

The Search for Truth in Spain

Debates Around the Creation of a
Truth Commission

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Imprint

The Search for Truth in Spain: Debates Around the Creation of a Truth Commission

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Abstract

Since Spain's transition to democracy in 1975, no trials or official investigations into the crimes committed during the country's Civil War (1936-1939) and the dictatorship that followed have been conducted. Since 2000, however, demands for truth, justice and reparation have become increasingly prominent among civil society. In this context, some associations and victim's groups have asked for the establishment of a truth commission to look into Spain's violent past, a demand that has been echoed by some UN bodies and special procedures' mandate holders. This working paper seeks to examine the debates that the potential creation of such a mechanism has elicited. In particular, it discusses issues related to the timing of truth commissions, to the notion that these bodies seek to establish a single truth and to the frequently raised truth versus justice debate. Moreover, it looks at the process of the decentralization of memory laws in the country since 2011 and discusses the advantages and risks of creating regional truth commissions. In order to better grasp the discussions that this topic has prompted, the paper draws from existing literature and first-hand interviews with experts and civil society representatives.

Qué hermosa es la libertad, qué fea y triste es la prisión, siempre en mutua soledad
se me oprime el corazón por no poderte abrazar.

How beautiful is freedom, how ugly and sad is prison, always in mutual solitude my
heart is oppressed for not being able to embrace you.

Extract from a letter that Agustín García Sánchez wrote to his wife from prison

1 Introduction

In 1939, shortly after the end of the Spanish Civil War, Agustín García Sánchez and his father were arrested in their hometown of Andújar, a small town in the southern province of Jaén (Andalusia). Agustín was a militant of one of Spain's most prominent labor unions, known for its Spanish acronym as UGT (Unión General de Trabajadores), and after a 'summary trial' (or as it was known in Spain at the time, juicio sumarísimo), where he did not have the right to a defense. He was convicted to 30 years and one day in prison. After a few weeks in Jaén, Agustín was sent to Santoña, a small town in the northern shore of Spain 48 kilometers away from Santander (Cantabria), where he spent about three years serving his sentence. To the surprise of his wife and son, Agustín arrived back in Andújar the morning of January 26th, 1942 after being released. He never explained why he had been set free and he barely spoke about his time in prison. His son, who is now 89 years old, claims that he must have heard him talk about this experience not more than three times in his life, when he recalled the hunger he had experienced.¹

Human rights violations were widespread during the Spanish Civil War (1936-1939) and the 40-year long dictatorship that followed it. Like Agustín, thousands of people were imprisoned. Others were executed or forcibly disappeared.² Hundreds of babies were taken from their mothers, and thousands of people were forced into exile (Escudero, 2014). To this day, however, no steps have been taken to address the violations committed and impunity persists.

The Spanish transition to democracy after Franco's death in 1975 was marked by what has been referred to as a "pact of silence" or "pact of forgetting" (in Spanish Pacto de silencio or Pacto del olvido) and an Amnesty Law passed in 1977 that covered the crimes committed by authorities and public officials during the Francoist regime (Davis, 2005; Alija and Martín-Ortega, 2017).³ As a result, no trials have ever been held, and no official investigations have ever been conducted to look into the crimes and patterns of the violence of the Civil War and the dictatorship. Against this backdrop, various legal experts and international human rights bodies have noted that Spain has an international obligation to investigate and look into its violent past (Beceiro et al., 2016). Such an obligation is directly linked to the so-called right to truth,⁴ which is now a well-established right under international law.

The right to truth was first codified in Articles 32 and 33 of the Additional Protocol I to the 1949 Geneva Conventions, which recognize "the right of families to know the fate of their relatives" (Additional Protocol I, Art. 32, 1977) and establish an obligation on state parties to an international armed conflict to search for the missing (Additional Protocol I, Art. 33, 1977). Gradually, as enforced disappearances became increasingly prevalent during the 1970s, the notion of a right to truth garnered the attention of numerous international and regional human rights bodies. This notion was progressively expanded to other serious crimes, including torture, summary executions and other grave crimes (UN Commission on Human Rights, 2006). Today, the right to truth is recognized as both a collective right of

1 Agustín García Sánchez was my great-grandfather. Although he is no longer alive, his story lives in the memory of my grandfather, José García Olaya, who shared it with me so that I could include it in this research.

2 An enforced disappearance is defined as the "arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or groups of persons acting with the authorization, support or acquiescence of the State followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person" (ICPPED, Art. 2, 2006)

3 See Ley 46/1977, de 15 de Octubre, de Amnistía, Boletín Oficial del Estado, no. 248 (15 October 1977): 22765-22766, Articles 2(e) and 2(f).

4 According to Professor Sévane Garibian, together with the "duty to remember", the State obligation to investigate constitutes one of the corollaries of the right to truth (Garibian, 2020).

society and an individual one by most of the human rights bodies, and has been referred to in several international human rights instruments, such as the Convention on Enforced Disappearances or the Basic Principles and Guidelines on the Right to a Remedy and Reparation,⁵ as well as in several UN resolutions,⁶ and the jurisprudence of the Inter-American and European systems of human rights (Rodríguez, 2014).⁷

Since the year 2000, which marked the re-emergence of a social movement for the recovery of historical memory in Spain, claims for truth, justice and reparation have become increasingly prominent among civil society. Demands for the derogation of the 1977 Amnesty Law and the localization, identification and exhumation of thousands of disappeared persons who are still buried in mass graves have been particularly prevalent among families and memory activists (Aragüete-Toribio, forthcoming 2023). Requests for the suspension of all judicial sentences and trials conducted during the regime and for the elimination of street names and other symbols associated with the Francoist repression from public spaces have also been frequent among victims and civil society actors involved in the recovery of historical memory (Gálvez, 2006). This adds to their reiterated demands for an investigation into the crimes of the Civil War and the dictatorship, which have equally been a persistent cry of victims, families and activists (Beceiro et al. 2016). Some associations and victims groups have also asked for the establishment of a truth commission to investigate Spain's violent past, a request that has been echoed by several UN bodies and special procedures' mandate holders (Gálvez, 2006). This will be the focus of this paper, which seeks to examine the debates that the creation of such a mechanism for Spain has generated among victims' associations, scholars and transitional justice experts.

