25th IVR World Congress
LAW SCIENCE AND TECHNOLOGY
Frankfurt am Main
15–20 August 2011

Paper Series

No. 012 / 2012
Series B
Human Rights, Democracy; Internet / intellectual property, Globalization

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Legal System, Repression and Human Rights in Contemporary Spain. Some Remarks about Spanish Transition to Democracy

URN: urn:nbn:de:hebis:30:3-248702

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Some Remarks about Spanish Transition to Democracy

Abstract: As is well known, the 2nd Spanish Republic (1931-1936) was toppled by a military uprising which, after a cruel Civil War, set up an autocratic regime led by General Franco which lasted until his natural death in 1975. According to the contemporary theory of the legal system, a legal order exists on the sole condition that it is efficient in general terms and this was the case for both the Republic and the Dictatorship. In turn, the validity of the legal norms of all legal orders is based on its respective rules of recognition. Thus, neither the existence of the legal order nor the validity of its respective legal norms depends on moral considerations. In this paper, we call this affirmation into question on the base of the fact that the compensatory methods adopted from the Transition to Democracy show an evident concern to repair the damage of taking away a person's basic rights (life, health, freedom, expression, association etc) although the Spanish Constitution, with its catalogue of fundamental rights was not in force at that time. But these measures would not have much sense if, as Raz says, there was no shared content which is common to all legal systems. Like Nino, we claim that one must discriminate between a democratic legal order and an autocratic one to establish the level of validity of its respective legal norms. Thus it can be assigned a presumption of justice to democratic norms. Finally, we state that the criteria to weigh up the justice or injustice of legal norms, as that of legal orders, takes root in the level of respect they show towards human rights.
Keywords: Transitional Justice. Human Rights. Democracy. Validity of Legal Norms. Historical Memory.

For years, the Spanish transition to democracy (1975-1982) was seen, both inside and outside Spain, as a model. This is still understandable. The Spanish Transition was studied by politicians, historians and sociologists on an international level. As Tusell wrote, this was an "unexpected" success, a consequence of the lack of precedents and of the enormous deadweight which Franco's regime signified.[1] His Regime perpetuated along almost four decades "of peace".[2] Franco thought it would survive him and he used to say: "todo lo dejo atado y bien atado" (I leave everything tied up and well tied up).

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This work is part of the research project "From Defeat Discourse to Dialogue Discourse. Transitional Justice, Historical Memory and Constitution" (SEJ2007-64461), financed by the Spanish Ministry of Education and Science for 2007-2010. Thanks to Professor Serna for his interesting suggestions on this work.
[1] Javier Tusell, *Transición a la democracia [Transition to Democracy]*, Madrid, 2007, 20-21.
[2] This is the way of speaking of the Francoist Regime. García de Cortázar points that one should speak of "order" rather than "peace" See: Fernando García de Cortázar, *Los mitos de la historia de España [Myths on*

However, the Transition passed without any breakup, from the legal political reform of the Regime by itself. This, on the other hand, was complete as the political class of the Dictatorship did not self perpetuate in the new institutional scene.[3]

In all this, *remembering the past* had a highly important role. The awareness of danger was very present during the Transition. Politicians were very afraid of new fratricidal clashes such as those of the thirties. This needed to be avoided at all costs. A specific aspect of the Spanish Transition was the need to overcome the division between victors and the defeated which had been established after the Civil War, but which started to be abandoned in the last years of the Franco regime by its own offspring.

Largely due to this need to avoid new clashes,[4] the Spanish Transition occurred *without criminal justice*. People tried to look to the future, putting into oblivion all that had happened. But "putting into oblivion" is not the same as "forgetting"; it means remembering the past with the aim for closure. This is the opposite of amnesia,[5] as it implies investigating the past, not trusting anybody's memory, not even one's own.[6]

The Amnesty of 1977 on the other hand, was used to take ETA prisoners (and other left wing terrorist groups with violent crimes) out of prison. Political prisoners had already previously been granted Amnesty.[7] The Amnesty Act was approved by elected democratic Parliament and it was negotiated between the opposition parties and the Government. The same Parliament developed and enacted the Constitution of 1978. The Basque Nationalist Party probably was the one which defended the need for amnesty with the most insistence.

In this context, no public places were created for the memory of the defeated nor were symbolic and honorary aspects dealt with. But on the other hand, significant economic efforts were made. I refer, amongst others, to measures such as the rehabilitation of civil servants of the 2nd Republic; pensions for the disabled, widows and orphans of combatants and other servants of the Republic, and compensation for political prisoners. All this to the extent that in the last two decades of the 20th century, the number of pensions derived from the Civil War was 25% of the total of pensions for the non working classes.

Spanish History], Barcelona, 2004, 328.

[3] On the social and mental transformation which explains this surprising turn, see Tusell (note 1), 38-39.

[4] On other factors, see Alicia Gil, *La justicia de transición en España: De la amnistía a la memoria histórica [Transitional Justice in Spain: from amnesty to the Historical Memory]*, Barcelona, 2009, 137-140. Keep in mind for example that most of the Spanish society was in harmony with the Dictatorship for those years and even today there are many who refuse to condemn it.

[5] Sometimes the Spanish model has been summarised as "amnesty and amnesia".

[6] Santos Juliá, De nuestras memorias y de nuestras miserias [On our memories and on our miseries], 7 *Hispania Nova* (2007), 790, http://hispanianova.rediris.es, accesed November 2010. In fact, the Civil War and the Dictatorship were the object of many historical studies from the start of the Transition.

[7] Ibid., p. 794.

Curiously, the critical debate around the transitional Spanish model was raised, generally speaking, by the grandchildren of those who suffered in the Civil War. Thus, from the first years of the new century, various parliamentary groups have asked for the cancelation of all condemnations dictated for political motives during the Civil War and Dictatorship.[8] These demands lead to the creation of an Inter-ministerial Commission which studied this question and others which the pro historical memory supporters considered unfinished business: taking away Francoist symbols and monuments, granting pensions to the so-called "Children of War", improving the Spanish nationality granting system to those belonging to International brigades, an engagement of Government in the finding and disinterment of bodies etc. As a result of the works of the Commission, the Parliament enacted what was popularly known as the "Historical Memory Act" (HMA).[9]

Neither this Act not the afore-mentioned Inter-ministerial Commission ever managed to establish the possibility of criminal persecution of crimes committed during the repression of the Franco regime. Thus the writ of Judge Garzón 16 October 2008, was quite *innovative*, as it attempted to open a sort of general investigation for crimes committed during the Civil War and Francoism by the so-called "national group".[10] This led to a trial for *prevaricación* (abuse of power) on the base of his lack of venue in conducting this investigation.There are also some relevant legal obstacles as the expiring of the crimes, their lack of legal description as international crimes when they were committed and the Amnesty Act.

This paper aims to accomplish two things. Firstly, to offer a panorama of all that has been done in Spain to repair the consequences of the Civil War and the Dictatorship with the aim of forming a debate on the sufficiency or insufficiency of said measures. And secondly, to extract two consequences from the point of view of the Theory of Law: the need for a minimum respect for human rights that every legal order must promote and the different grades of validity of legal rules depending on their autocratic or democratic origin.

