

LAW, MEMORY AND AMNESTY IN SPAIN

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There are now memory laws in many European states against the denial of the Holocaust and the Armenian genocide as well as laws to regulate history curricula about slavery and colonialism. Laws explicitly addressing the memory of victims have also become a major focus of transitional justice mechanisms to manage political transition by recognising victims of human rights abuse in order to promote accountability and reconciliation. This article explores the role of law in regulating Civil War memory in Spain by looking at three laws — the Amnesty Law 1939, the Amnesty Law 1977 and the Law of Historical Memory 2007. It argues that these laws reconstituted the political community based on an official collective memory, the selective recognition of victims and a political consensus. It argues that, while the Law of Historical Memory 2007 may have created new rights for families of the disappeared through global claim making, these rights have not been easy to realise. The surviving political influence of Francoists and public avoidance of Civil War memory as politically divisive, a legacy of the forgetting instituted by the Amnesty Law 1977, has continued to present significant obstacles to the realisation of rights created by the Law of Historical Memory 2007.

I INTRODUCTION

This article is about law, the regulation of memory and justice. Its focus is the role of law in shaping collective memory of past violence. Political conflict over memory highlights the fact that (living) memory remains under the surface of law and sometimes becomes the object of laws.¹ In Europe, the legislation of *memory laws* has recently been growing to defend the memory of historical victims of violence. There are now memory laws in many European states against the denial of the Holocaust and the Armenian genocide as well as laws to regulate history curricula about slavery and colonialism.² Laws explicitly addressing the memory of victims have also become a major focus of transitional justice mechanisms to manage political transition by recognising victims of human rights abuse in order to promote accountability and reconciliation. This article examines law and the regulation of Civil War memory in Spain and the political

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¹ Vivian Grosswald Curran, 'History, Memory and Law' (2011) 16 *Roger Williams University Law Review* 100.

² *Ibid* 100–2.

controversy around the passing and implementation of the Law of Historical Memory 2007.³ It argues that the Law of Historical Memory 2007 is in dialogue with two earlier laws regulating Civil War memory — the Amnesty Law 1939⁴ and the Amnesty Law 1977⁵ — which had selectively recognised victims to define citizenship rights and reconstitute the political community at the time of political transition. It argues that the legislating of historical memory may create new rights based on global human rights standards but the political consensus underlying the underpinning of memory laws — here amnesty laws — needs to be undone to make those rights realisable.

This article explores the role of law in regulating Civil War memory in Spain by looking at three laws — Amnesty Law 1939, the Amnesty Law 1977 and the Law of Historical Memory 2007. The first Law marks the end of the Spanish Civil War (1936–39) and the creation of a new regime under General Franco, the second emerges after Franco’s death in 1975 and the establishment of democratic Spain and the third introduces global human rights to democratise Civil War memory and challenge the Amnesty Law 1977. By framing these laws as *memory laws* this article seeks to reveal the historical dialogue about Civil War memory they contain and how law has been used to re-code collective memory at these transitions. The amnesty laws not only selectively quarantine past memory, but they also embody the tensions of the state-making project, the normalisation of violence, the marginalisation of social categories and the degree of attachment of citizens to the state. They conceal not only crimes but also the undeclared design of the state-building project and the relationship between elites, classes and minorities in shaping the nation. The emergence of the global transitional justice discourse helped create new collective identities and memory through claim making to democratise Civil War memory in Spain. Global human rights transforms injury and suffering of historically marginalised victims from a political identity/side into a subject status as victim, no longer adjudicated by political judgment about ‘deserving victims’⁶ but as victims of human rights abuse.

Civil War memory in Spain refers to the impact and legacies of the war launched by General Franco’s Nationalist forces when he staged a coup against the elected Republican government in 1936, what Franco called the National Uprising of 18 July 1936. The war was particularly fiercely fought on both the Republican and Nationalist sides. Each accused the other of war crimes/human rights violations often arising from an underlying logic of territorial cleansing of the enemy, especially on the Nationalist side.⁷ The overall war casualties are estimated at around 500 000 to 600 000. Around 50 000 were victims of Francoist repression after the end of the Civil War in February 1939 and a further 190 000 prisoners were executed or died in prison.⁸ Victory in the war became the founding act on which Franco based the political legitimacy of his

³ *Ley de Memoria Histórica* [Law of Historical Memory] (Spain) 26 December 2007, Law 52/2007, *Boletín Oficial del Estado* [Official State Bulletin] (‘BOE’) No 310, 27 December 2007 <<http://leymemoria.mjusticia.gob.es/cs/Satellite/LeyMemoria/en/memoria-historica-522007>>.

⁴ *Ley de 23 septiembre 1939* [Decree-Law 23 September 1939] (Spain) 23 September 1939, BOE No 278, 5 October 1939.

⁵ *Ley 46/1977, de 15 de octubre, de Amnistía* [Law 46/1977, of 15 October, Amnesty] (Spain) 15 October 1977, BOE No 248, 17 October 1977.

⁶ Michael Humphrey, ‘The Politics of Trauma’ (2010) 32 *Arts The Journal of the Sydney University Arts Association* 37, 40. For example, the *deserving victim* is often the one seen as the morally innocent victim.

⁷ Antony Beevor, *The Battle for Spain: The Spanish Civil War 1936-1939* (Phoenix, new ed, 2007).

⁸ Josep M Tamarit Sumalla, *Historical Memory and Criminal Justice in Spain: A Case of Late Transitional Justice* (Intersentia, 2013) 6–7.

authoritarian regime between 1939 and 1975. While Franco recognised, compensated and celebrated his supporters under his new regime, he persecuted, marginalised and silenced the defeated Republican side. The defeated experienced two phases of repression: first during the war (1936–39) and second during the consolidation of the Franco regime (1939–75). In the first phase the Nationalist forces carried out summary executions and disappearances. The second phase at the end of the war saw the defeated criminalised by a range of laws punishing support for the Republican government. More than a million men were imprisoned and thousands were executed under this law.⁹ For the surviving victims and families of the victims, trauma and grievance centred on the experience of disappearance and the injustice and illegality of Franco's Councils of War and military tribunals.