While discussions around this issue have been recurrent, the topic has received little attention from academia. In light of this, the arguments presented in this paper will draw from both existing literature and first-hand interviews in order to better-grasp the discussions that this issue has elicited in the country. The paper begins by examining how the search for truth in Spain has unfolded in order to understand the dynamics that have characterized and conditioned the recovery of historical memory. After that, it examines the different debates that the potential creation of a national truth commission for the crimes of the Civil War and the dictatorship has generated. Then, it looks at the process of decentralization of historical memory laws that has taken place in Spain since 2011 in order to understand how this has affected the search for truth in the country. The paper continues with an examination of existing initiatives for the creation of truth commissions at the regional level and a discussion of the debates that these generate. Finally, it concludes with a prospective view on the topic, taking into consideration recent developments. This research comes at a particularly relevant and interesting time for historical memory in Spain, where a new Democratic Memory Law was enacted in October 2022. The law provides for the creation of an expert commission to look into the crimes committed during the Civil War and the dictatorship, thus making this topic the more pertinent.

5 See Art. 24.2 of the UN Convention on the Protection of All Persons from Enforced Disappearance and Paragraphs 24 and 22(b) of the Basic Principles and Guidelines on the Right to a Remedy and Reparation.

6 See, for instance, UN Human Rights Council Resolutions 2005/66, 9/11 and 12/12.

7 For the Inter-American Court, see, for instance, *Bámaca Velásquez vs. Guatemala* (2000). For the European Court, see, for instance, *El Masri v. The former Yugoslav Republic of Macedonia* (2012).

2 The Search for Truth in Spain

During Franco's dictatorship, the regime sought to impose a specific narrative and collective memory of the past that depicted the Civil War as a crusade against the threat of communism and portrayed the dictator as the "savior of the nation" (Alija and Martín-Ortega, 2017, 535). Those who had lost the war were excluded from this conception of the past and were forced into silence as a way to survive the repression of the regime (Alija and Martín-Ortega, 2017). The death of Franco in 1975 marked an important shift in the political discourse. The Spanish transition to democracy was based on a forward-looking narrative of national reconciliation that professed a need to forget the past and look to the future (Ferrándiz, 2022). This led to the adoption of what has been referred to as a "pact of silence" or "pact of forgetting", which was ultimately institutionalized in an Amnesty Law passed in 1977 that covered the crimes committed by public officials during the war and the dictatorship (Alija, Martín-Ortega, 2017).

At the time, this "pact of silence" was presented as an essential condition for the advancement and consolidation of democracy in the country, which was largely based on a persisting fear that looking at the past could generate further confrontation and jeopardize the transition (Gálvez, 2006; Aguilar, 2001). This fear of a potential re-occurrence of conflict is, according to political scientist Paloma Aguilar, "one of the most important elements to understand the attitudes of the main actors involved in the process of change" (Aguilar, 2001, 6).⁸ The official discourse was that society largely supported the idea of not looking back and re-opening "old wounds" (Alija and Martín-Ortega, 2017). Ultimately, however, the transition "imposed [on victims] a second layer of silence" (Alija and Martín-Ortega, 2017, 543) that translated into a generalized lack of substantial public demands to look into Spain's violent past and thwarted the search for truth during the first decades of democracy in Spain (Davis, 2005; Kovras, 2012).

The year 2000, however, marked a turning point in the search for truth and justice in the country. While the movement for the recovery of memory was already in motion prior to that year, with the creation of some associations in the mid-1990s, the exhumation of a mass grave in October of 2000 in Priaranza del Bierzo (León), led to a wider social movement for the recovery of memory (Gálvez, 2006). The tremendous social impact that this exhumation had, brought to light the demands for truth and justice that had remained latent in society after the transition to democracy and gave rise to a series of truth-seeking efforts led by civil society (Gálvez, 2006). Larger numbers of Spaniards whose grandparents had been victims of the regime became increasingly engaged in exhumations of mass graves across the country and started to challenge existing narratives about the Civil War, the dictatorship and the transition (Ferrándiz, 2022). Gradually, the demands of civil society would enter the political sphere, generating increased pressure on the government, which eventually led to the enactment of the so-called Historical Memory Law in 2007 (Kovras, 2012).

The Law provided the very first condemnation of Franco's dictatorship in a legal instrument (Escudero, 2014). However, it failed to guarantee the right to truth in

8 This paper contains quotes that were originally in Spanish. These quotes have all been translated into English by the author.

its entirety. While it recognized a right to personal memory, it did not provide for a comprehensive public policy for truth seeking or for the creation of any official mechanism to conduct an independent investigation into the crimes committed during the war and the dictatorship (Alija and Martín-Ortega, 2017). Additionally, the law only provided for an obligation to facilitate the recovery of human remains and placed no responsibility on state authorities “to initiate the exhumations themselves” (Escudero, 2014, 143). Hence, as professor Rafael Escudero has put it, the Law ultimately “privatized” the right to truth, as it largely kept the responsibility of its fulfillment on private citizens and organizations (Escudero, 2014, 143). The Law was strongly criticized by civil society actors working on the recovery of historical memory who felt that it was insufficient (Ferrándiz, 2022). At the same time, however, it also found significant resistance from various political actors of the Spanish right who, appealing to the national reconciliation discourse of the transition, viewed it as “divisive and unnecessary” (Ferrándiz, 2022, 217).

In any case, the victory of the right-wing Partido Popular (hereafter PP) in the general election of 2011 led to a virtual deactivation of the Historical Memory Law, which completely halted any potential advances in the recovery of historical memory and the search for truth (Ferrándiz, 2022). It has only been with the return of the left to the government that some steps have been taken, especially with the approval of the so-called Democratic Memory Law in October 2022. In terms of truth, the new law recognizes that not just victims and families but also “society in general” have a right to know the truth about the events of the past (Ley 20/2022, 2022, Art. 15(1)). Moreover, it establishes an obligation on the Spanish State to assume the responsibility for the search for the disappeared and it provides for the creation of an independent commission to look into the crimes of the Civil War and the dictatorship (Ley 20/2022, 2022, Art. 16(1); Art. 57(5)). However, civil society groups like the Association for the Recovery of Historical Memory (Asociación por la Recuperación de la Memoria Histórica, hereafter ARMH), have been critical of it, arguing that it is insufficient as it does not derogate the 1977 Amnesty Law and it does not mention the perpetrators when dealing with the right to truth (Martín and Riera, 2022). In any case, it might be too early to assess the actual impact that this law will have in the search for truth in the country.

