

## Road to Impunity: The Absence of Transitional Justice Programs in Spain

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### ABSTRACT

This article analyzes the ongoing process of recovering Spain's historical memory and building a transitional justice agenda to end the impunity of crimes against humanity committed during the Francoist dictatorship. Over thirty years after the transition to democracy, based on an agreement to silence and forget, a social movement that challenges the narrative of successful democratization has interrupted Spain's political landscape. Victim associations, relatives, and citizens who support the recovery of historical memory have generated a debate about how to deal with the dictatorial past. In 2007, the Spanish Parliament passed the Historical Memory Act to recognize and enhance victims' rights. However, victims and victim associations criticized the Act severely due to the absence of mechanisms that guarantee the implementation of a transitional justice agenda, including a failure to investigate the past or create a truth commission. In the wake of a 2012 Spanish Supreme Court decision, which asserts that it is legally impossible to conduct a judicial investigation into the crimes committed during the Francoist dictatorship, it appears that Spain is now further than ever from achieving this goal.

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## I. INTRODUCTION

In February 2012, the Spanish Supreme Court issued Decision 101, which rejected the possibility of investigating gross violations of human rights committed from 1936 to 1952 under the Francoist regime.<sup>1</sup> The complaint brought before the Supreme Court addressed, albeit indirectly, the disappearance of more than 113,000 people as a result of a well calculated, predetermined plot to eradicate political opponents. These opponents included political and trade union leaders, partisans of these organizations, and people who did not embrace the military insurrection. None of the disappearances mentioned in the complaint occurred on the battlefield or as a result of the military actions that took place during the Spanish Civil War, from 1936 to 1939.

The prosecution did not ask the Supreme Court to investigate the disappearances, but rather to adjudicate a trial of Baltasar Garzón, the Spanish judge who had started to investigate the disappearances.<sup>2</sup> The prosecution accused Judge Garzón of abusing his authority by committing the crime of prevarication when he opened a preliminary judicial investigation into the facts and circumstances behind a number of the disappearances in Francoist Spain.<sup>3</sup> The private prosecutors asserted that Judge Garzón violated his jurisdiction because he supposedly knew that Spanish law does not allow investigations into the crimes of the Francoist dictatorship.<sup>4</sup> The Supreme Court declared Judge Garzón not guilty, but it also stated that it was legally impermissible to investigate disappearances with respect to which "the right to know the historical truth is not part of a criminal process."<sup>5</sup> With these words, the Supreme Court further rejected the international legal doctrine that establishes a duty to investigate the destiny of the disappeared, even if it is not possible to punish those who are guilty because of amnesty or

1. The Franco Dictatorship governed in Spain from 1939 to 1975, after a 1936 coup d'état against the legitimate 1931 Republican Constitution.

2. Auto October 16, PA: 399/2006 V (2008) (Judge Garzón).

3. C.P., art. 446, B.O.E. No. 281, 34036 (24 Nov. 1995), defines the crime of judicial prevarication as the knowing issuance of unlawful decisions. It is a crime punished by a ten to twenty year suspension of the judge for overstepping authority. This crime requires that the judge not simply commit legal error, but deliberately act to violate the law.

4. The prosecutors were the ultra-conservative trade union *Manos Limpias* and the association *Libertad e Identidad*, largely related with the Francoist political party called *Falange Española*. Spanish Law allows citizens and private associations to act as private prosecutors.

5. S.T.S., 27 Feb. 2012, Decision 101, 1st Legal Ground, available at <http://www.poder-judicial.es/search/doAction?action=contentpdf&database=TS&reference=6294236&links=%22ANDRES%20MARTINEZ%20ARRIETA%22&optimize=20120301&publicinterface=true>. In another and separate complaint, Judge Garzón was accused of ordering illegal wire taps on confidential communications between lawyer and client in the context of a judicial investigation against political corruption. The Supreme Court declared Judge Garzón guilty and he has been removed from the bench. See S.T.S., 9 Feb. 2012, Decision 79.

prescription.<sup>6</sup> Under international law, the judiciary has the obligation to satisfy the right to truth that belongs to victims of alleged or established human rights violations.<sup>7</sup>

Decision 101 is not surprising in the Spanish context. Spanish judges rarely open proceedings upon the discovery of a corpse of someone who disappeared. In fact, very few Spanish judges ever go in situ to identify the remains of people reasonably believed to have died as a result of acts that occurred under Francoist repression.<sup>8</sup> Rather, Spanish judges usually refer to the 1977 Amnesty Act, passed by the democratically elected Spanish parliament, which has had the effects of forgiving human rights violations committed during the dictatorship and acting as a key obstacle to any official investigations.<sup>9</sup>

There are a number of reasons in favor of and against investigating human rights violations that took place in Francoist Spain. Key questions for understanding the modern framework include: Why were these violations not investigated in the seventies when Spain's democratization took place? Why was a transitional justice program not implemented? Would it be politically convenient to implement such a program now? The answers to these questions are grounded in understanding the factors that influenced the political process known as the Spanish transition. Official ideologists consider the Spanish transition successful and the hegemonic structures in place since the transition occurred have transmitted this characterization to the public.

More than thirty years after the passage of the 1977 Amnesty Act, the political landscape has changed. In October 2000, the remains of thirteen victims of extrajudicial killings were exhumed in Priaranza del Bierzo (León)—a little village in northern Spain. This incident was the first time that victims of the Francoist regime were exhumed under specially developed criteria.<sup>10</sup> Both the continued discovery of mass gravesites and the lingering, unanswered questions of the families of the disappeared have led some to

6. International treaties ratified by Spain undermine the Supreme Court's interpretation. Declaration on the Protection of All Persons from Enforced Disappearance, G.A. Res. 47/133, U.N. GAOR, 47th Sess., U.N. Doc. A/RES/47/133, arts. 2, 5 (18 Dec. 1992), ratified by Spain in 2010, a crime is not subject to prescription even though the victim is probably dead.

7. For the international evolution of the right to truth, see Juan Méndez, *Accountability for Past Abuses*, 19 HUM. RTS. Q. 255 (1997); Juan Méndez, *An Emerging "Right to Truth": Latin-American Contributions*, in LEGAL INSTITUTIONS AND COLLECTIVE MEMORIES 39 (Susanne Karstedt ed., 2009).

8. AMNESTY INT'L, CASOS CERRADOS, HERIDAS ABIERTAS: EL DESAMPARO DE LAS VÍCTIMAS DE LA GUERRA CIVIL Y EL FRANQUISMO EN ESPAÑA 17–18 (2012).

9. Amnesty Act 46/1977 (BOE n. 248, 17 Oct. 1977, 22765), available at <http://www.boe.es/boe/dias/1977/10/17/pdfs/A22765-22766.pdf>.

10. Francisco Ferrándiz, *The Intimacy of Defeat: Exhumations in Contemporary Spain*, in UNEARTHING FRANCO'S LEGACY: MASS GRAVES AND THE RECOVERY OF HISTORICAL MEMORY IN SPAIN 308 (Carlos Jerez-Farrán & Samuel Amago eds., 2010).

question the success of the Spanish transition. These people have started to call for reparations, claiming such settlements to be of the utmost importance for the success of a future Spanish democracy. Long-hidden stories of the disappeared have started to be shared through public forums and a social movement for the recovery of historical memory has garnered significant public attention.

Historical memory (*memoria histórica*) refers to a hidden past that is valued and rescued before being forgotten.<sup>11</sup> It constructs a collective story about the past in order to help forge the identity of a group. Two circumstances are key to this concept: first, awareness of past milestones, and second, the relationship of these milestones to the present.<sup>12</sup> Reviving the memory of the Francoist atrocities involves a serious challenge to the narrative of a successful and exemplary Spanish transition.

A telling example of the government's reaction to the call for the recovery of historical memory is the Spanish Parliament's passage of the Historical Memory Act in 2007. This Act contains some measures to improve victim reparations, but says nothing about a judicial investigation into past crimes. The Act's silence on judicial investigations deeply disappointed victims and associations dedicated to helping uncover historical violations. As a result, they sought the assistance of the judiciary by claiming that international law recognized a right to truth seeking.<sup>13</sup> Such associations consider an investigation into the atrocities committed under the Francoist regime a fundamental part of any reparations.

