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## TRANSITIONAL JUSTICE AND THE EFFECTS OF LIMITED TRANSITIONS: THE SPANISH AND CATALAN CASE\*\*

### Abstract

*In this paper I want to analyze the process of transition to democracy, particularly in relation to two points: the lack of solution to the problem of autonomous government and the lack of lustration in the judicial system, leaving extremely conservative judges who are now at the top of the Spanish judiciary and who seem to be pushing for a hard response to any attack against the unity of Spain, using an old category of criminal offence, that seemed to have been left out from European criminal justice systems: that of political crimes.*

### Keywords

*Secession – political crimes – right to self-determination – transition to democracy – criminal justice*

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## INTRODUCTION

The events of 1 October 2017 in Catalunya showed a level of state violence that had not been seen since the times of the dictatorship<sup>1</sup>. The movement for the independence of Catalunya was met with police violence and with the use of the criminal justice system as a mechanism to solve what can be considered a political problem. On 2 October 2018, the Spanish prosecutor presented its accusation and defined the actions of Catalan politicians as a crime of rebellion. The prosecution decided to use this category at time that the current socialist government refused to recognize the political character of their actions. Other categories, such as terrorism, were used in the public debate, but were off the legal table.

The government of the Popular Party (21 December 2011–2 June 2018) decided to deal with a political situation as if it was merely a criminal one. This choice has left little room for manoeuvre for the Socialist government, because it cannot be perceived as giving in to the claims of the independentist block. On the 31 October 2018, in the Parliament Control debate, one of the MPs, Albert Rivera of the right-wing political party *Ciudadanos*, asked Prime Minister Pedro Sánchez if he was willing to commit publicly to not granting any pardon to the imprisoned leaders of the Movement (hereinafter *El Proceso*). The question was, of course, not answered, but it shows the intentions of the rightwing parties to keep using Catalunya as an instrument of propaganda for the next elections. The question is asked in almost every Parliament Control debate, and it is met with the same response: silence.

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<sup>1</sup> On October 1st 2017 the Catalan people went out to decide in a referendum whether they wanted to be independent from Spain. Many irregularities in the process toward the referendum made it illegal. The Spanish government knew this and in its official rhetoric discarded the referendum as an invalid way to decide the political fate of this region. However, the day people went out to vote a referendum that could not be binding, Mariano Rajoy's government sent the police to prevent people from going to the polls. They wanted to close the electoral colleges, and, in that process, they used unnecessary and disproportionate violence, which amounted to police abuse, as human rights organizations have recognized. Despite this violence, many people voted, and the day ended with the images of the police preventing the exercise of democracy in Catalunya.

According to Javier Perez Royo, the Spanish Constitution has gone through two crises that have created the conditions for a radical reform: the economic crisis of 2008 and the decision of the Constitutional Court with regards to the Catalan Statute. These two events have shown the weakness of the current political system and its inability to deal with these radical challenges<sup>2</sup>.

The Spanish government could not have responded worse to these two crises. The economic crisis has been faced with a neoliberal reform that little by little has been dismantling the Spanish welfare state. And the crisis of the model of the *autonomías* have been responded to with a hard fist aimed to crush the model, elevate the tension, and destroy any possibility of dialogue. Pedro Sanchez' government has been working with Quim Torra's Catalan government to reduce the tension, but within a context of increasing criticism from the right wing which, in order to appeal to its constituency, has moved closer to extreme and exclusionary ideas. Within this context, Rajoy's administration decided to use the criminal justice system to scare activists, and to do so it has used the accusation of terrorism, but originally appealed to an accusation of rebellion, even against the literal definition of the crime<sup>3</sup>.

*El proces* (the process for the independence of Catalunya) has showed the limits of the Spanish transition to democracy, one that was characterized by many Spanish politicians as a model. In this paper I want to analyze the process of transition to democracy, particularly in relation to two points: the lack of solution to the problem of autonomous government and the lack of lustration in the judicial system, leaving extremely conservative judges who are now at the top of the Spanish judiciary and who seem to be pushing for a hard response to any attack against the unity of Spain, using an old category, that seemed to have been left out from European criminal justice systems: that of political crimes.

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<sup>2</sup> J. Pérez Royo, A. Losada, *Constitución: la reforma inevitable: Monarquía, plurinacionalidad y otros escollos*, Madrid: Roca, 2018.

<sup>3</sup> Rebellion is a crime that requires the use of armed violence against the state. It was understood in that way, in the trial of the only person convicted of the crime. The Guardia Civil colonel, Antonio Tejero, who attempted to overthrow the government in 1981.

## I. TRANSITIONS TO DEMOCRACY AND TRANSITIONAL JUSTICE

Transitional justice is a new field of international law and international relations that can be dated back to the 1990s, when the first books were published. Originally it was a series of mechanisms to guarantee a just transition from an authoritarian regime to democracy<sup>4</sup>. In this section I want to focus on the policies of transition to see how they are connected to transitional justice.

### 1. THE POLICIES OF TRANSITION

Transition policies are characterized by developing a series of mechanisms that allow the stability of the emerging democracy or peace, even in the absence of justice. There is a fundamental difference between transition policies and transitional justice: the concern for stability in the first case and for justice in the second.

