around 12 years). Spain, on the other hand, has the longest authoritarian regime (around 38 years) and the shortest-lived democratic experiences. Brazil stands in the middle, with a dictatorship that lasted for about 21 years and a previous democratic experience that, although longer than Spanish one, was also characterized by instability (and

for ‘low democratic quality’). Variation in regime duration and democratic past does correlate neatly with our variables of interest, but why exactly is this so?

One important dimension is that this meant that Uruguay had a much easier time restoring its political and legal system, as well as some of the civil society organizations that were active before. Unlike Spain and Brazil, it was sufficient for Uruguay to restore the democratic apparatus that had been in place before the dictatorship – namely the 1967 Constitution – rather than going through the process of drafting a new constitution and building a new political and legal system. Political challenges were especially acute in Spain, where a number of historically highly divisive cleavages had to be address (e.g. form of governance, the model of territorial organization, state-church relations, etc.). Uruguay’s political parties were also the same as before, in great contrast to Brazil – where the whole party system was *on the making* and where the left was busy rebuilding itself almost from scratch – and unlike the Spanish right-wing spectrum, where new parties were formed by elites coming from the dictatorial regime’s ruling circles.

In fact, while in Spain political elites were consensual when trying to find solutions different from past ones, the inverse happened in Uruguay. Rial (1990: 25) notes that the search for a ‘better yesterday’, in line with the myth of the old ‘happy Uruguay’ – seen as superior to other developing countries in its political culture, life quality, and the civic and cultural capital of the population –, were at the basis of a social imaginary pushing for restoration. That is, while Uruguayans looked with deference to their democratic past, the opposite was true in Spain. The short-lived II Republic was associated with the instability that gave birth to the Spanish Civil War, which further contributed to increase the posture of moderation and risk-aversion during the Spanish transition.

The concrete implications of this is that the absence of great renovation challenges in Uruguay – in contrast to both Brazil and Spain – freed up space for other concerns, namely human rights violations during the dictatorship. In addition, the greater confidence in Uruguay’s democratic vocation and ‘civic credentials’ probably made social and political forces less risk-averse than in Spain and thus less accommodative of outgoing forces.

7.2.2. Characteristics of repression

Levels of repression tend to be considered an important variable in accounting for transitional justice choices, in great part because they can have a direct impact on the level of demand for transitional justice policies, often coming from victims. The general expectation is that 'a higher number of abuses will increase the likelihood that the state will adopt transitional justice mechanisms' (Reiter, Olsen and Payne, 2013: 144). However, findings of large-n studies are contradictory in this regard. Focusing on contexts of war, Reiter, Olsen and Payne (2013: 164) find supporting evidence that 'post-conflict cases with higher battle deaths are indeed more likely to prosecute state agents and hold truth commissions.' Binningsbø et al. (2012: 737), on the other hand, make use of a different dataset which shows that trial processes are more common in cases of low-intensity conflicts (with less than 1,000 battle-related deaths) than in full-blown civil wars. Referring to authoritarian regimes only, Olsen, Payne and Reiter (2010: 53) find little correlation between the level of repression and the use of various TJ mechanisms.

Our cases show no clear-cut correlation between the severity of violence and TJ outcomes, given the much higher number of deaths of Spain, not only during the civil war but also in its aftermath. However, I think this variable should not be easily dismissed since, on the one hand, it can help account for variation between Uruguay and Brazil and, on the other hand, there are good reasons to set the Spanish case apart from the other two. This is, first of all, because of the civil war context and the concomitant two-sided nature of violence. It can well be that the high number of deaths in a context of a civil war complicates the identification of victims and perpetrators and thus precludes the demand and employment of TJ measures. This context propels arguments of 'shared responsibilities' and 'collective madness', often used to defend the position that 'the past should be left behind'. Moreover, as shown in detail before, Spain has the aggravating circumstance of having a regime that was much lengthier than the other two and in which the peak of repression was concentrated at the start (thus the importance that Olsen, Payne, and Reiter [2010] give to the variable 'timing of transition since the height of repression'). What this means is that the victims of the worst period – associated to the republican side – grew old and got used to a regime of stigma, silence, and fear. Unlike the families of the 'disappeared' in Uruguay and Brazil – who could have a remnant of hope that the 'disappeared' would be found alive –, the same did not happen in Spain (given how long it had been since the worst repressive period and because the repressive methods of the Franco's regime did not involve disappearances later on). Moreover, because the transition period in

Spain involved high levels of separatist violence, this further complicates the issue of liability for state agents at this stage.