Through the process of repression and censorship, the Franco regime created *two Spains*, the world of the victors and that of the defeated, each with very different memories of the Civil War. For the victors, the war was to be memorialised and commemorated as a necessary Nationalist war to save Christian Spain. For the defeated, the war continued, experienced as their ongoing repression as the *enemy* as well as a silenced personal traumatic memory. The impact of Franco's 36 year long rule was to so demonise his enemies and the horrors of the Civil War that at his death most people wanted to avoid the past as a source of dangerous division threatening the return of vengeful violence. Still today the polarised character of Civil War memory is evident in commemorations. For example, on 14 October 2013 the Vatican announced the beatification of 522 martyrs of the faith, largely priests and nuns, who were killed during the Spanish Civil War (1936–39). It represents the latest of a total of 1500 people beatified as 'martyrs'¹⁰ because they refused to renounce their faith during the Civil War.

II MEMORY LAWS

In political transition after conflict, the memory regulated is the memory of violence, loss and suffering. In addressing questions of justice and harm, memory laws define who is to blame for the violence and who is a deserving victim. The laws regulating memory have three elements: firstly, a statement of official collective memory; secondly, the criteria for inclusion and exclusion in the new social and political order; and thirdly, a political consensus which underpins law's legitimacy and endurance.

Firstly, the official collective memory produced by the state is based upon judgments about why war happened and who is to blame. The private memory of victims is selectively included in an official collective memory in order to constitute a collective identity and membership based on ideas about cause, blame and the deserving victim. The collective memory included in the laws is reinforced by a public culture of memorialisation and commemoration of anniversaries in rituals and cultural productions in the form of books, film, photography and music.

⁹ Angela M Guarino, 'Chasing Ghosts: Pursuing Retroactive Justice for Franco-Era Crimes against Humanity' (2010) 33 *Boston College International and Comparative Law Review* 61.

¹⁰ Paul Hamilos, 'Vatican Beatifies over 500 "Martyrs of the Faith" Killed During the Spanish Civil War', *The Guardian* (online), 14 October 2013 <<http://www.theguardian.com/world/2013/oct/13/vatican-beatifies-martyrs-killed-spanish-civil-war-pope>>.

Secondly, inclusion in the new order is determined by the parameters of entitlement based on a moral lens which identifies the deserving victim — whose suffering should be acknowledged. The creation of *two Spains* based on victory and defeat clearly demarcated who were to be the beneficiaries of the new Spain. Impunity, lustration and compensation were implemented according to who was seen as the *moral victim*.

Thirdly, amnesty laws are juridical expressions of the political consensus and asymmetrical power underlying them. The consensus is elaborated through related laws marginalising opponents and rewarding supporters. Moreover, the memory laws create their own inertia because of the political risk in trying to challenge the underlying political consensus which brought them into existence. These laws regulating memory give juridical form, and thereby legitimacy, to that political consensus.

This article argues that the construction of the victim is central to the way these laws have sought to regulate Civil War memory. The Amnesty Law 1939 constructs the politicised victim of war in which only those on the victor's side are seen as deserving victims and beneficiaries of justice and recognition. The Amnesty Law 1977 constructs the universal victim based on corporeal suffering and the Law of Historical Memory 2007 constructs the universal victim of human rights abuse. How the victim is constructed shapes the way justice, moral community and state legitimacy are configured and Civil War memory is re-coded. Victims construct their claims and constitute their collective identities with reference to specific publics. Each memory law addresses a specific public.

The Law of Historical Memory 2007 is a juridical response to the emergence of global human rights as an international public sphere, constituted through a set of global standards and mechanisms for victims to make rights claims. Law shapes subjectivity by establishing the parameters in which individuals construct themselves as subjects of injustice. International law and lawyers have created ideas, rights and instruments to provide victims with a new basis for constructing collective memory and identity with respect to a globally abstract and unknown public. Consequently, global human rights has emerged as an instrument for global governance in which transnational organisations support victims in making rights claims to abstract publics. Transitional justice refers to an international legal field that has functioned to expand the reach and intervention of human rights through developing exportable practices of legal and moral intervention. The legitimacy of global human rights follows from the importance of public appeal as a mechanism of rights compliance in a globalising world.

A *Amnesty Law 1939*

The Amnesty Law 1939 was a declaration of victory by the Nationalists in their war or 'Crusade to save Christian Spain'.¹¹ The Law was declared under martial law introduced after the military coup d'état in 1936 and lasted until 1948. The law followed an earlier amnesty declared on 13 September 1936 which pardoned everyone who had committed 'crimes against the Constitution, against public order, breached laws regarding possession of arms and explosives, homicides,

¹¹ Carmen Lamarca Perez, *Tratamiento Juridico Del Terrorismo* [Judicial Treatment of Terrorism] (Centro de Publicaciones del Ministerio de Justicia [Centre of Publications of the Ministry of Justice], 1985) 128.

injuries¹² as long as they agreed ideologically with the Franco regime. The Amnesty Law 1939 functioned as a ‘reverse amnesty’¹³ law because it set out to prosecute for rebellion those who had defended Republican legality. The only concession was a partial amnesty given in January 1940 to some political prisoners serving sentences of 12 years or less — the vast majority of prisoners accused of ‘military rebellion’¹⁴ were sentenced to long sentences, with many awaiting the death penalty. This was followed by a series of further partial pardons between 1945 and 1969 at anniversaries and commemorations of Franco’s rule.¹⁵ The collective memory of the war celebrated the cause of the National Movement and sought to blame the Republicans for the situation that caused the war and to expunge their project from historical record. Victory signified the defeat and elimination of the project of the enemy. Moreover, the official collective memory of victory became the source of legitimacy of Franco’s National Movement through which he justified ongoing repression to punish those responsible for the Civil War. The *origin-based* legitimacy of victory, the founding narrative of the National Movement, continued as the basis for governance through fear and sustained marginalisation of anyone identified with the Republican side.