## II. CRIMES AND VICTIMS OF THE SPANISH DICTATORSHIP

Many questions exist regarding the crimes committed during the Francoist dictatorship—the investigation into this part of Spain's history is far from finished. Many aspects of the dictatorship's repression remain hidden because during the time that Franco was in power investigating and denouncing human rights violations was impossible. Then, when the dictatorship formally ended, initiating investigations was impossible because the transition was based on forgetting and silencing the past.<sup>14</sup> Despite these difficulties, academics and

11. This is a theoretical concept from French sociology and historiography. See MAURICE HALBWACHS, *LA MÉMOIRE COLLECTIVE* (1950); PIERRE NORA, *LES LIEUX DE MÉMOIRE* (1984).
12. Elizabeth Jelin, *Silences, Visibility, and Agency: Ethnicity, Class, and Gender in Public Memorialization*, in *IDENTITIES IN TRANSITION: CHALLENGES FOR TRANSITIONAL JUSTICE IN DIVIDED SOCIETIES* 188–89 (Paige Arthur ed., 2011).
13. International law recognizes the right of the victim to go to the judiciary and obtain effective and immediate reparation. See *Basic Principles and Guidelines in the Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights and Serious Violations of International Humanitarian Law*, Res. 60/174, U.N. Doc. A/RES/60/147, arts. 22(b), 24 (15 Dec. 2005).
14. Santos Juliá, *Echar al Olvido: Memoria y Amnistía en la Transición*, 129 *CLAVES DE RAZÓN PRÁCTICA* 14, 17 (2003).

historians have reached a relative consensus on the scale and type of human rights violations that occurred during the dictatorship: more than 130,000 people disappeared and died in extrajudicial executions; 700,000 people were held in concentration camps from 1936 to 1942; 400,000 people were imprisoned for political reasons, many of whom were subjected to torture or other cruel, inhuman, degrading treatment; 500,000 people were exiled for their political beliefs.<sup>15</sup>

These known violations of human rights are stunning and the violations of due process of law are countless. The Francoist regime established a judiciary system that punished the political opposition in summary trials and charged those who supported the former regime or those who did not agree with the new one with the crime of military rebellion. Military commissions, such as the Repression of Masonry and Communism Court, often handed down multiple ad hoc convictions for ideological reasons, demonstrating no respect for any defense. The Political Responsibilities Court was created to adjudicate the political responsibilities of those who had already been found guilty in a criminal trial and was especially active in the first years of the dictatorship. Once the Court sentenced a defendant to jail or to death for the crime of military rebellion, the defendant would face a second trial to determine the level of support that he or she had provided to the former Republic. The Political Responsibilities Court undertook more than 229,000 investigations, most resulting in economic penalties such as confiscation of property.<sup>16</sup> This system legalized the stripping of private property from those associated with the Republic, as well the subsequent transfer of such property to the supporters of the Franco dictatorship. The quantity and value of confiscated property remains unknown. Additionally, the Francoist regime implemented lustration policies against teachers, professors, public employees, and members of the former government's army. Most of these professionals never recovered their previous job statuses or positions of employment.<sup>17</sup>

Recent investigations have shown that the Francoist authorities participated in the creation of a child trafficking network. A government decree from 1940 stated that incarcerated mothers could keep their children with them until the children turned three years old; once the children turned three, the authorities were to take custody and remove the children.<sup>18</sup> In the forties

15. See, e.g., MANUEL ÁLVARO DUEÑAS, FRANCISCO ESPINOSA MAESTRE & JOSÉ MARÍA GARCÍA MÁRQUEZ, *LA GRAN REPRESIÓN: LOS AÑOS DE PLOMO DE LA POSGUERRA (1939–1948)* (Mirta Núñez ed., 2009); JOSÉ MARÍA GARCÍA MÁRQUEZ, PABLO GIL VICO & JOSÉ LUIS LEDESMA, *VIOLENCIA ROJA Y AZUL. ESPAÑA 1936–1950* (Francisco Espinosa Maestre ed., 2010).
16. MANUEL ÁLVARO, *POR MINISTERIO DE LA LEY Y VOLUNTAD DEL CAUDILLO: LA JURISDICCIÓN ESPECIAL DE RESPONSABILIDADES POLÍTICAS* 265 (2006).
17. See SPANISH INTERGOVERNMENTAL COMMISSION, *REPORT CONCERNING THE SITUATION OF THE VICTIMS OF CIVIL WAR AND FRANCOIST* (2006), available at [http://www.mpr.es/uploads/media/pdf/6/informegeneral2\\_1232475655.pdf](http://www.mpr.es/uploads/media/pdf/6/informegeneral2_1232475655.pdf).
18. RICHARD VINYES, MONTSE ARMENGOU & RICARD BELIS, *LOS NIÑOS PERDIDOS DEL FRANQUISMO* 57–59 (2002).

and fifties, about 30,000 children became wards of a public organization called *Auxilio Social* or of various Catholic institutions.<sup>19</sup> After the Francoist authorities changed the children's names, many were given to families loyal to the new regime or to families that were willing to pay for a child. Most of these children never returned to their biological families. Additionally, despite the decree allowing women to keep their children for the first three years, many women who delivered while imprisoned were told that their children were stillborn. In reality, many newborns were simply put up for adoption. No clinic records, registration papers, or other documents exist concerning how many babies were truly stillborn versus how many were given to other families.

This child trafficking network was well coordinated and included the participation of government agents, doctors, and nurses, most of whom were nuns.<sup>20</sup> The purpose of trafficking these children changed over the years. While initially it was politically motivated as a way to prevent the spread of a perceived mental illness called Marxism, this rationale soon gave way to economics—the sale of young children was highly profitable. Spanish courts are only now starting to recognize these cases and are focusing on the trafficking that occurred toward the end of the Francoist regime. Ascertaining the real measure of this crime—gathering statistics and identifying persons and institutions involved—would require an official investigation that the Spanish government still rejects.<sup>21</sup>

### III. FRANCOIST CRIMES: CRIMES AGAINST HUMANITY

It is important to determine whether the crimes committed by the Francoist authorities qualify as crimes against humanity. This determination is relevant not only for conceptual and analytical reasons, but also for comprehending the severity of the acts. The best expression of the international community's consensus against impunity, the Rome Statute of the International Criminal Court (Rome Statute), defines crimes against humanity in detail and lists several examples of acts that qualify for this designation. Article 7 defines crimes against humanity as multiple widespread and systemic acts committed pursuant to an organized policy.<sup>22</sup> Among the listed acts are: murder, imprisonment in violation of fundamental rules of international law, torture,

19. About this question, see ÁNGELA CENARRO, *LA SONRISA DE FALANGE. AUXILIO SOCIAL EN LA GUERRA CIVIL Y EN LA POSGUERRA* (2006); ÁNGELA CENARRO, *LOS NIÑOS DEL AUXILIO SOCIAL* 77 (2009).
20. FRANCISCO GONZÁLEZ DE TENA, *NIÑOS INVISIBLES EN EL CUARTO OSCURO* 13–14 (2009).
21. MIGUEL ÁNGEL RODRÍGUEZ ARIAS, *EL CASO DE LOS NIÑOS PERDIDOS DEL FRANQUISMO, CRIMEN CONTRA LA HUMANIDAD* 144–53 (2008).
22. Rome Statute of the International Criminal Court, adopted 17 July 1998, art. 7, U.N. Doc. A/CONF.183/9 (1998), 2187 U.N.T.S. 90 (entered into force 1 July 2002).

persecution of specific political groups, and enforced disappearances.<sup>23</sup> All of these acts occurred under the Francoist regime. Further, these acts were committed against a civilian population as part of a widespread and systematic policy created and carried out by the Francoist military authorities. The military authorities knowingly ordered and implemented systematic attacks against the civilian population as a key element of the Francoist political agenda.<sup>24</sup> Thus, these acts are consistent with the definition of crimes against humanity found in Article 7.

