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What Makes Transitional Justice Possible. An Analysis from the Spanish Case

The main purpose of this research is to identify the determinants that intervene in the transitional justice choices made in general, and those made in the Spanish case in particular. The construction of a linear regression model containing 83 countries/transitions was developed to identify the significant explanatory factors in the transitional justice choices. The analysis enabled us to place Spain at some distance from the countries considered as successful in terms of transitional justice to classify it as an exception that is not adequately explained by the general model, and to identify the main reasons and specificities for this.

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1. Introduction

Transitional justice is a fairly recent field of study which deals with the way societies and states account for past human rights abuses or violations of international humanitarian law. The concept of transitional justice has been understood in different ways: as a sort of degraded justice, as exceptional justice, and as a kind of constitutional justice with instruments that operate outside or parallel to the ordinary system of justice. There are several definitions, but the most consensual among them is the one developed by the UN in paragraph 8 of the report entitled ‘The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies’¹:

8. The notion of transitional justice discussed in the present report comprises the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and nonjudicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.

Despite this theoretical conceptualisation, there have previously been few empirical analyses enabling meaningful differences and determinants among

¹ United Nations. *Report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies* (New York: UN Doc. S/2004/616, 2004).

transitional justice processes to be identified, thereby justifying the relevance of seeking to analyse the differences and the reasons for them. To this effect, the current work can be understood as an attempt to broaden the empirical literature, which is especially necessary in the case of variables for which there is no real consensus as to their definition or measurement.

This general objective is complemented with a more specific one: to evaluate the particularities of the Spanish case. Spanish transition has traditionally been understood as a model of success and a paradigm of peaceful and stable transition, with other countries even attempting to emulate it. However, according to some authors, this interpretation is no longer valid. First, because it is a myth that the Spanish transition was peaceful and exemplary given the failure to report the numerous political killings that took place during that period; and second, because the model is increasingly being challenged both in Spain and around the world due to increasing demands for justice and the truth about past atrocities². This development has placed the problem of transitional justice on the Spanish political agenda, which helps us to understand the context surrounding the recent efforts made by the Spanish government.

To achieve these goals, the article is structured as follows: section two provides an overview of the literature on the concept of transitional justice and its determinants; section three aims to identify the factors that lead governments to adopt transitional justice mechanisms by specifying a new general model, estimated using Ordinary Least Squares (OLS); section four analyses the main

² Paloma Aguilar and A. Leigh Payne, *Revealing New Truths about Spain's Violent Past* (London: Palgrave Macmillan, 2016).

characteristics and singularities of the Spanish case, based on a qualitative and quantitative analysis; and section 5 presents the main conclusions of the paper.

2. Transitional Justice and its Main Drivers

Transitional justice emerged as a field of study in the early 1990s at the hand of some legal scholars³. Although there is still some debate about the origin of the concept, it is generally considered to have been first introduced by Teitel (2000)⁴. Some scholars, such as Jon Elster, believe that transitional justice has been present since Athenian democracy⁵.

Although the field was at first dominated by legal scholars, other disciplines were soon incorporated. One of the first debates revolved around the idea of retributive justice and the justice cascade, referring to the global trend of holding political leaders criminally accountable for past human rights violations through international and domestic prosecutions⁶. However, the works of scholars such as Mallinder, Freeman and Fried have shown that amnesties are important elements to consider when implementing post-conflict transitional justice policies⁷.

Empirical studies on transitional justice have focused on anecdotal evidence. Payne, Olsen and Reiter⁸ were the first to introduce an empirical analysis of the effects of transitional justice. Other transitional justice datasets have

³ David A. Hoogenboom, 'Theorizing Transitional Justice' (PhD diss., University of Western Ontario, 2014).

⁴ Ruti G. Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2000).

⁵ John Elster, *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge: Cambridge University Press, 2011).

⁶ Hunjoon Kim and Kathryn Sikkink, 'The Justice Cascade: The Origins and Effectiveness of Prosecutions of Human Rights Violations', *Annual Review of Law and Social Science* 9269 (2013), doi: 10.1146/annurev-lawsocsci-102612-133956 (accessed July 4, 2023).

⁷ Louise Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide* (London: Hart, 2008).

⁸ Tricia D. Olsen, A. Payne Leigh, and Andrew G. Reiter, *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy* (Washington, WA: United States Institute of Peace Press, 2010).

since been created, as summarised by Mallinder and O'Rourke (2016)⁹, including the most recent database of Personnel Transitional Justice in which purges and vetting are stored to measure transitional justice severity¹⁰. Measuring transitional justice, however, has proven to be a difficult task. Concepts such as reconciliation are politically charged and difficult to measure (Skaar, 2013)¹¹, and the consideration of time has been quite varied and controversial in the empirical literature. It is not clear, for example, whether the implementation of transitional justice mechanisms must be measured before, during or after the transition and, if it is after, then for how long, for which actors and what are the determinant factors, among other considerations. According to Hansen (2016)¹², while conceptually it has been assumed that there is a relatively well-defined period of time during a transition when transitional justice potentially appears, in reality justice processes addressing serious human rights abuses are created both before and long after a democratic transition has occurred, and in practice much of contemporary scholarship is occupied in the task of analysing these types of justice processes. To this effect, it is unclear whether there is an immediate relationship between transitions and the adoption of transitional justice. One good example can be found

⁹ Louise Mallinder and Catherine O'Rourke, 'Databases of Transitional Justice Mechanisms and Contexts: Comparing Research Purposes and Design', *International Journal of Transitional Justice*, 10, n°3 (2016): 492-515, <https://doi.org/10.1093/ijtj/ijw012> (accessed July 5 2023).

¹⁰ Genevieve Bates; Cinar Ipek, and Monika Nalepa, 'Accountability by numbers: A new global transitional justice dataset (1946-2016)', *Perspective on Politics*, 18, n° 1 (2020): 161-184, doi: 10.1017/S1537592719000756 (accessed July 5 2023).

¹¹ Elin Skaar, 'Reconciliation in a transitional justice perspective', *Transitional Justice Review*, 1, n° 1 (2013): 54-103, <https://ir.lib.uwo.ca/tjreview/vol1/iss1/10>.

¹² Thomas O Hansen, 'The Time and Space of Transitional Justice', *Transitional Justice Institute Research Paper*, 16-11 (2016): 1 – 16, <http://dx.doi.org/10.2139/ssrn.2685861>

in the model developed by Olsen, Payne and Reiter (2010)¹³, in which a specific timing is not assumed for transitional justice mechanisms.

Transitional justice mechanisms are understood as the instruments or measures used by governments and international bodies to redress the legacy of past large-scale human rights abuses in order to ensure accountability, provide truth, serve justice, reinforce the victim and achieve reconciliation¹⁴. According to the current literature, three main categories of mechanisms exist¹⁵:

- (1) Mechanisms of accountability for past crimes: trials, truth commissions¹⁶, lustration policies.
- (2) Victim-oriented restorative justice mechanisms: reparations, construction of monuments, public memory projects.
- (3) Mechanisms of security and peace: amnesties¹⁷ and pardons, constitutional amendments, institutional reforms, etc.

Regarding the success criteria or, in other words, the effectiveness of transitional justice mechanisms to achieve their goals, there are four main theoretical approaches in the field of transitional justice¹⁸. First, the maximalist

¹³ Olsen, Payne, and Reiter, *Transitional Justice in Balance*.

¹⁴ Anna Macdonald, 'Local understandings and experiences of transitional justice: a review of the evidence'. *The Justice and Security Research Programme*, 6 (2013): 1- 98.

¹⁵ Olsen, Payne, and Reiter, *Transitional Justice in Balance*.

¹⁶ Defined by Olsen, Payne and Reiter (2010, 15) as 'Newly established, temporary body, officially sanctioned by the state or an international governmental organization to investigate past human rights abuses'. Olsen, Payne, and Reiter, *Transitional Justice in Balance*.