The Amnesty Law 1939 rewarded Franco’s supporters and punished his Republican enemies. The law had the wider effect of abolishing the legality of the Second Republic. The *two Spains* refers to the division of the society produced by victory into the included and excluded. Repression was seen as a process of purification targeting the main enemies of the regime, ‘the liberals, reds and separatists’.¹⁶ The National Movement pursued repression through legal and political means to extract revenge and to remove Republicans from any positions of influence. The benefit of amnesty granted to the Nationalists under the Amnesty Law 1939 was amplified by the extensive legal repression of Republicans. The state of affairs created by these penal laws came to be known as *justicia al revés*, ‘upside down justice’.¹⁷ The General Prosecutor of the Supreme Court instructed the *causa general* [general legal investigation] under the Decree 26 April 26 1940, which sought to *do justice* against those who committed crimes during the period of *red domination*. The General Prosecutor collected information about crimes committed against people and property in the Republican zone but also by ‘the authorities, armed and security forces and supporters of left-wing Republican governments since the establishment of the Second Republic in 1931’.¹⁸ The *causa general* persisted until the 1960s as an ongoing legal accounting of the crimes of the Republican side. A wide range of laws and special tribunals targeting specific groups and their activities facilitated the judicial repression of political opponents. These included the Law of Political Responsibilities 1939;¹⁹ the Law of the

¹² Paloma Aguilar Fernández, *Memory and Amnesia: The Role of the Spanish Civil War in the Transition to Democracy* (Mark Oakley trans, Berghahn Books, 2002) 76 [trans of: *Memoria y olvido de la guerra civil española* (first published 1996)].

¹³ Perez, above n 11, 128.

¹⁴ Michael Richards, *After the Civil War: Memory Making and Re-Making Spain since 1936* (Cambridge University Press 2013) 72.

¹⁵ Aguilar Fernández, *Memory and Amnesia*, above n 12, 97.

¹⁶ Josep M Tamarit Sumalla, *Historical Memory and Criminal Justice in Spain: A Case of Late Transitional Justice* (Intersentia, 2013) 8.

¹⁷ Ibid 59.

¹⁸ Ibid 69.

¹⁹ Law of Political Responsibilities 1939 (Spain) 9 February 1939, BOE No 81, 22 March 1939.

Repression of the Masons and Communists 1940,²⁰ the Law of State Security 1941,²¹ the Basic Law 1944;²² military justice 1945; the legal decree defining and repressing the crimes of banditry and terrorism 1947; and the Law of Public Order 1959.²³

The Law of Political Responsibilities (*'Ley de Responsabilidades Políticas'*) legislated on 9 February 1939 is an example of the social penetration of legal investigation of the past directed at punishing those the regime blamed for the war. It made political parties, trade unions and other organisations illegal and imposed economic penalties on business people that had supported the Republic. The process of investigation itself opened up the opportunity for abuse and coercion because judges were required 'to obtain a report about the conduct of the accused from the local council, another from the Guardia Civil, another from the Falange and a fourth from the local priest'.²⁴ It meant law was abused as an arbitrary means of repression through detentions without charge, torture, imprisonment, executions, exiles, fines and professional disqualifications.

Repression deeply penetrated personal lives. Political revenge saw widespread physical elimination of opponents and their flight into exile. Laws designed to dismantle Republican state institutions such as the Law of the Depuration of the Publicly Employed (*'Ley de Depuración de Empleados Públicos'*) deprived Republican supporters of jobs and careers through lustration of public employees, which included judges, university professors and teachers.²⁵ Under Law 25 August 1939, 80 per cent of jobs in all public institutions were assigned to veterans on the Nationalist side.²⁶ Moreover, repression implicated ordinary people through a process of collaboration and reporting that impacted community and family life. In certain cases an emission of guarantees of good conduct allowed detainees to be excused if they could get respectable members of society to guarantee their good conduct, a practice which undermined them through humiliation and indebtedness.

The unequal treatment of the dead and missing of the Civil War also underwrote division between the victors and the defeated. Under Decree 16 May 1939 the fees associated with burial, exhumation and reburial of remains of victims of *red barbarism* killed in the war were waived or reduced. Moreover, the heroes and martyrs of the Nationalists were buried in a huge mausoleum, *El Valle de Caídos* [The Valley of the Fallen], in Cuelgamuros as a monument to victory. Franco also encouraged commemoration of victory by the Nationalist associations of ex-captives, ex-combatants and the families of 'martyrs'²⁷ through the remembering of their victimhood and collective trauma. By contrast, the families of the dead and missing on the Republican side were neither unable to find out what had happened to their relatives nor exhume them, even in cases

²⁰ Law of the Repression of Freemasonry and Communism 1940 (Spain) 1 March 1940, BOE No 62, 2 March 1940.

²¹ Law of State Security 1941 (Spain) 4 January 1941, BOE No 101, 11 April 1941.

²² Law of the New Revised Edition of the Penal Code 1944 (Spain) 19 July 1944, BOE No 204, 22 July 1944.

²³ Law of Public Order 45/30 July 1959 (Spain) BOE No 182, 31 July 1959.

²⁴ Sumalla, above n 16, 48.

²⁵ Alicia Gil Gil, 'Spain as an Example of Total Oblivion with Partial Rehabilitation', in Jessica Almqvist and Carlos Esposito (eds), *The Role of Courts in Transitional Justice: Voices from Latin America and Spain* (Routledge, 2013) 103, 105.

²⁶ Sumalla, above n 16, 58.

²⁷ Richards, above n 14, 69.

where they knew approximately where they had been buried.²⁸ This private trauma of the marginalised eventually became the focus of a social movement for exhumations which began in the late 1970s and became systematically organised in 2000.²⁹

The Amnesty Law 1939 came at the end of the Civil War and was the foundation of victor's justice. It was based on the imposed consensus of the victorious. There was no peace negotiation or movement towards national reconciliation. The political significance of war, Elaine Scarry argues, is that it can produce effects which outlast its termination. 'A military contest differs from any other contest in that its outcome carries the power of its own enforcement'.³⁰ War has the ability to produce outcomes which appear incontestable even if defeat is not absolute. Victory gives 'rise to the fiction that its outcome cannot be (or should not be, or must not be) contested?'³¹ The Amnesty Law 1939 was a juridical expression of Franco's military victory which resulted in the total defeat of the Republicans and their large scale elimination, imprisonment and exile. For the Republicans, defeat only opened a new phase of repression in which they became the object of persecution through criminalisation and marginalisation.

