

Janus in the aftermath of post-dictatorial societies: No international justice in the crimes committed during the Spanish Civil war and Franco's regime.

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Abstract: In the present paper I aim to analyze how the Spanish legal system is dealing with the crimes committed during the Civil War and Franco's regime, as well as answering the question of how post-national human rights law is manifested in this case. Is Spain in this case coming into terms with international justice? I claim that there is a collision due to the legal pluralism and the failure in the "vernacularization process" of human rights. Further I state that there is a need to learn from the experiences of the past and of other countries.

Keywords: Vernacularization; Legal transplants; Spain, Crimes committed in the past; Human rights

Janus no rescaldo das sociedades pós-ditatoriais: sem justiça internacional dos crimes cometidos durante a guerra Civil Espanhola e regime Franco

Resumo: No presente artigo, pretendo analisar como o sistema legal Espanhol está lidando com os crimes cometidos durante a Guerra Civil e Regime Franco, bem como responder à questão de como a lei pós-nacional de direitos humanos manifesta-se nesse caso. A Espanha, neste caso, entrará em um acordo com a justiça internacional? Eu afirmo que há uma colisão devido ao pluralismo jurídico e do fracasso no "processo de vernacularização" dos direitos humanos. Além disso, afirmo que há uma necessidade de aprender com as experiências do passado e de outros países.

Palavras-chave: Vernacularização; Transplantes Jurídicos; Espanha; Crimes cometidos no passado; Os Direitos Humanos.

1. INTRODUCTION

As a lawyer I come to law to explore justice, but in the end one finds that there is no consensus on what legal justice might mean or require. We might have normative justice if we only look at the problem from a domestic point of view and understand by that the achievement of legal certainty. However,

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the truth is that each legal system is part of a globalized world and one cannot leave the post-national framework apart.

The balance or collision (as I see it) between impunity and retribution, sovereignty and international human rights law is never ever satisfactorily stricken in post conflict situations. There are just some that are able to dress the windows to make it appear so. There always seem to be “Catch-22’s”² at either end of the spectrum, with humanity in between struggling (in some regards) to find that perfect balance. If the law gave a clear answer, there will be no problem.

In the present paper I aim to analyze how the Spanish legal system is dealing with the crimes committed during the Civil War and Franco’s regime, as well as answering the question of how post-national human rights law is manifested in this case. *Is Spain in this case coming into terms with international justice?*

The Spanish transition from the dictatorship to the social and democratic rule of law³ was marked by the lack of any attempt to deal with the crimes committed in the past⁴. The passing of the 1977 Amnesty Law was an infliction of silence, which created an imbalance between the victims and the offenders. As it was argued by the congressmen when the law was passed⁵, this was necessary to establish the rule of law in Spain. It was understood that dealing with those crimes and trying to establish the rule of law were two tasks difficult to handle at the same time and the establishment of the rule of law was primary. So, one can argue that this amnesty was the price to pay to achieve the rule of law. However, I state that once democratization is rooted, this amnesty should tend to disappear.

In 2002, the United Nations Working Group on Enforced or Involuntary Disappearances for the first time included Spain in its list of countries that have yet to resolve the problem of forcible detention and subsequent “disappearance” of people⁶. In response to submissions made by the Asociación para la Recuperación de la Memoria Histórica (ARMH, Association for the Recovery of Historical Memory), a Spanish nongovernmental organization founded in 2000 to coordinate exhumations of the remains of the disappeared people. In addition to this, the Spanish Supreme Court stated that the crimes cannot be judged by virtue of the principle of legality, non-retroactivity and criminality⁷. Moreover, the UN special rapporteur for the promotion of truth, justice, reparation and guarantees of non-repetition urges the Spanish state to rescind the Amnesty Act from 1997 and to judge the crimes⁸. Even the European Court of Human Rights refused to admit 5 claims of the victims who were able to reach the international court⁹. In addition to this,

² A paradox, as Joshep Heller shows it in his historical fiction novel “*Catch 22*”.

³ The Spanish Constitution states in its article 1.1 that “Spain constitutes itself as a social and democratic state of law, which advocates freedom and political pluralism as higher values of its legal system, justice, equality.