The structure is the following. Firstly, the traditional theory of the legal system is briefly exposed. This theory admits the possibility for legal rules of having any content if they have been correctly enacted in the framework of an effective legal system. Next the oppression legal system during the Dictatorship is reviewed. Then we look at the theory, defended by Nino, that states that non democratic rules have a lower grade of validity. Next, we examine

[8] Note than in Germany in 1998 the Law of 25 August cancelled unjust national-socialist sentences in the administration of criminal justice.

[9] Law 52/2007, 26 December, whereby rights are recognised and extended and measures are set in favour of those who suffered persecution or violence during the Civil War and Dictatorship (HMA).

[10] The analogy of this approach became evident with the Decree of 26 April 1940 whereby the Franco Government ordered the Supreme Court "to start a investigation whereby all the proof of criminal acts committed in the national territory during the Red domination is reunited".

the various measures of repair accorded during the Transition. Finally, we state the opinion that the protection that such measures embody (life, health, freedom etc,) highlights the primacy of human rights above the criteria of mere legality and efficacy. We also state that formally there is no transition to a new legal order at all, because it does not involve a new rule of recognition, but the transformation of the Francoist regime by itself. So the traditional theory that legal systems can have any content is put into question.

I. A formal Theory of legal system

1. Legal order and the legal system

Nothing is indifferent to time —even humankind's most fundamental rights are affected in some way by it. For instance, the right to education in peacetime is different to that during a War (although all children have this right). Even the right to Life can be questioned as regards its efficacy in the case of legitimate defence. In general, legal systems change constantly. The sole fact of promulgating a new Act determines a new legal system which is different from the previous one, not only as it hosts a new rule but because it generates a new set of logical relations with the rest of legal regulations that compose the system.[11] This fact generates a succession of legal *systems* over time which is perfectly compatible with the existence of a single legal *order*. Following Alchourrón and Bulygin's terminology, we can say that a legal order is made up of a sequence of legal systems linked by a legality chain.[12] When this chain is broken, a new legal order can emerge. For example, the military uprising of July 1936 involved a new legal order. But, did it the Transition from Francoist Regime to Democracy?

When does a new legal order exist? The basic criterion among legal theorists is efficacy: a legal order exists when it is generally efficient.[13] Hart states this implies two things: citizens obey the legal rules and officials accept them rationally as critical common standards of official behaviour.[14] For Raz, the authority of legal rules derives from the fact that they are enacted by competent organs. This, he believes, turns them into exclusionary reasons for action.[15] But is there nothing to say about the content of legal orders?

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[11] Carlos E. Alchourrón and Eugenio Bulygin, *Sobre la existencia de las normas jurídicas [On the existence of legal norms]*, México, 1997, 73-75.

[12] Carlos E. Alchourrón and Eugenio Bulygin, Sobre el concepto de orden jurídico [On the concept of the legal order], in C. E. Alchourrón and E. Bulygin, *Análisis lógico y derecho [Logical Analysis and the Law]*, Madrid, 1991, 397.

[13] Oscar Vergara, Epílogo [Epilogue], in *Teorías del sistema jurídico [Theories of Legal System]*, ed. by Oscar Vergara, Granada, 2009, 307-308.

[14] Herbert L. A. Hart, *The Concept of Law*, Oxford, 1961, 113. For a critical point of view, see Pedro Rivas, El sistema jurídico en la teoría del derecho de Hart [The legal system in Hart's Theory of Law], in Vergara, ed. (note 13), 133-137.

[15] Joseph Raz, *Practical Reason and Norms*, Oxford, 1999, 142-143. With "exclusionary reason" means that when a legal norm is applicable to a case, it must be followed independently of any other moral, economical,

2. The Spanish legal system from 1936

a) As is well known, on 18 July 1936 a military uprising took place in Spain which, after its triumph in the Civil War, led to a new autocratic legal order which lasted until the mid '70s. This is a clear case of breaking the chain of legality.

The Decree of 24 July 1936 set up a Junta of National Defence, formed by main military authorities that took part in the coup, "which assumes all the powers of the State and legitimately represents the country before foreign countries". This is a Decree which has no support in Republican legality. In the second paragraph, the Junta seems to grant itself the power to dictate Decrees and draft a procedure: "The Decrees from this Junta will be promulgated after having been accorded by it and will be authorised with the President's signature and published in this 'Official Bulletin'."[16]

As a complement of this norms, the Decree of 1 November 1936, declared all rules set after 18 July which had not come from Military Authorities of the Junta of National Defence as null and void.

b) This topic has been dealt with in the Legal Theory. For Kelsen, the State, which he identifies with the legal order, has, like God, a vocation of eternity. However, it is a fact that States or legal orders succeed after one another. One of the functions of International Law is actually to legally articulate this succession. It is thought that a triumphant revolution is a condition amongst others, which allows us to speak of the emergence of a new State legal order.[17] Kelsen consequently thinks that a legal order exists in its whole when it is efficient according to the principle of effectiveness (regardless of legitimate or illegitimate origin). "Thus", he writes, "a State legal order has a beginning and an end in time, like companies, associations, cooperatives, corporations etc within this order."[18] There seems therefore no place for the moral question of legitimacy.

Kelsen writes: a State exists in the sense of the International legal community "when an independent power of control is established over people living in a certain territory. In other words, when a coercive order of human behaviour —that only has International Law above it— acquires real efficacy in a certain scope".[19]

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religious etc. reasons which can also be applicable.

[16] This refers to the Official Bulletin of the Junta of National Defence in Spain.

[17] Hans Kelsen, *Allgemeine Staatslehre* [*General theory of Law*], 1925, repr. Vienna, 1993, 148.

[18] Ibid., 148.

[19] Ibid., 127.

In other words, International Law gives a legal character to the effective control. For this, the triumphant revolution or the victorious usurper becomes a "legitimate power".[20] Jhering had already noticed this, pointing out that when an Uprising triumphs, one talks of "Revolution" but, if it fails, of "Rebellion".[21] Naturally, if the new Revolution fails, the preceding legal order is maintained with its basic norm as if it had never lost its validity.[22] In Kelsen, such power can assume any kind of content. No transcendent value is sought.[23]

3. Legal norm and sanction

For the traditional positivist theory, all legal norms have the structure "hypothesis – legal consequence", being this a positive or negative sanction. With regard to its nature, the legal norm has been traditionally understood as the sovereign's command guaranteed by a sanction.[24] But Kelsen does not agree with this opinion and he considers that a legal norm is a hypothetical judgment which expresses a logical link (imputation) between a conditioning fact and a conditioned consequence: "If it is A, it ought to be B". For him, this connection does not imply any moral or political value.[25] Kelsen considers this "ought to be" as a purely formal character in the sense of Kant; he sees no link with a transcendent idea of Law. "It remains applicable whatever the content of the connected facts is".[26] For this author, the legislations of the USSR, of fascist Italy or of democratic-capitalist France are equivalent. All are legal orders. Thus he writes: "There is no human behaviour as such human behaviour, regarding its content, which is excluded from being the content of a legal norm."[27]

Raz refines this approach but does not go beyond it. He thinks that not all legal regulations are coercive. Coercive is the legal order in its whole. In fact, he thinks, coerciveness is not logically essential to the Law, although it is humanly impossible to do without it, given the way the human beings are.[28] In any case, legal rules have authority and are binding if they have been enacted by a competent body.