The logic of war allowed Franco to erase the Republican project from public memory. However, victory was not by itself enough to secure his dictatorship. He built his legitimacy on 'a policy of marginalising the losing side, a justification of war and the exhibition of victory'.³² The only political organisations legally allowed to exist — National Movement, Falange Party, National Syndicalists — were those supporting him. The victor/vanquished war narrative blocked any possible initiatives for reconciliation and further entrenched the *two Spains*. Franco's political authority as *Caudillo*,³³ was sanctified in the bodies of the Nationalist martyrs and monuments — for example, the Valley of the Fallen — and the faithful to establish modern Spain.

Franco's celebration of *Veinticinco Años de Paz* [25 years of Peace] revealed how the discourse on the past was changing from 'origin-based' legitimacy to a 'performance-based legitimacy'.³⁴ It shifted the narrative of state legitimacy to the achievement of peace which became the basis of the social consensus that underpinned the transition to democracy in 1977. Repression achieved a widespread depoliticised subjectivity oriented towards preserving the peace and belief in the need for peace. The campaign celebrated the achievement of peace and poured political opprobrium on the idea of disturbing what had been achieved with such sacrifice. In practice, repression had succeeded in keeping the lid on any opposition through subjectivities produced through the isolation imposed by the banning of political and worker organisations and the individual traumatic memories reinforced by the ongoing fear of arrest, torture and imprisonment.

²⁸ Layla Renshaw, *Exhuming Loss: Memory, Materiality and Mass Graves of the Spanish Civil War* (Left Coast Press, 2011).

²⁹ Francisco Ferrándiz, 'Cries and Whispers: Exhuming and Narrating Defeat in Spain Today' (2008) 9 *Journal of Spanish Cultural Studies* 177.

³⁰ Elaine Scarry, *The Body in Pain: The Making and Unmaking of the World* (Oxford University Press, 1985) 96.

³¹ *Ibid* 108.

³² Aguilar Fernández, *Memory and Amnesia*, above n 12, 33.

³³ *Caudillo* refers to a military-political leader. During Franco's dictatorship in Spain state and official documents refer to him as *Caudillo de España* [the Leader of Spain].

³⁴ Aguilar Fernández, *Memory and Amnesia*, above n 12, 5.

B *Amnesty Law 1977*

The transition to democracy after Franco's death in 1975 was punctuated by the Amnesty Law 1977 which re-coded Civil War memory by creating symmetry between the victors and vanquished as victims. Both sides were now blamed for causing the fratricidal civil war and both had suffered. Official memory was created by the state through the Amnesty Law 1977, the juridical narrative of forgetting, and the 'good memory' (*la buena memoria*), the discourse of forgetting, silence and equivalence of victims, to realise modern democratic Spain.³⁵ Ricard Vinyes describes the *good memory* as the 'pacification of memories'.³⁶ The juridical narrative in the Amnesty Law 1977 constructs the new subject of the victim as universal based on their bodily suffering, not their political or moral attributes.³⁷ The victim of *human rights abuse* emerges only later with the Law of Historical Memory 2007.

The *good memory* constructs Spain as a model of transition to democracy, realised as a political product rather than one with a historical cause.³⁸ Ruti Teitel coins the term 'transitional amnesty' with reference to the Spanish case. Amnesty is adopted as a 'forward-looking measure to excuse all crimes, to repudiate the past regime and at the same time reinforce liberalizing political change'.³⁹ The *good memory* avoided the past and civil war memory because it had come to be seen as divisive and a risk to the *peace* achieved under the dictatorship. Franco had so manipulated and demonised the past that all parties approached transition by renouncing revenge. In fact, public knowledge about the Civil War era was so limited that most people were unaware that the Republican government had been democratically elected.⁴⁰ As Aguilar observes, 'only a nation so traumatised by war could be so devoted to peace, and not only during the postwar period, but throughout the Franco era and beyond'.⁴¹ One consequence of this aversion towards the past, and manufactured ignorance of it, was the complicity of civil society in making no demands for debate about past injustice or compensation for victims.⁴²

The political consensus underlying the Amnesty Law 1977 was the political *pacto del olvido* (or 'pact of forgetting') brokered by the political elites and subsequently agreed to by the majority of Spaniards. It was approved by 93.3 per cent of parliamentarians in October 1977.⁴³ I will return to the political consequences of this pact below. The exercise of transition to create post-Franco democratic Spain was important because it engaged people in a process of 'negotiation, pact-

³⁵ Ricard Vinyes, 'La Memoria Del Estado' [The Memory of the State] in Ricard Vinyes (ed), *El Estado y la Memoria: Gobiernos y Ciudadanos Frente a los Traumas de la Historia* [The State and Memory: Governments and Citizens Facing the Traumas of History] (RBA Libros, 2009) 23, 35.

³⁶ Ibid 40.

³⁷ Ibid 42.

³⁸ Ibid 35.

³⁹ Ruti G Teitel, *Transitional Justice* (Oxford University Press, 2000) 52.

⁴⁰ Paul Preston, *The Politics of Revenge: Fascism and the Military in Twentieth-Century Spain* (Routledge, 1990).

⁴¹ Aguilar Fernández, *Memory and Amnesia*, above n 12, 135.

⁴² Sergio Gálvez Biesca, 'El Proceso de la Recuperación de la "Memoria Histórica" en España: Una Aproximación a los Movimientos Sociales por la Memoria' [The Process of the Recovery of "Historical Memory" in Spain: An Account of Social Movements for Memory] (2006) 19 *International Journal of Iberian Studies* 25.

⁴³ Gil Gil, above n 25, 108.

making, giving ground, and tolerance'.⁴⁴ This was important not only because of the substance but because 'it left behind a long tradition of intolerance, imposition, subjection of the opponent and *tragalás* or imposed constitutions'.⁴⁵ Reconciliation and rehabilitation were based on making victor and vanquished equivalent and turning them into victims of the Civil War, both entitled to compensation and impunity. The defeated were selectively included through a bureaucratic-legal process focused on reparations in the form of pensions and compensation payments for injury. However these reparations measures have been criticised as selective, piecemeal and often inadequate.⁴⁶ The Royal Decree-Law on 5 March 1976⁴⁷ recognised their entitlement to compensation for their injuries and granted them pensions, but widows were excluded. A Royal Decree-Law on March 1978⁴⁸ granted pensions to relatives of persons killed as result of the Civil War with special recognition of the destruction of *Guernica*.⁴⁹ It was not until 1984 that the law formally recognised rights of the Republican veterans and their families from the Civil War.⁵⁰ The function of commemorative national days was also changed. The Victory Parade held on 1 April 1939 became Armed Forces Day.⁵¹ In order to more closely link the monarchy with reconciliation, the 10th anniversary of the King's coronation on 22 November 1985 was used to inaugurate a monument to 'all the Spanish fallen'.⁵² The political and legal neglect of issues such as long-term discrimination and the disappeared left the victims of repression marginalised during the Civil War and after it. The political and social consensus around peace through forgetting excluded these marginalised victims who lacked any alternate collective memory to make their demands.

