

# Mechanisms and Contexts of Transitional Justice in Spain and Taiwan: A Comparison

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## Abstract

Spain and Taiwan have highly similar historical backgrounds and made similar policy choices in their respective past dictatorships and subsequent periods of democratic transition. During the period of democratic transition, both states chose to respond to past human rights violations in a more reserved manner instead of taking on a punishment model. Some scholars suggest that the period of democratic transition does not end until transitional justice is fully completed. Therefore, this article marks the first election after the end of dictatorship as the beginning of democratization and observes the official measures undertaken by Spain and Taiwan dealing with past human rights violations thereafter. Spain passed the Amnesty Law in 1977 to prohibit any investigation of past crimes; Taiwan passed several compensation acts in the 1990s, mainly aimed at monetary compensation for political victims.

Interestingly, the attitudes and achievements of Spain and Taiwan have changed significantly over the course of several decades. Spain passed the 2007 Historical Memory Law and drafted a bill, the Democratic Memory Act, in 2020. Taiwan has since passed several transitional justice-related laws, and even established the Transitional Justice Commission, which functions as a truth commission, taking the initiative to investigate the truth.

This article aims to analyze two issues. What are the contextual factors for Spain and Taiwan when addressing transitional justice during democratic transition and what are those which are applicable once progress has been made many years later? What efforts have Spain and Taiwan made and what is still to be done in the future? This article argues that three essential factors

have shaped the recent achievements of transitional justice in the two states: the nature of their democratic transition, the efforts of civil society, and the interaction of political power. Notably, however, as such progress has been dependent upon these various factors, the recent achievements in both states are full of instability. States must carefully examine the compatibility of transitional justice projects with international human rights law. Otherwise, these efforts will result in political retaliation, or even worse, risk being overturned when political power is transferred.

### **Keywords**

transitional justice, Taiwan, Spain, Democratic Memory Act, Act for Promoting Transitional Justice

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## **I. Introduction**

In transitional justice projects across different countries, there are often calls to prosecute perpetrators of dictatorships. It was suggested that international law imposes affirmative duties to punish human rights violence, and amnesty laws are not permissible. In this perspective, prosecution plays a vital role in ending state violence and promoting the consolidation of democratic transitions (Orentlicher, 1991: 2542). In other words, prosecution is the most effective mechanism against future repression (Orentlicher, 1991: 2542). The purpose is to prevent it from happening again, and simultaneously, to inspire the public to reaffirm the fundamental principles of respect for the rule of law as well as for the values of human rights.

However, Article 2(3) of the International Covenant on Civil and Political Rights (hereinafter “ICCPR”) obligates State Parties to “ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy,” even that violations have been committed by the state, which shall be “determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State”, and enforced by “the competent authorities” (International Covenant on Civil and Political Rights, 1996: art. 2(3)), that is, it does not obligate State Parties to merely resort to criminal proceedings when addressing the human rights atrocities of past regimes. Truth

commissions, which are often compared with trials, also serve the functions of investigating the truth and clarifying accountability. The objective of a truth commission is sanctioned fact finding, including the establishment of an accurate record of the past, and the clarification of uncertain incidents (Hayner, 2011: 20).<sup>1</sup> It aims to “lift the lid of silence and denial from a contentious and painful period of history” through the investigation of the involvement of perpetrators in abuses, and the disclosure of critical information and archives from perpetrators or the system of repression (Hayner, 2011: 20).

Even so, it is worth noting that in the case of Spain, the United Nations (hereinafter “UN”) human rights bodies have repeatedly condemned its 1997 Amnesty Law and the 2007 Historical Memory Act (Reuters, 2013), which was passed during the Spanish democratic transition, and stressed the need for the participation of a judicial body, in its transitional justice project. In 2020, in an appropriate political climate and in response to international and domestic pressures, the Spanish government approved the draft bill of the Democratic Memory Act, which is an extension of the 2007 Historical Memory Act and will annul the ideological convictions endorsed during the Franco regime (La Moncloa, 2020; Deshmukh & Parekh, 2020).

Taiwan’s authoritarian era was led by the Kuomintang (hereinafter “KMT”). The transitional justice policies adopted afterwards during the democratic transition which is known as the “Quiet Revolution” are highly similar to those of Spain. After the Democratic Progressive Party (hereinafter “DPP”) took office in 2016 and with the establishment of legislation relating to transitional justice and the Transitional Justice Commission (hereinafter “TJC”), Taiwan actively conforms to international human rights standards and its transitional justice project is in full swing.

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1 Ruti Teitel makes three observations about the current directions in transitional justice developments.

1. In post-Cold War phase, transitional justice has been closely associated with diverse nation-building projects and related local understandings of the rule of law and legitimacy, “sacrific[ing] the aims of ideal justice for the more limited ones of assuring peace and stability.”
2. The contemporary transitional justice reflects its association with globalizing politics, implying a complex interaction of the international, national, and local. This orientation put emphasis on a historical orientation of society (preservation and record-keeping).
3. The recent evolution is associated with contemporary political developments, which have shaped the expansion and normalization of transitional justice (i.e., the expansion of the humanitarian law regime and the establishment of International Criminal Court).

*See generally* Ruti G. Teitel, *Transitional Justice in a New Era*, 26(4) *Fordham International Law Journal* 893 (2002).

International human rights developments, domestic advocacy, a suitable political climate, and international networks were necessary to reach the current status in both Spain and Taiwan. It is worth noting that the democratization processes and the development of transitional justice in both states were largely dependent on the relentless efforts made by civil society. The strong foundation that civil society had built is not merely a domestic institutional framework. In contrast, with their “transnational natures of agency,” civil society groups had built an “intermediating transnational regime” where the state can align itself with international human rights and democracy standards (Chang, 2009: 229).

