

Legal Silences and the Memory of Francoism in Spain

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1 Introduction: War of Memories in Spain

From the very beginning of the construction of the European Union, European laws, solemn declarations, and political statements have made reference to history. References to armed conflicts such as the two world wars, or to the various dictatorships of the twentieth century, are easy to find in European 'soft' law, from declarations recognizing the facts of mass atrocities to an EU Council Decision criminalizing genocide denials.¹ At other times they take the form of preambles or 'songs of the law', interpreting or supporting the legitimacy of the rules.²

In 2008, the European Parliament decided to highlight this memory of the European project by establishing 23 September as a day of remembrance of the victims of Nazism and Stalinism.³ One year later the same Parliament approved a resolution on European conscience and totalitarianism.⁴ Similar resolutions were approved by the Parliament about other historical events, such as the Holodomor.⁵

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¹ I.e. Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, *Official Journal of the European Union (OJ)*, 6 December 2008, L 328/55–L 328/58. See also chapter by Luigi Cajani in the present volume.

² M.-T. Fögen, *Das Lied vom Gesetz* (München: Carl-Friedrich-von-Siemens-Stiftung, 2007).

³ European Parliament: Declaration of 23 September 2008 on the proclamation of 23rd August as European Day of Remembrance for Victims of Stalinism and Nazism. *OJ C 8 E*, 14 January 2010, 57–9.

⁴ European Parliament: Resolution of 2 April 2009 on European Conscience and Totalitarianism. *OJ C 137 E*, 25–7.

⁵ European Parliament: Resolution of 23 October 2008 on the commemoration of the Holodomor, and the Ukraine artificial famine (1932–33). *OJ C 15 E*, 78–80.

Interestingly, a proposal for a similar resolution regarding Franco's regime was presented before the European Parliament one year later. However, the members of the Parliament were unable to agree on a declaration condemning Franco's 1936 coup d'état. The Christian Democrats, following the conservative Spanish *Partido Popular* (People's Party), refused to join in. In the end, the Parliament decided to issue a statement from its President, at the time a Spaniard himself, José Borrell,⁶ followed by other statements by various MEPs. Mr. Borrell condemned the coup d'état and Francoism. The Spanish conservative MEP Jaime Mayor Oreja refused to do the same and warned of the danger of meddling with historical memory. In the words of Mayor Oreja:

We must not change our attitude, and many Spaniards believe it to be an historical mistake to try to promote a second transition today. It is an historical mistake to unilaterally destroy the essence of our Constitution of harmony; it is historically foolish to introduce the debate on the right to self-determination in Spain, the creation within Spain of new nations that have never existed; it is an historical mistake because it moves us away from the harmony we have created.⁷

This contrast between the European Parliament's declaration concerning Nazism and Stalinism and the proposed resolution concerning Francoism perfectly captures the conflict that persists in Spain between the different collective memories of the Civil War and Francoism.

This conflict has also had legal repercussions in Spain, with one set of laws making references to the country's democratic past, and other laws and judicial decisions pointing to its dictatorial past. This makes memory laws in Spain a controversial subject. At the national level we find only one legal provision clearly in line with memory laws – the provision in the Criminal Code proscribing the denial of the Holocaust.⁸ There are no laws imposing a particular version of the Francoist past, nor punishing the denial of the crimes of the dictatorship. Even the Historical Memory Act of 2007 does not proscribe Francoist ideology.⁹ Therefore it would be an

⁶ European Parliament: 70 years after General Franco's coup d'état in Spain (Statements by the President and the political groups), *OJ*, Minutes, C 303E, 15 and following.

⁷ Statement of MEP Jaime Mayor Oreja. See previous footnote.

⁸ Ley Orgánica 1/2015, of 30 March modifying the Ley Orgánica 10/1995 of 23 November of the Criminal Code, *BOE* 77, 31 March 2015, 27061–176.

⁹ Ley 52/2007, of 26 December recognizing rights and establishing measures for those who suffered persecution or violence during the civil war and the dictatorship, *BOE* 310, 27 December 2007, 53410–6.

exaggeration to consider that Spanish law has adopted a severe regulation of historical memory.

The current situation dates back to the lack of a formal process of transitional justice and memory legislation during the transition. Yet the political transition, which took place between the years 1975 and 1982 and which allowed for the continuity of Francoist institutions and legal behaviours beyond the transition to democracy, also partially explains the Spanish anomaly in the Western European context. The legislator and the drafters of the Constitution decided not to erase the precedent of Francoist law. They also opted for silence: no condemnations of the dictatorship and no references to the anti-Francoist opposition or the victims of Francoism are to be found. The consequence was what Boaventura de Sousa Santos calls a 'palimpsest of legal cultures.' This lack of regulation led to the creation of a legal culture combining elements of the old Francoist system and the new democratic one.¹⁰

This silence also has legal and political consequences in the legal system. As stated by Eric Heinze in this volume, 'Not to legislate is also to legislate. Legal power acts through law's proceedings, but also through law's abstentions.'¹¹ Legal vacuums can be occupied by pre-existent discourses or by new ones. In Spain, the narratives about the dictatorship that had already existed occupied the silent space left by the legislator, that is, the Francoist nationalist discourses, together with their references to the Civil War and the years of 'peace' that followed. This has led to the acceptance of Francoism as something natural, as being a part of the Spanish national identity.

The legal system is not only a normative order – it also contains a narrative, values, and culture that have an influence on collective identity and the political system. According to Christian Giordano, this narrative often refers to history in search of consensus, common values, and ideas, with the aim of legitimizing the law.¹² Re-conceiving the past as a way of legitimizing a legal institution or national identity has been also studied by António Hespanha.¹³

¹⁰ B. Sousa Santos, 'The Heterogeneous State and Legal Pluralism in Mozambique', *Law & Society Review* 40 (2006), 39–75, at 47.