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[20] Ibid., 127.
[21] Rudolf von Jhering, *Der Zweck im Recht* [*Law as a Means to an End*], 1904, repr. Hildesheim, 1970, 244.
[22] Hans Kelsen, *Théorie pure du droit: Introduction a la science du droit,* [*Pure Theory of Law, Introduction to the science of Law*], H. Thévenaz, trans., Neuchatel, 1953, 117-118.
[23] Hans Kelsen, *Reine Rechtslehre* [*Pure Theory of Law*], 2nd ed., 1960, repr. Vienna, 1992, 223.
[24] Jeremy Bentham, *Of Laws in General*, H.L.A. Hart, ed., London, 1970, 93; John Austin, *The Province of Jurisprudence Determined*, 1861, repr. Cambridge, 1999, 24-25.
[25] Hans Kelsen, *Reine Rechtslehre* [*Pure theory of Law*], 1st ed., Vienna, 1934, 23.
[26] Ibid., 24.
[27] Kelsen, *Reine Rechtslehre* [*Pure Theory of Law*], 2nd ed., 201.
[28] Raz (note 15), 158. On the theme of coerciveness, see José Antonio Seoane and Pedro Rivas, *El último eslabón del positivismo jurídico: Dos estudios sobre Joseph Raz* [*The Last link of Legal Positivism: Two studies on Joseph Raz*], Granada, 2005, 134-135.

II. Legal system and repression during the Dictatorship

4. Professed justification

If what is written above is true, a legal order does not require more legitimacy than that of Victory as it can establish a system of coercion which is coherent with the goals it promotes (whatever they may be). Nevertheless, if we examine the positivist Spanish Law, one sees it aspires to moral legitimisation.

The Decree of 13 September 1936 states in its Preface:

> For a long time, Spain has been a victim of political actions developed by certain parties which, instead of co-operating in the prosperity of the country, satisfied personal ambitions to the detriment of the common good […].

This justification falls on its rules. Such a decree declares the illegality of "all parties and political and social groups which [...] integrated the so-called Popular Front, as well as the political and social associations that were against the forces that work together in the National Uprising" (Article 1). Likewise, all assets are seized and they become the property of the State (Article 2). It stipulates moreover that public civil servants and workers from companies that are granted with a State subvention can be corrected, suspended or dismissed if their attitude is considered "anti patriotic or contrary to the national Uprising" (Article 3).

A "patriotic ideal" is also attributed to those who attempted the failed 1932 coup against the II Republic.[29] Taking into account their "bravery, high spirit and far-seeing views" through the Decree of 13 September 1936, the Junta of National Defence grants them complete Amnesty, including reinstatement, taking into account "the feelings and desires of the country".

It's worth mentioning that this appeal to popular legitimacy was shared by the Republic. In fact, its Constitution proclaimed in Article 1: "Spain is a democratic Republic of workers of all classes, which is organised in a regime of Liberty and Justice" and that "the powers of all its organs come from the people."

As Alexy has written, each legal order harbours a claim to correctness.[30]

5. Re-establishment of the Courts of Honour

The moral question is essential in the Decree of 17 November 1936 for re-establishing the Courts of Honour:

[29] We refer to the coup of General Sanjurjo 10 August 1932, for which he was condemned to death. This was later changed to life imprisonment. In 1933, he was granted partial amnesty without being able to re-join the Army.

[30] Robert Alexy, *Begriff und Geltung des Rechts [Concept and validity of the Law]*, Freiburg/München, 1994, 64.

Military institutions fervently worship Honour, source of the high virtues of loyalty and heroism. Hence, the need to entrust those who wear the uniform of the Army and Armada an efficient way to prevent sullying the most appreciated of its emblems.

These were authorized to judge "all behaviour […] which, in the opinion of the military community, sullies the good name or chivalry of its authors" (Article 2). If the Court of Honour considers it dishonourable, it will propose separation from the service (Article 6).

6. The Law on Political Responsibilities

The Law of 9 February 1939, on Political Responsibilities, was set "to settle the [political] guilt of those who performed grave actions or omissions in order to create the Red subversion, to keep it alive for over two years and to hinder the fortunate and historically inevitable triumph of the National Uprising" (Preface). It is a *sui generis* responsibility, for the types and range of sanctions, as the Preface recognises:

The purposes of this Act and its development go beyond the strict concepts of a penal norm pressed in expired moulds. The intentional magnitude and the material consequences of the affronts inflicted on Spain are such that no punishment or repair would be adequate. But our National Revolution desires neither suffering nor cruelty nor taking poverty into homes.

The following actions are susceptible, for example, to political responsibility (Art. 4): having been condemned for the crimes of Rebellion or treason, having held management positions in (or be linked to) illegal parties or groups, [31]having been put forward for positions of trust for the government of the Popular Front, having spoken publicly in defence of the said Front, having belonged to the Masonic Lodge, having actively opposed the National Uprising, etc.

There were three types of sanctions: unable to work (absolute or special disqualification), restriction of abode (deportation abroad, deportation to the Spanish territories in Africa, confinement or exile) financial (total loss of assets, payment of a fixed quantity or loss of certain assets) and exceptionally, the loss of Spanish nationality.

Likewise, special jurisdiction of political responsibilities is created. This is made up of the following organs: Regional Courts of Political Responsibilities; a National Court of Political Responsibilities,[32] that resolves the appeals against those courts; some provincial

[31] The Law on Political Responsibilities sets and gives a detailed list of the groups and associations which were already declared illegal in virtue of Decree 13 of September 1936 (above).

[32] This Court was under the authority of the Vice-President of the Government, integrated by a President, two generals or military of the Army or Armada, two National Ministers of the Traditionalist Spanish Falangist Movement and JONS (who must be lawyers) and two Magistrates of at least Magistrate Court level, all freely proposed by the Government (art. 19). The President will be the Superior Administrative Head of Political Responsibilities. These Headquarters aimed, amongst other duties, to occupy, administer, make an inventory, transfer goods seized from the mentioned institutions, associations or parties which were declared illegal (art. 23). The *Juntas de Ofensiva Nacional Sindicalista (JONS)* was a political movement of fascist ideology founded

Prosecution Courts, that collect evidence and specify charges. Finally, a Special Civil Court is assigned to each of the Regional Courts. It deals with matters of the assets of accused people. Its resolutions can be appealed before the corresponding Provincial Court.

7. The Law on Repression of Masonry and Communism

The Law of 1 March 1940 creates the crime of belonging to the Masonic Lodge and Communism and dissolves and prohibits all its organisations, branches or auxiliary nuclei. The Law tries to justify it given their "perniciousness". These groups are considered a leading factor in the decadence of Spain and they are attributed, amongst other things, the revolutions of the 19th century, the fall of the monarchy as well as many state crimes. According to the Preface:

> These serious crimes imposed on the greatness and well-being of the Nation were worsened during the last decade and culminated in the terrible atheist, materialist anti-military and anti Spanish campaign which made our Spain a satellite and slave of the Soviet criminal tyranny.