2.1 DEMANDS FOR A TRUTH COMMISSION

The inclusion of a provision for the establishment of an independent body to investigate the crimes of the Civil War and the dictatorship in the Democratic Memory Law did not happen in a vacuum. Since the renewed impulse of the movement for the recovery of historical memory in the year 2000, demands for an official inquiry into the events and crimes of the Civil War and the dictatorship have been commonplace among victims and civil society organizations (Beceiro et al., 2016). However, as noted earlier, the 1977 Amnesty Law prevents all investigations into Spain’s violent past and no efforts have been made to initiate any independent inquiry that will guarantee the right to truth of both victims and society at large (Rodríguez, 2014; Beceiro et al., 2016). Therefore, Spain lacks an official source of information about the violations committed during the Civil War and Franco’s regime (Beceiro et al., 2016). As noted by the former Special Rapporteur for Truth, Justice, Reparation and Guarantees of Non-recurrence, Pablo de

Greiff, investigations into these crimes have mainly been conducted by “academics, historians or journalists” (UN Human Rights Council, 2014, 10), and information about the past has remained largely dispersed and fragmented (UN Human Rights Council, 2014).

In this context, many organizations and victim groups have called for the establishment of a truth commission to look into Spain’s past (Gálvez, 2006). Such a demand even led to the creation of a Platform for a Truth Commission in 2012, which gathered a number of organizations sharing the idea that a truth commission “[could] facilitate the resolution of the demands of victims and relatives, fulfill the duty of memory and be an instrument for democratic coexistence” (Ruiz, 2017, 3).

Calls for an independent investigation into the violations committed and for the establishment of a truth commission have also found an echo at the international level. In 2006, the Council of Europe condemned the crimes of the dictatorship and called for the creation of a “national committee to investigate violations of human rights committed under the Franco regime” (Parliamentary Assembly, Recommendation 1736, 2006). Similar requests have been made by various UN bodies. In 2009, the Human Rights Committee, which monitors the implementation of the International Covenant on Civil and Political Rights (ICCPR), called upon the government to “consider setting up a commission of independent experts to establish the historical truth about human rights violations committed during the civil war and dictatorship” (UN Human Rights Committee, 2009, 2). Similar demands were issued in 2013 and 2014 by the UN Committee on Enforced Disappearances and the Working Group on the same issue respectively.⁹ Pablo de Greiff, in his capacity as Special Rapporteur on Truth, Justice, Reparation and Guarantees of Non-Recurrence, also made a request to the government to “launch serious discussions concerning the establishment of an independent, but official mechanism or body, whose aim would consist of achieving an exhaustive understanding of the human rights and humanitarian law violations that occurred during the Civil War and the Franco era” (UN Human Rights Council, 2014, 11). Amongst the mechanisms he referred to, was a truth commission. His successor, Fabián Salvioli, has reiterated this claim, arguing that while 45 years ago support for the dictatorship was still significantly prevalent, today the situation has changed and different steps can be taken, including the establishment of a truth commission (Salvioli, 2021).

9 See CED/C/ESP/CO/1 and A/HRC/27/49/Add.1 respectively.

3 Debates Around the Creation of a Truth Commission for Spain

The Updated Set of principles for the protection and promotion of human rights through action to combat impunity (hereafter Updated Set of Principles) defines truth commissions as “official, temporary, non-judicial fact-finding bodies that investigate a pattern of abuses of human rights or humanitarian law, usually committed over a number of years” (UN Commission on Human Rights, 2005, 6). These extra-judicial mechanisms examine violent events of the past and seek to elucidate the causes and consequences of the crimes committed in order to make recommendations and to prevent their future re-occurrence (Freeman, 2006). Truth commissions are generally created by the State where grave violations took place, but should be independent from it (Freeman, 2006). They are victim-focused and involve the participation of the population concerned, and are non-permanent bodies that tend to conclude their mandates with the publication of a report (Heyner, 2011). From Argentina to South Africa, Sierra Leone, or most recently, Colombia, truth commissions have been included in many transitional justice processes and have become a key mechanism to address past violations of human rights and international humanitarian law (Heyner, 2011).

In Spain, demands for the establishment of an independent body to look into the crimes committed during the Civil War and the dictatorship by civil society groups and international actors led the left-wing party PSOE to present a proposal that called upon the government to create a truth commission “in line with the recommendations of the United Nations” (Proposición no de Ley 162/000327, 2017, 29). This initial proposition was developed in a law proposal presented by the same party in December 2017 to create a commission to find out the truth of what happened and to elucidate the facts of the human rights violations committed with a view to “promote the recognition of responsibilities” and “favor democratic coexistence” (Proposición de Ley 122/000157, 2017, Art.6). The body, according to the text, would look into the crimes committed between the start of the Civil War and the approval of the 1978 Constitution, and would have 11 commissioners, 2 of which to be proposed by the UN (Proposición de Ley 122/000157, 2017). Although this proposal was never passed into law, the announcement of the newly elected PSOE-led Government in 2018 that it intended to set up a truth commission based on its 2017 proposal, gave significant impulse to the idea of creating such a mechanism for the Spanish case and generated immediate debate among historians, transitional justice experts and civil society actors (Cué, 2018; Ferrándiz and Hristova, 2019).