¹¹ See chapter by Eric Heinze in the present volume.

¹² C. Giordano, 'The Past in the Present: Actualized History in the Social Construction of Reality', *Focaal* 26:28 (1996), 97–107.

¹³ A. M. Hespanha, 'Legal History and Legal Education', *Rg-Rechtsgeschichte* 4 (2004), 41–56, at 41.

In this way, the lack of a clear legal and political discourse has allowed Francoism to become naturalized. That is, it has led to the general acceptance of the dictatorship as a natural part of Spanish history and culture, and the acceptance of the symbols of this dictatorship as part of the Spanish landscape. Law has played a role in this process.

This explains the indifference of Spanish institutions towards the demands of the victims. Likewise, it explains the remaining Francoist monuments and street names,¹⁴ along with the lack of commemoration of the victims of the dictatorship, or any commemoration of the liberation of the Nazi camps to which approximately 9,500 Spanish Republicans were deported.

In this chapter I discuss the laws that contributed to this culture of oblivion and acceptance of Francoism during both the dictatorship (1936–75) and the transition (1975–82). I explain the origins of the memorialist movements, which began around the year 2000, and how the state institutions reacted to them by initially attempting to satisfy the victims with new memory laws. Finally, I describe the current panorama of these conflicting memories today.

2 The Memory of Francoist Law: 1939–1975

On 18 July 1936, a part of the military, some of the conservatives, and the pro-fascist Falange party executed a coup d'état. This military coup failed in the industrialized areas, mostly in Andalusia and in the Mediterranean coast. With financial and military support from Nazi Germany and Fascist Italy, Franco's African troops successfully returned to the Peninsula, turning the failed coup into a Civil War that lasted three years.

In April 1939 Franco's victory put an end to the war, but the repression continued. The regime was founded on a narrative of the war that presented Francisco Franco as the *caudillo* (charismatic chieftain, or leader) of Spain, delivered by the Grace of God and the coup, and the Civil War as a National Uprising and a Holy Crusade. From 1939 until 1975, the remembrance of this 'crusade' played an important role in legitimizing the regime created by a coup d'état, an act that defied both the Criminal Code and the Constitution of the epoch. Street names and monuments throughout

¹⁴ That is, the Francoist Mausoleum in San Lorenzo de el Escorial, or the Monument to the Francoist fighters of the Ebre battle in Tortosa. The local Government of Madrid decided recently to remove all Francoist street names. See 'El Ayuntamiento de Madrid cambiará el nombre de 30 calles franquistas', *El Mundo*, 23 December 2015.

the country memorialized references to the war. Both 18 July (the date of the coup, which was dubbed 'the National Uprising') and 1 April ('Victory Day') were highlighted as national holidays in Spain's official calendar. From 1942 onwards, all cinemas were obliged to show a NO-DO (documentary or newsreel) before every screening, which very often depicted episodes from the war or reconstruction efforts.

The law also contained references to the war. Starting from early repressive legislation, such as the 'Law against free-Masonry and Communism' or the 'Political Responsibility Act', to decrees regulating minor issues,¹⁵ Spanish law directly or indirectly assumed the legitimacy of the Civil War.

The defeat of the Axis powers in 1945 and the social and economic changes of the 1960s forced the regime to undergo deep transformations. The institutionalization of the dictatorship made its survival possible during a time of growing complexity and state intervention in the economy. The main pillars of the regime – the authority of Francisco Franco and National Catholicism – remained, while new rational elements were also introduced, contributing to the aforementioned 'palimpsest of legal cultures.'¹⁶

Legitimacy by origin (the Civil War) was combined with arguments of legitimacy by exercise (particularly economic growth). References to the war did not disappear, but underwent a mutation. Instead of 'war' or 'victory', the word 'peace' was introduced into the political discourse. A massive campaign was organized to commemorate the twenty-fifth anniversary of the victory in the Civil War, yet the phrase used referred not to 'victory' but to 'peace': '25 Years of Peace.'¹⁷ The word 'peace' started to appear in the names of institutions, streets, schools, and even the hospital where Franco himself died in 1975. However, the legitimacy of origin and the references to religion and the eternal nation did not entirely disappear. An example of this mixture can be found in the decree that declared amnesty for certain political criminals. Published on 1 April 1964, hitherto

¹⁵ For example, the 'Orden of 6 May 1970 concerning validation of studies in universities not located in the national area during the Crusade of Liberation', *BOE*, 132, 3 June 1970, 8569.

¹⁶ Sousa Santos, 'The Heterogeneous State and Legal Pluralism in Mozambique'.

¹⁷ For more on the campaign '25 Years of Peace', see F. Fernández-Crehuet, 'Recht und Fiktion im Franco Regime', in F. Fernández-Crehuet López and A. M. Hespanha (eds.), *Franquismus und Salazarismus: Legitimation durch Diktatur* (Frankfurt am Main: Vittorio Klostermann, 2008), 3–12. See also A. Aragonese 'El derecho bajo el franquismo. Transformaciones del sistema jurídico español (1936–1978)', in M. Capellà and D. Ginard (eds.), *Represión política, justicia y reparación: La memoria histórica en perspectiva jurídica (1936–2008)* (Palma: Plural, 2009), 123–39.

the 'Day of Victory' and henceforth the 'Day of Peace', it included references to peace but also to the victory, the Crusade, and the head of state.¹⁸

In 1959 Franco's gigantic mausoleum, the *Valle de los Caídos*, or the Valley of the Fallen, was inaugurated. This monument, located in San Lorenzo de El Escorial some fifty kilometres northeast of Madrid, was designed to honour the National Crusade and Franco. However, the monument was also meant to play an important role in the creation of a new narrative in the 1960s: the discourse of reconciliation. The bodies of thousands of Republican soldiers were transported to the monument, without their relatives' permission.¹⁹ The goal of this operation was to combine the old discourse of victory with a newly created discourse of reconciliation, imposed on the defeated by the victors.