The world has witnessed various waves of democratization. The first is the one that occurred in the first half of the nineteenth century, when several states gained their independence and liberal constitutions were passed. The second wave, after World War II, when several countries in Europe undertook a democratic path and when many of their former colonies, particularly in Africa and Asia, became independent. But it is the third wave of democratization that gives rise to the study on how transitions occurred, which agents made it possible, and what are the obstacles to a successful transition. From this field it is recognized that the modes of the transition are important to determine the success or failure of democracy and the rule of law<sup>5</sup>.

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<sup>4</sup> N. Kritz (ed.), *Transitional Justice. How emerging democracies reckon with former regimes*, Washington: United States Institute for Peace, 1995; R. Teitel, *Transitional Justice*, Oxford: Oxford University Press, 2000.

<sup>5</sup> R. Teitel, *Transitional Justice Genealogy*, "Harvard Human Rights Journal", Vol. 16, 2003, pp. 69-94. See also Kritz, *supra* note 4; Teitel, *supra* note 4.

One of the questions in the field is about the conditions that make the transition to democracy possible. That is, why do those who hold power decide to leave it and call elections? These conditions depend on the design of the new democracy and, above all, its ability to differentiate itself from the old regime. However, the conditions that have made democracy possible are not necessarily the same conditions that have made it stable.

The transition modes can be divided as follows: transitions from above or from below, depending on the actors that have played a more important role in the promotion of democracy; transitions from within and from outside, depending on the role played by the international community in the pressure for a country to democratize<sup>6</sup>.

The different modes of transition are determining factors in establishing the quality of democracy. Thus, for example, the political transitions of Venezuela and Colombia at the end of the fifties of the last century established limited democracies with little access to democratic participation that gave rise to the emergence of guerrilla groups in the 1960s and 1970s. This is a typical top-down transition model in which the elites who leave power agree with the incoming elites not only the content and limitations of the new democracy, but they also pass amnesties and self-amnesties for crimes committed in the past<sup>7</sup>.

Next to the cases of Colombia and Venezuela we find the cases of Spain, Brazil, and Poland, where the elites agreed to the pardon of all their crimes and even, as in the Spanish case, a “Pacto del Olvido” that made it impossible to publicly discuss these crimes and their culprits, leaving to other areas, such as film and literature, the discussion about truth and memory. In these types of transitions, the discussion of justice and the rights of the victims is almost non-existent, since the elites do not care that their crimes are exposed or that their role within the deposed

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<sup>6</sup> B. Ackerman, *The Future of Liberal Revolution*, New Haven: Yale University Press, 1994; C. Bell, *Transitional Justice, Interdisciplinarity and the State of the ‘Field’ or ‘Non-field’*, “International Journal of Transitional Justice”, Vol. 3, 2009, pp. 5–27; F.S. Benavides Vanegas, *Justicia en Épocas de Transición: Conceptos, modelos, debates*, Barcelona: ICIP, 2011.

<sup>7</sup> F.S. Benavides-Vanegas, *¿Tiene futuro la justicia transicional?* “Revista Derecho Penal”, No 58, 2017, pp. 5–44; R. Karl, *Forgotten Peace. Reform, Violence, and the Making of Contemporary Colombia*, Oakland: University of California Press, 2017.

regime is questioned, a regime which is often called ancient or old regime but is not labelled a dictatorship<sup>8</sup>.

But transitions to democracy can also be the result of the struggles of social movements, which organize to press for democratic change. The cases of Argentina and the former Czechoslovak Republic (now the Czech Republic and the Slovak Republic) are good examples of these two forms of transition. In Argentina, the transition was the result of internal forces and external factors such as the defeat in the conflict against the United Kingdom in the Malvinas / Falkland War.

Given the defeat of the Armed Forces and their loss of prestige, and given the overwhelming triumph of Raúl Alfonsín, it seemed possible that those responsible for human rights violations would be tried. However, the economic crisis that Alfonsín was already facing, the division of society, and the relative strength of the Armed Forces, led to the impossibility of bringing the perpetrators to justice immediately. The laws of due obedience and full stop prevented the Argentine judicial system from bringing to justice those responsible for serious crimes.

In Czechoslovakia the so-called Velvet Revolution occurred, so described because it was a peaceful revolution, very similar to the Prague Spring in 1968, which resulted from the government's repression of the demonstrations in November 1989. The daily demonstrations and the general strikes were the forces that led to the government leaving power and being forced to call for democratic elections. Although the elites negotiated the new political pact, it was the social movements that drove the change with their demonstrations for democracy. In this case, the non-intervention of the Soviet Union was very important, since in this transition it was feared that the USSR would send in the tanks, as it did in Hungary in 1956 and in Czechoslovakia itself in 1968.

The nature and extent of repression determine the type of transition that is possible. If the actors that leave power have been responsible for serious violations of human rights, it is very likely that amnesty arrangements or mechanisms that prevent the investigation and prosecution of those responsible will be developed. The Spanish case is illustrative of this type of transition. During the civil war the nationalists

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<sup>8</sup> J. Tamarit, *Historical Memory and Criminal Justice in Spain. A case of Late Transitional Justice*, Cowley Road: Intersentia, 2013.

committed serious crimes against the populations loyal to the Republic. Once the republicans were defeated, the Franco government initiated an unprecedented repression against them and began a dictatorial regime that lasted almost 37 years. At the time of transition, opponents and supporters of the regime agreed on a pact of oblivion that prevented them from digging up the past and judging those responsible for the crimes<sup>9</sup>. In this case, a policy of clemency and forgiveness and forgetfulness seemed necessary, since members of the old regime kept power and there was still fear of a new civil war and the horrors that the last had brought. The question then is whether it is possible to ignore the past, either because it is very distant, or because the crimes are so serious as not to allow their oblivion<sup>10</sup>.