Jurist Carlos Castresana, for instance, argued for the need to establish such a mechanism claiming that “most Spaniards do not know their recent history well, or are in denial about it” (Musseau, 2018). Others, however, have questioned its appropriateness for the Spanish case. Historian Julián Casanova has argued that truth commissions are associated with the foundations of democracy and that the creation of such a body in Spain would have made sense in the late 1970s or beginning of the 1980s, but not later (Casanova, 2018). In his view, exposing the historical truth and taking stock of the repression and political violence of the regime is important, but not through an ad hoc body like a truth commission.¹⁰

Whether such bodies are to be created only in transitional times is a contested argument. In his definition of truth commissions, transitional justice expert Mark

Freeman included that these are bodies that “focus primarily on acts that occurred during recent periods of abusive rule or armed conflict” (Freeman, 2006, 15). Political scientist Paloma Aguilar seems to agree with this idea: truth commissions are usually established in transitional times (Aguilar, 2018). However, as she expressed in an opinion article following the Government’s announcement, “their greater appropriateness in times of political change does not demonstrate their inappropriateness in later stages” (Aguilar, 2018).

As noted by numerous authors, it is widely accepted in transitional justice spheres and literature that there is not one single model for truth commissions and that transitional justice measures are to be context specific.¹¹ Following this rationale, a truth commission in Spain would be viable now to the extent that it is adapted to the specificities of the current context. In an interview conducted for this paper, Jorge Rodríguez supported this idea. According to him, in Spain, although a commission should have preferably been created in the 1980s, when the country was in a more stable situation after the death of the dictator, the fact that it was not created then does not mean that this is not an applicable model today (Jorge Rodríguez, interview by author, 15 July 2022). As he noted, however, it is essential that such a mechanism is tailored to the Spanish context, which entails that the time factor is taken into consideration in the design and functioning of the commission (Jorge Rodríguez, interview by author, 15 July 2022). This, in turn, might translate into a commission of a rather historical nature due to the time elapsed since the events at hand (Jorge Rodríguez, interview by author, 15 July 2022). Lawyer Alfons Aragoneses also shared this view, noting that a truth commission could now be a viable model for Spain as long as it responds to the country’s current context (Alfons Aragoneses, interview by author, 25 July 2022). In this sense, he noted that the country is now in a “post-transitional” period, and that a truth commission similar to the one created in South Africa in 1995, for instance, would not be suitable for Spain today because, among other things, more time has passed since the crimes at hand (Alfons Aragoneses, interview by author, 25 July 2022).

In any case, the argument that truth commissions are only appropriate in transitional justice periods seems to be associated with what jurist Farid Benavides calls the “old model of transitional justice” (Farid Benavides, interview by author, 3 August 2022). As he pointed out to me in an interview, truth commissions like the ones created in Canada, which addresses the impact of the country’s residential schools system on indigenous peoples, or in Australia, which deals with the wrongs committed against Aboriginal Victorians,¹² show that the truth commission model is no longer strictly linked to the period of a country’s political transition, and that today, transitional justice measures are also used in order to deal with past events that “cause pain” in a particular society and that need to be addressed (Farid Benavides, interview by author, 3 August 2022). This, in turn, confirms Eduardo González’s claim that the “validity [of truth commissions] is independent from moments of political transition” (González, 2011, 341) and that today, such mechanisms are established in a variety of different situations (González, 2011).

10 Casanova referred to this in an interview with Ángel Munárriz, where he rejected the idea of a truth commission. He did not, however, refer to any other specific measure or strategy as an alternative to it (Casanova, 2018).

11 See, for instance, Fernández, Covadonga. 2015. “Las Comisiones de la Verdad: El pasado frente al espejo.” Working Paper 06/2015. Madrid: Fundación Internacional Baltasar Garzón; Ferrándiz, Francisco and Hristova, Marije. 2019. “Valoración comparada de las políticas públicas de Memoria Histórica en Euskadi (2000-2018).” Instituto de la Memoria, la Convivencia y los Derechos Humanos (Gogora)

12 See Government of Canada. 2021. “Truth and Reconciliation Commission of Canada.” Accessed August 2022. <https://www.rcaanc-cirnac.gc.ca/en/g/1450124405592/1529106060525>; Government of Victoria. 2022. “Truth and Justice in Victoria.” Accessed August 2022. <https://www.firstpeoplesrelations.vic.gov.au/truth-and-justice>

Another argument put forward by those who have questioned the appropriateness of a truth commission to address the crimes committed in Spain relates to the notion that such bodies are aimed at establishing a single truth about the past (Aguilar, 2018). This was the position of historian José Álvarez Junco, who positioned himself against the creation of such a mechanism arguing that he was “opposed to teaching one single, official version in schools” (Musseau, 2018) and that “precisely because this issue is so controversial and emotive, it cannot have a single truth” (Musseau, 2018). Paloma Aguilar, again, questioned the validity of such an argument. As she noted, truth commissions do not seek to establish a “single . . . and definitive truth” about the events of the past nor are they aimed at preventing potential future accounts of the past from being introduced (Aguilar, 2018). Instead, they are intended “to expose the main patterns of violence and abuse through cases and testimonies” (Aguilar, 2018). In this sense, she emphasized that the State is uniquely positioned in terms of human and material resources to facilitate a thorough investigation of the country’s violent past through the systematic collection of data in the entire territory (Aguilar, 2018). This suggests, therefore, that the value of a truth commission would not lie in the establishment of a single, official truth but in the ability of the State to conduct an official investigation of the facts in a comprehensive manner, thereby challenging the “single truth” that has prevailed during and after the years of oppression.

In our conversation, Farid Benavides was also critical of the “single truth argument”. As he pointed out, truth commissions are dialogic models aimed at the collective construction of the truth (Farid Benavides, interview by author, 3 August 2022). In such mechanisms, both victims and perpetrators are given the chance to share their testimonies, which are later included in a final report (Farid Benavides, interview by author, 3 August 2022). This, as he noted, is precisely the advantage of a truth commission: the fact that it is not a mechanism for the establishment of one single and absolute truth (Farid Benavides, interview by author, 3 August 2022).

