PAST INJUSTICES, MEMORY POLITICS AND TRANSITIONAL JUSTICE IN SPAIN

Paloma Aguilar. Associate Professor of Political Science, UNED, Spain

Clara Ramírez-Barat. Senior Research Associate, International Center for Transitional Justice, USA
INTRODUCTION

The Spanish transition has often been presented as one of the most peaceful and successful democratic transitions and praised as a model to follow. The traumatic memories of the population after a brutal Civil War and a long-lasting and cruel dictatorship were not easy to overcome. According to many authors, the basis for the peaceful and successful stabilization of democracy in Spain was precisely the decision to leave behind the thorniest aspects of the past. However, in recent years, different voices have been claiming that the Spanish transition was not as exemplary as it has been portrayed, mainly because it failed to provide justice and truth to the victims of Francoism, and because it left untouched certain institutions inherited from the dictatorship. Moreover, neither was it a peaceful process; indeed, political violence was present throughout the democratization period (Aguilar & Sánchez-Cuenca, 2009). However, what arouses greater criticism is the failure of the first socialist governments (1982-1996) to undertake a more comprehensive reparative policy for the victims of the Civil War and the dictatorship. Many of those who now hold this critical view also claim that it is still necessary to correct these shortcomings. Moreover, some human rights and victim groups have resorted to international jurisdiction as a means of obtaining the justice and truth denied to them in Spain.

In the first section, the paper summarizes the transitional justice (hereafter, TJ) and memory policies passed from Franco’s death in 1975 until the creation of the Association for the Recovery of Historical Memory (Asociación para la Recuperación de la Memoria Histórica, ARMH) in 2000. The second section deals with what we have called the ‘post-TJ period’, which started in 2000, reaching a peak in 2007 with the approval of the so-called ‘Law of Historical Memory’ (hereafter, LHM), and remains open today. Finally, some conclusions are presented.

TRANSITIONAL JUSTICE AND MEMORY POLICIES (1975-2000)

Franco’s dictatorship started being dismantled upon the death of the dictator on 20 November 1975, although the legacy it had left behind still loomed large. According to the latest rough estimates, the Republican repression caused around 50,000 deaths during the conflict and the Francoist repression caused around 130,000 deaths (including an estimate of 50,000 after the Civil War) (Espinosa, 2010). Between 1936 and 1942, approximately 500,000 political prisoners passed through more than 100 concentration camps, and several tens of thousands of Spaniards were court-martialled (Rodrigo, 2003). At the end of the war, Spain’s prison population was approximately of 270,000, while between 1940 and 1945 around 10,000 persons were deported to Nazi camps (Bermejo & Checa, 2006). During the conflict, around 30,000 children on the Republican side (the so-called ‘children of the war’) were sent abroad, many of whom never returned; while after the war hundreds of thousands went into exile, though a
significant number of them returned in the next few years (Alted, 2005). After a very exhaustive depuration process in the post-war years, thousands of people were forbidden from returning to their former jobs. Moreover, the Francoist regime denied economic support to war veterans, mutilated, widows and orphans of the defeated side, and only the relatives of the victims of Republican repression were allowed to exhume bodies from mass graves and obtained different sorts of official aid for reburying the remains in cemeteries. In contrast, those who fought or sympathized with Franco’s forces were widely honoured, given preferential treatment in employment, granted compensation measures and pensions, provided with healthcare benefits and given the possibility of exhuming the bodies of their family members from mass graves to bury them properly.

After an almost forty year long dictatorship, political change in Spain came through a very long process of negotiation between the reformist sectors of Francoism and the different political forces of the democratic opposition. Soon after the dictator’s death, some partial mercy measures for political prisoners were adopted invoking the spirit of ‘national reconciliation’. In July 1976, the first government of the monarchy passed a Royal Decree-Amnesty Law releasing political prisoners “if they had not put in danger the life or the integrity of other persons.” However, this measure was so restrictively enforced by the extremely conservative judiciary of the time that it had to be later complemented with some additional mercy measures. After the democratic elections of June 1977, the first law approved by parliament was precisely an Amnesty Law that covering crimes of a political nature led to the release of most of the few political prisoners still captive. More interestingly, it also amnestied those who had been sentenced for committing crimes involving bloodshed until 15 December 1976; and between that date and the democratic elections when it was possible to prove that the crimes had been committed while furthering the reestablishment of public liberties or vindicating territorial demands. The practical majority of the political parties, except the heirs of Franco (Alianza Popular, AP), supported a very ample amnesty that covered not only the actions committed by the groups opposing the dictatorship, but also the violations committed by the officers of the regime. This law is still considered by many today the quintessence of ‘national reconciliation’ in Spain.

The decision not to undertake punitive measures against human rights perpetrators came with the establishment of several compensatory policies for the defeated that, material in nature, were the sole reparation measures undertaken by the new democratic government. From 1976 until 1984, seven different laws were passed providing some form of economic support or rehabilitation to different categories of beneficiaries from the Republican side (including war wounded, widows and orphans, and members of the military and the forces of public order). The intention of these measures, which were never part of a comprehensive policy aimed at dealing with the legacy of the repressive past, was neither to establish the truth nor to obtain justice. In broad terms, these policies began granting compensation to the victims of war that had not received reparation during Francoism – recognizing the “unequal treatment that was given to the defeated, and offering them the same rights of the victorious” – and only later as those of Francoists. Indeed, it would only be in 1986, when the members of the military who had received sentences under Francoism recovered their active rights, that one of the most important gaps of the Amnesty Law was finally amended; i.e. the reincorporation in the army of those who were members of the Democratic Military Union (Unión Militar Democrática, UMD). The fact that it took nine

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1. The collective memory of the Civil War, the legacies of Francoism, and the TJ policies adopted since Franco’s death have been studied in length by Aguilar (2008a). See also, Aguilar & Ramírez-Barat (2014).
years after the Amnesty Law to adopt such a measure reveals the power that the military retained during the first years of democracy. Finally, in 1990 the State General Budget Law granted compensation measures to those who had spent time in Francoist prisons for the first time.