The punishment imposed on Masons or Communists (Art 5) is imprisonment (from 12 years and a day to 20 years), unless there are aggravating circumstances,[33] in which case longer imprisonment will be given (from 20 years and a day to 30 years).[34]

Likewise, those who prior to the publication of this Law, had belonged to the Masonic Lodge or Communism must provide the Government with a retraction, within 2 months from the fact being known as well as any pertinent circumstances (Art. 7).[35] If no excuse is recognised,[36] they are definitively removed from any State post, public and official Corporations, subsidised institutions and concessionary firms, managerial posts and boards of directors of private firms as well as positions of trust (command or management) of these. Perpetual disqualification and confinement or expulsion is ordered for these workers. Likewise, they will be submitted to imposition of economic sanction in accordance with the Law of 9 February 1939.

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in 1931. In 1934 it joined *Falange Española (FE),* of a similar ideology, created in 1933 by José Antonio Primo de Rivera and others. In 1937, Franco united FE-JONS and the other political and paramilitary bastion of the National Movement, Carlism, which was of a traditionalist ideology (non fascist) from which resulted the Traditional Spanish Falangist Movement.

[33] Aggravating circumstances in the Masonic qualification are, e.g.: having obtained one of the grades from 18 to 33 or having taken part in the assemblies of International Masonic association or in national assemblies. And, as regards communists, being "in the leadership of agitation, in Headquarters and connection core groups linked with foreign organisations and having participated actively in national or foreign communist congresses" (Art. 6.).

[34] As a matter of fact, there were few people condemned for communism by this Court as there were other oppressor formulas for its repression. See Raúl Cancio, *Guerra civil y tribunales populares: de los jurados populares a la justicia franquista (1936-1939)* [*Civil War and popular juries: from popular juries to Franco justice (1936-1939)],* Cáceres, 2007, 160.

[35] The details of this are regulated in Decree 30 March 1940.

[36] See Art. 10

The Courts of Honour were responsible for finding these facts in the case of Army officials. For others, a special Court was created "headed by that who designed the Head of State and a General of the Army, a leader of the Traditionalist Spanish Falangist Movement and JONS and two lawyers".[37]

8. General Trial for crimes committed during "Red Domination"

In virtue of Decree 26 April 1940, the Government ordered the Public Prosecutor of the Supreme Court to "instruct a general trial which reunites the proof of criminal actions committed on the entire national territory during red domination" (art. 1). This meant providing all the authorities and civil and military corporations with all the help needed. With this trial, it is expected to elucidate (Preface):

> […] from the preparatory acts of subversion to the final behaviour of the defeated leaders and to investigate the causes and effects of the crime, the procedures used in its execution, the attribution of responsibilities, the identification of victims and the determination of the material and moral damage caused against people or assets, as well as against Religion, Culture, Art and national Patrimony.

9. The Court of Public Order

The Act of 2 December 1963 created the Court and Tribunal of Public Order —the Court for preliminary investigations into cases. Exclusive competence was granted on the entire national territory to prosecute for the crimes which were "singled out for a low or high level of severity in subverting the basic principles of the State, perturbing the public order or spreading confusion in national conscience" (Preface). It had also competence on crimes typified in the Act of 1 March 1940. These were crimes of repression of masonry and communism, after the abolition of the special corresponding Court (final Resolution 4). It specifically had competence on crimes against the Head of State, the Parliament, the Council of Ministers and the Form of Government; rebellion, sedition, public disorder, illegal propaganda and illegal detention for political or social motives" (Art. 3).

10. The Crime of Rebellion

The most serious crimes were those of Rebellion. Until 1945, this crime was regulated by the code of Military Justice approved by the Royal Decree of 24 September 1890.[38] The crime of

[37] See Art. 9.

[38] See Oscar Vergara, La Ley de Memoria Histórica: ¿cuentas pendientes? Sobre la revisión judicial de las condenas por motivos políticos o sin las debidas garantías durante la Guerra civil y la Dictadura [The Remaining Accounts of (Spanish) Historical Memory Law: On Judicial Review of Sentences Passed by Political Reasons or without Due Process of Law during Spanish Civil War and Dictatorship], *Justicia*, 2011, 188-190, for detailed information on this theme.

Rebellion consists of rising up against the State or its legitimate authorities. However, in virtue of the Decree of 24 July 1936[39] , all the powers of State are taken by the Junta of National Defence and legitimate authorities become those of the Uprising. In its original edition of 1890, Art 237 of the Code of Military Justice defines the crime of rebellion as the following:

Offenders of the crime of military rebellion are those who raise arms against the Constitution of the State, against the King, Co-legislative Bodies or the legitimate Government, providing that one of the following circumstances occur:

1. that these are ordered by the military or that the uprising is started, sustained or is aided by the Army.

2. that it forms a military organised group of 10 or more individuals.

3. that it forms a group of under 10, if in a certain territory of the Nation there are other groups of the Army before or after having declared the state of War.

As regards punishment, the most serious was death which could be administered to the Head of the Rebellion and to those who command the different units. For the rest, such as those who supported rebellion, the punishment varied from life imprisonment to death. Nevertheless, during the Civil War, the Ban of 28 July 1936 of the Junta of National Defence extended the offences types of the crimes of rebellion, as well as those considered responsible.

There is no legal reform of the Code of Military Justice in this subject until 1943, in virtue of the Act of 2 March 1943, which restricts the modifications established in the Military Bans from 1936. In 1945, a new Code of Military Justice was promulgated in virtue of the Act of 17 July 1945, which substitutes that of 1890. Art 286 establishes:

Offenders of the crime of military rebellion are those who raise arms against the Head of State, its Government or fundamental Institutions of the Nation, providing that one of the following circumstances occur:

1. that these are ordered by the military or that the uprising is started, sustained or is aided by the Army.

2. that it forms a military organised group of 10 or more individuals.

3. that it forms a group of fewer than 10, if in a certain territory of the nation there are other groups or forces which set themselves the same objectives.

4. that it harasses the forces of the Army

5. that offenders of the crime of military rebellion are also those who are declared as such in special Laws or in bans of military authorities.

As regards punishment, death was imposed to those who head the Rebellion. Article 287 states:

The Head of the Rebellion will be punished with the death penalty as will he who heads the rebel forces or elements.

[39] See above the Section "2. The Spanish legal system from 1936".

Rebels who lead Companies and analogous superior of any of the three Armies will also be punished by the death penalty.

Those not principally in charge and mere executors are punished (article 288) with imprisonment of 12 years and a day to death "which the Court will apply discretionally". The same punishment will be given to promoters and co-operators as well as those who join the Rebellion with actions which signify impulse, promotion, help or support (art 288.2). Those who help the Rebellion without identifying with it are given a six month and one day prison sentence (art 289). The same punishment will be given to those who incite the Rebellion, even if it doesn't occur, and those who, once the crime has been perpetrated, justify it (article 290). Conspirators will also be imprisoned (art. 291).

