

Time and Politics: Transitional Justice in Hungary and Spain

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Submitted to
Central European University
Department of International Relations and European Studies

In partial fulfilment of the requirements for the degree of Master of Arts

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Word Count: 17, 250

Budapest, Hungary
2011

Abstract

Over the past twenty years, ‘transitional justice’ (TJ) has increasingly gained recognition as a coherent ‘field’ of scholarship. Derived from practice, the field seeks to explore what it means to obtain justice in the aftermath of conflict or authoritarianism during which grave human rights violations occurred. Debates concerning methods of accountability and the adequacy of truth as a form of justice have dominated. This growth of TJ as a field has helped define what is expected from a democratic state, especially with regards to truth and transparency. In turn, the traction of these transitional justice norms has succeeded in forcing states to revisit attempts to hide or obscure past abuse. Developments concerning the ‘right to truth’ and the imperative of ending impunity mean that a policy of ‘forgetting’ is simply no longer tenable in this legalized international domain.

This thesis challenges the claim that the passage of time necessarily serves to ameliorate popular desire to (re)examine the past. Rather, as confidence in the stability of democracy increases, the voicing of critical opinions about the past becomes easier – no longer silenced by the legacy of fear which persists in the immediate post-transition phase. Thus, the passage of time makes calls for TJ processes more likely. However, the thesis also posits that transitional justice delayed stands a much higher chance of being politicized to the detriment of justice demands. It seeks to illustrate these arguments through ‘thick’ description of specific approaches to ‘dealing with the past’ in Spain and in Hungary.

Acknowledgements

First, I would like to thank God for all the blessings I have been given including the opportunity to attend CEU. Secondly, I would like thank all of my family and my friends for their constant support. I am in deep gratitude for my mother's support and prayers, my sister's encouragements and for all the smiles my niece, Natalie, has brought to my face through this last year. And to Moritz for being supportive during such a stressful time.

In specific, I would like to thank Ms. Laura Ingalls for being closer than a sister, helping me when I needed it the most and always believing in me. And Ms. Zsuzsa Kover for being my Hungarian translator, travel guide, shoulder to cry on and most importantly my friend.

I am also immensely indebted to Professor Michael Hamilton for guiding me through this arduous process, being a constant support from the beginning and encouraging me to read more, write better and think deeply. Coffee is on me, any time.

I would like to thank Robi Bellers and the Academic Writing Center for all their hard work and the IRES faculty and staff for providing an environment where to learn and grow.

Finally I would like to thank all of my CEU friends for the long nights spent encouraging each other to work on the thesis, for the laughs shared while discussing our different cultures and for all the adventures that have made my time in Budapest memorable.

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Abbreviations

ARMH	Association for the Recovery of Historical Memory (Asociación para la Recuperación de la Memoria Histórica) (Spain)
CEE	Central and Eastern Europe
ECHR	European Court of Human Rights
EU	European Union
FiDeSz	Alliance of Young Democrats (<i>Fiatal Demokraták Szövetsége</i>) (Hungary)
IACHR	Inter American Commission for Human Rights
IAHRC	Inter American Court for Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICTR	International Criminal Tribunal for Rwanda
ICTFY	International Criminal Tribunal for the Former Yugoslavia
IOs	International Organizations
MDF	Hungarian Democratic Forum (Magyar Demokrata Fórum)
MSzMP	Hungarian Socialist Party (Magyar Szocialista Munkás Párt)
MSzP	Hungarian Socialist Party (Magyar Szocialista Párt)
NATO	North American Treaty Organization
PP	Popular Party (Spain)
PSOE	Spanish Socialist Worker's Party (Partido Socialista Obrero Español)
SzDSz	Alliance of Free Democrats (Szabad Demokraták Szövetsége) (Hungary)
UN	United Nations
UNCHR	United Nations Commission on Human Rights
UNHRC	United Nations Human Rights Committee
USSR	Union of Soviet Socialist Republics

Introduction

In modern times, societies transitioning out of violent regimes are expected to confront their past.¹ Transitional justice (TJ) as a field describes the processes that are used by transitioning nations—specifically nations attempting to adopt democratic systems—to address their violent pasts.² Since the 1980s, the fields of TJ and human rights, as well as the jurisdiction of international courts, have experienced significant growth. Hundreds of cases have been brought to international tribunals and the norm has become not to forget, but to come to terms with crimes and the past.³ International courts now enjoy permanent status, lending the study of transitions increased credibility. However, while transitions by definition have an end, there is no consensus in the field on how to measure the success of a transition, nor any established best practices for assisting countries to deal with the past.

Hungary and Spain, both, had to face more than 40 years of history marred by violence, much of which took place as their respective authoritarian regimes first took power.⁴ For both countries addressing the past meant addressing the present due to the fact that much of the leadership involved in the transition had ties to the authoritarian regime.⁵ In both, members of the former regime were directly involved in the

¹ “What is Transitional Justice,” International Center for Transitional Justice, <http://www.ictj.org/en/tj/>. Last accessed June 2nd, 2011.

² “Transitional justice is made up of the processes of trials, purges, and reparations that take place after the transition from one political regime to another.” Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective*, (Cambridge: Cambridge Press, 2004), 1

³ Examples are the ICTY and ICTR, the ICC proceedings of DRC rebel leaders, the Cambodian hybrid trials. see www.ictj.com

⁴ The official transition did not begin until 1989 in Hungary but most political crimes (including, arguably, crimes against humanity) occurred between 1956-8. The Spanish transition began in mid 70s, most deaths occurred 1936-1952.

Kenneth Maxwell and Steven Spiegel, *The New Spain: From isolation to influence*, (New York: Council on Foreign Relations, 1994), 4-24 and N.J. Kritz, “Hungary.” *Transitional Justice: How Emerging*

negotiations to determine their country's transitional path. Although constitutions changed and legislation passed to address certain aspects of the past, there were no criminal proceedings in either transition. Spain chose to 'forget' and address pressing economic issues.⁶ Hungary, on the other hand, only addressed its criminal past with lustration⁷ but legislated a 30-year time span before communist-era files could be accessed by average citizens. Far from comprehensive, the lustration in Hungary took a political overtone.⁸ By the mid 2000s, both Hungary and Spain were members of the EU, which despite a frame rooted in economics, sought to build a community of democratic states abiding under the western liberal rule of law.⁹

However, upon closer examination, assertion that all EU member states have transitioned to democracy is problematic. In 2007, Spain, deemed the poster child for the forgetting policy of TJ, passed a law of "Historical Memory" making provisions, for among other things, opening up graves and identifying victims under Franco's regime.¹⁰ In the other hand, Hungary has not aimed to forget completely, however, due to its Constitutional Court's strict interpretation of the constitutional rule of law, all proposed TJ legislations were curtailed.¹¹ Over the years, its limited but existent lustration legislation has condemned officials with Communist-regime connections, while at the

Democracies Reckon with Former Regimes, Volume II: Country Studies. (Washington, DC: United States Institute of Peace Press, 1995), 645-6.

⁶ Encarnación, Omar G. "Justice in Times of Transition: Lessons from the Iberian Experience." *Center for European Studies Working Paper Series #173*(2009) http://www.aei.pitt.edu/11883/01/CES_173.pdf

⁷ Lustration can be defined as "special public employment laws [to] regulate the process of examining whether a person holding certain higher public position worked or collaborated with the repressive apparatus of the communist regime." For a fuller discussion on the definition of lustration see: Cynthia Horne, "Lustration and Trust in Public Institutions: A retrospective on the State of Trust Building in Central and Eastern Europe," *Sfera Politicci Numarul 142, Anul XVII* (2009): 32-33.

⁸ Kritz, pg. 647-669

⁹ See Copenhagen Criteria

http://ec.europa.eu/enlargement/enlargement_process/accesion_process/criteria/index_en.htm

¹⁰ Giles Tremlett, *Ghost of Spain*, (London: Faber and Faber Limited, 2006)

¹¹ Kritz, 644-692, See Chapter 3.2

same providing no threat beyond public exposition of still secret files to stop people for seeking office without disclosure of their past. Frictions over the public's right to know vs. individual privacy have kept most of the Communist-times files away from the public eye, but public enough to have lead to a number of scandals over the past of officials. It is in this frame that transitional processes cannot be considered complete, especially as domestic demand and international pressures support TJ processes to deal with the past.

This thesis explores why forgetting is not an option in the current international climate. It posits that growth of the TJ field has helped define expectations for a democratic state, especially with truth and transparency forcing states to revisit legislation that obscures the past. Lastly, it finds that later legislation has a greater chance of being politicized, even when transnational TJ bodies and civil society are involved. Spain and Hungary share two important characteristics: declared quick early third-wave transitions, signaling limited TJ methods applied and that decades have passed from the initial transition. Furthermore as EU members, Spain and Hungary are perceived as fully transitioned democracies politically abiding under the western liberal rule of law.¹²

¹² See Copenhagen Criteria
http://ec.europa.eu/enlargement/enlargement_process/accesion_process/criteria/index_en.htm

Chapter 1 – Theoretical Framework

1.1 Thick Description

Defining concepts such as justice and truth in TJ mirrors the difficulties encountered by anthropologist in defining culture. To define culture, Clifford Geertz utilized a “semiotic approach” or as he described it a conversation between the subject and the researcher. Research becomes not just a way to analyze but also a way to understand what is beneath the surface getting to the motivation. Tensions between the need to analyze and the need to understand become tangible. In anthropology culture is not its “own master,” rather it becomes the surface of what is underneath, which is captured by “thick description.”¹³ Culture is shaped by the logic of what drives it. Thick description of culture is not only what it is but also why it is.

Under the cover of TJ terms we find cultural and special motivations, and which become symbols formed by the thick descriptions underneath. The definitions of what TJ encompasses are defined by the specifics of each context and each researcher. For example, Ruti Teitel’s understanding highlight democracy as a goal and Jon Elster set his definition at a macro-historical level, Christine Bell, Colm Campbell and Fionnuala Ni Aolain talk about “political dilemmas” where TJ becomes a tool of interpretation for the usage of the rule of law.¹⁴ Under such a broad construction, one might fall guilty of calling anything and everything part of transitional justice, this perspective allows for a wider view that does not isolate but places TJ within a larger process. Seeking to be a bit

¹³ See Geertz’s narration of what a wink is in terms of what is behind a wink. Clifford Geertz, "Thick Description: Toward an Interpretive Theory of Culture," in *The Interpretation of Cultures: Selected Essays*. New York: Basic Books, 1973, 10

¹⁴ Christine Bell, Colm Campbell and Fionnuala Ni Aolain, “Justice Discourses in Transition,” *Social Legal Studies* 13, (2004), 305 <http://sagepub.com/cgi/content/abstract/13/3/305>.

more careful, TJ will be defined at greater detail using a basic level of thick description as well. A section of each case study is dedicated to the general climate of the state where public and political opinions on the processes provide a better analysis of the specifics of TJ in each state. A criticism, which is addressed by the theoretical framework, may be that still there are underlying/overarching mechanisms of value which strict usage of thick descriptions might miss.¹⁵

One purpose of this paper is to isolate some of the TJ processes and get to how the lack of comprehensive legislation over time has affected the understanding of transition in Hungary and Spain. Though, admittedly this thesis seeks a sort of generality within the general theory of TJ, it follows Geertz's assertion that "what generality it contrives to achieve grows out of the delicacy of its distinctions, not the sweep of its abstractions."¹⁶ Therefore, instead of comparing the case studies, both are used to bolster up the argument that time complicates issues of TJ even for states said to have obtained democracy. Due to time and length constrictions the focus is narrowed to questions of time and politics with an emphasis not just on the country studies, but on theory.

Though TJ is the main emphasis in this study, in order to explore the implications of over arching mechanism the study integrates international theory by considering the field of transitology. These fields should not be seen as competing, but rather together, illuminate written TJ literature. For example TJ by Teitel is described within the terms of achieving democracy,¹⁷ Paige Arthur places it within modernity,¹⁸ both of these

¹⁵ In specific see Elster's argument for overlying TJ mechanism—though admitting they are a "lower level of abstraction," 76.

¹⁶ Geertz, 25

¹⁷ Ruti Teitel, *Transitional Justice*. (New York: Oxford University Press, 2000):3.

¹⁸ Paige Arthur, "How 'Transitions' Reshaped Human Rights: A Conceptual History of Transitional Justice," *Human Rights Quarterly* Vol. 31.2 (2009): 321-267. doi:10.1353/hrq.0.0069.

assumptions guide principles of transitology. In framing the case studies through these theories, a richer explanation of the implication of time can be constructed.

1.2 Transitology

At a paper presented in 2004 at the Fifth Pan European International Relations Conference, George Lawson criticizes what he calls ‘the poverty of transitology’ or the tendency to drive transitions towards a presupposed goal—a perfect transition to a peaceful and working democracy.¹⁹ Robert Brier posits that thanks to Geertz’s influence, post 2001 transitology has actually looked into the “splinters” focusing on history and culture. He argues that more than obvious differences in the different transitions, there are different interpretations providing variations under one framework.²⁰ Transitions, Brier argues, not only have an individual cultural level but also a transnational level. To add to the complexity, Jonas Wolff and Iris Wurm posit that international pollination tends to be studied from one side: the receptor of change or the country being democratized. From their perspective, democratization studies focus on “compliances” and “international socialization” and leave a gap regarding analyzing the “mechanisms of external democracy.”²¹ Following that logic what becomes important for Spain and Hungary’s studies is the ability not only to see that international customs (as an example) were imposed, but how the states as receptors reacted and whether a new regime based on both national and international law was created.