⁴ Since the 1977 Amnesty Law declared the non criminal responsibility of the offenders, the only activity on dealing with them has been provided by a Historical Memory Law in 2006 (it only provided a declaration for the recognition of being a victim and some ways of monetary compensation) and the case that was brought before the National Court in 2006, but rejected in 2008.

⁵ As stated in the Royal Decree – Law No. 10/1976 of the 30th of July, of 1976 (the first attempt to establish the amnesty): “*As Spain is going towards a full democratic normality, it is time to finalize this process forgetting any discriminatory legacy of the past in full fraternal coexistence of Spaniards*”.

⁶ See Cue C., La ONU pide que se investigue donde estan enterrados republicanos fusilados tras la guerra, EL PAÍS, 16 Nov. 2002, Madrid ed., at 22. For the text of the UN Working Group’s report, see Comisión de Derechos Humanos, Derechos Civiles y Políticos, Incluso Cuestiones de Desapariciones y Ejecuciones Sumarias, available at www.geocities.com/priaranza36/informeonu.htm (last checked on the 7th of march 2015).

⁷ The Supreme Court said in its ruling No. 101/2012, of 27th February 2012, that the 1977 Amnesty Law is still into force and that the concept of crimes against humanity was not introduced into the Spanish legal system by the time the crimes were committed. I understand the interpretation of the law made in this ruling as a paradigm of the principle of *Tempus regit actum*.

⁸ See Spanish Newspaper “El País”: *The UN rapporteur insists Spain must judge the crimes of Franco era (El relator de la ONU insiste: España debe juzgar los crímenes del Franquismo)*. http://politica.elpais.com/politica/2014/02/03/actualidad/1391443224_877477.html (checked on the 5th of December 2014).

⁹ See in Spanish newspaper: Del Campo A., “*El Tribunal Europeo de Derechos Humanos da un portazo rotundo a la investi-*

there is a trial going on right now in the National Court of Buenos Aires (Argentina), which was opened by virtue of the principle of universal jurisdiction. However, the Spanish government refuses to extradite the criminals identified by this court.

2. DISCUSSION

- A failure in the “vernacularization” process: a collision caused by the long term problem of sovereignty -

In the first international trials in history, the Nuremberg Trials, elites chose a different option, something revolutionary. They chose “true justice”, they chose to conduct a fair trial. The Nuremberg Trials reformed the human rights movement, accountability and the concept of international trials and justice.

Regarding this, I consider as international justice the fact of materializing the accountability for genocide, war crimes and crimes against humanity. The process of Nuremberg ended up in a corpus of law designed to protect all individuals from the abuses of their own governments¹⁰. These trials were also a watershed for recognizing that individuals, and not merely states, are responsible for violations of human dignity, and that officials who order or commit such abuses must be held accountable¹¹.

In fact, Nuremberg principles are a part of customary international law because they are widely recognized as a precedent and the General Assembly of the UN specifically voted to include them as into the corpus of customary international law in 1946¹². This resolution of General Assembly is the closest thing you can get to a universally accepted international act.

In addition to this, the right to effective remedy of the victims is provided by legally binding treaties such as the ICCPR, the European Convention of Human Rights and the European Charter on Human Rights¹³.

Regarding the Spanish case, one cannot see any reference to the international customary human rights law above stated¹⁴ as the ruling from the Supreme Court is putting the Spanish constitution, and hence its sovereignty, before the international scope. This implies a legal paradox provided by the heterarchy of laws or positive legal pluralism¹⁵ existing in this post-westphalian notion of the state as a

gación de los crímenes del franquismo”. El Plural periódico digital. 2012. <http://www.elplural.com/2012/12/03/el-tribunal-europeo-de-derechos-humanos-da-un-portazo-rotundo-a-la-investigacion-de-los-crimenes-del-franquismo/> (last check on the 7th march 2015).

¹⁰ Steven R. Ratner, Jason S. Abrams, James L. Bischoff. *Accountability for human rights atrocities in international law. Beyond the Nuremberg legacy*. Third edition. Oxford university press. 2009. Pp. 2-5.