The forward-looking project upon which the Amnesty Law 1977 was premised is captured in the statement 'Spain is the problem, Europe is the solution'.⁵³ As Blakeley points out, the forward-looking orientation of the Law did not mean Civil War memory was forgotten. It was present as a warning about returning to the past.⁵⁴ The political elite, with the acceptance of the majority, produced a consensus around avoidance of the threat of disorder embodied in Civil War memory and the transformation and modernisation of Spain through incorporation into Europe. The widespread pro-amnesty demonstrations across the political spectrum — including the left and separatist movements — aimed at the release of political prisoners and highlighted the asymmetry between the victors and vanquished. Similar support by leftist groups for amnesty to secure the release of political prisoners occurred during transition to democracy in Uruguay, in

⁴⁴ Aguilar Fernández, *Memory and Amnesia*, above n 12, 151.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.* 198.

⁴⁷ Royal-Decree Law 5 March 1976 (Spain) BOE No 84, 7 April 1976.

⁴⁸ Royal-Decree Law 21 December 1978 (Spain) BOE No 305, 22 December 1978.

⁴⁹ Aguilar Fernández, *Memory and Amnesia*, above n 12, 199. Guernica is a Basque Country town in northern Spain that was bombed by the Italian and German air forces on 26 April 1937. The aerial bombing provoked international outrage at the time and Picasso's famous painting entitled 'Guernica' commemorates the human and material destruction wrought.

⁵⁰ Madeleine Davis, 'Is Spain Recovering its Memory? Breaking the *Pacto del Olvido*' [the Pact of Forgetting] (2005) 27 *Human Rights Quarterly* 858, 863.

⁵¹ Aguilar Fernández, *Memory and Amnesia*, above n 12, 204.

⁵² *Ibid.* 208.

⁵³ Jose Ortega y Gasset, *Man and People* (WW Norton, 1963) quoted in Victor Perez-Diaz, *The Return of Civil Society: The Emergence of Democratic Spain* (Harvard University Press, 1993) 1.

⁵⁴ Georgina Blakeley, 'Politics as Usual? The Trials and Tribulations of the Law of Historical Memory in Spain' (2008) 7 *Entelequia Revista Interdisciplinar* 315, 316.

which the groups negotiated with the military in the *Pacto del Club Naval* ('Naval Club Agreement') in 1984. The Amnesty Law 1977 in Spain and the Amnesty Law 1986 in Uruguay highlight the asymmetry in these top-down transitions in which the weaker party is forced to compromise by trading impunity for the powerful to achieve basic rights for the weak.⁵⁵

The political consensus brokered by the elite was underwritten by a constitutional referendum in 1978, democratically affirming the agreements of the transition. However, the narrative of peaceful transition as a bureaucratic achievement neglected the role of popular movements in resisting the dictatorship and shaping the political environment of transition.⁵⁶ Gradually it became apparent that the political consensus of the *pacto del olvido* was too narrow, as those excluded from the agreement began to demand rights and seek legal remedies. The defeated victims recognised under consensus were in practice limited to those in the service of the Republican state and army — soldiers and civil servants. Two other categories of victims emerged as sources of opposition — the families of the disappeared and those condemned under the Councils of War and the military tribunals.⁵⁷ The issue of the disappeared in particular led to the emergence of a bottom-up victims' rights movement, initiated by an exhumation movement and a new legal activism in the context of the emerging transitional justice movement against impunity. The meaning of impunity in Spain however was different to the Southern Cone — Argentina, Chile, Uruguay — where it referred to amnesty laws imposed by militaries to prevent accountability for crimes against humanity. In Spain, impunity did not refer to blocked accountability because those responsible were already dead. Instead, Vinyes argues, impunity referred to the democratic state's unwillingness to 'destroy politically and juridically the legal validity of the Councils of War and the sentences issued by the special tribunals of the dictatorship against resistance, opposition and its social setting'.⁵⁸ These had produced mass imprisonment as well as executions under Franco's rule.

The globalisation of justice through the emergence of a 'transitional justice culture'⁵⁹ contributed to the erosion of the 'sacralised culture of *consenso*'⁶⁰ underpinning the Amnesty Law 1977. Transitional justice culture is based on 'a set of beliefs and practices grounded in rejection of impunity, confrontation of the past, prioritising state accountability and aiming towards a broader societal inclusion of past regime victims'.⁶¹ In Spain, the development of transitional justice culture was boosted by two high profile legal cases: firstly, Judge Baltazar Garzón's attempt to extradite Pinochet; and secondly, the terrorist bombings of commuter trains in Madrid.⁶² The Pinochet case introduced the principle of universal jurisdiction into the Spanish courts, opening up the analogous Spanish experience of amnesty and impunity with transition to democracy. The terrorist train bombings produced a crisis of confidence in the Popular Party ('PP') government,

⁵⁵ Louise Mallinder, 'Uruguay's Evolving Experience of Amnesty and Civil Society's Response' (Working Paper No 4, Institute of Criminology and Criminal Justice, Queen's University Belfast, 16 March 2009) 18–20.

⁵⁶ Josep Maria Colomer, *La Transición a La Democracia: El Modelo Español* [Transition and Democracy: the Spanish Model] (Anagrama, 1998).

⁵⁷ Stephanie R Golob, 'Volver: The Return of/to Transitional Justice Politics in Spain' (2008) 9(2) *Journal of Spanish Cultural Studies* 127.

⁵⁸ Vinyes, above n 35, 37.

⁵⁹ Golob, above n 57, 128.