It is convenient to ask then about the necessity of justice (criminal, civil, constitutional) to account for the past and to establish the new democratic regime. Are wasted energies those that are used to deal with the crimes of the past? Should we rather focus on the design of the new state and try not to awaken sleeping demons? What is the quality of a democracy that is built on oblivion and impunity? The future of the transition depends on the ability and courage of military and civilian leaders to devise agreements on rules and mutual guarantees that go beyond the extremes of impunity or legal revenge. Transitional justice is supposed to deal precisely with the design of the best and most appropriate scenarios to face those challenges imposed by political transitions.

## 2. WHAT IS TRANSITIONAL JUSTICE?

The political transitions that occurred during the third wave of democratization left many questions about what to do with the crimes of the past. The questions were aimed at establishing responsibility for the crimes, on what basis, and the moral authority to do so. In the

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<sup>9</sup> J. Guillaumet (ed.), *Las Sombras de la Transición. El relato crítico de los corresponsales extranjeros (1975–1978)*, Valencia: Universidad de Valencia, 2016.

<sup>10</sup> S. Julia, *Transición. Historia de una política española (1937–2017)*, Barcelona: Galaxia Gutenberg, 2017.

discussion of these problems, moral imperatives, such as justice, and issues of political prudence, related to the protection of democracy from attacks by the rulers of the outgoing regime, were discussed.

Transitional justice is an academic and public policy field that is constantly expanding. It has been applied in various regions of the world and in countries with different ideologies in order to face a past of authoritarian governments and serious violations of human rights and international humanitarian law<sup>11</sup>. However, it is a concept that is loaded with ambiguity, since it applies equally to situations of transition from authoritarian governments, forming part of the studies of transition to democracy; as well as situations of passage from a situation of armed conflict, international and non-international, to a situation of peace, thus forming part of peace studies.

The term transitional justice began to be used in the mid-1990s and as an academic field it only came to be consolidated as of the year 2000. It emerged for the first time with reference to the processes of transition to democracy in South America and Central America that took place between the late 1980s and the first part of the 1990s<sup>12</sup>. The debates regarding the punishment of those responsible for serious crimes in Central America and in the Southern Cone – especially the Pinochet case in Chile – fed the discussions of the field and the need to account for the past through criminal justice in times of transition.

The debate about the nature of transitional justice must be placed in the contexts in which it occurs. The current framework of international criminal law prevents the development of policies of forgiveness and forgetting, because there is a series of international instruments that make it mandatory for States to find out the truth and punish those responsible for serious violations of human rights and international humanitarian law. This means that when we talk about justice for times of political transition, we do not refer exclusively to the policies of forgiveness and forgetfulness, or to truth commissions, or criminal justice, since all of them are mechanisms with which States face a past of abuses and violations and therefore all fall within the field called “transitional justice”.

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<sup>11</sup> Bell, *supra* note 6.

<sup>12</sup> Kritz, *supra* note 4.



Transitional justice is then considered a field of practices and studies to account for the past and to prevent the repetition of a past of human rights or international humanitarian law violations. As such, it looks at the past, to have a better future. The main goal of TJ measures is to guarantee the non-recurrence of violations. That is, to not let the past pass.

The toolkit of TJ has focused on measures such as criminal or restorative justice; truth commission; some sort of institutional reform; reparations to victims; and recently a focus on the memory of the past. These TJ mechanisms are supposed to help in the process of building a democratic society, or to be an important part of peacebuilding strategies.

There have been crises and criticism in TJ<sup>13</sup>. Some criticize its liberal matrix and the fact that it does not deal with distributive justice or the root causes of conflict. It is also criticized for its dependency on the liberal transitional paradigm. The idea of models of TJ also leads to the idea of a normative fallacy, that is, from empirical facts they deduce normative consequences.

Alexander Hinton writes about the imaginary of transitional justice, to show an orientalist and developmentalist view of societies. The imaginary presents a world in chaos or distress that is put right after TJ interventions, being the goal of a liberal society. Time and Space are important in these measures: they usually focus on the acts of violence, but causes are left outside<sup>14</sup>. Laplante analyzes this with regard to Truth Commissions, but other mechanisms such as criminal justice are more limited<sup>15</sup>. But these critiques have ended up in broadening the field and including those missing elements that the critics pointed out<sup>16</sup>.

The official narrative of transitional justice focuses on what it considers its positive effects, such as the alleviation of the pain that results from participation in its mechanisms, such as the Truth and Reconciliation

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<sup>13</sup> E. Posner, A. Vermeule, *Transitional Justice as Ordinary Justice*, "Chicago Unbound", 2003, pp. 762–825.

<sup>14</sup> A. L. Hinton, *The Justice Facade. Trials of Transition in Cambodia*, Oxford: Oxford University Press, 2018.

<sup>15</sup> L. Laplante, *Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence through a Human Rights Framework*, "The International Journal of Transitional Justice", Vol. 2, 2008, pp. 331–355.

<sup>16</sup> Bell, *supra* note 6.

