

Josep M. Tamarit Sumalla

Historical Memory and Criminal Justice in Spain

A Case of Late Transitional Justice

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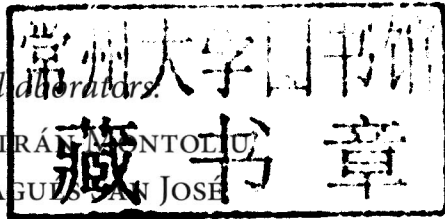
A Case of Late Transitional Justice

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CHAPTER 1

INTRODUCTION

The Spanish transition from the Franco regime to democracy has not been a very popular subject amongst researchers examining transitional justice at the international level. This impression can be easily supported by conducting a search through the list of countries in which the attention of publications and/or scientific activities have focused on this subject.¹ However, Spain presents certain peculiarities that make it an interesting case in which to explore comparative law and sociology. It has sometimes been seen as a model of peaceful transition, but has also been labelled as an example of an “amnesic” transition to a democratic system in which victims’ rights, justice and truth were forgotten. During the Spanish transition, some of the decisions taken were very different from those made in Europe and in certain Latin American countries.

As Huyse pointed out, post-Franco Spain could be seen as an example of a “third route towards impunity”.² It was not impunity derived from a unilateral decision taken by the old authoritarian regime (self-amnesty) and it was not even impunity accompanied by a process in which the truth concerning the atrocities of the past was declared. Almost all of the democratic forces agreed to confer immunity on individuals who had committed crimes either defending or opposing the authoritarian regime; there was a conscious decision not to look back to the past and to forgive without setting any kind of conditions. As in post-War France, post-Franco Spain was an example of a policy of forgetting.³ Nino, and later Elster, presented the Spanish case as one of the transitions that took

¹ See, for example, the contents of the *Journal of International Criminal Justice*, the *International Journal of Transitional Justice* or the activities of the International Centre for Transitional Justice, the Research Group on Transitional Justice at the University of Leuven, or the Oxford Transitional Justice Research network of the University of Oxford. Similarly, the Spanish case was not present in publications concerning transitional justice in which several different countries were analysed.

² See L. HUYSE, “Justice after transition: on the choices successor elites make in dealing with the past”, in N.J. KRITZ (ed), *Transitional Justice. How Emerging Democracies Reckon with Former Regimes* (Washington 1995, 2nd printing 2004), 338. This model was based on the agreement of almost all democratic forces to confer immunity to individuals who committed crimes defending or opposing the Franco regime.

³ N. BIGGAR, *Burying the Past: Making Peace and Doing Justice after Civil Conflict*, Washington 2007.

place in Southern Europe during the 1970s. However, the similarities in the situations of Spain, Greece and Portugal were little more than a coincidence.⁴ Spain was the only case in which a decision was taken to avoid transitional justice. This has sometimes been praised, but never copied.

The first Act that included an explicit condemnation of the Franco regime was not passed until 2007, more than thirty years after the dictator's death. We should therefore ask ourselves whether Spain's lack of memory has, in fact, really come to an end and whether transitional justice itself has been anything more than just a time bomb. The moment at which the transition came to an end has certainly been a question that has received a number of different answers in the course of the last thirty years.

How to present the transition politically and legally is now a rather controversial issue in Spain. The keywords during the years of transition (in the second half of the 1970s) were "consensus" and "reconciliation". However, this political consensus no longer exists, since the left-leaning parties and all the others that were historically opposed to the dictatorship now want to review the past and to correct the deficiencies of the transition, while the *Partido Popular* (on the Spanish right) radically refuses to look back and criticise the Franco regime.

The official position of the international community concerning the Franco regime was stated in Resolutions 32(I) and 39(I) of the United Nations General Assembly regarding the relations of the Organisation's member states with Spain.⁵ This resolution stated that, "the peoples of the United Nations, at San Francisco, Potsdam and London, condemned the Franco regime in Spain and decided that, as long as that regime remains, Spain may not be admitted to the United Nations". A Sub-Committee of the Security Council charged with investigating the regime unanimously found that "in origin, nature, structure and general conduct, the Franco regime is a fascist regime patterned on, and established largely as a result of aid received from, Hitler's Nazi Germany and Mussolini's Fascist Italy". The UN General Assembly therefore recommended that the Franco Government of Spain "be debarred from membership in international agencies established by or brought into relationship with the United Nations, and from participation in conferences or other activities which may be arranged by the United Nations or by these agencies, until a new and acceptable government is formed in Spain".