The context of this propaganda operation generated a perception of the dictatorship as something 'natural', as the only possible response to the instability during the Second Republic, as the only path to the transition to modernity.²⁰ Francoism was presented as the source of stability, economic growth, social well-being, and modernization. This is important because that narrative survived Franco and became one of the pillars of the 'acceptance of impunity' by the victims during the transition.

3 Amnesty, Oblivion, and Democratic Normality: 1977–1999

On 20 November 1975, Francisco Franco Bahamonde died. The Spanish head of state did not pass away in prison, nor was he executed by partisans. Franco was never tried for his crimes before any court. Instead, he died in agony in the *La Paz* (Peace) hospital, which he had personally inaugurated in 1964. He was buried on 23 November in the *Valle de los Caídos*.

20 November 1975 marks the beginning of the Spanish transition to democracy. Yet it was not until 1978 that the democratic Constitution was promulgated. We can conclude that the transition finished in 1982 with the victory of the social democratic PSOE party in the general elections. The transition was marked by political violence from anti-democratic forces, from terror groups like ETA in the Basque Country and the extreme leftist

¹⁸ Decreto 786/1964, of 1 April, granting a general pardon on the occasion of the 25 years of Spanish Peace. *BOE* 84, 7 April 1964, 4313.

¹⁹ See the documentary 'Avi et trauré d'aquí', produced by Catalan Public Television TV3 and directed by Montse Armengou and Ricard Belis (2013).

²⁰ M. Fraga, *Horizonte Español* (Madrid: Editora Nacional, 1965).

GRAPO, from police and paramilitary forces, and from extreme-right organizations.²¹

After Franco's death, King Juan Carlos I was appointed Head of the State. The *Ley de reforma política*²² was passed by the Francoists in 1976 by the *Cortes*, the corporatist Francoist parliament. The law initiated the dismantling of the Francoist institutional framework and opened a path towards democratization. It provided a framework for the general elections of 1977, won by the UCD, a centre-right party founded by former Francoists and conservative opponents. Thus the transition started with a deal between Francoist politicians and opponents under pressure from the military. This explains why no references to the victims were made either in the law or in the political discourse of the time.

In 1976 the Government enacted a first Amnesty, via a 'Decreto Ley',²³ for opponents of Francoism and civil servants of the Spanish Republic.²⁴ The Parliament elected in June 1977 began discussion of another very important law, the *Ley de Amnistía*, or Amnesty Act.²⁵ This legislation represents both a cornerstone in democracy-building as well as an important element in the construction of a culture of impunity and oblivion. The law is still in force today, and its legal effects continue to block attempts to ascertain and assign legal responsibility for serious human rights violations.

In its first article, the Amnesty Act declares that general amnesty will be granted to 'all acts with a political motive (*de intencionalidad política*), irrespective of their effects, which were classified as crimes but were committed before 15 December 1976', as well as all the acts of the same nature made between 15 December 1976 and 15 July 1977, provided that the political motives behind these acts had been aimed at 'the re-establishment of public liberties or autonomy for the territories of Spain'.

Article 2 of the Act is even more important and has had a more lasting effect in Spanish law and society. According to this article, the following cases are included in the amnesty 'in any case': 'Crimes that may have been committed by authorities, civil servants, and public order agents with the aim of investigating and prosecuting acts included in this law'; i.e. with the

²¹ S. Baby, *Le Mythe de la Transition Pacifique: Violence et Politique en Espagne (1975-1982)* (Paris: Casa de Velázquez, 2013).

²² Ley 1/1977, of 4 January of Political Reform. *BOE* 4, 5 January 1977, 170–1.

²³ A "Decreto-Ley" is a "Ley" enacted first by the Government and later ratified by the Parliament.

²⁴ Real Decreto-Ley 10/1976, of 30 July concerning Amnesty. *BOE* 186, 4 August 1976, 15097–8.

²⁵ Ley 46/1977, of 15 October, concerning Amnesty. *BOE* 248, 17 October 1977, 22765–6.

aim of repressing opponents of Francoism. This provision has blocked any initiative to bring individuals responsible for serious human rights violations before a court, blazing what Rafael Escudero²⁶ has called ‘the path to impunity.’

The Amnesty Act also sealed what has been called the ‘pact of silence’ of the transition to democracy. According to Escudero, the victims accepted silence in exchange for democracy: the tension and violence of the transition did not allow any other options.²⁷ At the same time, however, the urge for democracy and the modern legitimacy discourses of the 1960s also put the demands of the victims in second place.

In the words of Alejandro Baer, the victims and legislators ‘opted for a tacit agreement to leave the legacy of the war and the dictatorship out of the political debate,’ a strategy he termed the ‘pact of silence.’²⁸ We can conclude that there was no transitional justice. What occurred was, in the words of Bartolomé Clavero, a ‘constituent amnesty’ and an oblivion: the Constitution of the new democratic regime was based on the oblivion of the crimes of Francoism.²⁹

Nevertheless, both before and after the ratification of the Constitution, some laws and decrees were enacted that acknowledged certain rights for the victims of the Civil War. In April 1976, a royal decree³⁰ declared that the soldiers of the Republican Army had the same rights as those of the Francoist forces under the Spanish War Mutilated Soldiers Act, enacted in March of that year.³¹ Similarly, a 1979 law granted pension rights and medical assistance to relatives of victims on both sides of the Civil War,³² although it excluded those whose death was ‘caused by execution of a death sentence’ or ‘derived from violent action on the part of the victim.’

