

Transitional Justice versus Traditional Justice: The Basque Case

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Transitional justice is often understood as a field or a toolkit that facilitates the establishment of “justice” and rule of law in post-conflict societies. It is also the interdisciplinary understanding and study of that toolkit or field. This article explores to what extent transitional justice is a relevant way of understanding the transformations taking place in the Basque Country in the post-conflict situation created since the final ceasefire was declared by ETA on October 20, 2011. The article analyses different aspects of the field of transitional justice and the experience in Spain and the Basque Country. It underlines the prevalence of truth-seeking processes (over amnesia) and of addressing violations and victims’ suffering to conclude with the need to enhance the rule of law and traditional—individualised—justice and transitional justice.

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conclude with the need to enhance the rule of law and traditional—individualised—justice and transitional justice.

Part one draws from fiction, the novel *Twist* by Basque writer Cano, in order to introduce the issue of transitional justice (TJ) in the Basque Country. It then moves on to show the interdisciplinary character of TJ, which calls for methodological pluralism. Part two identifies some key issues in the field of TJ. Part three explores some major experiences and policies developed (or claimed but not developed) in the political, legal and institutional context, namely in the European Union (EU), in Spain and in the Basque Country. Part four provides a suggestion for a normative agenda regarding TJ for the Basque Country.

1. Perspectives and discourses on transitional justice

In his prize-winning novel *Twist*, published in 2012, Basque writer Harkaitz Cano deals with a tragic episode of recent Basque history, using the literary techniques of fictional narrative and flashback memory. The main character and narrator, Diego Lazkano, a sort of anti-hero, was a close friend of “Soto and Zeberio”—fictional names for Lasa and Zabala, two young ETA activists who disappeared on October 15, 1983,² were tortured for three months and then shot dead by Spanish paramilitary with close links to the Spanish police forces. A high official of the Civil Guard, Rodriguez Galindo, was found guilty of torture and, after serving two thirds of his sentence, was set free in 2013.

The narrative twists from one side of the conflict to the other. Soto and Zeberio are tortured and killed by the Spanish police, but they also engage in the kidnapping and killing of a civil victim as ETA activists. The novel twists from present to past, but also from one site to another: from Donostia-San Sebastian to other places like Cambalache, Barcelona, France and Mexico. Lazkano had been an activist involved in the (watching of the) kidnapping of an engineer “executed” by ETA. Lazkano himself was tortured by two hooded paramilitaries, but was released after disclosing the whereabouts of “Soto and Zeberio”, near Biarritz. After his release by the torturers, Lazkano, like his father had done before under different circumstances, fled to France and disappeared from social life.

With no attempt to idealise normality, the narrative shows how the different protagonists on all sides of the conflict lead their lives with their ups and downs. Many years later, the calcined bodies of Soto and Zeberio are found in Southern Spain

and new evidence is collected. Lazkano himself has the case reopened by an able but sombre advocate. However, on the day of the trial, Lazkano fails to show up to testify as witness, accepting a double deal from an influential politician who had been intermixed with the paramilitary as civil governor of the Basque Country at the time of the events. He is told about his disappeared father's whereabouts in Mexico and he is given a file on his own personal records, with an implicit expectation of getting cleared of charges, although this is not apparent from the novel. Here is an extract from the novel that includes an interesting thought on disappeared persons:

The disappeared, do they not inflict those who have not disappeared with a certain thirst for disappearance? ... Those left behind disappear from their usual business, schedules and behaviours as a result of the blow they suffered. Somewhat disappearing a little bit themselves, makes them feel closer to those who have disappeared ... Unconscious and absurd behaviour that separates us from our previous routines, as if giving them up, running away from the places we were and appearing somewhere else, could somehow bring back those who disappeared.

In one of the final episodes, Lazkano has translated Chekov from Russian for a play directed and staged by his current companion, a former friend and colleague of the theatre group from the times when Soto was an actor and Zeberio did the lighting. On the day of the debut, Lazkano sits in one of the front rows of the theatre. A climax takes place when Lazkano recognises the voice of one of the actors in the play: one of his two hooded torturers.

The novel is to be commended as an epitome of the twists inherent to the TJ field: twists in time, places and issues, twists where victims become perpetrators, twists between memory and forgetting. As we anticipated in the introduction, TJ is often understood as a toolkit that facilitates the establishment of “justice” and rule of law in post-conflict societies. The specific goals are to bring about the right to “truth”, access to “justice”, victims’ right to “reparation”, and the right to recognition of their suffering and to have their dignity restored—but the goals are also social reconciliation and to secure the non-repetition of violations. TJ is also the interdisciplinary scholarly understanding of that field. Besides focusing on the fair distribution of basic goods (Rawls, 1971) and on procedural-discursive views (Habermas, 1996), the term “justice” refers to the administration of justice in an institutional system of courts, or through alternatives to litigation.

Issues of TJ are dealt with from different genres and disciplines. As we have just seen through *Twist*, this also includes literature, which presents the events and the experiences of the protagonists: perceptions, representations, symbols and aesthetic experience add to the experience of TJ, but from an individual perspective. Humanities can illustrate points otherwise made in practical philosophy,³ especially moral philosophy, ethics, political philosophy and philosophy of law. These carry forward a very relevant analysis of reconciliation, guilt, forgiveness, responsibility, memory and collective dialogue, rational and emotional discourse. History also brings along an interesting analysis of the processes and influences, events and documents marking the epochs before, during and after transitions and conflict, and discusses the nature of regimes (see Elster, 2004). Perhaps also religion contributes to the enhanced perspective of TJ. Religion is difficult to classify amongst these disciplines, but for many people, especially within the Christian world-view, religious experience and faith provide a sense of the immanence and interfaith ecumenical spirit implied by forgiveness and pardon,⁴ and helps develop hope, cohesion and peace, essential to TJ. The culturally-bound aspect of religion in multicultural and multi-faith societies should not be neglected in the analysis of TJ studies.

Last but not least, law or legal science contributes to the knowledge and the proposals of forms and mechanisms of TJ. The issues mentioned above are not a monopoly of any of these disciplines, but they can all interact in a sort of trans-disciplinary methodological pluralism (Bell, 2009: 24). Several branches of legal studies take an interest in TJ. Constitutional law is concerned with system transitions and procedural and institutional mechanisms to implant and consolidate democracy. International human rights law tries to find a balance between past perpetrations and violations and victim recognition and reparation, while also looking forward to ensure recognition of fundamental rights and effective means of protection and remedies in the legal system and administrative practice.

Criminal law—more generally, the criminal justice system—takes an institutional and individualised approach to guilt and stresses the role of institutional society—the legislator—in deciding universally on the allocation of responsibilities, reparation, compensation, and even restoration. The traditional insistence on the particular criminal act and on the *mens rea* of the perpetrator now faces challenges from a greater focus on the “actor” or perpetrator, often stigmatised as the “enemy” or

as “dangerous”, as well as from victim-oriented approaches. These more recent developments are leaving their mark on TJ.