The military jurisdiction was competent on the crime of Rebellion in all its forms, according to the summary proceedings in the corresponding Council of War. Both the Code of 1890 and that of 1945 showed a more than trifling catalogue of procedural safeguards.[40]

III. Towards a material Theory of legal system

11. Legitimacy of the legal order and its norms

From the above, two conclusions can be taken:

1. As has been already said, every legal order harbours a "claim to correctness" (Alexy): in this case, the mentioned norms respond clearly to a certain conception of State and the common good, which is imposed coercively upon a pernicious political concept.

2. The justification of the legal order is moral in nature[41] – it can only be thus. As Nino shows, the recognition of the norms dictated by a *de facto regime* cannot base itself on the fact that they have been set by those who exert power. This implies a fallacy, which is an illegitimate jump from *is* to *ought*. [42]

However, the justification of the norms of a legal order *de iure* is the same. As the Argentinean professor pointed out, "showing consistency between these norms and a constitution seems a valid foundation purely because it assumes acceptable ethical values".[43]

Kelsen tries to avoid this conclusion, resorting to a presupposed —or fictitious[44]— fundamental norm[45] which sometimes he identifies with the norm of international Law which

[40] Vergara (note 38), 188-190; 210-211.
[41] Carlos S. Nino, *Derecho, moral y política* [*Moral and Political Law*], Barcelona, 1994, 58-59.
[42] Carlos S. Nino, *La validez del derecho* [*The Validity of Law*], Buenos Aires, 1985, 92.
[43] Ibidem.
[44] Hans Kelsen, *Allgemeine Theorie der Normen* [*General Theory of Norms*], K. Ringhofer and R. Walter, ed., Vienna, 1979, 206.
[45] Kelsen (note 23), 209.

confers validity to the various legal orders in its scope.[46] But this is problematic, because what gives validity or binding force (in Kelsen it is the same) to International Law?

Bulygin considers that the question of obligation is a moral one, totally unsuitable in a positivist approach. Validity implies direct or indirect recognition for the final rule of a system which has a conceptual, but not moral character: It defines what rules form part of it but does not aim to confer obligation.[47] Ross has qualified Kelsen's pure theory as "quasi positivism".[48] For Olivecrona, the notion of binding force of law is just an empty word with an emotional meaning.[49]

Nino distinguishes between two types of legitimacy of legal norms —those that refer to its origin and those that refer to its content. In his view, when a norm fully satisfies the demands of content, the question of origin becomes superfluous. However, when this is not the case, the considerations about its origin become relevant. For this reason, the origin of norms must be legitimate, so norms whose contents branched off into reasonable margins must be obligatory, from the substantive demands of justice which, on the other hand, is inevitable given the tendency of man to fall into moral errors.[50]

For Nino, the superiority of democracy, as decision making system, lies in its ability to be the best substitute for moral discourse. It allows fulfilling in a high grade the demands of free deliberation and consensus. In moral discourse, its rules constitute the outcomes of it. This constitutive character transfer to democratic process, but restrictedly. Its justificatory capacity is *prima facie.*[51] It is possible to bring into question those decisions that would not have been taken in a genuine moral discourse. These diversions are inacceptable when they imply to destroy the preconditions that make this discourse subsist. This justifies democracy being limited by a set of basic rights. In Nino's opinion, the goal of promoting individual rights is what supports the existence of a Government. If it is democratic, it is backed by the presumption of correctness of the means for that end.[52]

The rules of autocratic origin lack this presumption of justice. This is not to say that their content can not be just and that they can not be morally compulsory. Is there any possibility of setting the validity of these rules attending to their origin? Nino criticizes the argument that

[46] See above the Section "2. The Spanish legal system from 1936".
[47] Eugenio Bulygin, Sobre la regla de reconocimiento [On the rule of recognition in Law], in *Derecho, Filosofía y Lenguaje: Homenaje a Ambrosio L. Gioja* [*Philosophy and Language, homage to Ambrosio L Gioja*], Buenos Aires, 1976, 37-39.
[48] Alf Ross, Validity and the Conflict between Positivism and Natural Law, 4 *Revista Jurídica de Buenos Aires* (1961), 78-82.
[49] Karl Olivecrona, *Law as fact,* 1st ed., Copenhagen-London, Einer Munksgaard-Humphrey Milford, 1939, 17.
[50] Nino (note 42), 96.
[51] Unlike Raz, who considered it exclusionary, see above the Section "1. Legal order and the legal system".
[52] Nino (note 42), 97.

says: it is better some government rather than no government, because it does not necessarily grant the human rights. Nevertheless, Nino thinks, once *de facto* authority holds the power, if it is not possible to restore the democracy, a widespread disobedience can be too onerous in terms of preservation of rights: "So, if *de facto* authorities are respectful with basic rights, there are moral considerations of order, peace, security, etc., in favour of its rules. They have some weight and they have to be weighed basically by judges, considering their possible diversion from justice [...]".[53]

This weight of origin of the rules of a *de facto* government is lower than that of the rules of a democratic government because those rules lack the presumption of justice. This involves, as we will see in the Spanish case, that order, peace and security are reasons that can only be fully argued while the *de facto* regime is in force. When it is replaced, it is not so onerous to disregard its rules. Nevertheless, those values still operate in some aspects, regarding norms that have generated vested rights, expectations and consolidated situations. Reverting from those situations could generate great legal insecurity.[54]

According to what has been said, for Nino, legal validity is gradual. It is higher when the origin of rules is of a democratic character, because it supposes justice. If it is not the case, there is still some grade of validity, on the basis of considerations of order and security. But these are not decisive when a democratic regimen comes after. In this case, autocratic rules can be easily overtaken by value considerations if they do not gravely affect legal security, as we will see it happens in the Spanish case.

12. Revision of pre-constitutional right

Curiously, the Transition to democracy does not establish a new legal order in the terms analyzed in § 1, because it does not involve a new rule of recognition, but the transformation of the Francoist regime by itself. Formally, a new chain of validity is not established. The reform of the regime starts from a "Ley Fundamental" (Fundamental Act), correctly emanated from the Francoist Legislative Assembly: The Political Reform Act (Nr. 1/1977, January 4th) (PRA). This Act requires the Government to call the first democratic election. As a result of this, the Amnesty Act of 1977 and the Constitution of 1978 are developed and sanctioned. This democratic Constitution recognizes a set of fundamental rights, considered as the basis of the political order, and confers to the Parliament the power to enact laws, which are sanctioned by the King. But those three aspects —democracy, fundamental rights and legislative process— were yet provided by PRA in its first article. To speak about a new legal

[53] Ibid., p. 99.
[54] Ibid., p. 100.

order is only possible on the basis of material or content considerations. But the material transformation itself is previous to the Constitution of 1978 and it is generated by the Francoist Regime itself by the PRA. Anyway, formally the legal order is not changed. There is not breakup. It is necessary to attend to the content of preconstitutional rules in order to determine if they are or not conflicting with the Constitution. Its 3rd Transitional Rule abolish all the rules that are conflicting with the Constitution. Finally, the own constitutional reform process, that culminates in the Constitution of 1978, is specifically provided in the PRA (3rd article).