¹¹ See footnote 9.

¹² Resolution of the General Assembly 95 (I), of the 1st of December 1946, on the “*Affirmation of the principles of international law recognized by the Charter of the Nuremberg Trials*”. Checked on <http://www.un.org/documents/ga/res/1/ares1.htm> (last checked on the 7th of march 2015).

¹³ Right to effective remedy is internationally provided by article 2 of the International Covenant on Civil and Political Rights, article 13 of the European Convention of Human Rights and article 47 of the European Charter of Fundamental Rights.

¹⁴ In S. Tierney's words, this would be an example of a state-centered constitutional order, its external independence and its supremacy of law. See Tierney S., *Sovereignty and the idea of Public Law. Part 1: on the idea of public law. Public law and politics, the scope and limits of constitutionalism*. Edited by Emiliós Christodoulidis and Stephen Tierney. Edinburgh Centre for Law and Society. 2008. Pp. 19-20.

¹⁵ Gordon R. Woodman calls it legal pluralism. Also, it can be called a problem of interlegality if one looks from a state perspective as the critical legal sociology suggests. In the end it is all about the coexistence of different normative orders. See Woodman G.R., “The development problem of legal pluralism, an analysis and steps toward solutions”. *Legal Pluralism and Development, scholars and practitioners in dialogue*. Edited by Tamanaha B., Sage C. and Woolcock M., Cambridge University Press. 2012.

member of an international community: on the one hand, human rights law imposes an obligation on countries to provide remedies and reparation for the victims of human rights violations; and on the other hand the state had the right to maintain its sovereignty. When you have more than one option there is a complexity of systems.

From the point of view of legal anthropology, this means that there is a malfunctioning of the process of *vernacularization*¹⁶ of the Nuremberg principle VI-c) and the Rome Statute's article 7 related to crimes against humanity and which help to overcome the problem of impunity and enforce the human right to effective remedy¹⁷.

I understand *vernacularization* in the case of the Spanish crimes, not only as a process of translation of these human rights principles into practice, but also as the enforcement of them. That is to say, the judicial application and interpretation of human rights to provide justice. What, in fact, cannot be found in the Spanish case.

Regarding this, I claim that there is an inability to effectively translate human rights into practice in this case. So that there is a need to overcome this difficulty by letting the international human rights regime transform the Spanish sovereignty to strengthen the rule of law.

- A diffusion of justice: learning from the experiences of the past and of other countries as a way of overcoming the failure to vernacularize -

While several Latin American countries undergoing democratic transitions adopted official policies aimed at establishing truth and pursuing retroactive accountability, Spain did not. The unexpected emergence of a memory politics in Spain, itself partly inspired by the example of other countries, still needs some reassessment of the Spanish case in the light of subsequent research.

As M. Davies points out *“the incidence of transitional truth and justice policies has been divided into three waves, and a wide variety of strategic responses may be observed within as well as between each wave. The first wave occurred after the end of the Second World War in response to the atrocities of the Nazis. Democratization in Southern Europe in the mid-1970s brought the second. Greece placed members of the military juntas that had ruled it on trial and purged the bureaucracy. Portugal experienced purges during the most leftist phase of its transition from 1974–75, but these were later reversed or annulled”*¹⁸.

One can appreciate diffusion of the Nuremberg principles and the international human rights principles in practically all the legal systems. This can be seen in the ratification of international treaties. The elements of time, conditions and the received law or practice¹⁹ are very important in the context

¹⁶ The process of translating international human rights principles from the global to the local. S. Merry calls this process “vernacularization”. In addition, G. Sarfaty calls it “internalization”. See Merry, S.E., *Legal transplants and cultural translation: Making human rights in the vernacular*. Human Rights and Gender Violence: Translating International Law into Local Justice. Chicago : Chicago University Press. 2006. Pp. 134-178. See Sarfaty, G. A., *Reconciling Interpretive Gaps: Economizing Human Rights*. Values in Translation: Human Rights and the Culture of the World Bank. Stanford: Stanford University Press. 2012. Pp. 107-132.

¹⁷ See footnote 12.