¹⁷ Defined by Olsen, Payne and Reiter (2010, 15) as 'Official stated declaration that individuals or groups accused or convicted of committing human rights violations will not be prosecuted or will be pardoned for their crimes and released from prison'. Olsen, Payne, and Reiter, *Transitional Justice in Balance*.

¹⁸ Luc Huyse, 'Justice after transition: on the choice's successor elites make in dealing with the past', *Law & Social Inquiry* 20, no. 1 (1995), doi: 10.1111/j.1747-4469.1995.tb00682.x (accessed July 4, 2023).

approach advocates that trials advance democracy and human rights, while amnesties undermine these goals. The prosecution of the perpetrators of human rights violations is thereby considered as a duty¹⁹. Second, the minimalist approach supports that amnesties are the most effective way to advance democracy, human rights and peace, whereas trials and prosecutions of perpetrators of atrocities risk leading to instability, which can cause further atrocities²⁰. Third, the moderate approach considers that truth commissions are pragmatic tools balancing moral convictions and political responsibility, thus becoming a middle ground between maximalists and minimalists. Last, the holistic approach sustains that no single mechanism can address the magnitude of past violations, insisting that a mix of mechanisms is needed to achieve the main objectives of transitional justice, such as improving democracy and human rights.²¹

Therefore, considering the lack of a theoretical consensus, any assessment of transitional justice mechanisms and their determinants should start by identifying the approach of the analysis. In this particular case, the holistic approach is adopted given its critical importance to identify whether the process of transition in Spain was really marked by a lack of transitional justice²².

¹⁹ Olsen, Payne and Reiter, *Transitional Justice in Balance*.

²⁰ Jack Snyder and Leslie Vinjamuri, 'Trials and errors: principle and pragmatism in strategies of international justice', *International Security* 28, no. 3 (2003/2004): 5 - 44.

²¹ Olsen, Payne and Reiter, *Transitional Justice in Balance*.

²² Paloma Aguilar, *Políticas de la Memoria y Memorias de la Política. El Caso Español en Perspectiva Comparada* (Madrid: Alianza Editorial, 2008). Rafael Escudero, 'Road to impunity: the absence of transitional justice programs in Spain', *Human Rights Quarterly* 36, no. 1 (2014): 123-146, doi: 10.1353/hrq.2014.0010 (accessed July 4 2023).

Beyond the need to consider contextual factors, the specialized literature has identified some general drivers of transitional justice that can be grouped as follows:

- a) *Nature of the conflict*: both the duration and the severity of the conflict and human rights violations can influence and shape transitional justice mechanisms. According to the scholarship, demands for criminal justice tend to be higher in countries where conflicts were especially brutal, to the detriment of reparations, reconciliation and amnesties²³. This conclusion is shared by Civic and Miklaucic (2011)²⁴, which identifies brutality in ethnic cleansing in Yugoslavia as a key factor to understand why the great powers finally acknowledged the need to promote a forceful and punitive international response to war crimes and crimes against humanity.
- b) *Political commitment*: the role played by political parties and its leaders can be also crucial to explain the outcomes and success of transitional justice mechanisms. In this regard, the availability of financial resources, the approval of legal reforms or its policy implementation, *inter alia*, will depend on their commitment to reckon with the past and promote democratic and peace values. Political will is in the center of the analyses

²³ Grace Akello, 'Reintegration of Amnestied LRA Ex-Combatants and Survivors' Resistance Acts in Acholiland, Northern Uganda', *International Journal of Transitional Justice*, 13, n°2 (2019): 249 – 2671.

²⁴ Melanne A. Civic and Michael Miklaucic, *Monopoly of Force: The Nexus of DDR and SSR* (Washington, D.C: Center for Complex Operations Institute for National Strategic Studies).

developed by Firchow (2014)²⁵ and Sarkin (2015)²⁶ to explain, respectively, collective reparations programs in Colombia and the lack of prosecutions in Uganda.

- c) *Civil society*: the effectiveness and legitimacy of transitional justice processes depend, to an important extent, on the support of civil society organizations and the incorporation of diverse voices, in increasing the sense of ownership and trust in the process. Likewise, the strength of civil society can be fundamental to mobilize public opinion and pressure governments to boost the process. Some good examples of this relevance can be found in Barahona de Brito et al. (2001)²⁷ and Sriran (2010)²⁸, in linking the involvement of victims and civil society with the success of transitional justice mechanisms.
- d) *Legal frameworks*: according to a part the scholarship, the existence of clear and credible legal frameworks -constitutional reforms, specialized courts, or comprehensive legislation- can be essential to prosecute the perpetrators, repair the victims or establish truth commissions, in reinforcing the idea that trials and investigations are transparent and fair. Based on the analysis of

²⁵ Pamina Firchow, 'The implementation of the institutional programme of collective reparations in Colombia', *Journal of Human Rights Practice*, 6, n° 2 (2014): 356 – 375.

²⁶ Jeremy Sarkin, 'The Interrelationship and Interconnectness of Transitional Justice and the Rule of Law in Uganda: Pursuing Justice, Truth, Guarantees of Non-Repetition, Reconciliation and Reparations for Past Crimes and Human Rights Violations', *Hague Journal on the Rule of Law*, 7, n°1 (2015):111.

²⁷ Alexandra Barahona de Brito; Carmen González-Enríquez, and Paloma Aguilar, *The Politics of Memory: Transitional Justice in Democratizing Societies*. Oxford Studies in Democratization. (Oxford: Oxford University Press, 2001).

²⁸ Chandra Lkena Sriram, 'Beyond conflicts and pursuing accountability: beyond justice versus peace', in *Advances in Peacebuilding: Critical developments and approaches* (Basingstoke: Palgrave Macmillan, 2010), 279–293.

Brazil, India, Indonesia, Nigeria and South Africa, Brinks (2008)²⁹ advocates for the relevance of judicial institutions and its interplays with political and social factors to understand how transitional justice is shaped.

e) *International pressure*: the involvement of external actors, such as donor countries or international organizations, can enhance the pressure to promote transitional justice mechanisms and provide technical and financial assistance geared to facilitate the process. However, to ensure the legitimacy of the process, this external involvement cannot substitute, in any case, local ownership and leadership. Barahona de Brito et al. (2001)³⁰ and Sikkink (2011)³¹ highlight the role of transnational advocacy networks and global norms in the promotion of TJ mechanisms. In a similar vein concludes O'Neill (2010)³², in advocating for the need to consider the interplays between local realities and global mechanisms in understanding the cultural norms and power dynamics of transitional justice processes.

f) *Economic development*: while political and legal factors may shape transitional justice choices, economic factors can be regarded as essential for poor countries which would probably not be able to afford the elevated cost of trials or truth commissions. This is the ground put forward by Greiff and Duthie (2009)³³, which highlights the need of considering economic

²⁹ Daniel Brinks and Varun Gauri, *Courting Social Justice. Judicial enforcement of social and economic rights in the developing world* (Cambridge: Cambridge University Press, 2008).

³⁰ Barahona de Brito; González-Enríquez, and Aguilar, *The Politics of Memory*.

³¹ Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics* (New York: W.W. Norton & Co, 2011).

³² Onora O'Neill, 'A Kantian Approach to Transitional Justice', in *The Cosmopolitanism Reader*, ed. Garrett W. Brown and David Held (Cambridge: Polity, 2010), 45-61.

³³ Pablo De Greiff and Roger Duthie, *Transitional Justice and Development: Making Connections* (New York: Social Science Research Council, 2009).

and institutional limitations of developing countries (poverty, inequality, weak institutions, poor governance, and low levels of social capital) to face transitional justice processes. Socioeconomic factors are also emphasized by Laplante (2009)³⁴ which links transitional justice and sustainable peace with the addressing of structural inequalities, poverty, and socio-economic grievances.