²⁶ R. Escudero, ‘Road to Impunity: The Absence of Transitional Justice Programs in Spain,’ *Human Rights Quarterly* 36 (2014), 123–46.

²⁷ *Ibid.*, 132.

²⁸ A. Baer, ‘The Voids of Sefarad: The Memory of the Holocaust in Spain,’ *Journal of Spanish Cultural Studies* 12 (2011), 95–120, at 98.

²⁹ Expression of B. Clavero, *España 1978: La amnesia Constituyente* (Madrid: Marcial Pons, 2014).

³⁰ Decreto 3025/1976 of 23 December regulating pensions for those Spaniards who suffered mutilation due to the war and could not enter in the Cuerpo de Caballeros Mutilados de Guerra por la Patria. *BOE* 9, 11 January 1977, 522.

³¹ Ley 5/1976, of 11 March, of ‘Mutilados de Guerra por la Patria.’ *BOE* 63, 13 March 1976, 5209–15.

³² Ley 5/1979, of 18 September concerning pensions, medical, pharmaceutical, and social assistance for the benefit of widows and relatives of Spaniards who died in the past civil war. *BOE* 233, 28 September 1979, 22605–6.

In a law enacted in 1984, the rights of both the members of the Republican Army and the police forces were explicitly recognized.³³

The transitional government policy combined amnesty and impunity in its granting of certain social rights for a few victims of the Civil War. Francoism was not condemned by either the Government or the Spanish Tribunals. There is no reference in the Constitution to the dictatorship, the democratic opposition, or the crimes of the dictatorship. The transition conceived the democratic system as a natural continuation of the dictatorship. Antonio Baylos has noted that 'the drafters of the constitution chose not to define the dictatorial regime as a permanent state of exception. This would have allowed for the elimination of all Francoist laws and judicial decisions.'³⁴

A new actor in the Spanish legal and political system, the Constitutional Tribunal, could have changed this legal approach to the past, but in 1982 it decided to consider Francoist law as fully valid and to deem the democratic law as the continuation of Francoist law. The Court decided a case lodged by Juan Bautista Santaella, a former member of the Spanish Republic Army who, in 1979, demanded the recognition of all the rights he had according to a Decree of 1936. The Constitutional Court decided that the law of the Francoist territory in the Civil War was the one which was imposed over the whole Spanish territory, and, therefore that Republican law could not be considered as law by the present legal system.³⁵

This result was, according to the Constitutional Court, based on 'the hard reality of history', which could not be avoided. The Court indirectly endorsed full legality to Francoist legislation, even though it was illegitimate by origin, while outlawing the legal system put in place during the democratic Spanish Republic (1931–9). According to the court, the Francoist regime was not a permanent state of exception, but a valid, legitimate legal system.

In another case, in 1983, an association of Aviators of the Second Republic claimed they had the right to enjoy the same rights as the Francoist aviators. The Constitutional Court declared that it lacked the competence to correct the lack of action on the part of the legislator in the sphere of

³³ Ley 37/1984, of 22 October, recognizing the rights and services to those who were members of the Armed Forces, Public Order Forces of the Republic. *BOE* 262, 1 November 1984, 24433.

³⁴ A. Baylos, 'Derechos económicos e indemnizaciones derivados de la memoria histórica', in J. A. Martín Pallín and R. Escudero (eds.), *Derecho y memoria histórica* (Madrid: Trotta, 2008), 185–208, at 188.

³⁵ Decision of the Constitutional Tribunal 28/1982 of 26 May, *BOE* 137, 9 June 1983, 19–21.

the rights of civil servants of the Spanish Republic.³⁶ According to Baylos, these decisions helped the 'democratic normalization of the past'.³⁷

The pact of silence was not discussed after 1981. Some organizations considered the Constitution to be a starting point for the recognition of rights of the victims and the elaboration of an official, democratic policy of remembrance. However, a failed coup attempt in 1981 brought certain democratization processes to a close. The social democratic *Partido Socialista Obrero Español*, PSOE, won the general elections in 1982 and put an end to the reparation measures that had been timidly initiated under the previous governments. Only in 1990 did the government acknowledge the right to financial compensation for a small subset of former political prisoners, namely those who had spent more than three years in prison and were older than sixty-five.³⁸

Spanish society did not protest against this culture of silence. Spain's entry into the European Community (1986), together with economic growth and new cultural freedom, obscured the unresolved problems of justice and memory. In his novel *La Buena letra*, Rafael Chirbes illustrates these developments with the story of a family of defeated Republicans who abandon their ideals and past in the name of economic growth and well-being.³⁹ This reality of the 1980s and 1990s is also depicted in cultural creations such as the films of Pedro Almodóvar, in which a modern cosmopolitan Spanish society enjoys its freedom without concern for its past history. Luisa Elena Delgado's analysis of Almodóvar's films from this perspective is both insightful and telling.⁴⁰

I recall here only one judicial case during this period: the Ruano case. Enrique Ruano was a student who died in 1969 at the hands of the police. The regime press presented his death as a suicide, but in 1995 his relatives sued the police officers. The defendants claimed innocence and demanded application of the Amnesty Act. The judge was willing to accept this only on the condition that they admitted to having committed a crime for political reasons. The defendants would not accept this condition, and they were acquitted for lack of evidence. This decision of the *Audiencia Provincial de*

³⁶ Decision of the Constitutional Tribunal 63/1983 of 20 July, *BOE* 189, 9 August 1983, 21657–9.

³⁷ Baylos, 'Derechos económicos e indemnizaciones', 188.

³⁸ Ley 4/1990, of 29 June, of General State Budget for 1990. *BOE* 156, 30 June 1990, 18669–710.