⁶⁰ *Ibid* 127.

⁶¹ *Ibid*.

⁶² *Ibid* 132.

and the unexpected election of the Socialist Party *Partido Socialista Obrero Español* ('PSOE') under Zapatero (2004–8) with the promise to *tell the truth*. The electoral victory allowed Zapatero to embark on policies to enhance Spanish citizenship, which included support for associations searching for truth about the past and democratising Civil War memory.⁶³

C *Law of Historical Memory 2007*

The Law of Historical Memory 2007, legislated by the Socialist government under Prime Minister Zapatero, aimed at democratising Civil War memory. The Law created the new 'individual right to personal and family memory'⁶⁴ and also sought to extend the recognition already given to victims of the Civil War. In the Aims and Purposes of the Law, it states it seeks to enhance the 'knowledge of our history and the promotion of democratic memory'.⁶⁵ At the heart of the Law of Historical Memory 2007 was the new victim, not the defeated, suffering Republican victim, but the *victim of human rights abuse* informed by a transitional justice culture. This human rights framing reconstituted the dyadic relationship underlying Civil War memory; however, this time not defined as a relationship between victor and defeated but between perpetrator and victim. It re-coded the Civil War memory by revealing the number of unrecognised victims and the institutional responsibilities for human rights violations. However the Law recognised victims' rights more than it created victims' rights. It broke the silence on the scale of past repression and allowed the private memory of the traumatised victims of the Civil War and dictatorship to contest the *consenso* underpinning the Amnesty Law 1977 by pluralising memory. The Law did not, however, challenge impunity. It only declared illegitimate the decisions of the military tribunals and councils of war. It did not provide for the annulment of their judgments.⁶⁶

In fact, the Law was the culmination of growing concerns about moral reparations and the passing of a series of laws that reinstated rights of victims identified with the Republican side. The conservative government (under the *Partido Popular*) of José María Aznar in 2002 passed the Law of Recovery of Nationality,⁶⁷ which was directed at exiles from the Spanish Civil War and approved a decision of the Constitutional Commission of the Congress of Deputies for moral recognition of all victims of the Spanish Civil War and of those who suffered.⁶⁸ The Zapatero

⁶³ Ibid 133. See also Paloma Aguilar Fernández, 'Transitional or Post-Transitional Justice? Recent Developments in the Spanish Case' (2008) 13 *South European Society and Politics* 417.

⁶⁴ José María Sauca Cano, 'El derecho ciudadano a la memoria histórica: concepto y contenido' [The Right of the Citizen to Historical Memory: Concept and Content] in José Martín Pallín y Rafael Escudero Alday [Law and Historical Memory] (eds), *Derecho y memoria histórica* (Editorial Trotta, 2008) 73, 77–8.

⁶⁵ The 'Law of Historical Memory' quoted in José Luis De La Cuesta Arzamendi, 'Spanish Legislation on Historical Memory' in M Cherif Bassiouni (ed), *The Pursuit of International Criminal Justice: A World Study on Conflict, Victimization, and Post-Conflict Justice* (Intersentia, 2010) vol 2, 983, 992. See also *Ley de Memoria Histórica* [Law of Historical Memory] (Spain) 26 December 2007, Law 52/2007, *Boletín Oficial del Estado* [Official State Bulletin] No 310, 27 December 2007 <<http://leymemoria.mjusticia.gob.es/cs/Satellite/LeyMemoria/en/memoria-historica-522007>>.

⁶⁶ Aguilar Fernández, 'Transitional or Post-Transitional Justice? Recent Developments in the Spanish Case', above n 63.

⁶⁷ Civil Code Law of Recovery of Nationality 2002 (Spain) 8 October 2002, BOE No 242, 9 October 2002.

⁶⁸ Aguilar Fernández, 'Transitional or Post-Transitional Justice? Recent Developments in the Spanish Case', above n 63, 422.

Socialist government set out to provide material reparations through a wide variety of laws to address grievances over war pensions and the confiscated assets of unions and political parties. It also supported commemoration and other symbolic non-legislative actions to promote recognition of victims, acknowledge the impact of exile and recognise the suffering of political prisoners.⁶⁹ The Royal Decree 10 September (1891/2004)⁷⁰ established an inter-ministerial commission to study the situation of the victims of the Civil War and Francoism whose aim became to promote equal recognition and reparations for victims of civil war including support for associations searching for truth and recovery of historical memory and those who support victims.⁷¹

The Law's construction of the victim as the *victim of human rights abuse* emerged from the claim-making of the relatives of the disappeared and the legal activism of prominent judiciary such as Baltazar Garzón around the Pinochet extradition. The analogous case of disappearance and impunity in Latin America, especially Chile, saw the local exhumation movement in Spain become the focus for creating new rights of victims most marginalised by the Amnesty Law 1977. The strategy of Chilean human rights groups filing cases in Chilean courts, going global by promoting universal jurisdiction in Spanish courts and, 'in an effort to bring the values of transitional justice culture back home',⁷² provided a model for the Spanish exhumation movement. Garzón's role in the Pinochet extradition proceedings gave impetus to Spanish groups internationalising their rights claims to seek the truth and exhume the remains of their missing family members. The Association for Historical Memory,⁷³ founded in 2000, was one of the most active in seeking to challenge the Amnesty Law 1977. In 2002, the United Nations ('UN') Working Group on Enforced or Involuntary Disappearances included Spain in a list of countries failing in their human rights responsibilities to investigate disappearances. After representations by the Association for the Recovery of Historical Memory ('ARMH')⁷⁴ to the UN Working Group, it recommended that the Spanish government support investigations into the victims of repression.⁷⁵ Even though most cases occurred before 1945, beyond the scope of the Committee's brief, the effect of the listing was to raise the public profile of the issue in Spain.⁷⁶

The Law of Historical Memory 2007 promoted reconciliation through a 'non-adversarial, "victim-as-citizen" — centred and inclusion-oriented means of using the law, and state power, to advance some values of transitional justice culture'.⁷⁷ It represents the victim-centred choice of transitional justice by examining past violence through the experience of victims rather than through the crimes of perpetrators. The Law itself represents a clear break with the *pact of*

⁶⁹ Ibid 422–4. See Table 1 Principal Material Reparation Measures of the PP's Last Term (2000–04) and the PSOE's First Term in Office (2004–08).

