

Anti-Terrorist Penal Legislation and the Rule of Law: Spanish Experience

José Luis de la Cuesta*

1. Introduction

1.1. Existing universal instruments against terrorism (1) describe a universally established common framework of regulation that, at a minimum, States should include in their internal order with the view to assuring common action against terrorism, qualified by the Security Council Resolutions (particularly Resolution 1373) as “a threat to international peace and security” that needs to be combated “by all means, in accordance with the Charter of the United Nations”. This common framework includes several duties of the States concerning the incrimination of certain acts (terrorist acts, facilitation of terrorism, terrorism financing...), the protection of victims and witnesses, and the adoption of the necessary measures to promote and assure the efficacy of the incriminations and the cooperation at the international level (jurisdiction, principle of *aut dedere, aut judicare*, non-applicability of the political offence exception to extradition, other means of cooperation) with a full respect of human rights and of fair trial, as established by the Universal Declaration of Human Rights and the United Nations Covenant on Civil and Political Rights.

States are in any case free to choose the legislative technique that they prefer to follow in order to implement the duties incorporated into the universal instruments eventually ratified. Two ways are usually followed by the States in this respect:

- either the adoption of a specific and autonomous legislation following directly the contents of international instruments and including all the elements required by them;
- or, maintaining the domestic frame, the punctual and systematic reform of the existing legislation,
 - * in order to aggravate the treatment of the crimes committed by terrorists
 - * or to include independent and autonomous incriminations and other provisions (penal, procedural, penitentiary and other) concerning the crimes of terrorism (2).

1.2. Spain is part of the following universal instruments on terrorism:

Instrument	Date of publication in the Spanish Official Journal
1963 Convention on Offences and Certain Other Acts Committed On Board Aircraft (<i>Aircraft Convention</i>)	BOE 25-Dec-1969
1970 Convention for the Suppression of Unlawful Seizure of Aircraft (<i>Unlawful Seizure Convention</i>)	BOE 15-Jan-1973
1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (<i>Civil Aviation Convention</i>)	BOE 10-Jan-1974
1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons	BOE 7-Feb-1986
1979 International Convention against the Taking of Hostages (<i>Hostages Convention</i>)	BOE 7-July-1984
1980 Convention on the Physical Protection of Nuclear Material (<i>Nuclear</i>	BOE 25-Oct-1991

* President of the International Association of Penal Law. Director of the Basque Institute of Criminology (Spain)

¹ For a very complete collection, see M.C.Bassiouni, *International Terrorism: multilateral conventions (1937-2001)*, Ardsley (NY), 2001; and M.C.Bassiouni, *International Terrorism: A Compilation of U. N. Documents (1972-2001)*, Ardsley (NY), 2002.

² V.Moreno Catena, in *Terrorismo y proceso penal acusatorio*, Valencia, 2006, 375-377.

³ Concerning the Amendments to the Convention on the Physical Protection of Nuclear Material, done at Vienna on

<i>Materials Convention</i>)(3)	
1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Extends and supplements the Montreal Convention on Air Safety) (<i>Airport Protocol</i>)	BOE 5-March-1992
1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (<i>Maritime Convention</i>) (4)	BOE 24-April-1992
1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf (<i>Fixed Platform Protocol</i>)(5)	BOE 24-April-1992
1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection (<i>Plastic Explosives Convention</i>)	BOE 2-December-1998
1997 International Convention for the Suppression of Terrorist Bombings (<i>Terrorist Bombing Convention</i>)	BOE 12-June-2001
1999 International Convention for the Suppression of the Financing of Terrorism (<i>Terrorist Financing Convention</i>)	BOE 23-May-2002
2005 International Convention for the Suppression of Acts of Nuclear Terrorism (<i>Nuclear Terrorism Convention</i>)	BOE 19-June-2007

According to Article 96.1 of the Spanish Constitution, “validly concluded international treaties, once officially published in Spain, shall be part of the internal legal system. Their provisions may only be repealed, amended or suspended in the manner provided for in the treaties themselves or in accordance with the general rules of international law”. The provisions of the international instruments on terrorism officially published in Spain are, thus, part of the internal legal system. However, the penal contents of the international treaties are not frequently self-executing provisions. In these cases, in order to implement them the enactment of a specific legislation can be necessary, particularly if the existing legislation in force did not cover the contents of the concerned international treaty. In this respect, even if on several occasions a particular act was approved attempting to cover all the criminal policy aspects of the terrorist issue (see for instance Organic Act No 9/1984), Spain has usually preferred to follow the way of reforming the affected penal and procedural provisions. Nevertheless, recently a new legislation has been enacted in order to implement adequately some international instruments. This has been, for instance, the case for the financing of terrorism: following also the content of the European Regulation (CE) 2580/2001 and Resolution 1373 (2001) of the Security Council, the Act 12/2003, on prevention and freezing of terrorism financing, which was adopted on 21st May 2003, creating a specific Commission of surveillance of the activities of terrorism financing.