Nevertheless, despite the academic interest of isolating all the previous drivers, most studies see transitional justice as a complex and multicausal phenomenon that cannot be explained by just one factor. This multifactorial approach is followed, for example, by Kritz (1995)³⁵ which, on the basis of the analysis of 20 transitions from World War II, explains transitional justice outcomes through the combination of political commitment, civil society, legal framework and international pressure. Political and legal factors, civil society engagement or the involvement of external factors are also chosen by Skaar, García-Godos and Collins (2016)³⁶ to explain the increasing implementation of transitional justice mechanisms in nine Latin American countries.

The difficulties to build robust and comparable datasets on transitional justice mechanisms explain the small number of empirical studies aiming to identifying the main drivers of transitional justice. One of the most relevant

³⁴ Lisa Laplante, 'Transitional Justice and Peacebuilding: Diagnosing and Addressing the Socioeconomic Roots of Violence through a Human Rights Framework', *International Journal of Transitional Justice* 2 (2009), 331.

³⁵ Neil Kritz, *Transitional Justice. How Emerging Democracies Reckon with Former Regimes* (Washington: United States Institute for Peace, 1995).

³⁶ Elin Skaar; Jemima García-Godos, and Cath Collins, *Transitional Justice in Latin America: The Uneven Road from Impunity towards Accountability* (London and New York: Routledge, 2016).

attempts to shed some light on the factors that explain government decisions, using a cross-national quantitative approach, is Olsen, Payne, and Reiter (2010)³⁷. With this purpose, they created a comprehensive database called the *Transitional Justice Database*, containing the transitional justice mechanisms used by many countries. The same authors, along with others, have recently created another database called *Transitional Justice Research Collaborative*, which expands the previous one and was likewise used for the present research.

The authors formulated individual hypotheses for each factor based on what had previously been established in the literature, meaning that each factor could lead to one or another transitional justice mechanism. The investigation found quantitative evidence to support that some transitional justice mechanisms such as trials, truth commissions, amnesties, reparations and lustration policies are used to varying degrees depending on the results of different political, economic, and international factors. According to this study, the following factors are relevant in at least one of the mechanisms of transitional justice considered: type of break, democratic history, time since height of repression, level and height of repression, level of fractionalisation, individualist nature of the regime and its duration, the economic health of the country (GDP, GDP per capita, change of GDP) and the signing of international treaties, in particular the Convention on the Prevention and Punishment of the Crime of Genocide.

3. The Determining Factors of Transitional Justice: a New Quantitative Proposal.

³⁷ Olsen, Payne and Reiter, *Transitional Justice in Balance*.

Despite their limitations, the works measuring the level of transitional justice achieved by countries provide valuable information allowing different experiences to be compared and evaluated, and the determining factors of the most successful experiences to be identified. As already explained, Olsen, Payne and Reiter (2010)³⁸ is one of the few studies focused on the determinants of transitional justice. However, their statistical analysis presents at least two problems: first, while the holistic approach recommends the combination of different mechanisms as the most effective way of dealing with the past, they analyse each transitional justice mechanism separately; and second, the use of non-dichotomous variables as dependent variables impedes the implementation of statistical methodologies that allow for deeper analysis, for example using the Ordinary Least Squares (OLS) estimation.

Consequently, in order to capture its complementary nature and consider the development of transitional justice as a whole, the current analysis proposes a new model in which a synthetic *Index of Transitional Justice* is constructed and used as the dependent variable, thus summarizing the different transitional justice mechanisms in just one variable. Furthermore, apart from understanding what the meaningful factors for Transitional Justice in general can be considered to be, the proposed OLS estimation also allows the specific effect of each of them to be measured and the countries that are explained the least effectively by the model to be identified.

³⁸ Ibid.

3.1. *Model and data*

Based on the determinants identified by the literature, the current estimation aims to use a set of political, legal, and economic variables to explain the level of transitional justice achieved by the 83 transitions in a total of 72 countries that saw authoritarian regimes apparently transformed into democracies between 1970 and 2004³⁹.

- *The dependent variable*

- Transitional Justice Index (TJ)

Given that transitional justice is a complex concept based on different mechanisms, it is clear the interest of synthesizing them in a single indicator that allows to measure the level of transitional justice of one country and its evolution over time and make comparisons between countries. As aforementioned, the dependent variable is calculated as the combination of the following mechanisms:

- a) *Domestic criminal trials*: the quantitative research considers the trials identified as domestic criminal trials against human rights violations. This means that our analysis only takes the prosecutions of state agents for action against nonstate agents, commonly known as state repression, into account⁴⁰.
- b) *Truth Commissions*: the analysis considers commissions that are officially sanctioned by a state or by an international government organization;

³⁹ The original database consisted of 84 transitions but we discarded the 1997 considered transition in Albania because it did not follow the necessary conditions to be considered as such due to the protests did not suppose a regime change. There are more transitions than countries because some countries suffered more than one authoritarian regime and its followed transition to democratic path.

⁴⁰ Ibid.

informal or independent projects, often organised by NGOs, do not meet the criteria for a truth commission⁴¹.

- c) *Reparations*: like Olsen, Payne and Reiter (2010)⁴², the analysis of reparations has been limited here to the individual reparations that were granted as an official state policy in the way of monetary payments, property or other restitutions of monetary value, to victims or the relatives of victims of past human rights violations.
- d) *Lustration policies*: this study considers the lustration policies that states enacted for denying certain individuals' employment in public positions because of their former political acts or identity linked to a direct involvement or membership of a particular group that committed large-scale human rights abuses⁴³.
- e) *Amnesties*: this variable is based on the database constructed by Francesca Lessa, Leigh A. Payne, and Gabriel Pereyra⁴⁴, which differentiates between total amnesty laws, which do not comply with international human rights standards, and partial amnesty laws, which comply with international human rights standards because they exclude perpetrators of war crimes, genocides, and crimes against humanity from among their beneficiaries.

Logically, the construction of the Transitional Justice Index is not exempt from some methodological issues that need to be addressed. In this sense, two crucial

⁴¹ Ibid.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Francesca Lessa; Leigh A Payne, and Gabriel Pereira, 'Overcoming barriers to justice in the age of human rights accountability', *Human Rights Quarterly* 37 (2015): 728-750.

aspects to be considered are the level of homogeneity of data (a necessary condition to compare transitions) and the weighting criteria used to construct the synthetic index. Regarding the first issue we make two decisions: to minimize the number of databases used in the analysis and standardize all variables, in order to remove the scale effects.⁴⁵

The statistical information used in this empirical research is mainly retrieved from Olsen, Payne & Reiter (2010)⁴⁶, the *Transitional Justice Database* and the *Transitional Justice Research Collaborative*. These databases were used to identify the mechanisms adopted in each country-transition because they are the ones that include the widest range of transitional justice mechanisms and because they are considered as ‘one-shot’ events. They are only complemented by the dataset constructed by Lessa, Payne & Pereyra (2015) concerning amnesties because this database distinguishes between total and partial amnesties. While more recent datasets exist, such as the one developed by Genevieve Bates, Ipek Cinar, and Monika Nalepa [‘Accountability by Numbers: A New Global Transitional Justice Dataset (1946– 2016)’], the personnel transitional justice approach adopted in their paper differs from the approach used in this research. Since the holistic approach does not identify a specific timing for applying transitional justice mechanisms, the mechanisms up to 2012 are considered.

Within the frame of the holistic approach, which considers that the effect of combining different mechanisms is higher than the addition of individual effects,

⁴⁵ To remove the effect of different scales, all variables are standardized as follows: $z = (x_i - x_{\min}) / (x_{\max} - x_{\min})$.