In Decision 101, the Spanish Supreme Court discussed crimes against humanity. In its own words, “both sides committed atrocities and did not respect the laws of war.”<sup>25</sup> Yet, the Court rejected the judicial investigation into these crimes. It defined the gross violations of human rights committed in Francoist Spain as crimes against the laws of war, but then denied the judiciary's legal obligation to investigate them.<sup>26</sup> This decision destroyed the judiciary's opportunity to reject impunity and guarantee the victims' rights to truth, justice, and reparations. It is a bizarre but meaningful conclusion to qualify these atrocities as crimes for conceptual reasons, but this qualification has no legal significance.

The Spanish Supreme Court approached this conclusion through a two-step strategy. First, the Court rejected the application of international legal standards to the human rights violations committed in Spain from 1936 to 1952. Second, the Court labeled the crimes in such a way as to trigger domestic, not international, adjudication, thereby allowing it to apply prescription and amnesty to these claims. In rejecting the application of international legal standards, the Spanish Supreme Court argued that international law had not yet codified crimes against humanity when these acts were committed.<sup>27</sup> However, this claim ignores the 1899 and 1907 Hague Conventions on the Laws of War, which established an international obligation to respect “the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.”<sup>28</sup> Judge Garzón believed that this approach was sufficient to overcome the bar to the retroactive application of international criminal law even though Spain did not ratify the 1945 Nuremberg Principles or the 1949 Geneva Conventions until 1952. This reasoning is based on the fact that the 1945 Nuremberg Principles did not create new crimes; rather, they codified the criminal character of certain

23. *Id.*

24. Francisco Espinosa Maestre, *Julio de 1936: Golpe Militar y Plan de Exterminio*, in *MORIR, MATAR, SOBREVIVIR: LA VIOLENCIA EN LA DICTADURA DE FRANCO* 115–19 (Julián Casanova ed., 2002).

25. S.T.S., Decision 101, *supra* note 5, 4th Legal Ground.

26. *Id.*

27. *Id.* 3rd Legal Ground.

28. Convention Respecting the Laws and Customs of War on Land (Hague IV) (18 Oct. 1907), PmbI., available at [http://avalon.law.yale.edu/20th\\_century/hague04.asp](http://avalon.law.yale.edu/20th_century/hague04.asp).

atrocities already considered war crimes or crimes against humanity.<sup>29</sup> The Spanish Supreme Court rejected this claim, asserting that these international agreements were insufficient to allow the prosecution of those who violated the laws of humanity in Francoist Spain.<sup>30</sup>

Once the Spanish Supreme Court discarded the application of international law provisions, it developed the second step by considering the alleged criminal acts from a domestic point of view and by applying the principle of legality.<sup>31</sup> The Court concluded that if the crimes were not subject to international law, then they were subject to the Spanish statute of limitations. As the acts occurred over twenty years ago the maximum period of prescription established by the Spanish Criminal Code charges could no longer be brought against the perpetrators. This argument is particularly confusing with regard to the nature of the crimes alleged. Enforced disappearances, illegal detentions, and child trafficking are all permanent crimes, meaning that they are not subject to prescription until information about the destiny of the affected person is obtained.<sup>32</sup> Further, the presumption of death should not be treated as a closing clause but rather as a reason to start an investigation into what happened.

A multitude of international judicial bodies have found that the crimes of the Franco period should be investigated. In 2009, the United Nations Human Rights Committee (UNHRC) and the United Nations Committee Against Torture (UNCAT) recommended that Spain exhume and identify the corpses that remain hidden in mass graves and establish an independent truth commission to create a report on the human rights violations committed in the past. They also recommended that Spain repeal the 1977 Amnesty Act.<sup>33</sup> Despite internal and international calls for compliance, Spain has not followed any of the recommendations.<sup>34</sup> Further, relatives of Dorado Luque,

29. Nuremberg Statute art. 6(c) defines crimes against humanity as those "committed against any civilian population, before or during the war." In the Spanish context, this would include acts committed before 1939. Further, in December 1946 the General Assembly of the United Nations passed Resolution 95(II), which affirmed "the Principles of International Law recognized by the Charter of the Nuremberg Tribunal," establishing that these laws were simply a written declaration of already existing international law. See AMNESTY INT'L, *supra* note 8, at 18–19.

30. S.T.S., Decision 101, *supra* note 5, 3rd Legal Ground.

31. According to the Spanish Supreme Court, *id.* 7th Legal Ground, "human rights protection culture must respect the principle of legality, guaranteed in Article 9.3 of Spanish Constitution:" *lex previa, lex certa, lex stricta* and *lex scripta*.

32. Mónica Zapico Barbeito, *Investigating the Crimes of the Franco Regime: Legal Possibilities, Obligations of the Spanish State and Duties Towards the Victims*, 10 INT'L CRIM. L. REV. 243, 254 (2010).

33. The prohibition of amnesties is a key element in the fight against impunity, regardless of whether an amnesty is passed by a formally democratic parliament. See Javier Chinchón Álvarez, *The Challenges Posed to the Recent Investigation of Crimes Committed During the Spanish Civil War and Francoism*, in THE ROLE OF COURTS IN TRANSITIONAL JUSTICE: VOICES FROM LATIN AMERICA AND SPAIN 155 (Jessica Almquist & Carlos Espósito eds., 2012).

34. *Id.* at 147.

one of the disappeared presumably killed in July 1936, recently submitted a complaint to the European Court of Human Rights (ECHR). The ECHR decided that the duty to investigate is a "separate and autonomous duty on Contracting States" and that this duty is binding on Spain even if the death took place before the European Convention on Human Rights entered into force.<sup>35</sup>

The Spanish Supreme Court also claimed that the Amnesty Act's application prevents a judicial investigation. This Act, which the Court calls "an essential, irreplaceable and necessary pillar," is central in the stage set up after Franco's death.<sup>36</sup> By preventing investigation and accountability, the Act has become a pass for impunity and a symbol of the triumph of dictatorship over democracy.

The Court's reasoning is based on the desire to keep intact the legal and political bases of the Spanish transition to democracy. The narrative of this transition requires questioning neither the Act nor the Constitution, which is a derivative of the Act and which dismisses accountability for the crimes of the past and for the crimes of its authors. Under this approach, the process of reparation cannot include the hypothetical right to a judicial investigation of the atrocities because such an investigation could jeopardize the entire democratic system. In this way, the Spanish Supreme Court overextended its reach by defending a political agreement when its function is to interpret and apply law.

#### IV. A TRANSITION TOWARD IMPUNITY AND OBLIVION

Franco died in 1975 and the Spanish people ratified a democratic Constitution by referendum in 1978. During this time period no transitional justice mechanisms were established in Spain and the government undertook no legal reforms or public policy changes to satisfy a demand for truth, justice, and reparation for the victims of decades of human rights violations.<sup>37</sup> The new government started neither judicial investigations nor truth commissions, and offered no official apologies.<sup>38</sup>

35. Gutiérrez Dorado and Dorado Ortiz v. Spain, App. No. 30141/09, Eur. Ct. H. R. ¶ 34 (27 Mar. 2012). However, the Court declared the application inadmissible because the complaint was introduced out of time (June 2009). Though the Court recognizes the lack of effective investigations due to the Amnesty Act, this fact does not discharge the applicants "from the duty to display due diligence." *Id.* ¶ 39. It is a highly formalistic decision that ignores the abandonment of the victims by the Spanish democracy.

36. S.T.S., Decision 101, *supra* note 5, 3rd Legal Ground.

37. RAFAEL ESCUDERO, *MODELOS DE DEMOCRACIA EN ESPAÑA 1931 Y 1978* 57–61 (2013).

38. PALOMA AGUILAR, *POLÍTICAS DE LA MEMORIA Y MEMORIAS DE LA POLÍTICA* 462–65 (2008).



Silencing and forgetting was part of Spain's process of democratization. Some claim that the consensus to forget and silence the past made reconciliation among Spaniards possible and that it was a pillar of the transition to democracy. Both opponents to dictatorship and Franco supporters who acknowledged that it was impossible to reproduce a new dictatorship without Franco agreed that implementing the silencing and forgetting clause was necessary. Consequently, they permitted Spain to move beyond the old regime and to develop a new democratic one, acting as an ideological background of the new constitutional system.<sup>39</sup>

A summary of the so-called transition agreement is as follows: forget the past and in return we will construct a new democracy. The transition served several purposes. First, it assured that former Franco supporters and members of the democratic opposition alike would remain silent about the crimes, their authors, and, more generally, everything that happened during the dictatorship. Amnesia is the first clause of the transition agreement: discussion of the dictatorship and the attendant violations of human rights have been expelled from academic, cultural, social, and political life.<sup>40</sup>

Second, the agreement rejected vindication of the past. Each party essentially committed to renouncing the past. Just as the Franco supporters had to renounce the dictatorship, democrats had to renounce the former Republic and the 1931 Constitution.<sup>41</sup> This created an ideological and political middle ground: a halfway point between dictatorship and democracy, between the Franco regime and the Spanish Republic. The goals, remembrances, and aspirations related to a more liberal democracy were discarded, including the ability to hold a referendum regarding the monarchy, the possibility of establishing a federal state, and even the separation of church and state.

