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Twenty-first century political justice: Reflections on the blind spots of current debates on penality

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Abstract
This paper aims to examine the contours of current manifestations of political justice, in a time in which liberal democracy arrangements are more widespread than ever before. For these purposes, it begins by exploring international indices unveiling varying degrees of illiberal penal practices in global north jurisdictions. Subsequently, it scrutinises the Spanish penal field, in which outmoded political justice practices are intriguingly enduring and have been apparently on the rise over the last decade. In analysing the political catalysts of these Spanish cases, the paper sheds light on certain factors nurturing twenty-first century forms of political justice and enemy penology. Finally, the paper concludes by outlining a research agenda for seriously considering these 'abnormal justice' phenomena in current academic conversations on penality.

Keywords Political justice · Enemy penology · Illiberal penal practices · Twenty-first century penality

Introduction

Three decades ago, the twilight and subsequent end of the cold war-era global order gave a decisive boost to the so-called 'third wave of democratisation' (Huntington, 1991; Weyland, 2014) and dramatically altered many political conceptions. This epochal event called into crisis a number of politico-legal arrangements that, being – wittingly or unwittingly – grounded in a post-WWII *Weltanschauung*, have strived to adapt to the new global order emerging at the turn of the millennium.

An evident manifestation of this development regards the right of asylum, since the collapse of the post-war global order has led to the gradual narrowing of the avenues for international protection in many global north jurisdictions (Gibney, 2004; Mountz, 2020; Valluy, 2009). An additional case in point involves political crimes,

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political justice and similar notions of this semantic field. At least from a Western world perspective, these concepts seemed to be relatively uncontroversial during the cold war period, in which manifestations of political justice were not infrequent, even in consolidated liberal democracies (Kirchheimer, 1961), and political justice was a label always ready to be used against authoritarian regimes affiliated to the adversary bloc. By contrast, both the fall of the Berlin Wall and the third wave of democratisation led us to a much murkier scenario.[1] Certainly, policing the protest strategies are frequently hotly debated and the criminalisation of social movements is still relatively widespread in many countries (Vegh Weis, 2022). By contrast, what may be called traditional forms of political justice are much rarer – at least in global north jurisdictions. Otto Kirchheimer's classical monograph 'Political Justice' (1961) may particularly assist in grasping this shift. The German-American political scientist differentiates three types of political trials, which are globally characterised by stressing that 'in a political trial (…) court action is called upon to exert influence on the distribution of political power' (Kirchheimer, 1961, 50). In this framework, the quintessential type of political justice is what Kirchheimer categorises as the 'classical political trial', defined as 'a regime's attempt to incriminate its foe's public behaviour with a view to evicting him from the political scene' (Kirchheimer, 1961: 46). Six decades after the publication of Kirchheimer's book, this archetypical form of political justice seems to have faded away from the political scene in various global regions, as is corroborated by the international indexes examined in the next section. In a politico-legal conception in which judicial independence and rule of law are seen as pivotal elements of a 'full democracy' political regime and are indispensable to e.g. be a member state of the European Union (Bárd, 2022; Damjanovski et al., 2020), political justice phenomena seem to pertain to a pre-third wave past in many jurisdictions.[2]

This paper challenges that viewpoint. In scrutinising some cases of twenty-first century political justice, it aims to unveil the texture, characteristics, and conditioning forces of this manifestation of 'abnormal' criminal justice.[3] In so doing, this article contributes to uncover a significant blind spot of current debates on penology and to nuance widespread accounts on penality and punitiveness.

For these purposes, the article proceeds as follows. After having scrutinised international indexes providing taxonomies of both democratic models and illiberal penal practices,[4] the paper addresses some manifestations of political justice witnessed in

[1] See nonetheless the Council of Europe's definition of political prisoner (Resolution 1900 (2012)), which was passed by the Parliamentary Assembly of the Council on October 3, 2012 (assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=19,150&lang=en. Accessed 24 June 2021). See also Herrmann, 2020.

[2] In fact, the indexes explored in the next section show that political justice practices markedly declined since the pre-third wave period in many jurisdictions.

[3] I borrow this notion from the Norwegian criminologist Katja Franko (Aas, 2014; Franko, 2020), who coined the term to examine crimmigration practices targeting noncitizens in Europe. Evidently, I am using this term to explore a different sub-field of criminal justice policies.

[4] By 'illiberal penal practices' I refer here to legal and policy arrangements ignoring constitutional limits on penal power and depriving individuals of basic rights and freedoms.

Spain in the recent past, thereby underlining the relevance of the Spanish case in this field. In examining the particular factors coalescing in this national case, the paper subsequently analyses the conditions that enable political justice practices to thrive in twenty-first century global north jurisdictions. Finally, the article discusses the implications to be drawn from this empirical case to refine current debates on penality and state punitiveness.