⁴⁶ Olsen, Payne and Reiter, *Transitional Justice in Balance*.

the weighting process is based on interviews with experts on Transitional Justice.⁴⁷ In doing so, we prioritize the deep knowledge on the topic to other weighting methodologies, such as the proposed in the Principal Component Analysis, in considering that it allows for better founded weighting decisions. In turn, the selection of a diverse group of experts allows to reduce potential biases and get more balanced assessments.

Consequently, the following scores were assigned to adopting each transitional justice mechanism: zero points were awarded to the transitions that suffered a subversion process ending in another authoritarian regime; one point was given for adopting a noncompliant amnesty; two points were granted to the endorsement of an amnesty; two points for a lustration policy; three points for a reparation; four points for a truth commission; and five points for a trial. All the values of the mechanisms applied to a country/transition were then added together to achieve a final score for each country/transition in the Transitional Justice Index. Last, based on the multiplicative effect acknowledged in the holistic approach, extra points were given for the following reasons: one extra point for the countries/transitions that combined two of the last three mechanisms (reparations, truth commissions and trials); and two extra points for the countries/transitions that enforced all three. The decision to award these extra points to the countries/transitions that combined two or three mechanisms including reparations, truth commissions and trials responds to the need to highlight the countries that provided their population with the most appreciated principles to

⁴⁷ The weighting process has been based on discussions with the following experts in transitional justice: Andre G. Reiter, Josep M. Tamarit, Lorena Paola Avila and Farid Benavides.

address the past: victim-oriented justice and reparation, truth and justice.⁴⁸ To conclude, the countries/transitions could achieve a maximum score of 19 points and a minimum score of zero points. According to this criterion, the maximum level of transitional justice was achieved by Guatemala after 1986, and Lithuania after 1991. However, 14 of the transitions were not followed by any transitional justice mechanism (See Figure A.1 in Appendix 1).

▪ *The independent variables*

Based on the specialized literature on the drivers of transitional justice the following independent variables are selected. All variables were standardised to be able to compare the impact of each factor on the level of transitional justice reached by each country/transition⁴⁹.

- Democratic experience (dem): This variable considers the democratic experience of each country prior to the authoritarian regime and transition under analysis. Countries with a major democratic experience (more than 5 years) were awarded one point, countries with minor experience (from one to five years) were awarded 0.5 points, and countries with no democratic experience scored zero points⁵⁰.

⁴⁸ A very similar criteria is adopted by Kleiman (2018) to evaluate the progress toward accountability of Argentina, Uruguay, Brazil, Chile, Paraguay, El Salvador, Guatemala, Peru, and Colombia. On the basis of experts interviews, they develop a ranking of preferable combinations of transitional justice mechanisms where trials get the highest score (10 points) and amnesties the lowest (1 point).

⁴⁹ The sources which are not specified are directly extracted from Olsen, Payne, and Reiter (2010).

⁵⁰ Monty G Marshall; Ted Robert Gurr, and Keith Jagers, *Polity IV Project: Political Regime Characteristics and Transitions 1800-2016* (Vienna: Center for Systemic Peace, 2017). <http://www.systemicpeace.org/inscrdata.html> (accessed July 5, 2023).

- Regime duration (dur): The longer the authoritarian regime, the greater the difficulty in developing transitional justice mechanisms because long-standing regimes are normally deeply institutionalised⁵¹. Therefore, shorter regimes were awarded one point, and the longest regime zero points⁵².
- Human Rights Background of the new leaders (HR): A country with a strong civil society or with democratic leaders who were former members of the opposition against the regime are more likely to implement trials and truth commissions and less likely to pursue amnesties⁵³. This variable estimated the background of the leaders of the democratic government until five years after the transition, with one point awarded to those with a human rights background and zero to those without.
- Repression (rep): It is assumed that a high level of atrocities committed by authoritarian regimes make new democracies more likely to adopt accountability mechanisms such as trials and truth commissions and less likely to adopt an amnesty. This variable is approximated using the average of the following variables.

a) *Peak of repression throughout the authoritarian regime*: ranges from zero to one, with the maximum mark awarded to the highest level of repression.

⁵¹ Paloma Aguilar, 'Justice, politics and memory in the Spanish transition', in *The Politics of Memory and Democratization*, ed. Alexandra Barahona De Brito (Oxford: Oxford University Press, 2001), 92 – 118.

⁵² Ibid.

⁵³ Olsen, Payne and Reiter, *Transitional Justice in Balance*.

- b) *Temporary distance from the peak of repression to the transition year*: The closer the peak to the transition year the higher the score, meaning that one point was awarded to the highest level of repression and zero to the lowest.
- c) *Level of repression the year before the transition*: The higher the degree of repression, the higher the score.
- Type of transition (ToT): It is commonly understood within the field that democracies coming after the defeat or downfall of the former dictatorial regime easily hold old regime members accountable to justice, whereas negotiated transitions, which imply that the old regime will maintain some power, can be more tented, or even ‘forced’ to grant amnesties⁵⁴. Therefore, clean breaks were awarded one point, whereas negotiated transitions scored zero.
 - Convention on the Prevention and Punishment of the Crime of Genocide (CPPCG): Ratifying the treaty was awarded one point, while not ratifying it was awarded zero points⁵⁵.
 - Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT): States that ratified this convention were awarded one point, while those that had not ratified it scored zero points⁵⁶.

⁵⁴ Olsen and Payne, *Transitional Justice Database*.

⁵⁵ United Nations Treaty Collection. *Chapter IV Human Rights. 1. Convention on the Prevention and Punishment of the Crime of Genocide*, 2020a
https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-1&chapter=4&clang=_en
 (accessed July 23, 2023).

⁵⁶ Ibid.

- Rome Statute of the International Criminal Court (Rome): States that ratified and did not ratify this statute were awarded one point and zero points, respectively^{57,58}.
- GDP per capita (GDP): calculated as the average GDP from the transition year up to 2009, except in cases of subversion where the real GDP per capita was obtained from the transition year up to the year the next authoritarian regime started⁵⁹. The highest average of GDP per capita obtained one point and the lowest zero points, while all the other countries were placed in between⁶⁰.

The specification of the model also included four dummy variables (Eur, LA, AS, AF), designed to capture regional specificities.

$$TJ_i = \beta_1 dem_i + \beta_2 dur_i + \beta_3 HR_i + \beta_4 rep_i + \beta_5 TTYPE_i + \beta_6 CPPCG_i + \beta_7 CAT_i + \beta_8 Rome_i + \beta_9 GDP_i + \beta_{10} Eur_i + \beta_{11} LA_i + \beta_{12} AS_i + \beta_{13} AF_i + e_i \quad (1)$$

The OLS estimation of equation 1 enabled us to identify the determining factors of transitional justice and the transitions that were explained least by the general model.

⁵⁷ United Nations Treaty Collection. *Rome Statute of the International Criminal Court*, 2020b, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&clang=_en (accessed July 5, 2023)

⁵⁸ The last year in which ratification of the 3 conventions abovementioned obtained 1 point was 2009 because we considered a period of at least three years for the international ratification being translated into real effect for the state taking into account that mechanisms (dependent variable) were accounted for until 2012.

⁵⁹ World Bank (n.d) *World Bank Indicators*, <https://data.worldbank.org/indicator/NY.GDP.PCAP.CD> (accessed July 5, 2023)

⁶⁰ In order to obtain meaningful results, 1 point was given to the first and the second GDP per capita average (Germany and Slovenia), in considering that both countries exceeded the minimum economic threshold and the large distance, in terms of GDP per capita, between Germany and the rest of the countries.

3.2. *Estimation methodology and results*

The OLS estimates for equation 1 are given in Table 1. The objectives of this estimation were first to identify the main determinants of transitional justice, and second to identify what countries are explained the least by the model.