2. Evolution of anti-terrorist legislation in Spain

The legal situation referred to as terrorism changed significantly in Spain during the final phase of the dictatorship (1970-1975). At that time, the provisions of the Penal Code dealt mainly with episodic or individual terrorism, or terrorism by disorganized and unstable groups. Acts perpetrated by more permanent organizations (the communists, anarchists and separatists) to undermine the unity of Spain, the integrity of its territories and its institutional order, were tried by the military courts on the basis of the Code of Military Justice. Less than two months before the death of General Franco, Legislative Decree No. 10/1975 lengthened the list of terrorist offenses and increased sentences to their maximum levels if the victim was an agent of the authorities or a

8 July 2005, and still in the process of ratification, see BOCG, VII Legislatura, A, 380, 25 May 2007.

⁴ Concerning the 2005 Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at London on 14 October 2005, and still in the process of ratification, see BOCG, VII Legislatura, A, 393, 15 June 2007.

⁵ Concerning the Protocol to the Protocol, done at London on 14 October 2005, still in the process of ratification, see BOCG, VII Legislatura, A 392, 15 June 2007.

member of the security or armed forces, imposing the death penalty for crimes of abduction or assassination.

This system was progressively dismantled during the pre-constitutional period: terrorism was no longer tried under military jurisdiction and finally, by December 1978, it was so fully incorporated into the Penal Code that all direct reference to terrorism even disappeared.

Continuing acts of terrorism (mainly committed by the Basque separatist movement *Euskadi ta Askatasuna* or E.T.A.) brought about a rapid change in this state of affairs. The Constitution contained provisions allowing for the restriction of some of the basic rights of members of armed gangs or terrorist cells. The democratically elected parliament quickly took advantage of these powers. This marked the beginning of a period of frequent legislative reforms which have continued to the present day. These reforms relate to all aspects of the criminal law (including new criminal law applicable to juveniles) (6).

3. The concept of terrorism. Membership in terrorist groups

3.1. In Spain, the legal concept of terrorism is closely linked with Article 55.2 of the 1978 Constitution that allows for the restriction of certain procedural rights in connection with the acts of armed gangs or terrorist cells (7); these acts are generally characterized by the purpose

- either to cause serious disruption to “public order”;
- or to undermine the constitutional order.

The Penal Code does not contain a precise definition as to what is meant by the term “terrorist group”. Doctrine (8) and case law (9), following the major trend in Europe (10), and seeking to distinguish terrorism from other crimes committed by organized crime (11), in order to establish the definition, combine

- some objective criteria:
 - * a sufficiently large group with a structure (usually including a hierarchy) (12) that demonstrates a degree of permanence,
 - * possessing arms and explosives in a similar quantity to that necessary for the offence of deposit;
- with a subjective one (often the key element of the incrimination)(13): the end purpose of the criminal acts: to engender fear and to subvert the political order.

In fact, since Constitutional Court Judgment No. 199/1987, a group is deemed to be a terrorist group if it engenders an intense feeling of insecurity in members of the population so that “citizens are unable to exercise the fundamental rights inherent in their ordinary and habitual coexistence as members of society”; this is particularly caused “by the use of the weapons in their possession and by the type of crimes they commit” and, finally, by the systematic commission of serious

⁶ For a description of the Spanish evolution, J.L.Gonzalez-Cussac, in *Terrorismo y proceso penal acusatorio*, cit., 98-121.

⁷ Article 55.2 and 3 of the Spanish Constitution of 1978 states: “2. An organic act may determine the manner and the circumstances in which, on an individual basis and with the necessary participation of the courts and proper parliamentary control, the rights recognized in section 17, subsection 2, and 18, subsections 2 and 3, may be suspended for specific persons in connection with investigations of the activities of armed bands or terrorist groups. 3. Unwarranted or abusive use of the powers recognized in the foregoing organic act shall give rise to criminal liability as a violation of the rights and freedoms recognized by the laws”.

⁸ C.Lamarca Perez, in *Anuario de Derecho Penal y Ciencias Penales*, 1993, 559.

⁹ Supreme Court Decision of January 25, 1988.

¹⁰ J.L.Gonzalez-Cussac, cit., 71.

¹¹ A.Asua Batarrita, in *Estudios Jurídicos en Memoria de José María Lidón*, Bilbao, 2002, 51.

¹² However this requirement is now submitted to question, since *Al Qaeda* has not a strict organization. J.L.Gonzalez-Cussac, cit., 79-80.

¹³ Critically, L.Arroyo Zapatero, in *Reforma política y Derecho*, Madrid, 1985, 20.

offenses using weapons and explosives.

According to this Decision, there are three requirements to be fulfilled by a group in order to be considered as a terrorist one (14):

- Stability and permanence of the group
- Armed group
- Capability to engender terror in the members of the population, by the way of the attacks against the citizen's security and against the democratic society as a whole.

Although this concept of terrorist group is quite clear there has always been some debate in Spain on the extension of the concept of terrorism to the "other terrorism" (15), i.e., the paramilitary actions or the violent offences committed by members of the security forces organized as an illegal group to fight against terrorists. In this sense the G.A.L. (Antiterrorists Groups of Liberation), although seriously punished, were not considered terrorists by the Supreme Court (Decision of July, 29, 1998) (16).