¹⁹ He criticizes in specific Francis Fukayama, Guillermo O’Donnell, Larry Diamond among others.

²⁰ Robert Brier, “Transnational Culture and the Political Transformation of East-Central Europe,” *European Journal of Social Theory* 12 (2009): 338. doi:10.1177/1368431009337350.

²¹ Jonas Wolff, and Iris Wurm, “Towards a Theory of External Democracy Promotion: A Proposal for Theoretical Classification,” *Security Dialogue* 42 (2011): 78. doi:10.1177/0967010610393551.

For Lawson the solution of transitology has to be framed through Hegel's words that any attempts to theorize or control moves in world affairs would only obscure them even further and the solution is "to pay sufficient heed to local contexts, histories and norms."²² In an international law example, a state is only obliged to take on a treaty if it chooses and to implement it through its own lens of history, cultural and local norms: the Geneva Convention was not simply imposed on Spain or Hungary, but the states had to *adopt it*.

Lawson also proposes that any study must be framed on not only short term realizations, but also long term economic and social factors, as well as the international impact on the causes, processes and outcomes of democratization.²³ In turn, Wolff and Wurm advice that what is important in the democratization discourse is not only what is done but why it is and the motives behind actions, outside actors being an important pull.²⁴ Also since the path to democratization is uneven, it has to be analyzed within modernization and globalization, Lawson argues.²⁵ Taking it a step further Brier analyzes cultural as a transnational phenomena where history is described beyond borders and a third cultural element beyond simply national or international is introduced, the result being a combination of both.²⁶ TJ as local implementation of international norms over fits this model.

For the purposes of this paper, transitology becomes important in three ways: first categorizations such as Huntington's third wave transitions and the assertion that the

²² George Lawson, "The Czech Republic and the Poverty of Transitolog," (Presented at the Fifth Pan European International Relations Conference, Hague, Netherland, September 9-11, 2004), 4

²³ Ibid, 7

²⁴ Wolffand Wurm, 79-88

²⁵ Lawson, 2-3

²⁶ Brier, 344

international climate causes states to seek democracy. Second, the usage of Geertz's methods in transitology can be replicated in TJ to explain differences and provide a general structure beyond mere generalization. Third, it sets the 'glocal' approach such as the one proposed by Brier and Lawson. As Lawson states, it is important to strike a balance between the local and the international and to accept that there are pulls and pushes in both. Transitology helps set TJ not just as local or international, but as a transnational phenomenon.

1.2 Transitional Justice

TJ theory is defined by the practices of states during their transition, which go beyond legal questions to encompass structural, political, moral, and even historical cognition.²⁷ This provocative interaction across fields is what made Christine Bell describe TJ as both a field and a non-field.²⁸ Interdisciplinarity is intrinsic to a discipline born out of the observation of practice and not based on theory. This section, then, will focus on laying a basic theoretical frame through which to understand what TJ has become, how the discipline emerged, and lastly, begin to analyze TJ in light of the case studies, arriving at the thick description of Hungary and Spain.

1.3.1 Arriving at a Theory

In 2000, Ruti Teitel published *Transitional Justice*, a seminal book that refined the definition of what had previously been a general theory to include moving toward liberalization and democracy through political, not just judicial means, and developed a

²⁷ Ruti Teitel, "Transitional Justice Genealogy," *16 Harv.Hum.Rts.J.* 69(2003) 70-71 and Arthur, 357-363, Elster, and Alexandra Barahona de Brito, Carmen González-Enríquez, and Paloma Aguilar. "Introduction." In *The Politics of Memory: Transitional Justice in Democratizing Societies*, ed. Alexandra Barahona de Brito, et al. (Great Britain: Oxford University Press, 2001), 1-39.

²⁸ Christine Bell, "Transitional Justice, Interdisciplinary and the State of the 'Field' or 'Non-Field'," *The International Journal of Transitional Justice*, Vol. 3 (2009): 5-27. doi:10.1093/ijtj/ijn044.

constructivist view of how transitional legal processes occur.²⁹ Teitel's book is grounded in an underlying assumption that transitional justice leads to the creation of public knowledge, or subjective truth, that allows a country to deal with the past and move forward simultaneously.³⁰ If taken to an extreme, such a notion would suggest that transitions are over when the nation state as a whole believes that they are. In part, this complements an understanding of TJ that is defined by state practice and goals, but it also creates questions of whose goals and what practices. It is true that the practiced aspects of TJ—truth commissions, lustration/vetting, reparations, and trials—are mostly defined, remain focused on legal aspects, and seek the broadly defined goals of truth, reconciliation, and justice.³¹ However, the 'whose' aspect remains elusive and ever changing from ideal (victim centered), to realistic (perpetrator), to universalistic and pluralistic (community, international community, everyone).³²

If viewed from the practices, "the outcome of transitional justice is a series of legislative, administrative, and legal decisions."³³ Two significant actors in promoting and seeking certain practices are individual citizens through civil society and the international community—which have increasingly collaborated independent of individual governments, and at times during the twentieth century, even changed policy and state governance. Although neither the international community nor civil society always act as

²⁹ Teitel, *Transitional Justice*, 5.

³⁰ Ibid, 6.

³¹ Bell, Kritz, Ibid

³² See Elster's Chapter 6.

³³ Ibid, 116.

a cohesive entity, their actions have led to other ‘general rules of practice,’ one of them being how amnesty is viewed.³⁴

There are a number of assumptions which guided TJ practitioners and then were analyzed by academics. The first assumption is that there is a need to legislate on crimes of the past.³⁵ As opposite as amnesties and trials are, both are legislated. Spain’s “Pact of Forgetting” became a reality with the passage of the 1977 Amnesty Law. The second key assumption, which distinguishes TJ from other judicial processes, is that it is backward as well as forward looking in seeking legitimacy for its processes.³⁶ Lustration laws, such as those in Hungary, sought to prevent the resurgence of past crimes by purging perpetrators from office. Processes are not seen as merely preventive, but are a tool to overcome the past. Legitimacy plays a central role in understanding why a TJ process is taking place.³⁷ Justice, then, becomes subjective to the definition of legitimacy, which not only guides the process, but becomes the outcome and its explanation. Another assumption is based on policy advice about using TJ to deal, in specific, with violence prevention by building states’ commitment to human rights.³⁸

There are two more assumptions that play a key role in the question of time. The first assumption is that liberal democracy is the goal of transitions³⁹ and the second is that

³⁴ “What international law specifically permits or requires during the transition remains unclear, but ...blanket amnesties covering serious international crimes are not permissible, and some level of (unspecified) amnesty is permissible and even required.” Bell, 16.

³⁵ Juan Méndez, “Accountability for Past Abuses,” *Human Rights Quarterly* 19 (1997): 255-282 and Kieran McEvoy, “Beyond Legalism: Towards a Thicker Understanding of Transitional Justice” *Journal of Law and Society*, Vol. 34, Issue 4 (2007):411-440.

³⁶ Teitel, *Transitional Justice*, 215.

³⁷ Bell, 20.

³⁸ David Forsythe, “Forum: Transitional Justice: The Quest for Theory to Inform Policy,” *International Studies Review* 13 (2011):2. doi: 10.1111/j.1468-2486.2011.01016x.

³⁹ Teitel, *Transitional Justice* 3, and *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, Report of the Secretary-General, UN Doc. S/2004/616.

conflict does not only belong to the parties, but it affects all states.⁴⁰ As democracy, defined by individual political involvement, took center stage in international politics, the tone adopted by international organizations (IOs), and subsequently its members, pointed toward a unified, even if loose, language which included justice, rule of law, and solidarity in transitions.⁴¹ Phrases such as “following the American example or the European example” became part of everyday language. International law became concerned not only with self-regulation, but also universal regulation.⁴² Yet, during the first of what Huntington coins as “third wave” transitions, the policies, best practices, and involvement were fluid. The bloody conflicts of the 1990s, Yugoslavia and Rwanda specifically, provided a compelling justification for TJ process and aided the concretization of an international legal code. Academics have pondered the beginnings of transitional justice theory, one that combines the political, administrative, and criminal aspects and is flexible enough to deal with cultural differences. This process has been aided by an increased internationalization of values and beliefs and the continuous use of international courts. Understanding the history of TJ, then, becomes a necessary tool for developing a framework.

1.3.2 The Evolution of the Non-field Field

In *Closing the Books*, Jon Elster begins his analysis of TJ in Athens 411 B.C.⁴³ This historical perspective brings placing transitional and justice trends and mechanisms as part of humanity’s trajectory. However, it is also problematic in that the term TJ was

⁴⁰ Ibid

⁴¹ UN Reports, EU Copenhagen Criteria, OSA

⁴² Teitel in “Transitional Justice Genealogy,” 70, and 81-83

⁴³ Also see: Adriaan Lanni, “Transitional Justice in Ancient Athens: A Case Study,” *Harvard Law School, Public Law & Legal Theory Working Paper Series*, Paper No. 11-05 (2010):551-594.

only in use in the late 1980s and that the field did not come together until the 2000s.⁴⁴ On the one hand, a too early approach misses out on important components of how TJ works today such as the notion of an overarching need for something akin to truth or justice, but on the other hand only seeing TJ as a product of the 90s misses on the possibility of an evolutionary understanding of TJ, which is important for a field which is constantly looking to the past.

A better approach maybe achieved by following Teitel's example in "Transitional Justice Genealogy," which explains TJ in three phases concentrating on a start during the world wars, an acceptance of the field due to the events of the 90s and ending with current changes in universal understanding.⁴⁵ Even as Elster takes a wider historical analysis, he underlines the value of analysis of the world wars and the post 90s events.⁴⁶ Yet viewed from a modern perspective most analysts would agree that the third phase, which we are currently experiencing, has gained the goals of democracy and violence prevention.⁴⁷ For the purposes of this paper Phases II and III are of most importance.

Teitel sees Phase II, which is akin to Huntington's third wave nations, as a time where countries "rely upon the diverse rule-of-law understandings tied to a particular political community and local conditions."⁴⁸ Moving away from a criminal hard justice stance during Phase I, or Nuremberg mostly, countries begin to redefine justice as not only having cultural-centric elements, but as being able to be reached by other means such as truth or reparations. Yet, as the field gains support for country centric solutions,

⁴⁴ Bell, 7 and Arthur, 327-329

⁴⁵ Teitel, "Transitional Justice Genealogy," 70-71, 89-92

⁴⁶ Elster, 1-2

⁴⁷ Bell, 13

⁴⁸ Teitel, "Transitional Justice Genealogy," 71

Arthur narrates the history of TJ as coming out of a number of conferences where the same practitioners and academics were present.⁴⁹ Much like the historical economics of Alex Gerchenkon, countries begin to advance their own processes by innovation replacing imitation.⁵⁰ Countries do not only mimic but improve, the process then is not always linear but it gains a slope. South Africa learns from Argentina, which in turn teaches Chile about its own process.⁵¹

Through this process of learning, the normalization of TJ was not only introduced but it becomes validated. Teitel furthers the genealogy by explaining that “[t]he third phase is characterized by the *fine de siècle* acceleration of transitional justice phenomena associated with globalization and typified by conditions of heightened political instability and violence.”⁵² The reasons for analyzing TJ in light of modernity and globalization are parallel to the reasons behind Lawson’s added value to the study of transitology as not merely national or international, but as also in between.⁵³ Out of this mix and crosses that become part of TJ but are not TJ, Bell arrives at the idea of an interdisciplinary non-field field.⁵⁴

In Phase III modernity and globalization tie in and affect not only TJ but also the development of a humanitarian regime, new notions of law and departure from old understanding, the way democracy and varieties of democracy are understood, and even economics arriving at varieties of capitalism and understanding of interdisciplinary as a

⁴⁹ Arthur, 322

⁵⁰ A Gerschenkron, *Economic Backwardness in Historical Perspective*, (Cambridge: The Belknap Press of Harvard University Press, 1976), 5-10.

⁵¹ Teitel, “Transitional Justice Genealogy,” 89

⁵² Ibid 71

⁵³ Lawson, 1-10.

⁵⁴ Bell, 5-15.

must.⁵⁵ The irony is that as TJ gains status as a field, it becomes a lot more decentralized and it is harder to define.⁵⁶

Perhaps then the best understanding is as Bell proposes, TJ as a “cloak.”⁵⁷ TJ becomes the goal, the means and the purpose of its own existence. The issue then becomes, what are the results of TJ becoming a solid field, one that is not only a reaction to the past by a number of countries, but an expected response of those wanting to achieve not only democracy but also professing to be part of a world under a humanitarian law regime? This thesis looks at one small area, the countries which have adopted modern values but at the time of their initial transition did not receive the same pressures that exist today. It goes further to posit that the result is not on a return of the past in terms of justice, but also the politicization of the dialogue.