This paper aims to analyze several questions: What are the factors that have contributed to the progress of transitional justice in Spain and Taiwan both during and after their democratic transitions? What actions did these two states take and what are the future prospects for transitional justice in them?

## II. Historical Narratives of Dictatorship and Democratization: Spain and Taiwan in Comparison

### A. Spain

Francisco Franco’s dictatorship in Spain lasted from 1939 to 1975. It began after the Civil War (1936-1939) broke out between the Republicans and the Nationalists, the latter led by Franco (Hajji, 2014: 84). During the Spanish Civil War, tens of thousands of people were killed as the result of both legal and extrajudicial executions (Aguilar, 2008: 419). In the immediate post-war years, as part of a deliberate system of revenge, the violence continued, and it is estimated that the Franco regime executed approximately 50,000 people (Aguilar, 2008: 419), with over 300,000 people detained in Francoist concentration camps (Aguilar, 2008: 419). Around 440,000 Republicans were exiled, with around 10,000 dying in Nazi concentration camps (Hajji, 2014: 84). During Franco’s dictatorship, trials, executions, torture, arbitrary detention, disappearances, forced labour for prisoners, and murder in secret occurred regularly.

Upon Franco’s death in 1975 and during the subsequent democratic transition, there were massive and worldwide waves of protests calling for democratization and amnesty<sup>2</sup>. Even so, in the period of democratic transition,

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2 His death occurred in a political crisis that caused a worldwide wave of protests, such as the torching of the Spanish embassy in Lisbon. (Threlfall, 2008: 939).

Spain did not take any accountability measures as its transitional justice mechanism (Hajji, 2014: 84-85). Instead, Spain adhered to an unwritten pact, which was known as the “*Pacto del Olvido* (Pact of Forgetting)” (Tremlett, 2007). To democratize, the pact was a commitment imposed by political elites. It included institutionalized collective amnesia about the past to silence any reference to the mass human rights violations during the Civil War and the subsequent dictatorship (Encarnación, 2008: 437). After Franco’s dictatorship, the first democratic Parliament passed the first law, an Amnesty Law, in 1977, aiming to shield this past against any judicial proceeding by pardoning all political crimes, including those committed by the Franco regime against its enemies (Aguilar, 2008: 419-420). This consolidated the Pact of Forgetting. As a result, Franco’s followers received an official promise that none of them would be held to account. Several compensatory measures followed: from 1976 to 1984, several laws were passed providing economic support and rehabilitation for those wounded in war, widows and orphans, and members of the military and the forces of public order from the Republican side (Aguilar & Ramírez-Barat, 2016: 58-59). However, none of these laws was with regard to the establishment of truth or redress for gross violations of human rights. In sum, the heart of Spain’s transition to democracy was to turn the page of history and look to the future (Encarnación, 2008: 437), by means of silencing the truth—to help stabilize the new democracy while proactively investigating into past crimes would result in the reverse (Hajji, 2014: 84-85).

## B. Taiwan

In 1945, when Japan was defeated in World War II, the Republic of China (hereinafter “ROC”) government, which was then represented by the KMT, replaced decades of colonial rule in Taiwan but imposed harsher political repression on Taiwanese than during the previous era. In that year, after Chiang Kai-shek’s troops arrived in Taiwan, tensions began to rise between local people and new arrivals (Chang-Liao & Chen, 2019: 625). In 1947, conflict arising from this tension finally exploded on February 28 to become an “island-wide popular uprising against the Chinese provincial administration” (Chang-Liao & Chen, 2019: 625-626), and was then suppressed by bringing troops from the mainland of China (Chang-Liao & Chen, 2019: 625-626), thereafter referred to as the “2-28 Incident.” It was recorded that an estimated 18,000 to 28,000 Taiwanese were killed (行政院研究二二八事件小組, 1994). In 1949, after losing the Chinese Civil War, the

ROC government retreated to Taiwan, and imposed a martial law decree that would prevail for a long time (1949-1987) (Cheung, 2016). During the martial law era, the KMT government suppressed dissent and tortured political dissidents on the basis of vaguely-worded sedition laws (Huang, 2019: 88-89)<sup>3</sup> and court-martials (Chang-Liao & Chen, 2019: 626-627; Chen & Hetherington, 2020; Yang, 2019). It was officially recorded that approximately 29,000 political trials took place resulting in 3,000 to 4,000 executions during this period, which is now referred to as the “White Terror” (Chang-Liao & Chen, 2019: 625). In 1975, Chiang Kai-shek died and was succeeded by his son, Chiang Ching-kuo (Reuters, 2011).<sup>4</sup> In 1984, Chiang Ching-kuo hand-picked Lee Teng-hui as Vice-President to eventually succeed him in 1988.

In the late 1970s, political activism kept rising while Taiwan was still under martial law. People calling for democratization organized themselves and spread the objectives of democracy in different ways. This was known as the *Dangwai*<sup>5</sup> movement. Finally, Taiwan lifted almost four decades of martial law in 1987. Lee was elected by the National Assembly as president in 1990, and was first directly elected as president in 1996 (Reuters, 2011). During the period of democratic transition, the Lee government passed two laws regarding political victims of White Terror: the 1995 Act Governing the Recovery of Damage of Individual Rights during the Period of Martial Law, relating to the reinstatement of political victims’ rights to serve in public office and to receive pensions; and the 1998 Compensation Act for Wrongful Trials on Charges of Sedition and Espionage during the Martial Law Period, which provides opportunities for retrial, but the original judgment would not be regarded as wrongfully decided if it would also be sustained according to the current law (Huang, 2019: 88-89). In 1995, the Lee government passed the February 28 Incident Disposition and Compensation Act, and established the Memorial Foundation of 2-28 to monetarily compensate political victims of the 2-28 Incident (Cheung, 2019).