On the other hand, the debate on the application of the concept of terrorism concerns also those social and political groups that intervene in the "grey zone", i.e., with a very strong connection with the terrorist groups but without employing violence directly. Many of them have been included in the annex of the UE Council Common Position of 27 December 2001 on the application of specific measures to combat terrorism (17). Alternative and even contradictory decisions can be found in case law concerning these groups that are being progressively embraced by the broad concept of terrorism, although they should be commonly considered illegal associations and not terrorist groups (18).

3.2. Membership of an armed group or of terrorist groups and organizations is defined as a criminal offense in Articles 515.2 and 516.2 of the Penal Code. It carries a sentence of between six and twelve years' imprisonment, and offenders are denied the right to be employed in a public capacity or to be entrusted with public responsibilities for a period of six to fourteen years.

The instigators and leaders of armed gangs and terrorist organizations and anyone who runs such a group are liable to a term of eight to fourteen years' imprisonment and are denied the right to be employed in a public capacity or be entrusted with public responsibilities for a period of eight to fifteen years (Article 516.1).

Inciting others, conspiring or purposing to commit these offenses of illegal association is also punishable by a sentence one or two degrees lower than the sentence for the offense itself (Article 519) (19).

4. Crimes of terrorism

Aside from the offenses mentioned above, there are regulations referring to so-called "terrorist offenses", which feature among the offenses that are contrary to "public order" (Title XXII, Volume II), Chapter V, Section 2, separate from those dealing with terrorist groups and associations.

¹⁴ A. Fernández Hernández, in *Revista Penal*, 17, 2006, 106-108.

¹⁵ On the non-univocity of the concept of terrorism, R.Ottenhof, in *Anuario de Derecho Penal y Ciencias Penales*, 1989, 947-953.

¹⁶ Critically, C.Lamarca Perez, in *Anuario de Derecho Penal y Ciencias Penales*, 1993, 535-559; Portilla Contreras, in *Libro homenaje al Profesor Marino Barbero Santos*, Cuenca, 2001, 501-530.

¹⁷ See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001E0931:EN:NOT> that includes a reference to the different decisions amending the annex.

¹⁸ On the special characteristics of the groups of juveniles (JARRAI/HAIKA/SEGI) around ETA, qualified as illegal associations by a decision of the National Audience (2005) modified by the Supreme Court in January 19, 2007, A. Fernández Hernández, in *Revista Penal*, 17, 2006, 106-108

¹⁹ According to the Spanish Penal Code, if the punishment for a certain offense is, for instance, imprisonment from 8 to 12 years, a sentence one degree lower would be imprisonment from 4 to 8 years and a sentence two degrees lower would go from 2 to 4 years.

Terrorist offenses include:

- * terrorist cooperation, a concept that goes far beyond the traditional forms of punishable participation;
- * a series of common offenses aggravated by the fact that they are connected to the terrorist purposes or activities (20);
- * so-called individual and/or urban terrorism; and
- * exalting terrorism.

In any case, *preparatory* acts for the commission of offenses of terrorism, including conspiring, purposing or inciting others (Article 579.1) are always punishable, but the punishments will be one or two degrees lower than those foreseen for the corresponding prepared offenses.

4.1. Terrorist cooperation is defined as:

- Procuring economic resources (Article 575) by violating the property rights of others to benefit armed gangs and terrorist cells (21). The sentence applicable is one degree higher than the punishment laid down by law for the same standard offenses.
- The performance, procurement or supply of any other act of collaboration (Article 576). The following are deemed acts of collaboration:
 - * information about, or surveillance of, persons, goods or property;
 - * building, fitting and equipping, selling or using lodgings or warehouses;
 - * concealing or transporting any person connected with an armed gang or terrorist organization or group;
 - * organizing or taking part in any training program or, generally,
 - * any similar cooperation or assistance, or any economic or other form of involvement in the activities of armed gangs or terrorist organizations and groups.

Doctrinal criticism has been raised against the borderless definition of these acts of collaboration, that do not require to be punished the ideological adhesion with the terrorist purpose; only a collaborative will, knowing their terrorist condition, is required (22). Furthermore, although most of these acts clearly have the nature of preparatory acts, the Supreme Court qualifies them as modalities of generic collaboration with terrorism, susceptible of being autonomously punished; according to the Supreme Court, only if they are exclusively referred to a concrete crime, their punishment (as real preparatory acts) should be considered sufficiently covered by the punishment of the main crime (23).

Terrorist cooperation carries a sentence of five to ten years' imprisonment and a fine (18 to 24 months). However, concerning the minimum of five years it should be reminded that before 1996 (entrance into force of the 1995 new Penal Code) the minimum punishment for terrorist collaboration was six years and the Constitutional Court, in its Decision No 136/1999, considered that this minimum punishment was excessive and annulled the sentence pronounced by the Supreme Court to the leaders of *Herri Batasuna* (generally considered as the political wing of the terrorist group E.T.A.) (24).

There is also a provision for heavier sentencing:

- if the information about (or the surveillance of) individuals endangers their lives, physical safety, freedom or property; the sentence applicable will be in the upper range of the

²⁰ J.R.Soriano Soriano, in *Terrorismo y proceso penal acusatorio*, cit., 188.