Despite the implementation of these reparative measures, in sharp contrast with other countries that have democratized recently, none of the following policies were undertaken in Spain, either during the democratization period or (with some exceptions, as will be seen) afterwards: trials; vetting; restitution of individual property; truth-seeking; and symbolic reparations. As a result, several national and international organizations have pointed out that the Spanish state is ignoring important obligations recognized by international law, including investigating, judging, sanctioning and redressing gross violations of human rights.

The generational change has proved to be a crucial variable. To begin with, and as this paper emphasizes, the third generation that brought this issue back to the forefront of the public sphere has grown under a stable democracy, is devoid of guilty feelings and fears of their predecessors, and feels much more identified with the international legal framework and with the language of human rights (Aguilar, 2008b). An important part of this generation of ‘grandchildren’ of those who lived through the war believes that challenging the institutional arrangements made during the transition is not going to destabilize the political situation, and considers that the time has come to fully compensate the victims of Francoism and to give them public recognition for their suffering.

The second factor is the creation in 2000 of the ARMH, as well as various other organizations estab-

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2. The only measures eventually taken in this respect were the early retirement of some judges and military personnel, and the reallocation and reform of the police forces.

3. There have only been a couple of laws to restitute the property rights of political parties and unions: in January 1986, a law established the return of seized properties to unions; and in 1998 another law restituted goods that had been stolen from political parties.

4. Several monuments honouring the victims of the dictatorship have been built in recent years, but only at the local level.


6. We have borrowed this fortunate expression from Alexander Wilde, Irruptions of Memory, Expressive Politics in Chile’s Transition to Democracy, 31/2 J. LAT AM STUD, 473 (1999).
lished in recent years, in most cases, by families of victims of the war. All of these groups have very strongly advocated the recovery of the ‘silenced’ memory of the Republican victims. In particular, the ARMH, founded by the grandchildren of Republicans, has promoted many successful exhumations all over Spain, and a handful of initiatives vindicating the recovery of the memory of the victims of the Civil War and Francoism that have played a key role in providing visibility to justice claims in the public space (Ferrándiz, 2010). Their initiatives have been very important for shedding light on the Francoist repressive machinery and have contributed to raising awareness at the national and international levels about the existing lacunae in terms of victims’ reparation in Spain.

Thirdly, a strategic political turn took place in the Partido Socialista Obrero Español (Spanish Workers’ Socialist Party, PSOE) after it first lost power in 1996, following four legislatures in office (1982-1996) during which the legacy of the past was mostly ignored. When the main conservative party, the Partido Popular (Popular Party, PP), took office under president Jose María Aznar, the leftist, Catalan and Basque nationalist parties tried to stigmatize it for its Francoist roots. This process was particularly active during the second PP government (2000-2004) (Aguilar, 2006). The initiatives presented or supported by the PSOE during that period established a precedent difficult to ignore when it later regained office in 2004. The fact that the PSOE, this time lacking a parliamentary majority, needed the parliamentary support of parties that were much more determined to give a strong drive to these issues (especially the parties on the left of the political spectrum, Izquierda Unida (IU) and Esquerra Republicana de Catalunya (ERC)), also helps explain the important policies that were approved after 2004 (Aguilar, 2008b).

Fourthly, the consequences derived from the evolution of international human rights and international criminal law frameworks and the lobbying efforts of INGOs, such as Amnesty International, but also international institutions such as the United Nations, the Council of Europe and the European Parliament, have also proved to be very relevant. Following the work of the Committee of Enforced Disappearances, the official visit to Spain in January 2014 of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Mr. Pablo de Greiff, significantly increased the pres-

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7. Although the ARMH is the best known of these victims’ organizations, there are many others, including Forum for the Recovery of Memory (Foro para la Recuperación de la Memoria, created in 2002), Friends of the International Brigades (Asociación de Amigos de las Brigadas Internacionales, founded in 1995), or the Exile Association (Asociación de Descendientes del Exilio, founded in 2002), as well as various former prisoners, ex-combatants, and ‘children of the war’ groups, some of these founded in the beginning of the transition.

8. Responding to a report submitted by the ARMH, in 2003 the UN Human Rights Committee (HRC) included Spain among the countries with cases of forced disappearances. Although so far the Committee has only recognized two cases of disappearances in Spain, it deals only with disappearances after 1945, whereas the vast majority of the cases in Spain are between 1936 and 1940. Still, in 2009, the HRC called on Spain to revoke the 1977 Amnesty Law; See Consideration of the Reports Submitted by States Parties Under Article 40 of the Covenant on Civil and Political Rights, Concluding observations of the Human Rights Committee, Spain, Human Rights Committee, Ninety-fourth session, U.N. Doc. CCPR/C/ESP/CO/5 (2009). In September 2013 the Working Group of Enforced and Involuntary Disappearances made an official visit to Spain. In its preliminary observations, the Working Group called on the government to fully implement the LHM, prepare a national plan to search for the disappeared, repeal the amnesty law and prosecute forced disappearances in Spain. See Observaciones preliminares del Grupo de Trabajo sobre las Desapariciones Forzadas o Involuntarias de la ONU al concluir su visita a España, 30 September 2013. In parallel to this process, and following a request presented by AEDIDH and RIS at the UN, in December 2012 Spain submitted an official report to the Committee of Forced Disappearances. The committee examined the report in November 2013 and, once again, requested the government to take all the measures necessary to ensure the investigation of forced disappearances in Spain (see Observaciones finales sobre el informe presentado por España en virtud del artículo 29, párrafo 1, de la Convención, advanced version, Committee of Enforced Disappearances, 8th period of sessions, 4-15 November 2013). However, the Spanish Ambassador in Geneva reiterated that Spain would not revise the amnesty law.