It is obvious that the repressive right of Dictatorship is not compatible with the Constitutional right. The Courts of Honour are specifically forbidden; one cannot establish sanctions for political or ideological reasons; nobody can be prosecuted for being a mason or communist and nobody can be given the death penalty for rebellion (currently not even in times of War). There is no doubt that these regulations violate fundamental rights such as ideological liberty, freedom of opinion, freedom of association, religious freedom, the right to honour and the right to the free development of personality etc.

However the Spanish Constitution (SC) abrogates (but does not annul) laws where repression was legally founded. This means that if there is not a legal requirement which specifically states it, the sanctions imposed by virtue of the repressive Law are still valid. From the Transition to the present day, the legislator has tried to mitigate their effects by economic and moral reparations to those who suffered from them. Moreover, a big effort has been made in order to compensate the damages and prejudicial consequences derived from the civil conflict; specifically those suffered in the most basic areas as a consequence of the War: life, health, physical integrity etc.

At first, the reparations tended towards the rehabilitation of the civil servants and to the recognition of their passive rights. This coincided with granting Amnesty for the crimes and misdemeanours of political intent. Gradually, a series of pensions were granted to those who were disabled because of the War as well as to the families of the deceased and missing. Later, those who suffered prison for political reasons were compensated and a pension was given to the so-called “Children of the War”. Nationality was also given to members of International brigades. Finally, the Historical Memory Act has completed the reparatory panorama from a financial, but especially moral, point of view. We will look at this in more detail in the following paragraphs.

IV. Reparations from Transition

13. Amnesty for crimes and misdemeanours of political intent

One of the government's first measures during the Transition was the revision *ex officio* and cancelling the effects of administrative sanctions imposed to civil servants of the State by virtue of the Law on Political Responsibilities, 10 February 1939.[55]

So, Royal Decree Law 10/1976, 30 July aims to achieve the "national reconciliation" because it considers "the moment has arrived to finalise this process by forgetting any discriminatory legacy of the past". For this, it granted Amnesty for all the crimes and misdemeanours of political intent and opinion, providing that they had not harmed or placed in danger[56] the life or integrity of people or the nation's economic patrimony through monetary fraud. Amnesty covers the crimes of rebellion and sedition and includes deserters, fugitives and conscientious objectors.[57]

But the Parliament went much further than Government in virtue of Law 46/1977, 15 October, by granting amnesty to all acts of political intent (regardless of the result) which were classified as crimes and misdemeanours carried out before 15 December 1976.[58] It is important to note that oblivion applied to all, not only for the prisoners of ETA (for whom this measure of grace was especially conceived), but also the crimes and misdemeanours which the authorities, civil servants and public order agents could have committed with the motive of investigation and persecution of the acts included in this Act.

14. Reinstatement of civil servants

a) As regards civil servants who had lost their jobs as a consequence of their acts of political intent, the Royal Decree Law 10/1976 (Art. 9) and the Amnesty Act (Art. 7) stipulated their reinstatement into service. Nevertheless, they could only receive income for the time they had worked. Their time away from the civil service counted as seniority.

b) At first the professional military had no right to be re-instated into their jobs and careers even if they had received income in accordance with the post they had had when they

[55] In virtue of Decree 3357/1975, 5 December. See above the Section "6. The Law on Political Responsibilities".
[56] Royal Decree 19/1977, of 14 March, eliminated the clause "placed in danger".
[57] Decree 1081/1978, 2 May specifies some aspects of the Royal Decree-Law 10/1976 regarding the civil servants of the Government of Cataluña.
[58] The recently mentioned Royal Decree Law 30 July 1976 had established 30 July 1976 as a deadline. The same Amnesty Act extended further the deadline to 15 June 1977 "when in the political intent it can be seen a motive for re-establishing public liberties or the Spanish Peoples claim for autonomy". The date was extended to 6 October 1977 if actions had not meant serious violence against people's lives or integrity.

committed the forgiven crime (articles 8 and 6 respectively).[59] Later, Law 37/1984, 22 October, stipulated retirement for those soldiers with retirement inherent rights and with a position which they would have had if they had remained in service. Finally, Law 24/1986, 24 December, established that professional soldiers could also request to be reinstated to the position that corresponded to their seniority.

c) As regards the non-professional military, the afore-mentioned Law 37/1984 recognised "rendered services" to all personnel "who had entered the service of the Republic in the Armed Forces and had obtained a position or grade of at least NCO during the period from 18 July 1936 to 1 April 1939", as well as those who, over the same period, had entered the service of the Republic as members of Forces of the Public Order or the *Carabinero* Corps.[60] These people are also granted the right to a pension as well as medicine and social services in the same measure as pensioners receiving Social Security. It also grants surviving spouses and orphans rights to a widow/ orphan's pension as well as the other services mentioned.

d) As well as this, specific requirements of reinstatement were established for local administration civil servants,[61] as well as civil servants working in the justice department ,[62] primary school teachers from the Professional Plan of 1931[63] and primary school teachers from the Primary Stage of 1936.[64]

15. Those wounded and disabled by the War

Decree 670/1976, 5 March, grants a pension to all those who suffered wounds which led to a significant reduction in their faculties as a direct or indirect consequence of War actions

[59] The Royal Decree Law 6/1978, 6 March stated that such personnel consisted of the Officers, NCOs and classes who had consolidated their post or who had entered as students of the Military Academies (before 18 July 1936) belonging to the Armed Forces or Forces of Public Order and who took part in the Civil War. Likewise, it stated that pensions would be assessed by taking into consideration services rendered until 17 July 1936 and from 18 July of the same year to the date when they had reached the official age to retire. Likewise, widows and orphans were given the right to a pension in accordance with the deceased's salary received at the time of death. Law 10/1980, 14 March modified Royal Decree Law 6/1978 considering professionals as those who before 18 July 1936 had re-joined a military body, belonged on that date to the forces of Public Order or the Squadron of Escort of the President of the Republic or who were pupils of the Marine Schools of the Armada.

[60] The Sentence of the Constitutional Court 116/1987, 7 July, declared Articles 1 and 4 partially unconstitutional for having violated the principle of equality by considering, in accordance with the previous legislation, only those military men who had entered the military profession before 18 July 1936, a distinction which was not made for civil servants of the State.

[61] Royal Decree 393/1976, 1 October and Order of the Ministry of Interior 6 July 1977.

[62] Royal Decree-Law 44/1978, 21 December.

[63] Royal Decree1555 /1977, 2 June.

[64] Royal Decree 329/1979, 13 February.

developed on the National territory between 18 July 1936 and 1 April 1939. They could not enter the Body of Knights Disabled by War for the Country.

Some problems affecting those disabled in this period were left unresolved and these were addressed in Royal Decree Law 43/1978, 21 December. This Decree distinguished between those disabled in action, those who became disabled during their service and those who were unable to work. It granted those of the first degree, as well as those who were unfit for work the right to a basic pension as well as a disabled pension for their families.[65]

We recall that the Royal Decree Law 6/1978, 6 March, stated the pension for professional soldiers, as well as for their widows and orphans. Royal Decree Law 46/1978, 21 December, moreover gave them the right to a life pension for having suffered, during the Civil War, wounds or lesions which had led to notable reduction of their faculties.