At the civil society level, the position of some relevant groups further feeds into discussions around the creation of a truth commission in the country. While some have been strong proponents of such an idea, others, including some of the most prominent associations for the recovery of historical memory in Spain have been rather reluctant towards the establishment of such a mechanism. The president of ARMH, Emilio Silva, explained in an interview conducted for this research that the creation of a truth commission would be positive insofar as it would contribute to the search for truth in the country (Emilio Silva, interview by author, 26 July 2022). However, he did not believe that such a mechanism would be the right model for Spain at the moment. For him, the establishment of a judicial truth about the crimes of the past was more important (Emilio Silva, interview by author, 26 July 2022). As he put it, even if judicial processes “have no consequences for anyone in terms of prison sentences, grave human rights violations were committed in the country, and this needs to be acknowledged by a judicial body” (Emilio Silva, interview by author, 26 July 2022). The Federación Estatal de Foros por la Memoria (or National Federation of Forums for Memory; hereafter Foro) adopted a similar position in 2012, when it issued a statement rejecting the idea of creating a truth commission for Spain: “as long as the legal framework that sustains the Spanish model of impunity is not annulled, victims of Francoism will not be able to access the rights to truth, justice and reparation, because there is no truth more valid than the judicial truth, in the form of laws and sentences” (Federación Estatal de Foros por la Memoria, 2012).

Debates around the production of truth and the appropriateness of judicial or extra-judicial mechanisms to do so are common in discussions around transitional justice. Juan Mendez, on the one hand, suggests in his piece “Accountability for Past Abuses” that “the adversarial format [of trials] results in a verdict that is harder to contest” (Méndez, 1997, 278). As such, judicial truth has, according to him, “a tested quality that makes it the more persuasive” (Méndez, 1997, 278). Such truth is, however, rather limited (Heyner, 2011). As several authors have noted, trials seek to respond to specific wrongs: they are intended to find “whether a defendant can be proved to have been responsible for [a] specific crime” (Duff et al., 2007, 296). As such, they are limited in the degree to which they can expose the truth about the causes and consequences of crimes and the general patterns of violence that affect a particular society (Duff et al., 2007). As opposed to truth commissions, therefore, the individualistic focus of criminal trials makes them rather ill-suited “to giving a comprehensive account of the kinds of large scale and multi-agent wrongdoings that characterize political conflicts or political oppression” (Duff et al., 2007, 296).

As noted in the Updated Set of Principles, however, truth commissions are not an alternative to justice (UN Commission on Human Rights, 2005). Instead, a complementary relationship between both is essential in order to obtain a comprehensive account of past events and address impunity (Beceiro et al., 2016). As Eric Brahm explains, however, in many contexts “the alternative to truth commissions is . . . not conducting trials, but doing nothing at all” (Brahm, 2007, 21), which seems to be the case in Spain. On the one hand, the country’s 1977 Amnesty Law still prevents criminal trials from being conducted. In 2008, Judge Baltasar Garzón, attempted to circumvent it and opened a judicial investigation into crimes committed between 1936 and 1951. However, shortly after, the National High Court (Audiencia Nacional) dismissed the case and the Judge was prosecuted for “perversion of justice” (Ferrándiz, 2022, 217). This definitively closed the door to any potential judicial action in national courts (Alija and Martín-Ortega, 2017). On top of this, the delivery of justice in Spain is further constrained by the fact that most perpetrators have already passed away, which, even in the absence of the Amnesty Law, would make it very difficult for many cases to be brought to the courts.

In such a context, a truth commission seems to offer a potential avenue for the country to deal with the crimes of the Civil War and the dictatorship. According to Brahm, these types of mechanisms can provide some degree of non-judicial accountability for the crimes committed and a comprehensive account of the violent events of the past, which in Spain, where no perpetrators have ever been held accountable and no trials are likely to be held, seems to be particularly relevant (Brahm, 2007). Beyond such potential exercise of non-judicial accountability, authors like Mendez have noted that States where trials are not possible still have an obligation to investigate and elucidate the facts about past crimes (Méndez, 1997). In Spain, therefore, where this is the case, a truth commission could also contribute to fulfilling such an obligation. As noted by various authors, however, the establishment of a commission alone is not enough for it to be able to comply with the obligation to investigate, to fully guarantee the right to truth and to deliver some form of accountability for the crimes committed: the extent to which such a body can achieve that will depend on whether it has the appropriate features and powers that enable it to do so (Beceiro et al., 2016).

4 Decentralized Truth: Memory Laws at the Regional Level

Given that the possibility of bringing cases to the courts has been blocked since 1977 and that for years, there has not been any state policy to deal with the crimes of the past, Spain has done little to advance the recovery of historical memory at the national level. As noted earlier, the 2007 Historical Memory Law was a significant step forward, but it was also largely insufficient, as it fell short of providing for a comprehensive framework that guaranteed all victims' rights (Escudero, 2021). On top of this, the victory of the right-wing party PP in the 2011 general election thwarted any potential advances on this front until 2018 (Soler, 2019). In its first year in office, the new government, led by Mariano Rajoy, reduced the budget allocated to historical memory-related programs by 3.7 million euros¹³ and closed the Office for Victims of the Civil War and the Dictatorship (Soler, 2019). Moreover, in 2013, it further paralyzed all advances in the historical memory front by allocating no budget line to memory-related programs and initiatives, which translated into a de facto suspension of the 2007 law (Soler, 2019; Ferrándiz and Hristova, 2019).

Altogether, this led to a gradual decentralization of historical memory laws, with regional governments enacting their own legislation in order to fill some of the gaps of the 2007 law and overcome the paralysis of the central government on the matter (Soler, 2019; Escudero, 2021). Today, 12 of the 17 autonomous communities in Spain have their own laws on historical memory and 2 have issued decrees on the matter.¹⁴ Only Murcia, Galicia and Madrid are lacking specific regulations on this issue.