10. On 4 July 2006, the majority of the political groups in the European Parliament expressed their condemnation of the Franco regime, while in November 2012, the European Parliament urged the Spanish Government to assist the daughter of a man killed by Francoist forces to find the remains of her father (Junquera & Albert, 2012). In October 2013, the European Parliament again condemned the Francoist dictatorship, underlining the right of the victims to historical memory, truth, justice, and reparation.
sure on the government. In a preliminary statement issued after his visit, Mr. de Greiff warned of the great distance between the government and victims’ groups, and called on the government to revise the Amnesty Law and adopt a series of measures to provide justice to the victims of the Civil War and Francoism. Finally, the importance of fortuitous events, such as anniversaries, should not be underestimated. Among them, a crucial episode is what has been called the ‘Pinochet effect’. The consequences of the detention in London in October 1998 of the Chilean dictator – on the initiative of the Spanish Judge Baltasar Garzón – have been abundantly outlined in the literature for explaining the recent developments of the Spanish case (Golob 2008; Encarnación, 2008).

**Measures Approved from 2002 to 2013**

On 20 November 2002, the Constitutional Commission of the Congress of Deputies unanimously approved a declaration stating that “no one could feel legitimated to use violence with the aim of imposing political convictions and establishing totalitarian regimes,” and urging the government “to develop an integral policy of recognition for those exiled as consequence of the Civil War” (Parliament, 2002). Only one year later, as part of the commemoration of the 25th anniversary of the Spanish Constitution, the Congress organized an act of tribute to the victims of the dictatorship. The homage was not endorsed by the PP, the governing party at the time, arguing that the parties of the opposition were breaking the verbal agreement reached in 2002, according to which if the PP was for the first time in its history “to condemn Francoism”, the political left would have to accept in turn “never to use this subject again for political confrontation.” Not surprisingly, only some weeks earlier, the PP had also opposed an initiative submitted by Eusko Alkartasuna (EA) – and endorsed by the PSOE and IU, among other parties – requesting the government to assist and provide recognition to the victims of the Civil War and the dictatorship, facilitate access to the archives containing information about the war, support the exhumation of the remains buried in mass graves and reassess the pensions of the ‘children of the war’ (*El País*, 15 October 2003).

Taking on these demands and several that followed, after the PP lost the elections in March 2004, and only two months after Jose Luis Rodríguez Zapatero started his presidency, the Congress approved a non-law proposition requesting the government to undertake a study regarding the legal situation of the victims of the Civil War and the dictatorship’s repression and to advance proposals for ameliorating their economic condition. Moreover, the motion urged the government to facilitate access to private and public archives containing relevant information of the repression, and to submit a draft bill of solidarity with the victims who suffered personal harm during Franco’s regime while trying to exercise the civil liberties that would be later recognized in the Constitution (Parliament, 2004). To undertake these requests, the government appointed the so-called ‘Interministerial Commission for the Study of the Situation of the Victims of the Civil War and Francoism’. The commission, chaired by the vice-president of the government, was given the mandate to undertake the above-mentioned study and submit recommendations on the matter before the end of the year. For this purpose, it was granted a budget of €5 million, part of which was to be used to fund the exhumation projects that were already being carried out with private funds by civil society associations.

Following the creation of the commission, several additional measures were taken in response to the increased number of petitions that, from June 2004,

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12. Including the 25th, 30th and 35th anniversaries of Franco’s death; the 70th and 75th anniversaries of the beginning of the Civil War; the 75th and 80th anniversaries of the proclamation of the Second Republic; and 70th anniversary of the end of the Civil War.

some groups submitted to the parliament. In January 2005, after a long negotiation with associations representing the children of the war, the government approved an increase in their pensions and improved the healthcare access of those who were still living abroad (El País, 22 January 2005). Some months later, a Royal Decree was passed requesting the transfer of the documents that were seized in Catalonia after the Civil War by Franco’s regime, and since then kept in the General Archive of the Spanish Civil War (in Salamanca). Finally, in 2006, and partially reflecting this increasingly positive situation, the Congress approved a law-proposition from the IU declaring 2006 as the year of historical memory.

On 28 July 2006, the Interministerial Commission submitted to parliament two reports (one regarding the situation of the victims and a second one on archives [2006; 2006a]) and a draft law. The submission of the bill initiated a long and complex negotiation process between the PSOE and the rest of the political parties. While the PP manifested strong opposition to the law, the leftist parties and some human rights and victims’ groups criticized the inadequacy of the proposal (Amnistía Internacional, 2006; Aguilar, 2008b). The bitter debates in parliament soon reverberated in the media, involving many public figures and academics (especially historians).

However, despite the existence of this very clear two-sided confrontation in the political space, the truth is that the average Spaniard was hardly involved in the discussion.

Finally, an amended version of the original text was approved on 31 October 2007. Two groups opposed the law: the PP and ERC (which, although it was initially one of its main promoters, finally refused to endorse the law because it did not declare null the trials of the Franco era).

Law of Historical Memory, passed in 2007, regulated four different issues, including reparations, the exhumation of mass graves, the removal of Francoist symbols and the question of access to archives.