Within the law, it is also useful to distinguish instruments and institutions usually grouped under soft law (*e.g.* recommendations, policy documents, procedures of dispute resolution like mediation or conciliation that are not strictly legal or judicial but can be seen as alternatives, truth commissions, and international support groups) and hard law (*e.g.* laws, judgments, courts, enforcement agencies, prisons, criminal laws and criminal procedure—in the case of Spain the criminal justice system, an area of State competence). The federal issue of competences and powers (who does what, who can legislate in what areas) becomes crucial. Restoring the rule of law and the criminal justice system of a society, a primary aim of TJ, is normally the exclusive competence of the state legislator. However, governance in the polity is not only to be understood from an institutional, constitutional, vertical perspective covering the hierarchical institutions, lower levels of government, central powers and the federal or decentralised levels, *i.e.* the separation of powers. Governance is also about civil society, community, citizens’ initiatives, non-governmental organisations (NGOs) and public-private partnerships. The role of civil society in TJ is paramount. Therefore TJ can be developed by both hard and soft law measures, depending on the competences, but also on the policy choice, bottom up initiatives and democratic decisions. It thus needs to be analysed as an interdisciplinary field.

2. Aspects of transitional justice

Rather than providing a comprehensive definition of TJ (such as the type cited in note 1), I list some of the most salient issues in the sphere of TJ. “Justice in the context of transition after conflict” and “justice to facilitate transition” are two ways of understanding TJ as a means of coming to terms with past crimes, even with atrocities, in the former sense, and as a means to bring an end to violence, wide-scale conflict and human rights abuses, in the latter sense. In the first approach, TJ operates in a post-conflict context. In the second, TJ operates in conflict-ridden societies and the priority may be to bring about an end to conflict rather than address its consequences. Transition implies regime change, from dictatorial, totalitarian regimes to some form of constitutional democracy. Peaceful or smooth transitions are often opposed to transitions characterised by catharsis, violence or prosecutions. But TJ can also be understood as transition from a conflict-ridden context of political violence to

a context of the cessation of hostilities. In the first case, TJ facilitates transition to “democracy”. In the second, it facilitates a definitive ceasefire. The TJ toolkit can provide policy options or a set of approaches and solutions broadening the traditional focus on criminal prosecutions against perpetrators. TJ balances fair treatment of perpetrators with their punishment, but enlarges the focus to capture larger societal and institutional responses to wide-scale abuses, taking primarily into account the suffering of all types of victims, but also the needs of communities. Those needs span from general and individual prevention—*i.e.* non-repetition—through reparation and restoration to reconciliation.

TJ as a *field* in Bourdieu’s sense of the expression⁵ is associated with Truth and Reconciliation Commissions (TRC), or with national scale criminal proceedings and with international criminal trials, courts and tribunals, and related actors. It can also be associated with the (democratic) vetting of State institutions and procedures, or with dismissals of State officials involved in past abuses, thus removing the elites and personnel involved in the human rights violations of the conflict-ridden or totalitarian regime. Criminal justice is only one way, amongst others, of dealing with the legacy of past conflict, atrocities and human rights violations perpetrated in a society. The reference to *justice* in the term “transitional justice” does not need to be limited to formal or legal justice. Even if we stick to the law, other processes, procedures and rituals that are alternatives to the criminal justice system may offer less conventional, yet acceptable workable solutions from a normative point of view.

2.1. *Transitional justice as a process*

Rather than a normative structure, TJ is better seen as a normative *process* of facing up to the past. Neglecting, discarding or tiptoeing around a totalitarian and violent past in a given society amounts to a rejection of TJ. Past scenarios, *pre*-transition stages characterised by war or armed conflict, totalitarian regime, and human rights violations need to be reported, faced up to and made (critical) sense of, in order to collectively construct a view for the *post*-transition horizon of an, ideally, reconciled society. In the new horizon, the conflict is transformed if not resolved, and peaceful living together becomes a shared ideal. Furthermore, in such a horizon, human rights violations are universally despised, condemned and avoided by all actors in society. If that ideal is attained, TJ will have succeeded and will step back, giving way to justice *tout court*.

The *transition* phase is a bridge, a process, between the two horizons. In the transition phase categories projected from the past like “victims” or perpetrators—*victimizers*—are still operating and largely shape the form of transition where each of these actors brings in their own perceptions, experiences, expectations, claims, and memories. However, a view of the post-transition future is one where such strong experiences of the past are turned into a collective, inter-subjective, “memory”, but no longer determine the normative agenda. Ideally, in the new horizon those categories—victims, victimizers—dilute and dissolve. Transitional virtues like forgiveness, reconciliation, pardon, assumption of guilt and responsibility, practices like shaming and blaming, confronting through discourse, avoiding revenge, are all instrumental during transition; they facilitate but are not carried into post-transition.

TJ thus involves three important diachronic stages. It is a process that flashes back into the past, but is always looking forward to a model of society to be set up after transition. Roht-Arriaza speaks about a series of antinomies between the fields of TJ and international criminal courts:

these antimonies recall Martti Koskeniemi’s description of international law as an indeterminate set of movements bouncing from moralist utopia to *realpolitik* apology. Something similar happens here: the emphasis shifts, the pendulum swings back, the search for a middle ground continues, but the fundamental logic is binary, the critique of each movement endlessly producing its opposite. Thus, there is no possibility of final resolution of the tensions—or synergies—of the two fields. (Roth-Arriaz, 2013: 1-2)

Whether the pendulum swings or twists, the similarity of metaphors is striking. As in Harkaitz Cano’s novel, the transition period becomes crucial because it concentrates the multiple *twists* in TJ: from past to future (Teitel, 2000: 11ff), from revenge to forgiveness (Minow, 1998), from presence to disappearance, from insistence to avoidance, from living in the past to amnesia, from victim to perpetrator, from impunity to over-punishment, from criminal trial to betrayal of the trial, and from *desert* to amnesty. Moreover, the novel shows the twists that TJ itself has undergone as a field, from *realpolitik* and the paramountcy of the claims to cease the conflict—peace as ceasefire—to utopia (Koskeniemi, 2005). It shows new goals regarding gender justice, the rights of children, of minorities, corruption, land and asset restitution and redistribution, or even addressing social exclusion related to the conflict, *i.e.* through better provision of economic, social and cultural—education and language—rights. Thus, the novel reveals the complex, multi-faceted nature of TJ.

As Nir Eisikovits (2009) puts it, there is a tension between a desire for calm after war, for turning the page, and the importance of putting the perpetrators of human rights violations on trial. There is a tension between the need, as part of a political transition, to create a reliable historical record of past abuses and the coherence of forgiveness in politics. There is a further tension between collective involvement and orchestration of human rights violations and the individual allocation of responsibility of the criminal justice system, deeply ingrained in most legal cultures.