Table 1	OLS estimation for equation 1	
	<i>Coefficient</i>	<i>p-value</i>
<i>Dem</i>	2.452	0.096
<i>Dur</i>	-1.409	0.570
<i>HR</i>	0.952	0.397
<i>Rep</i>	10.153	0.013
<i>GDP</i>	2.448	0.315
<i>CPPCG</i>	1.527	0.291
<i>CAT</i>	2.036	0.159
<i>TTYPE</i>	0.253	0.813
<i>Rome</i>	2.397	0.062
<i>Eur</i>	-7.484	0.018
<i>LA</i>	-5.922	0.018
<i>AS</i>	-7.793	0.009
<i>AF</i>	-8.901 ^c	0.007
R-squared	0.705	
Akaike	483.40	

Source: authors' own elaboration.

The ability of the model to explain the level of transitional justice is confirmed by the significance (with the expected sign) of several political and legal

variables. Likewise, the results enable us to identify *repression*, which includes the level of repression exerted by the authoritarian regime, the repression the year before the transition, and the distance between the peak of repression and the transition year, as the most important driver of transitional justice, thereby suggesting that transitional justice mechanisms are more likely to occur in countries where repression is higher and more recent. The results also show that the higher the previous democratic experience, the more likely the implementation of transitional justice mechanisms. Likewise, the ratification of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment* seems to be relevant to explain the level of transitional justice achieved by the sample countries. Moreover, the regional dummies are significant at a confidence level of 90%. While all of them could be interpreted as a negative constant, the higher value for the Latin-American case could indicate that the conditions to promote transitional justice mechanisms are better entrenched in the Latin-American countries of the sample.

Although it is difficult to compare the results of the previous estimation with the ones obtained in Olsen, Payne and Reiter's analysis, given that they try to explain the behaviour of different dependent variables, it is notable how the effect of the variables that approximate both repression and democratic history is significant and positive in both models⁶¹.

3.2.1. Robustness check

⁶¹ In Olsen, Payne, and Reiter (2010) both democratic experience and repression variables are significant in three out of 5 transitional justice mechanisms.

With the aim of testing the robustness of the previous results, we proceed next to evaluate how sensitive the estimated parameters are to changes in the weighting process. To this end, we construct two alternative versions of the Transitional Justice Index calculated in the previous section based on different weighting criteria:

- a) *Same contribution for all mechanisms and no synergies* (TJ_{sc}): in this case, we give the same score (one point) to each mechanism, thus refusing that some mechanisms are preferable to others. Given that synergies are not contemplated in this case, no extra points are added when coinciding different mechanisms.
- b) *Different contributions and no synergies* (TJ_{dc}): in this case, we assume that some mechanisms are preferable to others (based on the scores described in section 3.1) but now synergies are not contemplated. As a result, no extra points are added when coinciding different mechanisms.

Table 2 shows the results of estimating equation 1 but using as dependent variable the Transitional Justice Indexes calculated from the new weighting criteria.

Table 2 OLS estimation for equations 1 with alternative weighting criteria

Dep. Var Ind. Var	TJ _{sc}		TJ _{dc}	
	<i>Coefficient</i>	<i>p-value</i>	<i>Coefficient</i>	<i>p-value</i>
<i>Dem</i>	0.843	0.038	3.194	0.016
<i>Dur</i>	-0.119	0.861	-1.390	0.531
<i>HR</i>	0.244	0.430	1.190	0.238
<i>Rep</i>	3.047	0.007	11.484	0.002
<i>GDP</i>	0.843	0.210	1.568	0.472

<i>CPPCG</i>	0.421	0.290	1.767	0.173
<i>CAT</i>	0.846	0.035	2.347	0.071
<i>TTYPE</i>	-0.072	0.806	0.070	0.941
<i>Rome</i>	0.064	0.854	0.513	0.652
<i>Eur</i>	-2.159	0.013	-7.823	0.006
<i>LA</i>	-1.645	0.069	-6.746	0.023
<i>AS</i>	-2.636	0.001	-9.200	0.001
<i>AF</i>	-2.481	0.006	-9.057	0.002
R-squared	0.739		0.732	
Akaike	269.19		465.01	

Source: authors' own elaboration.

The results of the new estimates show great stability, thus confirming their robustness. Both the parameter associated with the repression variable and the democratic experience variable are once again positive and significant. Additionally, the four dummy variables that approximate regional peculiarities are also negative and significant. The only difference with respect to the first estimate stems from the international treaty which turns out to be significant. While in the first estimate the ratifying of the Rome Statute of the International Criminal Court was significant, on this occasion it seems to be the convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. In both cases, the international pressure derived from ratifying international treaties seems to have a say in shaping transitional justice.

4. Analysis of the Spanish case: performance and singularities

As mentioned previously, the widespread interpretation of the Spanish transition as successful and exemplary has been challenged in recent years. This section is aimed at analysing the Spanish case and describing its particularities to provide new insights into the debate.

Regarding the transitional justice mechanisms put into practice, a general amnesty was approved in 1977 during the transition. In terms of the political transition, the December 1976 Political Reform Act and the signing of the ‘Moncloa Pacts’ in October 1977 established a reformist path for political change, which was reinforced by the October 1977 Amnesty Law, providing not only amnesty for prisoners that had committed political crimes but impunity for all the perpetrators of the state repression that had taken place during the authoritarian regime. These amnesties were granted without any kind of truth-telling or prosecution⁶². Two years later, in 1979, a reparation law was passed, compensating the widows and other relatives of those who had died during or because of the Spanish Civil War. Neither did the period after the transition offer much in the way of progress. Despite compensation being finally determined and featured in the 1990 General State Budget, advancements in terms of transitional justice were almost non-existent until the beginning of the new millennium. During the first decade of this century, a social movement challenging the transitional process emerged as a mobilised group asking for historical memory and victim’s rights, justice and truth. Commonly known as ‘the grandchildren of the Civil War’, the

⁶² Paloma Aguilar and Leigh A Payne, *El Resurgir del Pasado en España: Fosas de Víctimas y Confesiones de Verdugos* (Madrid: Taurus, 2018).

demands made by this sector of society were partially met by the exhumations of some mass graves, judge Baltasar Garzón's decision to investigate the crimes committed by the Franco Regime throughout the post-civil war era, and the Historical Memory Law passed by the socialist government led by José Luis Rodríguez Zapatero on 26th December 2007.

Law 52/2007 marked an advancement in terms of historical memory and transitional justice by explicitly condemning the Franco Regime for the first time and discrediting the civil war tribunals imposed throughout the dictatorship⁶³. As Georgina Blakeley stated, 'the bulk of the law, 6 out of 22 articles, concerns improving existing compensation payments to victims or defining new categories of victims eligible for compensation'⁶⁴. 'The Autonomous Communities have demonstrated their commitment to historical memory at varying levels, by approving specific legislation and establishing institutions, particularly after the state level Historical Memory Law of 2007 took effect'⁶⁵.

Although the Historical Memory Law can be understood as an advancement, above all in terms of victims' reparations, it has been criticised for its limited ambition (for instance the fact that it does not use the term victim but refers to 'those that suffered the consequences of the Civil War and the dictatorship') and its lack of funds. By way of example, the budget allocation to

⁶³ Josep M Tamarit, 'Memoria histórica y justicia transicional en España: el tiempo como actor de la justicia penal', *Anuario Iberoamericano de Derecho Internacional Penal*, 2014, 2: 43 – 65, doi: 10.12804/anidip02.01.2014.02

⁶⁴ Georgina Blackeley, 'Evaluating Spain's reparation law', *Democratization* 20, no. 2 (2013): 240 – 259 doi: 10.1080/13510347.2011.650912 (accessed July 5 2023).