At first there was no distinction between Republican and national fighters. The latter had been compensated although there were a small number of them who had not been able to access the corresponding protector norms[66] or who had opted to exercise better rights. Law 35/1980, 26 June,[67] was aimed specifically at those disabled and invalid soldiers of the Republican area,[68] considering that the previous regulation was susceptible to improvement.

Finally, Law 6/1982, 29 March, was aimed at civilians left disabled because of War, establishing basic retribution for those as well as a pension and the possibility to claim Social Security as well as other rights.

16. Deaths due to the Civil War

Law 5/1979, 18 September, grants pensions to widows, children and other relatives of those deceased during (or as a consequence of) the Civil War as well as of those missing in action at the Front or elsewhere if it can be presumed they died by those motives. As well as (life) pensions, they have right to medical/pharmaceutical assistance and certain social services

[65] Those disabled to the first degree and who could not work could join the General Regime of Social Security. Those of the 2nd degree were only entitled to a disabled pension.

[66] These are: Law of 15 September 1932; Law of 12 December 1942; Law of 26 December 1958; Law 5/1976, 11 March.

[67] The Royal Decree-Law 391/1982, de 12 de February integrates in the General Regime of Social Security disabled ex servicemen of the Republican area. They are entitled to healthcare and social services.

[68] This refers specifically to all those "Spaniard ex-combatants of the Republican area who, by belonging permanently or incidentally to the Armies, Forces of Public Order (of a military nature) or collaborating with these under the orders of natural command had suffered wounds which affected permanently their physical or psychological integrity". This also applied to those "who suffered incapacity due to illnesses which began or worsened in service during the period between 18 July 1936 and 1 April 1939, or from captivity suffered as a direct consequence of War actions over that period".

such as Access to the Residences and Homes of the Social Service of Assistance to Pensioners.[69]

17. Compensation for deprivation of liberty for political reasons

Amnesty meant the end of limitations and suspension for many Spaniards as regards their active and passive rights. However, it did not solve the problem of the lack of social protection which affected many people, who, due to their stay in prison, could not reap Social Security benefits. Law 18/1984, 8 June, completed the Amnesty Act to "eliminate the final obstacles to integrate (as citizens with full rights) those who fought for liberty and peaceful co-existence in Spain".[70] This Act recognises the effects of Social Security contributions and the periods spent in prison as a consequence of the cases stated in the Amnesty Act.

Likewise, Law 4/1990, 29 June, Additional Norm 18, of the General State Budget for 1990, established compensation for those who had suffered prison for the same motives stated in the Amnesty Act for three years or more.[71] The surviving spouse received the compensation if her spouse had died and if he was 65 by 31 December 1990.[72]

For the many people who did not fulfil these requisites, almost all the autonomous communities have enacted specific norms, recognising a right to compensation.[73]

18. Returning assets to political parties and Trade Unions

a) The Law 4/1986, 8 January freely gives Trade Unions and business organisations the assets of the Accumulated Trade Union Patrimony (Patrimony of the State) and gives back the assets of the Historical Trade Union Patrimony to Trade Unions who can prove they are the legitimate successors of those who suffered confiscation,[74] (providing that assets had not passed to third parties or had not undergone substantial alterations which prevented them

[69] This Law was developed by the Royal Decree 2635/1979, 16 November. The Resolution of the General Management of the Treasury of 23 November 1979 set a series of norms. Its financial benefits were extended by the Historical Memory Act. See below the Section "21. The Historical Memory Act" .

[70] Law 18/1984, 8 June, Preface.

[71] At a ratio of a million *pesetas* for the first three years and two hundred thousand for each additional three completed years.

[72] Modified by the Historical Memory Act. See below "21. The Historical Memory" Act.

[73] In short, according to the Inter-ministerial Commission, approximately 574,000 applications had been resolved favourably by 2005, of an approximate value of 16,356 million Euros. Of these, 391 correspond to compensation and the rest to pensions. The number of beneficiaries had reduced over time. In 2005, there were 22,397 with an average monthly pension of 707.55 Euros and 73,546 relatives with an average monthly amount of 398.40. It is clear that an enormous budgetary effort was made to counteract the worst effects of the Civil War. As the Report shows, in the last two decades of the 20th Century, the number of people who received a pension from the Civil War was 25% of the total number of people receiving the state pension.

[74] In virtue of this, we recall the Decree of 13 September 1936 and the Law on Political Responsibilities 1939.

from being integrated with original assets). In this case, the State was obliged to give compensation for their value.

Despite this, almost twenty years later, it has not been possible to give back the assets of the Historical Union Patrimony, mainly due to the demands that Law 4/1986 set as regards crediting ownerships. These demands did not take into account the existence of a Civil War followed by a long period of Dictatorship. The Royal Decree Law 13/2005, 28 October tried to solve this problem by establishing a deadline (31 January 2006) —which the Act had not done, with the consequent perjury of legal security. It also updates the criteria for compensation of assets, that the Law 4/1986 set around the market value in 1986.

b) Law 43/1998, 15 November, did the same with political parties, stipulating the restitution to those mentioned in the Law 9 February 1939[75] of property assets and patrimonial rights which they had owned and which had been seized even if they had not have legal status. In those cases in which these goods or rights could not be totally or partially returned (as they had not been sufficiently identified or for belonging to third parties, or for being public property or for any other reason), the monetary (market) value would be given.

With regard to the individuals, the evident technical difficulties[76] have prevented providing legal measures to return them goods and patrimonial assets. To this, the demand for legal security of Article 9.3 of the SC can be added, taking into account the quantity of legal transactions linked to such goods and rights in the last 70 years.

19. Granting Spanish nationality to members of International Brigades

Article 21.1 of the Civil Code states "Spanish nationality is acquired by naturalisation papers, granted discretionally by Royal Decree when there are exceptional circumstances for the interested party". Royal Decree 39/1996, 19 January, considers that voluntary members of the International Brigades during the Spanish Civil War from 1936 to 1939 are indeed in those exceptional circumstances. However since Article 23 of the Civil Code demanded that former nationality be renounced, many members simply requested a certificate from the General Management of Registrars and Notaries which stated the faculty to exercise this right.

[75] Providing that before 6 December 1978 they had formally requested their legal restitution or by such a date had been already given back legally and that their legal status had not expired before 1 December 1995.

[76] The Report of the Inter-ministerial Commission for the Study of the Situation of Victims of the Civil War and Dictatorship lists these: "establishing those who are entitled and the types of assets and rights which must be returned; setting rules to establish the succession of former owners; means of accreditation of this ownership, setting the procedure of restitution; the criteria of evaluation of the assets and rights to be given back; whether to compensate or not when goods and rights have been transmitted by the State to third parties; setting substitute compensation in the case of loss, deterioration or disappearance of goods and assets, etc.".