Law 52/2007, which recognizes and expands the rights, and establishes measures in favour of those who suffered persecution or violence during the Civil War and the dictatorship (or the so-called ‘Law of Historical Memory’) was passed by the Senate on 10 December 2007. The final text, which was to establish the framework for the implementation of politics of memory in Spain, included in the end some of the demands of the left that exceeded the initial intentions of the government. Broadly speaking, it regulates four different issues including reparations, the exhumation of mass graves, the removal of Francoist symbols and the question of access to archives. Five different ministries have participated in its implementation and several additional legislative measures were adopted after its entry into force to develop further some of its provisions. It should be noted, however, that while the law constitutes the most comprehensive attempt to date to address the violent and repressive past in Spain, its coming into being and later implementation were marked by the radical opposition of the PP, the deep disappointment of many victims’ groups, and the inhibition of the majority of Spanish society, which, as a consequence of the prudence inherited from its traumatic past, has recurrently showed a tendency to keep a distance when confronted with a sharp two-sided debate on this matter. A brief explanation of each of

14 Royal Decree 2134/2008 regulating the procedure whereby to return documents confiscated during the Civil War to private citizens. BOE, 9 (2009, January 10), pp. 3411-3415.
these points will follow, including the principal lines of action that were taken by Rodríguez Zapatero's government.

Reparatory Measures. The bulk of the articles of the law establish different compensation measures and recognize some categories of beneficiaries that were not included in previous reparatory laws, also standardizing some situations that were hitherto differently addressed by the Autonomous Communities. Especially interesting is the fact that, for the first time after the transition, the law granted reparations for those who died while “defending the Spanish democracy” between 1 January 1968 and 6 October 1977.

In terms of symbolic reparations, the law declares the illegitimacy of all the tribunals that were created on political, ideological or religious grounds during the Civil War and the dictatorship. Additionally, it recognizes the right of the victims to obtain a “declaration of reparation and personal recognition” issued by the Ministry of Justice. This measure was highly contested at the time, for many were expecting that the law would declare the sentences of the Francoist tribunals null and void. Other fundamental symbolic measures included in the law was the granting of Spanish nationality both to the members of the International Brigades who fought on the Republican side during the war, and to the descendants of those who were forced into exile between 18 July 1936 and 31 December 1955. In 2011, the Senate approved another disposition, long requested by memory associations, according to which those who disappeared during the Civil War and the Dictatorship were to be included in the civil registry as deceased.15

The issue of the mass graves. One of the key issues regulated by the law was the location of mass graves and the identification of the remains of those who were killed during the Civil War and its aftermath. This was important not only because it constituted one of the major demands of victims’ associations, particularly after the re-eruption of memory issues after 2000, but also because until today there has not been any official attempt to locate and identify the thousands of bodies that are still buried all over the national territory. While civil society associations had been particularly active in the location and exhumation of mass graves, this activity had been mostly carried out in an ad hoc and private manner. Consequently, many families have had to surmount administrative and legal challenges to access the places where the burials are located in addition to the mere financial ones. The law tackled the issue along three lines: the commitment of the government to draft a protocol for the exhumation of the remains, the development and publication of a national map of mass graves, and the establishment of a programme to economically support such activities. However, the law still left the task of exhuming and identifying the remains in the hands of civil society. Victims’ associations and human rights groups heavily criticized this provision (Ferrándiz, 2012).

In December 2008, the government passed a law announcing the establishment of an Office for the Victims of the Civil War and the Dictatorship that, among other tasks, was mandated to produce a “protocol of scientific and interdisciplinary action for the exhumation of mass graves and the production of an integrated map covering the national territory of the inhumation sites.”16 In May 2011, a still-incomplete map of mass graves was made available online.17 Finally, on 23 September 2011, with a four-year delay, an exhumation protocol was approved. However, it has to be said that the idleness of the central government in this respect contrasted with the approach taken by several Autonomous Communities in this same matter, especially Catalonia, Andalusia, Navarra, and the Basque Country.

Although the law did not recognize the state’s responsibility for the exhumation of the mass graves of the Civil War, it did establish, however, some provision for economic support. Starting in 2005, the socialist government passed an annual call for applications, with the general aim of "promoting the recovery of the collective memory and the moral recognition of the victims of the Civil War." Addressed at associations, foundations, universities, among others, the grants served to finance a variety of projects including the compilation of censuses of the disappeared, exhumations, celebration of tributes, compilation of documents and oral testimonies, production of documentaries, celebration of exhibits and publications. This support was, however, sharply interrupted after the PP won the elections in 2012. While in 2012 the government reduced allocated funds by 60%, in 2013 the line was eliminated from the budget. This explains why associations are now resorting to crowdfunding to at least continue with the exhumations, which is a serious backward step in the reparation process.

**Removal of Symbols.** The removal of symbols commemorating the military rebellion or the Francoist repression – except in those cases in which such symbols have artistic or religious relevance – was also contemplated in the Law. Although the PSOE government undertook important measures to remove a significant amount of symbols, the application of this measure has been irregular all over the country. In particular, there has been strong resistance in some municipalities to remove monuments and change the names of the streets. The leftist parties, ERC, IU and ICV, have recurrently raised this concern in parliament. Among the symbols of the Francoist past, the Valley of the Fallen – a religious-funerary monumental complex in which Franco is buried – has a quintessential standing. The complex is at the same time a mass grave holding the remains of 33,847 victims of the Civil War. The LMH provided that the Valley of the Fallen “shall not be used to celebrate political rallies”, while an additional disposition succinctly states that “the Management Foundation of the Valley of the Fallen will include in its mandate to honour and rehabilitate the memory of all those who died during the Civil War or as the result of the later political repression.” On 27 May 2011, the Council of Ministers created an ‘Expert Commission for the Future of the Valley of the Fallen’, composed of eleven experts and chaired by the Ministry for the Presidency. Five months later, the Commission submitted a report with several recommendations, all of which except one – the relocation of the remains of Franco in a private cemetery – were agreed upon by all of its members. Two years after the submission of this report, however, not a single recommendation has been implemented. On the contrary, in May 2013 the PP government announced a project to restore the portal of the basilica where Franco was buried. We also have to take into account that, given the religious nature of the Valley, any change in the monument would have to be authorized by the Catholic Church, whose reticence towards digging into the Civil War and the dictatorship is well known.