⁶⁵ Ebru İter Akarçay and Bilgen Sütçüoğlu, 'Multilevel Governance in post-Transitional Justice: The Autonomous Communities of Spain', *Partecipazione e conflict*, 13, n°3 (2020): 1521-1538, DOI: 10.1285/i20356609v13i3p1521 (accessed July 5 2023).

the Historical Memory Law has so far not been sufficient to guarantee public help to exhume mass graves. In fact, between 2013 and 2018, the law received no budget allocation at all by decision of the Popular Party (PP), in power from 2011 to 2018, meaning that the majority of the mass grave exhumations were funded by private money and performed by the Association for the Recovery of the Historical Memory, or supported by regional institutions.

Regarding judge Garzón's decision to open a criminal case for crimes against humanity perpetuated by public institutions in the post-civil war period, this was disputed by the Supreme Court and the procedure cancelled. In 2010, Garzón was removed from his functions by the General Council of the Judiciary, and in 2012 the Supreme Court asserted that it was legally impossible to conduct a judicial investigation about crimes that were committed during Franco's regime, guaranteeing the full applicability of the 1977 Amnesty Law⁶⁶. This decision involved prohibiting the investigation into the disappearance of more than 113,000 people as part of the calculated plan to eradicate political opponents⁶⁷.

As a result of the Spanish public institutions' unwillingness to investigate past crimes, many human rights associations presented the Argentinian Courts with cases concerning Genocide and Crimes against Humanity throughout the Civil War and the Francoist dictatorship. Since then, the Argentinian judge Maria Servini has twice applied for the extradition of 19 Spanish citizens who committed

⁶⁶ Tamarit, *Memoria histórica*.

⁶⁷ Rafael Escudero, 'Road to Impunity: The Absence of Transitional Justice Programs in Spain', *Human Rights Quarterly*, 36, n° 1 (2014): 123-146.

crimes recognised under international law, and has both times been refused by the Spanish authorities⁶⁸.

Neither a trial nor a truth commission have been ordered by the Spanish authorities, meaning that only one out of three of the most important mechanisms identified by the literature (reparations) has been implemented in the country. The United Nations has frequently urged Spain to revoke the Amnesty Law and investigate Franco-era disappearances and crimes, notably in 2012 and 2014, but the Spanish authorities always turn a blind eye to these requests, thus bequeathing a deficit in terms of truth, justice and memory.

Having said this, since its constitution, the socialist government led by Pedro Sánchez has shown a different attitude towards the dictatorship, its significance and historical memory, allowing Franco's exhumation from *El Valle de los Caídos* on 15 February 2019 and displaying a willingness to reshape the significance of this historical monument to the Francoist regime. More recently, the Government of Spain has approved the 20/22 Democratic Memory Law, a significant step forward in terms of transitional justice in Spain. The law highlights that oblivion and silence, the bulwarks of the Spanish transition, cannot be a solid foundation for constructing an advanced democracy and, for the first time, considers that the international principles of truth, justice and reparation must be the main solid base to guarantee the non-repetition of totalitarianism.

To this end, the 20/22 Democratic Memory Law is a clear step forwards in improving transitional justice in Spain. In terms of truth, although the law does not

⁶⁸ Asociación para la Recuperación de la Memoria Histórica (n.d) *Querella Argentina*, <http://memoriahistorica.org.es/querella-argentina/> (accessed July 5, 2023)

contemplate truth commissions it does represent advances in many fields, including the exhumation of mass graves, the creation of a Documentary Collection for Historic Memory and the release of secret documents about the coup, the Civil War and the Francoist dictatorship period. Regarding justice, a prosecutor chamber is planned to be created to investigate the facts that constitute violations of Human Rights and International Humanitarian Law. The objective is to guarantee the public investigation of the Human Rights violations that took place during the war and the dictatorship. In terms of reparations, some measures have been incorporated into those already implemented since the transition, such as different actions to recover possessions as spoils of the Civil War and the dictatorship, and allowing those whose parents or grandparents forced into exile for political and ideological reasons access to Spanish nationality. Furthermore, the law complements some actions already put in practice by the present government such as the reversal of Francoist trials and of the punishment of apology to the Franco Regime, and the revocation of a large number of honours and distinctions obtained during the Civil War and the dictatorship.

From a quantitative approach, Spain's comparable performance in transitional justice can be assessed using the Transitional Justice Index described in the previous section, according to which the country scores 4 out of 19 points, due mainly to the non-compliant amnesty and the reparations, placing it in 37th position and with a performance score below the average score of 4.84 points. While the abovementioned 20/22 Law could alter Spain's future score (mainly because of advancement in justice, since the new law does not provide for Truth

Commissions), it is too soon to assess if it will improve its position in the Transitional Justice Index. Due to the lack of comparable data for the rest of the sample and the pending implementation of the new law, it is recommended that the Spanish performance is assessed based on the index estimated in the previous section.

To this effect, the level of transitional justice so far achieved in Spain is far from exemplary, inviting analysis of the factors that could explain both this relatively poor performance and its late temporal development. From a quantitative point of view, the first question to be asked is whether the Spanish case follows the general pattern or if it is the result of particular circumstances and specific behaviours. To this end, we will now compare Spain's current result with the one predicted in both Olsen, Payne and Reiter's model and in the model proposed in this paper.

Olsen, Payne & Reiter (2010)⁶⁹ concludes that negotiated transitions lead to the adoption of less transitional justice mechanisms than a transition coming after the collapse of the previous authoritarian regime. This is the only conclusion of their analysis that can be applied to the Spanish case, with the country contradicting the majority of their other findings: first, countries with democratic experience are more likely to adopt accountability mechanisms such as trials and truth commissions; second, the longer a regime is in power, the less likely it is to receive amnesty for its abuses; and third, dictatorships with an individual authoritarian leader are less likely to promote lustration policies than well-

⁶⁹ Olsen, Payne and Reiter, *Transitional Justice in Balance*.

institutionalised ones. All these assumptions are contradicted in the Spanish case, which does not comply with Olsen, Payne and Reiter's main conclusions. With regards to the economic determinants, Spain also contravenes Olsen, Payne and Reiter⁷⁰, which concludes that 'richer countries are more likely to move up the cost scale of transitional justice mechanisms (i.e., trials), while poorer countries are more likely to adopt inexpensive mechanisms (i.e., amnesties or doing nothing at all)'⁷¹. Last, in terms of international factors, Olsen, Payne & Reiter (2010)⁷² holds that despite membership of intergovernmental organizations not playing a significant role, the countries that have signed the Convention on the Prevention and Punishment of the Crime of Genocide (CPPCG) were seen to be more likely to use trials than those that did not. However, this was not the case in Spain, meaning that the results of the research performed by Olsen, Payne & Reiter (2010)⁷³ do not adequately explain the Spanish case.

Regarding the quantitative proposal put forward in this paper, the OLS estimation of equation 1 allows us to quantify the estimation errors⁷⁴ and the capacity of the specified model to predict the level of transitional justice of each country. As Table 3 shows, the estimation error in the Spanish case is one of the highest in the sample, ranking 4th out of all the countries and with a worse performance than the estimated one.

⁷⁰ Ibid.

⁷¹ Ibid, 74-75.

⁷² Ibid.

⁷³ Ibid.

⁷⁴ Calculated as the difference between the level of transitional justice really achieved and the estimated one.

Table 3 List of countries not adequately explained by equation 1

<i>Countries with a better performance than the predicted one</i>	<i>Estimated error</i>	<i>Countries with a worse performance than the predicted one</i>	<i>Estimated error</i>
Guatemala (1986)	10.855	Spain (1978)	-7.967
Lithuania (1991)	10.626	Ecuador (1979)	-7.508
Perú (1993)	8.496	Peru (1980)	-7.312
Indonesia (1999)	7.503	Slovenia (1991)	-6.036
Algeria (2004)	7.485		
South Korea (1988)	7.308		
Chile (1989)	6.417		
Albania (1992)	5.843		

Source: authors' own elaboration

Indeed, focusing the analysis on the second group (countries with a worse performance than the predicted one), the Spanish transition shows the highest distance between the level of transitional justice actually achieved and the expected one. The results therefore suggest that the level of transitional justice achieved in Spain should be much higher than the level actually achieved, thereby supporting the hypothesis that the Spanish case could be an exception to the general pattern and highlighting the need to analyse it in greater depth and identify its particularities.