²¹ See also the Act 12/2003, on prevention and freezing of the terrorism financing (BOE 22 May 2003), creating a specific Commission of Surveillance of the Activities of Terrorism financing.

²² For instance, Decision of the Supreme Court June 15, 2007.

²³ J.R.Soriano Soriano, cit., 192-194.

²⁴ A.Cuerda Riezu, in *La Ciencia del Derecho Penal ante el Nuevo siglo. Libro Homenaje al profesor doctor don José Cerezo Mir*, Madrid, 2002, 237-255.

punishments laid down by law for this offense;

if the act is actually committed, those cooperating are deemed to be co-perpetrators or criminal participants in the offenses committed.

4.2. Among those *common offenses classified as terrorist offenses* are arson and criminal damage, causing loss of human life, causing serious bodily harm, abduction and unlawful detention, causing any other bodily harm, unlawful detention, threats or coercion by duress, possession, deposit and manufacturing of weapons, munitions, explosives and similar devices and any other offense or wrongdoing. General punishments applied to these common crimes -if committed by non-terrorists- are, for instance, fifteen to twenty years in case of murder (20-25 years if it is an aggravated murder); ten to fifteen years in case of homicide; twelve years for more serious bodily harm; four to ten years in case of unlawful detention and abduction; six months to three years in case of coercion by duress.

If these offences are classified as terrorist due to their connection to the terrorist purposes or activities (25), the punishments are raised to:

- * arson and criminal damage (Article 571): imprisonment of fifteen to twenty years, without prejudice to any additional punishment that may apply if there has been an attack on someone's life, physical safety or health;
- * causing loss of human life: twenty to thirty years' imprisonment (Article 572.1);
- * causing serious bodily harm, abduction and unlawful detention (Article 572.2): imprisonment for fifteen to twenty years;
- * causing any other bodily harm, unlawful detention, threats or coercion by duress (Article 572.3): imprisonment for ten to fifteen years;
- * possession, deposit and manufacturing of weapons, munitions, explosives, inflammable and incendiary devices (Article 573): six to ten years' imprisonment;
- * any other offense or wrongdoing (Article 574): a sentence in the upper range of the punishment normally imposed for such offenses.

4.3. Expanding the ordinary concept of terrorism, which usually requires the presence of an organization (26), Article 577 incriminates a series of offences very similar to the public disorders (27) (Article 557): *individual and/or urban terrorism*. These include:

- * committing acts of homicide, causing bodily injury, abduction, unlawful detention, the issue of threats or coercion through duress; or
- * committing acts of arson, criminal damage or destruction, and possession, manufacturing, storage, trafficking in or supplying arms, munitions, explosive, inflammable, incendiary or asphyxiating substances or devices, or their components;

without belonging to an armed gang, terrorist organization or group, with the aim of undermining the constitutional order or seriously disrupting public order, or contributing to these ends by terrorizing the inhabitants of an urban community or the members of a social, political or professional group.

The sentence imposed will be in the upper range of the punishments ordinarily laid down by law for such offenses.

4.4. The legitimacy of penalizing the *apology* of terrorism (support or encouragement of a criminal offense in public or in the press) has repeatedly been a point of debate in Spanish criminal policy. A widespread opinion in the literature maintains that the guarantees of the freedom of thought, belief, opinion and expression are not compatible with a punishment of apology as an autonomous

²⁵ J.R.Soriano Soriano, *cit.*, 188.

²⁶ However, J.Terradillos Basoco, *Terrorismo y Derecho*, Madrid, 1988, 60.

²⁷ J.C.Campo Moreno, *Represión penal del terrorismo: una visión jurisprudencial*, Valencia, 1997, 40.

offence (28) and considers that it should only be punished if it is capable to endanger or harm a penal protected interest (29), i.e., in the light of the future offence (30), as a modality of incitement or provocation and requiring at least the purpose of incitement to crime (31). Due to the doubts as to the constitutionality of the previous rules, this was the trend followed by the new Penal Code of 1995, where apology was only punishable if consisting in a direct and intentional (32) incitation to the commission of a penal offence.

The reform intervened by the Organic Act No 7/2000 reintroduced in the Penal Code the autonomous incrimination of the apology of terrorism by the way of the punishment of *exalting* terrorism (Article 578). This Act punishes in very open terms (33) any praise or justification of terrorist offenses or of those involved in committing them through any form of public expression or broadcast. Exalting terrorism also covers acts that serve to discredit, scorn or humiliate the victims of terrorist offenses, their families or relations.

The offense carries a sentence of one to two years' imprisonment (and some freedom restrictions – such as prohibiting the offender from approaching the victim – Article 47 of the Penal Code).

Obviously, the introduction of the new provision has raised new criticism, and particularly after the Decision of the Supreme Court (June, 14, 2002) considering it as an (autonomous) “offence of opinion” (34).

4.5. Outside Section 2 of Chapter V (Title XXII, Volume II) the Penal Code also contains further provisions relating to terrorism, as the terrorist threats (Article 170) and the insults or serious disturbances of the functioning of local assemblies provoked by people manifesting their support to terrorist organizations or groups (Article 505). Here the punishments are imprisonment from six months to two years in the first case, and imprisonment from six months to one year in the second case.