³⁹ R. Chirbes, *La Buena letra* (Barcelona: Anagrama, 2007).

⁴⁰ L. E. Delgado, *La nación Singular: Fantasías de la Normalidad Democrática Española (1996–2011)* (Madrid: Siglo XXI, 2014), at 33.

Madrid can be seen as having opened a gate for using the Amnesty Act as a mechanism to access the truth, but this gate was never used.⁴¹

Despite being passive towards the Francoist past between 1977 and 2008, the Spanish legal system at the same time reacted to past violations of human rights in other parts of the world. Judges of the Audiencia Nacional initiated procedures against former repressors in Chile and Argentina, invoking universal jurisdiction. Obviously these were cases against Argentinean and Chilean individuals who had committed crimes in their respective countries. However, this changed many Spaniards' perception of justice and universal jurisdiction, fuelling the demands of associations in 2008 and the years that followed.

4 The Rebellion of the Grandchildren and the *Historical Memory Act: 1999–2011*

The novel *Blutorangen* by Verena Boos magnificently portrays the shift in the Spanish culture of memory in the final years of the twentieth century.⁴² A Spanish student goes to Munich on an Erasmus Programme exchange in the 1990s. There she meets Germans of her age whose grandparents were Spanish antifascists. Her political conscience is awakened, and she starts questioning many aspects of her Spanish identity and its relationship with the past. She then becomes involved with the movement for the defence of historic memory in Spain. Maite, the novel's main character, is the paradigmatic figure of what Margalida Capellà has called 'the rebellion of the grandchildren', which occurred when a generation of young Spaniards, being the grandchildren of those who fought in the Civil War, suddenly realized the abnormality of Spain's culture of memory and, as young adults, created and propelled the movement for historic memory.⁴³

The year when the first mass graves were exhumed, 1999, can be said to mark the beginning of this 'rebellion of the grandchildren'. After almost twenty years of silence and transition, a new generation started joining efforts with people of older generations to demand justice and reparation. However, in addition to generational factors this phenomenon is also explainable by cultural and economic factors. This young generation had greater access to a university education and to alternative channels of communication.

⁴¹ Audiencia Provincial de Madrid, Auto, 19 December 1995.

⁴² V. Boos, *Blutorangen* (Berlin: Aufbau Verlag, 2015).

⁴³ M. Capellà, 'La rebelión de los nietos', *La Vanguardia*, 26 October 2008.

These young Spaniards, together with their older counterparts, formed organizations like the *Asociación para la Recuperación de la Memoria Histórica*, as well as local and regional associations. They provided support for, and even participated in, exhumations; they endorsed the review of Francoist judicial decisions; and they sought recognition for the democratic struggle against Francoism.

Such was the general atmosphere when the PSOE won the national elections in March 2004. The new government took several steps to attempt to respond to the demands of this 'memorialist movement'. Parliament declared 2006 the Year of Historical Remembrance,⁴⁴ and it started funding public remembrance policies. In that year, 2006, the government presented a bill for historical remembrance that generated strong opposition from the main conservative party (*Partido Popular* or *PP*), founded by former Francoists, as well as the conservative media. The climate of political tension and the attack from the right-wing media influenced the debate around the *Ley de Memoria Histórica* (Historical Memory Act), which was passed into law in December 2007.⁴⁵

Following the 'grandchildren's rebellion', democratic remembrance and human rights organizations demanded the annulment of court sentences against Republicans who had fought against Franco's insurrection. They also asked that the state take responsibility for the exhumation of mass graves and demanded reparations for all victims. The Act itself did not provide the associations for the victims of Francoism with a satisfactory answer to their demands.⁴⁶

Intense debates were held concerning the *Ley de Memoria*. The right wing PP accused the PSOE of 'breaking the spirit of the Transition'.⁴⁷ It repeatedly referred to 'the wounds of the Civil War', which it accused the left-wing parties of reopening.⁴⁸

Actually this law is not, strictly speaking, a memory law. The popular name, the Historical Memory Act, does not reflect its content. The official title is 'Law recognizing rights and establishing measures for those who

⁴⁴ Ley 24/2006, of 7 July, declaring 2006 the Year of Historical Memory. *BOE* 162, 8 July 2006, 12309.

⁴⁵ Ley 52/2007, of 26 December, recognizing rights and establishing measures for those who suffered persecution or violence during the civil war and the dictatorship. See footnote 10.

⁴⁶ See E. Nizkor, 'The question of impunity in Spain and crimes under Franco', 2014. Available at: www.derechos.org/nizkor/espana/doc/impuspa.html (last accessed 4 January 2017).

⁴⁷ 'El PP rechaza la ley de memoria y dice que rompe el pacto de concordia sobre el pasado', *El País*, 6 December 2007.

⁴⁸ 'Rajoy: Abrir heridas del pasado no conduce a nada', *El País*, 6 September 2008.

suffered persecution or violence during the civil war and the dictatorship'. It does not impose or even support a particular reconstruction of history. It only declares annulable the judicial decisions of the Francoist Courts, regulates the financial support to relatives and pensions for certain groups and victims, and forbids political acts in the Valley of the Fallen. Likewise, it only regulates the documentation centre of the Civil War, without imposing a particular vision of it.

In the law's preamble, Francoism is indirectly condemned by expressing adherence to the 'content of the Report of the Parliamentary Assembly of the Council of Europe signed in Paris the 17th March 2006',⁴⁹ which 'strongly condemns the extensive and wide-ranging human rights abuses committed by the Franco regime in Spain from 1939 to 1975'.⁵⁰ The preamble acknowledges the suffering of the victims of the dictatorship. At the same time however, there are references to the 'spirit of the transition' in which the law would find its legitimacy.