Third, the agreement had its base in an amnesty for those who committed grave crimes during the Francoist dictatorship. One year before the new constitution, the Spanish Parliament passed the 1977 Amnesty Act, granting amnesty for political crimes. Initially, anti-Franco political parties and trade unions envisioned the Amnesty Act as a means of freeing activists who remained imprisoned for their exercise of political rights, such as freedom of speech or freedom of assembly via demonstrations or striking, considered political crimes during the dictatorship.<sup>42</sup>

However, the Amnesty Act included a provision granting amnesty to public agents and officials who committed human rights violations by pros-

39. Juliá, *supra* note 14, at 22.

40. *Id.*

41. JOAQUÍN LEGUINA, *EL DUELO Y LA REVANCHA. LOS ITINERARIOS DEL ANTIFRANQUISMO SOBREVENIDO* 121–57 (2010).

42. José Antonio Martín Pallín stresses that a democratic parliament amnesty for those who committed politically intentional activities is a “legal lapse without precedents in other countries that have developed democratization processes.” *Amnistía*, in *DICCIONARIO DE MEMORIA HISTÓRICA: CONCEPTOS CONTRA EL OLVIDO* 57, 62 (Rafael Escudero ed., 2011).

ecuting and jailing people for their political affiliations.<sup>43</sup> This provision was considered necessary to assure the cooperation of former Franco supporters and to cement a democracy.<sup>44</sup> Further, the Spanish Supreme Court used the provision in its determination that investigating crimes committed under Franco was impermissible.

No arguments dispute this interpretation of the Amnesty Act.<sup>45</sup> The purpose of the Act is to grant amnesty for “all the actions with political intentionality” and is therefore directly related to political crimes such as demonstrating, striking, and engaging in other forms of political association.<sup>46</sup> This wording reveals that the difference between actions with the intent to engage in political voice and the exercise of rights and those without is important. Crimes against civilians, spoliation of private properties, and child trafficking do not seem to have this political intention behind them, but only to manipulate a populace to maintain control, so they should not be covered by the Act.

Several months before passing the Amnesty Act, Spain ratified the 1966 International Covenant on Civil and Political Rights (ICCPR). The ICCPR outlines the principle of legality, namely that no person can be held retroactively accountable for a crime that was not a crime at the time that it was perpetrated, but adds that “nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time it was committed, was criminal according to the general principles of law recognized by the community of nations.”<sup>47</sup> If the 1977 Act included amnesty for actions considered as crimes against humanity, it was clearly against Article 15 of the ICCPR and should not have been applied by the Spanish judiciary.<sup>48</sup>

In addition, because the Amnesty Act was passed before the 1978 Constitution, Spanish law may undermine the Act. The Spanish Constitutional Court ruled that all acts passed before the 1978 Constitution can be ignored or not applied by any judge who considers the Act unconstitutional.<sup>49</sup> As a

43. Amnesty Act, *supra* note 9, art. 2(f).

44. As Aguilar notes, the approval of this measures had no political impact, because “it was hardly mentioned in parliamentary debates before the approval of the law,” and “the most important newspapers of the period also failed to allude” to them. See Paloma Aguilar, *Justice, Politics, and Memory in the Spanish Transition*, in *THE POLITICS OF MEMORY: TRANSITIONAL JUSTICE IN DEMOCRATIZING SOCIETIES* 92, 102 (Alexandra B. de Brito, Carmen González-Enríquez & Paloma Aguilar eds., 2001).

45. Zapico, *supra* note 32, at 258–60; Chinchón, *supra* note 33, at 156.

46. Amnesty Act, *supra* note 9, art. 1.

47. International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., U.N. Doc. A/6316, art. 15 (23 Mar. 1976).

48. Louise Mallinder, *Can Amnesties and International Justice be Reconciled?*, 1 INT'L J. TRANS'L JUST. 208 (2007) (regarding the relationship between International courts and amnesty acts).

49. S.T.C., 24 Feb. 1981, (B.O.E., No. 47, Decision 4) (Spain).

pre-constitutional act, the 1977 Amnesty Act is thus open to this interpretation. Judge Garzón used his authority to interpret this law in such a manner when he opened an investigation into the disappeared. However, the Spanish Supreme Court rejected his authority and endorsed the full constitutionality of the Amnesty Act.<sup>50</sup>

Even if the Spanish Supreme Court's position is accepted, the provisions of this Act should be validated through a judicial trial directed to clarify the circumstances, facts, and truth. However, this has not happened, and the Amnesty Act remains a triumph against any judicial investigation and a guarantee for impunity.

## V. THE SPANISH TRANSITION: A SUCCESSFUL AND EXEMPLARY PROCESS?

The Spanish transition has been considered a successful and exemplary process, worthy of export to other countries transitioning out of a dictatorship and into a democracy.<sup>51</sup> The official narrative—a hegemonic discourse consolidated over the years—delineates a peaceful process that allowed not only reconciliation among Spaniards, but also the development of a modern political system similar to contemporary European democratic regimes.<sup>52</sup> According to the narrative, all of this has been possible due to the transition and attendant silencing and forgetting of the past.<sup>53</sup>

But, there is another interpretation—one that is not so optimistic. Points of view that differ from the hegemonic narrative about the transition are starting to enter the social and the academic debate. This interpretation relies on three arguments that derail the idyllic tale of the transition. The first argument looks to the result of the process, specifically Spain's "low-level democracy."<sup>54</sup> The Spanish political system deserves this qualifier because of the absence of mechanisms to guarantee the participation of citizens in public affairs beyond the election of representatives every four years. Except for referenda on constitutional reform, referenda passed by the people are merely advisory, not binding, and Spanish law does not allow referenda to

abolish laws.<sup>55</sup> This constitutional model stifles any possibility of advancing toward a more participatory democracy.

Additionally, Spain has a majoritarian electoral system that privileges governability and bipartisanship over ensuring the best representation of the plurality of political options that coexist in society.<sup>56</sup> This style of low-level democracy was the only one that could be achieved under the circumstances surrounding the transition agreement. Control of the process belonged to politicians and former authorities from the Franco dictatorship, commonly, but not officially, referred to as the Military Party.<sup>57</sup> The Military Party prohibited discussion of the continued existence of the monarchy—a monarchy that the Francoist government had guaranteed would stay in place. This was but one of the many characteristics of the Military Party's influence over the transition.<sup>58</sup> Their privileged position allowed them to control and limit the constitutional text ultimately approved.<sup>59</sup> For instance, when stressing the unity of Spain there was no discussion of the ongoing territorial structure. They were able to ensure that a capitalistic economic system was prioritized over social rights, which are highly devaluated in the constitutional text. Further, due to the influence of the Catholic Church, a huge supporter of the Francoist regime, Spain did not transition into a secular state; instead, the Constitution establishes a non-confessional state, that is, a system that guarantees the cooperation between state and church.<sup>60</sup> Effectively, this clause denies the neutrality of the civil authorities and creates a preferential relationship with the Catholic Church.