Commission. Negative feelings are also part of the transition process and the normative claim of transitional justice which is achieved is the imposition of the ideal victim, the one who forgives and who submits to the dictates of the State. The victim who does not forgive, the one who refuses to accept official policies is subjected to ostracism and is isolated from public discussion<sup>17</sup>. Hinton calls attention to the creation of a neoliberal subject: and bearer of rights who heals through TJ interventions<sup>18</sup>.

The official story is characterized by four distinctive notes: tragedy has a resolution; pain and suffering have a social value, that is, victims have not suffered in vain; the confrontation with the past is inescapable, it cannot be simply forgotten; knowledge is equated with transformation<sup>19</sup>. By standardizing the descriptive accounts, the model of transitional justice produces an exclusion of many subjects and creates what is called an epistemic violence in the field, this is the presentation of what is merely local – western conceptions of justice- as if it were universal.

## II. THE SPANISH TRANSITION: A MODEL OF TRANSITIONS?

In November 1975, Francisco Franco died. This was the end of his 36 years of dictatorship, but it did not mean the beginning of democracy in Spain. As Pere Ysás has shown it, the Spanish transition was possible for the activism of social movements and for the crisis in the dictatorship, that had started with the death of Admiral Carrero Blanco, who was assassinated in 1973 by a command of ETA, leaving Franco and his followers without a fit successor who came from those who participated in the civil war<sup>20</sup>. To Ysás, the factors that made possible the transition are to be found in the 1960s: the social and economic transformations and the opening of

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<sup>17</sup> S.I. Dube, *Transitional justice beyond the normative: towards a literary theory of political transitions*, "International Journal of Transitional Justice", Vol. 5, 2011, p. 186.

<sup>18</sup> Hinton, *supra* note 14.

<sup>19</sup> Dube, *supra* note 17 at p. 185.

<sup>20</sup> P. Ysás, *La crisis de la dictadura franquista*, [in:] Carme Molinero (ed.), *La Transición, treinta años después. De la dictadura a la instauración y consolidación de la democracia*, Barcelona: Península, 2006.

Spain to foreign influences, due to increasing tourism and to the changes in the Church's doctrine, with the Second Vatican Council. A central role was played by workers' mobilization and their ability to create a situation of social conflict that forced the regime to be more open to demands for democratization<sup>21</sup>.

According to Santos Juliá, there were two projects of transition: a reformist, that just wanted to make some changes in the law without questioning the legitimacy of the regime, and the other project, called *rupturista* because it wanted to radically break with the past, and it counted amongst its members people who were dissidents of the regime, and who at some point had supported the dictatorship, but who had grown disappointed with it; and those who were in the illegal opposition from the very beginning, and who wanted a radical transformation of the political system. According to Juliá, the *rupturista* project was the one that was finally realized, but without any constituency to make it happen. This led to a limited application and to a sort of reform within the process of breaking with the past<sup>22</sup>.

The Spanish transition to democracy was considered as a model to be exported, since the elites in power negotiated their exit with members of the opposition, including the Communist and the Socialist parties, thus changing a vision of politics and the transition that was common during the years 1940 to 1950. In fact, the idea of a transitional government was not new in Spanish politics: what was new was the will to negotiate with all the political forces and the recognition of the Communist Party and its leader, Santiago Carrillo, as legitimate parties in the negotiations to bring democracy to the country<sup>23</sup>.

The fact that the Spanish Socialist Workers Party PSOE and the Communist Party took part in the elections and in the drafting process

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<sup>21</sup> Ysás, *supra* note 20 at p. 41.

<sup>22</sup> S. Juliá, *En torno a los proyectos de transición y sus imprevistos resultados*, [in:] R. Carme Molinero (ed.), *La Transición, treinta años después. De la dictadura a la instauración y consolidación de la democracia*, Barcelona: Península, 2006; N. Sartorius, A. Sabio, *El Final de la dictadura: la conquista de la democracia en España: noviembre de 1975 – Junio de 1977*, Madrid: Temas de Hoy, 2007.

<sup>23</sup> S. Juliá, *Transición antes de la Transición*, [in:] S. Juliá, *Hoy no es ayer. Ensayos sobre la España del siglo XX*, Barcelona: RBA, 2010; J.M. Baquero, *El país de la desmemoria. Del genocidio franquista al silencio interminable*, Barcelona: Roca Editorial Libros Ltda., 2019.

of a new Constitution is seen as a model of openness and political participation. However, a price had to be paid: forgiveness and, above all, forgetfulness.

On the 23 October 1977, Josep Tarradellas, the last president of the Generalitat, after long and difficult negotiations with Suarez, returned to Catalunya. In his speech in the Palace of the Generalitat, he said his now famous words: “Ciudadans de Catalunya, ja sóc aquí (Citizens of Catalunya, I am finally here)”<sup>24</sup>. Tarradellas brought representatives of all the political parties to his government, in order to express and reach unity in Catalunya<sup>25</sup>.

In 1977 the Spanish Parliament passed an amnesty law that allowed members of ETA to leave prison, given that they had an intention to reestablish public freedoms or to revendicate the autonomies in Spain. The model that Spain approved was one based on decentralization of the government, not only in Catalunya and the Basque Country, but in the rest of the country. However, the Constitution did not include a regulation of how autonomies would work, but a general clause that let this definition to an infra-constitutional norm: The Statute of Autonomies. There was a clear understanding of Autonomies in Spain. Catalunya got its own Statute that would regulate the relations between the central government and the government of the Generalitat. As Javier Pérez Royo holds, there was no problem in this development, until the Popular Party decided to challenge the constitutionality of the Statute, and the Constitutional Court, a political body rather than a juridical one, decided to declare some norms of the Statute against the Constitution in its decision STC 31-2010<sup>26</sup>.