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3 Such as 1949 Suppressing Rebellion Act, Article 100 of the Criminal Code before 1992, and 1950 Communist Espionage Prevention Act.

4 Chiang Kai-shek appointed his son, Chiang Ching-kuo, as Taiwan premier, raising the prospect of a “Chiang dynasty” and fuelling an underground Taiwan independence movement in 1972. Subsequently, dissidents formed Taiwan’s first opposition party, the Democratic Progressive Party [DPP] in 1986.

5 黨外, “outside the party”.

### C. The Similarities

Franco's and Chiang's dictatorships are both exemplars of right-wing authoritarianism. The former arose from the Spanish Civil War, while the latter arose from the Chinese Civil War. During the dictatorships, the *Falange Española Tradicionalista y de las Juntas de Ofensiva Nacional Sindicalista* and the KMT were the only legal parties in Spain and Taiwan respectively (秦胆, 2019). Both dictatorships prohibited association, assembly, procession and use of dialect (秦胆, 2019). Moreover, tens of thousands of people from these two states were killed, disappeared, arbitrarily detained, and tortured.

With the public desire for democratization and amnesty after Franco's death, the Spanish government reached a consensus to forget the past in the process of political compromise so as to democratize. The unwritten Pact of Forgetting in 1975 and the 1977 Amnesty Law set obstacles for the restoration and investigation of the crimes committed during Franco's dictatorship (秦胆, 2019). Similarly, Taiwan finally moved towards democracy with the efforts of civil society, but the former dictator still set obstacles for transitional justice. The National Security Act, the Assembly and Parade Act, and the Civil Associations Act, which Chiang Ching-kuo required the Legislative Yuan to pass before the lifting of martial law, also added obstacles to the correction of improper trials conducted during the authoritarian era (秦胆, 2019). In the 1990s, circumstances in Taiwan started to change during the democratic transition with the passing of several laws regarding political victims' rights. However, when people wanted an official apology for the 2-28 Incident, Lee declined, stating that people should "bury the hatchet and look toward the future instead of the past" (Cheung, 2016).

After many years, Spain and Taiwan have made significant progress in their transitional justice mechanisms. Yet, we have also learned that during the democratic transition, both states responded to past human rights violations in a silent way.



### III. The Evolution of Transitional Justice Mechanisms: Spain and Taiwan in Comparison

#### A. Spain: Amnesty Law weakens the Subsequent Progress and violates International Human Rights Standards

The evolution of Spanish transitional justice mechanisms can be divided into three parts: the 1977 Amnesty Law, the 2007 Historical Memory Law, and the recent development, the 2020 draft bill of a Democratic Memory Act.

After Franco's death, the Parliament passed the Amnesty Law in 1977. This was considered to be the fruit of a political consensus brokered by the political elites during the period of democratic transition (Humphrey, 2014: 32). The 1977 Amnesty Law freed political prisoners, and acknowledged the unequal treatment that had been given to the vanquished (Aguilar, 2008: 421). However, it officially codified the Pact of Forgetting and guaranteed impunity for public officials or agents who had participated in human rights violations under the Civil War and the Franco regime (Guarino, 2010: 66).

While the 1977 Amnesty Law granted an opportunity to evade the transitional justice process, Spain faced increasing pressure from civil society around 2000 (Guarino, 2010: 66-67; Hajji, 2014: 85). The Pinochet case (the charging of the Chilean dictator filed by Spain) raised public attention in 1998. Spanish citizens wondered why Spain would condemn foreign human rights abuses but fail to provide justice for its own victims. In addition, in 2000, a non-governmental organization (hereinafter "NGO"), the Association for the Recuperation of Historical Memory (hereinafter "ARHM") began to assist private initiatives in exhuming mass graves and investigating the disappearances (Memoria Histórica, 2020). Around 2006, a social movement for the recovery of historical memory occurred, and the Spanish public continued pressing the government to acknowledge the truth of human rights violations during the Franco regime (Guarino, 2010: 66; Hajji, 2014: 85; Escudero, 2014: 137).

In response, Spain formally acknowledged the actions of Franco's dictatorship as unjust for the first time by passing the Historical Memory Law in 2007 (Hajji, 2014: 85). This was deemed "a newfound momentum toward moving past the 'pact of forgetting'" (Guarino, 2010: 67). Its objective was to recognize and widen the rights of those who suffered persecution or violence for political, ideological or religious reasons (Guarino, 2010: 67),



and thus enhance the pensions of survivors and political prisoners and grant the exhumation of mass graves (Guarino, 2010: 67). The Law recognizes the “right to personal memory” as part of the legal status of citizenship. It extended several affirmative rights, such as the right to apply for an official and individual statement of reparation from the Spanish government, the right to obtain Spanish nationality for the descendants of those exiled during the dictatorship, and new measures for financial aid to victims (Escudero, 2014: 142-143). Yet, the Law had limitations. It did not mention historical or collective memory, nor did it set the basis for clarifying the truth and past human rights abuses (Hajji, 2014: 85). Under the Law, the right to truth was being privatized as it merely encouraged political authorities to give economic support to groups for the recovery of historical memory instead of setting up a mechanism to guarantee the implementation of transitional justice. This failure was severely criticized due to the absence of setting up a truth commission to investigate the past (Escudero, 2014: 143). In addition, the Law acknowledges that the summary trials conducted during the Franco regime were illegitimate but still holds them to be valid (Guarino, 2010: 67; Human Rights Council, 2014: ¶ 104(p)).