History rhymes: Political justice in the global north

In February 2018, the Spanish artist Santiago Sierra presented his piece 'Political prisoners in contemporary Spain' (*Presos politicos en la España contemporánea*) at the ARCO Art Fair in Madrid. This work consists of 24 pixelled black and white pictures portraying a wide variety of prisoners, from grassroots activists to top-rank officials, who were criminalised and incarcerated in Spain in the last decades while engaged in advocating various social, ecological and territorial justice causes. The manager of the ARCO Art Fair banned the exhibition of this artwork immediately after the inauguration. Although Sierra was not criminally prosecuted, this ban sparked concern within art milieus and ultimately motivated a well-known Spanish art collector to purchase the piece (Minder, 2018).

This vignette illustrates a phenomenon that is widely overlooked by the Spanish public and hardly known by the global public. More than four decades after the end of the last autocratic period, the Spanish criminal justice system still features prominent political justice practices. This trait of the Spanish criminal justice system is notably puzzling. In the 1980s Spain was widely heralded as a critical site of cultural creativity. In the late 1990s and early 2000s, Spain was internationally acknowledged as a nation featuring a powerful model of post-Fordist economic innovation. In the mid-2000s, Spain was for some time seen as a jurisdiction championing advanced civil rights standards. In the third decade of the twenty-first century Spain has a consolidated democratic political regime as a long-time member state of the European Union.

This consolidated nature of Spain's liberal democracy is evidenced by a number of international indexes (see also Klose, 2017). The World Bank's Worldwide Governance Indicators (info.worldbank.org/governance/wgi/Home/Reports. Accessed 26 June 2022; see also Kaufmann et al., 2010) report that from 2010 to 2020 Spain ranked behind long consolidated European democracies such as France, Germany and UK with regard to all measured governance indicators, including rule of law. However, it ranked significantly ahead of Southern European neighbours such as Greece and Italy – albeit not Portugal. Likewise, World Justice Project's Rule of Law Index averages from 2015 to 2021 show Spain ranking significantly below Germany and the UK, but only slightly below France – and above Portugal, Italy and Greece—in terms of the quality of its legal system (worldjusticeproject.org/rule-of-law-index/global/2021. Accessed 26 June 2022). These assessments stand essentially in line with the conclusions of The Economist's Democracy Index, which in its 2021 edition gave Spain the highest overall score of all four Southern European countries, and ranked it third below Portugal and Greece in civil liberties (www.

eiu.com/n/campaigns/democracy-index-2021/. Accessed 26 June 2022). In sum, such indices confirm that Spain features a relatively healthy political and legal system, which compares quite well to other Mediterranean countries such as Italy and Greece.[5]

In contrast to this positive institutional evaluation, the scenario is markedly different when illiberal criminal justice practices are taken into account (see also Karstedt, 2014, 2015). International indexes assist in exploring this intriguing coexistence of liberal democracy arrangements and illiberal penal practices. The Political Terror Scale (hereinafter PTS; www.politicalterrorscale.org/Data/Datatable.html. Accessed 27 June 2022; see also Landmann & Carvalho, 2010) draws upon Amnesty International, the US Department of State and Human Rights Watch reports to assess the level of exceptional state coercion of a given jurisdiction on a 5-level scale in which higher scores stand for higher impact of illiberal penal practices (Wood & Gibney, 2010).[6] Spain's score from 1976 to 2020 is 2.12, only ranking ahead of Romania (2.31), Greece (2.19), and Bulgaria (2.14) among EU and European Free Trade Agreement (hereinafter, EFTA) countries, and significantly behind EU15 (1.44), and EU + EFTA (1.48) averages.[7] In the last period, Spain scored 2.00 from 2010 to 2020, being only ahead of Greece (2.33) and ranking again well behind EU15 (1.36), and EU + EFTA (1.30) averages. PTS scores above 2 are described as follows: 'there is a limited amount of imprisonment for nonviolent political activity. However, few persons are affected…' (www.politicalterrorscale.org/Data/Documentation.html. Accessed 8 June 2021).[8]

These scoring results are corroborated by another international index, the CIRIGHTS dataset (see Cingranelli & Richards, 2010). Its PhysInt (Physical Integrity Rights; www.dropbox.com/sh/t8utmzsvde8m63q/AAAs1_WIJTqXurAE5nvEKWE5a?dl=0. Accessed 8 June 2021) index jointly evaluates indicators of extremely illiberal repressive practices, in a sub-scale ranging from 0 (i.e. no government respect for human rights) to 8 (i.e. full government respect for human rights) (Cingranelli & Richards, 1999). Interestingly, Spain's average score from 1981 to 2017 is by far the lowest of all EU and EFTA countries. This striking score cannot be disconnected from the 'dirty war' counter-terrorism practices carried out in the 1980s

[5] However, Eurobameter data reveal that the Spanish justice system faces significant public legitimacy obstacles, for it is perceived as hardly independent by wide swathes of the Spanish public, who show low levels of trust in the national judicial system (see flash Eurobarometer reports no. 435, 447, 461, 474, and 483; www.gesis.org/en/eurobarometer-data-service/survey-series. Accessed 8 June 2021; see also standard Eurobarometer reports; europa.eu/eurobarometer/surveys/browse/all/series/4961. Accessed 8 June 2021). Judicial independence concerns arose in the institutional field as well in recent years, as reported by the European Commission's, 2020, 2021 Rule of Law reports (European Commission, 2021).