In contexts where violence is more restricted and perpetrators and victims can be more easily identified – as in Brazil and Uruguay –, differences in how heavy-handed top-down repression was can indeed be thought to affect the mobilization capacity of the families and the recruitment of allies. The fact that Uruguayans experienced more heavy-handed repression than Brazilians on a per capita basis (an estimated 2% of Uruguay's population was imprisoned and tortured!), meant that a greater number of people could relate to the cause of the families. In Brazil, instead, the fact that the most violent forms of repression were relatively more targeted at small and isolated political groups had an impact in their social isolation later on. This, together with the fact that the geography of Uruguay helps with establishing networks and creating a cohesive social movement scene – very much in contrast to Brazil –, should be taken into account when comparing the mobilization capacity of families in Uruguay and Brazil.

In addition to the relative intensity of repression, the comparative analysis of Brazil and Uruguay actually begs for an emphasis on a different repression-related variable: the history of state repression and its perpetuation over time, and the concomitant (lack of) expectation in terms of fair treatment from the state. It is logical to think that the social and political reaction to repression will depend on *how used* people are to state violence, that is, on how much of a *shock* it is to see state agents employ repressive tactics. Though the lack of concrete data leaves me with little empirical basis of support, it seems to be widely accepted that the use of state violence was a very unusual phenomenon in Uruguay before the dictatorship, in line with the widespread image of a 'civil and civilized' nation (Roniger and Sznajder, 1997: 58). This is very much in contrast with Brazil and its long history of top-down violence. Pinheiro (1998) speaks of 'the serious human rights violations that occurred during the democratic periods before 1964' in Brazil and the 'lengthy tradition of the authoritarian practices of elites against 'nonelites' and class interactions', which account for the long history of endemic violence in Brazil. Pereira (2005: 41) similarly notes that 'the practice of judicial repression of political opposition is to some extent a feature not just of the 1964-1985 regime, but of the Brazilian state.' In fact, when speaking of repression in Brazil, it is common to go as far as to point to Brazil's history of slaveholding on a grand scale (abolished in 1988) and how this translated into a highly hierarchical society (Pereira, 2005: 41). Furthermore, and as highlighted before, police violence continued to be heavily practiced during and after the transition (especially

against the most marginalized sectors), and impunity continues to be the norm. This clear-cut contrast between Uruguay and Brazil is surely an important background factor in understanding why families in Uruguay attracted the sympathy of larger social segments – which certainly had much higher expectations in terms of fair treatment from the state –, whereas the ones in Brazil remained largely isolated.

7.2.3. The transition's political context & impact on the Amnesty Laws

The detailed description of each country's transition context has made clear that, despite the negotiated nature of all three, there were actually visible cross-country differences in the political context, including the correlation of forces and risk-aversion postures. Out of the three, the Uruguayan transition appears as the one that was controlled less strongly by the outgoing forces. Whereas it was no different from the other two in that it was initially led from above, the defeat of the regime in the 1980 plebiscite and the results of the 1982 internal party elections put the military and the most conservative sectors in a more fragile position than outgoing forces in Brazil and Spain. The unwillingness of one of Uruguay's major mainstream parties to sit at the negotiation table (the *Partido Nacional*) speaks of a context of greater radicalization in Uruguay, possibly contributing inadvertently to put the *Frente Amplio* in a position of greater strength, given that it became an indispensable actor at the Club Naval talks. The fact that the great architect of the transition, Julio Sanguinetti, had been deprived of his political rights from 1976 to 1981 and had been a critic of the dictatorship, is also telling of the relative greater strength of the opposition in Uruguay.