These tensions point to a problem at the heart of international criminal law that is reflected in the following question: does the unique nature of mass atrocity, whereby numerous people harm others with differing degrees of acquiescence and direction from a large bureaucratic class, really lend itself to the legalistic commitment to individualising guilt on the basis of direct evidence? Or do the distinct features of such crimes require relaxing our standards of individual responsibility to implicate the entire State structure that made the atrocities possible? If the latter, it may be difficult to hold fast to the justification of such trials as expressing a firm commitment to legalism and the idea of the rule of law so dear to most legal cultures. An application of this dilemma to the Basque context would lead to considering the responsibility of the State apparatus behind the ‘GAL’—the ‘Antiterrorist Liberation Group’ established within the Spanish Ministry of the Interior to combat ETA using its same methods—the practice of torture or the criminal theory that treats all the social movements around the Basque nationalist left as “part of ETA”. We shall return to this question.

Amongst the major instruments in the TJ⁶ toolbox, two are worth looking into: permanent or *ad hoc* tribunals to try atrocities and establish guilt and criminal responsibility, and truth (and reconciliation) commissions following the model of the South African Truth and Reconciliation Commission, itself based on previous Latin American experience.⁷

2.1.1. International tribunals

In this section we follow Eisikovits (2009). The starting point is the Nuremberg Tribunals experience, followed by the *ad hoc* tribunals for the former Yugoslavia (ICTY), set up in The Hague in 1993, and for Rwanda (ICTR), set up in Tanzania in 1994, which created detailed records of atrocities. One of the criticisms against the

Nuremberg Tribunals, the ICTY and the ICTR is that they were not established at the sites where atrocities took place. As a response, internationalised or hybrid courts were set up in Bosnia Herzegovina (since 2005) and in Kosovo (since 2000), employing both international and local jurists and adjudicating on the basis of a mixture of national and international law. A significant development in international criminal justice since the Nuremberg trials has been the establishment, by the Rome Treaty in 1998, of the permanent International Criminal Court (ICC) in The Hague. The ICC's authority is residuary: it acts only if member states cannot or will not. One of the most innovative features of the ICC is the fact that it gives a significant role to victims in its proceedings. Victims can send information directly to the court's prosecutor, they can request the opening of a preliminary investigation, they can appear before the court's pre-trial chamber when it deliberates on whether to open a full-blown investigation into a case, and, most significantly, they can ask to present their position during the trial itself.

2.1.2. Truth commissions

In this section we follow Hayner (2011).⁸ Truth Commissions deal with the past. They investigate continued patterns of abuses and not specific, isolated, cases; they operate for a fixed period of time and submit reports summarising their findings. Usually they are official bodies sanctioned by the State and normally have as goals to: unearth, clarify and formally acknowledge past abuses; respond to the needs of victims; help create a culture of accountability; outline institutional responsibility and possible reforms; advance the prospects of reconciliation and reduce conflict over the past.

Truth Commissions may tackle some of the problems of individual responsibility of the criminal justice system, allowing for findings of collective responsibility. But this is not always guaranteed. In the case of South Africa, the perpetrators of heinous crimes were effectively given freedom in exchange for a “bit” of truth telling, while victims and their families were generally denied access to the courts. Truth prevailed over justice, understood in a procedural sense as prosecution in the courts, imputation and prison sentences.

Another relevant feature of Truth Commissions or similar mechanisms is that they can facilitate enquiry into the *why* of conflicts and systematic human rights violations, the policies that brought them about and the effects of those policies on the

actors and sectors in society to an extent that is not possible in (traditional) criminal justice focused on individuation of responsibility—on the *what*, or, if at all, the *how*.

But what about historical memory? Is it a necessary corollary of truth? Is there a risk that truth, as quasi-officially established by the Truth Commission, might fade away from a community's ethos? Is it futile to impose a duty to memory? Perhaps we should also contextualise an obsession with “memory” from a historical perspective.

2.2. *The dynamic perspective*

Time and a dynamic perspective are the essence of TJ. To conceive a theory of justice along transitional lines means to replace the traditional “static”, “fixed” approaches to justice as those advanced by contract-theories with more dynamic and contextually-oriented judgment approaches (Corradetti, 2013). The first step and requirement of transition is to decide to face up to the past. Does facing up to the past rule out amnesty and amnesia? And what if amnesty is itself the end result of a collective societal process that has examined the past and decided to forgive or forgo criminal sanctions? The type of past being considered may be relevant and the answer to amnesty may differ when comparing dictatorships, states of exception, repressive regimes, wars and war crimes, as well as when taking into account the networks and constellations of power and interests around the transition: perpetuation of elites, access to resources, social control and security, political party leadership, competition and authority in steering transition, national sovereignty interests, institutional clashes. Examples are: military versus security forces, military and security versus judiciary, executive versus legislative, executive versus judiciary, legislative versus judiciary, judges versus procurators, or judges versus prison officers. Amnesty is already a problem, but amnesty plus amnesia can be a direct affront to victims. Healing and reconciliation seems impossible then.

The second phase is transition itself, but transition towards what? Transition to peace and civil society, overcoming enemy status and recognising each other as relevant others. Honneth (2004: 354) argues that experience of social injustice is measured in terms of withholding some sort of recognition considered to be legitimate, and in that sense some form of moral progress results when sensitivity is gained and recognition is directed towards individuals, communities and situations previously ignored and deprived of due recognition. TJ can thus contribute to moral progress.

3. Transitional justice from the EU to the Basque Country

This section reconstructs an institutional framework to the policies on TJ in a multilevel European setting. The examination will not be exhaustive, but will rather be indicative or illustrative of the issues addressed.

3.1. European integration as TJ: the EU experience

The whole idea of European integration from the Schuman Declaration to the latest accession—Croatia, July 2013—is, arguably, about TJ. It concerns war atrocities perpetrated by all belligerents, genocide by totalitarian regimes, societies devastated by World War II, and civil wars in many of the Member States towards democratic societies. But European integration was also designed in the background of Cold War “peace” and the urgent reconstruction needs of post-war towards greater peace. In the aftermath of World War II, forgetting, not remembrance, was considered a legitimate approach towards the past (*i.e.* Adenauer’s politics, Vichy “myths” in France, neglect of Holocaust memory in all European countries, etc.).⁹

An analysis of a TJ policy of the EU would distinguish external relations—external action—from domestic or European instances of TJ. The EU has become involved in TJ throughout the world as part of its external policy and through its support for international tribunals and the ICC. As regards the European dimension, there is arguably no TJ policy as such, in the sense described in part two. Still, a three-pronged analysis or approximation can be carried out.

First, association agreements and pre-accession to the EU can be seen as a potential form of TJ. They impose satisfaction of the democracy, rule of law and human rights tests in order to accede to the EU. There is a double risk of complacency in this approach: (i) thinking wishfully that because a Member State is part of the EU and has passed the test (Copenhagen criteria), there will be no longer any serious human rights issues; and (ii) thinking that simply because a measure is produced by the EU, it will automatically satisfy all the quality standards of respect for fundamental rights. One hopes the accession of the EU to the European Convention of Human Rights will fill this gap.