[6] The Political Terror State essentially assesses particularly grave forms of state coerción, namely 'state-sanctioned killings, torture, disappearances and political imprisonment' (see www.politicalterrorscale.org/About/FAQ/; accessed 27 June 2022; see also Wood and Gibney 2010).

[7] These PTS scores are based on Amnesty International reports. Were US State of Department reports to be taken into account, these scores would change to varying – albeit non-negligible – degrees.

[8] By contrast, the description of level 1 reads as follows: 'Countries under a secure rule of law, people are not imprisoned for their views' (see www.politicalterrorscale.org/Data/Documentation.html; accessed 27 June 2022).

(Ubasart-González, 2019; Woodworth, 2002).[9] However, Spain's recent PhysInt scores are not particularly promising, either. From 2008 to 2017, Spain's average ranks twenty-ninth, only above those of Romania, Bulgaria, and Greece of all EU and EFTA countries. In stark contrast, the V-Dem CSO Repression index (www.v-dem.net/en/analysis/VariableGraph/. Accessed 4 June 2021) assesses political repression in Spain in much less ominous terms. In both the long run (1976–2020) and the short run (2011–2020), Spain's scores stand around EU and EFTA averages, well above those of Bulgaria, Croatia, Hungary, and Poland.

'Old school' political justice in Southern Europe

The V-Dem CSO Repression index specifically focuses on the repression of civil society organisations (www.v-dem.net/vdemds.html. Accessed 27 June 2022). By contrast, the PTS and CIRIGHTS indexes claim that, despite having both a gradually consolidated liberal democracy regime and a no less institutionalised criminal justice apparatus, Spain is an outlier among European countries in terms of political justice – although it is an *ordinary* country with regard to many other, even more pivotal dimensions of the penal system.[10]

Political justice practices can be framed today under the wider umbrella of enemy penology (Krasmann, 2007).[11] In this regard, the Spanish case features what may be called an 'old-fashioned' model of enemy penology. In contrast to currently hegemonic illiberal penality schemes, in which exceptional penal measures target nameless and faceless individuals (Mbembe, 2016), in Spain these strategies are still focused on widely popularised (political) folk devils, as was the case elsewhere, e.g. in the counter-terrorism field, until the mid- to late twentieth century. In addition, whilst in many global north jurisdictions enemy penology tactics are increasingly

[9] A number of far right para-police and paramilitary organisations engaged in 'dirty-war' practices in Spain from the late 1970s to the late 1980s, mainly targeting Basque separatist activists and Basque separatist armed militants, and perpetrating dozens of homicides. The last and best known of these groups were the GAL (Spanish initials for Antiterrorist Liberation Groups) which were active in the Spanish and French Basque country until 1987 (Woodworth, 2002).

[10] It is certainly true that Spain was an outlier among western European countries in terms of incarceration rates in the early 1990s and throughout the 2000s, before they began to decline in 2010 (Brandariz, 2018; González Sánchez, 2021). In addition, crimmigration arrangements are deeply consolidated in Spain (Brandariz, 2021). Yet these two relatively concerning dimensions of the penal field does not make Spain essentially different from its neighbouring countries – at least, not today.

[11] The German criminologist Susanne Krasmann (2007) coined the notion 'enemy penology' to describe the German legal scholar Günther Jakobs' 'criminal law for enemies', i.e. a proposal to build a specific criminal law sub-system for individuals considered enemies of both the state and the national community. This raison d'état-based legal scheme pursues national security goals and strips 'enemies' of various legal rights and safeguards. Jakobs' theory clearly resonates with Carl Schmitt's description of the concept of the political as the capacity to differentiate between friends and enemies (Schmitt 1932/1996) – although Jakobs eludes this reference. Originally presented in the mid-1980s, Jakobs' theory gained significant traction in the framework of the post-9/11 counter-terrorism agenda championed by the US and other countries in the 2000s. Since the publication of Krasmann's article, thise concept of enemy penology has left behind its former connection to Jakobs' criminal law theories, being increasingly used to describe a wide variety of illiberal penal practices and policies.

routinised, trivialised, and centred on noncitizen groups (Stumpf, 2020; Weber & McCulloch, 2019), in Spain such tactics target citizens in certain critical and highly symbolic cases. This stands in contrast to Franko's (2020) 'abnormal justice' thesis, which asserts that global north criminal justice systems are evolving in two separate directions: on the one hand they are keeping penal welfarism schemes to deal with national penal populations while at the same time using incapacitation measures to punitively manage noncitizen groups (see also Turnbull & Hasselberg, 2017; Ugelvik & Damsa, 2018; Weber, 2015). This increasingly dual penal model has not taken hold in Spain.[12] In order to illustrate these distinctive features of Spanish enemy penology and political justice practices, two prominent recent cases are briefly examined.