Importantly, the relative greater strength of a unified left at the negotiation table in Uruguay meant that outgoing elites did not leave with an unequivocal amnesty deal. As spelled out in detail in the chapter on Uruguay, this opened a small window of opportunity for the families and support groups, who had a realist opportunity to submit charges in Uruguayan courts throughout 1985 and 1986, thus amplifying the issue. The fact that the enactment of the Expiry Law came as a reaction to this situation makes the amnesty issue unequivocally different in Uruguay. This contrasts heavily with the Brazilian case, where the amnesty law was approved six years before the first civilian took office and ten years before the first direct presidential election, under the terms imposed by the regime. The fact that Brazil had the most unfavorable correlation of forces at the time of definition of its mnemonic regime contributed to leave pro-

accountability voices largely isolated – as their demands appeared unrealistic, at a time in which Brazil still had plenty of major political challenges ahead.

In fact, looking at each country's amnesty laws and the different contexts in which they were approved tells a great deal not only about the correlation of forces and different perceptions of what was possible, but also speaks directly to the reasons behind the different mnemonic regimes at *t0* and cross-country variation in criminal accountability outcomes. Uruguay is the only country out of the three that had separate amnesty laws for political prisoners (Law 15.737) and for the military and policemen (Law 15.848, the so-called Expiry Law). This was once again a result of a more favorable balance of power, given the joint parliamentary majority of the FA and the *Blancos* when the first law was approved and their opposition to the inclusion of the military and the police in this law. This separation meant that the Expiry Law would explicitly be associated with impunity for military and police crimes. The first law, instead, could hardly be characterized as a law of impunity, given that 'blood crimes' by political prisoners were not forgiven, having instead their sentences reduced by one-third of jail time.

In Spain and Brazil, on the other hand, the above-mentioned distinction was not made, and laws which focused almost exclusively on political prisoners had one provision which either explicitly (Spain) or implicitly (Brazil) covered state agents. In both cases this provision was largely taken as a natural counterpart to an agreement/ political situation which afforded no other alternative. In Brazil, this was most obviously the result of an entirely unfavorable correlation of forces, given that the law was approved very early on in the transition process, in a parliamentary setting where the party sponsored by the regime held a majority and the military were still firmly in control. While this could in principle affect its legitimacy negatively, this was hardly the case as it was widely endorsed by the opposition and seen as result of a bottom-up demand, on top of being an important signal of the opening of the regime. In Spain, instead, the 1977 amnesty law was approved by a newly inaugurated democratic parliament that was keen on making it a symbol of the end of past divisions – in line with the transition's spirit of consensus –, though this specific law was actually linked to a delicate bargaining context whereby the violent crimes committed shortly before its enactment – most notably by the separatist group ETA – were included too. Political violence during the transition period (including separatist violence) and the concomitant military agitation in Spain make for a more unstable transition context than in the other two countries, thus contributing to the general risk-aversion posture.

These different contexts had/ have a number of important consequences. The most obvious is that both in Spain and Brazil these laws were celebrated for the concrete benefits they brought to political prisoners and for constituting a symbolic stepping stone in the path towards a democratic and integrated polity. This was especially the case in Spain, where there was a consensual political effort to make this law the quintessential symbol of reconciliation (for reasons particular to the Spanish context), coming most notably from left-wing sectors. It did not occur to almost anyone to challenge these laws until several decades later, once successful challenges elsewhere resonated with domestic actors in Brazil and Spain. Besides the legal difficulties involved in challenging these laws at this point in time, these initiatives are met with accusations of subverting the historical context in which they were approved, the intention of the legislators, and the backing of the amnesty movements that in all countries pushed for amnesty laws. If it is true that in Uruguay there was also a major obstacle – the referendum results on the Expiry Law –, the fact is that it still continued to be seen as a contentious legal instrument which had no other explicit goal than to protect former state agents. In line with its different context, legal challenges started earlier in Uruguay, and the design of the law itself allowed for the executive to decide what fell within its scope.