The second argument countering the official version of the transition concerns the climate under which the change in government took place. Frequently characterized as peaceful, the period after Franco's death and spanning the first stages of the new democracy was a time of huge social conflict.<sup>61</sup> In fact, Spain's shift into formal democracy, and not into another authoritarian regime, occurred largely because of the social and political movements that developed on the outskirts of the official consensus. At least 591 people died in politically motivated violence between 1975 and 1983.<sup>62</sup> Many of these deaths were due to terrorist attacks, though 188 people or

50. S.T.S., Decision 101, *supra* note 5, 3rd Legal Ground.
51. Luis López Guerra, *The Application of the Spanish Model in the Constitutional Transitions in Central and Western Europe*, 19 CARDOZO L. REV. 1937, 1937–39 (1998).
52. SANTOS JULIÁ, HOY NO ES AYER: ENSAYOS SOBRE LA ESPAÑA DEL SIGLO XX 273–74, 317–23 (2010).
53. Paloma Aguilar, *The Spanish Amnesty Law of 1977 in Comparative Perspective: From a Law to Democracy to a Law for Impunity*, in AMNESTY IN THE AGE OF HUMAN RIGHTS ACCOUNTABILITY: COMPARATIVE AND INTERNATIONAL PERSPECTIVES 315, 318 (Francesca Lessa & Leigh Payne eds., 2012).
54. Gerardo Pisarello, *Constitución y Gobernabilidad: Razones de una Democracia de Baja Intensidad*, in LAS SOMBRAS DEL SISTEMA CONSTITUCIONAL ESPAÑOL 129, 132 (Juan Ramón Capella ed., 2003).

55. C.E., art. 92, B.O.E. No. 311 (29 Dec. 1978) (Spain).
56. LUIGI FERRAJOLI, PODERES SALVAJES: LA CRISIS DE LA DEMOCRACIA CONSTITUCIONAL 86–89 (2011).
57. IGNACIO LACASTA, CULTURA Y GRAMÁTICA DEL LEVIATÁN PORTUGUÉS 143 (1988).
58. Juan Ramón Capella, *La Constitución Tácita*, in LAS SOMBRAS DEL SISTEMA CONSTITUCIONAL ESPAÑOL, *supra* note 54, at 17, 20.
59. *Id.* at 31.
60. C.E., *supra* note 55, art. 16.3. This constitutional clause allows civil authorities to privilege the Catholic faith in government decisions and above other cults and beliefs.
61. Rafael Escudero, *Los Derechos de las Víctimas de la Transición*, in EL ITINERARIO DE LA MEMORIA 193, 197–201.
62. MARIANO SÁNCHEZ SOLER, LA TRANSICIÓN SANGRIENTA: UNA HISTORIA VIOLENTA DEL PERIODO DEMOCRÁTICO EN ESPAÑA 303, 353 (2010).

more were killed in actions institutionally organized or tolerated by the authorities.<sup>63</sup> Political violence was part of a strategy designed by public authorities to generate a climate of fear and intimidate civil society into giving up its democratic claims. This violence was especially prevalent in, though not limited to, the Basque region, where people were also demanding independence and self-determination.<sup>64</sup> Under an atmosphere of impunity already created by the Amnesty Act, many of the human rights violations during this period—including torture, illegal detention, and rape—were not investigated or reported.<sup>65</sup> The rights of the victims of the democratization process remain neglected to this day.

The third argument that undermines the official interpretation of the Spanish transition stresses the inconsistency of calling a political transition exemplary when it silences and forgets victims of the past government. People were killed for their ideals and for supporting the Spanish Republic. For the victims, turning a blind eye brought the infinite delay of their legitimate claims for rehabilitation, reparations, and judicial investigation. For all of Spanish society, this agreement included the end of any political claim or remembrance to the Republic and the 1931 Constitution.

Through these arguments, it is possible to question not only the alleged success of the Spanish transition, but also whether the transition itself has actually ended. Accountability for past abuses, democracy, and the rule of law are interrelated concepts.<sup>66</sup> It is possible that a democratization process only finishes once all the remains of the last regime have been cleared, which includes implementing public policies that recognize the rights of the victims of the former government. If this is the case, and Spanish society must embrace fair reconciliation to complete democratization, then transition remains open in Spain.

## VI. RECOVERING THE HISTORICAL MEMORY

In the 1980s, the Spanish government, under the Socialist Party, approved some basic economic compensation and pensions for people who had been imprisoned for political reasons and thus removed from the army or from their civilian jobs.<sup>67</sup> In addition, the rights of some civil servants were reinstated, though not for former members of the Republican Army. Most

63. *Id.* at 353.

64. *Id.* at 251–80.

65. Escudero, *supra* note 61, at 196–97.

66. See Juan Méndez, *Individual Accountability for Human Rights Violations*, in GLOBAL STANDARDS, LOCAL ACTIONS: 15 YEARS VIENNA WORLD CONFERENCE ON HUMAN RIGHTS (Wolfgang Benedek ed., 2009).

67. AGUILAR, POLÍTICAS DE LA MEMORIA, *supra* note 38, at 417–20.

were compensated via retirement pensions but were never restored in their original positions.<sup>68</sup> These measures were not directed toward reclaiming the memories of victims and the political regime they defended, but rather to compensate them economically and, to a minor extent, to try to correct for some of the discrimination they suffered.<sup>69</sup> When compared with the privileges awarded veterans of the civil war—those who fought in the rebel army, the so-called National Army—and with other acts passed in favor of victims of political repression by the Republic, this was a paltry form of reparation for the victims of the Franco era.<sup>70</sup>

Thus, a political movement arose to address the remaining holes in the governmental response to past crimes. Born at the end of the 1990s, the movement to recover historical memory places the rights of victims in the center of the political debate. This movement consists of NGOs, victim associations, victims' relatives, and citizens who support the cause.<sup>71</sup> It is not a movement created for or guided by a political party; it rises from the generation of grandchildren who, not having matured under the dictatorship, were not afraid to ask about the Francoist victims publicly. However, the movement did not become well known until the first scientific and forensically executed exhumation of the mass graves of the disappeared in October 2000.<sup>72</sup>

Recovering historical memory is a reconstructive process that goes from the present to the past and vice versa. Those who remember and those who suffered during the Francoist dictatorship have transmitted much of it orally. This oral history has become a source of knowledge that contradicts the official history. In this way, recovering the historical memory is to “rub history against the grain,” that is, to give voice to those who never appeared in the books.<sup>73</sup>

This appeal to memory and the oral transmission of facts are necessary in Spain, where these are the only ways to preserve a historical account of

68. *Id.*

69. Paloma Aguilar, *Transitional or Post-Transitional Justice? Recent Developments in the Spanish Case*, 13 SOUTH EUR. SOC'Y & POLITICS 417, 421 (2008).

70. AGUILAR, POLÍTICAS DE LA MEMORIA, *supra* note 38, at 421–22.

71. Sergio Gálvez, *El Proceso de Recuperación de la Memoria Histórica en España: Una Aproximación a los Movimientos Sociales por la Memoria*, 19 INT'L J. IBERIAN STUD. 25, 32–36 (2006).

72. During the late 1970s there were some exhumations carried out by relatives of the victims but without scientific and forensic tools. However, as Omar Encarnación notes, “after the 1981 [failed] military rebellion, the exhumation of Republican graves came to a screeching halt.” See Omar Encarnación, *Reconciliation after Democratization: Coping with the Past in Spain*, 123 POL. SCI. Q. 435, 443 (2008).

73. See this argument in Walter Benjamin, *Theses on the Philosophy of History*, in ILLUMINATIONS: ESSAYS AND REFLECTIONS (Hannah Arendt ed., Harry Zohn trans., Schocken Books 1968) (1940).



the violent past.<sup>74</sup> The oral history undermines an official history that praises the Franco dictatorship, allowing the reconstruction of what really happened under the dictatorship and rescuing victims' experiences from oblivion. This is especially important where the Spanish government has worked hard to erase any other means of accessing the past: almost all physical proof of the repression, including papers, documents, archives, and even the places where the violations of human rights took place, have been destroyed, supposedly to further national reconciliation.

Collective character—the character of a nation, society, or social group—is predicated on historical memory. First, memory is personal and subjective, but it influences and is influenced by the framework in which a person lives and acts.<sup>75</sup> This creates a kind of interdependence between the individual and the collective memory, constructed together into a set of values and concepts that adapt to each other to establish the worldview of a community and provide fuller meaning to individual memory. Second, the collective dimension of memory refers to the elaboration of a common and shared tale with the aim to forge a group identity.