The first instantiation of political justice to be considered is the so-called Bateragune case. Bateragune (meeting point in Basque) may be seen as the terminus station of an illiberal criminalisation strategy initiated in the late 1990s, in the framework of the conservative turn triggered by the administration led by José M. Aznar. This strategy, which was critically upheld by the Spanish Supreme Court in its decision No. 50/2007, of 19 January 2007,[13] aimed to prosecute individuals affiliated to the Basque pro-independence movement with terrorism crimes for a wide array of unarmed political activities, ultimately turning unconstitutional political goals themselves into the essence of terrorism crimes (Colmenero, 2017; Salellas, 2019; Ubasart-González, 2019). In the twilight of separatist terrorism in the Basque country,[14] the Bateragune procedure prosecuted five Basque separatist political leaders for the offence of belonging to a terrorist organisation. Paradoxically, the defendants were then engaged in putting an end to decades-long political violence in the Basque country (Eguiguren & Rodríguez Aizpeolea, 2011; Murua, 2017; Whitfield, 2014).[15] This episode may be seen as an evidence of the puzzling fact that criminalisation tactics frequently aim to tackle a harmful phenomenon when that phenomenon is essentially over (Tonry, 2004). Nonetheless, Bateragune defendants were put in pre-trial detention and subsequently received severe prison sentences for terrorism crimes imposed by the Spanish National Court in September 2011 (BBC, 2011), in a decision upheld by the Supreme Court in May 2012 – albeit with reduced sentences (Aduriz, 2012). Neither the Supreme Court's ruling nor the Constitutional Court's 2014 decision (Público, 2014) acknowledged a gross due process infringement which eventually led the European Court of Human Rights (hereinafter ECHR; case Otegi Mondragon v. Spain, of 6 November 2018)[16] to overturn these convictions and nullify the Bateragune procedure. By then, the Bateragune prisoners had

[12] Franko (2020: 176) stresses that this dual penal model can also be verified in most serious criminal cases involving citizen defendants, such as the lethal terrorism attack perpetrated in Utoya, Norway, in 2011. This is a conspicuous difference with the Spanish case.

[13] See vlex.es/vid/delito-asociacion-ilicita-27819415 (accessed 27 June 2022).

[14] In fact, the Bateragune procedure should be grasped in the framework of the political – and judicial – events characterising the period between the termination of the last failed ETA's ceasefire in December 2006 and ETA's permanent cessation of armed activity in October 2011 (Whitfield, 2014).

[15] See also the documentary *El fin de ETA* (The Demise of ETA; Justin Webster, 2017).

[16] See https://hudoc.echr.coe.int/eng?i=001-187510 (accessed 27 June 2022).

already served their six-year sentences (Minder, 2016). More recently, the Spanish Supreme Court reacted to the ECHR ruling in late 2020 by reopening the case and ordering the re-trial of the separatist defendants (Nieva Fenoll, 2021; Tomás, 2020).

The second recent manifestation of 'classical' political justice in Spain is the so-called Procés case, for the Catalan word generally used to refer to the separatist impulse gaining momentum in Catalonia since the early 2010s.[17] This is not actually a single case, but rather a wide array of criminalisation procedures gathered under the umbrella of a common punitive impetus focusing on the Catalan independence bid. In the framework of this wide encompassing criminalisation effort, a specific event deserves particular attention (on other dimensions of this penal endeavour see Balcells et al., 2020; Bernat & Whyte, 2020, 2022).

What makes this case specifically relevant is the criminal prosecution of Catalan officials for rebellion and sedition crimes initiated by various local and national courts in the contentious Catalan autumn of 2017 and immediately taken on by the Spanish Supreme Court (see on this Clavero, 2019; Martín Pallín, 2020; Working Group on Arbitrary Detention, 2019). In October–November 2017 six former Catalan cabinet members, including the former deputy president, as well as the former president of the Catalan parliament and two top social leaders were put under pretrial detention. Their detention led to six additional Catalan ministers and political leaders – including the former Catalan president—fleeing into exile in Belgium, Switzerland, and the UK (Jones, 2017).[18] In October 2019, the Spanish Supreme Court handed down a decision (decision No. 459/2019, of 14 October 2019)[19] sentencing the main nine defendants for sedition – and in some cases misuse of public funds—to prison terms ranging from nine to thirteen years (Ekaizer, 2019; Martín Pallín, 2020; Salellas, 2019). The Spanish Constitutional Court upheld the Supreme Court decision in April 2021, with two dissenting opinions (Urías, 2021b). Eventually, the centre-left Spanish government pardoned the nine imprisoned leaders in June 2021, after they had served more than three years in custody (Jones, 2021).