The Law does not annul the judicial decisions handed down by exceptional tribunals: the military *Consejos de Guerra* or War Courts, the special jurisdiction against communism and freemasons, the tribunals for political responsibilities, or the Public Order Court (special tribunals created to repress political opponents). Article 2.1 only declares that these decisions were 'unjust and illegitimate'. Article 3 states that the tribunals or courts who made these decisions were illegitimate as well. Yet the Law does not go so far as to declare these decisions void and illegal. Escudero has explained the difference between nullity and 'annulability'.⁵¹ The illegitimacy of these decisions is clear from a democratic point of view. However, if they are not declared void, they remain part of the legal system.

According to the Historical Memory Act, the victims of those court decisions, in many cases taken by exceptional military courts, may petition the Spanish Ministry of Justice for a 'declaration of reparation and personal acknowledgement', which is important from a political and symbolic point of view. Yet it does not change anything in terms of their legal validity and nor does it create a right to compensation for damages.

⁴⁹ Ley 52/2007, of 26 December recognizing rights and establishing measures for those who suffered persecution or violence during the civil war and the dictatorship. *BOE* 310, 27 December 2007, 53410.

⁵⁰ Parliamentary Assembly. Council of Europe. Report of the Committee on Political Affairs and Democracy. Report. Document 10737. Rapporteur: Mr. Brincat.

⁵¹ R. Escudero, 'Nulidad/illegitimidad de las Sentencias Franquistas', in R. Escudero (ed.), *Diccionario de memoria histórica: Conceptos contra el olvido* (Madrid: Catarata, 2011), 84–9.

Articles 11 to 14 of the Act regulate the administrative duty to assist relatives and associations in the exhumation of bodies in mass graves. According to legal scholars, this violates international law, which considers the state to be the party responsible for mass violations of human rights and therefore responsible for the exhumation of the bodies from mass graves.⁵²

Articles 15 to 17 of this Act order the removal of Francoist symbols and forbid political acts in the Valley of the Fallen, Francisco Franco's mausoleum, which is of great symbolic importance for Franco supporters. In accordance with these articles, the remaining statues of Franco were removed from public spaces, although other monuments and street names still exist in many Spanish cities.

The law left the interested associations unsatisfied. While it gave them, and citizens in general, some means to obtain financial assistance from the state for the exhumation of bodies or the removal of symbols, recent episodes have shown how difficult it is for the Spanish state and society to confront its past. The first such episode was the reaction of the conservative *Partido Popular* to the 2015 decision of Madrid's city council to change Francoist street names, proving that this legislative directive is still far from effective.⁵³ Another example is the elimination of funding for exhumations by the ruling national *Partido Popular* government.

Nevertheless, the Spanish Historical Memory Act has fostered the intervention of local authorities in removing Francoist monuments and has also been used as a basis for regional laws and public policies of remembrance.

Following the 2003 elections, the Catalan government created a special 'General Agency of Democratic Remembrance' and funded several local associations and government projects. In 2006, before the Historical Memory Act was enacted, the new regional Constitution of Catalonia (*Estatut d'Autonomia*) declared in Article 54 that the Catalan government 'and the other public authorities shall work for the knowledge and the

⁵² M. Capellà, 'Represión política y derecho internacional: Una perspectiva comparada (1936–2006)', in M. Capellà and D. Ginard (eds.), *Represión política, justicia y reparación: La memoria histórica en perspectiva comparada (1936–2008)* (Palma: Plural, 2009), 161–254, at 240; J. Chinchón, *El tratamiento judicial de los crímenes de la Guerra civil y el franquismo en España. Una visión de conjunto desde el derecho internacional* (Bilbao: Universidad de Deusto, 2012), at 23 and following; J. Bonet Pérez/R. A. Alija Fernández, *Impunidad, derechos humanos y justicia transicional* (Bilbao: Universidad de Deusto, 2009), 45.

⁵³ 'El Ayuntamiento de Madrid cambiará el nombre de 30 calles franquistas', *El Mundo*, 23 December 2015.

maintenance of the historical memory of Catalonia as a collective heritage'. In accordance with this article's mandate, in 2007 the Catalan Parliament created the Democratic Memorial with the task of developing 'public policies of remembrance directed by the civic action of retrieving, commemorating, and fostering democratic memory'.⁵⁴ In 2009 the same Parliament approved the Mass Graves Act, building on the Historical Memory Act to assist the relatives and associations in the identification and exhumation of mass graves.⁵⁵

Just recently the Balearic Parliament also adopted a Mass Graves Act.⁵⁶ It protects the mass graves and regulates their identification and opening, as well as the exhumation of the remaining bodies.⁵⁷ It considers the enforced disappearances of the Civil War and Francoism as 'crimes against humanity'.⁵⁸ This legal categorization could make it possible to include this act in the category of laws that 'prescribe or proscribe certain views of historical figures, historical dates, historical symbols, or historical events'.⁵⁹

This wave of regional laws related to historical memory may be seen as creating a dichotomy between the legal silence of Spanish national law on the one hand, and the legal activism of some autonomous regions on the other. It demonstrates the existence of different political and memorialist cultures, which use the law to pursue their own ends.

The trajectory of the Historical Memory Act has not been very successful since 2011. A controversial lawsuit that went before the *Tribunal Supremo* – the *Garzón* case⁶⁰ – and the victory in the Parliamentary elections of the conservative *Partido Popular*, which was opposed to this law and to memory laws in general, has rendered many aspects of this law non-applicable and/or deprived them of real legal effect, for example by simply eliminating funding for the exhumations.

⁵⁴ Llei 52/2007 of the Democratic Memorial, *DOG*C 5006, 12 November 2007, 45172–9.

⁵⁵ Llei 10/2009 on localization and identification of persons who disappeared during the Civil War and the under Franco, *DOG*C 5417, 9 July 2009, 55065–71.