⁷⁰ Royal Decree 1891/2004 of 10 September (Spain) BOE No 227, 20 September 2004.

⁷¹ De La Cuesta Arzamendi, above n 65, 990.

⁷² Golob, above n 57, 132.

⁷³ Ferrándiz, above n 29, 178.

⁷⁴ The Association for the Recovery of Historical Memory (ARMH) is the most prominent of the national victims' organisations which emerged from the local movement for the exhumation of mass graves of Civil War victims in Spain. See Ferrándiz, above n 29.

⁷⁵ Davis, above n 50, 859.

⁷⁶ Aguilar Fernández, 'Transitional or Post-Transitional Justice? Recent Developments in the Spanish Case', above n 63, 429.

⁷⁷ Golob, above n 57, 137.

forgetting by greatly enhancing the rights of victims and opening up discussion of Civil War memory.

A central aim of transitional justice culture is to re-educate citizens about past violence through victim testimony to national publics and thereby bring about national reconciliation. The human rights construction of the victim in the Law of Historical Memory 2007 arises out of the local exhumation movement going global to appeal to an ‘international abstract public’⁷⁸ to leverage the Spanish state to comply with its human rights obligations. The Law authorised the collective identity and rights claims that victims had made to international human rights agencies and an international abstract public, thereby relocating the rights claims to a *domestic public*.

The passing of the Law of Historical Memory 2007 signalled a break with the *pact of forgetting* on which political consensus underlying the Amnesty Law 1977 had been based. However, despite political convergence about the need for moral reparations for Republican victims, this did not go as far as a consensus for the Law of Historical Memory 2007. The Socialist Party PSOE had only begun to make demands for greater recognition of Republican victims in opposition, without ever having proposed it during their first period of government between 1982 and 1986. It had not even been part of their political agenda during the 2004 election campaign.⁷⁹ From the perspective of many Francoists, the Law of Historical Memory 2007 was not just about reburying the Republican dead but a project of vengeance with the aim of criminalising the Franco regime. For them, the Law’s prohibition of political rallies at Franco’s Valley of the Fallen monument confirms it.⁸⁰

Political opposition to the Law of Historical Memory 2007, and its aim of breaking the *pact of silence* of 1977, surfaced in the Supreme Court over the case of Judge Baltazar Garzón in 2010. Three private parties representing right-wing organisations⁸¹ accused Garzón of exceeding his judicial authority by opening investigations into 22 alleged cases of illegal detention and forced disappearance that involved more than 100 000 victims. Internationally, the idea that Spanish courts should prosecute a judge for investigating crimes against humanity was strongly condemned. Human rights organisations such as Human Rights Watch responded arguing that the Spanish government should abide by the UN Human Rights Committee’s 2009 call to end the Amnesty Law 1977.⁸²

The impact of these accusations of criminal behaviour against Garzón saw him stood down from his role as investigating magistrate by the Supreme Court in 2010. Although the Supreme Court subsequently (in January 2012) acquitted Garzón of the charge of malfeasance for *knowingly exceeding his powers* — ie violating the Amnesty Law 1977 — he was convicted for the use of illegal wiretaps in another case on public corruption (‘Gürtel’). The effect of these Supreme

⁷⁸ Ronald Niezen, *Public Justice and the Anthropology of Law* (Cambridge University Press, 2010) 223.

⁷⁹ Aguilar Fernández, ‘Transitional or Post-Transitional Justice? Recent Developments in the Spanish Case’, above n 63, 427.

⁸⁰ James J Friedberg, ‘Wane in Spain (of Universal Jurisdiction): Spain’s Forgetful Democratic Transition and the Prosecution of Tyrants’ (2012) 114 *The West Virginia Law Review* 825, 895.

⁸¹ *Manos Limpias* [Clean Hands], *Libertad e Identidad* [Liberty and Identity], *Falange Española* [Spanish Falange].

⁸² Human Rights Watch, *Spain: End Amnesty for Franco Era Atrocities* (19 March 2010) <<http://www.hrw.org/news/2010/03/19/spain-end-amnesty-franco-era-atrocities>>.

Court decisions was firstly to close off legal remedy for the victims of the crimes of Franco's dictatorship in Spanish courts, and secondly, to remove Garzón from the judiciary for 11 years.⁸³ The overall impact of these decisions was to sideline Garzón as a judicial activist and leader on the issue of victims' rights in relation to crimes against humanity in Spain. On the whole, public opinion polls showed support for Garzón — a *Metroscopia* opinion poll showed that 61 per cent of respondents believed that Garzón was a victim of persecution because the Supreme Court removed him from office for 11 years.⁸⁴

Not only has the impetus for exhumations and identification of remains been slowed by the removal of Garzón as a judicial activist but also by the loss of government political and economic support with the arrival of the Conservative PP government of Prime Minister Mariano Rajoy in November 2011. In the context of the severe economic crisis in Spain and the implementation of austerity measures, cutbacks have been seen in social spending at home and abroad including for the organisations funded to exhume and identify victims of Franco's repression such as ARMH. The PP government's opposition to the use of universal jurisdiction in Spanish courts in cases of genocide, crimes against humanity and war crimes has seen them introduce a Bill to limit the use of universal jurisdiction to cases where the suspect is a Spanish national or a foreigner resident in Spain.⁸⁵ The strategy of using universal jurisdiction in Spanish courts to *go global* with the aim of bringing attention to domestic human rights abuses has greatly increased since the Chilean human rights organisations' initiative to extradite Pinochet. The term *lawfare*, turning the political into the legal as a means of coercion, has come to be used to describe this strategy.⁸⁶ Recent arrest warrants issued by Spanish courts against former Chinese officials over crimes against humanity in Tibet has been a catalyst for the Bill limiting universal jurisdiction. Garzón has criticised the Bill arguing that the government was putting diplomatic and trade issues ahead of questions of international law and justice.⁸⁷

Even though Garzón has been removed as judicial activist around Civil War memory and universal jurisdiction is being severely limited in Spanish courts, this has not prevented others launching investigations in other countries. Argentine lawyers previously involved in the universal jurisdiction case held in Spain against the ex-marine officer Scilingo from the Naval Mechanics School ('ESMA'), a notorious secret detention centre in Buenos Aires, have opened a case investigating the crimes against humanity committed by the Franco regime.⁸⁸

⁸³ Interights, *Baltasar Garzón v Spain* <<http://www.interights.org/garzon/index.html>>.