Evidently, the effective 1997 Amnesty Law and the modest 2007 Historical Memory Law could not satisfy the public. Public opinion and international NGOs (e.g., Amnesty International) argued that the laws did not go far enough to bring Spain in line with international norms (Faber, 2020). In 2009, the UN Human Rights Committee clearly stated that the 1977 Amnesty Law violated the ICCPR, and that the 2007 Historical Memory Law did not provide appropriate remedy and assistance to the families of the disappeared persons. The Committee strongly suggested that Spain should:

(a) consider repealing the 1977 amnesty law; (b) take the necessary legislative measures to guarantee recognition by the domestic courts of the non-applicability of a statute of limitations to crimes against humanity; (c) consider setting up a commission of independent experts to establish the historical truth about human rights violations committed during the civil war and dictatorship; and (d) allow families to exhume and identify victims’ bodies, and provide them with compensation where appropriate (Human Rights Committee, 2009: ¶ 9).

In response, Spain refused to repeal the 1977 Amnesty Law, claiming it was the first step towards reconciliation in Spain—that the Spanish

democratic transition had been highly praised on both domestic and international levels. The basic spirit of the democratic transition was the 1977 Amnesty Law and the subsequent 1978 Constitution. The 1977 Amnesty Law was a manifestation of transitional justice, that is, the result of the Spanish people's desire for reconciliation, which directly reflects the spirit of the 1978 Constitution and has been confirmed by the Spanish Constitutional Court (Human Rights Committee, 2013: ¶ 194; Escudero, 2014: 133-134). Therefore, the 1977 Amnesty Law did not intentionally aim at allowing victors to cover up their crimes during the dictatorship (Human Rights Committee, 2013: ¶ 195). In addition, any effective statute of limitations for past crimes did not breach Spain's obligations under the ICCPR as the Covenant could not be applied retroactively regarding actions that occurred prior to the entry into force of the Covenant for Spain (Human Rights Committee, 2013: ¶ 195). Coming to the Committee's suggestion of setting up a commission of independent experts to establish the historical truth about human rights violations, Spain responded with implementation of the 2007 Historical Memory Law, which was commonly commented on as being insufficient for transitional justice (Human Rights Committee, 2013: ¶¶ 200-221).

The Spanish position on trials of past perpetrators was also presented in its Supreme Court Decision in February of the same year (2012)—the Spanish Supreme Court rejected the possibility of investigating past human rights violence when citizens filed a complaint for crimes against humanity during the Franco regime (General Council Judiciary, 2012). Moreover, an internationally-known human rights judge, Baltasar Garzon, who had started to investigate the disappearances, was prosecuted for defying the 1977 Amnesty Law (Escudero, 2014: 124-125). Judge Garzon was eventually declared not guilty, but the Court also stated that it was legally impermissible to investigate disappearances (Escudero, 2014: 124-125). Later, Judge Garzon was disbarred by the Spanish Supreme Court on an unrelated charge (Reuters, 2012).

Nevertheless, international NGOs and the international human rights bodies continued to put pressure on Spain. Amnesty International submitted a briefing to the Committee on Enforced Disappearances (hereinafter "CED") for its forthcoming examination of Spain's state report, aiming to draw the CED's attention to Spain's breaches of its obligations under the Convention (Amnesty International, 2013). In 2013, the CED stated that

Spain should investigate all disappearances thoroughly and impartially, “regardless of the time that has elapsed since they took place;” and should take necessary legislative or judicial measures to remove any legal barriers to such investigations in domestic law, “notably the interpretation given to the Amnesty Act” (CED, 2013: ¶ 12). Furthermore, perpetrators should be prosecuted, and punished (CED, 2013: ¶ 12). Subsequently, the UN Human Rights Committee reiterated both the CED’s Concluding Observations and the fact that the 1977 Amnesty Act should be repealed or amended to fully comply with the ICCPR (Human Rights Committee, 2015: ¶ 21). Additionally, Spain should actively encourage investigations into past human rights violations, to identify, prosecute, and punish perpetrators, and establish a legal framework at national level for allowing the opening of archives on the basis of clear, public criteria (Human Rights Committee, 2015: ¶ 21).

Although the ICCPR does not oblige State Parties to merely resort to criminal proceedings when addressing the human rights atrocities of past regimes, the UN human rights bodies have repeatedly condemned the 1997 Amnesty Law, and stressed the need for investigation, prosecution, and punishment, in addressing Spain’s past human rights violations.

Recently, in response to such heavy international pressure along with civil society’s moves for her defence and recognition of human rights, Spain finally took another step in 2020. It approved the draft bill of the Democratic Memory Act, seeking to “uncover the truth, justice, dignify the victims, ensure forgiveness and the co-existence of the Spanish people” (La Moncloa, 2020). One of the measures in the bill goes further than the 2007 Historical Memory Law and will see the annulment of convictions and executions during the dictatorship, which were described by the 2007 Historical Memory Law as illegitimate but still valid (Spain in English, 2020).

## B. Taiwan: Various Transitional Justice Mechanisms gradually conform to International Human Rights Standards

Taiwan’s transitional justice mechanisms also did not take the approach of trials. Rather, the government made several tries at facing the truth of the martial law era (including the 2-28 Incident). Eventually, it employed a truth commission as an instrument.

The effort to enact transitional justice can be traced back to the 1990s. The rehabilitation movement for victims of the 2-28 Incident began before

the lifting of martial law, and the number of participants has been ever-increasing since 1988. In the wake of the growing public desire to address past injustices, the first public monument was erected in the following year and several draft acts regarding compensation for the victims were filed in 1992 (Stolojan, 2017: 29). Additionally, the Lee government passed two laws regarding political victims of the White Terror. The first one was the 1995 Act Governing the Recovery of Damage of Individual Rights during the Period of Martial Law, which provides a statutory basis for the reinstatement of political victims' rights to serve in public office and to receive pensions. The second one was the 1998 Compensation Act for Wrongful Trials on Charges of Sedition and Espionage during the Martial Law Period, which provides opportunities for a retrial, but an original judgment would not be regarded as wrongfully decided if it would also be sustained according to the current law. This law did not acknowledge the illegality of the trials by court-martial, but instead referred to these judgments as “wrongful” or “improper” (Huang, 2019: 88-89). In 1995, the Memorial Foundation of 2-28 to compensate political victims of the 2-28 Incident was established, aiming at granting compensation to victims, advocating education and truth research, healing historical pain, restoring reputation and promoting ethnic harmony (Memorial Foundation of 228). However, the Foundation could only accept compensation claims passively and could not actively investigate the truth of an incident.