Second, the EU’s involvement in conflict-ridden regions of the (Member States of the) EU is another process with traits that relate to the TJ toolkit. The

PEACE program is worth mentioning in this regard.¹⁰ This has been possible because of the many peace initiatives internal to Northern Ireland, but also because there has been an active involvement of the two Member States concerned—the UK and Ireland—thereby recognising a significant “European” dimension to the resolution or transformation of the conflict, which ceases to be an internal question to the UK or to Ireland. This is a key difference with the Basque case, as neither Spain nor France recognise there is any conflict to begin with. To the extent that the EU itself might consider that there could be any issue of TJ in the Basque Country, this would be considered “purely internal” to Spain. As a consequence, the EU does not consider itself permitted to mediate or intervene in any way or to favour any particular instrument of TJ.

Third, and finally, a “politics of memory” is gradually taking place in different parts of the EU, and some support from institutions like the European Parliament helps to consolidate these different forms. The political discourse on memory has been channelled mainly around several constitutional moments: the construction of European integration post-World War II; the Greek, Spanish and Portuguese accessions to the EU following their transitions from dictatorships, the Eastern enlargement in 2004 (and then 2007) and the most recent accession of Croatia as a prelude to a discourse on memory in the former Yugoslavia.¹¹ The discourse on memory can also apply to a new wave of post-conflict transitions in Northern Ireland and the Basque Country.

According to Carlos Closa, ‘claims on memory in the EU are claims for recognition and, because of this, the way in which they are addressed contributes to the construction of an EU-specific model of identity at the level of specific nations within the EU and at the level of European (EU) identity’ (Closa, 2011: 5). Whereas Europe—the EU and the Council of Europe—provides minimal control of TJ measures on the basis of human rights, it defers and shows comity to the constitutional and legislative choices made at the Member State level. It is revealing that the EU Agency for Fundamental Rights should not have any specific activity related to TJ.

The work carried out by the Council of Europe has excelled in innovating traditional justice mechanisms with the system of the European Convention of Human Rights and its Strasburg Court, but the UN Human Rights Committee has also been innovative.¹² At the same time, vetting democracy in the former Eastern block

through the Venice Commission on Democracy through Law can be seen as a further, interesting experiment in TJ. The Council of Europe combines tools of traditional and transitional justice. Another key European player on TJ is the Organisation for Security and Cooperation in Europe, following from the Helsinki Final Act of the Conference.¹³

3.2. Transition in post-Franco Spain

Spain lived its own transition to democracy from dictatorship, but insofar as it did not face up to the past, it did not really undergo *transitional justice* in the sense discussed in part two. Rather, in order to democratise, it aimed at *transformative constitutionalism* (Klare, 1998), expecting the entry into force and implementation of its 1978 Constitution to transform the entire social system, not only the legal and political systems, without removing a single official from the dictatorship. Spain combined amnesty and amnesia through a sort of “pact of forgetting” (*pacto de olvido*). This was particularly clear in the 31 year period spanning from the 1977 Amnesty Law 46/1977 to the 2008 Law 52/2007 on Historical Memory, and perhaps to this day. The need to preserve “peace and order” and to ensure a certain version of “*la transición*” prevailed.¹⁴ Human rights violations were committed from all sides during the civil war and then by the Franco regime. ETA and anti-Franco armed groups, later labelled as terrorist groups, also engaged in human rights violations, initially targeting State police and later generalising their attacks indiscriminately on politicians and civilians. ETA has been active between 1968 and 2011, but only post-amnesty violations (post-1977) have been addressed by the law and by official policy. The past was brushed aside. Pardon or amnesty has been interpreted as clearing anyone involved in State or paramilitary abuses. Perpetrators were, and are, protected both from criminal charges and from civil liability, which amounts to a denial of justice in transition. Official records of past events have, in many cases, been destroyed, or “expunged”.

Forgetfulness, of course, is a non-solution:

forgetting cannot serve as the basis for peace-making. It is destructive on both the individual and collective levels. It compounds the suffering of individuals by forcing them to watch their tormentors walk around freely, re-enter politics, or maintain their posts in public service and the military. All of this takes place while their own painful memories and traumas remain unacknowledged.

Furthermore, policies advocating forgetfulness decrease the chances that victims will be compensated for their suffering (Eisikovits, 2009).

This approach suits Spain really well (Tremlett, 2006; Encarnación, 2008). I argue that it was really a strategy for nation-building: the crimes perpetrated by the Franco State, itself an illegitimate regime that ousted the lawful and constitutional Spanish Republic, were seen as “necessary” to safeguard the unity and indivisibility of the Spanish nation (now safeguarded through Article 2 of the Spanish Constitution).

Eisikovits (2009) relies on Ernest Renan (1882) to make this point. Renan admitted that “forgetting” and perhaps even “historical error” are essential in the creation of national identity: ‘the essence of a nation is that all individuals have many things in common and also that they have forgotten many things’. But, have they simply forgotten or have they chosen to forget? What if all parties involved in a conflict really wanted to forget? What if there is a tacit or explicit agreement not to dwell on the past? And what if it were a deal to ensure impunity? Was the Amnesty Law abused in its Article 2 so that crimes and offenses committed by State officials—generally civil servants, military, judiciary, police, secret agents—could go unpunished and their perpetrators continue safely in office? Should future generations be bound by such *realpolitik* dealings? No convincing answers have been found for these questions, but the UN Human Rights Committee has requested Spain in 2008 to abolish its Amnesty Law.¹⁵

Article 2 of the Amnesty Law is the basis for the Supreme Court’s refusal to authorise, under Spanish law, any inquiry into the crimes against humanity that may have been committed during the Franco *coup d'état* and the dictatorship.¹⁶ The Court denies the relevance of international instruments of human rights. The first legal ground formulated by the Court is that ‘the right to know historical truth is no business of criminal procedure’. This statement goes against at least two of the four pillars of the modern international legal system: international human rights law, international humanitarian law, international criminal law, and international refugee law.

Closa (2011), also relying on Renan (1882), considers that nations are:

quintessential to the construction of justice models because they are based on the thick glue of national identity. Strong demands for justice in different spheres are made and are often met within nations. Indeed, justice within nations reaches the spheres of redistribution, retribution, reparation, rehabilitation and, naturally,

recognition. Identity (national identity) possesses an enormous capacity to provide social meaning to social goods. Among these, goods linked to recognition and memory policies and the recognition associated with them fulfil an important identity function in nations. They serve to convey the identity of the nation over time; to re-create the community and to give it a sense of temporal continuity and coherence. (Closa, 2011: 19)¹⁷

In the Spanish transition, only the future shape of constitutional society was really debated, and the transition period itself—which is considered to have concluded with the failed *coup d'état* of February 23, 1981 and the victory of the Socialist Party in the October 1982 general elections—was a lost opportunity to think collectively about the failures, injustices and repressions of the past, many of which carried over to the transition period. The general understanding was that discussing the past would be hazardous, whereas discussing the future would wash out the past and provide automatic catharsis. The Law on Historical Memory came late, long after transition was completed. It was a form of post-transitional justice.