1.3.3 TJ and the Third Wave

Although Spain and Hungary are seen categorically as part of the third-wave transitions belonging to Phase II of Teitel’s genealogy of TJ, in reality their transitions should be seen as a gradient within Phase II, highlighting the differences in availability of TJ tools. For example, at the time of Spain’s transition in the 1970s, TJ had not emerged as a field and there were no major successful attempts in addressing justice beyond trials. The choice seemed rather stark: trials such as those for Nuremberg, which could be seen as even more of a provocation against peace, or complete amnesty and the pact of forgetting.⁵⁸ But by 1989, some TJ processes had taken place. In 1983, Argentina’s

⁵⁵ Teitel, 92

⁵⁶ Bell, 15

⁵⁷ Ibid

⁵⁸ Tremlett, xvii-xix

President Alfonsín had set a precedent by trying the former regime's juntas.⁵⁹ Processes in Latin America were opening the door of Phase II, which was unlocked by the overflow of post 1989 transitions.⁶⁰ Although Teitel's assertion that this period was marked by a step away from a formal judicial process into a truth-centered, almost developmental process, it would be misleading to see both Spain and Hungary as having the same options.

Instead, it is better understood by seeing it as a process first supported by countries wanting to depart from a hard line approach to justice, such as that in Nuremberg, but also not accepting full amnesty as a real option and therefore developing other mechanisms to deal with the past.⁶¹ This gradient provides a better framework to analyze the earlier transitions. It would be wrong to see Spain's transition as refusing to use other TJ methods, but as existing outside of them.⁶² For Hungary, although some methods were present, they were not the accepted norm. Its leaders had to decide whether their country would benefit from exploring new ways to deal with the past, using older criminal procedures, or choosing to forget.⁶³ The lustration methods and reparations show this ambivalence. On one hand, post-Communist regimes required that minimum reparations be done (land reforms and property rights), but it also limited the scope of criminal proceedings, wanting to avoid any resemblance to what it deemed a foreign invader, the USSR. Therefore, both classes must be viewed within their historical frames.

⁵⁹ Naomi Roth-Arriaza, "The Role of International Actors in National Accountability Processes" In *The Politics of Memory: Transitional Justice in Democratizing Societies*, ed. Alexandra Barahona de Brito, Carmen González-Enríquez, and Paloma Aguilar, (Great Britain: Oxford University Press, 2001), 40-64.

⁶⁰ Teitel, "Transitional Justice Genealogy," 75

⁶¹ Elster, 197

⁶² Tremlett, xvii

⁶³ Teitel, "Transitional Justice Genealogy," 81-85

1.3 Case Study Exposition

This paper is not comparative in nature. The case studies were not chosen according to their comparability to each other, but rather their status with respect to the variables with TJ measured here: time and limited TJ proceedings. Though Hungary and Spain do have similarities, their differences become a major point of objection. Instead of attempting to address every difference, the analysis is done with a great amount of differentiation between the transitions only making connections where pertinent by treating TJ as Bell's "cloak" or Elster's "mechanism".

The transitions have key differences. Spain has been the first modern case radical amnesty policy while Hungary law laws dealing with lustration and reparations. No formal criminal proceedings occurred in both, though legislation was past in the Hungarian case against crimes committed in the Revolution of 1956. Furthermore, Spain saw its Civil War as a time of "two Spains" when the country broke internally against itself, which brought a lot of shame and internal fear of another divide.⁶⁴ The perception of the authoritarian times in Hungary instead looked not just internally but outwardly against an outside actor with internal spies. Hungary then saw itself as "returning" to democracy.⁶⁵ Spain saw itself avoiding conflict.

Fast forwarded twenty years, the common perception is that Hungary never let go of the past and Spain returned to it. Yet, the argument for Spain must be made that the

⁶⁴ Tremlett, xix

⁶⁵ Boulanger

proper way to see its silence is not as silence, but as quieted whispers finally let out in the early 2000s.⁶⁶ Also as we shall see, there were attempts at legislation until the mid 1990s.

The key similarity is the amount dissatisfaction with how the past was dealt with in both countries. Also it is important to note that both transitions were elite negotiated agreements.⁶⁷ This commonality is perhaps the most salient as Spain was used as a possible example for the CEE transitions.⁶⁸ The next two Chapters will explore the historical and legal events of each transition starting with Hungary and ending with Spain.

⁶⁶ J.R. Resina, *Disremembering the Dictatorship: The Politics of Memory in the Spanish Transition to Democracy*, (Amsterdam: Rodopi B.V.) 2000.

⁶⁷ Richard Gunther, "Spain: The Very Model of the Modern Elite Settlement," in *Elites and Democratic Consolidation in Latin America and Southern Europe*, eds. John Higley & Richard Gunther. (Cambridge: Cambridge University Press 1992).

⁶⁸ Maxwell, Kenneth. "Spain's Transition to Democracy: A Model for Eastern Europe?"

Chapter 2 – Opening Hungary’s not so Secret, Secret Files

2.1 Hungarian Pre-Transition Considerations

One question that emerges in any analysis of the Hungarian transition in terms of justice is: “which transition?” The implication is that any analysis should be framed by looking legacies of past uses of the rule of law in the state. In the 1989 transition, legislation and dealing with the past become more complicated because there are no two clear players, but at least three: Communist/Socialist Hungarians, Non-Communist/Socialist Hungarians, and the USSR. Mirroring the authoritarian regime in Spain, silence became a permanent fixture during Communist time and the transition provided a voice which, due to the unique circumstances of the Cold War, in some ways managed to keep the blame as an external issue. Yet, time complicated things as democratic politics brought back the dirty past— one where not only Soviets were to blame, but also Hungarians.

The end of World War II left Hungary with a legacy of a Nazi past and an alliance with the Soviet Union. And to a degree even that transition underwent a sort of “transitional justice” with purges, trials, death sentences and loss of civil rights of former Nazi members.⁶⁹ In 1949 a new constitution was drafted making Hungary a “workers' and peasants” state and resulted in nationalized industry, collectivized agriculture and began a wave of police terror.⁷⁰ With the support of the Soviets the Hungarian Communist party leader, Mátyás Rákosi, purged the judiciary, civil service and military as well as

⁶⁹ Elster, 57-59, 113

⁷⁰ “Spain—Timeline”

suppressed the church and any local opposition.⁷¹ Furthermore “[i]n post-1945 Hungary, the Minister of Justice insisted “both on the need to observe strict legal procedures and on the need to exercise revolutionary political justice.”⁷² As with Spain, it was not a lack of rule of law that would ensue, but more a lack of political legitimacy if compared to modern democracy standards.⁷³

The next important chapter in Hungarian history was the 1956 Revolution. In 1953, Imre Nagy became prime minister of Hungary thanks to new Soviet leadership and he began to institute a number of liberal reforms including a reduction of the power of The State Security Department, which had been Rákosi’s tool of terror.⁷⁴ Though Nagy’s reforms were welcomed by the public, a power struggle followed that in 1955 resulted in Nagy being ousted from office and a restoration to the previous state of oppression. By 1956, however, Hungarians decided to stage a peaceful mass march which became a revolution when the police fired into the crowd.⁷⁵ The revolution resulted in Nagy’s return to power, the renouncement of the Warsaw Pact and a petition to the UN to be considered neutral. On November 4th Soviet tanks invaded Hungary reinstating communist control under Janos Kadar.

Hungary once more experienced purges under Kadar, as well as the execution of those involved in the 1956 revolution. Yet in the 1960s, Kadar began to relax controls releasing political prisoners, closing concentration camps and even permitting some

⁷¹ Kritz, 645

⁷² Elster, 236

⁷³ Ibid, 237

⁷⁴ Kritz, 645

⁷⁵ Ibid

travel to the West.⁷⁶ Hungary began experiencing greater freedom of expression and liberal market leniencies than other countries under the Iron Curtain. The official policy became “those who are not against us are with us,” and as with Spain’s silence became part of survival.⁷⁷ In May of 1988, facing economic woes Kadar stepped down and the door of transition was opened. Just like in Spain there was a certain air of inevitability but this time due to an economic crisis and the general atmosphere under the Iron Curtain. Reforms pointing at a transition begun as early as 1985 with multi-candidate elections and soon the allowance of opposition associations.⁷⁸ The transition would be elite negotiated and a lot of post-transition legislation passed before what would later be seen as the year of transitions for CEE, 1989.

Transitions of 1989; however, took “place in a context of ideological collapse, imperial demise, and social and economic change, which deprived the Communist elite of pre-existing power resources.”⁷⁹ Indicative of the transition is the change of names of the Communist party to Hungarian Socialist Worker’s Party (MSzMP).⁸⁰ Though those in power remained the same during the negotiations, Communist ideology had been discredited and the re-named party made an effort to distance itself from the past and even went as far as renouncing Marxism in favor to democratic socialism.⁸¹ Therefore, though the transition was elite led, the political climate dictated that not all the power was concentrated on one side.

⁷⁶ “Hungary—Timeline” *BBC News*. http://news.bbc.co.uk/2/hi/europe/country_profiles/1054642.stm. Last accessed June 2nd, 2011.

⁷⁷ Kritz, 646

⁷⁸ “Hungary 1989,” *Conflict Writing & Conflict Resolution*, <http://www.princeton.edu/~pcwcr/reports/hungary1989.html>. Last accessed June 2nd, 2011.

⁷⁹ Barhona de Brito et al, 13

⁸⁰ Kritz, 646

⁸¹ Barhona de Brito et al, 13

Yet, it is important to remember the popular support played a role, for example there was a mass demonstration on January 30th, 1988 seeking free elections which posited an open challenge to the Communist regime.⁸² Though perhaps sparked by the air of reform since September of 1987, the first non-communist association was established: The Hungarian Democratic Forum, which one year later would solidify as an opposition political party.⁸³ Also, until 1987 most of the power had been concentrated in the Presidential Council, when an Act was passed giving more powers to the National Assembly and more discussion within the Assembly.⁸⁴ Perhaps nothing made the inevitability of the change as tangible as a government official, Imre Pozsgay, describing the 1956 Hungarian Revolution as a popular uprising, a startling contradiction of the official Communist view that the revolt was a counter-revolution.⁸⁵ This act became known as the “Pozsgay-putsch,” which resulted in the dissolution of the one party system to avoid a split within the party February 10th-11th of that same year.⁸⁶ By April, The Party would declare “the solution of the political, economic and moral crisis [in Hungary] and the transition to democracy can only occur peacefully, without coercion, and in accordance with the law.”⁸⁷

A month before the Roundtable talks where most of the amendments would be negotiated Hungarians once more took to the streets on June 16th, 1989 due to the exhumation of Imre Nagy in validation of 1956 as a symbol of Hungarian strive for

⁸² Antal Visegrády, “Transition to Democracy in Central and Eastern Europe: Experiences of a Model Country—Hungary,” *William & Mary Bill of Rights Journal* Vol. 1 Iss. 2 Art.6 (1992): 246
<http://scholarship.law.wm.edu/wmborj/vol1/iss2/6>.

⁸³ Ibid

⁸⁴ Istvan Pogany, “Constitutional Reform in Central and Eastern Europe: Hungary’s Transition to Democracy,” *International and Comparative Law Quarterly* 42 (1993): 334-5 doi:10.1093/iclqaj/42.2.332

⁸⁵ “Hungary—Timeline” *BBC News*.

⁸⁶ Visegrády, 247

⁸⁷ Pogany, 337

freedom.⁸⁸ The marches provided a sense of relief and belief that the changes in the USSR meant the external threat was no longer.⁸⁹ It must also be noted that though the Hungarian transition occurred during a ‘wave’ of transitions, the specifics of its transformation was “historically unprecedented,” due to its nature of leaving behind its Communist past so quickly and in a peacefully negotiated manner that kept the “governing ability of the central power.”⁹⁰ Most perplexing was the outcome, instead of re-drafting a new constitution, “The Amendment” agreed mostly during the Round Table Talks changed the constitution in such a manner that though it was meant to be provisional but remained constitutional until 2011.⁹¹ The resulting document was a mix of looking outwardly towards a democratically defined future, an apprehension of Soviet led Communist past, and a sense of common guilt and return to national unity.

There was also a sense that “Living well is the best revenge” and that “[t]he Hungarians may have wanted to demarcate themselves not only from the communist era but also from an even older tradition.”⁹² Rather than seeking criminal justice, Hungarians were happy there was a change. Yet the move towards democracy meant the revisiting of the constitution and the integration of certain human rights principles.⁹³

⁸⁸ Visegrády, 248

⁸⁹ Pogany, 337

⁹⁰ Visegrády, 250

⁹¹ András Sajó, “The Difficulties of Socio-legal Transition: Constitutional Efforts in Hungary” *UNB Law Journal* *University of New Brunswick Law Journal* Vol. 39 (1990):255.

⁹² Elster, 240

⁹³ Halmai, Gábor and Kim Lane Scheppele, “Living Well is the Best Revenge: The Hungarian Approach to Judging the Past,” In *Transitional Justice and the Rule of Law in New Democracies*, ed. A. James McAdams, 156 (Indiana: University of Notre Dame, 1997).