In 2007, Catalonia had passed law 13/2007, whereby it established a “Democratic Memorial”, an independent institution focused on the recovery of historical memory in the region.¹⁵ A few years later, in 2013, and following the Catalan experience, which had set a significant precedent for subsequent regional laws, Navarre passed its own legislation (33/2013), which, as José Luis de la Cuesta and Miren Odriozola put it, “opened the door to a new generation of regional laws [on historical memory]” (De la Cuesta and Odriozola, 2018, 33; Soler, 2019). The Basque Country would then follow Navarre in 2014 when it passed a law that provided for the creation of an Institute for Memory, Coexistence and Human Rights (Gogora) (Soler, 2019). However, the enactment of regional laws would gain particular momentum from 2016. As Pere Soler explains, most autonomous communities held regional elections in 2015, which led to the establishment of new regional governments willing to advance the recovery of historical memory and pass legislation on the matter (Soler, 2019). From then until 2018, when a vote of no confidence removed the PP from the central government, numerous autonomous communities enacted their own memory laws, which Pere Soler has divided into three different groups according to their nature. On the one hand, Soler speaks of “limited laws” focused on a particular issues, such as the Law for the Recovery of Disappeared Persons during the Civil War and the Dictatorship passed in the Balearic Islands in 2016 (10/2016). Second, he points at “measures aimed at enforcing certain aspects of the 2007 law” (Soler, 2019, 14), which has been the case in Castilla y León or La Rioja, and finally, he distinguishes “integral laws”, such as the ones passed in Andalusia or Valencia (Soler, 2019, 15).

13 During the last year of Rajoy's preceding government, which was led by José Luis Rodríguez Zapatero (PSOE), the resources allocated to the recovery of historical memory amounted to 6,2 million euros. In 2012, Rajoy's government reduced it to 2,5 million (Soler, 2019).

14 Castilla y León and Castilla La Mancha do not have a specific law on historical memory but they do have decrees on the matter. For Castilla y León see Decree 9/2018; For Castilla La Mancha see Decree 109/2021.

15 See Ley 13/2007, de 31 de octubre, del Memorial Democrático, Boletín Oficial del Estado, n.284 (27 November 2007): 48487-48491.

In many aspects, the scope of these regional laws goes beyond that of the historical memory law of 2007 (Soler, 2019). In terms of the right to truth, several recognize both the collective and individual dimension of this right (Escudero, 2021). The law passed in Andalucía, for instance, recognizes “the right to know . . . the history of the struggle of the Andalusian people for their rights and freedoms, as well as the duty to facilitate victims and their families the search for the truth of the acts of violence or persecution that they suffered” (Ley 2/2017, 2017, Art. 3(a)). This contrasts with the 2007 national law, which only recognized a right to “personal memory”. All regional laws provide for an obligation of regional authorities to take on the responsibility of identifying and recovering human remains (Escudero, 2021). In Extremadura, for instance, the law establishes that “the process of localization and, if necessary, exhumation and identification, will be initiated ex officio by the competent regional Ministry” (Ley 1/2019, 2019, Art. 10(1)). This, again, differs from the 2007 historical memory law, which only provided for an obligation of public administrations to facilitate such tasks (Ley 52/2007, 2007).

With a view to advance the right to truth, several regional laws also provide for the creation of mass grave maps, including the ones passed in Valencia, Extremadura or Andalusia. Some, such as those in Navarra, Aragón or the Canary Islands, provide for the establishment of DNA banks, and some also provide for the creation of victims’ census. This is the case in Valencia, for instance, where not only does law 14/2017 foresee the creation of a census of victims of the civil war and the dictatorship but also of stolen babies, something completely left out of the 2007 law (Ley 14/2017, 2017). As a fundamental component of the right to truth, various regional laws have also included the right to access archives. In Aragón, for instance, the law guarantees access to relevant documentation even if it is in the hands of private entities that receive public funds, and laws like the ones of the Balearic Islands, Valencia or Andalusia provide for an obligation to investigate the disappearance of historical memory-related documents (Ley 14/2018, 2018; Escudero, 2021).

Some regional laws have also provided for the creation of truth commissions. In Valencia, law 14/2017 states that the regional government “will ask the central government to create a truth commission in line with the recommendations of the United Nations to establish a historical, legal and institutional truth about the events that took place during the Civil War and Franco’s dictatorship until the entry into force of the 1978 Constitution” (Ley 14/2017, 2017, Additional Provision 6(1)). The law, however, does not stop there, as it also provides for the establishment of a regional truth commission to specifically look into the violations committed in the autonomous community (Ley 14/2017, 2017). Nevertheless, it does not specify the commission’s composition, mandate or rules of procedure, and it does not define how the national and regional commissions would interact beyond it stipulating that the regional commission will share its conclusions with the national one. Although the law was passed in 2017, the regional government has not yet established the commission.

The Andalusian law also provides for the creation of a body to look into the crimes of the past: “an independent working group or commission will be created to . . . prepare a consistent, inclusive and comprehensive report . . . of Franco’s repression in Andalusia . . . that enables [the population of the region] to reach an agreement about their past” (Ley 2/2017, 2017, Art. 41). The body, according to the law, is set to look into the crimes committed in the region from the start of the Civil War until the adoption

of the statute of autonomy of Andalusia in 1981, and shall present its final report within 18 months of its creation (Ley 2/2017, 2017). The establishment of a right-wing government in the region after the election of 2018, however, has resulted in very little progress on the recovery of historical memory, and no steps have been taken towards the creation of the truth commission envisioned in the law (Ramajo, 2022).

In Navarre and the Basque Country, in turn, two commissions have been created as mechanisms to contribute to the reparation of victims (Escudero, 2021). In Navarre, law 16/2015 provided for the establishment of a Recognition and Reparation Commission for victims of politically motivated acts committed by far-right groups or public officials since January 1st, 1950 (Ley Foral 16/2015, 2015). Upon investigation of the facts, the commission would evaluate and decide on the recognition of victimhood of individuals, and those recognized as victims would then be eligible for reparations.