The monarchy secured transition and also its inherent injustice. The judiciary, intelligence and police forces, the military, and the State administration were all secured from the dictatorship and not only left intact, but allowed to continue and often promoted. Only the representative political institutions—local and national assemblies—or the new organs, such as the Constitutional Court, were staffed by persons not directly linked to the regime. The attempts at TJ in Spain have been circumscribed to a policy of “historical memory”. In the few instances where truth-seeking through judicial means has been explored, they have been curtailed, as the Garzón case illustrates (Bengoetxea, 2011). The Law on Historical Memory tries to recover a democratic memory to claim the narrative of the victims of Francoism and to value to the Second Republic and the 1931 Constitution, thus facing up to the hegemonic political narrative of “transition” that has legitimised the current constitutional system (Escudero, 2013).¹⁸

The majority of Spanish legal and political culture does not interpret the treatment of ETA violence and its human rights violations as having anything to do with TJ, but rather as a mere application of the criminal justice system to ordinary crime. The issue of victims and the policies and laws designed to recognise and repair (part of) the damage caused to victims has also come late.¹⁹ Whereas many victims’ organisations do carry out a discourse that relates to TJ, this discourse sometimes

serves as a call to enforce retribution and punishment under the criminal justice system. In a sense, TJ is discarded in favour of traditional criminal justice.

The picture would not be complete without the inclusion of considerations of the French Pays Basque. France was a sort of sanctuary for ETA activists during the Spanish dictatorship, and although Basque national movements developed also there, and even armed wings of ETA like *iparretarrak* were set up, ETA refrained from striking in France. Its first mortal victim related to the French State happened in a road control shooting near Paris in 2010, and it may have been fortuitous.

France had its own dubious history during the Vichy regime, and collaboration by its leader Philippe Pétain with the Nazis was not rare. Facing up to the past came late there as well, but France had its own atrocities in Algeria in the colonial period. France has always treated ETA as a Spanish problem. However, police cooperation was enhanced since the mid-1980s and the European arrest warrant came into effect in the early 2000s, followed by some recent episodes concerning its application not only to ETA prisoners but also to political activists that the Spanish prosecutors considered to be “members of ETA”—the case of Aurore Martin, political leader from the French Pays Basque—which shows that France is actively involved in cooperating with Spanish intelligence in their general policing of ETA and its “environment”. The same criminal justice system approach is followed regarding ETA. The common approach in France and Spain has thus been generally to avoid TJ, truth commissions and similar mechanisms.

3.3. Transitional justice in the Basque Country

The Basque Country lived the *transición* in a particularly intense way. Aguilar (2001) points out that during the transition, almost all actors were aware of the need to repair damage to the victims of the first years of “Franquism”, with the result that later repressive episodes—those of the 1960s and 1970s, which were lower in numbers—were somewhat neglected.

In the Basque Country, however, violence had a higher visibility, given that repression was more severe [than in the rest of Spain] precisely during the second half of the dictatorship, after ETA began carrying out terrorist attacks. This explains why the absence of retroactive justice was criticized more in the Basque Country than elsewhere. Indeed, reservations regarding the nature of the transition process as a whole are much greater in the Basque Country, particularly among the Nationalist electorate ... continuity in terms of personnel

in repressive institutions helps to explain the lower level of legitimacy of democracy among the nationalist Basque electorate. (Aguilar, 2001: 117)

TJ in the *current* Basque Country does not refer to regime change. Rather, it refers to a field and a scenario after the final ETA ceasefire²⁰ where measures are agreed and adopted as regards the past (truth seeking, historic memory); as regards the present (recognition of the harm caused to victims and to society generally, full respect of human rights and procedural guarantees by the State and all its organs); and as regards the future (the total dismantling of ETA, the decommissioning of its arms, the facilitation of progressive and gradual measures towards ETA prisoners' social inclusion). The future horizon for such TJ would be a new scenario where the conflict and the human rights abuses committed in response to the conflict are part of collective memory and serve as a foundation of the social contract for peace and respect for all.

We analyse here only the southern, Spanish part of the Basque Country, and concentrate on the Basque Autonomous Community, leaving aside the special and important case of Navarre. As mentioned in part one, it is important to take the dynamic system of competences into account. The criminal justice system is a competence of the Spanish parliament (criminal law generally) and government (criminal policy and penitentiary policy and administration), and the judiciary is a centralised power of the State. Attorneys or public prosecutors are only relatively autonomous, functionally and organically, since there is ultimately a functional and political link with the Spanish executive.

The types of measures (hard or soft) that can be adopted by different levels of governance and institutions depend on the distribution of powers and competences. The scope for legislative action (hard law) of the Basque institutions in the justice sphere, and also of TJ itself, is very limited, if not completely absent. It is limited to social welfare, soft measures, and the handling of the Basque police. In spite of those shortcomings, since 2007 the Basque Parliament and Government have managed to take some significant steps in relation to TJ: they have drawn up expert reports on victims²¹ on both sides of the conflict and adopted measures and decrees seeking some form of relief, as will be explained below.

All the Basque autonomous institutions—government, parliament and its federated institutions, provincial parliaments and governments and their

municipalities—can use their instruments and agencies to adopt recommendations, plans, and petitions, and to host high-level meetings, peace conferences and similar activities, but they have a very limited scope for adopting specific laws, so long as these laws do not have bearing upon the criminal justice system, a competence of the State. When there is agreement between all institutions involved it becomes possible to adopt small-scale measures of TJ in the area of penitentiary policy and to facilitate the transition from retributive to restorative justice.

Significant institutional measures of TJ taking the form of “hard law” are two Basque Parliament Acts—one on victims of terrorism (4/2008) and another on the recognition of the rights of victims of crimes committed during the civil war and the dictatorship (52/2007)—and the Basque government decree on victims of police abuses between 1960 and 1978 (Decree 107/2012).

Other institutional measures take soft law forms, as policy instruments, recommendations or projects, like the Basque Parliament Commission on Peace set up in September 2013 with the aim of elaborating a Report on Peace;²² the projects for an Institute of Memory or for a Memorial for the Victims of Terrorism; the Basque Government Plan for Peace and “Living Together” of June 11, 2013, containing proposals for action and social encounters in education (schools and universities) in line with those already launched under the previous Socialist Party government; and, at the local level, initiatives such as the Gipuzkoa Provincial Government Plan for Human Rights, Recovery of Historical Memory and Spreading “Living Together”²³ 2012-2015.

TJ is not only about the institutional side of governance (top-down). The civil society bottom-up component is essential, and this is no longer the ambit of constitutional distribution of competences or decision-making by legislatures, courts and executives. There is a broad scope for social initiatives by social movements, citizens, NGOs, and for *auzolan* (community cooperation in Basque). Indeed, it is mostly these bodies and groups that are bringing about a wave of civil society-based TJ, often with the support of the different Basque institutions.