Legal debates aside (see on this Gimbernat Ordeig et al., 2020; International Trial Watch, 2019),[20] certain aspects lay bare the political nature of this case (Martín Pallín, 2020). The Supreme Court punished Catalan leaders for two massive political events – the rally held in downtown Barcelona on September 20, 2017 (The

[17] This independence bid should not be disassociated from the deep political crisis affecting Spain since the early 2010s (see also Sánchez Cuenca, 2018). The 15 M or 'Indignados' movement that gained momentum in 2011 was the first patent symptom of this political turmoil (Tejerina & Perugorría, 2017). Immediately thereafter, civil society organisations and eventually political and institutional actors gave impetus to the separatist agenda in Catalonia, which was crucially fostered by two illegalised referenda, held in November 2014 and October 2017.

[18] In the course of the criminal adjudication process, no arrest warrant has been accepted so far by European judicial authorities (Carrell, 2020; The Brussels Times, 2020). Extradition requests have not been even filed against the former officials expatriated in Switzerland (Martín Pallín, 2020).

[19] See vlex.es/vid/817525869 (accessed 27 June 2022).

[20] The most detailed legal analysis of this case published to date is former Spanish Supreme Court justice José A. Martín Pallín's (2020) monograph *El gobierno de las togas*.

Guardian, 2017) and the unlawful independence referendum of October 2017 –[21]by leveraging two unambiguously political early modern criminal offences – rebellion and sedition (Bernat & Whyte, 2020). While autocrats often resort to these offences to curb political dissidence, their utilisation was unheard of in Spain's contemporary democracy (Salellas, 2019). In addition, the live broadcasting of the three and a half-month Supreme Court trial in early 2019 – achieving significant audience ratings in Catalonia (El Periódico, 2019; Salellas, 2019)—allowed this single criminal justice act to play many social roles classically attributed to punishment rituals (see also Fonseca, 2019). This is unparalleled in Western Europe in the recent past. Whilst in global north jurisdictions –including Spain—Durkheimian-like social cohesion and institutional legitimacy purposes are served by staged criminal procedures targeting folk devils indicted for heinous (common) crimes, in the Procés case these goals were pursued via a highly publicized punitive ritual based on outmoded criminal offences targeting high profile politicians.

All three categories of political trials described by Kirchheimer in his seminal work on political justice have been witnessed in Spain in recent years,[22] including what the German-American political scientist defined as 'the trial involving a common crime committed for political purposes and conducted with a view to the political benefits which might ultimately accrue from successful prosecution' (Kirchheimer, 1961: 46).[23] This is especially the case with regard to what Kirchheimer (1961: 46) calls 'the derivative political trial' that is focused on speech crimes (Maroto-Calatayud, 2021). However, both the Bateragune case and the Procés case stand out in this enemy penology landscape for being a twenty-first century incarnation of what Kirchheimer defines as 'the classical political trial', in which 'the services of courts [*are enlisted*] in behalf of political goals' (Kirchheimer, 1961: 419). In fact, both cases were part and parcel of comprehensive political-legal efforts to defeat political foes by non-electoral means (see also Martín Pallín,

[21] Both events epitomised freedom of assembly rights (Martí, 2019b; Sánchez Cuenca, 2018; see also Amnesty International, 2019a, b), or were at worst acts of civil disobedience (Fassin, 2019; Urías, 2019).

[22] In fact, a wide number of ECHR rulings have overturned decisions of top Spanish courts in cases targeting political activists, especially Basque separatist politicians and militants. In addition to ECHR rulings mentioned elsewhere in this paper, the cases Otegi Mondragon v. Spain of 15 March 2011, Del Rio Prada v. Spain of 21 October 2013, Atutxa Mendiola and others v. Spain of 13 June 2017, Stern Taulats and Roura Capellera v. Spain of 13 March 2018, Toranzo Gomez v. Spain of 20 November 2018, and Erkizia Almandoz v. Spain of 22 June 2021 should be particularly referenced (see also Martín Pallín, 2020, 2022).

[23] A peculiar case of this category of political trial is the so-called Altsasu case (Sagardoy-Leuza, 2020). It dealt with a late-night bar brawl involving eight local youngsters and two off-duty *Guardia Civil* (paramilitary police) officers in the remote Navarre village of Altsasu in October 2016. Conservative politicians and media outlets drew on the widespread Basque nationalist allegiance of this small community to frame the case as an aggression against Spanish institutions. Consequently, the National Court took on the case as a terrorism case (Amnesty International 2018). Although the terrorism charges were eventually withdrawn, the National Court in June 2018 (Intxusta Pagola & Agirrezabal Moreno, 2018; The Irish Times, 2018) and subsequently the Supreme Court in October 2019 sentenced the defendants to severe prison sentences (Biurrun Mancisidor, 2019). This case resulted in one of the most widespread movements against criminalisation procedures witnessed in Spain over the last decades (Parra, 2018; Público, 2019), and led to the production of the TV series *Altsasu* (Jon Olivares, Erik Probanza and Nikola Zalduegui, 2020).