The Spanish transition to democracy is characterized by a total lack of criminal trials, or any kind of accountability. The memory of the civil war, the bloody repression during the first part and the last part of the

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<sup>24</sup> Gillaumet, *supra* note 11, at p. 219.

<sup>25</sup> The first elections showed that political parties did not have an overwhelming majority to control the process by themselves, so all of them needed to find points in common with all the other parties in order to reach consensus in the most important topics. In Catalunya the socialist party in coalition with the PSUC – the historical socialist party of Catalunya – won the election, and Jordi Pujol’s party was in second place with Adolfo Suarez’ UCD. Guillaumet, *supra* note 11, at p. 188.

<sup>26</sup> J. Perez Royo, *El parche autonómico y la solución federal. El Estado de las Autonomías no es una forma de Estado: no está definida en sede constituyente*, Ara, November 8<sup>th</sup>, 2017, p. 1.

dictatorship made it advisable that the transition be negotiated and that a broad amnesty be granted to members of the government and perpetrators of grave crimes. A strong critic of the transition has written that the pact between Franco's supporters and anti-Francoists was to the benefit of the members of the authoritarian regime. By appealing to the motto "national reconciliation", members of the government took advantage of the process of transition and made sure that no trial or truth commission or revision of the past was made. In the words of Franco himself, everything in this field was tied and very well tied<sup>27</sup>.

The Spanish transition has been presented as a peaceful transition, but Paloma Aguilar shows that it was not the case. Between 1975 and 1980 there were more than 460 deaths and in a period of six years there were more than 400 hundred people killed in terrorist<sup>28</sup> attacks. The Pact of Forgetting was made in a context of extreme confrontation, especially between members of ETA and members of the military; and of moderation, especially on the part of parties like the PSOE and the Communist Party and the faction led by Adolfo Suarez in the government. The reformist approach and the pact of forgetting is the result of memory, but also of the extreme radicalization of some sectors, and the existing tensions in Spanish society. Parties in the opposition feared that the military would take power again and that democracy would not be achieved. They moved from demanding a radical transformation and retrospective justice, to a humbler reform, one wherein Spain could have democracy and in exchange the past was going to be thrown into oblivion. Unlike other transitions where "never again" meant the non-repetition of atrocities, in Spain this "never again" pointed at the civil war, the transition was made to never again have another civil war or another dictatorship<sup>29</sup>.

As a result, critics stress the limitations of Spanish democracy and the permanence of violence due to unresolved issues such as the Basque

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<sup>27</sup> J.M. Colomer, *La transición a la democracia: el modelo español*, Barcelona: Anagrama, 1998.

<sup>28</sup> A. Barahona de Brito, P. Aguilar (eds), *Las políticas hacia el pasado. Juicios, depuraciones, perdón y olvido en las nuevas democracias*, Madrid: Istmo, 2002, p. 147.

<sup>29</sup> P. Aguilar Fernández, *Políticas de la memoria y memorias de la política. El caso español en perspectiva comparada*, Madrid: Alianza Editorial, 2008.

question and the presence of different nations within the Spanish state. The Spanish Congress passed a law granting amnesty to those who took part in the civil war, in order to consolidate what they saw as a process of reconciliation with the past and with those who fought on the opposite side. But the law granted amnesty to perpetrators of grave abuses and human rights violations too. In that way, the Pact of Forgetting threw into oblivion the crimes committed during the civil war and during the dictatorship. Historians could do research on these topics, but public discussion on these topics was closed, the pact granted that the public would not know about the past, and that only experts would be able to talk about it.

Spain and Catalunya have passed laws of memory, in order to open public discussion on the legacy of the war and the dictatorship. Despite the fact of this commitment, the fact remains that Spanish society in general is unable to deal with the past. When Baltasar Garzón tried to bring Franco and his supporters to justice, right wing critics mocked him for bringing to trial dead people, or for even attempting to bring into public discussion Spain's past of torture and human rights violations. Extreme right-wing groups have made attempts to prevent the search into the past. They have accused Garzón of violating the law or of politicizing justice; the only charge they make is Garzón's attempts to bring the past into public life, to finally discuss the legacy of violence and torture that many rightwing politicians share. So far, he has failed, and the pact of forgetting is still very much alive<sup>30</sup>.

But another element that remains without reform is the Police and the judiciary. Without a significant reform to these institutions, the transmission of an authoritarian view of the past is still possible, as the situation in Catalunya clearly shows. In the following section I want to focus on the question of political crimes and the crime of terrorism, considering that the former expresses a remnant of the past, whereas the latter shows the new understanding of democracies in Europe.

In 2014, the Special Rapporteur on the Promotion of Truth, Justice, Reparations, and Guarantees of Non-Recurrence released a report on the

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<sup>30</sup> M. Davis, *Is Spain recovering its Memory? Breaking the Pacto del Olovido*. "Human Rights Quarterly", Vol. 27, No 3, 2005, pp. 858-880.