It is easy to conclude that the recovery of historical memory is political: it seeks to retrieve the hidden past with the purpose of achieving a better future—one committed to democratic and human rights values.<sup>76</sup> Such a future includes an awareness of former crimes and atrocities, where society is made aware of its terrible past through the stories of the victims and their suffering. Historical memory also creates a moral duty to think and act in a way that ensures the experience is never repeated.<sup>77</sup> As an ideological reference for the whole society, the recovery of historical memory is only possible through public policies that promote knowledge about the past and the values hidden by the official history.

## VII. A REPLY TO THE CRITICS

Those who reject the use of memory to accurately reconstruct the past criticize the process of recovering historical memory. This critique devalues

74. Julio Aróstegui, *Retos de la Memoria y Trabajos de la Historia*, 3 PASADO Y MEMORIA: REVISTA DE HISTORIA CONTEMPORÁNEA 15, 34–36 (2004).

75. *Cadres sociaux* is the well-known expression of Maurice Halbwachs. See MAURICE HALBWACHS, *LES CADRES SOCIAUX DE LA MÉMOIRE* (1925).

76. Reyes Mate insists that “also the historians must recognize that, after the State-nation consolidation in 19th century, the history becomes a preferential tool for the public authorities to construct collective identities.” See REYES MATE, *TRATADO DE LA INJUSTICIA* 183 (2011).

77. THEODOR ADORNO, *NEGATIVE DIALECTICS* (E.B. Ashton trans., Routledge, 1973) (1966).

the epistemic value of memory.<sup>78</sup> Proponents argue that where memory is a set of fragmentary, selective, and subjective remembrances, historical reconstruction must be based on the investigation of whichever empirical facts have survived and can be studied. For these critics, memories and oral transmissions should not be the source of information for a rigorous historical record.<sup>79</sup>

However, historians have always used the plurality of resources available to them when reconstructing the past. Memory is one of the many resources relied upon. Historians use both oral and written accounts of people's experiences. Thus, it is anomalous to reject a source solely for its oral form. A historian should analyze and evaluate globally all the materials available, including testimonies founded in the memory.

The majority of opposition to the use of oral testimony to recover historical memory has been political rather than scientific. Because almost all records were destroyed during the dictatorship and transition years, oral sources are the only means of reconstructing what happened under Franco. Denying the validity of memory as a source of fact attempts to keep these terrible crimes from public knowledge. It is a strategy of deleting the past to avoid the possibility to judging the crimes and finally revealing the truth.<sup>80</sup>

The recovery of historical memory of the Francoist era is also repressed as part of the narrative of the transition process. Recovering historical memory undermines the common approach of blaming both sides for the atrocities committed in the Spanish Civil War. Supporters of silencing and forgetting the past claim that both the legitimate republican government and those who organized the coup d'état committed violations of human rights because both wanted to gain political power and exterminate their political opponents. Thus, they argue, the best option is to forget the past, ignore partisan arguments, and “cast into oblivion” the bitter memories of each side.<sup>81</sup> Now, more than thirty years later, they say it is not time to start questioning this understanding with demands of historical memory or transitional justice.

This argument distorts the real history of the fall of the Spanish Republic. While there were crimes and abuses committed in the Republican area once the coup occurred, the extent and extremity of the violations is not

78. JULIÁ, *HOY NO ES AYER*, *supra* note 52, at 338–47.

79. Eduardo Manzano Moreno, *La Memoria, el Olvido y la Historia*, in MEMORIA HISTÓRICA 71, 73–75 (Juan Sisinio Pérez Garzón & Eduardo Manzano eds., 2010).

80. The debate about the use of oral resources in historiography has arrived at the Spanish Constitutional Court. Its Decision 43 (BOE n. 99, 23 Apr. 2004) stated the prevalence of the scientific freedom versus the right of honor and self-image (of those identified as participants in political repression) when the investigations are carried out according to methods used by historical science. See FRANCISCO ESPINOSA MAESTRE, *SHOOT THE MESSENGER? SPANISH DEMOCRACY AND THE CRIMES OF FRANCOISM: FROM THE PACT OF SILENCE TO THE TRIAL OF BALTAZAR GARZÓN* (2013).

81. JULIÁ, *HOY NO ES AYER*, *supra* note 52, at 316; LEGUINA, *supra* note 41, at 95–102.

comparable to those committed by the Francoist authorities.<sup>82</sup> Uncontrolled groups in territories loyal to the Republic committed serious crimes. However, those groups did not act under the mandate of the Republic and the legitimate authorities ended these acts as soon as possible. Dissimilarly, leaders of the coup d'état and military acted according to an extermination plot, premeditated and developed as a systemic, condoned, and purposefully harmful system of violence. Thus, the argument that both sides committed atrocities and that both should be forgotten equates planned and systemic violations with acts that were stopped as soon as possible—an unacceptable parallel from a human rights point of view.<sup>83</sup>

Another common argument is that a plurality of memories coexists in every society, so the implementation of public policies that favor one would distort the past.<sup>84</sup> In the Spanish case, this is used to argue against making the memories of defeated supporters of the Republic into accepted history. However, it has been posited that a central purpose of the recovery of historical memory is to recover pieces of history that are not told—pieces buried by the victors of history.<sup>85</sup> Those who argue against highlighting any one set of memories forget that the purpose of recovering the historical memory of the Franco period is to overcome the single official tale consolidated during the transition—an official tale that effectively favors one created set of memories over another. The difference between the narrative of the dictatorship and the silencing of other legitimate narratives has increased the sense of abandonment retained by victims of the dictatorship.

Recovering historical memory is important to support victims and their rights by recognizing their suffering and returning their dignity. It also provides collective social reconciliation and helps to guarantee that the violent past will not be repeated. It is necessary to include a human rights perspective by providing a more democratic, fair, and inclusive political system for victims. Victims and their supporters claim that respecting human rights includes implementing public policies that recover historical memory. In other words, the development of a transitional justice agenda in Spain would bolster the rights to truth, justice, and reparation for past violations of human rights.<sup>86</sup>

82. See generally PAUL PRESTON, *THE SPANISH HOLOCAUST: INQUISITION AND EXTERMINATION IN THE TWENTIETH-CENTURY SPAIN* (2012).

83. The Supreme Court also assumes this thesis when referring to Republicans and rebels as "sides in conflict" and qualifies the Franco government as "the regime that emerged from the civil war," not a dictatorship. S.T.S., Decision 101, *supra* note 5, 4th Legal Ground.

84. See TZVETAN TODOROV, *HOPE AND MEMORY: LESSONS FROM THE TWENTIETH CENTURY* (David Bellos trans., Princeton University Press 2003) (2000).

85. Benjamin, *supra* note 73.

86. Individual and collective dimensions are inseparable in the concept of transitional justice. See Pablo de Greiff, *Repairing the Past: Compensation for Victims of Human Rights Violations*, in *THE HANDBOOK OF REPARATIONS* 6–13 (Pablo de Greiff ed., 2006); Paige Arthur, *How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice*, 31 *HUM. RTS. Q.* 321, 355–57 (2009).

## VIII. HISTORY, MEMORY AND JUSTICE IN THE PARLIAMENT: THE 2007 ACT

During the first decade of the twenty-first century the historical memory movement underwent consolidation in the public arena. Through the action of the movement, the victims of the Francoist regime regained visibility. A new generation of activists and politicians contributed to the public recognition of these memories and worked to end the impunity of silence and forgetting. This movement has also been very successful internationally.<sup>87</sup> NGOs such as Amnesty International and Human Rights Watch have started to support the claims of victims and to lobby for them in the international political scene. At the same time, some international organizations have started to consider and denounce the Spanish policy of silencing and forgetting.<sup>88</sup> In 2002, the UN Working Group on Enforced or Involuntary Disappearances included Spain for the first time in the list of countries that had not resolved or investigated historical disappearances.<sup>89</sup> Spain remains on this list today.<sup>90</sup> Four years later, in 2006, the Parliamentary Assembly of the Council of Europe issued an official and public condemnation of the Franco regime and its crimes.<sup>91</sup> That same year, the European Parliament discussed and condemned the Spanish dictatorship.<sup>92</sup>

Meanwhile, in Spain, there was little progress. In November 2002, the Constitutional Commission of the Spanish Parliament unanimously passed a declaration condemning the use of violence to impose political ideologies against liberty and establish a totalitarian regime.<sup>93</sup> Though symbolically of significance, this was not an explicit condemnation of the Franco regime.<sup>94</sup> Then in 2004, after the victory of the Socialist Party in the general elections,

87. Georgina Blakeley, *Digging Up Spain's Past: Consequences of Truth and Reconciliation*, 12 *DEMOCRATIZATION* 44, 50–54 (2005).