In 2000, Chen Shui-bian of the DPP led Taiwan's first peaceful transfer of power, ending the fifty-five year one-party dominance of the KMT. It was then expected that the newly elected government, which had the required institutional opportunities, would step forward on the transitional justice agenda. Indeed, several measures were proposed and undertaken by the Chen government—for instance, the renaming of the Chiang Kai-shek Memorial Hall to National Taiwan Democracy Memorial Hall (Iok-sin & Wang, 2007), and attempts to identify perpetrators of crimes (Schafferer, 2014). However, the pan-blue camp headed by the KMT was still the majority party in the Legislative Yuan, making the DPP government a minority government. During this period of time, transitional justice in Taiwan did not make any real progress.

In 2007, since the government was passively faced with the truth, the Taiwan Association for Truth and Reconciliation (hereinafter “ATR”), an NGO expected to contribute to Taiwan's transitional justice and employ truth

and reconciliation commissions as models, gathered civil resources to bring attention to the victims' and their families' right to know the truth. Utilizing historical archives, the Association was able to assist victims to file claims and to reflect on the system and the role of perpetrators, and so on (Taiwan Association for Truth and Reconciliation). It has played an important role in creating the concrete outcomes of transitional justice over the past 13 years.

In 2008, when Ma Ying-jeou of the KMT won the presidential election victory, the government took the issuance of apology as their main approach (Taiwan Today, 2020) and reversed almost all previously adopted transitional justice mechanisms without public consultation (Schaffer, 2014). Until then, previous developments of transitional justice mechanisms in Taiwan suggested that the government lacked initiative (Huang, 2020), and that it mostly took a compensatory approach. As a result, the truth of the past was silenced and thus contributed to the phenomenon of “victims with no perpetrators” (Wu, 2005).

This negative situation changed significantly in 2016 when the DPP came to power again. During her campaign and after the election to the Presidency in 2016, Tsai Ing-wen made transitional justice one of her main commitments. Tsai first officially claimed the name “transitional justice” and pushed for Taiwan’s version when she took office in 2016, expecting to follow the cases of Germany or South Africa in order to establish the truth about the KMT’s authoritarian era (1945-1987). So far, unprecedented progress has been achieved—the passage of the 2016 Act governing the Settlement of Ill-gotten Properties by Political Parties and their Affiliate Organizations (政黨及其附隨組織不當取得財產處理條例, 2016), the 2017 Organizational Act of the National Human Rights Museum (國家人權博物館組織法, 2017), the 2019 Political Archives Act (政治檔案條例, 2019), and most importantly, the 2017 Act for Promoting Transitional Justice (促進轉型正義條例, 2017) and the establishment of the TJC.<sup>6</sup>

The TJC is an independent agency that plans the opening of political archives, the removal of symbols of the authoritarian regime, the preservation of sites where injustice was committed, and the restoration of justice. The Commission restores historical truth, promotes social reconciliation, and addresses improper handling and use of party property and other transitional

6 Functions of the TJC, see Transitional Justice Commission, <https://www.tjc.gov.tw/about> (last visited Dec. 28, 2020).

justice matters. Importantly, the TJC takes the initiative to investigate the truth and, in inviting concerned parties to express their views, uncovers the facts surrounding human rights abuses as to ascertain the responsibility of perpetrators and participants in mechanisms of oppression. It takes statements from victims and survivors, and considers these accounts to complete its investigative reports. Therefore, the functions of the TJC are mainly in line with the tasks of truth commissions, which are to discover, clarify, and formally acknowledge past abuses, to address the needs of victims, to outline institutional responsibilities and recommend reforms, and to promote reconciliation and reduce conflict over the past (Hayner, 2011: 20). To date the truth-investigation reports completed by the TJC include: the death of Professor Chen Wen-cheng (陳文成) and the murder of three family members of democracy activist Lin I-hsiung (林義雄) (Transitional Justice Commission; Lin, 2020; Pan, 2020a). Furthermore, the 2017 Act provides that any illegitimate conviction and any punishment, rehabilitative measure, or confiscation against people during the dictatorship shall be deemed void and shall be expunged from the record (促進轉型正義條例, 2017: art. 6; Chen & Chung, 2020).

As in the experience of Spain, such progress in Taiwan followed the discipline of international human rights law. In 2009, with the relentless advocacy and lobbying of civil society (Chang, 2019: 240-241),<sup>7</sup> Taiwan's Legislative Yuan adopted the Act to Implement the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, and thus, the ICCPR and the ICESCR operate as domestic law within Taiwan. Although Taiwan was excluded from the process of the Human Rights Committee evaluations of States Parties' compliance with the ICCPR, the government has regularly invited international experts to review its human rights performance. On the topic of transitional justice, the 2013 review panel recommended that while “[c]ertain measures were taken for the sake of healing and reparation, including the adoption of the 2-28 Incident Dispensation and Compensation Act and the construction of the 2-28 Incident Memorial,” “[t]he right to reparation should include measures of social and psychological rehabilitation of the victims and should be accompanied by the right to truth and justice” (Concluding Observations

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7 The early stage of the democratization process of Taiwan in the 1990s brought the calls for ratifying international human rights conventions. The initial move to ratify the two Covenants was made in 2000.