5. Process Law

In order to facilitate prosecution and developing the contents of Article 55.2 of the Constitution, a series of restrictions imposed by the law affect certain basic rights of the members of armed gangs or terrorist cells (or those acting jointly with them) (35).

5.1. Police custody may be extended to up to five days, i.e., 48 hours longer than the standard 72-hour period generally applied to all the citizens. The decision of prolonging police custody has to be demanded by the police within the first 48 hours and has to be adopted by the judge before the general limit of 72 hours is elapsed (Article 520 bis of the Penal Procedure Act).

The police arrest is usually applied in these cases “without communication” i.e., without the right not only to choose legal counsel but also of maintaining any interview with the lawyer (officially designated) that has to be present during the police questioning (Article 527).

Police arrest can obviously be followed by a provisional detention in prison, to be always ordered by the competent judge. This one can also decide the complete isolation of the inmate, if this decision is proved to be necessary in the interest of the police research. The general limit of the isolation will be five days, but for those persons accused of terrorism the judge can order a prolongation of three days more (Article 509 Penal Procedure Act).

The Spanish practice of “*incommunicado*” detention has received a formal censure from the

²⁸ T.S.Vives Anton, in *Terrorismo y proceso penal acusatorio*, cit., 39-42.

²⁹ J.Mira Benavent, in *Anuario de Derecho Penal y Ciencias Penales*, 1987, 524.

³⁰ J.C.Carbonell Mateu, in *Comentarios a la legislación penal*, II, Madrid, 1983, 241.

³¹ B.del Rosal Blasco, in *Cuadernos de Política Criminal*, 1996, 84.

³² J.M.Silva Sanchez, *El nuevo Código Penal. Cinco cuestiones fundamentales*, Barcelona, 1997, 156.

³³ Critically, J.C.Carbonell Mateu, in *Terrorismo y proceso penal acusatorio*, cit., 52.

³⁴ Critically, M.V.Caruso Fontan, in *Revista Penal*, 20, 2007, 47.

³⁵ V.Moreno Catena, in *Terrorismo y proceso penal acusatorio*, cit., 381-398.

European Committee for the Prevention of the Torture -established to guarantee the full application of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (November, 26, 1987) (36)-, due to the length of the situation of non-communication and to the restrictions introduced to the constitutional right to a legal counsel, that according to the most relevant authors should also fully apply during the police arrest. However the Spanish Constitutional Court has considered that the presence of an officially appointed lawyer is a sufficient guarantee (37).

5.2. The right of privacy at any home where such individuals have been hidden or sheltered and the right to privacy of communication for individuals under suspicion in investigations into such offenses (Articles 533 and 579 Penal Procedure Act) are also limited. Therefore, if it is proved to be necessary by exceptional or urgent reasons, the police can enter and examine the places where the suspects are (and the instruments they find there), and the telephone calls can be controlled by order either of the minister or of the Director of the State Security; this order has to be immediately communicated to the competent judge in the *Audiencia Nacional* (Article 579.3).

5.3. Although repeatedly criticized by the specialized literature (38), the *Audiencia Nacional* (a specialized central court that sits in Madrid) is legally the only competent body to investigate and judge the terrorist offences which are governed by the principles of extraterritoriality and universal jurisdiction. Furthermore, terrorism is one of the crimes included in the list of the European Arrest Warrant (European Frame-Work Decision 2002/584/JAI, 13 June 2002).

5.4. Accused terrorists may be remanded in custody for periods exceeding the standard custody periods and will be detained for a further period of one month if the public prosecutor appeals against the decision of the court to release them (Article 504 bis of the Penal Procedure Act). Those employed in a public capacity or entrusted with public responsibilities are suspended from their jobs (Article 384 bis of the Penal Procedure Act).

5.5. Concerning extradition, Article 13.3 of the Spanish Constitution, after having excluded political crimes from extradition, states: "but acts of terrorism shall not be regarded as such".

5.6. Finally, other procedural particularities concerning these crimes (and also organized crime) are the regulation of the police infiltration (Article 282 bis), the European joint investigation teams (Act 11/2003) and the protection of witnesses (see Organic Act No 19/1994, 23rd December).

6. Sanctioning and execution of the punishments

6.1. According to Article 76, terrorist crimes justify an extension of the general limits of the prison sentences in Spain. These limits are generally established

either in twenty years

or, in exceptional circumstances,

* in twenty-five years: where the offender has been convicted of at least two offenses and one of these offenses carries already a maximum prison sentence of twenty years

* or, even, in thirty years, where the offender has been convicted of at least two offenses and one of these offenses carries a prison sentence exceeding twenty years.

However, according to Article 76.1 c and d, these limits are raised to forty years, where the offender has been convicted of at least two offences and two of these offenses carry a term of imprisonment exceeding twenty years or has been convicted of at least two terrorist offenses and one of these offenses carries a prison sentence exceeding twenty years.

On the other hand, for terrorist offenses, absolute disqualification (Article 579.2) is imposed as an

³⁶ See the reports on the visits to Spain (in 2003 and 2005), as well as the responses of the Spanish Government in <http://www.cpt.coe.int/en/states/esp.htm>.