⁸⁴ 'El 61% afirma que Garzón es víctima de una persecución' [61% Say that Garzon is the Victim of Persecution] *El País* (online), 2 February 2012 <http://politica.elpais.com/politica/2012/02/09/actualidad/1328820937_252009.html>.

⁸⁵ International Federation for Human Rights, *Spain: The Bill on Universal Jurisdiction Must Be Rejected* (10 February 2014) <<http://www.fidh.org/en/europe/spain/14632-spain-the-bill-on-universal-jurisdiction-must-be-rejected>>.

⁸⁶ Jean Comaroff and John L Comaroff, *Law and Disorder in the Postcolony* (University of Chicago, 2006).

⁸⁷ Sonya Dowsett and Inmaculada Sanz, 'Spain Sets Economy Above Human Rights Says Pioneering Judge', *The Star* (online), 20 February 2014 <<http://www.thestar.com.my/News/World/2014/02/20/Spain-sets-economy-above-human-rights-says-pioneering-judge/>>.

⁸⁸ Paul Hamilos, 'Argentina Calls for Extradition of Francoists over Human Rights Abuses', *The Guardian* (online), 20 September 2013 <<http://www.theguardian.com/world/2013/sep/19/argentina-spain-franco-extraditions>>.

III CONCLUSION

Law is used during periods of political transition to regulate historical memory. The Law of Historical Memory 2007 in its name is explicit about that purpose. However, in addressing historical memory it reveals an important dialogue about Civil War memory with earlier memory laws — the Amnesty Law 1939 and the Amnesty Law 1977. Each of these laws was constituted by a narrative of violence, a statement of wrongs about who are the deserving victims, and an underpinning political consensus. Central in these violence narratives is the construction of the victim — the one who deserves recognition and reparations for injury or loss. These violence narratives are politically foundational and in moments of transition define legitimacy, membership and entitlement. Civil War memory has been so controversial and bitter precisely because Franco's victory meant the total defeat and elimination of the Republican project under Franco's National Movement. Socially and politically this amounted to the elimination, expulsion or exclusion of Republicans from Franco's New Spain in 1939. Moreover, because defeat is never really complete, despite the enthusiasm of power associated with victory, repression continued under the dictatorship as a mechanism to ensure victory was permanent. Those excluded were repressed and marginalised for most of the dictatorship.

Each of these memory laws sets out the official memory, criteria for inclusion and the political consensus. The construction of the victim changes according to the violence narrative. In the Amnesty Law 1939 the victory narrative constructs a political victim — those on the winning side who deserve recognition, reward, reparations and those on the losing side who are criminalised and socially and economically dispossessed. In the Amnesty Law 1977 the narrative of forgetting constructs a universal apolitical suffering victim as the basis for a broader reconciliation. In the Law of Historical Memory 2007 the narrative of remembering and reconciliation constructs a universal human rights victim. Each law seeks to regulate memory as the basis for political participation in the new political order. But the regulation of official memory is also part of the constitution of it through control over the production of knowledge. Control over public debate about the past and over the content of school curricula quarantine the past from those who have no direct memory of the Civil War and isolate those who do share familial knowledge about victimisation during the Civil War and dictatorship and who are silenced by marginalisation, trauma and insecurity. The Amnesty Law 1977, based on the pact of forgetting, is informed by a depoliticised subjectivity about the threat of disorder and a return to violence which produced public avoidance of Civil War memory. The Law of Historical Memory 2007 insists on an inclusive remembering as the basis for national reconciliation. These memory laws have constituted new Civil War memories. The Amnesty Law 1977 constructed Civil War memory as the opposite of the peace achieved under Franco's dictatorship.⁸⁹ The Law of Historical Memory 2007 legitimated a transitional justice culture in which the families of the disappeared forged a new collective identity and memory coalescing around legal claims about their right to know the fate of their family members. The Law of Historical Memory 2007 is a product of human rights learning from analogous situations in Chile and Argentina and the role of Spanish courts in conducting prosecutions for crimes against humanity under universal jurisdiction.

⁸⁹ See the fictitious conversation between two lawyers, the rightist Manuel Fraga Iribarnel and leftist Baltazar Garzón, on the benefits of peaceful transition and forgetting. Friedberg, above n 80, 829–40.

But the Amnesty Law 1939 and the Amnesty Law 1977 that have regulated Civil War memory have proved historically very resilient and difficult to overthrow. The political consensus underlying these Laws concealed an asymmetrical power clearly apparent in the benefit of impunity. What was revealed by Garzón's removal as investigating judge into crimes against humanity committed during the Franco regime was the lack of political consensus that still exists to challenge the Amnesty Law 1977. The Law of Historical Memory 2007, and the new rights of victims of the disappeared it creates, was not enough to nullify the Amnesty Law 1977. These legislated rights for families of the disappeared to exhume mostly unmarked gravesites in fact turned out to be difficult to realise in practice. The task of identifying gravesites and getting permission to excavate was often prevented, or greatly delayed, by bureaucratic processes and veto at the local community level.⁹⁰

Memory laws are the product of the emergence of a transitional justice culture based on the creation of *global abstract publics* and the ability to leverage global human rights to create new national rights for victims. However, what the struggle over Civil War memory reveals is that memory is socially and politically embedded. Contests over collective memory are constrained by official memory and the political consensus underpinning it. Amnesty laws as memory laws have proven remarkably resilient, precisely because they rest on political subjectivities produced by repression and violence and because to challenge them remains a political risk. We will have to wait to see whether the latest strategy of *going global* to realise human rights domestically by Argentine courts under universal jurisdiction investigating crimes against humanity during Franco's dictatorship will consolidate the new rights created in the Law of Historical Memory 2007.

⁹⁰ Natalie Maystorovich, *The Judicialisation of Social Movements for the Exhumation of Mass Graves in Spain: A Perspective on the Instrumentality of Law in Advancing the Interests of Social Exhumation* (Honours Thesis, University of Sydney, 2012).