and Recommendations Adopted by the International Group of Independent Experts, 2013: ¶ 24). Besides, it recommended that “measures be taken to reveal the full truth about the gross violations of human rights during the years of the ‘White Terror’ and that, as a requirement of reparative justice, the suffering of the victims be duly recognized” (Concluding Observations and Recommendations Adopted by the International Group of Independent Experts, 2013: ¶ 25). In 2017, the review panel gave clearer guidance—(1) the legislative proposals need to effectively and directly address the right to truth and the restoration of the access to justice after the lifting of martial law; (2) the effective access of victims and researchers to all archives should be guaranteed; (3) the panel strongly recommends that the Government initiates an inclusive truth and reconciliation process, involving also the security forces, to discuss and reflect on collective memory (Concluding Observations and Recommendations Adopted by the International Review Committee, 2017: ¶ 17). All these requirements have been fulfilled by the Tsai government under the Act for Promoting Transitional Justice, the Political Archives Act, and the operation of the TJC. Additionally, these achievements were fully reported in the Third National Report, which is divided into three parts: ensuring victims and researchers are able to access all archives effectively; initiating truth and reconciliation procedures; and discussing and reflecting on collective memory through the creation of the Taiwan Transitional Justice Database (Response to the Concluding Observations and Recommendations Adopted by the International Review Committee on January 20, 2017, 2020: ¶¶ 30-37).

#### IV. Comparison of Experiences between the Two States and Prospects

##### A. Contextual Factors

Contextual factors often determine states’ choices in transitional justice mechanisms. It was suggested that “the effects of economic conditions on the preferences, resources, and strategies of key political actors” may be a factor since in those states in which “the transition coincided with an economic boom, the authoritarian rulers had much greater negotiating capacity” to establish more advantageous institutional arrangements (Aguilar, 2008: 417). Coming to the question of the contextual factors in Spain and Taiwan in addressing transitional justice during democratic transition and those of



making new progress many years later, this paper categorizes them under three headings: the nature of democratic transition, the efforts of civil society, and the interaction of political powers at a later time.

1. *The Nature of Democratic Transition* — The nature of democratic transition affects a state's arrangement of transitional justice mechanisms (Lee, 2012: 166). A state which intends to legalize the establishment of a new regime by way of trial against a former regime so as to promote the political purpose of transition, or with international intervention, tends to take the punishment model (Lee, 2012: 166). This did not apply to either Spain or Taiwan. A state with a highly divided and hostile political and social background, or one which takes the initiative to democratize, tends to choose a moderate model, such as reparation, reconciliation, or amnesty (Lee, 2012: 166; Orentlicher, 1991: 2544-2547). This may explain why Spain and Taiwan chose to “silence the truth” during the democratic transition.

2. *The Continuous Efforts of Civil Society* — The continuous effort of civil society was one of the most important drivers of the recent achievements in both states.

In Spain, the first government of the monarchy after Franco's death was an authoritarian continuity. Not surprisingly, there was a massive and a worldwide wave of protests calling for democratization. Also, activists demand amnesty for political prisoners. However, the government refused to reform and police violence continued. The government still praised Franco and ignored amnesty demands while civil society was united and continually expanded democratic activities—the discords between authoritarianism and the forces of democracy became more and more intense. Finally, the transition to democracy started after the appointment of a new prime minister (who had been a protestor demonstrating for amnesty) in July 1976 (Threlfall, 2008: 938-942).

Then, the government enacted the 1977 Amnesty Law and other norms regarding reparation of the victims of the Civil War and the Franco regime. These norms were accompanied by the activity of civil society aimed at the exhumation of those buried in mass graves (Escudero, 2014: 125-126). This initial period of exhumations occurred from late 1978 to the 1990s. During this period, the issue received very little media attention (Escudero, 2014: 125-126).

In October 2000, an exhumation in Priaranza del Bierzo (León) took place on the initiative of associations of victims, such as the ARHM, triggering significant public attention (Ferrándiz, 2013; Escudero, 2014: 125-126). Then, as mass grave sites were continually discovered and the families of the disappeared started to call for reparations, a social movement for the recovery of historical memory began (Ferrándiz, 2013; Escudero, 2014: 125-126).<sup>8</sup> The actions under such a social movement ranged from the exhumations themselves to the removal of Francoist symbols, the promotion and care of archives, the vindication of the annulment of the Francoist Court sentences, the elaboration of censuses of victims, and so on. These actions were claimed to be crucial for the success of Spanish democracy and gave rise to the initiative of the 2007 Historical Memory Law (Escudero, 2014: 125-126). Proposals on what contents the Historical Memory Law should have (truth, justice and reparation) were submitted by many civil groups though the final text of the Law did not satisfy their objectives (Escudero, 2014: 126).

Nevertheless, the civil groups did not give up. They filed a complaint in the Spanish Court for crimes against humanity during the Franco regime (Escudero, 2014: 126) and also in Argentina (Álvarez & Tejón, 2020). Furthermore, relatives of Mr. Dorado Luque (who disappeared after being apprehended by armed forces in 1936), submitted a complaint to the European Court of Human Rights, alleging Spain's violations of Articles 2, 3, 5, 8 and 13 of the Convention (Gutierrez Dorado & Dorado Ortiz v. Spain). All of these actions indicated the efforts of civil society imposing pressure on the government to move on.

Likewise, in Taiwan, Chiang Kai-shek's death was not an end to authoritarianism. Taiwan was still under martial law while political activism kept rising. The *Dangwai* movement (outside the Party, i.e., KMT) was one of the most important drivers in support of Taiwan's transition to democracy. Initiatives calling for democratization organized themselves and founded opposition magazines. Following the growing popularity of magazines, the *Dangwai* movement became a thorn in the government's side. The tension eventually culminated in the well-known Kaohsiung Incident, where police and protesters clashed in a peaceful campaign held by *Formosa Magazine* to celebrate International Human Rights Day on December 10, 1979. Virtually

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<sup>8</sup> Towards 2006, more than 160 organizations could be counted within the social movement for the recovery of historical memory.

all the *Dangwai* leaders were arrested and accused of subversion (Chang-Liao & Chen, 2019: 627).