7.2.4. International influence

While international advocacy networks were far from developed at the incipient stages of these countries' processes of regime change, there is important variation in how the TJ norm has travelled across time and space. The greater extent to which the Uruguayan case was influenced by its Argentinian neighbor since the early stages can hardly be overstated. As Sikkink (2011) has argued, Argentina is a key case in the early instigation of an accountability norm, starting in the first half of the 1980s. As highlighted before, not only is it the case that the Uruguay shares strong geographical and cultural bounds with Argentina, but most of the Uruguayan 'disappeared' were actually abducted in Argentina, where the largest share of the Uruguayan exiled community resided. It is no surprise that families and human rights groups drew inspiration from their counterparts in Argentina and that the trials of the Junta in 1985 resonated loudly across the border, possibly encouraging families and victims to follow the same patterns of legal mobilization.

It is in fact striking to see how developments in Uruguay tend to follow the ones in Argentina in temporal terms: the Expiry Law was enacted virtually at the same time as the Full Stop Law (*Ley de punto final*) in Argentina; the military confessions in Argentina in 1995 produced an impact in Uruguay too; the so-called 'truth trials' (*juicios por la verdad*) started in Argentina in 1998, at the same time that *truth* became a more salient demand in Uruguay and led to the creation of the Peace Commission in 2000; the Argentinian amnesty laws were declared null by Congress in 2003 and the first trials started in 2006, while in Uruguay the 'loophole approach' to the Expiry Law was enacted from 2005. Moreover, it is no coincidence that the issue of criminal accountability for grave violations became straightaway framed as a human rights issue in Uruguay, following the same language used by a strong pro-accountability scene in Argentina. Although political actors in Uruguay tend to be somewhat dismissive of the influence Argentina plays – as the negotiating and democratic vocation of Uruguayans is said to contrast with the quick-temperament and confrontational nature of Argentinians –, the fact is that it is impossible to miss the parallels (Interview UR8).

This is in great contrast to Spain where, in line with the absence of political or social initiatives on the matter, there was not the widespread perception that there was a pending human rights issue when it came to the victims of the civil war and the dictatorship. It was not until the ARMH made exhumations a contentious issue that the recovery of the bodies of family members started to be publicly articulated as a human *right*, and in this the ARMH visibly borrowed from the language associated to the Latin American disappeared. Before the Pinochet case in 1998, there are no sings that other countries' experiences on accountability for past crimes had any publicly visible impact in Spain. It is telling that it is not until 2002 that the Spanish case is submitted to the United Nations Working Group on Enforced or Involuntary Disappearances, an organ that had already denounced disappearances in Uruguay and Brazil throughout the 1980s. The same is true for Amnesty International, more active in Latin America during this period, and only drawing attention to Francoist crimes after the appearance of the 'historical memory movement' in Spain. The fact that the TJ norm did not travel to Spain until the late 1990s/ early 2000s is important because, as I highlighted before, the 'TJ culture' has provided a normative framework that has helped those who suffered from state violence construct a sense of victimhood and develop and affirm a feeling of entitlement to certain rights as a result.