88. Madeleine Davis, *Is Spain Recovering its Memory? Breaking the Pacto del Olvido*, 27 *HUM. RTS. Q.* 858, 872–73 (2005).

89. UNHCR, 59th Sess., Civil and Political Rights, Including the Questions of: Disappearances and Summary Executions, 45 (21 Jan 2003).

90. UNHRC, 22d Sess., Report of the Working Group on Enforced or Involuntary Disappearances, 97 (28 Jan 2013). In September 2013 the Working Group visited Spain to examine the measures adopted to guarantee the rights to truth, justice, and reparation for victims of enforced disappearances. The preliminary observations and recommendations of the Working Group are entitled "Spain: The State Must Assume a Leadership Role and Engage More Actively to Respond to the Demands of the Relatives of the Disappeared," available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13801&LangID=E>.

91. Parliamentary Assembly, Recommendation 1736 (2006), available at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta06/EREC1736.htm>.

92. Europe Parliament (10 Jul. 2006), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+IM-PRESS+20060628BRI09328+FULL-TEXT+DOC+XML+VO//EN>.

93. Spanish Parliament, Declaration 161 (20 Nov. 2002), available at [http://www.congreso.es/public\\_oficiales/L7/CONG/BOCG/D/D\\_448.PDF](http://www.congreso.es/public_oficiales/L7/CONG/BOCG/D/D_448.PDF).

94. *Id.*

the Spanish Parliament agreed to address the issues raised by the historical memory movement.<sup>95</sup> The Socialist Party agreed with some claims of the movement, though it failed to adopt the criticism of the transition so endemic to the movement for the recovery of historical memory.<sup>96</sup> In 2007, after very difficult negotiations among the political parties, the Parliament passed the Recognizing and Enhancing Rights and Establishing Measures for Those who were Prosecuted during the Civil War and Dictatorship Act, commonly known as the Historical Memory Act, with the purpose of guaranteeing victims their rights and closing this "open wound" in Spanish society.<sup>97</sup>

The 2007 Act contains the first explicit legal condemnation of the Francoist regime.<sup>98</sup> The preamble solemnly acknowledges the suffering of those whose rights were violated for political or ideological reasons.<sup>99</sup> It also recognizes the civilians and military personnel who fought in defense of democratic values.<sup>100</sup> The Act orders the development of public policies directed to recover the "democratic memory"—the histories of those who supported or who were prosecuted for supporting the Republic.<sup>101</sup> This included the withdrawal of all symbols commemorating the 1936 coup d'état or the dictatorship that still remained in the streets and public spaces of Spain.<sup>102</sup>

The Act also recognizes a "right to personal memory" as part of the legal status of citizenship.<sup>103</sup> Several affirmative rights derive from this right. First, all persons or family members of persons who were sentenced to death, imprisoned, or punished for political, ideological, or religious reasons can apply for an official and individual statement of reparation from the Spanish government.<sup>104</sup> Second, volunteers for the International Brigade who came to Spain to fight for the Republic and the descendants of those exiled during the Francoist period were granted the right to obtain Spanish nationality without having to rescind their citizenship elsewhere.<sup>105</sup> Third, the scheme

95. See in-depth analysis of the 2007 Act in *Derecho y Memoria Histórica* (Juan Antonio Martín Pallín & Rafael Escudero eds., 2008).

96. See the Socialist Party position about the Spanish Transition in Ignacio Sánchez-Cuenca, *Consenso y Conflicto en la Transición Española a la Democracia*, in *DEMOCRACIA Y SOCIALDEMOCRACIA, HOMENAJE A JOSÉ MARÍA MARAVALL* 153 (A. Przeworski & Ignacio Sánchez-Cuenca eds., 2012).

97. B.O.E. n. 310, 27 Dec. 2007, 53411, available at <http://www.boe.es/boe/dias/2007/12/27/pdfs/A53410-53416.pdf>. If not officially called Historical Memory Act, that is because the intelligentsia of the Socialist Party—the majority in the Parliament at that time—rejected the concept of historical memory as defined in this article.

98. *Id.* Pmbl.

99. *Id.*

100. *Id.*

101. *Id.* art. 1.

102. Historical Memory Act, *supra* note 97, note art. 15.

103. José María Sauca, *El Derecho Ciudadano a la Memoria Histórica*, in *Derecho y Memoria Histórica*, *supra* note 95, at 82.

104. Historical Memory Act, *supra* note 97, arts. 3–4.

105. *Id.* art. 18.

of economic reparation formulated in the 1980s was improved, providing new measures for financial aid to victims.<sup>106</sup>

Nevertheless, the payment scheme does not seem to be sufficient to meet the serious nature of the crimes and the damage caused. For instance, confiscated properties were never returned to their legitimate owners nor were owners compensated for the value of these properties.<sup>107</sup> When compared with the more exhaustive and complex system for protecting and ensuring dignity for the victims of terrorism attacks, the Historical Memory Act is insufficient. The Historical Memory Act creates two classes of victims of human rights violations in Spain: the first-class victims of terrorism and the second-class victims of the Franco regime.<sup>108</sup> This discrimination violates the principle of equality guaranteed by the Spanish Constitution. A more comprehensive reparation scheme is necessary: public memorials, days of remembrance, and official and top-level apologies ought to be included in any future discussion of reparations.<sup>109</sup>

In contrast to what the Historical Memory Act should do, it has instead established programs that provide funding for NGOs to conduct investigations into the past—important, but not official actions.<sup>110</sup> In this way, the right to truth is being privatized: its fulfillment depends on historians and their studies of the dictatorial past. The Historical Memory Act only encourages political authorities to give economic support to groups for the recovery of historical memory. This includes historical, legal, political, or philosophical studies, as well as victim focused associations that exhume and identify the remains of corpses hidden in mass graves.<sup>111</sup> This crucial aspect of the Act states a principle, but not a requirement, of collaboration between public administrations, descendants of victims, and victim-focused associations to assist each other. The Act only states that Spanish political authorities have a "duty to facilitate" exhumations carried out by family members, volunteers, and supporters of the historical memory cause.<sup>112</sup> Public officials are given no duty to initiate the exhumations themselves.

106. *Id.* arts. 5–10.

107. This does not include the properties of Republican political parties and trade unions confiscated once the coup d'état succeeded. They were partially restored thanks to the 1986, 1998, and 2007 Acts.

108. See the differences in Escudero, *supra* note 61, at 202–11.

109. Activists have created local public events and homages to the victims, but not as part of a public policy or a greater commitment to transitional justice programs. In many cases, these events have been without the proper participation of the victims in their design and development. On the participation of the victims when regulating the integral reparation measures as a way to empower them, see Diane Orentlicher, "Settling Accounts" Revisited: Reconciling Global Norms with Local Agency, 1 INT'L J. TRANS'L JUST. 10 (2007).

110. Historical Memory Act, *supra* note 97, Pmbl, art. 1.

111. *Id.* art. 11.

112. Luciano Parejo, *Administración Pública y Memoria Histórica*, in *Derecho y Memoria Histórica*, *supra* note 95, at 147.

The Spanish legislative response has been very disappointing, especially regarding locating, exhuming, and identifying the remains of the victims of enforced disappearances. The Historical Memory Act did not codify a right to exhume victims' bodies—an important task given that only 5,000 have been recovered in the last ten years and that the majority remain hidden in an estimated 2,000 mass graves supposedly spread across Spain.<sup>113</sup> The result is that the recovery and identification of corpses bearing signs of violent death are not undertaken by public officials, but rather are carried out by private citizens and organizations.