In 2018, however, Spain's Constitutional Court found this Commission unconstitutional (Escudero, 2021).¹⁶ In its sentence, the Court argued that Law 16/2015 violated article 117 of the Constitution, as it gave the Commission investigative powers over criminal acts, which was a competence that corresponded exclusively to the judiciary (Sentencia 85/2018, 2018). This, in turn, could also compromise the right to due process guarantees of those individuals found to have perpetrated crimes by the Commission (Sentencia 85/2018, 2018). The dissenting opinion of Judge María Luisa Balaguer provides for an interesting discussion of the Court's sentence. On the one hand, she argued that the judicial power does have an exclusive right to punish (*ius puniendi*), "but that does not mean that only judicial bodies can undertake investigations of alleged criminal acts" (Sentencia 85/2018, 2018, 83059). As she noted, the aim of the Commission was not to sanction individuals, which would certainly correspond to the judiciary, but to "determine the condition of victim by verifying the facts presented by the applicants" (Sentencia 85/2018, 2018, 83059). Balaguer also alluded to the Court's argument that the investigations and conclusions of the Commission could violate the due process guarantees of alleged perpetrators. In this respect, she noted that the sentence overlooked the right to truth of both victims and society and that the Law was in full conformity with the principles upon which such right is based, which recognize the possibility for a non-judicial body to conduct investigations to elucidate the truth about past events (Sentencia 85/2018, 2018). By limiting such tasks to the competence of the judiciary, she continued, the interpretation of the judges hindered such right, especially "due to the limitations of judicial processes to elucidate the truth about events that occurred more than sixty years ago" (Sentencia 85/2018, 2018, 83065).¹⁷

In the Basque Country, Law 12/2016, which was later on modified by Law 5/2019, provided for the establishment of a commission similar to the one in Navarre. In this case, however, the country's Highest Court noted that the law prohibited the body to investigate the facts that would determine a persons' eligibility for compensation, and found that as long as its functions were limited to confirming the existence of a causal link between the facts and the harm suffered, the Commission did not interfere in the competences of the judiciary (Escudero, 2021).¹⁸

16 The Court found articles 1.2 (a), 1.2 (c), 1.2(d), 2, 3, 4, 5, and 6 of the Law unconstitutional.

According to the Court, therefore, only as long as these commissions refrain from conducting investigations into alleged criminal acts, can they be considered lawful under the Constitution (Escudero, 2021). This, in turn, raises questions about the possibility of creating a truth commission-type of body to look into the crimes of the Civil War and the dictatorship in the country, as these are mechanisms that are specifically aimed at investigating criminal acts and patterns of violence. In the event that a commission is established in the country, therefore, it remains to be seen whether judges at the Constitutional Court will lean towards Judge Balaguer's position and allow for a non-judicial body to conduct investigations into the crimes of the past in the name of the right to truth, or whether they will maintain the position adopted so far by the majority of magistrates and reject this possibility.

4.1 DECENTRALIZATION: DEBATES, ADVANTAGES AND RISKS

The decentralization of laws on historical memory in Spain has certainly presented advantages and risks. In the face of the paralysis that persisted on the issue since 2011 at the national level and the insufficiencies of the 2007 Historical Memory Law, the enactment of regional legislation has enabled the continuation of action on the recovery of memory. This has been welcomed by some civil society groups such as Foro, which in a statement issued in 2017, “[celebrated] the fact that autonomous communities [had acknowledged] the need to give a response to the demands that victims groups . . . [had been making] to the State” (Federación Estatal de Foros por la Memoria, 2017).

The proliferation of regional laws, however, has also led to the fragmentation of the legal framework on historical memory in the country, which has carried several risks (Soler, 2019). As Pere Soler explains, people in the country will have different institutional responses on historical memory-related matters depending on where they are, which can generate important differences and inequalities among victims (Soler, 2019). The preambles of some regional laws have alluded to this. In the Balearic Islands, for instance, the law on the recovery of disappeared persons during the Civil War and Francoism (10/2016) warns that local administrations cannot be left with all the responsibility for the recovery of human remains “because not all [of them] have the same financial and human resources to investigate and exhume mass graves” (Ley 10/2016, 2016, 3). This, according to the preamble, “is generating grave discrimination between the families of the disappeared” (Ley 10/2016, 2016, 3). Foro, in turn, also referred to this issue in its 2017 statement, noting that the variety of existing norms and frameworks related to the recovery of historical memory, which provide for different rights and guarantees, has led to significant inequalities between victims (Federación Estatal de Foros por la Memoria, 2017).

Following this rationale, the establishment of truth commissions at the regional level, as envisioned in the laws of Valencia or Andalusia, for instance, could be an important step forward in the advancement of the right to truth of victims in different regions, especially in the absence of a similar mechanism at the national level. Hence,

17 In 2019, law 16/2015 was replaced by law 16/2019. This time, however, the Court found that as long as the functions of the Commission were limited to confirming the existence of a causal link between the facts and the harm suffered, it did not interfere in the competences of the judiciary. Eventually, this led to its creation in September 2022 (Gobierno de Navarra, 2022).

18 See sentences 83/2020 and 131/2020.

as Jorge Rodríguez explained in his interview for this paper, victims in Andalusia, Valencia or elsewhere would be able to have their right to truth recognized (Jorge Rodríguez, interview by the author, 15 July 2022). At the same time, however, this could also generate huge differences between victims, with some having access to a commission and others not.

On the other hand, it is well known that the Civil War and Franco's repression affected different autonomous communities in different ways. In this sense, a regional truth commission can be of great value, as it will be well suited to grasp the specificities of the violence committed in a particular region. Both Jorge Rodríguez and Rosa Ana Alija, however, warned that a regional commission could also produce a partial account of the facts: violence, they argued, "was systematic in the entirety of the territory" (Jorge Rodríguez, interview by author, 15 July 2022), and "there is a shared story" to be told (Rosa Ana Alija, interview by author, 21 July 2022). In this sense, Rodríguez emphasized that information will always have to be looked for outside of a particular autonomous community, and thus, "the account of the events that such an institution could produce would be rather limited" (Jorge Rodríguez, interview by author, 15 July 2022). Against this backdrop, Alija raised an interesting point: it is the work of a national truth commission that needs to be decentralized; not the creation of truth commissions themselves (Rosa Ana Alija, interview by author, 21 July 2022). This has been the case in countries like Colombia, where the need to capture the specificities of violence in different regions played an important role in the decision to decentralize the work of the country's truth commission and thus, to establish 11 regional offices to implement its mandate.¹⁹

In any case, the laws of Valencia or Andalusia foresee both the creation of their own regional commissions to look into the crimes committed during the Civil War and the dictatorship in their autonomous communities and also the establishment of a commission at the national level. The question here, however, is how exactly these mechanisms will interact and how their mandates will complement each other, which is something that the laws do not really specify. Such lack of clarity about the way these commissions would relate to each other in practice raises many questions, which will have to be resolved in the event that these initiatives are materialized.