The first singularity of the Spanish case is the combination of two elements, the Spanish Civil War itself and the subsequent, long authoritarian regime. These two episodes are crucial to explain the five main reasons of the lack of transitional justice in Spain: the weakness of the democratic political opponents and civil

society during the transition; the leading role of the ‘Francoist’ or the regime’s ‘moderate’ forces; the risk aversion of Spanish society; the lack of social and political consensus; and the deadline to prosecute most crimes committed during the Franco’s regime.

The weakness of the opposition and civil society derived from the virtual elimination throughout the brutal civil conflict and the effective repression carried out during the Franco regime. As a result, the ‘Francoist’ forces were the most powerful party within the balance of power structure throughout the transition, supported by their close relationships with the armed forces, who retained significant power within the ensuing political scenario, despite their being understood to be fragmented⁷⁵. These characteristics could be placed within Jack Snyder and Leslie Vinjamuri’s definition of domestic constraints that determine transitional justice decisions. According to these authors, retroactive punishment can be handed out when the human rights violators are weak, whereas when they have the capacity to shake the pillars of the rule of law the impact of justice is more sensitive; and this could be the case of Spain⁷⁶.

The result of this combination together with other factors, such as the main stakeholders’ attitude of risk aversion and a fearful population’s desire for peace, and order, made it a transition characterised by the decision to forget the past, through the ‘Pact of Silence’ or ‘Pact of Oblivion’⁷⁷, and prioritize democracy. Therefore, the Spanish social and political context favoured a forward-looking

⁷⁵ Paloma Aguilar, ‘Justice, politics and memory in the Spanish transition’, in *The Politics of Memory and Democratization*, ed. Alexandra Barahona De Brito (Oxford: Oxford University Press, 2001), 92 – 118.

⁷⁶ Jack Snyder and Leslie Vinjamuri, ‘Trials and Errors: Principle and Pragmatism in Strategies of International Justice’, *International Security*, 28, n°3 (2003): 5-44.

⁷⁷ Aguilar and Payne, *Revealing New Truths*.

approach focused on promoting political stability and democratic institutions. This opinion is shared by Encarnación (2017)⁷⁸, in considering Spanish amnesty as a necessary mechanism for the making of Spanish democracy.

To this effect, the risk aversion theory helps to explain how fear of conflict determined the attitude of the main stakeholders involved in the Spanish process. In other words, the giant shadow of the ghost of fascism was too huge to claim more justice, and the fear of regressive action overshadowed the main stages of the transition process. Subsequently, most citizens only demanded the release of political prisoners, with polls showing that peace, order and stability were the top priorities for Spanish citizens in the period 1975-77 (Aguilar, 2001: 94). In general, the Spanish transition to democracy was marked by the concept of ‘oblivion’ and ‘reconciliation’. While the first concept clearly defines the political scenario in which the transition took place, identifying the conscious use of the second and how it was prioritised above the notion of justice is also extremely important to understand⁷⁹.

Another important element to consider in the transition to democracy in Spain was the division of Spanish society and the lack of social and political consensus. At the beginning of the transition there were two competing claims: those in the regime saw the transition and its outcome as the point of arrival for the country, whereas for the forces promoting democratisation the transition and all its institutions were the point of departure to build a stronger democracy. The result

⁷⁸ Encarnación Omar, ‘Peculiar but not unique: Spain’s politics of forgetting’, *Aportes*, 94 (2017): 149-179.

⁷⁹ Josep M Tamarit, *Historical Memory and Criminal Justice in Spain. A case of Late Transitional Justice* (Cowley Road: Intersentia, 2013).

of this tension was that radical reforms, accountability and even institutional reforms were impossible to implement, leaving transitional justice stagnant or limited to a few mechanisms such as those developed in the Law of Historical Memory⁸⁰. In fact, the lack of political consensus keeps being one of the main obstacles to promote Transitional Justice mechanisms in Spain⁸¹. Notably, the conservative party in Spain at the time of the transition was made up of and funded by some figures that were present in the dictatorship, which has hugely hindered the development of transitional justice mechanisms. This penetration by the old forces into the new democratic political parties responsible for developing transitional justice policies could also be considered a Spanish singularity. In this regard, although the 20/22 Democratic Memory Law may represent huge advances in terms of transitional justice, the lack of political and social support it has received from the country's conservative sectors is a major risk for its stability and future application. Indeed, the current leader of the main Conservative Party has already claimed that the first thing he will do if his party wins the next elections is derogate the law⁸². The relevance of the lack of political consensus is illustrated

⁸⁰ Javier Perez, 'El parche autonómico y la solución federal. El Estado de las Autonomías no es una forma de Estado: no está definida en sede constituyente'. *Ara*, November 8, 2017, https://www.ara.cat/es/opinion/javier-perez-royo-parche-autonomico-solucion-federal_0_1902409825.html. Javier Pérez and Antón Losada, *Constitución: la Reforma Inevitable: Monarquía, Plurinacionalidad y Otros Escollos* (Madrid: Roca, 2018).

⁸¹ One good example of the unwillingness of the conservative party to deal with the past was the elimination of the office for victims of the Civil War and the dictatorship in 2012.

⁸² Jorge Amerstar, 'Feijóo reitera que derogará la Ley de Memoria Democrática porque atenta contra el espíritu de la Transición', *Europapress*, October 5, 2022, <https://www.europapress.es/nacional/noticia-feijoo-reitera-derogara-ley-memoria-democratica-porque-atenta-contra-espiritu-transicion-20221005224719.html> (accessed July 7 2023).

by the correlation between Spanish political cycles and the implementation of Transitional Justice mechanisms.⁸³

However, according to some authors, the institutional reluctance to investigate the Spanish dictatorship goes beyond a part of the political spectrum. In this sense, Alija and Martín-Ortega (2017)⁸⁴ argues that ‘Franco’s victims faced a judicial system which was largely a continuation of Franco’s regime’. Without considering the lack of agency of victims during the dictatorship, Spanish courts systematically dismissed their claims. On the contrary, the same type of crimes have received a very different treatment by the Argentinian courts, which showed from the beginning their willingness to investigate the crimes committed during the Spanish dictatorship⁸⁵.

The variables identified in this section as domestic constraints open a potential new line of investigation to improve the explanatory capacity of the general model by incorporating some of the items such as a previous civil war, the balance of power during the transition, the role of the armed forces and the penetration of old forces into the new democratic parties.

The last factor to be considered is time. Due to the statute of limitations, the deadline to prosecute the main perpetrators of the Franco’s regime has expired. This is the argument advocated by Tamarit (2013)⁸⁶, in highlighting that the

⁸³ As reported by Akarçay and Sütçüoğlu (2020), ‘regionalist and left-wing parties have been leading memory-related policy development’.

⁸⁴ Rosa Alija, Ana Fernández, and Olga Martín-Ortega, ‘Silence and the right to justice: confronting impunity in Spain’ *The International Journal of Human Rights*, 21, nº 5 (2017), DOI: 10.1080/13642987.2017.1307827 (accessed July 5 2023).