The Spanish Supreme Court showed its support for this private approach when it declared in Judge Garzón's case that, because a criminal investigation without the ability to impose criminal responsibility is legally impossible, the right to truth is not a judicial matter.<sup>114</sup> The Court effectively closed the door on victims and exhorted them to look elsewhere—the Parliament or, perhaps, academia—to obtain the right to know what happened to their loved ones.<sup>115</sup>

However, the Historical Memory Act guarantees compatibility with "the exercise of the actions and the access to all ordinary and extraordinary judicial proceedings established in laws or in the international covenant and treaties ratified by Spain."<sup>116</sup> But, the Spanish Supreme Court dismissed the possibility of ensuring that Spain's international obligations would be met by finding that the Amnesty Act created a legal barrier to any investigation related to Francoist regime crimes.<sup>117</sup> In this way, Spain fails to meet its international obligation to reconcile with the victims of human rights violations.<sup>118</sup>

Finally, the response by the Spanish Parliament and the Historical Memory Act to the Francoist regime's military trials and ad hoc courts has been especially disappointing. While the Act declares the judgments and convictions that these courts handed down to be illegitimate and unjust, it does not question the legal validity of the courts' resolutions.<sup>119</sup> The conclusion not to revoke the Franco courts' decisions was motivated by the desire to maintain legal certainty, and—though they are very old decisions whose primary effect has already passed—they remain valid precedent. Ultimately, in the Spanish legal system illegitimacy and unfairness are only moral and

113. See the figures from the web page of the Spanish Department of Justice, available at <http://www.memoriahistorica.gob.es/Mapafosas/index.htm>.

114. S.T.S., Decision 101, *supra* note 5, 1st Legal Ground.

115. *Id.*

116. Historical Memory Act, *supra* note 97, 2nd Additional Provision.

117. Amnistía Internacional, *El Tiempo Pasa, la Impunidad Permanece: La Jurisdicción Universal, una Herramienta Contra la Impunidad Para las Víctimas de la Guerra Civil y el Franquismo en España* 4–5 (June 2013).

118. Carmen Pérez González, *Desapariciones Forzadas*, in *DICCIONARIO DE MEMORIA HISTÓRICA*, *supra* note 42, at 117, 120, 123.

119. Historical Memory Act, *supra* note 97, arts. 2–3.

political reproaches without legal consequences. If the Spanish Parliament truly wanted to distance itself from the past, end the false equation of the former legitimate government with the Franco regime, and provide reparations to the victims of arbitrary courts, it should have reviewed and revoked the judicial standing of the Francoist military tribunal and ad hoc courts.<sup>120</sup>

In general terms, the Act did not satisfy victims and victims associations. Even though the Act was created to end the political and social debate about the best way to make reparations to victims and overcome the traumatic past, the Historical Memory Act is far from achieving these objectives from an individual or a collective perspective. The provisions fail to give integral reparation to the victims of human rights violations and other atrocities committed by the former regime. The failure to institute reform to correct the problems built into the system at transition maintained a flawed form of Spanish democracy. Thus, the goal of recovering historical memory remains unfinished.

But there are critics from the other side of the political spectrum. In particular, the Spanish Popular Party argues that the Historical Memory Act is a political attempt to undermine the transition and reopen old wounds.<sup>121</sup> The Popular Party is a conservative group consisting of many members of the Franco regime that never rejected its ties to a dark past.<sup>122</sup> This party currently governs Spain and has a qualified majority in the Parliament that ideologically rejects not only the public policy of recovering historical memory, but also the Act itself. Under these circumstances, the Historical Memory Act is often seen as a missed opportunity.<sup>123</sup>

120. Rafael Escudero, *Nulidad/Ilegitimidad de las Sentencias Franquistas*, in *DICCIONARIO DE MEMORIA HISTÓRICA*, *supra* note 42, at 84, 86; INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, JORGE ERRANDONEA, ESTUDIO COMPARADO DE LA ANULACIÓN DE SENTENCIAS INJUSTAS EN ESPAÑA 11–14 (2008), available at [http://ictj.org/sites/default/files/ICTJ-Spain-Amnesty-Justice-2008-Spanish\\_0.pdf](http://ictj.org/sites/default/files/ICTJ-Spain-Amnesty-Justice-2008-Spanish_0.pdf).

121. In 2012 the Spanish Government under the Popular Party removed the programs (referred to in Article 11 of 2007 Act) that provided fundings for NGOs to locate, exhume, and identify the remains of the victims of enforced disappearances. See Rafael Escudero, *Los Desaparecidos en España: Víctimas de la Represión Franquista, Símbolo de la Transición y Síntoma de una Democracia Incompleta*, in *DESAPARICIONES FORZADAS, REPRESIÓN POLÍTICA Y CRIMENES DEL FRANQUISMO* 156–57 (Rafael Escudero & Carmen Pérez González eds., 2013).

122. *Id.* at 151.

123. In this complicated situation, the only cause for hope is the judicial process opened in 2010 in Argentina (No. 1 Buenos Aires Criminal and Correctional National Court), after a criminal complaint presented by human rights associations and Argentinean family members of victims for crimes against humanity under the Francoist dictatorship. The documents, orders, and decisions related to this judicial process can be followed in the web page of the Chilean newspaper Clarín, available at [http://elclarin.cl/index.php?option=com\\_content&task=view&id=14023&Itemid=73](http://elclarin.cl/index.php?option=com_content&task=view&id=14023&Itemid=73). See also Ana Messuti, *La Querella Argentina: La Aplicación del Principio de Justicia Universal al Caso de las Desapariciones Forzadas*, in *DESAPARICIONES FORZADAS*, *supra* note 121.

## IX. CONCLUSION

The process of Spanish democratization is an example of a transition without transitional justice. None of the aspects related to transitional justice were implemented in the process of establishing a constitutional regime.<sup>124</sup> Further, the Historical Memory Act did not remedy this lack of commitment to transitional justice values. The Act fails to satisfy the rights of victims and their relatives to the truth about what happened to their loved ones. The solemn provisions contained in the preamble about the duty "to promote the knowledge and the deliberation about our past" are not accompanied by public policies that ensure effective implementation.<sup>125</sup> Further, the Act did not create a truth commission to issue a report on the crimes committed under the dictatorship. Such a report would have been extremely useful, not only to satisfy rights of victims to truth, but also to reject those crimes and show commitment to democracy and human rights in an official capacity. The Spanish Parliament has not established a transitional justice agenda to end the impunity of the Francoist era. To date there is "neither truth nor justice, and only partial reparation to the victims."<sup>126</sup>

These are tough times for the recovery of historical memory. Not only did the 2012 Spanish Supreme Court decision severely limit the options for the future, but also the current political climate and political party in power are unfriendly to the implementation of public policies that would develop the Act. Regardless, complaints to the judiciary should go on. If Spanish courts played an active role in the recovery of historical memory—for example, ordering exhumations—this could foster civic trust in the judicial system. Given that there were no lustration policies and many structures and operating modes were inherited from the Franco regime, the judiciary could take advantage of the potential of transitional justice mechanisms to improve its public image.

Finally, the movement must intensify the social pressure and reinforce its lobbying of political parties. The economic crisis has hit a huge percentage of the Spanish population, and people in the streets are finally demanding not only economic reform, but also democratic improvements at a political and institutional level. Embracing a transitional justice agenda should be part of this and would help to end the legacies of the dictatorship—basically, a low-level democracy—that survive to this day.

124. According to Jon Elster, the Spanish case is the only example in the transitions to democracy of "a deliberate and consensual decision to abstain from any form of transitional justice." See JON ELSTER, *CLOSING THE BOOKS: TRANSITIONAL JUSTICE IN HISTORICAL PERSPECTIVE* 61 (2004).

125. Historical Memory Act, *supra* note 97, Pmlb.

126. Margalida Capellà, *Represión Política y Derecho Internacional: Una Perspectiva Comparada*, in *REPRESIÓN POLÍTICA, JUSTICIA Y REPARACIÓN. LA MEMORIA HISTÓRICA EN PERSPECTIVA JURÍDICA* 234 (David Ginard & Margalida Capellà eds., 2008). See also Alicia Gil, *Spain as an Example of Total Oblivion with Partial Rehabilitation*, in *THE ROLE OF COURTS IN TRANSITIONAL JUSTICE*, *supra* note 33, at 103.