⁵⁶ Llei 10/2016, concerning the recovery of disappeared persons during the Civil War and Francoism, *BOIB* 76, 16 June 2016, 18241–7.

⁵⁷ Article 1, of the Llei 10/2016.

⁵⁸ Articles 2 and 10 of the Llei 10/2016.

⁵⁹ See Antoon De Baets' chapter in this book.

⁶⁰ 'Garzón abre la primera causa de la historia contra el franquismo', *El País*, 17 October 2008. See Audiencia Nacional, For the Resolution of Justice Baltasar Garzón. Juzgado Central de Instrucción no 5: Auto of 16 October 2008 (Diligencias Previas PA 399/2006 V).

In 2006, in the light of the strength at that time of the memorialist movement, a group of associations filed a lawsuit in the National Court seeking an investigation of Francoist crimes. The controversial judge Baltasar Garzón was put in charge of this investigation. Garzón was a renowned judge, responsible for the indictment of Argentinean and Chilean authorities for crimes committed during the dictatorships in those countries. Garzón sought to open a general investigation for crimes against humanity committed during the Francoist dictatorship, arguing that such crimes against humanity did not fall under the general 1977 amnesty.⁶¹ The problem was that, according to Spanish law, the *Audiencia Nacional* had the right to claim universal jurisdiction for crimes committed abroad, but not for crimes committed in Spain. So technically Judge Garzón was not competent to start an investigation. In the end Judge Garzón recused himself amid a strong and controversial political and social debate. Responsibility for the investigation went to the territorial courts.

Two far-right organizations nevertheless proceeded to sue Garzón for perversion of Justice (*prevaricación*) in 2009. The lawsuit created a major scandal, and on 27 February 2012 the Spanish Supreme Court issued its decision 101/2012.⁶² The Court declared Garzón not guilty, but imposed an interpretation of the Spanish legal system that ran contrary to the demands of the associations. According to this decision, the 1977 Amnesty Act precludes investigation of the crimes of Francoism. In the Court's opinion, transition is considered to be a 'perfect model'. The Court also established the doctrine according to which the 'search for truth is a legitimate and necessary aspiration and must avail itself of all the disciplines and professions, especially of historians. But it is not a matter for judges'. The crimes of Francoism, according to this view, entail no legal consequences, but rather only scholarly ones.

As Escudero reminds us, with this decision the 'Supreme Court further rejected the international legal doctrine that establishes a duty to investigate the destiny of disappeared persons, even if it is not possible to punish those who are guilty'.⁶³

This legal approach to the crimes of Francoism runs parallel to the dismantling of the Historical Memory Act following the victory of the *Partido Popular* in the 2011 general elections. Over the course of three

⁶¹ Vid Juzgado Central de Instrucción no 5: Auto of 16 October 2008.

⁶² Tribunal Supremo. Sentencia 101/2012, 27 February 2012, Caso Manos Limpias y Asociación Libertad e Identidad vs. Baltasar Garzón.

⁶³ Escudero, 'Road to impunity', op. cit., at 124.

consecutive General Annual Budgets, starting in 2012, the new government has eliminated appropriations for the exhumation of mass graves.⁶⁴ On 4 November 2015, a journalist asked President Rajoy for clarification of the non-allocation for the Historical Memory Act. The president's response was that 'the budgetary allocation [for Historical Memory] has been zero',⁶⁵ clearly presenting his government's lack of support for this law as an achievement, leaving the Act in many aspects without force due to the lack of financial support.

Something similar happened in Catalonia after the 2010 elections. The new government, formed by the liberals and Christian Democrats of *Convergència i Unió*, reduced the budget for Historical Memory and cut back staffing at the Democratic Memorial. It also changed its approach to democratic remembrance by promoting a discourse that treats the victims of the two sides of the Civil War and the victims of the Francoist dictatorship on equal terms.⁶⁶

5 Francoism Forgotten; World War II Remembered: 2011–2015

As already explained, political and legal systems make reference to the past to legitimize themselves.⁶⁷ In this sense, the current Government is also using history to legitimize itself. Similar as in the case of Hungary, also analysed in this book,⁶⁸ the efforts to reinterpret medieval history and the time of the Catholic Monarchs are quite remarkable.⁶⁹

In spite of the anti-Semitism growing in social and political discourses,⁷⁰ Spanish institutions have been making a great effort to involve Spain in

⁶⁴ 'Rajoy completa una legislatura de olvido económico a las víctimas del franquismo'. Eldiario.es, 4 August 2015; 'La promesa que Rajoy sí cumplió'. *El País*, 5 October 2013; 'El Gobierno elimina el presupuesto de la Memoria Histórica'. *El Mundo*, 29 September 2012.

⁶⁵ The full answer can be found on the Spanish government website: www.lamoncloa.gob.es (last accessed: 4 January 2017).

⁶⁶ 'El Memorial dona veu als monistrolencs que van patir la guerra civil'. *Regió7*, 7 May 2015.

⁶⁷ Giordano, 'The past in the present'.

⁶⁸ See chapter by Miklós Könczöl in the present volume.

⁶⁹ See the Public television serial 'Isabel' about the Catholic Monarchs, produced by Televisión Española directed by Javier Olivares and broadcasted between 2012 and 2014.