¹⁸ Davies M., “Is Spain recovering its memory? Breaking the Pacto del Olvido”. Human Rights Quarterly, Volume 27, Number 3. Published by the John Hopkins University Press. August 2005. Pp. 862-863.

¹⁹ See Twining W., “Diffusion of law: a global perspective”. The Journal of Legal Pluralism and Unofficial Law. 2004. See Twining W., “Social Science and diffusion of law”. Journal of Law and Society. 2005.

of crimes against humanity. W. Twining talks about the appropriate conditions for the diffusion of law and as I see it, since the westphalian conception of the state as part of an international community, the conditions are already there. The problem in this case is not the diffusion, it is the whole process of enforcement of human rights principles itself (the *vernacularization*). It seems to me that this process is composed by 3 steps: first, the diffusion of laws or practices, then the legal transplant²⁰ (let's do in other context what it is working in one context, this is why I claim that Spain should learn from experiences from other countries) and finally the judicial application of those laws or practices to effectively translate them into practice. Each system may develop its way of dealing with the transplant, but in the end it is important not to lose the essence of global human rights principles. This essence is the minimum common agreement by the international community. In the Spanish case, one can say that this essence is composed by the Nuremberg principles as they are *jus cogens*. The last step of this process of *vernacularization* would be what I call "*informing the global from the local*", I mean, to evaluate the application of human rights in practice.

I argue that all the above stated could be materialized by the creation of a specific legal doctrine to deal with the crimes committed in the past in Spain²¹. What would illustrate the importance of the legal decision making in the courtroom and the role of the judge as a *constitutionally legitimated vernacularizator* to enforce human rights principles and to fix the gaps drawn by law.

3. CONCLUSION

Legal anthropology as well as civil society vernacularizers (the Association for the Recovery of the Historical Memory of Catalunya (ARMHC) and El Foro por la Memoria) can help to establishing an objective record of the atrocities of the War. As pointed out by Ermengol Gassiot Ballbe and Dawnie Wolfe Steadman, "*the common goal is to use scientific forensic and archaeological techniques to reconstruct historical memory of the Spanish Civil War and invigorate legal restitution for families*"²². So one can see that the human rights principles have been *vernacularized* into civil society and from this local context, there is a huge effort and a big attempt to frame the Spanish law within human rights values.

The application of these techniques gives scientific credibility to the process of establishing facts about the events that led to the deaths by providing empirical evidence that supports or disputes the notions of crimes against humanity and justice that are found in this case under analysis. Legal, and more specifically forensic, anthropology are crucial in this case to make the atrocities visible and inform not only the Spanish legal system but the international community too. Remember that in this post-Westfalian conception of the state, we cannot deny the post-national scenario where the Spanish state is. Moreover, crimes against humanity as described in the Rome Statute, have no boundaries and they are a matter of the whole international community.

Given the reasoning given in this paper, I claim that there is no international justice in the case of Spain. The only thing that this case provides is legal certainty, but it provokes an unjustifiable impunity for the victims.

²⁰ The term legal transplant was coined in the 1970s by the Scottish-American legal scholar W.A.J. 'Alan' Watson to indicate the moving of a rule or a system of law from one country to another. See Watson A., "*Legal Transplants: An Approach to Comparative Law*". Scottish Academic Press. 1974.

²¹ These cases are extraordinary because of the massive scale of alleged crimes committed during long periods and across many localities, because of the enormous volume of evidence, because they have a political dimension.

²² Gassiot E. B. and Wolfe D. S., "*The Political, Social and Scientific Contexts of Archaeological Investigations of Mass Graves in Spain*". *Archaeologies: Journal of the World Archaeological Congress*. 2008. Pp.5-6.

It seems to me that there is a need to assess the weight of the two issues disputed in this case: on the one hand, the right to effective remedy and the right to justice and truth that the families and victims of such atrocities have; and on the other hand, the maintenance of the legal certainty, that is to say, respecting the rule of law principles concerning the 1977 Amnesty Law and the fact that the crimes against humanity were not introduced in the Spanish legal system by the time the crimes were committed. For me, a Young human rights defender and a great granddaughter of a Franco era victim, the answer is clear: justice, truth and remedy should be upheld and a specific legal doctrine should be created to deal with the Spanish political memories from the past, by learning from the experiences from other countries and by letting post-national human rights customary law transform the Spanish legal system.