Different geopolitical neighborhoods can also say something about why Brazil is somewhat between the two. On the one hand, Brazil is not as culturally proximate to Argentina as Uruguay is and it took longer to adhere to international human rights standards. This is visible, for example, in the fact that it did not sign the American Convention on Human Rights until 1992 and did not recognize the jurisdiction of the Inter-American Court of Human Rights until 1998 (when Uruguay had done so in 1985). However, its (late) insertion into the Inter-American human rights system made it more exposed to the TJ norm than Spain. As highlighted before, the IACHR has played a pioneering role in the development of transitional justice-related jurisprudence, not only when it comes to judicial remedies and the lack of validity of amnesty laws, but also in terms of the 'right to truth' and comprehensive reparation policies. Besides the alleged role of the 2010 condemnation over the decision to create the National Truth Commission, this same ruling has strengthened quantitatively and qualitatively the pro-accountability movement in Brazil. Moreover, Brazil's neighborhood is different from the Spanish one in that, by 2010, Brazil was one of the very few countries in Latin America that did not have an investigation commission of this type. If it is true that developments in Latin America are far from unknown in Spain, the European geopolitical and legal orbit does not exert the same kind of influence in the matters of concern here. Even though a few complaints have been brought to the European Court of Human Rights after the backlash against Garzón in 2008, they have been ruled inadmissible (on the basis that the applicants took too long to present them).

7.3. Conclusion

Despite exhibiting an apparent similarity in the type of transition and the concomitant absence of TJ measures at this stage, a zoom into the transition period puts into evidence that the way the violations of the past regime were approached was not everywhere the same. In line with path-dependence theories, I argued that the moment of transition from dictatorship to democracy was key in defining a country's 'mnemonic regime' – that is, how the violations of the predecessor regime are approached from a political perspective – because this is an issue that will be explicitly or implicitly present at this stage and because the moment *zero* of any regime is naturally important in setting the tone. Assuming that initial conditions leave an imprint that shapes perceptions and discourses, and facilitates or complicates choices, I argued that cross-country differences in the political treatment of the past later on are not independent from the 'mnemonic regimes' in which actors are embedded.

To put it bluntly, the fact that social and political actors in Uruguay found the means and the motives to make the past a highly salient and conflictual issue during the transition period facilitated the perpetuation of conflictual patterns over time and the enactment of robust TJ measures at *t1*. The politicization of the accountability issue at *t0*, its early framing as a human rights issue, and the widespread endorsement of progressive sectors meant that social and political actors at *t1* needed only to wait for an 'opportunity structure' to reintroduce the topic on the agenda. Instead, in Spain, and to a lesser extent in Brazil, a consensual mnemonic regime and its perpetuation over the years meant that (new) interested circles were faced with the harder task of breaking with past patterns. This is especially the case if the transition's agreements were widely endorsed at the time and seen as an important feature in the creation of a democratic and integrated polity. Although this is, to an extent, true for both, it is especially the case in Spain, where there was a broader and more consensual agreement across the political spectrum and where the seriousness of past divisions contrasted more neatly with the achievements of the transition period. This, as argued, is not independent from the greater difficulties that political actors in Spain have in dealing with transitional justice measures nowadays.

Explanations based on different types of mnemonic regimes naturally beg for answers regarding the structural factors that shape the type of mnemonic regime, that is, the country-specific features that condition the posture of social and political actors in the first place (not only at *t0* but also over time). The factors that I choose to put an emphasis on were a combination of variables highlighted in the literature with the ones that inductively appeared as the most relevant when putting each country case against one another. While relative differences in the correlation of political forces at *t0* is one of those factors – which could put into question the initial assumption that we are dealing with the same type of transitions to democracy (not *exactly* the same after all) –, this is not the only factor that explains the existence of a conflictual mnemonic regime in Uruguay, besides failing to account for the subtler differences between the mnemonic regimes of Spain and Brazil (considering the Brazilian amnesty law was the one approved under the most unfavorable correlation of forces, but Spain is the country with the most consensual regime).

In Uruguay, the favorable geopolitical neighborhood, its democratic history, and the levels of repression in a society that was unused to state violence are important factors too, not to mention the institutional opportunities and the meso-level factors that we highlighted in the chapter on

Uruguay (including the connections between the left and human rights group). Spain, instead, distinguishes itself from the other two not so much because the correlation of political forces was more critical (at least not in comparison to Brazil), but because of (1) the context of a ferocious civil war at the onset of a long dictatorial regime, (2) the challenging transition context in terms of violence and construction of a radically new polity, and (3) the lack of a previously stable democratic experience. Brazil, on the other hand, stands out for its highly top-down transition and for the relative lower levels of repression, in the context of a society that has an ambiguous and historically entrenched relationship with violence and (the lack of) accountability for state agents.