³⁷ For instance (Decision No 7/2004). Critically, V.Moreno Catena, *cit.*, 395-398.

³⁸ V.Moreno Catena, *cit.*, 391.

additional principal sentence “for a term of six to twenty years more than the term of the custodial sentence, taking the seriousness of the offense, the number of offenses committed and the offender’s circumstances into consideration.”

Any foreign sentences imposed are taken into account for the purpose of assessing international recidivism (Article 580).

6.2. In a similar way as provided by Article 6 of the European Framework Decision of June, 13, 2002, since 1984 (39), in Spain, mitigation of the punishment of the offence of terrorism is possible in cases of *dissociation*.

According to Article 579.3 of the Penal Code, if the convicted dissociates himself, the sentence can be reduced by one or two degrees. Dissociation means that the offender has:

- voluntarily given up his criminal activities; and
- gives himself up to the authorities, admitting the activities in which he has been involved and, also,
 - * cooperates actively with the authorities to stop the offense being committed or
 - * provides effective assistance in obtaining decisive evidence leading to the identification or capture of other offenders or to prevent the acts or development of armed gangs, terrorist organizations or groups to which he belonged or with which he collaborated.

The literature has repeatedly criticized this provision (and its precedents). Even if its justification has always been the relevance of such an instrument in the fight against terrorism, in practice the juridical effects are limited, the requirements high and the risk of contamination of the process with false accusations is important. Furthermore, the situation of those criminals who collaborate with the prosecution authorities is not adequately regulated in Spain (40).

6.3. Penal sanctions are ordinarily imposed in Spain onto individuals held guilty of the commission of the infractions incriminated by the penal legislation. At the present (41), legal persons cannot be declared guilty of a crime or an offence, but can be obliged to pay the fines imposed to their managers for offences that have been committed acting in this quality (Article 31.2).

The Penal Code also provides for several consequences if a legal person is used as an instrument for the commission of a crime. Article 129 allows then the closing either of the enterprise or the establishment, the dissolution of the society, the suspension of the activities, the prohibition of doing in the future similar activities and the intervention of the enterprise in order to guarantee the rights of the employees and creditors. To apply these consequences to legal persons involved in certain offences a particular provision must declare it applicable to them. Article 520 foresees this possibility concerning the crimes of illicit association, but no specific provision is included concerning the specific terrorist offences.

6.4. In prison, those convicted of crimes of terrorism are usually classified in the first degree of the penitentiary execution and kept in a closed regime (Article 102.5 Penitentiary Regulation 1996), often in high security establishments/units located very far from their domicile.

They have recognized the right to visits and communication with their families, friends, their lawyer and other professionals and authorities (Article 51.1 Penitentiary Act 1979); and the communications between the prisoner and his lawyer can only be restricted by a judicial decision (Article 51.2 Penitentiary Act and Article 48.3 of the Penitentiary Regulation).

³⁹ J.L.de la Cuesta Arzamendi, *Cuadernos de Política Criminal*, 30, 1986, 559-602.

⁴⁰ M.L.Cuerda Arnau, *Estudios penales y criminológicos*, XXV, 2005, pp.33-35.

⁴¹ The Draft No 121/000119, now pending in the Parliament contains a new regulation of the penal responsibility of legal persons in Spain. *Boletín Oficial de las Cortes Generales. Congreso de los Diputados*, serie A, No.119-1, January 15, 2007.

But there are many restrictions, particularly concerning the classification in the third degree (open regime) and the access to parole (42): according to Article 76.2 of the Penitentiary Act and Articles 36.2, 90 and 91 of the Penal Code, these decisions cannot be adopted before the execution of at least a half of the punishment (for parole, three quarters of the execution are generally necessary), and require the repentance of the terrorist and the payment of compensation to victims.

On the other hand, Article 78 of the Penal Code provides that the amount of time to be served before an inmate is entitled

- * to be classified as a third level penitentiary inmate,
- * to temporary exit rights or prison privileges or
- * to be released on parole

must be calculated on the basis of the aggregate sentence imposed, where this exceeds double the legally stipulated time limit for serving sentences (according to Article 76) (43).

Furthermore the Supreme Court (see Decision of February 28, 2006) has broken a traditional trend and establishes now that, in those cases where a convicted has received accumulated punishments, all the temporary requirements concerning the penitentiary benefits are to be referred to each one of the punishments imposed (that are to be executed consecutively) and not, as it was traditionally done, departing from the general limits foreseen by Article 76 (44).

7. Juvenile criminal law

Terrorism is also a case for specific treatment under criminal law for minors and juveniles (between 14 and 18 years old) (45).

The Organic Act No 5/2000 on the penal responsibility of minors (reformed in 2006) establishes in this way an extension of the period of internment in "closed conditions" (for young offenders found guilty of acts of terrorism, punished by the Penal Code with imprisonment of more than 15 years) to

- up to eight years – plus a period of probation of five years – for juveniles of at least 16 years old (and less than 18 years) and
- up to five years - plus a period of probation of three years – for minors of at least 14 years of age (and less than 16 years).