2.2 The Hungarian Legal Transition

The Hungarian transition was exemplified by a number of amendments to the 1949 constitution, the introduction of the Constitutional Court,⁹⁴ failed attempts at laws punishing past perpetrators, and lustration laws with limited mandates. The economy and possible prospects of joining the EU also played a large role.⁹⁵ As far as TJ processes there was a great amount of hesitation of major criminal proceedings and a remorseful look at the past seeking to avoid the same type of justice.⁹⁶ There was also a sense that the agreements that led to the transition were to be accepted and in a society of rule of law, upheld. Stephen Holmes posits “Morally, the most disturbing lesson of the transition has been this: the way “justice” is defined depends wholly on who holds effective political power.”⁹⁷ Any legislation attempts post 1989 had to deal with the legacy of the changes and even institutions left behind by the reforms that had started in the 60s.

The most decisive negotiations took place between July and September of 1989, commonly known as the Roundtable talks, culminating in October 23rd, the anniversary of the 1956 revolution and the declaration of Hungary as a republic and the end of communism.⁹⁸ What is the most interesting then is that the negotiations were done among parties and the Assembly before any popular referendum was done, Antal Visegrády points out “Politically, the country became lawless (*ex lex*): on one side, the State Party was no longer legitimate; on the other, the oppositionist parties had not yet been

⁹⁴ The Court was created by Act 32 on October 1989, and came into full function on January 1st, 1990.

⁹⁵ Endre Spaller, “The Political and Economic Transition in Hungary,” ed. Rebecca Blocksome, Szabolcs Nagypal, Peter Sajda, *Medi(t)ations and (Re)conciliation: Conflict Resolution and European Integration*. (Bratislava: Bgoi& WSCF-CESR, 2004), 86<http://www.koed.hu/medit/>.

⁹⁶ Holmes, 119

⁹⁷ Ibid

⁹⁸ Sajó, 255

legitimated.”⁹⁹ The outcome was a general belief that it was not necessarily a change in the elite or the regime, but simply a changing of mind by the state. Looking back, current Parliament member, Endre Spaller writes “The previous leaders of the communist regime became democrats fully accepting democratic rules, and even entrepreneurs; so they had no interest in changing the system back. Thus no part of the political elite had an interest in reintroducing communism to the country.”¹⁰⁰ Legislation would reflect on these feelings by reassuring a certain amount of impunity.

The MSzMP met with self-appointed leaders of other newly formed parties at the Roundtable with the goal of planning the first election.¹⁰¹ Out of the negotiations solidified changes to the 1949 Constitution creating a practically new document which by 1992 only retained one line from the original document, but was commonly known and perceived as the Amendment.¹⁰² Yet no agreements over prosecutions or major TJ processes were reached and though there is debate over the promises made (or not) then, there seemed to be an agreement against any major processes: “the elected Hungarian governments since 1990 have never made a general attempt to go after all those who maintained the party state.”¹⁰³ There was an agreement, however, for a “free withdrawal of the state party upon the peaceful transfer of power” which can be read as an agreement not to deal criminally with the past. Instead the Amendment showed a high mistrust of the previous government given Parliament supremacy, restricted presidential powers and cementing the Constitutional Court.¹⁰⁴ The talks were seen as revolutionary, but they also

⁹⁹ Visegrády, 247

¹⁰⁰ Spaller, 89

¹⁰¹ Halmai et al, 157

¹⁰² Halmai, 189

¹⁰³ Halmai et al, 157

¹⁰⁴ Sajó, 254-56 and Halmai et al, 159.

added to a sense of lack of rupture with the past. Gábor Halmai describes the changes as having been “carried out on the basis of legality and legal continuity.”¹⁰⁵ Yet though all the changes seemed to abide under the “rules” of democratic rule of law, the reality is that the legislations stopped persecutions or major TJ process through the use of a strong constitutional court¹⁰⁶ and their validity was called into doubt due to elite-driven negotiations, and the lack of a ‘new’ constitution put up for a general vote.¹⁰⁷

What became important for TJ in Hungary was the power of the Constitutional Court which had the right to annul any law or rule that it deemed unconstitutional and its decisions were binding on everyone without right to appeal.¹⁰⁸ The Court struck down several attempts to deal with crimes of the past, for example, the 1991 law which attempted to restart the statute of limitations for selected crimes committed between 1944-1990.¹⁰⁹ It was not only the Court decision that made the passage of the law controversial, but also the fact that it had been sponsored by radical members of the MDF.¹¹⁰ The Court remarked that the law would not abide by the *nullum crimen sine lege* principle adding that Hungary was “a state founded on the rule of law.”¹¹¹ Two more attempts in 1993 to draft an “authoritative legislation” and an amendment to extend the statute of limitations of an existing law that would serve a similar job as the aforementioned law, failed to pass through the Court.¹¹² Therefore ironically it was a strong belief on the law that aided a lack of a comprehensive TJ legislation of any sort.

¹⁰⁵ Halmai, 189

¹⁰⁶ Elser, 194

¹⁰⁷ Pogany, 339

¹⁰⁸ Ibid 341

¹⁰⁹ Also known as Bill 2961, Concerning the Prosecutability of Offences between December 21 1944 and May 2 1990, Kritz, 646.

¹¹⁰ Halmai et al 158.

¹¹¹ Pogany, 342, For further discussion see Halmai et al, 160-62.

¹¹² Halmai et al 165.

Two years later, in 1993 the Court would approve a revised version under which crimes of 1956 would be deemed as crimes against humanity and therefore the statute of limitations would be null.¹¹³ Therefore it was only within the language of international law that Hungarian national legislation was passed. Even so the Court limited the interpretation of the law and the crimes that would qualify under the law.¹¹⁴ This law was limited in scope by the Hungarian definitions used and lastly it was found too that it “could not be used in concrete cases.”¹¹⁵ Therefore there were only two people tried under this law before it was “paralyzed” by the Court’s ruling.¹¹⁶ The controversy ended in September 1996 when the court decided that the statute still violated international law by defining war crimes differently from the international standard, but left a door open for trials stating that for Hungarian courts could directly apply international law without an amendment.¹¹⁷ This aided, however, to a general sentiment that the first few democratic years in Hungary were more appropriately a “courtocracy.”¹¹⁸

The Court played a role defining the constitutionality of reinstitution laws. Since 1948 most property had been made into “public property” and the seizing of property continued through out the dictatorship.¹¹⁹ By the 1988 legislature on property rights was complicated by Soviet seizures of land plus unresolved pre-Communist expropriations.¹²⁰ In the immediate transition, the priority was the dealing with Communist seizures in

¹¹³ Kritz, 646.

¹¹⁴ Halmai, 166-68.

¹¹⁵ Halmai et al, 170.

¹¹⁶ Barhona de Brito et al, 6.

¹¹⁷ Halmai et al, 170.

¹¹⁸ Boulanger, 3.

¹¹⁹ Peter Paczolay, “Judicial Review of Compensation Law in Hungary,” In *Transitional Justice: How Emerging Democracies Reckon with Former Regimes, Volume II: Country Studies*, edited by Kritz, N.J., 669 (Washington, DC: Institute of Peace Press, 1995).

¹²⁰ Elster, 128.

1991.¹²¹ Again the Court was asked to weight in on the Property Rights Clause and the Equal Protection of Property Clause. The decision's language was vested within human rights language and posited the bill unconstitutional defining equal protection as "equal right to human dignity."¹²² The Court furthermore saw no State obligation to compensate individuals whose land had been seized and ruled unconstitutional any return property that would not be exactly the same across the board.¹²³ As for the land owned by cooperatives, the Smallholders party argued for the Court to deny any protection of lands obtained illegally; however, the Court ruled that past misdeed did not affect the current property rights and therefore dissolution of the cooperatives had to be accompanied by compensation.¹²⁴

There was another Compensation Law passed in 1991, which once more was forwarded by the President to the Constitutional Court. The Law was found constitutional it because it imposed a "moral obligation to compensate the former owners" upholding its previous ruling that there was no legal obligation only a moral one.¹²⁵ Yet once more the importance of this decision is that the Court's language though controversial, it tries to "harmonize the special character of the transition with the concept of legal continuity."¹²⁶ Another problem raised by the 1991 was that the return of property to the Catholic Church meant the return of repurposed buildings such as the dismantling of a school in order to return a church building.¹²⁷ Therefore, in complex issues that created injustices either way, the Court saw its role to up hold the rule of law in accordance to the ideal of a

¹²¹ Elster, 128

¹²² Paczolay, 674

¹²³ Ibid 675

¹²⁴ Ibid 677

¹²⁵ Ibid 681

¹²⁶ Ibid 681

¹²⁷ Elster, 95

democracy even when solving issues that were created a by rule of law fashioned under Communism.

2.2.1 Lustration Issues

One critical issue with passing lustration laws was that a large portion of the population was involved and it was “difficult to assess blame.”¹²⁸ The regimes in CEE countries have been described by academics as “criminal regimes” where guilt is collectively shared.¹²⁹ At the time of the Roundtable Talks, there was no cohesive group that could shoulder the blame, and questions of lustrations were kept at a minimum.¹³⁰ Instead, the legacy of Soviet lustrations created a desire to break with such tradition.¹³¹ Yet all of these states faced a problem because of the files created under communism, specifically those naming informants.

In Hungary, the files were created through legal measures as late as 1987 when the Presidential Council passed a law on state secrets defining as secret “any information that would be dangerous to the Hungarian state or to any other political, economic, or defense interest.”¹³² Furthermore, the danger the files posed was heightened by the secret police revealing that they engaged in surveillance and the destruction of files as late as 1989 in an incident that came to be known as “Danubegate.”¹³³ The necessity of purging former agents was then framed not in terms of moral consideration, but due to the

¹²⁸ Elizabeth Barrett, Péter Hack and Ágnes Munkácsi, “Lustration as Political Competition: Vetting in Hungary,” In *Justice as Prevention: Vetting Public Employees in Transitional Societies*, ed. Alexander Mayer-Rieckh and Pablo de Greiff, 265 (New York: Social Science Research Council, 2007).

¹²⁹ Barhona de Brito et al, 20

¹³⁰ Barrett et al, 261, 265

¹³¹ Elster, x

¹³² Halmai et al, 173-74

¹³³ The Danubegate scandal involved the writetapping of political enemies as well a shredding of state security secrets by the Communist government’ secret service, anticipating political opposition. Barrett et al, 261

political vulnerability that blackmail posed to certain officials.¹³⁴ Lustration then gained internal support and even more validation as it became a dominant form of TJ following its legal adoption by Czechoslovakia.¹³⁵ In all of the post-communist states, there is a feeling that lustration was necessary because “existence of documents and files relating to the agent network and security services operation during the communist era might disrupt the functioning of the new democratic system.”¹³⁶

However, political suspicion set in as it was assumed that only the minister of internal affairs and the prime minister had access to the files, and that the ruling party could prevent the leaking of names, but also exert pressure on its political opponents.¹³⁷ The result was a lack of consensus within the political parties that aided the constant change of ruling parties after each parliamentary election, with the exception of 2006.¹³⁸ As for lustration, Williams and his coworkers counted ten cyclical attempts by 2003.¹³⁹ Pushes for lustration were manifested as early as 1990 when FiDeSz’s Victor Orban posited that the country needed to build a political *tabula rasa* to finish the history that “we had been working at for so long, to end communism.”¹⁴⁰ That first attempt to open the secret police files was at the behest of SzDSz, The Alliance of Free Democrats, a

¹³⁴ Oltaý, 667

¹³⁵ Barrett et al, 266

¹³⁶ Barrett et al, 262

¹³⁷ Edith Oltaý, “Hungary’s Screening Law,” In *Transitional Justice: How Emerging Democracies Reckon with Former Regimes, Volume II: Country Studies*, edited by Kritz, N.J., 662.(Washington, DC: Institute of Peace Press, 1995).

¹³⁸ Csilla Kiss, “The Misuses of Manipulation: The Failure of Transitional Justice in Post-Communist Hungary,” *Europe-Asia Studies*, Vol 58, No.6 (2006), 928.

¹³⁹ Aviezer Tucker, “Paranoids May Be Persecuted: Post-totalitarian Transitional Justice,” In *Retribution and Reparation in the Transition to Democracy*, ed. Jon Elster, 189. (New York: Cambridge University Press, 2006).