While the transnational diffusion and consolidation of a transitional justice norm is undoubtedly contributing to create more cross-country convergence over time, the fact is that most of these domestic-specific factors continue to play out in one way or another and are thus essential in understanding differences as to where the three countries stand today.

CHAPTER 8. Conclusion

Unlike what the term *transitional* justice could otherwise suggest, this dissertation started by pointing to the plethora of empirical examples which show that TJ measures are far from being a *transitional* affair. Despite the passage of time – and the obvious fact that those involved grow old or die and investigation becomes more difficult –, often times we see TJ measures being implemented several decades after the abuses they refer to. I asked why is that so and what explains cross-country variation in TJ trajectories and the type of TJ policy instruments chosen later on, narrowing it down to contexts that similarly initiated their TJ path under 'constraining' conditions, that is, under a negotiated transition to democracy. While the transition's balance of power is an inevitable part of the answer for why there were no TJ measures during the transition period, it does not provide satisfactory answers for why countries diverge in TJ outcomes later on or for why these measures are enacted at a certain time.

I deemed that TJ policies under stable democracies were not different from other policy issues in that the reasons behind their implementation could be approached through a *supply* and *demand* lens, in which the supply side follows a cost-benefit logic. More specifically, **political opportunities for TJ measures would arise depending on the combination between the *preferences* of the supply side and the levels and sources of *pressure,* weighted against the costs of specific measures**. I predicted that it was important to look both at supply and demand because it was logical to think that, on the one hand, the preferences of supply will seldom be strong enough to lead to policy implementation if there is no demand that legitimates such preferences and, on the other hand, demand for TJ measures will seldom be strong enough to outweigh a negative preference at the top. Moreover, I predicted that decision-makers have in mind the costs of such measures – given that TJ policies are rarely without detractors – and that the decision to take TJ steps – and, importantly, *which kind* of steps – was dependent on the perception of costs weighted against the benefits of following a preference and attending a demand. In practice, this meant that TJ steps would take place *when* perceived benefits matched or outweighed perceived costs and that the choice of policy instrument – which vary greatly in their costs – is adjusted to how strong the benefits (pressures + preference) were. Perceptions of costs and benefits are, however, far from independent of the historical and normative context in which actors are embedded. The way societies, institutions or political groups have

approached the past before (what I called the 'mnemonic regime') is important in shaping perceptions of what is possible and desirable, that is, in opening or closing opportunities for TJ later. As the transition was the moment zero of this regime, I deemed it was particularly important in defining it.

A conflictual mnemonic regime in Uruguay – where accountability for the crimes of state agents was from early on a salient and contentious issue – meant that the Uruguayan amnesty law became, for a significant portion of Uruguayans, perceived as an instrument of impunity for serious human rights violations and thus a shameful stain in the otherwise good image of the country. The opposite is largely true for Spain and Brazil, where the 'transition pacts' – including their respective amnesty laws – were for a long time perceived as an instrument of reconciliation and pacification and thus a major stepping stones on the road towards a successful process of regime transformation. Unlike Uruguay, there were no political or social voices (or only isolated ones, in the case of Brazil) pushing for accountability for the crimes of state agents, either because this was seen as impossible or not even conceivable. This is the more so in the Spanish case, where the consensual agreement not to politicize a conflictual past was part of a broader effort at creating a clean slate where a newly integrated and reconciled polity could emerge. Still today, the moderate left in Spain shows a great deal of reverence to the way the transition was orchestrated.