In case of terrorism, a period of absolute disqualification of 4 to 15 years is added to these measures of incarceration under mandatory "closed conditions".

On the other hand, if the minor is prosecuted because of a plurality of infractions and one (or more) constitute a very serious crime or a crime of terrorism, the internment in closed regime can be raised up to 10 years for those aged 16 or 17 and up to six years for those under 16 (Art. 11).

Acts of terrorism committed by minors and juveniles less than 18 years old are within the jurisdiction of the Central Juvenile Judge of the *Audiencia Nacional*, whose decisions in matters of prevention prevail over any sentences imposed by other judges or juvenile court divisions. The measures imposed to them are to be served in those specific institutions (and under the supervision of specialist staff) that the government places at the disposal of the *Audiencia Nacional* by agreement with the Autonomous Communities.

⁴² P.Faraldo Cabana, in *Nuevos retos del Derecho Penal en la era de la globalización*, Valencia, 2004, 317-329.

⁴³ P.Faraldo Cabana, *cit.*, 329-335.

⁴⁴ J.L.Manzanares Samaniego, in *Derecho Penal y Criminología como fundamento de la política criminal. Estudios en homenaje al profesor Alfonso Serrano Gómez*, Madrid, 2006, 874-880.

⁴⁵ J.L.de la Cuesta & I.Blanco, in *European Juvenile Justice Systems*, Milano, 2007, 385-424.

8. The treatment of the victims of terrorism

At the beginning of the 1980s, legislation was passed whereby the State accepted to pay damages and compensation to the victims of terrorism for the acts of terrorism that they had suffered.

Regulated separately from the general system of public assistance to the victims of violent crime and sexual offenses (Act No. 35/1995 and Royal Decree No. 738/1997), the basic legal source of the Spanish government's treatment of the victims of terrorism is the Victims of Terrorism Solidarity Act No. 32/1999 of October 8, 1999, amended in 2000 and 2003, and Royal Decree No. 288/2003 of March 7, 2003 approving a new regulation governing compensation and assistance for the victims of terrorist crimes (46).

According to these regulations, the State is bound to compensate for personal injury (whether physical or psychological) and to pay the costs of medical treatment and any damage to property caused to those who are not responsible for criminal acts

- * by or as a consequence of terrorist offenses committed by armed gangs or terrorist cells, or
- * by those seriously disrupting public order or public safety.

In addition, there is also provision for financial aid for research and studies, psychological or psycho-pedagogical assistance and other extraordinary aid intended, in exceptional circumstances, to alleviate the personal or family hardship of victims that are not covered or are insufficiently covered by the standard aid programs.

The right to benefit from these allowances requires proof of a causal link between the damage or suffering and terrorism. The government report and, depending on the circumstances, the final judicial report, will normally provide evidence of this link. Compensation for damage to property is subject to compensation under insurance policies and any other compensation payable for the same case by another public agency or authority.

The aid and compensation payments are handled by the Ministry of the Interior and are processed expeditiously (4-6 months) and with emphasis on the interests of the victims, avoiding any formalities that might create delays or complicated claims. If the facts of a case are well known or information about a case is already filed in the archives of the Ministry of the Interior, the claimant is not required to provide any form of documentary evidence.

9. Concluding remarks

9.1. Spanish anti-terrorist criminal legislation is a typical example of emergency legislation, characterized by a complete range of exceptions to the general rules.

On the one hand the law includes special (and very much justified) measures to assist the victims of these offenses.

Nevertheless, the treatment of the victims is not the principal characteristic of the antiterrorist law. The main feature of this legislation is the diversion from the general regime in the substantive penal law, in the procedural field, in penitentiary law and even regarding the penal treatment of minors and juvenile delinquents; all of them allegedly justified by the need of efficacy in the "war against terrorism".

Antiterrorist legislation thus covers a broad range of offenses. Incriminations are often very complex and wide, in order to embrace all kind of behaviors connected with the terrorist groups or actions. New forms of punishable preparation and participation appear, frequently as autonomous offences, advancing the moment of the penal intervention and expanding a penal treatment unorthodox if compared with strict rules of legality.

⁴⁶ There are also particular programs of help established by some Autonomous Communities and other regulations concerning the aid of the associations and entities devoted to the defence of the interests of the victims of terrorism.

Offenses carry sentences that exceed the ordinary standard limits set out in the Penal Code and their application is also submitted to many exceptions to the ordinary rules with the view to guarantee a full and integral execution of the sentences...

But mitigation can also be acknowledged if the terrorist dissociates and collaborates with the authorities.

At the same time, the procedural guarantees are heavily restricted. The period of police custody may be extended. The right to legal advice while in police custody is reduced to its minimum expression... Communications may be monitored. Other exceptional procedural measures are implemented even concerning minors and juvenile criminal law...