Significant TJ measures are the result of social initiatives by citizens and NGOs aiming at the de-legitimation of political violence like the 15 minutes of silence organised by *Gesto por la Paz* (“a signal for peace”) whenever a person lost her life due to ETA terror or other related actions, including those of State security forces. More recently, *Elkarri*, and later *Lokarri*, applied the philosophy of dialogue

and mediation to call on ETA to end its actions and on the State to change its anti-terror law and policy. Some victims' organisations, and organisations supporting prisoners' rights, have also adopted initiatives. More recently, and more sporadically, Bake Bidea and the May 2013 "social forum" organised major events with the participation of international observers calling on ETA to start talks with the State towards its dissolution (El País, July 15, 2013).

Some of these initiatives have received institutional support from the Basque (PSE and PNV) government, and from the previous Spanish (PSOE) governments.²⁴ Two relevant examples are the meetings between victims of all sides of the conflict, namely the Glencree project—after the Northern Irish town where the restorative meetings took place—and the meetings between ETA victims and perpetrators in the Nanclares prison. An example of such initiative under the previous PSOE (Spanish Socialist Party) government is the so called "Nanclares way", where ETA prisoners and their victims engaged in face-to-face conversations (Bilbao, 2013; Deusto Forum, 2012).²⁵ The Popular Party (Spanish right-wing party) government in power since 2011 discontinued this initiative.

Finally, other measures take place at the local and micro level. In October 2013, one of the many initiatives was the International Peace Conference of Mayors convened by the Mayor of Donostia-San Sebastian. Some of the Basque mayors participating in the conference told their experience in bringing together victims of all sides of the conflict and sharing their experiences. The case of the town of Erreteria is worth mentioning in this sense because it brought together victims from all sides of the conflict and managed to reach a relatively high consensus between the local branches of the main political parties. Other projects are implemented in specific contexts like the University of the Basque Country.

The Basque contribution to TJ may consist of awareness of the importance of extending recognition of those who had been excluded from view in the discussion of political debates and in involving them in joined discussions of the future; this includes victims on all sides of the conflict, but also all political options like the different forms of *Batasuna* that had been declared illegal in the mid-2000s.

4. Twists in Basque transitional justice

The narrative in the Cano's novel twists from the violence and human rights violations by ETA—inflicted directly on victims and also on all those who felt

threatened simply by confronting it—to the abuse of force and human rights violations carried out by State organs and paramilitaries in the fight against ETA and the so-called Basque national liberation movement MLNV.²⁶ State violence has gone beyond those targets to include and criminalise its socio-political “environment” (*el entorno del entorno*) (El País, July 13, 2013). These twists historically created a spiral of violence: repression-reaction-repression-reaction. ETA and its socio-political environment adopted its *Oldartzen* strategy, which was aimed at intimidating through threats or violent acts whole sectors of civil society that openly disagreed with their “cause” or their methods, and as a response to this the Spanish criminal justice system adopted some traits of exceptional law or “criminal law of the enemy”,²⁷ *i.e.* treating the Basque case as an exception that would justify lowering human rights standards in the fight against terrorism. This would bring about a deterioration of democracy and the rule of law.

Recent examples of TJ twists are: the communiqué on the eve of the second anniversary of the ETA declaring a final ceasefire in October 2011; the detention of the 18 representatives of *Herrira*, the NGO that supports the rights of ETA prisoners; the trial against members of *SEGI*, the nationalist left youth organisation that followed the work of the illegalised *Jarrai*; the opening of the trial for case 35/02 before the *Audiencia Nacional* where several ex-leaders of the nationalist left are being prosecuted for membership in ETA and over 100 popular taverns (*Herriko Tabernak*) could be confiscated for engaging in illegal activities in support of ETA; and the protests and demonstrations organised by some ETA victims’ organisations after the Grand Chamber of the European Court on Human Rights issued its ruling on the *Del Río Prada v Spain*²⁸ case on October 21, 2013. The judgement referred to a “justice” *with victors and defeated*; some victims openly called on the Spanish Government not to apply the judgment and criticised the government for not having sufficiently lobbied the Spanish judge in Strasbourg.

Trying to ensure that victims participate actively in the processes of memory and reparation, in defining the policies and measures of TJ, and in political debates in general, is also important. For this purpose, it is essential not to make distinctions between victims, *i.e.* between victims of one group or one camp vis-à-vis victims of other camps. Distinguishing victims depending on the actors who victimised them implies accepting the categories and labels attached to the victims by the perpetrators. Likewise, the status of victim is not lost in cases where that victim has also been a

perpetrator, a risk often detected in torture-justifying discourse, or in the lowering of procedural standards for “terrorists”. Ensuring victim participation should not extend to affording victims a privileged position through veto powers. Victims are to be treated like all other citizens in political deliberation—but special efforts should be directed at having their voices heard.

Seeing the risk behind these twists, a series of principles can be identified on which a possible agreement should be based. The first principle is the need to limit and keep to a minimum any recourse to criminal law and the criminal justice system when considering not only TJ options, but also, more generally, the treatment of conflict itself. Acts that are not directly related to the commission of crimes and harm against others should not be dealt with through criminal law. The principle of *Ultima Ratio* (Bengoetxea *et. al.*, 2013)—*i.e.* not abusing criminal law to punish all types of conduct, but only the most harmful and blameworthy—together with the principles of democracy, legality, and proportionality should inspire the criminal justice system.

There is also a twist from individual to structural responsibility. As was mentioned in part two in the discussion of some key issues in TJ, a dilemma haunts the use of criminal law in “transition”: does the unique nature of mass atrocity, wherein numerous people harm others with differing degrees of acquiescence and direction from a large bureaucratic class really lend itself to the legalistic commitment to individualising guilt on the basis of direct evidence? Or do the distinct features of such crimes require relaxing our standards of individual responsibility so as to implicate the entire State structure that made the atrocities possible? An application of this dilemma to the Basque context would lead to considering responsibility of the State apparatus behind the paramilitary groups or in the cases of allegations of torture in which the structurally protected torture practices make it difficult to identify the perpetrator. The same difficulty of identifying the individual actor has been no obstacle however for the State prosecution in support of the criminal theory that treats all the social movements around the Basque nationalist left as “part of ETA”. Under this view, there is no need to identify individual criminal acts, since *belonging*, showing signs of support, sometimes is enough to be brought under the label “member of a terrorist group”.

In *Twist*, these dilemmas are symbolised in the judgment against the torturers: Lazkano fails to appear in court to testify as a witness and identify the torturers; we are not told of the details of the trial, only of its preparation by the lawyer. We do not

really know what happened: was he offered a plea bargain to be cleared of any charges? Was he shocked by the news of the whereabouts of his father? The result is that the trial against the torturers failed to deliver.

The second principle on which agreement should be built is inclusive memory, to create the possibility for the whole society to engage in an ideal rational discourse on memory: what happened and how and why it happened. Memory and truth narratives—how the conflict is told—are especially important. The novel *Twist* is itself the telling and unveiling of a very intricate past, where victimisers become victims and vice-versa. Moreover, one should not forget the special power of the media in constructing narratives. *Twist* interestingly features a journalist changing positions in the media world and having to adopt and provoke sensationalist positions on the conflict, and then not being able to put up with it, travelling to Paris, turning to sports, before exploring new frontiers in the web. Pluralistic and participatory mass media and opinion-creating circles should contribute to an ideal discourse situation where narratives are twisted and tested.