However, this did not stop the expansion of the *Dangwai* movement. Relatives of the defendants in the Kaohsiung Incident sought international support for activists. Meanwhile, the *Dangwai* dissidents continued to draw public attention to “the goals and objectives of the democratic opposition, the continuing lack of human rights and democracy and the plight of those imprisoned” in different ways. The government continuously suppressed the movement while the activists did not give up, later founding the DPP in 1986. Eventually, the government lifted martial law due to increasing domestic and international pressure for the democratization of Taiwan (Chang-Liao & Chen, 2019: 627).

Additionally, special attention was paid to initiatives advocating Taiwan’s adoption of the ICCPR and the ICESCR by commentators. In the beginning of Taiwan’s democratization in the late 1990s, leading individual<sup>9</sup> advocates and NGOs started to transform their “traditional role of challenging authoritarian government oppression into a broader form of responsibility”—placing international human rights on the government agenda to establish a better human rights infrastructure (Chen, 2019: 209-210). For instance, in 1999, twenty-two civil groups<sup>10</sup> formed the “Alliance for the Establishment of a National Human Rights Commission,” functioning to draft a bill for the organization of a National Human Rights Commission and to lobby politicians. Subsequently, the ratification of international human rights laws was also included on their agenda. Finally, international human rights laws were accepted as part of the national agenda for the first time in 2000, including the establishment of the Presidential Office Human Rights Consultative Task Force and other human rights projects. Although the attempts to adopt the two Covenants were unsuccessful during Chen’s time as president, their ratification was approved and an Implementation Act passed during Ma’s presidency (Chen, 2019: 207-220).

In addition, civil society organizations were devoted to the recovery of historical memory (e.g., the conservation of the sites of Green Island prison

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9 Peter Huang (黃文雄) and Mab Huang (黃默).

10 Including lawyers, NGOs and judiciary reform groups. The list of 22 representatives, see Bill for the Organization of a National Human Rights Commission at: <http://digitaltahr.org.tw/pages/db/pdf/D011-025.pdf>.

and Jing-Mei security agencies' detention center and military courts<sup>11</sup>) as well as protesting against the government's nomination of perpetrators as high-ranking officials (Chen & Yeh, 2019: 72-77).

3. *The Interaction of Political Power* — Apart from the above discussions with respect to the dramatic development of transitional justice mechanisms in Spain and Taiwan, the interaction of political powers may give the guidance as to why progress was made only over twenty-five years after the events.

Although the 2007 Historical Memory Law had limitations, it attempted to break the silence with respect to past human rights violence, and was a more forceful condemnation of the dictatorship, and thus could be considered as progress (Hajji, 2014: 95). It has been suggested that the Law was introduced in opportune political circumstances (Hajji, 2014: 95; Aguilar, 2008: 421-428). It was passed during rule by the Spanish Socialist Workers' Party (hereinafter "PSOE"), a time when other political parties lacked an absolute majority in Congress. Actually, the Law was condemned by the Popular Party (hereinafter "PP"), a conservative party consisting of many members of the Franco regime, who claimed that it was a political attempt by the PSOE to undermine the transition and the reconciliation of Spanish society and to marginalize the PP, as the PSOE was bolder in condemning the dictatorship (Hajji, 2014: 95; Escudero, 2014: 145; Aguilar, 2008: 427-428). Also, when facing international condemnation, the PP insisted on a tough stance in the ICCPR National Report as ruling party. Recently, Spain is making further progress in its transitional justice project, including the plan to establish a truth commission and a draft bill of the Democratic Memory Act to address the legacy of the civil war and subsequent dictatorship (Burgen, 2018; OHCHR, 2018; La Moncloa, 2020). We can see how instrumental the political climate and the political party in power are in determining the Spanish government's position when arranging transitional justice mechanisms.

In the case of Taiwan, it is more obvious that political power has affected the development of transitional justice. In 2000, the DPP took office, leading Taiwan's first peaceful transfer of power, and ending the fifty-five year one-party dominance of the KMT. However, the pan-blue camp headed by the

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11 They now turned into National Human Rights Museum.

KMT was still the majority party in the Legislative Yuan, making the DPP government a minority government. At that time, transitional justice in Taiwan did not make much progress. Later, an electoral victory in 2016 gave the DPP control of both the Executive and Legislative Yuans for the first time since the lifting of Martial Law in 1987, allowing the government to muscle through legislations to empower the TJC and open access to political archives (Law, 2020).

Despite this, the government still came in for a lot of criticism. During the discussion in the Legislative Yuan of bills relating to transitional justice, the KMT repeatedly stated that these bills should include issues of comfort women as well as issues regarding indigenous people in the scope of the bills in addressing transitional justice, or at least that vague clauses should be fully discussed by all parties rather than forcing them through the Legislature that year (*see, e.g.*, 立法院第9屆第4會期黨團協商會議紀錄, 2017a; 立法院第9屆第4會期黨團協商會議紀錄, 2017b). However, perhaps because the DPP faced pressure to pass the bill that year in order to fulfill its campaign promises, the final versions showed that the DPP did not make much compromise. Therefore, the KMT has continued to condemn the DPP government as a “new dictatorship” and stated that these Acts are political retaliation for targeting them (Yang, 2017; Taipei Times, 2020).