Spanish case. The Special Rapporteur found that in Spain many human rights violations were committed in the 40 years dictatorship. Analyzing the transition to democracy, he states that the measures adopted during this time “have not corresponded to a consistent, comprehensive, and overall State policy in favor of truth, justice, reparation, and guarantees of non-recurrence”. With regards to the Armed Forces, the report states:

24. In Spain there were no formal trials to clean up the Armed Forces. In view of the violations committed during the period of the Civil War and the dictatorship, this is a notable shortcoming. Alongside the reform process, however, an effort was made to promote generational renewal and the gradual change of attitudes less in tune with the values of the transition. Examples include the lowering of the retirement age from 70 to 65, reforms in the career and promotion system, and steps to encourage voluntary retirement, opening up opportunities and powerful incentives to bring about the rejuvenation of the top command.

25. At the same time as the numbers of armed forces staff were reduced, especially among the top echelons, and entries to military academies were curtailed, changes were initiated in military training and education, including curricular alterations, as well as renovation, rotation, and improvements in the conditions of employment of teachers, and a closer integration of military courses with other disciplines and with the regular educational system.

The report shows some advances in reform in terms of education and institutional changes. However, in the case of the judiciary, the report also shows that it is the branch of the state that has undergone the least structural reforms which affect the quality of democracy and the protection of human rights since the transition. A Recent decision of the European Tribunal of Human Rights, in the Otegi case, questions the impartiality of the Spanish judiciary. This has also been the case in the process against Catalan leaders investigated for the crime of rebellion, as a result of the referendum of October 1<sup>st</sup>.

### III. THE QUESTION OF POLITICAL CRIMES

The concept of political crimes is based on the idea of the existence of a repressive regime opposed by the political offender. Its basis can be



found in two sources: civil disobedience and the category of combatant in international humanitarian law<sup>31</sup>. Next to the political crime we find the category of terrorism, as the correlate of political violence in a State based on the rule of law (*Estado de Derecho*). That is, in regimes that lack legitimacy, the validity of the category of political crime seems to be recognized, while in those that have democratic legitimacy the existence of a political justification for a benign treatment of political violence disappears and that is why the category of terrorism supposes the exclusion of the subject from the community of subjects respectful of the law<sup>32</sup>.

The Spanish tradition of giving privileged treatment to the acts of terrorism saw a change during Franco's dictatorship. During these times, political opponents were treated as enemies of the state, that is as terrorists<sup>33</sup>. From 1938 to 1944 there was a construction of the enemy in the law, especially in judicial cases against the defenders of *La República*, that is, the legitimate government of Spain that Franco and his allies overthrew. This legal construction of the enemy resembles the one that is produced in the conflict between Catalunya and Spain for the former's independence.

Tébar has shown that during the early years of the dictatorship there were two kinds of criminal law: on the one hand, the one used for the repression of those who supported *la República*, and whose guarantees were eliminated, and, in many occasions, they just disappeared or were killed. This is what the author calls a "combat criminal law" (*derecho penal de combate*)<sup>34</sup>. At the beginning of the civil war, the state of exception was declared in the areas that were falling under rebel control. The Francoist army ruled these regions via *Bandos*, that is, military regulations. In these *bandos*, they declared a state of war, a special military jurisdiction, and a speedy trial to those who were accused of sabotage, rebellion,

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<sup>31</sup> I. Orozco Abad, *Elementos para una fundamentación del delito político en Colombia: una reflexión a partir de la Historia*, "Análisis Político", No. 9, 1990, pp. 30-51.

<sup>32</sup> G. Jakobs, M. Cancio, *Derecho Penal del Enemigo*, 2a ed, Madrid: Civitas, 1996; J.R. Serrano-Piedecasas, *Emergencia y Crisis del Estado Social. Análisis de la Excepcionalidad Penal y Motivos de su Perpetuación*, Barcelona: PPU, 1988.

<sup>33</sup> I. Tébar Rubio-Manzanares, *Derecho Penal del Enemigo en el Primer Franquismo*, Alicante: Publicaciones de la Universidad de Alicante, 2017.

<sup>34</sup> *Ibid.*, p. 12.



or sedition. Freedom of expression and reunion were prohibited and promoting or carrying out a strike were tantamount to sedition<sup>35</sup>. Those who defended the legitimate order were accused of rebellion, and the penalty was death. Before the end of the war (9 February 1929), Franco's regime passed the so-called *Ley de Responsabilidades Políticas* that punished those who collaborated with the *República* and they had to go through a sort of cleansing process, that in many cases involved economic sanctions and even losing their nationality, to be able to be part of the new society. This law was applied retroactively to cover the beginning of the republican government. Some of the acts that were considered criminal were the following:

- c) Being a member of political parties and worker's unions.  
(...)
- f) To call elections, be part of the Government or work in a high position; or being a candidate of the government; or candidate, representative or controller of any of the parties in the Popular Front; or being a convention delegate.
- h) Being a member or having been a member of the Masonry.  
(...)
- l) To have opposed actively the Movimiento Nacional<sup>36</sup>.

On the other hand, we find that the criminal law was implemented in order to discipline society into the new regime. In Spain, at the time, there was a dual state: a prerogative state that was arbitrary and did not work within the limits of the rule of law; and the normative state, that kept the appearances of being a legitimate state<sup>37</sup>. As a result of the former, several institutions were created such as the *Tribunal de Responsabilidades Políticas* and the *Tribunal Especial para la Represión de la Masonería*<sup>38</sup>. These two tribunals, especially the first one, were used to attack political opposition and to eliminate any kind of resistance towards the new dictatorial regime.