¹⁴⁰ Sarah Atwood, “Transition Pains: Hungary’s Uncertain Dissidents,” *View from the Ground*, Winter/Spring 4.1, (2003),

151.http://www12.georgetown.edu/sfs/publications/journal/Issues/ws03/ws03_view_atwood.html

liberal party, which wanted all secret police files to be made public for those interested.¹⁴¹ Distrust between the two main opposition “forces” (rather than parties per se),¹⁴² aided to a general belief that lustration or “decommunization” as an “elite power game” and “Lustration was a stick with which one group would-be leaders was attempting to beat another.”¹⁴³ Holmes argues further that popular skepticism in light of the politicization of morality was a song “not of amnesia, but of indelible memory.”¹⁴⁴ And indeed the periods in which lustration has made a greater advance in Hungarian legislation were election periods.¹⁴⁵ Ironically, lustration designed to “improve the trustworthiness of the public institution”¹⁴⁶ turned out to be a political game among elites, and with time, public yearning for purges proved vanishing small.¹⁴⁷

The first Hungarian screening law finally passed in 1994, two months before the election.¹⁴⁸ However, as with all the political problems of the transition, it was forwarded to the Court that defined its limitations.¹⁴⁹ Once more the court applied a strict interpretation of rights stating: “in its criminal decision on the matter in December 1994, 60/1994 (XII.24) AB h., it doesn’t do to repeat the mistakes of the past ... Everyone has rights at stake in this matter, even the spies.”¹⁵⁰ The law was struck down, although the process of lustration was well on its way, with the goal of screening some 12,000 individuals.¹⁵¹ Another attempt at a law with a narrower scope, targeting only 600

¹⁴¹ Kiss, 930

¹⁴² Ibid 928

¹⁴³ Holmes, 119

¹⁴⁴ Ibid 119

¹⁴⁵ Elster, 258

¹⁴⁶ Horne, 30

¹⁴⁷ Holmes, 117

¹⁴⁸ Tucker, 189

¹⁴⁹ Boulanger, 3, 8

¹⁵⁰ Halmai et al, 171

¹⁵¹ Elser, 258

individuals,¹⁵² was made in 1996, yet no productive lustration law was obtained until 2001.¹⁵³ Yet, each attempt added a layer that shaped how lustration was carried out in Hungary. The 1994 attempt set up a “secret panel of judges, who can offer them the choice between resigning and having their past misdeeds made public.”¹⁵⁴ The Parliament’s delay in reviewing the law was indicative of a general fear of airing not just the opposition’s laundry, but all the parties with the exception of those led by younger members would have a less of a past with which to contend.¹⁵⁵

Another problem with the lustration laws was the only built-in method of accountability was the fear of the files becoming public. But since most parties, including the ruling party led by József Antall (MDF), had ties to the past, the legislation was built to promise “but not deliver lustration.”¹⁵⁶ The result was not a complete purge, but at times the backfiring of such measures. The most obvious example of which is Gyula Horn,¹⁵⁷ who retained his position in government while openly talking about his past in the militia and even citing his positions in various communist governments as a defense.¹⁵⁸ When the Hungarian population voted in the party headed by Horn, they demonstrated a lack of interest in the way the lustration law had been enacted. Horn’s government would amend the bill and produce the 1996 Act LXVII on lustration, which followed in the shadow of the court’s ruling on how to make the 1994 constitutional. The

¹⁵² Applying only to public officials who had to take an oath before Parliament or the President, or who were elected by the Parliament. The list of lustratable roles, however, was extended again in 2000 by Act XCIII.

¹⁵³ Monica Nalepa, “Captured Commitments: An Analytic Narrative of Transitions with Transitional Justice,” *World Politics* 62, no.2(2010), 366.

¹⁵⁴ Elster, 69

¹⁵⁵ Kiss, 931

¹⁵⁶ Barrett et al, 264

¹⁵⁷ In 1956 he joined the Communist part and worked for the government through the regime. His last appointment was as foreign minister Miklós Németh.

¹⁵⁸ Kiss, 932

law also established “the legal conditions for exercising the right of information self-determination, primarily by creating the Historical Office” giving all citizens right to apply for access to information regarding themselves.¹⁵⁹

In 2000, with Victor Orban as Prime Minister, the law which was due to expire that same year would be expanded to inquire about 2,000 more cases and extend its mandate to the spring of 2006.¹⁶⁰ What is interesting is that during the years 1992-2002, public surveys suggest a general approval rating of 50 percent for publishing information about former secret agents.¹⁶¹ Even as people showed a general apathy toward formally pointing fingers and reviewing the past, there was a general curiosity to know what was documented from the past. In 2001, another amendment within the Act LXVII changed the status of the Historical Office, converting it into the present public security archive, as well as the repository for all former public security organizations documents.¹⁶² By 2002, there were two more drafts (T/541 and T/542) aiming to expand the powers of the lustration. Questions about what to do with the files emerged, but politics turned to more important matters such as the EU ascension and the country’s economic state. However, throughout that time “civic circles” started gaining force and Hungary’s politics would begin to take on a new character, what some would call “populism.”¹⁶³ Nationalism would take off, but not in promising a future, but by anchoring in the past. As one civic circle leader would respond when asked about democracy and leadership in Hungary,

¹⁵⁹ Barrett et al, 271

¹⁶⁰ Tucker, 189 and Barrett et al, 271

¹⁶¹ Barrett et al, 265

¹⁶² Barrett et al, 272

¹⁶³ Antwood.

“the leaders grew up during communism; they were faithful to the system. They always think...in undemocratic terms. They don’t know what real democracy means.”¹⁶⁴

This suggests that prolonged debates surrounding the scope and promise of TJ processes, such as lustration, serve to elevate the question of ‘dealing with the past’, thereby sustaining its relevance in the present. In terms of TJ theory, therefore, the passage of time can actually bear an inverse relation to the settlement of contested historical narratives. Rather than ensuring discontinuity with the former polity, TJ mechanisms can be used instrumentally by party elites to shape present-day politics by making the past eternally visible.

Opening Wounds: Secret Files in Hungary

For Hungary lustration was not only about purging officials, but it was --as has been mentioned before--interlinked with selective opening of the secret police files.¹⁶⁵ The 2002 drafts T/541 and T/542 prove that the secret files gained a lot more traction in the 2000s than formal lustration (towards which Hungarians are depicted as apathetic).¹⁶⁶ Draft T/41 – which concentrated on establishing a new Public Security Services’ History Archive to bring together all the documents of all the security service directorates in one location – was adopted on December 23, 2002.¹⁶⁷ Its approach was broad, and it emphasized the organization of documents compiled by the security services and the need to make them available for the purposes of understanding history. T/542 was more

¹⁶⁴ Atwood, 151

¹⁶⁵ Kiss, 929

¹⁶⁶ Holmes, 117

¹⁶⁷ Barrett et al, 272

concerned with cleansing, expanding lustration further to the media and church.¹⁶⁸ The 2002 law also symbolized a shift from an avoidable threat of disclosure, towards mandatory disclosure aiming to keep its constitutionality through transparency.¹⁶⁹

Legislation also received a push from the Medgyessy scandal, when on June 18th 2002, the conservative Budapest daily *Magyar Nemzet* revealed the Prime Minister's, Peter Medgyessy, past as a former communist secret agent.¹⁷⁰ Medgyessy at first denied all allegations, but the issue grew. The left-wing *Nepzava* news paper cried 'hypocrisy' and stated that the former Prime Minister József Antall had "damning evidence about Orbán's past" as well.¹⁷¹ There were two immediate outcomes: the first was the creation of the Mécs committee, a panel to collect information about all cabinet members since 1990, which was later ruled unconstitutional on the grounds that "there was no clear legal grounding for the collection of this data by a parliamentary committee."¹⁷² The second (which became a lot more weighty in terms of the opening of files) was Act V of 2003, which established a new Public Security Services History Archive and pushed for the revelation for all blacked out names.¹⁷³

Scandals also followed in 2004 and 2005 linked to the past activities of sports stars, musicians, and cultural critics leading to a proposed amendment in 2005 aiming to publish the names of all those who were employees of the political secret services, but it

¹⁶⁸ Gábor Halmai, "Lustration and Access to the Files of the Secret Police in Central Europe." In *Lustration and Consolidation of Democracy and the Rule of Law in Central and Eastern Europe*, ed. Vladimira Dvaráková and Andelko Milardovic, (Zagreb: Konrad Adenauer Stiftung, 2007),38

¹⁶⁹ Barrett et al, 274

¹⁷⁰ David Koch, "Hungary's Prime Minister Exposed as Former Communist Spy", *World Press Review*, July 25th, 2002, <http://www.worldpress.org/Europe/651.cfm>

¹⁷¹ Ibid

¹⁷² Barrett et al, 274-75

¹⁷³ Halmai, "Lustration and Access to the Files in Central Europe," 39 and Barrett et al, 274

failed to gain enough political support.¹⁷⁴ When a draft was passed, the Court decided to annul part of the law holding that only the files of those in public office could be revealed.¹⁷⁵ An important subsequent development was the *Kenedi v. Hungary* case, which reached the ECHR and aptly demonstrates the contradictions within the Hungarian government's handling of the files.

Although the ECHR did not publish its judgment until May of 2009, the historian János Kenedi's journey to obtain access to the files through the Ministry of Interior began in 1998.¹⁷⁶ The Ministry cited a decision that kept the documents as State secrets until 2048 as a denial for his application. Kenedi replied by citing section 21 of Act 63 of 1992 which could qualify his research under "data of public interest." In January 1999 the Budapest Regional Court approved his claim, but he was told his observations had to be kept confidential. Still in 2007, Kenedi had not been able to gain unrestricted access to the files despite continual tries. In 2009, the ECHR found that Hungary had violated Article 6(1) ECHR (due to the excessive length of the proceedings), Article 10 ECHR (since the obstinacy of the Hungarian authorities in refusing to comply with the domestic court's ruling could not be regarded as a restriction on the right to access information that was 'prescribed by law'), and Article 13 ECHR (due to the ineffectiveness of the available domestic remedy. Citing several cases as precedence, ECHR found Hungary in violation of the aforementioned articles and Kenedi hoped to gain access to the files.

The *Kenedi v. Hungary* decision gave sustenance to those lobbying for the government to make a commitment to open the files "beyond a verbal

¹⁷⁴ Barrett et al, 275

¹⁷⁵ Halmai, "*Lustration and Access to the Files in Central Europe*," 40

¹⁷⁶ All details were obtained from the Strasbourg final judgment 26/08/2009, Application no. 31475/05, Case of Kenedi v. Hungary

agreement.”¹⁷⁷ Almost a year later, in April 2010, Kenedi was appointed by then prime minister, Gordon Bajnai, to head a committee of experts to monitor the processing of secret files hosting over 50,000 names of communist-era informants, most of which were classified until 2060.¹⁷⁸ The commission was given a year to work and to reveal “the location of other agents” to the next PM.¹⁷⁹ However, by December of that same year, a push for legislation to publish all the document seemed to make the Kenedi commission’s work redundant. Even so, Kenedi described the aim of such historicizing as a way of ‘decriminalizing and depoliticizing’ the files.¹⁸⁰ Less than a week later, the government passed a decree allowing people who were spied on to take the original reports, allowing each individual to have complete control over their destruction or publication.¹⁸¹

The State Secretary of Justice, Bence Retvari, supported the decree by saying, “[a] state governed by rule of law cannot store personal data collected on citizens by illegal means. These are the immoral documents of an immoral era.” Kenedi, however, argued that although the decree juxtaposed the right to informational privacy and the freedom of research, only the latter would aid general public understanding.¹⁸² It is noteworthy that similar assessments had been made about the Court’s decision on the 1994 lustration law – this too pitted information to be protected in the name of personal privacy against information that might be thought to be in public interest, both which

¹⁷⁷ MTI, “Bajnai urged to speed up opening of communist-era secret files,” *Politics.hu* December 30, 2009 <http://www.politics.hu/20091230/bajnai-urged-to-speed-up-opening-of-communistera-secret-files>

¹⁷⁸ Hungary Around the Clock, “PM chooses experts to oversee processing of secret communist-era files” *Politics.hu* April 7, 2010 <http://www.politics.hu/20100407/pm-chooses-experts-to-oversee-processing-of-secret-communistera-files>

¹⁷⁹ Hungary Around the Clock, “PM chooses experts to oversee processing of secret communist-era files”]

¹⁸⁰ MTI, “Government ready to give access to communist-era secret files” *Politics.hu* December 9, 2010 <http://www.politics.hu/20101209/government-ready-to-give-access-to-communistera-secret-files>

¹⁸¹ MTI, “Historian, MPs criticize decree on handling communist-era secret files” *Politics.hu* December 21, 2010 <http://www.politics.hu/20101221/historian-mps-criticize-decree-on-handling-communistera-secret-files>

¹⁸² MIT, “Historian, MPs criticize decree on handling communist-era secret files”

were protected under the Constitution.¹⁸³ The Court in 1994 placed the issue in the hands of parliament as a “political issue” with instructions that parliament was “free neither to destroy all the records nor to maintain absolute secrecy of them, since much of what they contain is information of public interest.”¹⁸⁴ The decree of 2010 brought accusations that the government was taking “the easy way out” and did not want to deal with the reality of the files.¹⁸⁵

Declassification of files had been put on the table in 2008 by the previous government under the “dossier law” calling for a committee (which in 2010 would materialize under Kenedi). It was even proposed to create a internet database granting access.¹⁸⁶ Yet the frequency of scandals surrounding lustration made for a general belief that most “politicians have a dishonorable past” and “the absence of a generalized public disclosure of the files means that lustration has not allowed ‘closure’ on the past, but rather new cases and accusations continue to come to light.”¹⁸⁷ By 2009, Hungary saw its democratic ranking decline according to Freedom House indexes. In their report, the societal crisis was explained by a lack of fundamental reforms as well as an “unresolved Communist legacy, including the role of the secret services.”¹⁸⁸ By 2009, Hungary lagged behind Poland, the Czech Republic and Slovakia in revealing files and names. Kenedi stated that year that there was no “other eastern or central eastern European country

¹⁸³ Halmai et al, 173

¹⁸⁴ Ibid, 175

¹⁸⁵ MIT, “Historian, MPs criticize decree on handling communist-era secret files”

¹⁸⁶ MIT, “Government discusses declassification of secret police files” *Politics.hu*, November 4th, 2008 <http://www.politics.hu/20081104/government-discusses-declassification-of-secret-police-files>