**The archives.** The final set of issues regulated by the LMH relates to the preservation and access to private and public archives that contain information about the war. To date three steps have been taken in this direction. In 2008, an instruction was approved to regulate the access to death certificates from the civil registry dependent on the General Office of Registries and Notaries (Dirección General de Registros y Notarías). In 2009, the government passed a Royal Decree regulating the Military Judicial Archives, and finally in November 2011, a decree regulating access to the State Archives. Before the general elections of November 2011, the socialist Minister of Defence promoted the declassification of around 10,000 documents from the Judicial Military Archives

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18. In October 2013, the PP government rejected a parliamentary motion in favour of undertaking the recommendations of the experts’ commission, alleging that Spanish society is not ready to face its past and that any step in this direction would reopen old wounds.
dating from 1936 to 1968; however, in May 2012, the Ministry of Defence of the new rightwing government announced the cancellation of the process alleging potential diplomatic conflicts. In any case, a crucial obstacle for obtaining information on Francoist repression is the fact that the Law of Official Secrets (Ley de Secretos Oficiales), which regulates access to archives and official documents, was passed by the dictatorship in 1968. An additional problem is the deliberate destruction of certain archives directly linked with the repression during the first democratic government ordered by the Ministry of the Interior, Rodolfo Martin Villa.

Finally, regarding the preservation of archives, the law established the setting up of the Historical Memory Documentary Centre and the General Archive of the Civil War, and declared such collections part of the documentary and bibliographic national heritage (González Quintana, 2001). Located in Salamanca, the Centre hosts an impressive collection of materials relating to the war and the Francoist repression.

### Judicial Initiatives

Disappointed with the law and the evolution of the process, on 14 December 2006 five organizations of families of disappeared during the Civil War and under Francoism presented a series of claims at the Audiencia Nacional (National High Court, AN). According to the proceedings issued by the Prosecuting Judge, Baltasar Garzón, on 16 October 2008, these claims denounced “alleged crimes of illegal detention under the framework of a systematic and preconceived plan to eliminate political opponents through multiple deaths, torture, exile and forced disappearances from 1936, during the years of the Civil War and the post-war, which took place in different geographical spots of the Spanish territory.”

While the Prosecutor of the AN considered that the alleged crimes were ruled by the Amnesty Law of 1977, Garzón declared himself competent to investigate 114,266 disappearances that occurred during the Civil War and Francoism, stressing that the facts had never been judicially investigated before in Spain. With this move he was admitting the claims presented by twenty-two families of disappeared persons, formally accusing 35 members of the leadership of Francoism of the alleged crimes and authorizing the exhumation of nineteen mass graves.

The decision of the judge came as a big surprise to many, as the possibility of opening judicial proceedings against Francoism had never before been (seriously) considered. Garzón’s position was appealed by the Prosecutor of the AN. As a response, Garzón issued a new order declaring the extinction of the criminal responsibility of the accused, for they had already deceased, recusing himself from the proceedings and transferring the case to the territorial courts of the places in which the mass graves were located. Ten days later, the Criminal Chamber established the incompetence of the judge to investigate the crimes.

Besides the enormous reaction that Garzón’s action triggered in Spanish public opinion, the issue acquired another dimension when the ultra-right-oriented trade union, Manos Limpias, presented a complaint against Garzón for intentionally issuing an unjust judgment (querella por prevaricación) before the Supreme Court that led to the opening of a proceeding against the judge. While the PP manifested its strong support for the proceedings

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19. Diligencias Previas-Proced. abreviado 399/2006 V, A. N., Juzgado Central de Instrucción No. 5, 16 October 2008. It should be noted that in the Spanish case the term disappeared refers to those who were extra-judicially executed and whose bodies, buried in mass graves, have not been identified; although in most cases there is either official record or oral testimony about the execution (Ferrández, 2010).


(Lázaro, 2009), the situation aroused unprecedented discontent among Spanish society (Coli & Montañés, 2010a; 2010a). On 24 April, a widespread demonstration supporting Garzón was organized in more than twenty Spanish cities. Significantly, these demonstrations turned into the first mass mobilization in homage to the victims of Francoism. When, two weeks later, the body governing judicial power in Spain declared the preventive suspension of the judge, the issue acquired an international dimension. Reflected in international media, several human rights organizations declared their public support to the judge, while a group of internationally renowned legal organizations signed a joint petition requesting the UN to intervene.23 In Spain, memory associations strongly expressed their preoccupation, together with prominent figures of the legal profession. At the political level, several parties reacted by requesting parliament to modify the Amnesty Law, so as to exclude crimes against humanity from its rulings (El Mundo, 20 April 2010). All their motions were, however, rejected by both the PSOE and the PP.

The trial against Garzón started on 24 January 2012 accompanied by daily demonstrations outside the Supreme Court. As some commentators emphasized, the proceedings against Garzón made it possible for the families of victims of the Civil War to have their cases heard in a courthouse of Spain for the very first time in history. Finally, on 27 February, the Court issued a sentence clearing Garzón of abuse of power, considering, however, that he had misinterpreted the law and hence closing the possibility of any further investigation of the alleged crimes in Spain (Yoldi & Lázaro, 2012).24 Following this sentence, the Supreme Court also ruled in favour of the competence of local level courts to decide about the mass grave issue, considering that, although the families of those anonymously buried could request the exhumation through legal procedures for identification purposes, the alleged crimes could not be considered crimes against humanity (Lázaro, 2012b). As a consequence, from that moment on, the legal power to exhume mass graves would depend on the position of particular courts, instead of following a national policy. The situation became even more adverse for the families of the victims when the European Court of Human Rights (ECHR) declared non-admissible the first claim ever brought in front of such a tribunal regarding a Civil War disappearance. Echoing the arguments of the Spanish judiciary, the ECHR considered that the claim had been presented too late according to formal proceedings (Lázaro, 2012a).25