¹⁹ See Decreto 588 de 2017 por el cual se organiza la Comisión para el Esclarecimiento de la Verdad, la Convivencia y la No Repetición, Presidencia de la República de Colombia, (5 April 2017), Art. 7

5 Concluding Remarks: Looking Ahead

As illustrated in this paper, in Spain, the idea of creating a truth commission to deal with the crimes of the Civil War and the dictatorship has sparked a lot of debate among civil society actors, historians, lawyers and transitional justice experts. With some questioning the appropriateness of such a mechanism for the country and others adopting a more favorable position towards it, such debates raise important points that feed into discussions around transitional justice not just in the country but also in general.

On the one hand, the Spanish case puts on the table issues relating to the timing of truth commissions, the notion that these mechanisms seek to impose a single truth and the frequently invoked truth versus justice debate. Simultaneously, the decentralization of memory laws after 2011 has also raised its own set of questions relating to the advantages that regional truth commissions could offer in the absence of a national mechanism but also to the risk of deepening inequalities between victims and the provision of a partial account of the facts.

Far from being confined to the theoretical realm, these debates have now become particularly relevant in practice, especially with the introduction of a new Democratic Memory Law that foresees the creation of two separate mechanisms to look into Spain's violent past. Article 57(5), on the one hand, provides for the establishment of an independent commission "to contribute to the clarification of the human rights violations committed during the Civil War and the dictatorship" (Ley 20/2022, 2022, Art. 57(5)), whereas additional provision 16 provides for the creation of a technical commission to study the violations committed between the approval of the Spanish Constitution in 1978 and December 1983 (Ley 20/2022, 2022, Provisión Adicional Decimosexta).

In this context, various issues become particularly relevant. As noted in this paper, the establishment of such mechanisms alone does not guarantee the full realization of the right to truth in the country (Beceiro et al., 2016): they will have to be adapted to the current Spanish context and will have to be bestowed with certain powers and characteristics that allow them to be fully effective in the case at hand (Beceiro et al., 2016; Fernández, 2015). This, in turn, entails taking various aspects into consideration. On the one hand, it is of utmost importance that the commissions have well-defined temporal and subject-matter mandates. The new law specifies the periods of time that these commissions will cover and the violations that they will look into, but it does not define the time period that the bodies will have to implement their functions. Given the length of time that these commissions will potentially be dealing with, a two to three-year mandate seems to be a reasonable timeframe for them to function while not losing public interest,²⁰ despite the difficulties that this can present (Fernández, 2015).

Another important aspect to seriously consider in the event that these commissions are set up relates to their composition. The selection of the commissioners should be done in an open and transparent manner, ideally involving consultations (González and Varney, 2013). In this sense, it is essential that the commissioners are not involved with any political parties or groups in order not to jeopardize the independence of the body (Rodríguez, 2014). Moreover, it will also be important to consider the fields of expertise of the commissioners, which due to the particularities of the case, in Spain might include

²⁰ Experts like Priscilla Heyner have warned about the importance of assigning these types of bodies a mandate that does not exceed the two or three years in order not to lose public interest (Heyner, 2011).

lawyers, historians, sociologists, political scientists, forensic experts, psychologists and experts from academia (Beceiro et al., 2016; Rosa Ana Alija, interview by author, 21 July 2022).

Equally relevant are the powers that these mechanisms will be vested with, in particular as it relates to their ability to access relevant archives and documentation from both public and private entities (Beceiro et al., 2016). This issue is particularly important in Spain, where access to archives is rather restricted and civil society groups like the ARMH have persistently made requests for a better access to relevant documents (Emilio Silva, interview by author, 26 July 2022). This, therefore, will deserve particular consideration.

Issues related to the use and dissemination of the final report, in turn, will also have to be previously defined. Due to the specificities of the Spanish case, it might be particularly important to consider how the report might be added to school curricula, for instance, as Farid Benavides noted in his interview (Farid Benavides, interview by author, 3 August 2022). In this same vein, it might also be important to consider the establishment of a follow-up mechanism to monitor the implementation of the recommendations, as is being done in Colombia at the moment.²¹ This might be an interesting way to ensure that the conclusions and recommendations are acted upon.

Finally, it is essential that any commission created in the country enjoys the highest degree of legitimacy as possible. In this respect, the perception and acceptance of the mechanism among civil society will play a particularly relevant role (Beceiro et al., 2016). In Spain, however, this topic still generates great division (Fernández, 2015). Hence, authors like Covadonga Fernández have suggested that a sort of campaign is conducted prior to the creation of the commission in order to change existing perceptions of Spain's violent past and “detach [the work of the commission] from any political ideology to focus on the defense of human rights” (Fernández, 2015, 25). Public consultations, in turn, can also help enhance the legitimacy of the commission, as they can make it the more responsive to the demands of victims and society at large (González and Varney, 2013; Beceiro et al. 2016). In this same vein, the composition of the commission will also play a very significant role, since the credibility of the body will largely depend on it too (Rosa Ana Alija, interview by author, 21 July 2022).

Altogether, while these elements will ultimately determine the potential that a truth commission-like body could have in Spain, the creation of such a mechanism seems to offer an interesting avenue to advance the search for truth in the country. Undoubtedly, questions still remain as to the feasibility of establishing such a body, especially considering the experience of the commissions created in Navarre and the Basque Country. Despite this, however, Spain is now in a very interesting time for the recovery of historical memory, where the issues raised in this paper are as relevant as ever. Only time will tell whether victims like Agustín will ever receive the recognition that they deserve and whether progress on truth, justice and reparation will become a reality. I hope that this paper will contribute to existing discussions about a past that is still very much unresolved so that further steps in the direction of the recovery of historical memory can be taken and the rights of victims, families and society can be realized.

21 See Comisión de la Verdad. n.d. “Comisión de Seguimiento y Monitoreo (CSM) a la implementación de las recomendaciones para la no repetición del conflicto armado.” Accessed August 2022. <https://www.comisiondelaverdad.co/comite-de-seguimiento>

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