This is crucial in understanding each country's trajectory and outcomes. While in Brazil and Spain, their 'consensual mnemonic regime' at *t0* poses significant constraints at *t1* – that is, elevates the *costs* of implementing robust TJ measures and shapes non-confrontational *preferences* –, the same cannot be said of the Uruguayan case. Here, the enactment (and the *timing* of enactment) of criminal accountability measures later on – that is, the circumventing of the Amnesty Law – was largely dependent on a favorable political opportunity structure, which arose when the left came to power for the first time. Its previous commitment to the issue – even if not whole-hearted and critically dependent on the *pressure* of the pro-accountability movement – puts it on a radically different position from the Spanish and the Brazilian left, for whom the *costs* of challenging the 'transition's pacts' were much greater.

It is surely no coincidence that both Brazil and Spain opted for victim-centered measures at first. In a mnemonic context that was still largely consensual and where TJ measures were a concern only of a small group of directly affected people, policy-makers opted for the least

conflictual type of measure, attending to the demands of a specific group without creating the backlash that more robust TJ measures would carry and without significantly disrupting their mnemonic regime. The timing of their implementation is either explained by (small) agenda-setting pressures (SP1) or their combination with a shift in power to a more sympathetic actor, whose personal past could more easily 'embarrass' him if he did nothing (Cardoso for BR1). Note also that they were both enacted in the early/mid 1990s, at a time in which the TJ norm was not yet consolidated and no significant social and international pressure existed in this regard (especially not in Spain, less so in Brazil). Curiously, Uruguay took longer than Spain and Brazil to develop its reparations program, but this cannot be dissociated from a conflictual mnemonic regime where truth and justice were the only obvious demands and reparations would be taken as a 'silencing measure'. Instead, reparations were only enacted as part of a broader 'TJ package' under the Uruguayan left-wing government.

It is not until the mnemonic context starts to change that acknowledgment-type of measures (even if very timid in the Spanish context) are taken in Spain and Brazil. This is clear in Spain, where the previously consensual mnemonic regime was shaken by a series of events, including: the Pinochet case, the *increasing preference* of the left-wing opposition for using the past as a political and ideological weapon against the PP, and the birth of the 'movement for the recovery of historical memory'. In Brazil, instead, the families grow less isolated and, in concomitance with the consolidation of the TJ norm in Latin America, find a few legal and political allies, including actors *within* the state. The gradual development of reparatory and (timid) acknowledgment programs becomes more robust at the end of Lula's last mandate, when the decision to put forward a law on the creation of a Truth Commission is made. This came at a time in which the government already anticipated the upcoming IACHR condemnation and this seems indeed like the best explanation for the *timing* of this decision, even if it only served to strengthen the position of those political agents that were already pushing for TJ measures before. A similar process happened in Uruguay, where the IACHR sentence reinforced the positon of pro-accountability sectors that wanted the left-wing government to go beyond the 'loophole approach' to the Expiry Law and do away with the whole law. This, together with a circumstantial (but important) fact – the looming statute of limitations – pushed the government to take a further step.

Although the empirical chapters made clear that there are factors specific to each country's domestic context, and that they cannot be properly understood outside their own historical

circumstances, there is little doubt that recent changes in the mnemonic context of all three have been in part influenced by the diffusion and consolidation of a transitional justice norm at the transnational level. The morally compelling idea that states ought to confront a violent past and provide redress to the victims is, in world-historical terms, quite recent and has undoubtedly gained ground in the last two decades. The fact that Argentina was an early instigator of this norm, and that Uruguay has been influenced by its neighbor, is part of the reason why the latter stands out in terms of the commitment of left-wing political actors, the strength of the pro-accountability movement, and the overall salience of the topic when compared to the other two country-case studies. In Spain and Brazil, instead, the late appearance of the 'historical memory movement' in the first, and the growth of the pro-accountability movement in the second, occurred at the same time that their ideas and discourses were being shaped by what progressive international institutions and advocacy networks were saying in terms of the 'right to justice, truth, reparation, and memory'. Most importantly for our purposes, some of the sources of pressure that were highlighted are the ultimate and most direct manifestation of this norm – this is the case of the Pinochet affair and the IACHR condemnations. One broader implication of this is that negotiated transitions to democracy that occurred later than the ones under study will already be under a different international normative regime and thus it is likely that the TJ framework will be more readily available, perhaps contributing to prevent the type of 'unified regimes' that Brazil and Spain had.