2020). The Bateragune case ensued in the aftermath of the illegalisation of left-wing Basque separatist parties which allowed unionist political forces to secure a parliamentary majority for the first time in the regional elections held in the Basque country in March 2009 (Bourne, 2018). The Procés case, in turn, was initiated at the very same time when the Spanish government invoked the prerogative regulated in Article 155 of the Spanish Constitution, ousting the Catalan government and calling for new regional elections in October 2017 (Minder & Kingsley, 2017). In addition, the procedure was characterised by the obstacles posed by the Spanish Supreme Court to prevent Procés defendants from assuming their newly elected positions as regional, national and European MPs, and local council members (Martí, 2019a, c).[24] In both Spanish cases, though, the political gains seem to have been relatively unpromising, in a sort of confirmation of Kirchheimer's (1961: 172) bleak warning on the risks engendered by political justice procedures.

The two aforementioned cases demonstrate the unexpected resiliency of political justice practices in a consolidated global north liberal democracy. In order to further elucidate the significance of these penal practices, their causes are explored in the following section.

Lasting political and bureaucratic inertias conditioning current forms of political justice

In treating these recent Spanish cases as a critical object of study for socio-legal and criminological purposes, they may help to shed light on certain blind spots of current debates on penality. However, before moving to that point, which will be addressed in the next section, some considerations are required in order to examine why and how Spain features the tricky coexistence of an advanced liberal democratic political regime and recurrent manifestations of enemy penology focusing on highly sensitive political cases. For these purposes, at least two critical perspectives need to be considered, one of them related to the Spanish political system and another one related to the criminal justice apparatus itself.

Concerning the Spanish political system, recent political science literature has emphasised two aspects of the Spanish polity which are pivotal to understand the political justice dimensions of its penal system. Both of them stem from the peculiar texture of the Spanish model of transition to democracy, which did not arise out of a moment of political rupture, but rather out of a negotiation process in which former autocratic elites took the lead over most of the transition period (Linz & Stepan, 1996; see also Bernat & Whyte, 2020; Rodríguez López, 2015; Sánchez Cuenca, 2014).

The criminology literature exploring the impact of political factors on penality frequently adopts an institutionalist viewpoint (Karstedt, 2010; see also Wenzelburger, 2020). This body of research underlines the correlation among democratic

[24] See the Court of Justice of the European Union decision C-502/19 Junqueras Vies, of 19 December 2019, overturning some of these restrictions (eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62019CJ0502; accessed 28 June 2022).

institutions, democratic values and democratic practices (Karstedt, 2006, 2015). However, the wide variety of democratic practices and their relative disjunction from democratic institutions are pivotal in giving shape to the marked diversity of political democracy arrangements (Fishman, 2019; see also Karstedt, 2011). Drawing on his notion of 'democratic practice', the US political sociologist Fishman (2017, 2019) emphasises that the Spanish political model ranks particularly low in terms of political inclusion. This characterisation, fuelled by the long standing shadow of centuries-old autocratic traditions (Martín Pallín, 2020; see also Vilar, 1994), has cultivated a specific culture of detachment and imperviousness of state officials from the general public and non-hegemonic political forces (Fishman, 2019). This development has impeded the Spanish political system from being permeable and malleable enough to deal in a non-antagonistic way with demands coming from relatively secondary political actors, such as the decentralisation and even segregation aspirations of Basque and Catalan nationalists. This poor model of political inclusion also underpins the relatively minor role civil and political rights play in political contention, as shown e.g. in the Supreme Court ruling of October 2019.

Additionally, the Spanish political scientist Sánchez Cuenca (2018: 127–136) persuasively argues that Spain has a markedly 'legalist' democratic system, i.e. that Spanish political arrangements show an unbalanced relationship between the rule of law principle and the democratic principle. Consequently, abiding by the current legal order has long been enshrined as the main tenet of Spanish politics in approaching political conflicts, at the expense of widely shared democratic demands. Ultimately, this deeply grounded political culture has prompted elites to code and treat aspirations to alter the current constitutional status as (il-)legal – and potentially punishable – issues (see also Bernat & Whyte, 2020, 2022).