¹⁸⁷ Barrett et al, 300

¹⁸⁸ MIT, “Freedom House ‘democracy rating’ for Hungary declines,” *Politics.hu*, July 1st, 2009 <http://www.politics.hu/20090701/freedom-house-democracy-rating-for-hungary-declines>

where the uncovering of the past, the knowledge of history would have such deficiencies, and be as disregarded as in Hungary.”¹⁸⁹

Due largely to frustration with the government’s hesitancy and indecision regarding access to the files, in March 1st, 2011 Emlékpont, a museum of the Communist times, released via the web a list of 547 secret-agents.¹⁹⁰ The information presented was collected from the Interior Ministry’s files, and the website is named “top secret”.¹⁹¹ The list included members of the current ruling party causing Fidesz caucus leader János Lázár to say that all the post-1945 party state documents should be made public as soon as possible, as everyone is entitled to get to know the past.¹⁹² A week later, the foreign ministry fired seven staff members who were found to have been secret agents under communism and whose names were in the list published.¹⁹³ It has become apparent that continued uncertainty about rights of access has defeated one of the main aims of the lustration laws – that of preventing blackmail.¹⁹⁴

¹⁸⁹ Reuters, “Full access to secret files being debated in Hungary,” *Polytiko Blog* <http://polytiko.blogspot.com/2009/09/full-access-to-secret-files-being.html>

¹⁹⁰ Hungary Around the Clock, “Names of more than 500 Kádár-era “top secret” agents released by website; former PM, Orbán minister on list” *Politics.hu*, March 2nd, 2011 <http://www.politics.hu/20110302/names-of-more-than-500-kadarera-top-secret-agents-released-by-website-former-pm-orban-minister-on-list>

¹⁹¹ MTI, “Foreign ministry sacks seven suspected former secret agents,” *Politics.hu* March 11th, 2011 <http://www.politics.hu/20110311/foreign-ministry-sacks-seven-suspected-former-secret-agents>

¹⁹² Hungary Around the Clock, “Names of more than 500 Kádár-era “top secret”

¹⁹³ MTI, “Foreign ministry sacks seven suspected former secret agents”

¹⁹⁴ Barrett et al, 300

Chapter 3 – Spain’s Amnesty is no Amnesia

3.1 Spanish Pre-Transition Considerations

One of the difficulties in overcoming an authoritarian past, such as the ones experienced by citizens in Hungary and Spain, is that law is not entirely absent from dictatorship. Instead, it is present in what democracy practitioners deem as its evil force, an illegitimate mandate that restricts basic freedoms. The legacy of laws enacted under Franco’s regime cast a shadow over the transition period, playing a role in how events unfolded as well as shaping public perception. Choosing amnesty, then, was not only about the issue of remembering a bloody civil war, which cost an estimated 350,000 lives,¹⁹⁵ but it was also about remembering an oppressive legal regime that left prison marks on many who would have been considered innocent. In 1939, the same year that ended the Civil War, Franco passed the “Law of Political Responsibilities.” The law applied retroactively, imprisoning 400,000 Spanish “who had actively supported the Republican side.”¹⁹⁶ What ultimately resulted was a mix of death from hunger, slave labor, and mistreatment, plus the displacement of an estimated 500,000 citizens and the abuse of 30,000 orphaned children in an effort “to cure them of the so-called ‘red’ gene.”¹⁹⁷ Law, in this case, became a tool of the oppressor and a harbinger of death.

¹⁹⁵ “Spain—Timeline” *BBC News*. http://news.bbc.co.uk/2/hi/europe/country_profiles/992004.stm. Last accessed June 2nd, 2011.

¹⁹⁶ Encarnación, 9 and Madeleine Davis, “Is Spain Recovering its Memory? Breaking the Pacto del Olvido,” *Human Rights Quarterly* 27.3 (2005): 860
http://muse.jhu.edu/login?uri=/journals/human_rights_quarterly/v027/27.3davis.html.

¹⁹⁷ Encarnación, 9-10

The 1973 Penal Code, clearly illustrates the regime's longevity and why the reaction against it was so powerful. The code, approved by Franco a mere two years before his death, sustained the death penalty while listing 'penitentiary benefits,' or accelerated releases from prison to address the high number of people who were imprisoned over trivial things only to be released later for seemingly no cause.¹⁹⁸ When Franco died in 1975, the question became how to transition within the rules of the game. Spain found itself considering the possibility of change, witnessing such a transformation in neighboring Portugal, but still living under the rules set under the last 40 years of dictatorship. The answer became "to make the Francoist state steward of the transition to democracy, thereby foreclosing any possibility for meaningful transitional justice"¹⁹⁹ in the hope of mitigating the possibility of more violence.

The political atmosphere in 1976 was marked with uncertainty and fear, punctuated by widespread violence and ongoing mobilization.²⁰⁰ Winning outright would not be easy and the moderates ultimately came into power. In the face of perceived inevitable change, it was better for the elite negotiating the transition to control what was going to be lost than to risk landing on the wrong side.²⁰¹ Though in 1974, the PSOE, as ruling party for "dissolution of all repressive institutions," for the "devolution of rights to all persons deprived of [them] for political or trade union activities," and for the "restitution of property expropriated from political and trade union organizations"²⁰² going too far with criminal proceedings instead of distancing from the past would be like

¹⁹⁸ Ibid, 8

¹⁹⁹ Ibid, 11

²⁰⁰ Paloma Aguilar, "Justice, Politics and Memory in the Spanish Transition," In *Assessing the Impact of Transitional Justice: Challenges for Empirical Research*, ed. Hugo Van Der Merwe, et al, (USA: United States Institute of Peace, 2009), 97

²⁰¹ Ibid, 95

²⁰² Ibid, 100

joining its brutality. Even as early as the 1970s, the Spanish Communist party had made concessions to fit under the Franco regime through the Pacto for la Libertad, or Pact for Freedom. In the pact, they declared their willingness to reach agreements with the right and committed “to reconciliation with the army and the church and to the ultimate construction of Socialism gradually through democratic means.”²⁰³ The problem was that the definition of democracy in Spain, or the “democracia organica” that Franco sponsored,²⁰⁴ and the definition emerging from a representative, open society democracy, or the modern day ideal espoused by international watchdogs such as Freedom House, required different responses. Ironically, Franco left enough democracy to start a transition,²⁰⁵ but also enough fear to stop investigations.

Furthermore, although negotiations were mostly left to moderate opposition and the elite who saw change as inevitable,²⁰⁶ both extreme sides were present. The military retained its old hierarchy until 1984, when it was placed under civilian control.²⁰⁷ Although the transition is largely viewed as one “anchored on compromise and consensus,”²⁰⁸ nobody put down their weapons and fear became the most potent tool for violence to explode. Although transitions are generally regarded as a “golden opportunity”²⁰⁹ for change, in the Spanish case it turned out instead to be a golden opportunity for chaos, with the suspension of any legislation that might catalyze conflict.

²⁰³ Encarnación, 15

²⁰⁴ Juan Cruz, “El Franquismo está ahí, lo tocas,” *El País*, May 19, 2005.

http://www.elpais.com/articulo/cultura/franquismo/ahi/tocas/elpepicul/20110519elpepicul_5/Tes

²⁰⁵ In 1976, Aldofo Suárez, a Franco insider who was appointed by King Juan Carlos to head the transition insisted that the institutions left over by Franco were “democracy’s midwife.” Encarnación, “Justice in Times of Transition,” 17

²⁰⁶ Aguilar, 95

²⁰⁷ Encarnación, 25

²⁰⁸ Ibid, 1

²⁰⁹ Ibid, 4

Silence became a precondition for democracy.²¹⁰ However, as the TJ field progressed in the 2000s, the international community came to equate silence as an overly simplistic solution that hid rather than addressed the underlying problem

In some ways, the transition became pseudo-reconciliatory in which the lowest common denominator was found and justice was so exercised. Meaning that political prisoners were released, some retribution was organized, and then the biggest promise rested on the fact that there would be no more prosecutions. When the Amnesty Law was enacted in 1977, it not only spoke to the outgoing leaders, but also to the opposition which sat in jail paying for their beliefs until the last minute.²¹¹ The law not only gave a “full stop” of any trials for the outgoing members of the regime, but it also released most political prisoners to include people accused of blood crimes.²¹² In the joy of reaching an agreement, the fact that the law also prevented the prosecution of torturers and all those who committed abuses during the dictatorship, went undetected by most.²¹³

However, although the professed ideal was forgetting, the reality was a far cry from that. During forty years of dictatorship, Spaniards learned to keep quiet, but not to forget. The first time that Spanish gathered a critical mass of protest signatures and made international headlines was in 1981, four years after Franco’s death and following a failed coup that was interpreted as the ultimate sign that there was no going back.²¹⁴ Yet, it was over an issue that seemed safe as far as right vs. left tensions within the country: Spaniards gathered more than 600,000 signatures against joining NATO.²¹⁵ Although Spain would

²¹⁰ Ibid

²¹¹ Aguilar, 102

²¹² Ibid

²¹³ Ibid

²¹⁴ Maxwell et al, 17

²¹⁵ “Spain Under Democracy,” *nick.frejol.org/spain-under-democracy/* Last accessed May 31st, 2001

join NATO and then proceed to join the EC, this demonstrated a sharp departure from its silent past. The following year, 1982, would end not only with Spain joining NATO, but also with the first elected Spanish Socialist government since the Civil War.²¹⁶

Encarnación argues that in a lack of immediate transitional justice, there was an opportunity to move forward and adopt new rules: “the state had survived the transition to democracy virtually intact; and this allowed the authoritarian elites the opportunity to reinvent themselves as democratic reformers.”²¹⁷ However, as the state adopted this new way of looking at itself and as people gained a voice within modern times, new questions arise: Did Spain chose to forget or were there simply no other viable options at that point? As new options for addressing the past emerge and newly transitioning states increasingly utilize them, is it possible that people will not seek justice or at least truth and real reconciliation with the past? If the answer to Spain’s transition is that it chose amnesty out of fear, what happens when that fear is gone?

3.2 The Spanish Legal Transition

Domestically, the first sign of a transition came with the 2940/1975 Decree²¹⁸, which appointed his highness Juan Carlos de Borbón as king of Spain five days after Franco’s death. A number of laws and decrees followed, though aided democratization were viewed as “the model of absolute forgetting.”²¹⁹ The immediate result was the

²¹⁶ Encarnación, 25

²¹⁷ Ibid, 24

²¹⁸ All descriptions of any Spanish law are my translations. The documents can be found at: http://www.boe.es/diario_boe/ in the original Spanish. This particular document is BOE No. 284

²¹⁹ Javier Chinchón Álvarez, “Justicia transicional: “Memoria Histórica”, y responsabilidad internacional del Estado: Un análisis general a propósito del cumplimiento de ciertas obligaciones internacionales en juego después de más de tres décadas del inicio formal de la transición política española,” *Revista de Derecho de Extremadura*, 4 (2009):62

3357/1975 Decree, which as of December that year invalidated the 1939 law. This was followed by Decree 670/1976 which extended benefits to all Spaniards who had suffered bodily mutilation during the war. These benefits had previously only been extended to the “Caballeros Mutilados de Guerra por la Patria,” or the Nationalist-Franco side. That same year, King Juan Carlos declared by Royal Decree 2282/1976 that Francoist Aldofo Contreras Sánchez was the new head of state. Sánchez would oversee the change to a multiparty system, as well as the drafting of a new constitution—a process that is often viewed by TJ scholars as a model of elite negotiation and compromise in transition.²²⁰

With negotiations underway, a number of other changes occurred under the Royal Decree 393/1976 and through local legislation. These changes increased the transparency of local administrative processes and made candidate lists public, as well as moved from an application process tainted by pre-screening by the ruling part, to one based more on a candidate’s individual merit.²²¹ Although none of these opened past files, they “corrected” a wrong by legislating open processes for the future. Under Teitel’s aforementioned definition of TJ being both backward and forward looking, these resolutions come up short; however, they are an important part of understanding the transition and the legal elements behind it.

Indeed, 1976 and 1977 brought important changes for understanding the Spanish transition. These include the emergence of the Alianza Popular, a right wing political party; the dissolution of the Francoist law court, “the Tribunal de Orden Publico,” followed by Royal Decree 2/1977, which set up new courts; and a follow-up Royal

²²⁰ Gunter

²²¹ Some examples are: BOE-A-1977-15386 (dealing with librarians, archeologist and archivists), BOE-A-1976-18845 (dealing with those excluded from the merit based schooling), BOE-A-1976-18846 (dealing with those accepted into higher education tracks).

Decree 9929 that created new courts. Royal Decrees began to gain weight and made the feeling of change inevitable. They also began to use human rights language, such as the Royal Decree 2273/1977 that reformed all criminal institutions.