The closure of Spanish (and European) judicial venues triggered a radical change in the strategy of victims’ associations. Everything took an unexpected turn when, following a procedure that was presented in 2010 at the Federal Chamber of Buenos Aires (Gallego-Díaz, 2010; Junquera, 2010), the judge in charge of the case, María Servini, decided in September 2013 to officially request the extradition of four members of the Francoist security forces under alleged charges of torture (Delicado, 2013). In contrast to Garzón’s proceedings, which were against the already deceased members of the Franco regime's upper echelons, this case, in which two of the alleged perpetrators are still alive and in which the crimes they are accused of were committed in the 1970s, raised the hopes of victims’ groups and importantly contributed to catalysing their coordination, as will be seen, in a renewed and stronger stance against impunity (Vélez, 2013). While after a long proceeding in which the PP again showed its clear opposition to the use of judicial means to correct the abuses of


24. While not a consequence of this case, on 10 February Garzón was sentenced to 11 years of disqualification accused of being responsible of using illegal wiring to uncover a corruption case of the PP (Lázaro, 2012c).

power of Francoism, in April 2014 the National High Court rejected the extradition to Argentina of the two alleged perpetrators (while inviting the opening of a case in Spain) (Jiménez Gálvez, 2014). Judge Servini continued with the proceeding travelling to Spain in May of 2014 to gather testimony from four victims of Francoism (El Mundo, 18 May 2014). In parallel, another recent and unexpected achievement has been the admission by a Catalan court of the first criminal case related to the Civil War: the bombing of Barcelona by 21 Italian pilots of the Aviazione Legionaria (Garcia, 2013).

Finally, another important development in the judicial arena is the so-called issue of the ‘stolen children’. In one of the decisions Garzón issued in 2008, he warned about the existence of a ‘systematic plan’ of removal of children of Republican families, whose parents, considered ‘ideologically’ inadequate to raise their children, were dead, in exile, detained or disappeared. Once removed from their families, the children would come under state supervision and their names changed (Vinyes, 2002; Vinyes, Armengou & Belis, 2002; Rodríguez Arias, 2008).

According to Garzón (who estimated around 30,000 cases) these facts would not only constitute crimes against humanity not covered by the Amnesty Law of 1977 but, as he argued, most of the victims would still be alive. Accordingly, he requested the State Prosecutor and the competent judges to investigate the crimes, punish those responsible, and compensate the victims (Yoldi, 2008).

On 5 November 2010, three local courts referred the cases back to the AN, considering that the crimes should be dealt with under its jurisdiction, since they constituted crimes against humanity (Vázquez & Barcala, 2010). Although the Prosecutor of the AN considered that the Court did not have the competence to investigate these crimes, the pressure exercised by the Plataforma Grupos Afectados de Clínicas de toda España de la Causa de Niños Robados (Platform of Hospital Groups from all over Spain Affected by the Case of the Stolen Children) – which had collected documentation of more than 300 cases of disappeared children – led him to request the Ministry of Justice to create an office to coordinate through administrative means the demands of the affected persons (Público, 7 December 2010). The case entered a new phase when a second group, the Asociación Nacional de Afectados por Adopciones Irregulares (National Association of those Affected by Irregular Adoptions, ANADIR), presented a claim before the State Prosecutor, reporting around 261 cases of children allegedly stolen in private and public hospitals all over Spain between 1920 and 1990. They accused the professionals of these centres (many of which were administered by the church) of deceiving the mothers by telling them that the children were stillborn, and then giving them into illegal adoption to other families (Público, 27 January 2011).

The proceedings regarding this second case started in March 2011 in Madrid. By June 2011 there were 849 investigations open all over Spain (Público, 17 June 2011). In April 2012, the government announced its intention to create a census of those affected by this particular situation. Still in a design phase, the census will allow both parents and children looking for their biological relatives to cross-reference information (El País, 12 April 2012). In October 2012, in relation to a case from the 1970s, a judge established for the first time that the crime of stealing children is not subject to statute of limitations (El País, 5 October 2012). This decision was seconded by the State Prosecutor, who developed a policy on how to deal with these cases that was distributed to all public prosecutors (Junquera, 2012). In September 2013, the association Todos los Niños Robados son También Mis Niños (All Stolen Children are also...

26. The relation between these two cases, however, is highly contested. Some consider that the first set of cases was the direct result of the Francoist repression, but that the second set constituted mere criminal acts (and hence the systematic participation of the state would not be clear); others claim that both issues would naturally be concatenated.
my Children) presented a judicial complaint joining the Buenos Aires lawsuit (Rebossio, 2013).

Social Initiatives

During the first twenty-five years of democracy, politics of ‘national reconciliation’ prevailed. In the political sphere, this meant the avoidance of the thorniest aspects of the Civil War and the Francoist repression, while in the social sphere only very low profile initiatives took place. All throughout this period, Spain centred all its efforts on the economic modernization of the country and the political stabilization of the new democratic system.

However, as time passes and new generations emerge in the political sphere, the repressed memories of the traumatic past have a tendency to re-emerge. Indeed, in the past 14 years the violent legacy of the Civil War and the dictatorship has strongly irrupted in the public space. Starting in 2000, when families of the victims began to organize – notably represented by the March of Memory (Caravana de la Memoria), formed by several victims’ groups that travelled all over the country to tell their stories –, and managed to insert their demands into the political agenda of some of the leftist and nationalist parties, Spain has witnessed a gradual irruption of its most recent and tragic history. A solid – albeit very fragmented and, often, strongly contested – nationwide associative movement (also known as ‘movimiento memorialista’) has been consolidating during the past years, and some public initiatives – particularly in some autonomous regions such as Andalusia, the Basque Country and Catalonia – have helped bolster a movement that has reverberated in the public space in the form of films, books, research projects and photography or history exhibits about the war and the dictatorship.