Twist contains little on reparation to victims, but this is another crucial aspect of TJ. The third principle would thus be reparation. Reparation of harm and damage caused to victims—almost 900 killed by ETA with over three thousand other direct victims and over 2000 victims of State-related violations—is one logical consequence of the knowledge and recognition of the past. Recognition is the first step of reparation, but obviously forms of expression of sincere regret on having caused the harm are to be welcomed. Reconciliation is one of the most difficult tasks, and interestingly *Twist* does not give us redemption, only scars and escape routes, disappearing and avoiding, only occasionally confronting. Some ETA victims have openly declared that the only way to ensure reparation for them is to see ETA members ‘rot to their final days in jail’.²⁹ In *Twist*, former ETA activists, and former torturers appear living relatively normal lives in a context where, presumably, violence has ceased. A former torturer is acting in a Chekhov play; the protagonist does all sorts of things. Some “disappear” and re-emerge; others fade away.

The fourth principle inspired by TJ would be the guarantee of non-repetition and facilitating the social inclusion of former perpetrators. For prisoners who have been involved with violence and human rights violations, it would be desirable to adopt an overall strategy agreed by most political parties in the Basque Country. The very urgent measure is to release those prisoners who have already served the

sentence declared in their judgments in line with the *del Río* judgment of the Grand Chamber of October 21, 2013.³⁰ Additionally, those prisoners who have irreversible diseases could and should have been released if the existing penitentiary legislation had been correctly applied. No more is required than to apply the existing penitentiary legislation.

A political agreement on ETA prisoners has not yet been reached, even amongst Basque national parties. Such an agreement could deal with issues like recognition of harm caused, regret, repentance, asking for sincere pardon, analysis of the actual crimes perpetrated, length of prison term already served, and time left, making sure society is satisfied with a general solution, and also a comparison with the prison terms served by representatives of the Spanish State condemned for violations of human rights. The agreement could further deal with the conditions under which the sentence is served, *e.g.* prison regimes, how far from the family the prison is located (the policy of dispersal and distancing, sometimes over 800 km was started in the mid-1980s and is generally considered unfair and an additional punishment on prisoner and relatives). The general discussion on the principle of *Ultima Ratio* should also extend to a discussion of prisons and incarcerations.

Just as there are interactions between the interpretative and normative approaches to TJ, there are also connections between individual and collective perspectives. Feelings of pardon, revenge, guilt, remorse, pain, hatred, despise, mistrust and indifference are individually felt, but collectively reconstructed, and the social and political meaning given to them goes beyond the individual experience. This again poses a challenge to the traditional criminal procedure individualising guilt and responsibility, as opposed to the often collective responsibilities. It also affects the narratives of conflict, since an individual criminal sentence hides the social dimension of crime and conflict.

The interest of society normally lies in facilitating the transition from a destructive relationship to a constructive one, and this is something individuals concerned will experience in different ways. A victors' justice that insists on the strict application of the law for some perpetrators, "terrorists" and "enemies" while excusing, condoning or minimising the seriousness of other violations of human rights by organs of the State is a real obstacle to such transition. It distorts memory and combines over-punishment for foes with impunity for friends. Likewise, pretending that a unilateral ceasefire, important though it is, should be sufficient in order to ensure a

smooth and rapid “transition” is a serious mistake, the same mistake that was made in the Spanish transition. It avoids memory and recognition of harm and re-victimises not only direct victims but society at large. TJ should explore the terrain between those two pragmatic contradictions,³¹ always under the guidance of respect for human rights, as defined and understood by international law.

Conclusion

The title of this contribution suggests that there may be tension, *i.e.* a twist, between traditional and transitional justice. The general discussion of the field and its application to the Basque case shows, in my view, that both strategies are needed, and that they need not contradict, but can rather complement each other. A scenario of justice and rule of law after the violence and conflict of ETA is necessary given the immense harm ETA has caused to Basque and Spanish societies. But it is also a scenario of justice, rule of law and fundamental rights after abuses made by the State in the fight against ETA, which has extended abuses to Basque society generally. Addressing the justice issues regarding political violence and crimes will require a combination of tools from the field of TJ like truth-seeking, access to justice outside the formal institutional criminal law, and forms of reparation. It will also require that the State and its officials apply their traditional justice with full respect for human rights. As regards the State and the criminal justice system, given that TJ measures have been so limited, it may be better to start by restoring the rule of law, human rights and democracy and abandoning the consideration of the Basque conflict as an exception that justifies lower human rights standards.

Notes

- 1 Report of the Secretary General of the UN to the Security Council, ‘The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies’, S/2004/616 of August 23, 2004. Paragraph 8 provides a notion of transitional justice, as comprising the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.
- 2 Making a twist we should add that on that very day, ETA murdered Reyes, a civil guard in Oñati.

- 3 This section closely follows Corradetti (2013).
- 4 As an interesting example of religious approaches to TJ, Archbishop Desmond Tutu, called his book on South Africa's Truth and Reconciliation Commission *No Future without Forgiveness*, as a plea to forgo resentment and learn to forgive each other. Likewise, the role of Harold Goode and Alec Reid in Northern Ireland are worth noting. Remember also Monseñor Romero or Ignacio Ellacuria.
- 5 As an area of structured, socially patterned activity or “practice,” disciplinarily and professionally defined (Bourdieu, 1987: 805). For TJ as a “field”, see Bell (2009).
- 6 As Closa (2011: 26) aptly reminds us, the 1985 UN Basic Principles listed restitution, compensation and assistance as mechanisms for justice. The 1998 Statute of the ICC (Article 75) established that the Court must create instruments for reparations such as restitution, indemnities or rehabilitation. The 2005 UN Basic principles and guidelines listed the following restorative mechanisms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. With these guidelines, the UN moved towards sanctioning functions beyond restorative justice for reparation: satisfaction (for victims) includes verification of truth, an official declaration or judicial decision restoring the dignity of victims, public apologies, commemoration and tributes to victims.
- 7 *Nunca Más* in Argentina, Chile where the truth commission’s work provided evidence to support the Spanish extradition request that eventually led to Pinochet’s arrest in Britain, and the report ‘From Madness to Hope’ in El Salvador, instrumental in shaming and ultimately removing from service some of the military officials accused of especially egregious abuses. There are other instruments besides international tribunals and TCs, like vetting the democratic nature of institutions and procedures, laws on memory, on victims, on the recognition of past events (genocide, war atrocities, ect.), and even laws of amnesty in certain cases.
- 8 Hayner participated in a seminar on proposals of TJ for the Basque Country organised in Donostia-San Sebastian on October 17, 2013, to commemorate the second anniversary of the Aiete Declaration. I had the honour to moderate the expert panel she and Pierre Hazan shared, and have drawn important clues from both experts and from the entire seminar for this contribution.
- 9 I owe this point to Siina Loytomaki, University of Helsinki, with a reference to Judt (2006).
- 10 In June 2011 Commissioner Hahn officially opened the “PEACE Bridge” in Derry-Londonderry alongside the political leaders from Northern Ireland and the Republic of Ireland. The PEACE Bridge is one of the more iconic projects supported under the PEACE III Programme with an ERDF contribution of 11.2 million euro. Derry-Londonderry became an increasingly divided city during “the troubles” seeing thousands of Protestants moving away from the west bank. The PEACE Bridge has now physically united both sides of the riverbank and its design represents a symbolic handshake across the River Foyle. It is a powerful new symbol for the city, physically and metaphorically, linking communities on both sides and for whom the river had become a significant religious and sectarian divide. Peter Robinson, First Minister of Northern Ireland, said: ‘We now enjoy relative peace and stability after a period which saw 3000 people murdered and tens of thousands injured. The input of the EU has been crucial. It has supported thousands of projects across the province to build a better and shared future for our people.’
- 11 Slovenia being a special case.
- 12 See on this point Macklem (2005).