⁸⁵ Ignacio Perotti Pinciroli, ‘Derecho de las relaciones exteriores, derecho internacional comparado y el papel de los tribunales nacionales en la justicia transicional: los casos de Argentina y España’, *Anuario Colombiano de Derecho Internacional* 16 (2022): 1-62. <https://doi.org/10.12804/revistas.urosario.edu.co/acdi/a.12633>

⁸⁶ Tamarit, *Historical Memory*.

gravest violations occurred during the war and at the beginning of the dictatorship, and the fact that the dictator and other perpetrators who could be considered the most responsible had already died.

5. Conclusions

Departing from a holistic concept of transitional justice that aims to understand global governmental responses to the demands of justice and truth, the current research contributes to the literature in several ways. First, its construction of a synthetic index enables transitions to be compared depending on the level of transitional justice actually achieved. While a total of 23 transitions in the sample were not accompanied by any transitional justice mechanisms at all, at the other extreme Argentina (1983) and Guatemala (1986) stand out as the two processes with the best results. And second, the estimation of a non-dichotomous variable enables us to analyse the determining factors of transitional justice using the OLS methodology, and to identify transitions that are not adequately explained by the general model.

The results of the OLS estimation suggest that *repression* –both the level of repression and its closeness- is the most relevant factor to explain the level of transitional justice achieved by the countries analysed. This result seems to confirm the relevance that most qualitative and case studies analyses confer to the nature of the conflict. The results also highlight the fact that transitional justice mechanisms are more easily developed by countries with democratic experience. In this sense, it is worth noting that the democratic background of countries can

likewise influence other drivers identified by the literature, such as the level of organization of the civil society, the political commitment of leaders or the legal framework. The ratifying of international treaties, namely the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* and the *Rome Statute of the International Criminal Court*, are also significant and with the expected sign, thereby highlighting the relevant effect that international pressure can have in countries that have taken on international commitments in this field. The estimation results are robust and not very sensitive to changes in the weighting criteria followed to construct the Transitional Justice Index.

The results of the estimation also allow us to identify some *special cases like Spain's*. Deeper analyses of the singularities of these cases will help improve the general model and the understanding of the main drivers of transitional justice. In the case at hand, several reasons appear to explain the lower level and the late implementation of transitional justice mechanisms in this country. First, the negotiated nature of the transition and the powerful role played by the Francoist forces during the transition process. This fact was due to the weakness of the democratic opposition due to the massive repression carried out throughout the dictatorship, and the deeply rooted fascist institutions. Second, the important negotiating stakeholders risk aversion attitude, present for different reasons, but above all because of memories of the brutal Spanish Civil War and the subsequent lengthy regime. Third, because the predominant civil society demands at that time were for peace, order, and stability rather than for justice. Demands for justice were not paramount, and only the release of political prisoners was insistently

claimed due to fear of regression, considering the powerful position retained by the armed forces and the giant shadow cast by the long fascist regime and the devastating civil war.

While civil society's calls for truth and justice in Spain are nowadays louder and fear of regression has waned, advancement in this area is so far insufficient, with the focus on memory and reparation, and supported by individuals, associations and some autonomous communities but lacking in the required support of the central government. The 20/22 Democratic Memory Law is a notable advance in terms of transitional justice in Spain, but ensuring that the law does not become worth little more than the paper it is written on will depend on its future effective implementation and its permanence should the conservative party regain power. In this regard, the lack of political and social consensus would represent the fourth obstacle to further developments of transitional justice mechanisms in Spain, given that the Popular Party has consistently considered any attempt to improve the level of transitional justice since 1978 as a betrayal of the spirit of the Spanish transition and the unnecessary reopening of old wounds that would serve to divide Spanish society. Forty years after its occurrence, the political unwillingness to correct the deficits of the transition can therefore be identified as the main domestic constraint that limits the scope and stability of the advancement of transitional justice in Spain. Finally, the statute of limitations also contributed to impede the prosecution of the main perpetrators of the Franco's regime.

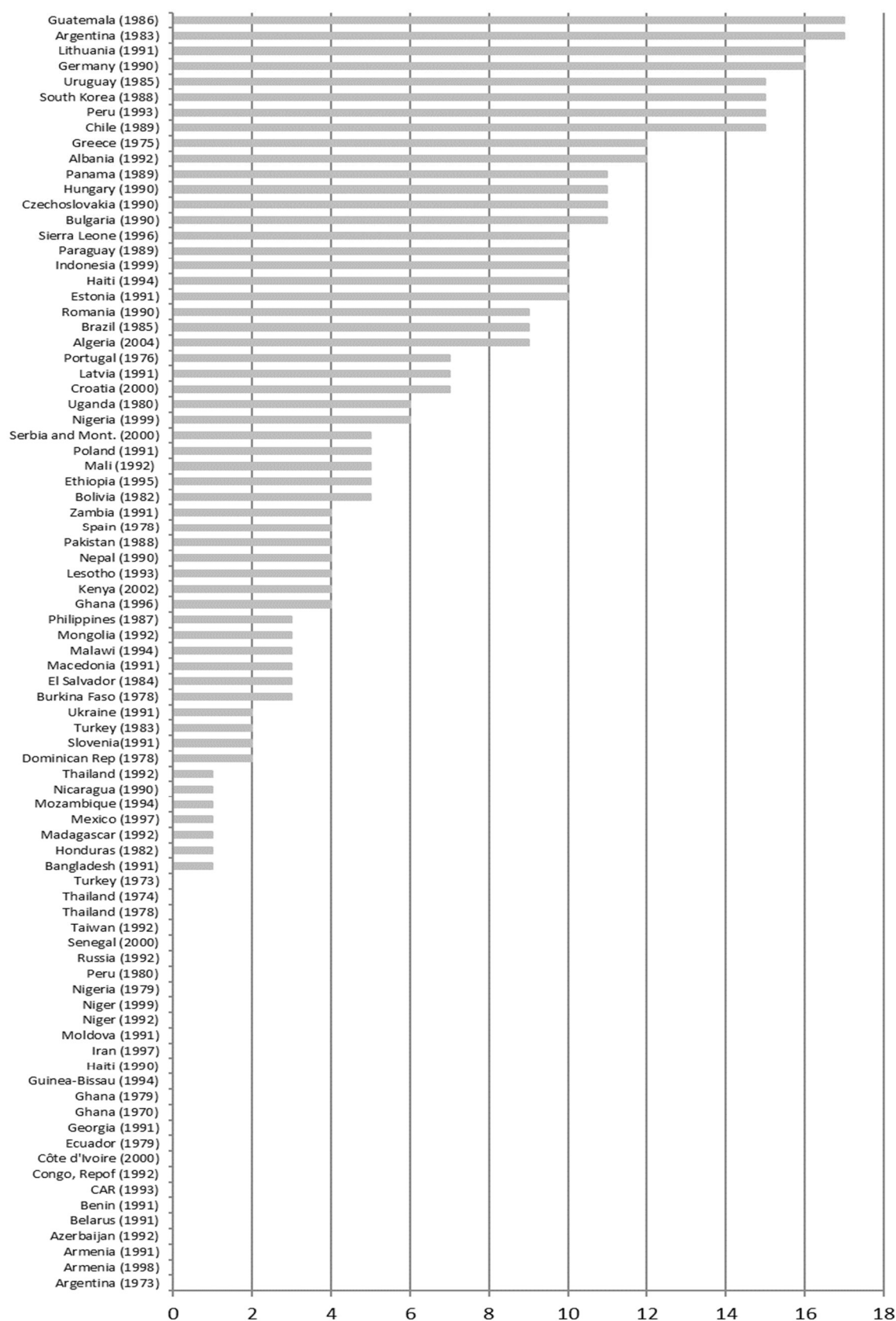
Despite the need of further research on the general drivers of transitional justice, the current analysis evinces that transitional justice outcomes can be tailored to local needs, making completely necessary to consider in the analysis context-specific factors, describing social, political, and historical particularities.

APPENDIX A

Transitional Justice Index

Figure A.1

Value of the Transitional Justice Index



Source: own elaboration