These salient features of the Spanish political landscape have spillover effects on the penal field. The lasting inertias of the institutional ways of tackling political controversies have assisted in self-perpetuating old-fashioned models of political justice. However, these enemy penology practices are nurtured as well by inertias of the criminal justice system itself. Spain has long had a sizeable national security apparatus aimed at curbing decades-long manifestations of domestic terrorism and political violence.[25] Due to a lack of actual oversight by politicians and courts, this apparatus has had almost no incentive to abandon its enemy penology strategies. This phenomenon confirms what has been recently concluded by the US criminologist Schoenfeld (2018) in elaborating her 'state capacity' thesis, that is, the relevance of path dependence effects (see Pierson, 2004; see also Wenzelburger, 2020) in giving shape and perpetuating specific punitive schemes, eventually through more or less Lampedusian changes (Colmenero-Ferreiro & Brandariz, 2019). Such effects are both bureaucratic and cultural, and in the Spanish case are particularly epitomised by the part played by the National Court in giving currency to enemy

[25] The Spanish Foundation for Terrorism Victims (*Fundación de Víctimas del Terrorismo*) reports that no less than 993 people were killed by domestic terrorism acts from 1968 to 2010 (fundacionvt.org/. Accessed 24 June 2021).

penology practices in combatting subversive and grave criminal events, namely terrorism (Salellas, 2019). In addition, the mentioned path dependence effects cannot be disconnected from the already long lasting hegemony of conservative magistrates and judicial communities among the medium and higher ranks of the Spanish judiciary, especially in the Supreme Court and the General Council of the Judiciary (Martín Pallín, 2022; see also Escolar, 2020; Sánchez Cuenca, 2018).[26] This consolidated position of conservative actors stands in contrast to the role played by judges and magistrates in the transition to democracy and the first stages of the democratic period (Hilbink, 2007). In fact, in a telling reaction to a critical political justice case, in July 1999 the Spanish Constitutional Court overturned the previous Supreme Court ruling imposing severe prison sentences to 23 leaders of the Basque separatist party Herri Batasuna for collaboration with ETA (Woodworth, 2002).

In contrast to this liberal precedent, the assemblage of the aforementioned traits of the Spanish political and judicial field has currently resulted in the gradual consolidation of a cultural ethos – particularly prevalent among segments of both judicial and political elites – in which notions like doing justice, shielding the constitutional order, protecting national integrity, and embracing enemy penology schemes belong to one and the same semantic field (see also Martín Pallín, 2022).

The characteristics of the Spanish criminal justice system explored so far substantiate the viewpoint elaborated by the US legal scholar Whitman (2003: 201–202; see also Garland, 2013), who claims that 'the power and autonomy of the state thus have a great deal to do with the relative mildness of criminal justice (…) A relatively weak state (…) is much more prey to a harsh retributive politics'. In other words, harsh forms of criminal justice are not symptoms of a strong state apparatus, but of a thinly legitimised state reacting to what it is mistakenly understood as existential threats, in these cases acts challenging the current constitutional order. Against this backdrop, the Catalan case in particular may be seen as an instance of what the US-based criminologist David Garland calls penal forms of denial and 'acting out', which reassert the 'myth of the sovereign state and its plenary power to punish' (2001: 110). In fact, the Catalan case is an act of penal denial, that is, the state coercion response of a state apparatus unable to deal with challenging political demands by political means (see also Fishman, 2019; Sánchez Cuenca, 2018).[27] Moreover, the analysed penal arrangements, with their institutional toll, recall a caution pointed out by the Italian philosopher Roberto Esposito in exploring the paradigm of immunity, defined as a bio-political scenario in which the life of the community is kept safe 'precisely by immunizing it from the dangers of extinction threatening it' (2002/2011: 112). Esposito warns that this political reasoning may easily lead to an

[26] Conservative jurists and magistrates have chaired both the General Council of the Judiciary and the Supreme Court all throughout the last thirty-five years, with the exception of two relatively brief interregna in the early 1990s and early 2010s. By contrast, progressive justices have chaired the Spanish Constitutional Court for longer periods.

[27] Although Garland was focused on relatively widespread punitive practices and consequently did not examine enemy penology, let alone 'classical' political justice, these exceptional, raison-d'état-based penal policies are consistent with the 'politicized, populist' institutional reactions that Garland (2001, 131–137) defines as penal denial and acting out. In fact, they actually epitomise the non-adaptive, neoconservative agenda of penal denial.

'(auto)immunitary crisis', in which 'the risk from which the protection is meant to defend is actually created by the protection itself' (2002/2011: 141). The examined cases show that political justice practices may actually trigger this type of political crisis, in the framework of which state agencies, in aiming to overzealously protect the political body from a given risk, end up harming its object of protection, that is, democratic arrangements and the rule of law. This '(auto)immunitary crisis' has resulted in various institutional and reputational harms (Martín Pallín, 2020; Urías, 2021a) in the Spanish case, epitomised by the resolution of the Parliamentary Assembly of the Council of Europe of June 2021 calling into question the Procés case (see Parliamentary Assembly of the Council of Europe, 2021).[28]