- 13 According to its website, www.osce.org, the OSCE offers a forum for political negotiations and decision-making in the fields of early warning, conflict prevention, crisis management and post-conflict rehabilitation, and puts the political will of its participating States into practice through its unique network of field missions. TJ is dealt with under the heading Conflict Prevention and Resolution.
- 14 One of the most comprehensive and balanced studies of Spanish transition is by Aguilar (2001). Aguilar mentions risk-aversion as a key factor.
- 15 In its Concluding Observations on Spain in 2008 (CCPR/C/ESP/CO/5/, October 27, 2008), the Human Rights Committee held that: ‘The State Party should: (a) consider repealing the 1977 amnesty law; (b) take the necessary legislative measures to guarantee recognition by the domestic courts of the non-applicability of a statute of limitations to crimes against humanity; (c) consider setting up a commission of independent experts to establish the historical truth about human rights violations committed during the civil war and dictatorship; and (d) allow families to exhume and identify victims’ bodies, and provide them with compensation where appropriate.’
- 16 In its judgment clearing Garzón of the charges of “prevaricación” (knowingly misapplying the law) concerning his initial investigation of crimes against humanity perpetrated during Franquism, STS of February 27, 2012, the Spanish Supreme Court considers that Spanish transition was exemplary.
- 17 Closa does not address the issue of different nations within the same territory competing in this memory narrative, especially when one national majority imposes its “memory” on other national minorities.
- 18 According to Escudero (2013: 338), ‘in the hands of the Tribunal Supremo, the Amnesty Law is a safe way to impunity, a victory of dictatorship and of its crimes over the democratic state and its victims’.
- 19 Spanish Parliament Acts Ley 32/1999 on Solidarity with Victims of Terrorism, and Ley 29/2011 on Recognition and Complete Protection of Victims of Terrorism. Only victims of terrorism are recognised and protected.
- 20 The final ceasefire was brought about by a combination of factors including police cooperation and gained efficiency in the fight against ETA, a hardening of legal and judicial measures, but mostly because of loss of popular support and the strong opposition of most social movements. There were talks and negotiations that facilitated this ceasefire including clandestine peace talks through international mediators, verification and support committees, peace conferences, open deliberations with institutions and civil society like the Brussels Declaration of March 2010 by Nobel Price and other prestigious facilitators, the Gernika Agreement of September 2010 calling on ETA to declare a final ceasefire, the Aiete Declaration of 17 October 2011 which brought the final ceasefire three days later.
- 21 Whereas the Report and the 4/2008 Law on the Victims of Terrorism entitled ‘*Ley de Reconocimiento y Reparación a las víctimas del Terrorismo*’ was relatively easy to get through, the 2011 Report on the ‘other victims’ was amply discussed and its long title reveals the compromises behind it: ‘Report on Victims of Human Rights Breaches and Unjust Sufferings produced in a Context of Politically-motivated Violence’.
- 22 It is not clear how much progress can be expected from this Committee since the Basque branch of the Spanish Popular Party, crucial for any agreement at a larger, Spanish scale, has decided not to participate and the Spanish Socialist Party branch of the Basque Country has followed suit.

23 Living together is the euphemism for reconciliation in the Basque Country both in Spanish, “*convivencia*”, and in Basque, “*bizikidetza*”. For some reason, reconciliation is avoided as excessively ambitious or pretentious, even quasi-religious.

24 PSOE is the Spanish Socialist Workers Party, and PSE is its Basque branch. PNV is the Basque National Party.

25 Nanclares is also the name given to the plans of the former Spanish government to facilitate individual measures of re-socialisation by ETA prisoners who renounce violence and adopt a self-critical standpoint on their violent past. This is a crucial issue since ETA as a group tries to keep the prisoners as a tight coherent block seeking group solutions and avoiding self-critique, an amnesiac strategy.

26 On the ideology behind the MLNV, the so-called Basque national liberation movement, see the insightful work by Bullain (2010).

27 Rafael Sainz de Rozas in a Conference on Transitional Justice in the Basque Country, held in Aiete Palace, San Sebastian, on October 17, 2013, characterised this exceptional criminal law by three traits: loose and vague definition of crimes of terrorism, excessive punitiveness with disproportionate penalties and downgraded legal guarantees. The term “criminal law of the enemy” was coined by Jakobs (1985).

28 The details of the case are highly technical, (Application no. 42750/09, European Court of Human Rights Judgement of July 10, 2012, confirmed by the Grand Chamber on October 21, 2013). It boils down to the calculation of the time served in prison after the individual judgment was rendered providing for the length of prison. The 1973 Franco period criminal code contemplated the possibility of remission, reducing from the length of the declared prison time the days worked in prison or the education carried out while in prison. The 1995 criminal code abolished this possibility and the Supreme Court in its judgment no. 197/2006 of February 28, 2006 concerning ETA prisoner Unai Parot, decided that sentence adjustments (*beneficios*) and remissions were no longer to be applied to the maximum term of imprisonment of thirty years, but successively to each of the sentences imposed. This new doctrine, known as Parot doctrine, condoned by the Constitutional Court, was retroactively applied to ETA prisoners and some other criminals serving sentence under the 1973 code, among them Ines del Río who brought the case against Spain before the European Court of Human Rights.

29 Ordoñez, representing the Association of Victims of Terrorism, AVT, literally said in a TV (*Telecinco, Abre los ojos y mira*) programme on Saturday evening October 26, 2013: ‘que se pudran en las cárceles’.

30 For the *del Río* case, see note 28. It concerned the so-called *Parot* doctrine developed by the Spanish judiciary (Audiencia Nacional, Supreme Court and Constitutional Court).

31 Interview with Carlos Martin Beristain, in Galde (2013: 6): ‘recognition of the many faces of suffering, of human rights violations and liability of the State need not imply equalising all processes of victimisation nor any form of symmetry of harms nor that all situations are comparable. It only means to recognise the importance of the issues so as to create a framework of legitimisation for the reconstruction of social fabric ... any narrative on truth and memory would therefore need to be inclusive.’

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