As such progress was highly dependent upon the interaction of political power. Spain and Taiwan must carefully examine the compatibility of these mechanisms with international human rights law. Otherwise, the current achievements are vulnerable to the same factor. In other words, they risk being overturned when there is a change of government. Take Taiwan for instance, the first demonstration of such a risk was the constitutional controversy over the Act Governing the Settlement of Ill-gotten Properties by Political Parties and their Affiliate Organizations in 2020. The Constitutional Court has recognized its constitutionality in Interpretation No. 793, stating that the constitutional basis of stripping ill-gotten assets of the former authoritarian party is to ensure fair competition among political parties (Judicial Yuan Interpretation No. 793, 2020; *Opinio Juris*, 2020). However, such an objective is not in conformity with the ICCPR as the Act regulates that such assets shall be transferred to the state, local self-governing bodies, or the original owners (政黨及其附隨組織不當取得財產處理條例, 2016: art. 6) instead of persecuted individuals or those injured by the ascribable human

rights violations (Roth, 2019: 63). As such, if the KMT takes office again in the future, these achievements are likely to be overturned as the KMT keeps claiming that the independence of the judiciary, the independent agencies, and, in general, the rule of law, is being eroded, and Taiwan is now under a “New White Terror” (Pan, 2020b).<sup>12</sup> Therefore, Taiwan’s transitional justice still faces challenges.

## B. Prospect

From the above observations, it can be said that both Spain and Taiwan gradually conformed to international human rights standards on transitional justice. International human rights law along with strong engagement of civil society are the most important drivers of the transition from “forgetting” to “investigating the truth.” In the same way, they will be the basis to prevent recent achievements from being reversed by political power hereafter. Additionally, which mechanism, be it trial or truth commission, should be taken as the so-called effective remedy under the ICCPR, remains a question. However, since the choice of transitional justice mechanisms is based on contextual factors, following development should also be carried out in an open and transparent social discussion in order to prevent the deepening of social divides. Further engagement and contribution from civil society is necessary to ensure the implementation of transitional justice mechanisms as well as international norms. (Chang, 2009: 230). States facing a similar traumatic history and similar dilemmas may also engage in dialogue to determine how to establish a community of collective awareness, bid farewell to a past authoritarian era, and eventually, to consolidate democracy.

## V. Conclusion

There are often calls to prosecute perpetrators of dictatorships within transitional justice mechanisms in order to prevent past human rights abuses from happening again. However, the ICCPR does not oblige states to merely resort to criminal proceedings when addressing the human rights atrocities of past regimes. Rather, it requires states to ensure that any persecuted person shall receive an effective remedy determined by competent judicial,

<sup>12</sup> The KMT also called for the repeal of TJC and the Act for Promoting Transitional Justice, see Lin Liang-sheng [林良昇], *Kuomintang Quanmian Fanpu: Lanwei Niti Fei Cuzhuanhui Gongtougou* [國民黨全面反撲：藍委擬提廢促轉會公投], Liberty Times Net (Dec. 18, 2018, 11:53 AM), <https://news.ltn.com.tw/news/politics/breakingnews/2645613>.

administrative or legislative authorities, or by any other competent authority provided for by the legal system, and enforced by the competent authorities. Truth Commissions can be another option to investigate truth and clarify accountability.

Spain and Taiwan have had highly similar historical backgrounds and policy choices under dictatorship and in subsequent periods of democratic transition. In the time of democratic transition, both states abandoned the punishment model. Spain passed the Amnesty Law in 1977 to prohibit any investigation of past crimes; Taiwan passed several compensation acts in the 1990s, mainly aimed at monetary compensation for political victims. The nature of democratic transition in both states led them to make this choice.

Interestingly, after many years, both Spain and Taiwan have made great progress in developing their respective transitional justice mechanisms. Spain passed the 2007 Historical Memory Law and the draft bill of the Democratic Memory Act of 2020. Taiwan has passed several transitional justice-related laws, and even established the TJC, which functions as a truth commission, to take the initiative to investigate the truth. Such great progress was shaped by the continuous efforts of civil society and the interaction of political power within the two states. In addition, the stronger international pressure Spain faced was also an impetus for the gradual improvement of its transitional justice mechanisms. In contrast, as Taiwan is not a UN Member, it proactively demonstrates its determination to comply with international human rights law in order to participate in international affairs.

Nevertheless, due to the close interaction between the current achievements and political power, if Taiwan does not carefully examine whether its transitional justice project is fully in line with international human rights law, it may easily become a victim of political retaliation. Even worse, when power is transferred, these achievements could easily be overturned.

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# 轉型正義的機制與脈絡因素之比較研究——以西班牙與臺灣為例

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## 摘要

西班牙與臺灣在過去獨裁統治時期及隨後的民主轉型時期有著極為相似的歷史背景與政策選擇。在民主轉型時期，兩國均選擇以沈默回應過去人權侵害，而非採取審判模式。本文以「獨裁統治時期結束後第一次民主選舉」作為民主化的起點，觀察西班牙與臺灣在其後所採的官方轉型正義機制。西班牙於 1977 年通過大赦法，禁止任何形式的真相調查；臺灣則於 1990 年代通過幾項賠償法，主要針對政治受害者進行金錢賠償。

值得注意的是，在多年以後，西班牙與臺灣面對轉型正義的態度及成就發生重大轉變。西班牙於 2007 年通過《歷史記憶法》，更於 2020 年批准《民主記憶法草案》；臺灣，自 2016 年起，通過數項轉型正義相關的立法，更成立促進轉型正義委員會，啟動過去人權侵害的真相調查。

本文探討兩項問題：西班牙與臺灣於民主轉型時期的轉型正義政策選擇，及多年後重新取得進展，其脈絡因素為何？西班牙與臺灣於轉型正義上的成果及未竟之業為何？

## 關鍵字

轉型正義、過去人權侵害、臺灣、西班牙、公民權利及政治權利國際公約、大赦法、歷史記憶法、民主記憶法草案、促進轉型正義條例、政黨及其附隨組織不當取得財產處理條例、促進轉型正義委員會

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