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<sup>35</sup> *Ibid.*, p. 32.

<sup>36</sup> *Ibid.*, p. 41.

<sup>37</sup> *Ibid.*, p. 15.

<sup>38</sup> G. Portilla Contreras, *La Consagración del derecho penal de autor durante el franquismo: el Tribunal Especial para la Represión de la Masonería y el Comunismo*, Granada: Comares, 2010.

José Ramón Serrano-Piedecasas analyzed the relationship between political crimes and the crime of terrorism several years ago. This analysis is important, since it is done at the time of the political crime crisis and the consolidation of the category of terrorism to account for the dissidence and to deal with those who opposed the State. From now on, there is a criticism of what would later be called the criminal law of the enemy and the political use of criminal law. Serrano already discusses the political use of the category and its instrumental use to deal with the crisis of legitimacy that occurred in the 1970s in Europe and the United States. For Serrano, the difference between the national liberation movement and terrorism lies in the means used and in the context in which the activities take place<sup>39</sup>.

The classification of a conduct as a political crime depends on a political decision, which can be given in the context of a request for extradition or within the context of the trial of those who oppose the State by violent means. García Valdés analyzed in 1984 the three historical phases of political crime. These are:

- a) The absolutist state model, which extended until 1786, which identifies the political crime with the *crime of lesa majestad*. Therefore, it is punished more harshly than ordinary crime;
- b) With the triumph of the French Revolution, political crimes are assimilated to the romantic figure of the hero who fights for the freedom of the people;
- c) The triumph of the Rule of Law, which does not admit the existence of political crimes, since the exercise of political activity is lawful, unless it is done with violent means, in which case it will be given the treatment of terrorism<sup>40</sup>.

Margalida Capellá analyses political crimes in international law<sup>41</sup>. She questions the possibility of accepting political crimes in a democratic state. She shows the state practice used to determine the elements of

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<sup>39</sup> Serrano-Piedecasas, *supra* note 32 at p. 30.

<sup>40</sup> *Ibid.*, p. 149.

<sup>41</sup> M. Capella i Roig, *¿Qué queda del delito político en el derecho internacional contemporáneo? (Observaciones en los ámbitos de la extradición y del asilo)*, "Revista Electrónica de Estudios Internacionales", No. 28, 2014, pp. 1-43.

political crimes. Her conclusion is that political crimes are those crimes that are politically motivated, are committed in a political context, or have political consequences. At the same time, she distinguishes between pure political crimes and relative political crimes, and complex and connected political crimes. In her analysis, she shows how state practice has moved from the recognition of political crimes to its exclusion in some cases, when extradition is possible, due to the nature of the act or to the nature of the criminal justice system. For instance, terrorism is one of the acts excluded. To overcome the lack of definition of terrorism, states have used the attack against a Chief of State clause and the anarchist clause. In any case, the depoliticization of these acts have led to consider them as common crimes, therefore as excluded from the possibility of asylum.

One of the most interesting cases is when the commission of political crimes by the rulers is considered an act of rebellion. One sector affirms that the acts of those in power must be sanctioned, since it supposes the respect of the rule of law. Others suggest that the democratic principle must be respected and therefore the rulers must act in some cases with dirty hands. The leaders in the Popular Party, the party in government at the time of the referendum, understood that the leaders of *el process* had committed a crime of rebellion, since they were disobeying the law. But those who supported the referendum understood that it was a political act and that it was made in accord with the constitution, but, that in any case, majority rule should prevail over formalities in the law.

#### IV. THE CATALAN CASE

As mentioned before, the new Constitution granted the right to autonomous government to regions in Spain. The Constitution led the determination of powers and roles to the statute of the autonomy, a sort of regional constitution, a step below the 1978 Constitution. In 2006 the citizens of Catalunya voted for the statute and approved the content determined by the Spanish Parliament. Political parties such as Esquerra Republicana did not like the whole content of the statute, but stillly decided to support it. This was not the case with the Popular Party that decided to take the case before the Constitutional Tribunal of Spain to see if it was in accord with the Constitution. We have to take into account

that the way the Tribunal is constituted leaves room for partisan politics, and for that reason, given the preeminence of the Popular Party and the Socialist Party at the national level, this is a very conservative court.

The Constitutional Tribunal took almost 4 years to decide the case, and finally on 28 June 2010 released their decision, curtailing several competences that were approved by the Catalan Parliament and ratified by the referendum of the Catalan people in 2006. As a result of this, a movement for independence started to grow, giving more votes to political parties such as Esquerra Republicana. Another political party, right wing *Convergència i Unió*, saw the opportunity to get votes in the movement for independence and it decided to include it in its political agenda.