The perseverance of the families of those who suffered the repression of Francoism, and especially their struggle to locate, exhume, identify and rebury the remains of their loved ones, has played a fundamental role in moving this process forward. According to recent figures, between 2000 and 2012, more than 300 mass graves have been exhumed and more than 5,700 bodies have been recovered (Universidad del País Vasco, Sociedad Aranzadi and Ministry of Presidency, 2012). Within the same process, and partly made possible by the existence of public subsidies since 2005, there have also been an increasing number of initiatives, especially at a local level, to vindicate the memory of the victims through symbolic means in streets, squares and cemeteries all over the country.

During the first 25 years of democracy, politics of ‘national reconciliation’ prevailed. In the political sphere, this meant the avoidance of the thorniest aspects of the Civil War, while in the social sphere only very low profile initiatives took place.

In parallel to the recovery of memory, the most recent developments in Spain have also clearly articulated a message of recognition that was absent before. However, and in spite of the important steps taken, the LMH had very important gaps; particularly, though not exclusively, for not assuming the possibility of annulling Francoist sentences and for leaving in the hands of civil society the exhumation of mass graves, instead of putting in place a nationally

27 As already stated, associations related to the Civil War, exile, and so on, began to emerge at the beginning of the transition. After Franco’s death some exhumations took place and a few monuments honoring the Republicans were built in some villages. But these initiatives had a very spontaneous and private character, failed to obtain the support of relevant national organizations (such as parties and unions), received no public support and only took place at the local level. This explains why these did not achieve national resonance, in sharp contrast with the second wave of exhumations that began to take place in 2000. This silence refers both to the social and political realms, not to the cultural one, where the memory of the Civil War and Francoism has been the object of great attention for a long time (Aguilar, 2006).
coordinated policy. It is thus not surprising that some political groups kept presenting new – though unsuccessful – proposals before parliament, both during Zapatero’s second term of office (2008-2011) and in the current PP legislature (from 2011), seeking to advance the agenda of this memorial movement in the political sphere. Similarly, the fact that, despite the immense social reaction that the proceeding caused, Garzón is the first person who has stood trial in a matter related to Francoism, is more than telling. In the current climate of economic uncertainty, together with the political change operated both at the national level and in some autonomous communities, victims’ associations are witnessing, with despair, how some of the steps taken have been interrupted or even reverted.

Indeed, one of the first measures adopted by the PP government was the closing of the Office of Attention to Victims of the Civil War and the Dictatorship, and eventually ended up suppressing all budgetary allocations for the LHM (Público, 2 March 2012; Jaúregui, 2012). Finally, it should be underlined that, while with the passage of time there have been an increasing number of public statements acknowledging the human rights violations committed during the war and the dictatorship and/or the suffering of the victims in Spain, at a national level, the PP has not yet publicly condemned Franco’s dictatorship in an explicit manner. In fact, in May 2013 the PP government was the only party voting against a parliamentary initiative aimed at establishing 18 July as the ‘day of the condemnation of Francoism’.

The stubbornness of the Spanish state to satisfy some of the victims’ demands is not only increasing the social pressure in favour of truth and justice for the victims, but also facilitating the creation of new associations made up of different social organizations (such as the Coordinadora contra la Impunidad del Franquismo, which groups more than 30 associations; the Plataforma por la Comisión de la Verdad sobre los Crímenes del Franquismo, which groups more than 100 associations; and Red Aqua, which groups all associations and individuals supporting the criminal process in Buenos Aires). Although the existence of collective platforms pursuing common goals constitutes a very important step in the memory movement, their survival is uncertain given its long history of fragmentation and internal confrontation.

CONCLUSION

TJ has increasingly become recognized as a normative and binding framework for countries dealing with legacies of human rights abuses. Focusing attention on the Spanish case, this paper has examined how Spanish society dealt with the legacy of political violence and dictatorial repression after Franco’s death, while also considering what has been called the post-TJ phase, providing an account of the role that generational change has played in this process. The political elites of the democratizing period, the second generation of the Spanish Civil War, considered that the priority was to stabilize the new regime in a country that, four decades after the end of the war, was still traumatized by the memory of the conflict – vividly evoked in the mid-seventies by high levels of political violence. Accordingly, this generation considered that the politics of ‘national reconciliation’ was the best means to achieve stability.

At the same time, the way in which the transition to democracy took place in Spain – with the reformists of the Franco regime playing a leading role in its architecture and the military exerting notable pressure – made punishing those responsible for the atrocities committed unthinkable.

The need to overcome the traumatic memory of the Civil War and Francoist repression, the desire to leave behind the historical spiral of revenge, the absence of a strong social demand for accountability, the lack of international pressure against impunity at that time, and, finally, the need to appease ETA terrorists and its supporters, help to understand the approval of an ample Amnesty Law in 1977. The importance of this law lies in the fact that all crimes by the parties in conflict (both during the Civil War and under the dictatorship) were forgiven, a gesture
that was presented as the foundations for the reconciliation among Spaniards. Even today, the symbolic power of such a gesture remains so strong that, contrary to the post-TJ developments that have taken place in other countries, in Spain the prospects for the annulment of this law are extremely low. For many, the Amnesty Law is still considered today, together with the Constitution, as the cornerstone of Spanish democracy. The result is that a law that was initially proposed to release the few remaining political prisoners of the dictatorship, and to award reparations its victims, has ended up also being a law impeding judicial investigation of the truth and granting impunity to human rights perpetrators (Aguilar, 2012; Gil Gil, 2012).