All in all, Jon Elster (2004: 77) is right in saying that there are hardly any 'laws' in transitional justice since 'the context-dependence of the phenomena' is an obstacle to grand generalizations. However, this does not mean that it is fruitless to engage in comparisons across contexts. This dissertation has hopefully made the point that TJ policies can be studied under the same light as other ideologically-charged policy issues, that there are common social sciences' lenses of analysis that can be applied, and that, even though TJ trajectories make indeed the most sense if studied within a specific historical context, it is still productive to put them one against the other not only to shed a new and more systematic light on individual cases but to also to put in evidence a set of general factors and trends that – even if context-bound and limited in generalizability – are capable of helping make sense of differences across time and space.

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Annex I

List of interviewees

Code	Spain	Category
SP1	Rafel Escudero	Academic
SP2	Sergio Gálvez Biesca	Academic
SP3	Emilio Silva	Civil Society
SP4	Carlos Closa Montero	Academic
SP5	Paco Ferrándiz	Civil Society
SP6	Ester Capella I Farré	Political actor (ERC)
SP7	José Álvarez Junco	Academic
SP8	Marina Ugarte	Academic
SP9	José Luis de Francisco Herrero	Political actor (PSOE)
SP10	Juan Fernando López Aguilar	Political actor (PSOE)
SP11	José Andrés Torres Mora	Political actor (PSOE)
SP12	Ramón Jáuregui Atondo	Political actor (PSOE)
SP13	Iñaki Anasagasti Olaveaga	Political actor (PNV)
SP14	Agustí Cerdà Argent	Political actor (ERC)
SP15	Rosa Maria Bonas Pahisa	Political actor (ERC)
SP16	Dolores Cabra	Civil Society
Code	**Uruguay**	**Category**
UR1	Carlos Demasi	Academic
UR2	Ana Laura de Giorgi	Academic
UR3	Raúl Olivera	Civil Society (PIT-CNT) / Lawyer
UR4	SERPAJ representative 1	Civil Society
UR5	SERPAJ representative 2	Civil Society
UR6	Margarita Percovich	Political actor (FA)
UR7	Álvaro de Giorgi	Academic
UR8	Rafael Michelini	Political actor (FA)
UR9	Victor Vaillant	Political actor (Colorado)
UR10	Gerardo Caetano	Academic
UR11	Pablo Chargoña	Lawyer / Civil society
UR12	Gonzalo Fernández	Political actor (FA)
UR13	Filipe Michelini	Political actor (FA)
UR14	Gastón Grisoni	Civil society (Crysol)
Code	**Brazil**	**Category**
BR1	Crimeia de Almeida	Civil Society
BR2	Rafael Neves	Academic
BR3	Levante Popular da Juventude	Civil Society
BR4	Maurice Politi	Political actor/ civil society
BR5	Ivan Seixas	Political actor/ civil society
BR6	José Carlos Moreira da Silva Filho	Academic / Amnesty Commission
BR7	Belisário dos Santos Jr	Human Rights Lawyer
BR8	Eugénia Gonzaga	Public Prosecutor / CDMDP
BR9	Virginius Franca	Amnesty Commission
BR10	Gilney Viana	Civil Society
BR11	Ivan Marx	Public Prosecutor
BR12	Edson Teles	Academic / Civil Society

BR13	Alípio Freire & Rita Sipahi	Civil Society
BR14	Konder Comparato	Lawyer (OAB)
BR15	Paulo Vannuchi	Political Actor
BR16	Marlon Weichart	Public Prosecutor
BR17	Renan Quinalha	Academic
BR18	Amélia de Almeida Teles	Civil Society
BR19	Anthony Pereira	Academic