⁷⁰ Observatorio de Antisemitismo. Casa Sefarad-Israel, Estudio sobre antisemitismo en España. Informe de resultados (Madrid: Casa Sefarad-Israel, 2012). See also A. L. Menny, 'Antisemitism in Spain: A Religion-Based Anti-Judaism?' *Proceedings/International conference "Antisemitism in Europe Today: The Phenomena, the Conflicts"* (Berlin: Jüdisches Museum, 2013), 1–13.

a cosmopolitan culture of remembrance. As Daniel Levy and Natan Sznajder have described, the Holocaust has become the cornerstone in the construction of a global culture of remembrance.⁷¹ Spanish institutions have organized acts of Holocaust remembrance since 2005 and are seeking legislative changes to increase Spanish participation in this global remembrance culture.⁷²

In 2014, a new education act introduced the Jewish Holocaust into the primary and secondary school curricula.⁷³ Royal decrees implemented this act and established the pedagogical content to be included in the secondary⁷⁴ and primary schools.⁷⁵ These include provisions to make the teaching of World War II and the Holocaust compulsory for all schools. At the same time, no reference to the Republicans deported to Nazi camps or the victims of Francoism was included. In other words, the government is trying to describe fascism as a part of the history of *other* states instead of an important part of its own past, similar to what is happening in countries like Hungary.⁷⁶

In 2015, an act was adopted that granted Spanish citizenship to Sephardic Jews.⁷⁷ To some extent this could be considered 'as acknowledgement of the memory of sufferings and exclusions', in the sense explained by Uladzislau Belavusau and Aleksandra Gliszczynska-Grabias, of Sephardic Jews who were expelled in 1492.⁷⁸ Furthermore, this law also tries to promote the inclusion of Spain in the European memory of the Holocaust. In the law's preamble, the Holocaust is described as an 'everlasting link' between Sephardic Jews and the memory of the Holocaust, as the Holocaust caused 'the brutal sacrifice of thousands of Sephardic Jews'.

In 2015 the Spanish Parliament implemented the Framework Decision of the European Council of 28 November 2010 on reform of criminal

⁷¹ N. Sznajder and D. Levy, 'Memory Unbound: The Holocaust and the Formation of Cosmopolitan Memory', *European Journal of Social Theory* 5 (2002), 87–106.

⁷² See Baer, 'The Voids of Sefarad'.

⁷³ Ley Orgánica 8/2013, of 9 December, to Improve Quality of Education (LOMCE). *BOE* 295, 10 December 2013, 97858–921.

⁷⁴ Real Decreto 1105/2014, of 26 December establishing the basic content of Secondary Education. *BOE* 3, 3 January 2015, 169–546.

⁷⁵ Real Decreto 126/2014, establishing the basic content of Primary Education. *BOE* 52, 1 March 2014, 19349–420.

⁷⁶ See chapter by Miklós Könczöl in the present volume.

⁷⁷ Ley 12/2015 of 24 June granting Spanish citizenship to Sephardim originally from Spain. *BOE* 151, 25 June 2015, 52557–74

⁷⁸ See Introduction by Uladzislau Belavusau and Aleksandra Gliszczynska-Grabias in the present volume.

legislation with regard to Holocaust denial.⁷⁹ The new article 510.1.c of the Criminal Code, amended in 2015, punishes anyone found guilty of 'publicly denying, trivializing in a grave manner, or exalting the crimes of genocide or crimes against humanity'.⁸⁰

These legislative reforms follow the general trend of remembering the Holocaust. The coming generations in Spain will be educated within the culture of human rights. Not surprisingly however, in the educational guidelines as well as in the Spanish Citizenship law, Spanish institutions avoid mentioning both the complicity between Adolf Hitler and Francisco Franco and the ambivalent role played by Franco during the Holocaust. Franco saved only a few thousand Jews at the very end of the war, while at the same time he allowed the deportation of both Jews and Spanish Republicans to Nazi camps. This silence over the fate of Franco's victims stands out in contrast to the historical-cultural references to World War II and the Holocaust.

6 Conclusion: Legal Silence and the Naturalization of Francoism

The Spanish state refuses to commemorate the victims of Francoism or to fulfil the mandates of the Historical Memory Act, which is once again present in political debates. These decades of oblivion and normalization of the dictatorship, which started in the 1960s, constitute serious obstacles to the development in Spain of public policies of remembrance similar to those being implemented in the heart of Europe.

The normalization of the Valley of the Fallen as a monument deprived of political symbolism is symptomatic of this situation. In 2016, an online travel agency included a special hotel offer that could strike many as peculiar: rooms were made available in the *Hospedería de la Santa Cruz del Valle de los Caídos*, the Francoist monument where Francisco Franco,

⁷⁹ Ley Orgánica 1/2015, of 30 March modifying the Ley Orgánica 10/1995 of 23 November of the Criminal Code, *BOE* 77, 31 March 2015, 27061–176. See chapter by Luigi Cajani in the present volume.

⁸⁰ While a 1995 reform of the criminal code had previously specified Holocaust denial as a crime, a 2007 decision of the Constitutional Court declared this article void for violating fundamental rights: A. Rubí Puig and P. Salvador Coderch, 'Genocide Denial and Freedom of Speech Comments on the Spanish Constitutional Court's Judgment 235/2007, November 7th, *INDRET* 4 (2008). Available at: www.indret.com/pdf/591_en.pdf (last accessed: 4 January 2017).

José Antonio Primo de Rivera, and 30,000 soldiers are buried.⁸¹ And the gigantic monument to the battle of the Ebre River still stands in Tortosa, Catalonia and enjoys legal protection.⁸²

The above phenomena reveal the degree to which Francoism has been naturalized in Spanish contemporary history, without criticism or questioning by Spanish institutions. The silence of the law in the seventies and eighties was only apparently neutral. In fact, the gap created by the lack of an official narrative about the dictatorial past has been occupied by the old narrative created between 1939 and 1978, which survived the death of Francisco Franco.

⁸¹ Seen at www.booking.com (last accessed: 4 January 2017).

⁸² This monument was inaugurated by Francisco Franco himself to glorify the Francoist soldiers who fought in the Ebre battle. It still stands today and is protected by municipal regulations.