It was the promise of all these changes that spurred a push for amnesty, especially with all the Francoist still in power.²²² Under Franco, amnesties were ruled out and what can be viewed as victor's justice was doled out generously. Given this legacy, Spanish society thought that perhaps nothing was as sharp a departure from the past as amnesty. By July 1976, more than a year before the formal amnesty, there was a Royal Degree on the matter. Indeed, the text of the decree featured language similar to modern TJ goals:

It is one of [the Crown's] principle missions to promote the reconciliation of all the members of the nation, ending in this way all the diverse legislative measures, which from the 1940s have sought overcome all differences among the Spanish people.²²³

The Crown's words would end with full amnestied legislation at the end of 1977, some five months after the ICCPR came into effect. How ironic that in using democracy as a goal, Spain both ratifies the ICCPR and then proceeds to pass a measure that prohibited citizens from exercising their rights to be heard in court, violating Article 2.3 of the same.²²⁴ Yet, it is understood under international public law that a country is penalized mostly by itself and there have been many cases under which a blind eye has been given to breaks on treaty obligations.

²²² Chichón Álvarez, "Justicia Trancional" 62

²²³ <http://www.boe.es/boe/dias/1976/08/04/pdfs/A15097-15098.pdf>

²²⁴ For a full discussion on Spanish international obligations and the amnesty law see: Javier Chinchón Álvarez, "Transición Española y la justicia trancional: ALSO, it has been criticized for its legacy of impunity in setting a bad precedence for countries such as Argentina, Uruguay among others and its validity has been questioned, see Chichón Álvarez, "Justicia Trancional" 64

The Ley 46/1977, or the Law of Amnesty, constitutes a main hurdle today for any judicial process. The law was passed by the first democratically-elected congress and served more for the purposes of reparation, such as those realized by political prisoners, than for the points of political and civil contention that it has come to represent in recent years: Article 3 (f) and (e). These two clauses insert into the amnesty any governmental authorities, functionaries, and agents. However, the underlying text missed, that in doing so, that injustice and the perpetration of silence would occur. It was discrimination by default.²²⁵ The same congress that adopted the amnesty law, adopted the new constitution and in some ways the lack of questions can be viewed as a desire to transition to democracy, not a lack of desire to look at the past or to obtain justice on the behalf of the Spanish people.

It can be argued that such a temporal logical compromise in modern terms should be viewed as “judicial foolishness” and one that should have garnered attention from IOs.²²⁶ And indeed, as Javier Chinchón Álvarez explains, the UN did reprimand the law in Spain, but not until 2008 in the passing of what has commonly become known as the “Law of Historical Memory.”²²⁷ The UN’s note joined the chorus that by 2008 included public exhortations against the 1977 law and pro-TJ processes by IOs such as the EU and Amnesty International. The October 27, 2008 UN report included a plea not only for Spain to repeal the 1977 law, but also for a truth commission mandate and the recognition of rights for families to indentify and receive reparations.²²⁸ Yet as previously mentioned,

²²⁵ Since it failed to acknowledge major reparations for the part of the population that have been labeled as associates of the Republicans.

²²⁶ See Chinchón Álvarez expansion on the reaction of by the UN to the Uruguay impunity laws, “Justicia Trancional” 64

²²⁷ Chinchón Álvarez, Justicia Trancional”, 66

²²⁸ http://www.un.org/en/events/pressfreedomday/pdf/Report_of_the%20HRC_A_64_40.pdf, pg. 87

part of the amnesty law, as well as subsequent laws, can be viewed in modern terms as “reparatory.”²²⁹ In his analysis, Chichón Álvarez includes Royal Decree Law 6/1978, which reached back as far as restoration of pre-1936 military service, and Law 5/1979 which awarded pension rights to all the families of “the fallen Spaniards due to or because of the Civil War.”²³⁰ In this light, these laws could be taken as TJ measures, except for the fact that that they were meant to address future problems rather than past crimes.

The aftermath of the 1977 Amnesty Law, including other judicial legislation and even to a degree aided to the historical push toward democracy, set the foundation for understanding the pushes and pulls in Spain’s current TJ debate. For example, the Royal Decree Law 44/1978 and the Law 10/1980 dealt specifically with creating a judiciary that operated independently above the political fray. Also less than a month after the Amnesty Law passed, Royal Decree 2761 reorganized the Presidency to include the Archivo General de la Guerra Civil Española, The General Archive of the Spanish Civil War, making it part of the Ministry of Culture. Although some files seem to be missing or lost, there are archives and files which were simply “set aside” and not made public. Today, one of the major issues has become the lack of transparency, not only concerning the Franco period, but also the democratic transition. While there is much talk about breaking the “Pact of Forgetting,” there is also an underlying debate that it is not forgetting that was agreed upon, but that silence was the price for moving forward.

²²⁹ Apart from the laws expanded on here see: Royal Decree Law 6/1978 and Law 37/1984 (military personnel), Law 35/1980 (deals specifically with mutilated Republicans), Royal Decree 8/1980 and Law 6/1982 (dealing with backed pension rights), Law 42/1981 (seeking fiscal equality),

²³⁰ Chinchón Álvarez, *Justicia Trancional*, 66

The legislature passed subsequent “reparatory” laws to deal with some of the imbalances created by the 1977 law. The first notable one was Law 19/1984, which recognized under social security any time spent in prison due to acts by personnel pardoned under the 1977 law. Law 4/1986 addressed returning trade union legacies and Law 24/1986 with the reestablishment of military personnel. From Law 4/1990 to the budgets of 1992, amendments passed to give monetary reparations to anyone imprisoned for more than three years due to “the alleged cover by the Law 46/1977” and who were older than 75 years by the end of December.²³¹ Almost 12 years later in 2002, Congress recognized for the first time the rights of not only Civil War victims, but also those targeted by the Franco regime.²³²

During those 12 years of seeming silence in Spain with respect to the 1977 law and full silence about the possibility of opening judicial proceedings, a number of changes took place in how the international community understood transitions. There were no longer transitions to democracy, but these were viewed in the light that any democratic state must deal with the past. Another important point is the power that civil society amasses under democracy and a uni-polar (or multi-polar) world system. Although this paper is not focused on exploring all of its effects, civil society is indeed an increasingly active player in TJ internationally, with organizations such as Freedom House, Amnesty International and International Justice Mission gaining considerable clout. Before jumping into the current issues of TJ and how time has not made these disappear, this paper will now examine Hungary’s transition to provide more evidence

²³¹ Chinchón Álvarez, *Justicia Trancional*”, 66

²³² *Ibid*, 68

that supports the conclusion that time indeed has not helped in forgetting, but in remembering in such a way that TJ becomes politicized.

3.2.1 The Pinochet Effect

An examination of Spain's legislative record and popular culture memory reveals that the Amnesty Law— although it served as a stop gap measure—was never effective at making the Spanish forget their past. However, nothing served as a better catalyst for dealing with that past than as the so-called “Pinochet Effect.” General Pinochet ruled Chile with a hard hand during the time of Franco in Spain. When his dictatorship fell, Chile introduced a blanket amnesty in 1978. However, it also ordered a truth commission among all the public debate.²³³ These human rights deliberations led to proceedings against Pinochet in 10 countries, shedding light on more investigations as foreign governments opened their archives and revealed records kept on Pinochet.²³⁴ At the same time, TJ processes around Latin America paved the way for lifting amnesty laws. The “Pinochet Effect”²³⁵ touched off the “Garzón Effect,” when in 1998 Spanish judge Baltasar Garzón opened investigations under “universal jurisdiction.”²³⁶ Cases against Pinochet were brought to the Spanish court as early as 1996, but Garzón brought international attention by issuing an arrest warrant and pursuing the case when Pinochet fled to the UK.²³⁷

²³³ Louise Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide*, (Hart Publishing: USA, 2008), 311-312.

²³⁴ Jose Zallaquet, “The Pinochet Case: International and Domestic Repercussions,” Alice Henkin ed. *The Legacy of Abuse: Confronting the Past, Facing the Future*, Aspen Institute: Washington, DC, 2002, 53.

²³⁵ Reed Broody, “One Year Later, The ‘Pinochet Precedent’ puts Tyrants on Notice,” HRW, October 14th, 1999, <http://www.hrw.org/en/node/70830>

²³⁶ Zallaquet, 53.

²³⁷ Roth-Arriaza, 48

The Spanish courts allowed proceedings to continue, ruling that domestic amnesties from other states did not satisfy Spanish law and were not binding.²³⁸ This decision made Spain the most proactive country in “implementing its domestic universal jurisdiction legislation to investigate perpetrators of human rights abuses committed elsewhere that have been shielded by a national amnesty.”²³⁹ The irony of this decision was not lost on the Spanish people, who became fascinated with the case, devouring hundreds of articles on Pinochet between 1996 and 1998.²⁴⁰ Spanish journalist Francisco Umbral said Spanish were interested in Pinochet’s case because, “Pinochet’s arrest is the vicarious dream of a historical impossibility, that of Franco being arrested in bed.”²⁴¹ Although the Spanish government tried to stay neutral, accusations emerged that its silence meant support for Pinochet and therefore a “pro-Franco ideological attitude,”²⁴² Amid the political debate, a civil society movement emerged, with its official beginning culminating with journalist Emilio Silva’s op-ed in *La Crónica de León* on October 8, 2000 titled “My Grandfather Was Also a Disappeared.”²⁴³

Silva’s point was simple: there was a desire from the Spanish people to know the truth, and most importantly, a way to know. Silva recounts his efforts— through courts, legislation, and asking townspeople—to find his grandfather’s unmarked grave where the remains were kept ‘secret.’ That same year, Silva became a founding member of the Asociación para la Recuperación de la Memoria Histórica, or Association for the Recovery of Historical Memory. ARMH aimed to locate and identify the victims of

²³⁸ Ibid, 52

²³⁹ Mallinder, 302

²⁴⁰ Davis, 868

²⁴¹ Ibid, 868-69

²⁴² Ibid, 869

²⁴³ Emilio Silva, “Mi Abuelo También Fue un Desaparecido,” *Algo Más*, <http://www.derechos.net/esp/algomas/silva.html> Last accessed June 1st, 2011

repression under the civil war and the Franco regime.²⁴⁴ The exhumation of Silva's grandfather, along with 12 other victims who shared the grave, became the first in a number of inquiries, exhumations and pushes for Spain to examine its past.

The ARMH proved to be a catalyst, not only for domestic processes, but also for international proceedings when it referred cases to the UN Working Group on Enforced or Involuntary Disappearances in August 2002. The ARMH argued that Spain's refusal to acknowledge the past and support investigations perpetuated discrimination against the losing party from the civil war and constituted "non-compliance with its obligation to investigate and to guarantee a right to the truth."²⁴⁵ The right to truth had been recognized by The Inter-American Commission on Human Rights (IACHR) in 1997, citing the ACHR and interpreting it as "imposing duties on the state to ensure rights to bodily integrity, to truth, and to mourn. The right to truth, in particular, created an obligation on the state to provide every means possible to find out what had happened thereby to provide answers to the families and the society."²⁴⁶ Therefore, such a reference from a Spanish NGO carried weight in the tribunal and resulted in a recommendation by November. However, the recommendation was weaker than expected, mentioning only cases after 1947 when the UN was established.²⁴⁷

Pressure on the government resulted in a parliamentary resolution that formally condemned the right-wing uprising that led to the civil war and extended "moral recognition" to the victims in November 2002.²⁴⁸ By October 2004, around 300 bodies

²⁴⁴ "Emilio Silva," *Centre de Cultura Contemporània de Barcelona*, <http://www.cccb.org/en/autor-emilio-silva-35926>. Last accessed June 1st, 2011.

²⁴⁵ Davis, 873

²⁴⁶ Roht-Arriaza, 43

²⁴⁷ Davis, 874

²⁴⁸ Ibid, 859

had been exhumed, mainly a result of ARMH which now had chapters and volunteers across Spain.²⁴⁹ That same year, a royal decree created an inter-ministerial commission to investigate the ‘moral and legal rehabilitation’ of thousands of civil war and Franco regime victims.²⁵⁰ The commission’s suggestions constituted much of what became the 2007 Law of Historical Memory.²⁵¹ Part of the ARMH’s push for a national legislation had to do with a lack of a victims list and restricted access to military and other archives.²⁵²

The government’s recognition in 2002 that led to the 2007 law was anchored in a polarized political climate. The Popular Party, associated with the rightist legacy of Franco’s regime, was in charge in 2002 and showed great hesitancy to move forward with any major legislation. But April 2004, Spain’s Socialist Party took control, raising expectations that the Prime Minister, José Zapatero, whose grandfather was a victim of the Franco regime, would push for legislation.²⁵³ It also opened floodgates of criticism that had been mounting with ARMH investigating graves, the criticism being that Spaniards were breaking the Pact of Forgetting by opening graves and looking into the past.²⁵⁴ That same year, however, there was little doubt that something had to be done. First, a number of organizations released a joint report invoking “Spain’s obligations under international law and placing Francoist repression firmly within the ambit of developing international human rights law, in a manner clearly influenced by the

²⁴⁹ Ibid

²⁵⁰ Mallinder, 52

²⁵¹ Mallinder, 52

²⁵² Davis 861

²⁵³ Paddy Woodworth, “Spain’s ‘Second Transition’: Reforming Zeal and Dire Omens,” *World Policy Journal*, Fall 22.3 (2005): 69-71.

²⁵⁴ Giles Tremlett, “Franco repression ruled as crime against humanity,” *The Guardian*, October 17th, 2008, <http://www.guardian.co.uk/world/2008/oct/17/spain>

international prosecutions of Pinochet and others.”²⁵⁵ By 2007 Law on the Historical Memory was passed and well received, but it came with a number of precautionary clauses and questions about where exactly it would lead.