⁴ See C.S. NINO, *Radical Evil on Trial* (New Haven 1996), 16; and J. ELSTER, *Closing the Books. Transitional Justice in Historical Perspective* (Cambridge 2004), translated into Spanish as *Rendición de cuentas* (Buenos Aires/Cambridge 2006), 80–1.

⁵ Resolutions of 9 February and 12 December 1946.

This clear position, which was a product of the immediate post-World War context, had no continuity once the international situation was dominated by the Cold War. The Franco regime subsequently adopted an opportunistic attitude towards the Western democracies that would pave the way to its admission to United Nations membership and a stable cooperation with the USA. The dictatorship, which had its origins in the military uprising against the Spanish Republic in 1936, therefore lasted until Franco's death in 1975.

As regards violations of human rights, a clear distinction must be made between the Civil War period (1936–39) and that of the Dictatorship (1939–75). Although closely linked, there were significant differences: whereas the Civil War period was characterised by a significant degree of “symmetrical victimisation”, the mass victimisation of the dictatorship was strictly asymmetrical and vertical.⁶ Furthermore, the victors committed flagrant acts of revenge in retaliation for acts of aggression experienced during the war. As we shall later see, many of the measures adopted by the democratic Spanish State have failed to make a clear distinction between these acts of violence. Many civil organisations view resolving this lack of distinction as a key requirement for achieving complete reconciliation.

There is now agreement among historians that the human cost of the Spanish Civil War was between 500,000 and 600,000 dead. The victims of revolutionary repression numbered around 70,000, while about 150,000 died as a result of Francoist repression, with 50,000 of these dying after the war had officially ended (after 1 April 1939).⁷ In the first half of the 1940s, the prison population probably exceeded 300,000 people, out of a total population of 25.9 million. For comparison, it should be noted that Spain's pre-Civil War prison population, in January 1936, was 34,526. The number of prisoners per 100,000 inhabitants in 1940 was nearly as high as that of Nazi Germany (1,158 and 1,614, respectively), even though the war had already finished in Spain.⁸ In 1944, a spokesman for Franco's Ministry of Justice admitted that over 190,000 prisoners had been executed or had died in prison.⁹ Historians have since revealed that between

⁶ A distinction between these two types of victimisation is used in literature on transitional justice; as stated by R. UPRIMNY YEPES, “Las enseñanzas de análisis comparado: procesos transicionales, formas de justicia transicional y el caso colombiano”, in R. UPRIMNY YEPES, C. BOTERO, E. RESTREPO and M.P. SAFFON (ed), *¿Justicia penal sin transición? Verdad, justicia y reparación para Colombia* (Bogotá 2006), 21. El Salvador and Colombia would be examples of symmetric victimisation and Argentina and Chile would present a situation of asymmetric or vertical victimisation.

⁷ See C. MIR CURCÓ, in J.M. TAMARIT, *Justicia de transición, justicia penal internacional y justicia universal* (Barcelona 2010), 243–244. According to the author, by 2005 about 30,000 books had been published about the Second Republic and the Civil War.

⁸ See Report Brincat (*infra*), 6.

⁹ According to Nino (*Radical Evil on Trial* (New Haven 1996), 17) more than 20,000 Spaniards died in prison between 1939 and 1942.

1936 and 1945 Franco's military judges passed sentence on more than 1 million people. These decisions ranged from the death sentence to jail terms of up to 30 years, though the main 'crime' committed by the vast majority of those condemned had been to merely side with the elected Popular Front government during the Civil War.¹⁰

Furthermore, Republican prisoners effectively became slave workers, while many thousands of working class children were sent to state institutions because the Franco regime considered Republican families unfit to raise them. Thus, babies and young children whose parents were victims of repression were given to families who supported the regime. Many others were taken from their imprisoned mothers and had their names changed so that they could be adopted by families loyal to Franco (the so called "lost children of Francoism").¹¹ During the Civil War, 500,000 people escaped from Spain, but only half of them returned once the conflict had finished. The success of the Francoist repression largely depended on the support and collaboration of a wide range of ordinary people. Thousands denounced their neighbours out of a mixture of political conviction, fear, revenge and/or opportunism. The Catholic Church, which had suffered the violence of radical left-wing groups during the Civil War, gave full support to the Regime's policy of purification and the repression of its enemies.¹² The three main declared enemies of the regime were "liberals", "Reds" and "separatists". Historians have explained how deep Franco's early investment in terror was and, as a result, why he was able to control Spanish society for decades.¹³