After the massive protest on 11 September 2011, the idea of independence has been present in the political discussion of Catalunya. But it is the massive mobilization of 2012 that led the political parties to use independence as the main argument in the elections, either because they were in favour or because they were against independence. In the 2012 elections, *Convergència i Unió* won the election including a call for independence. In the 2012 Parliament, the political parties for independence had the majority of the votes, and they approved a document that contained some of the steps to advance in the movement toward independence. This document, entitled *Declaració de Sobirania i del Dret a Decidir del Poble de Catalunya*, called for a referendum to ask the Catalan people about independence from Spain. From the very beginning these political parties called for a negotiated referendum, and even some members of the Catalan political parties went to Madrid to ask the Spanish Parliament for their support for this referendum. Of course, they refused to give this support, and for that reason the referendum of 9 November 2014 was just a non-binding consultation for independence in Catalunya, similar to those organized by *Esquerra Republicana* in several towns in the country. It was no surprise that those who were pro-independence won the referendum with almost 2 million votes, but with a small participation of those who were against it.

In the new elections, that were treated as if they were a plebiscite, the political parties that were pro-independence won the election, although not with an overwhelming majority, which showed the division of Catalan politics. In 2017 the Catalan Parliament approved, through an irregular

procedure, the Law of the Referendum and the Law of the Transition to the Republic. From different sectors these laws were criticized, not only for their content, but also for the irregular procedure used to approve them.

The Spanish reaction under the Socialist Party was one where Zapatero paid lip service to the statute, but without really doing anything to support it. When the Popular Party won the election, they used irregular means to fight the Catalan process of independence. In July 2016 it was discovered that the police were spying on those politicians who were in favour of independence, all of that being done without a judicial order. At the same time, since 2015, the Spanish government has intervened in the Catalan administration by ordering that their expenditures be approved by the Spanish government.

During the year, the Spanish police and the prosecution investigated Catalan politicians who promoted the referendum, without a clear public explanation as to the crimes that they thought were being committed. On September 20<sup>th</sup>, the Police arrested several members of the government with the purpose of stopping the referendum. Some of the charges of rebellion came from the protests people in Catalunya made to attack what they thought to be an illegal act. From that day on, every day there was a *cacerolazo* to show support for the government of Catalunya and to protest against the use of the police and the judiciary in what was clearly a political debate. In the investigation against the organizers of the referendum, the Spanish judge held that the *cacerolazo* was a form of violence that created stress in an apparently vulnerable police force. Those who criticized the police were threatened with accusations of terrorism or hate crime.

But despite these attempts at stopping the referendum, this was anyway celebrated on 1 October 2017. That day many people went very early in the morning to be ready to guard the electoral colleges and vote in what they deemed a valid referendum. But once the colleges opened, the Police charged against voters in some of the electoral colleges, in what is now widely considered police abuse and a violation of human rights. This level of violence was unprecedented in Catalunya, and what was more surprising was the level of hatred with which the Police and the Spanish government acted. In some regions of Spain, people said goodbye to the Police with chants that recalled those used before going

to war. People were chanting “go for them”, as if people in Catalunya were the enemies of the state.

Around noon, the Police ceased to attack electoral colleges, but the image of an aggressive police force remained. In the following days, given the positive result of the referendum, the Puigdemont government was supposed to declare independence, which it did, but suspended it to open the channels of dialogue with the Spanish government. This brought about disappointment in the supporters of independence, and it did not prevent the Rajoy government from suspending the *Autonomía* in Catalunya and from trying to use this temporary intervention to re-shape Catalan society.

In the aftermath of the referendum, Spanish judges prosecuted and persecuted several Catalan citizens for the mere fact of expressing their opinions online or on the streets. Members of the Committees for the Defence of the Republic were interrogated and investigated for crimes of terrorism, in what was clearly a strategy to scare them and to prevent them from organizing. But curious enough, these were not the charges brought against the leaders of *el process*. They were accused of the crime of rebellion. The judge who investigated the case held that the element of violence required in the crime of rebellion was met (because there was violence in the actions of the protesters). He found violence in the fact that people protested in the streets and in the *cacerolazo*. No judicial body in Spain has officially attacked or criticized these decisions, despite the fact that human rights organizations and democratic lawyers and judges have expressed their opinions on the illegality of the charges and on the disproportionate use of prison for people who do not present any risk of running away, or any danger to society, or to the integrity of the trial, the only reasons why a person can be held in prison.

## V. CONCLUSION: THE RISKS OF LIMITED TRANSITIONS

Transitional justice is a series of mechanisms that exist with one goal in mind: the guarantees of non-recurrence. To do so, there must be a real transformation of society and not just a timid application of the transitional justice liberal toolbox. This has been the case in countries

such as Colombia, Morocco, and Sierra Leone<sup>42</sup>. But in Spain we do not even see the limited liberal toolbox. The kind of measures used to deal with the past have been limited to memory and memorialization, but justice, truth, and a real transformation are absent.

The Catalan case shows the dangers of limited transitions, because in times of turmoil, political decisions were avoided, and the same forces that were used in the authoritarian regime to stop opposition are now used during democracy. The Popular Party refused to have any open dialogue with the Catalan government, and in its stead used the idea of the protection of the constitution to criminalize the movement for independence in the county, even though it was a peaceful one. The Police and the judiciary, two institutions criticized for their lack of transformation after the end of the dictatorship, were used as instruments for the depoliticization of the situation, and in that way a clearly political issue became a judicial one.

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<sup>42</sup> F.S. Benavides-Vanegas, B. Camps, O. Mateos. *Los retos de la Justicia Transicional en las nuevas transiciones: un estado de la cuestión a partir de los casos de Colombia, Marruecos y Sierra Leona*, "Revista de Relaciones Internacionales de la UAM", No. 38, 2018.