Conclusion: On the blind spots of current debates on penal power

The empirical cases explored in this paper does not characterise at all the Spanish criminal justice system writ large. Compared with the concerning forms of political justice witnessed in many global regions, they even appear to be relatively banal. Consequently, the main purpose of this paper is not exclusively exploring these cases, but chiefly reflecting on the lessons to be drawn from them to refine current debates on the political determinants of penality. Considerations on classical forms of political justice do not rank very high in current conversations on penology and punishment and society. This paper lays bare that at least in certain cases this gap represents a relevant blind spot of current academic debates. If the PTS and CIRIGHTS scales are right, then that shortcoming should not be particularly concerning, because Spain would be an outlier among global north countries in terms of political justice. Conversely, if the V-Dem's CSO repression index is right, then many further efforts are needed to scrutinise political justice not only in Spain, but in many other jurisdictions. International academic debates on criminology and penology are framed by scholar communities based in countries that feature long consolidated political democracies (Faraldo-Cabana & Lamela, 2021; see also Karstedt, 2010). This circumstance has contributed to many aspects of the influence of political forces on the penal field remaining unaddressed, thereby generating a number of blind spots on current debates on penality (see also Carrington et al., 2019).

Casting light on these blind spots by exploring apparently outdated forms of political justice may enrich current debates on penality at least in two different aspects. Initially, it may contribute to better grasp the impact of political forces on the penal field. In bringing peripheral and semi-peripheral regions into academic conversations, the criminology literature ought to come to terms with the fact that – even in Europe—the majority of jurisdictions initiated their transition to democracy in the last decades of the twentieth century. In so doing, this scholarship may consider in earnest the impact of late democratisation processes on penality (Cheliotis & Sozzo, 2016; see

[28] International human rights players such as Amnesty International (2019a), and international bodies such as the Working Group on Arbitrary Detention of the UN Human Rights Office (2019) have also decried various aspects of this case.

also Carrington et al., 2019; Karstedt & LaFree, 2006).[29] Since liberal democracy models show significant variation (Karstedt, 2006, 2013), this academic endeavour should embrace comparative politics viewpoints in scrutinising the heterogeneous impact of diverse democratic models on the punitive field. Such an undertaking may prompt scholars to go beyond institutionalist readings in exploring the impact of political determinants on penality,[30] by also considering more granular dimensions, such as political values (see Karstedt, 2006, 2011) and democratic practices (Fishman, 2019). In fact, the cases examined in this paper show the need to consider the ways in which democratic practices not only give shape to specific patterns of political inclusion, but also manage the uneasy coexistence of the rule of law principle and the democratic principle. That perspective may spotlight the 'disjunctions' of democratic processes (Holston, 2008), exploring the various combinations of advanced democratic arrangements, judicial independence schemes, and more or less widespread enemy penology strategies—including manifestations of traditional political justice – which characterise current liberal democracies. Ultimately, the penal outcomes of these combinations are the result of the agonistic relation of the various actors forming the penal field (Goodman et al., 2017; see also Wenzelburger, 2020).

Additionally, this revamped effort to examine twenty-first century political justice may shed new light on contemporary forms of enemy penology and illiberal criminal justice. It may re-delineate the contours of what should be considered as political justice in a period in which political democracy is much more consolidated in many countries and regions than it was for most of the twentieth century (Levitsky & Ziblatt, 2018; see also Diamond, 2008). Drawing on the cases explored here, penal practices targeting political activities, taking stock of early modern political criminal offences, and staging public penal rituals endowed with unambiguous political meaning should rank high in profiling contemporary forms of political justice. In addition, the proposed academic endeavour should inquire into the intriguing persistence of these apparently outmoded manifestations of enemy penology, as well as scrutinise their influence on *regular* penal practices at the local level. Moreover, this renewed reflection on political justice should aim to map the ways in which these penal practices are interwoven with late modern and post-modern forms of enemy penology, which are focused on potentially ubiquitous aliens to the community (see e.g. Franko, 2020), rather than on classical political foes.

Ultimately, the theoretical effort outlined in this concluding section may provide a useful contribution to the burgeoning debates on the *failure* of democratic regimes that are increasingly garnering the attention of political science scholars. In fact, the criminology literature may assist in understanding if and how the consolidation of forms of political justice and enemy penology contribute to liberal democracies perishing (Levitsky & Ziblatt, 2018), being hollowed out (Mair, 2013), entering

[29] More specifically, on the relation between late democratisation and punitiveness, see Cavadino & Dignan, 2014; Lappi-Seppälä, 2014; Sung, 2006.

[30] Although institutionalist analyses are particularly pertinent and useful (see Lacey, 2008, Lacey & Soskice, 2015; see also Karstedt, 2010), they give little space to scrutinise recently democratised systems that in many aspects – enemy penology and illiberal penality more generally being one of them – are more perfectible than long established liberal democracies.

into recession (Diamond, 2008) or turning into 'post-democratic' political forms (Crouch, 2005).

In sum, both criminology debates and political science conversations have much to gain from mapping and exploring apparently outmoded, twenty-first century forms of political justice.

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