After two decades in which the young democracy was consolidating, and during which the only TJ policies adopted in Spain consisted of a fragmented and incomplete reparations scheme, this status quo slowly started to be questioned by the third generation with the creation of a series of associations of victims and families of victims around 2000, which began to be supported by some of the leftist political formations of the democratic spectrum. The high visibility obtained by this second cycle of exhumations –the first one, which took place in the first years after Franco’s death, went practically unnoticed—made it impossible to go on ignoring Francoist terror and the deep wounds it had left in Spanish society. The images of the remains of victims, piled up in mass graves all over the country, were received with a mixture of horror and surprise both in Spain and abroad. Nobody seemed to suspect that such a modern and prosperous European country, which had been internationally praised as an example for its democratization process, could hide, more than 60 years after the end of the war and 25 years after Franco’s death, so many thousands of skeletons in her fields, caves, ravines, and wells.

All of this, together with the new political climate after the general elections of 2004, crystallized with the approval in 2007 of the first comprehensive LHM of Spanish democracy. Using more a memory than a truth or justice-based approach, the law contemplated a varied set of issues including some reparatory policies, the removal of symbols of the authoritarian past, conservation of and access to archives and, most importantly, some tentative measures to support the exhumation of the thousands of bodies that remain anonymously buried throughout the Spanish territory.

While it should be acknowledged that the LHM provided a strong impetus to the recovery of memory in Spain, its implementation has not been unproblematic and important obstacles remain. While many victims’ groups and human rights organizations have kept criticizing the shortcomings of the law, the PP has recurrently shown great resistance to look back to the Civil War and, very particularly, the dictatorship, and to support the demands of the victims.28 The mild position of the PSOE when in office, particularly during the first four terms, has not been particularly helpful in giving impetus to this process. The political and media polarization around these issues helps us to understand the apparent inhibition of the very cautious Spanish society when dealing with the past, even if, according to surveys, it is mostly in favour of the provisions of the law (Aguilar, Balcells & Cebolla, 2011). Moreover, the fall of the socialist government in 2012 with the victory of the PP has brought the politics of memory in Spain to a complete standstill, with the profound economic crisis as the perfect excuse for paralysing any development, including some of the provisions of the law.

In the social realm there seem to be two contradictory impulses. On the one hand, the lack of political and judicial will to attend to the most pressing claims of the victims has contributed to fostering the creation of some unitary platforms within a movement that has traditionally been – and still is – deeply divided. And, in

28. The PP is afraid of disappointing the section of its electorate that belongs to the extreme right and that, even today, passionately defends Francoism. This party, together with the Catholic Church, insists on the idea that breaking the ‘pact of silence’ could destabilize the country, and sustains that the only relevant victims nowadays are the victims of ETA terrorism.
some cases, it has also contributed to the radicalization of their demands. In fact, at the time the LHM was being debated in parliament, most victims’ associations would have been satisfied with the annulment of Francoist trials, the development of a state-led exhumation policy, and the conversion of the Valley of the Fallen into a museum devoted to the victims of Francoist repression.

The general weakness of Spanish civil society, and of the memory movement in particular, has been an important obstacle for advancing in TJ policies.

Garzón himself, as he has often explained, did not seek to place the Francoist perpetrators in the dock, but to bring out the truth of the highly repressive nature of Franco’s regime. However, the countless frustration of expectations has propelled victims’ associations to go beyond their initial demands: some of the plaintiffs of the Buenos Aires proceedings seek criminal justice for tortures committed by living perpetrators on victims that are also still alive. As Davis (2013) has shown in other contexts, when victims have to face impunity at home, they can go on with their quest for justice constructing different cases and resorting to foreign courts. On the other hand, the general weakness of Spanish civil society, and of the memory movement in particular, has been an important obstacle for advancing in TJ policies (Encarnación, 2001). These negative effects have been multiplied by the lack of sensitivity among Spanish judges to the recent developments in international human rights law and to the principles of universal jurisdiction. Whereas human rights advocacy has proven to be a crucial determinant of human rights prosecutions in other countries, the late and scarce support provided by legal experts to the associations for the recovery of historical memory has been determinant for understanding its lack of visibility and strength in Spain. The political and judicial reaction that was triggered against Garzón’s attempts to revise the crimes of the Civil War and the first years of Francoism, including the resulting sentence pronounced by the Supreme Court on the case, make further developments in the realm of criminal justice in Spain very unlikely.

Recent empirical evidence shows that “transitional countries with human rights prosecutions are less repressive than countries without prosecutions,” while at the same time truth commissions have been “associated with improvements in human rights practices” (Kim & Sikkink, 2010, p. 941). While these studies seem to question the classical thesis among early transitologists about the high risks TJ measures can exercise over stability, what recent developments in Spain seem to show is that, even in consolidated transitions, the past that has been simply set aside has a strong tendency to re-emerge in the public arena. The recent judicial initiative that is taking place in Buenos Aires – fiercely opposed by the PP government – shows that a wounded memory is something very difficult to suppress for good, for it always finds a way to make itself visible again.

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The Spanish case also shows that the fate of the victims and their claims very much depend on the ideological and instrumental reasons of the political and judicial powers at different historical moments, and this is one of the main reasons why TJ measures are so difficult to predict.

29. As a recent report from Amnesty International (2012) denounces, local courts are systematically closing the cases that are transferred to them. Chinchón (2012) has argued that the Spanish courts are systematically filing all the cases they examine alleging prescription of the crimes without opening any investigation or ordering the exhumation and identification of the remains. See also Aguilar, 2013.

30. This has only recently begun to change with the creation, in 2010, of Rights International Spain.
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