The crimes attributable to Franco's long regime must be examined by delimiting two different periods: the post-war years (1939–47), when the most serious atrocities against the enemies of the regime were committed, and the period of stability (1947–75), when autarchy and international isolation were gradually overcome, when the economic situation substantially improved and when the violations of human rights declined. The crimes committed during this second period consisted of sentencing people for political reasons and the extended use of torture against enemies of the regime. Some death penalties were carried out

¹⁰ P. ANDERSON, *In the Interests of Justice? Grass-roots Prosecution and Collaboration in Francoist Military Trials, 1939–1945*, (2009) 18 *Contemporary European History* 26. English historiography strongly contributed to the development of research into the Spanish Civil War. See, for instance, P. PRESTON, *The Coming of the Spanish Civil War: Reform, Reaction and Revolution in the Second Republic* (2nd ed, London 1994); S. PAYNE, *Politics and the Military in Modern Spain* (Stanford 1967). Less studied is the period of dictatorship. The military archives have only recently opened their doors to historians.

¹¹ See M.A. RODRÍGUEZ ARIAS, *El caso de los niños perdidos del franquismo: Crimen contra la humanidad* (Valencia 2008).

¹² See the Brincat Report, 6. The three enemies of the regime were liberals, Reds and separatists.

¹³ See P. PRESTON, *The Spanish Holocaust: Inquisition and Extermination in Twentieth-century Spain* (Hammersmith 2012).

after legal processes in which guarantees of a fair trial were not respected.¹⁴ Political repression was partially conducted through special courts, such as the *Tribunal de Orden Público* (Court of Public Order), which was not abolished until 1976, and also through military courts.

The aim of this book is, above all, to analyse the laws, policies and judicial decisions adopted in Spain that were related to the construction of the past and could therefore be understood as measures of transitional justice. To facilitate this analysis, we will include a description of the historical background and social context in which this transitional justice emerged. The methodological approach adopted will basically be that of legal research, consisting of a thorough review of norms and jurisprudence, interpreted within their teleological and social contexts. It will also include a critical review of the existing literature, relating to the fields of criminal law scholarship, and will be completed by references to the main contributions from the fields of international and comparative law, the social sciences, and particularly from international literature on transitional justice. By comparing the Spanish experience with transitional decisions adopted in other countries, we will then highlight the main features of the Spanish case as a particular example of late transitional justice, and the lessons that can be learned from it.

Here, we will review the measures adopted during the transitional period and more specifically the amnesty and subsequent decisions aimed at giving some kind of partial reparation to the victims of the repression. We shall then give a short description of the social developments that led to increased demands for a review of the past, the 2007 Historical Memory Act, and the controversial use of criminal justice as a way to unearth the truth. Finally, we shall analyse the difficulties that criminal law encounters when trying to give an answer to social expectations regarding the satisfaction of the right to justice, truth and reparation and we shall make a plea for the wholehearted involvement of public institutions through the creation of a Commission and the promotion of restorative justice.

¹⁴ We will refer below (Chapter 7, section 2) to the problem of the annulment of some of these cases.

CHAPTER 2

TRANSITIONAL JUSTICE AND THE SPANISH CASE

1. THEORETICAL BACKGROUND: MODELS OF TRANSITIONAL JUSTICE

In recent years a heated debate about transitional justice has emerged at the transnational level. This phenomenon has been reflected in numerous publications, which have mainly been in English, but also in Spanish. The latter have appeared in some Latin American countries, but also, more recently, in Spain. This is a clearly transdisciplinary field which has attracted contributions from specialists in political science, sociology, philosophy and public international law. Specialists in criminal law have been less drawn to this area¹, despite the challenges that the issues involved present from the perspective of theories of punishment and the points of contact that exist with international criminal law² and restorative justice.³

¹ Spanish penal literature includes contributions on individual aspects which do not cover the whole problem of transitional justice in way that is comparable with the experiences of other countries. See for example, F. MUÑOZ CONDE, "La transformación jurídica de la dictadura franquista en un Estado de Derecho" (2008) 22 *Revista penal* 69 ff; and G.I. ANITUA and R. BERGALLI, "Necesidad de conocer el pasado para enfrentarse al futuro. Un relato a partir de una polémica del presente" (2004) 13 *Revista penal* 3 ff. On the Spanish case, see A. GIL GIL, *La justicia de transición en España. De la amnistía a la memoria histórica* (Barcelona 2009).