20. The "Children of War"

As people know, many children were evacuated during the Civil War, being mainly welcomed (in Europe) in Belgium, the UK, France, the former Czechoslovakia and the former URSS. As regards America, they were sent to Mexico, Venezuela and Chile. Law 3/2005 of 18 March recognises an economic assistance to those who, being minors, were sent abroad and spent most of their life outside the national territory. The norm is aimed specifically for those with smaller incomes, i.e. to those who had to accept old age pensions in favour of Spanish immigrants (purely to survive) and specific retirement pensions addressed to those who did not contribute to Social Security.[77]

21. The Historical Memory Act

The Law 52/2007, of 26 December, which recognises and enhances the rights and establishes measures in favour of those who suffered persecution or violence during the Civil War and the Dictatorship (HMA), was the culmination of this reparatory process which started during the Transition (and which we have reviewed in brief). It looks specifically at the honorary and moral aspects which had not been done beforehand and it introduces improvements as regards pensions.

a) As regards the former, an "individual right to the personal and family memory of each citizen" is recognised. The unjust character of each form of persecution for political, ideological or religious reasons is stated. The illegitimacy of the organs created during the Civil War is declared as well as the sanctions and condemnations they set.[78] The right to obtain an administrative Declaration of redress and personal recognition to those who suffered from the effects of said resolutions is granted. Public administrations are forced to collaborate with individuals in finding and identifying victims. They are also told to remove all those symbols which exalt (individually or collectively) the military uprising, the Civil War or Dictatorship.[79] As regards the Valle de los Caídos (Valley of the Fallen),[80] all types of political or actions that exalt the Civil War, its protagonists or Francoism are forbidden. The Government also has to carry out a census of buildings and work done by Members of the

[77]The quantity is the difference between 6,090 Euros and the annual amount received for such pensions.

[78] The Historical Memory Act does not cancel such resolutions. Despite this, there are those who wrongly think that this is possible through the appeal for review in the Supreme Court. See Vergara, (note 38), *passim*.

[79] Exceptions are private memorabilia or when there are artistic, architectonic or artistic-religious reasons protected by the Law.

[80] This is a monument which commemorates those fallen in The Civil War between 1940 and 1958, where, amongst other tens of thousands of both camps, are buried Franco and Primo de Rivera.

Disciplinary Battalions of Working Soldiers as well as by prisoners of concentration camps, Battalions of workers and prisoners in Military colonial prisons. The Spanish nationality is granted to volunteers of the International Brigades, but now without having to renounce their previous nationality.[81] The Documentary Centre of Historical Memory is (re)created.[82]

b) But the Law also introduces improvements in financial benefits.

1) Those who died because of the Civil War: There was a problem with the beneficiaries of those who had died as a result of the Civil War, but after the two years deadline set by the Law 5/1979, September 18.[83] In order to grant them a pension, the HMA only demands that wounds which cause death are a consequence of the Civil War, without setting time limits.

Likewise, the afore-mentioned Law 5/1979 recognised that widows, children and fathers of those who had died during the Civil War were entitled to a pension. This had to be "as a consequence of political or Trade Union actions or opinions, when a direct and personal relation of causality between the Civil War and death could be established and whereby this had not been the consequence of a sentence, nor derived from the violent action of the interested party". Then the HMA removed the clause "and whereby this had not been the consequence of a sentence, nor derived from the violent action of the interested party".[84]

Finally, as regards this very same Law, as well as Law 35/1980, 26 June, from 1981, orphans had seen their pensions frozen. Therefore the HMA set this as 132.86 Euros a month and ensures this will be re-valued periodically.

2) Beneficiaries of the Amnesty Act: As regards Law 4/1990, 29 June, of the General State Budget for 1990, whose Additional Norm 18 granted compensation in favour of those who suffered prison as a consequence of the cases stated in the Amnesty Act,[85] the HMA modifies this Additional Norm 18, including in it members of the Disciplinary Battalions (who had been excluded). Likewise, it reduces the age required: from 65 to 60 on 31 December 1990, for a right to compensation. It also establishes new compensation for the spouse when the

[81] See above the Section "19. Granting Spanish Nationality to members of International Brigades".
[82] Its functions are, amongst others: *a*) maintain and develop the General Archives of the Spanish Civil War of Salamanca; *b*) recuperate and ensure that documents and secondary sources are available to interested parties (the same Law grants specifically an access right); *c*) promote historical research of the Civil War, etc. This organ had previously been created in virtue of Royal Decree 697/2007, 1 June.
[83] See above "16. Deaths due to the Civil War".
[84] To complete this, Law 5/1979 considered that those who had died after the Civil War due to a sentence, violent action or a situation of deprivation of liberty due to their participation in the War, were entitled to benefits.
[85] See above the Section "17. Compensation for deprivation of liberty for political reasons".

deceased had been condemned to death and executed even if he had not served the three years in prison.[86]

Fiscal benefits are also included. In connection with the Royal Legislative Decree 3/2004, 5 March that approves the Refunded Text of the Income Tax Act, article 7 states the exemption of certain income. The HMA exempts, with effect from 2005, the compensations granted by the State and the Autonomous Communities to repair those who were deprived of their liberty for reasons considered in the Amnesty Act. Likewise, it establishes a set of measures destined to compensate the tax burdens of compensations received since 1 January 1999 for the same motives.

Finally, there is a specific recognition, both moral and financial, of those "people who died defending democracy between 1 January 1968 and 6 October 1977". Its beneficiaries[87] are given the right to compensation of 135,000 Euros.

V. Conclusions and bibliography

22. Conclusions

1) The triumph of the military uprising of 18 July 1936 set a new legal order which radically changed the chain of validity of legal norms (§§1-2). This was not the case in the subsequent Transition to Democracy in the 70's, because it consisted in the transformation of the Francoist regime from itself (§12).

2) Formally, all the legal orders harbour an identical claim to correctness (§§4-10).

3) The traditional vision of the positivist theories of the legal system does not allow one to discriminate between legal orders as regards legitimacy, which is a moral question (§§2-3).

4) In such a way (formally) we can not distinguish between the Dictatorship and the new democratic Regime. But we can do it on the basis of their respective contents. Particularly, regarding the respective grade of respect that they embody for human rights.

5) Partly for that reason, a democratic legal order and an autocratic one must be distinguished on the base of the presumption of justice of the former. Democracy, as public decision making system, is a better substitute of the decision making system of the genuine moral

[86] In the case that they had not received a pension or compensation charged to one of the public systems of social protection. According to the 2007 edition, compensation rose to €.9,616.18

[87] These are the children, the spouse or partner and parents, siblings and children of the surviving person.

discourse (Nino). Nevertheless, this justification is only *prima facie*, as this system does not guarantee the infallibility of decisions. Likewise, the norms of an autocratic system can be valid for reasons of order and security when there is respect for basic rights although these reasons do not operate fully once the transition to a democratic system has been made (§11). The fundamental criteria are that of justice and, secondarily, that of security.

6) The criteria to weigh up the justice and injustice of legal requirements, (as well as legal orders) come from the degree of respect shown towards human rights. If these have been harmed, they must be repaired. This is the sense of the numerous financial and moral measures adopted since the Transition in relation to the effects of the Civil War and the later repression, as a consequence of loss of life, freedom or health, having been sanctioned for political or ideological reasons, having suffered exile or the loss of one's assets, etc. — all this to the extent that the legal security allows it (§§13-21).

7) Finally, one must take into account the fact that the Spanish Constitution, with its catalogue of fundamental rights, was not in force at the moment of its violation, but this did not prevent it from making the mentioned reparations. What it does is to recognise human rights, not grant or bestow them.

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