The law became the first formal condemnation of Franco, the civil war activist and the dictatorship.²⁵⁶ The stated objective was to “recognize and widen the rights of those who suffered persecution or violence for political, ideological or religious reasons.” The law called for the removal of Francoist symbols from public places, for facilitating the exhumation of mass graves, and for delegitimizing the trials conducted against civilians by Franco forces.²⁵⁷ In many ways, the law merely codified an existing process, giving a voice to the silent clean-up of the decades before it.²⁵⁸

Yet the law did not reverse or address the Amnesty of 1977 and the government, as well as civil society, seemed to agree that no persecutions would occur. The ARMH maintained during all its dealings that it did not seek “to blame or punish surviving perpetrators of repression.”²⁵⁹ In a *New York Times* interview, Marcos Ana, the famed Spanish poet and political prisoner under Franco, commented on new law: “We’re not looking to blame anyone, but we want to be recognized...Amnesty is one thing, but amnesia is another.”²⁶⁰ The government also tried to reconcile these two laws, with the vice-president, María Fernández de la Vega, clarifying the official stance in December 2006:

²⁵⁵ Davis, 875

²⁵⁶ Guarino, 67

²⁵⁷ Ibid

²⁵⁸ Michael Kimmelman, “Abroad; In Spain, a Monumental Silence,” *New York Times* January 13th, 2008, <http://query.nytimes.com/gst/fullpage.html?res=9507E2D8123BF930A25752C0A96E9C8B63&scp=2&sq=Main%20point%20of%20Spain%27s%20Historical%20Memory%20law&st=cse&emc=eta1>

²⁵⁹ Davis, 872

²⁶⁰ Victoria Burneet, “Bill in Spanish Parliament Aims to End ‘Amnesia’ About Civil War Victims,” *New York Times*, October 28, 2007 <http://www.nytimes.com/2007/10/28/world/europe/28spain.html?emc=eta1>

Also, I do not wish to enter in discussion, which would be lengthy, of not losing sight of the international norms which are constantly referenced with regards to the Amnesty inform that which has come to be called transitional justice, that is to say, a normative set of international character that intends to secure, of course, the respect of human rights, in conflict resolution, and the processes of transitioning regimes which have used violence systematically and arbitrarily to democratic regimes, in order to strengthen in such a way a new State of rule of law, that is what these norms are. From this point of view, there is no parallel with the situation of our country, which has done exemplarily and with great success its transition 30 years ago, a transition which was worth great respect and international renown and that has enabled us to enjoy the longest period of liberty and prosperity.²⁶¹

The remarks garnered numerous critics who pointing out that the Spanish amnesty law fell short and was contrary to many principles of international law.²⁶² Once more the contradiction and irony would lead the next great chapter.

3.2.2 Spain is brought to Court by Spain

On October 16th, 2008 Judge Garzón, who had previously been one of the judges behind the indictment of Pinochet, ordered formal criminal investigations against Franco declaring the repression under the Civil War and Franco until 1952 “crimes against humanity.”²⁶³ In a sixty-eight page document, Garzón accepted a petition by thirteen associations of Republican victims’ families seeking information on their disappearances.²⁶⁴ Though he ultimately ended up dropping the charges on November 18th, 2008, Garzón’s decision was viewed as a “symbolic blow” due to “a lack of political will...to push for reckoning with Spain’s dark past.”²⁶⁵ Garzón declared himself

²⁶¹ Javier Chinchón Álvarez, “Transición Española y justicia transicional: Qué papel juega el ordenamiento jurídico internacional en un proceso de transición? A propósito de la coherencia, buena fe y otros principios de derecho internacional postergados en la transición política de España” *Entelequia* No.7 (2008):342.

²⁶² Chinchón Álvarez, “Transición Española y justicia transicional,” 343.

²⁶³ Tremlett, “Franco repression ruled as crime against humanity”

²⁶⁴ Angela Guarino, “Chasing Ghosts: Pursuing Retroactive Justice for Franco-Era Crimes Against Humanity,” 33 *B.C. Int’l & Comp. L. Rev.* 61 (2010): 63 <http://lawdigitalcommons.bc.edu/iclr/vol33/iss1/4>.

²⁶⁵ Victoria Burnett, “Spanish Judge Drops Inquiry into Atrocities of Franco and his Allies,” *The New York Times*, Nov. 19, 2008, <http://www.nytimes.com/2008/11/19/world/europe/19iht-19spain.17947759.html>

competent to look into 114,000 killings and ordered the exhumation of 19 graves—which after his retraction, he passed responsibility to the local courts.²⁶⁶ The prosecutor raised a formal appeal on Garzón’s jurisdiction over crimes covered by the 1977 Amnesty Law and for which the statute of limitations had long expired.²⁶⁷ Garzón dropping the proceedings served to mobilize Spanish as well as international opinion.

The case brought back renewed international criticism of Spain’s application of universal jurisdiction over similar crimes on its own soil that it dared not prosecute.²⁶⁸ That same month of the indictment, UNHRC recommended the repeal of the Amnesty law and proposed that a truth commission be established.²⁶⁹ The report also recalled that, as of April 27, 1977, Spain was party to the ICCPR and observed that Article 7 ICCPR (the prohibition of torture) permitted no amnesty for such acts, and that Article 2 required the appropriate authorities to investigate such cases.²⁷⁰ Garzón himself had used this wording in defending the case and positing that amnesty was irreconcilable with Spain’s international obligations. He also cited the 1984 Council of Europe Parliamentary Assembly Resolution which indicates enforced disappearances are crimes against humanity that cannot be covered by amnesty laws.²⁷¹

The possibility of successfully trying the 34 indicted alongside Franco as members of that regime is minimal. Not only are most of them dead, but also the case has also to be justified against: due process concerns, the *nullum crimen sine lege* principle, statute of limitations (though this does not apply to crimes against humanity), and the

²⁶⁶ Ibid

²⁶⁷ Guarino, 63

²⁶⁸ Ibid, 68

²⁶⁹ UNHRC, 94th Sess. at 2, UNDOC CCPR/C/ESP/CO/5 (Oct.13-31, 2008), 2 <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/401/33/PDF/G0940133.pdf?OpenElement>

²⁷⁰ Ibid

²⁷¹ Guarino, 73

1977 Amnesty Law.²⁷² Angela Guarino posits that as Spain is party to the Rome Statute and ICCPR, it should seek to meet its obligations by following the UNHRC's suggestion of setting up a truth commission.²⁷³ No real push, however, has been given for such a measure. That said, the issue became even more politicized when in 2010 the Supreme Court allowed the indictment of Garzón for exceeding his legal purview.²⁷⁴

This indictment brought to light the stark differences in opinion within Spanish politics about accountability for abuses committed under Franco. It also attracted international attention – Human Rights Watch pointed out that the quick proceedings against Garzón were ironic in light of the slow undertakings to deal with its past.²⁷⁵ Amnesty International also denounced the proceedings stating that with Garzón's indictment, Spain had ceased to lead the fight against impunity.²⁷⁶ Furthermore, two months later, international human rights groups came together to petition the UN's support for Garzón “[i]nvoking the fundamental principle of the right to an independent and impartial judiciary”²⁷⁷ The UN asserted concern's over Garzón's indictment and asked that states remember the illegality of forced disappearances as violations of human

²⁷² Ibid, 71-80

²⁷³ Ibid, 81

²⁷⁴ Andrés Cala, “Spain Allows Case Against Noted Judge,” *New York Times*, March 26th, 2010 <http://query.nytimes.com/gst/fullpage.html?res=9E04E2DB1E3DF935A15750C0A9669D8B63&ref=franciscofranco>. See also, Raphael Minder, “Spain: Noted Judge Charged With Abuse of Power,” *New York Times*, April 8th, 2010.

²⁷⁵ Ibid

²⁷⁶ Natalia Junquera, “Amnistía Internacional denuncia ‘el retroceso de España en la lucha contra la impunidad,’” *El País*, November 10th, 2010. http://www.elpais.com/articulo/espana/Amnistia/Internacional/denuncia/retroceso/Espana/lucha/impunidad/elpepuesp/20101015elpepunac_25/Tes

²⁷⁷ “International Legal and Human Rights Groups Petition UN to Support Spanish Judge Baltasar Garzón and Independence of Judiciary,” *International Federation for Human Rights*, May 26th, 2010, <http://www.fidh.org/International-Legal-and-Human-Rights-Groups>

rights.²⁷⁸ Due to his national suspension pending trial, Garzón sought permission to work for the ICC and was granted it.²⁷⁹

Amidst all the political back and forth about the legality of Garzón's actions, in an ironic move pro-Garzón groups in Argentina decided to interrogate Franco's regime in Argentinean courts under the same principles sponsored by Garzón.²⁸⁰ The ARHM sought Spanish decedents residing in Argentina to bring a petition, and is said to have "many hopes" for the possibility of a trial.²⁸¹ Basing their argument on the principle of universal jurisdiction, in September 2010, two Argentines were able to open proceedings against Franco's regime.²⁸² It is ironic that the principle of universal jurisdiction, which Spain helped cement, is precisely the principle that makes it impossible to forget its past.

²⁷⁸ Natalia Junquera, "Representantes de la ONU muestran su "preocupación por la suspensión de Garzón," May 26th, 2010

http://www.elpais.com/articulo/espana/Representantes/ONU/muestran/preocupacion/suspension/Garzon/elpepuesp/20100526elpepunac_24/Tes

²⁷⁹ José Hernández "El Poder Judicial autoriza el traslado de Garzón a la Haya," *El País* May 18th, 2010 http://www.elpais.com/articulo/espana/Poder/Judicial/autoriza/traslado/Garzon/Haya/elpepuesp/20100518elpepunac_31/Tes

²⁸⁰ "Argentina tries probing crimes of Franco's Spain," *USA Today*, April 4th, 2010 http://www.usatoday.com/news/world/2010-04-14-argentina-spain-franco_N.htm

²⁸¹ Ibid

²⁸² "Argentine court reopens Franco probe," *BBC* September 4th, 2010 <http://www.bbc.co.uk/news/world-latin-america-11189926>

Conclusion

The developments in Spain and Hungary demonstrate the irony that as governments tried to promote forgetting, it was due to their policies that people not only remembered but began to press for truth. Both Spain and Hungary have declared themselves fully democratic countries post transition, abiding by rule of law. Spain became the biggest sponsor of universal jurisdiction despite the fact that it had not dealt with its own past, which ironically led to the reopening of inquiries. Furthermore, this thesis points out that even though the Amnesty of 1977 signaled an agreement to forget, laws that dealt with questions of the past continued to be enacted up through 1992. As for Hungary, its Constitutional Court can be praised for its strict adherence to the rule of law. The irony in this case rests on the fact that such strict interpretations have not resulted in peaceful justice, but in finger pointing and politicization of legislation.

This thesis challenged the claim that the passage of time quells popular desire to (re)examine the past. Rather, as confidence in democratic stability increases, it becomes easier for the public to criticize the past – with citizens no longer silenced by the fear that exists in the immediate, post-transition phase. Spain provides a model example as “the Pact of Forgetting”—the unspoken agreement initiated by the 1977 Amnesty—fell apart in the early 2000s with civil society groups exhuming mass graves from Franco’s regime. A smooth transition to liberal democracy under this agreement hinted that forgetting could be a viable way to deal with the past. However, a closer look at Spanish legislation and culture suggests that “forgetting” was the wrong way to describe the transition. Silence is more accurate. The solidification of the international transitional justice field raised expectations for how nations were to deal with their pasts and also provided a venue to air grievances.

I can therefore posit that the passage of time makes calls for TJ processes more likely as channels become more readily available. One clear example stems from the actions of the ARMH, which first brought their case against the Spanish government to the UN and then sought criminal proceedings abroad in Argentina. In Hungary, despite of growth of disillusionment with lustration laws, there is a continued need to know movement led by individuals like Kenedi or institutions like the Emlékpont museum. The TJ process in Hungary, however, also lends credence to the claim that delayed TJ processes stand a much higher chance of being politicized to the detriment of justice demands. Although lustration laws passed in 1994, 1996, and 2001, each process brought delays and pitted one party against the other. In Hungary, lustration became a form of public blackmail, even as one of its aims was to prevent blackmail.

These arguments, however, must be placed within the modern context, as Lawson posited when developing his transitology theory. Detailed accounts of TJ history from Elster, Teitel and Page demonstrate that, within modernity, the field of TJ has solidified from practices of states into precise expectations for how countries must deal with their pasts. A deep analysis of these two transitions demonstrates a correlation between time, politics, and the development of the TJ regime. Wider research into these areas could provide a more conclusive answer, as well as demonstrate some of the variances, because TJ is sponsored not only by the international community, but by states themselves. In this light, this thesis contribution is found in by utilizing think description to analyze the transitions of Hungary and Spain.

However, this is the area that may invite the most criticism to the thesis because a deep search into the transition process can obscure a wider view of the larger mechanisms present. Secondly, given the scope of this thesis—the question posited as one that merits additional research and application—it is hoped that setting up a framework will inspire further analysis. Utilizing thick descriptions also countered more succinct ways to explore the theory.

This thesis proves it might be easier to forgive than to forget.

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