In ancient Roman religion and myth, Janus is the God of beginnings and transitions, and thereby of gates, doors, doorways, passages and endings. He is usually depicted as having two faces, since he looks to the future and to the past. Janus presided over the beginning and ending of conflict, and hence war and peace. The doors of his temple were open in time of war, and closed to mark the peace²³. In the case of Spain, the doors are still open.

REFERENCES

Affirmation of the principles of international law recognized by the Charter of the Nuremberg Trials. Checked on <http://www.un.org/documents/ga/res/1/ares1.htm> (last checked on the 7th of march 2015).

Comisión de Derechos Humanos, Derechos Civiles y Políticos, Incluso Cuestiones de Desapariciones y Ejecuciones Sumarias, available at www.geocities.com/priaranza36/informeonu.htm (last checked on the 7th of march 2015).

DAVIES, M. Is Spain recovering its memory? Breaking the Pacto del Olvido. **Human Rights Quarterly**, Volume 27, Number 3. Published by the John Hopkins University Press. August 2005. p. 862-863.

DEL CAMPO, A. El Tribunal Europeo de Derechos Humanos da un portazo rotundo a la investigación de los crímenes del franquismo. **El Plural periódico digital**. 2012. <http://www.elplural.com/2012/12/03/el-tribunal-europeo-de-derechos-humanos-da-un-portazo-rotundo-a-la-investigacion-de-los-crimes-del-franquismo/>(last check on the 7th march 2015)

El País: The UN rapporteur insists Spain must judge the crimes of Franco era (El relator de la ONU insiste: España debe juzgar los crímenes del Franquismo). http://politica.elpais.com/politica/2014/02/03/actualidad/1391443224_877477.html (checked on the 5th of December 2014).

GASSIOT, E.B. The Political, Social and Scientific Contexts of Archaeological Investigations of Mass Graves in Spain. **Archaeologies: Journal of the World Archaeological Congress**. Springer: Berlín, 2008. p.5-6.

HELLER, J. **Catch-22**. New York: Everyman's Library, 2012.

²³ See http://en.wikipedia.org/wiki/Janus#cite_note-1 (last checked on the 8th march 2015).

MERRY, S.E. Legal transplants and cultural translation: Making human rights in the vernacular. **Human Rights and Gender Violence: Translating International Law into Local Justice**. Chicago University Press: Chicago, 2006. p. 134-178.

RATNER, R; ABRAMS, J.S.A; BISCHOFF, J. L. **Accountability for human rights atrocities in international law**. Beyond the Nuremberg legacy. Thrid edition. Oxford university press: Oxford, 2009. p. 2-5.

SARFATY, G.A. **Reconciling Interpretive Gaps: Economizing Human Rights**. Values in Translation: Human Rights and the Culture of the World Bank. Stanford University Press: Stanford, 2012. p. 107-132.

TIERNEY, S. **Sovereignty and the idea of Public Law**. Part 1: on the idea of public law. Public law and politics, the scope and limits of constitutionalism. Edited by CHRISTODOULIDIS, R; TIERNEY, S.. Edinburgh Centre for Law and Society: Edinburgh, 2008. p. 19-20.

TWINING, W. Diffusion of law: a global perspective. **The Journal of Legal Pluralism and Unofficial Law**: United Kingdom, Number 49, 2004. p. 1-45.

_____. Social Science and diffusion of law. **Journal of Law and Society**: New Jersey, Volume 32, 2005, p. 203-240

WATSON, A. **Legal Transplants: An Approach to Comparative Law**. Scottish Academic Press: Edimburgh, 1974.

WOODMAN, G.R. The development problem of legal pluralism, an analysis and steps toward solutions. **Legal Pluralism and Development, scholars and practitioners in dialogue**. Edited by TAMANHA, B., SAGE, C. and WOOLCOK, M. Cambridge University Press: Cambridge, 2012.