² Publications on International Criminal Law have had an increasing importance in Spain. See A. DOMÍNGUEZ, *Derecho penal internacional* (Valencia 2006); A. ZAPATERO, *Código de Derecho penal europeo e internacional* (Instituto de Derecho penal europeo e internacional / Ministerio de Justicia 2008); B. ARÚS and M. ZARAGOZA, *Manual de Derecho penal internacional* (Madrid 2003); A. GIL GIL, *Derecho penal internacional* (Madrid 1999); S. LEGIDO, *Jurisdicción universal y derecho internacional* (Valencia 2004). In the Spanish-speaking world, translations from German legal literature have had a great influence. Thus, K. AMBOS, *La parte general del Derecho internacional penal: bases para una elaboración dogmática* (trad. Ezequiel Malarino, Montevideo 2005); and G. WERLE, *Tratado de Derecho penal internacional* (trad. Díaz Pita, Valencia 2005).

³ See my contributions on restorative justice in J. TAMARIT and C. VILLACAMPA, *Victimología, justicia penal y justicia reparadora* (Bogotá 2006), 297 ff. Among the literature on restorative justice, see an interesting compilation of foundational and critical works in G. JOHNSTONE (ed), *A Restorative Justice Reader: Text, Sources, Context* (Cullompton/Portland 2003); or G. JOHNSTONE and D. VAN NESS, *Handbook of Restorative Justice* (Cullompton/Portland 2007).

Historically speaking, demands for justice in transitional contexts have traditionally been linked to the application of criminal justice against those responsible for violations of human rights that occurred under previous political regimes. If we focus on the best-known experiences from the contemporary era, we find that the regimes in question tended to emerge from an armed conflict or a revolutionary transition, and to adopt exceptional measures to repress those who were judged to have committed unlawful acts under the outgoing regime. A culture of punitive emergency and even the abrogation of the basic principles of criminal law and due process were the dominant attitudes of the new rulers once they had become entrenched in power. Lustration, special courts, the use of untrained judges, violations of the principle of legality and the prohibition of the retroactive application of criminal law have all been components of a model of transitional justice in which the concept of “political justice” has prevailed over the rule of law.⁴ Examples of this transitional model were common in the European transitions that took place immediately after the Second World War and were also seen more recently in the Portuguese revolution of 1974 and in post-Soviet political transformations of the 1990s. In these cases, we frequently find degenerate forms of justice, such as “revolutionary justice” or “victors’ justice”. This latter term has been used to discredit the Nuremberg trials; on the other hand, these have also been considered by many as the starting point of contemporary international criminal law, as they involved the creation of an international tribunal to try crimes of a supranational dimension.⁵

The new culture of transitional justice stands as a noble alternative to these other perverse forms of justice and also as a vindication of justice against transitional models that were characterised by a desire to forget the past and a “culture of impunity”. This has been a common criticism levelled against the political transitions of Spain, Chile and Argentina. In these cases the political transition did not come from a break with the past but rather from a transfer of power that was accepted by the former autocracies or from an agreement made between them and the emerging democratic forces. Therefore, the demand for transitional

⁴ See ELSTER, *Closing the books...*, about the measures of political justice adopted in different European countries after the Second World War and, more recently, in post-Soviet countries, based on administrative and para-judicial proceedings and radical lustration programmes; and J. ELSTER, *Rendición de cuentas. La justicia transicional en perspectiva histórica* (Buenos Aires 2006) 99. After making a sharp distinction between the concepts “political justice” and “legal justice”, the author highlights how retrospective decisions taken by governments in transitional processes have frequently had more of a political than a legal nature.

⁵ See criticisms in H.H. JESCHECK, *Tratado de Derecho penal – Parte general* (trad. Manzanera Samaniego, 4th ed, Granada 1993), 107; L. JIMÉNEZ DE ASÚA, *Tratado de Derecho penal* (Buenos Aires 1964), Part II, 1221 ff; and G. WERLE, *Tratado de Derecho penal internacional* (trad. Díaz Pita, Valencia 2005), 53–4. See the precedents and implications of the Nuremberg trials, G. WERLE, *op. cit.*, 50–2; and W.P. NAHAN, “Peace, Justice and Transition in Colombia” (2008) 9 *Global Jurist*, 16–7 and 19.