9.2. The described trend is not exclusive of Spain. After September 11, “the regression of the rule of law under the guise of combating terrorism” (47) is generalised and most of the States have enacted exceptional legislation in order to combat terrorism (48). Opening of new possibilities of intervention for the police and prosecution bodies (eventually in close connection to the intelligence services and specialized agencies and forces), increasing punishments and hardening the execution conditions and a severe restriction of the fundamental rights are the common measures implemented here and there with a clear support from the vast majority of the public opinion, very much concerned by the terrorist aggressions and crimes. As the comparative experience progressively shows, neither the Criminal Law nor the Constitution is a guarantee any more to those whose condition as citizens (and even of persons) is being progressively rejected (49) in certain States.

9.3. In fact, being that terrorism is “the most evident phenomenon of hostility to the system” (50), anti-terrorism policy appears to be a “perfect field” (51) for the application of the logic of the enemy (52) -where the criminal law requirements and the procedural safeguards are seen as obstacles in the war against terrorism- and, therefore, for the “infiltration” (53) and consolidation of the “enemy discourse” (54) in the Criminal Law.

Leaving aside the unacceptability of the consideration of terrorists as “non-persons” (55), the risks for the rule of law are however self-evident. In front of what is generally perceived by the public opinion, rationally we cannot expect an increase of the public security as a simple consequence of the legislative change (56). As the criminological knowledge has repeatedly demonstrated, the reduction of the criminal rate is not mechanically connected with the increasing of punishment (57). On the contrary, efficacy in the intervention against complex and multiform criminal phenomena (and terrorism clearly is this) can only be expected if addressed in a comprehensive way through the three traditional levels of the criminological intervention -criminality, crime and the criminal (58)-, that should be completed nowadays with the victimological perspective and by the analysis of the consequences of the intervention of the mechanisms of penal (and social)

⁴⁷ M.Charif Bassiouni, in *Revue internationale de droit pénal*, 76, 2005, 17-26.

⁴⁸ H.J.Albrecht, in *Derecho Penal y Criminología como fundamento de la política criminal. Estudios en homenaje al profesor Alfonso Serrano Gómez*, cit., 1139-1164.

⁴⁹ J.A.Ramos Vazquez, in *Serta. In memoriam Alexandri Baratta*, Salamanca, 2004, 1444.

⁵⁰ J.C.Carbonell Mateu & E.Orts Berenguer, in *Estudios penales en homenaje al profesor Cobo del Rosal*, Madrid, 2005, 186.

⁵¹ J.C.Carbonell Mateu & E.Orts Berenguer, *cit.*, 187.

⁵² J.Terradillos Basoco, *cit.*, 40.

⁵³ A.Asua Batarrita, in *Derecho penal del enemigo*, Madrid, 2006, 239-276. See also P.Faraldo Cabana, *cit.*, 299-340.

⁵⁴ “Enemy Criminal Law” (*Feindstrafrecht*), as proposed by Jakobs. G.Jakobs & M.Cancio Melia, *Derecho penal del enemigo*, 2nd ed, Madrid, 2006.

⁵⁵ However, G.Jakobs, in *Zeitschrift für die gesamte Straf- rechtswissenschaft*, 117, 2005.

⁵⁶ H.J.Albrecht, *cit.*, 1159 f.

⁵⁷ H.Kury, in *Modernas tendencias en la ciencia del Derecho penal y en la Criminología*, Madrid, 2001, 285 ff.

⁵⁸ J.Pinatel, *Criminología*, 2nd ed., Caracas, 1974, 93 ff.

control (59).

The experience has also showed that the logic of the introduction of exceptional measures and the restriction of individual rights, instead of assuring efficacy in the prosecution of certain crimes, can become a criminological factor and give more cohesion to terrorism. At the same time, they can potentially become a factor of de-legitimization of the system, not only due to the abuse (60) of the symbolic function of the antiterrorist legislation (61), but mainly because of the lack of legitimacy, from a rule of law perspective (62), of most of the results of its application (63). In fact, as Bassiouni states:

"History indeed teaches us that when the rule of law is replaced by the rule of might, civilization regresses and the social costs increase far beyond the temporary impressions of security" (64)

Certainly, terrorism is a very serious criminal behaviour that produces a lot of harm to central values and interests of the individuals, and of the society as a whole. Prevention and suppression of terrorism must be, therefore, obviously a priority in any modern society and in order to achieve it successfully States cannot spare any means. However, in the fight against terrorism everything should not be legitimated: if we do not want "to pave the way to tyranny" (65), the delicate balance among prosecution, penal intervention and individual rights that characterize the modern criminal policy model, is also to be assured here. Of course, punctual deviations from the ordinary system can be justified by the particular characteristics of the terrorist phenomena, but they should never result in the denial of fundamental rights and should always be applied under judicial control and with a full respect to the principles of legality and proportionality in order not to sacrifice what should never be sacrificed: the constitutional criminal policy model (66). In fact, as it has been frequently said (67), one of the best ways to know the "health level" of a democracy is the analysis of the antiterrorist legislation.

10. Epilogue

10.1 Anti-terrorist policy has also given rise in Spain to new legislative developments, but this time outside the scope of the criminal law.

The Political Parties Act No. 6/2002 outlaws a new form of action or conduct which does not carry any criminal or administrative sanction, but allows for the dissolution of political parties which pursue activities damaging to the foundations of democracy, particularly where the aim of these activities is to destroy or undermine individual freedom, eliminating or disabling the democratic system (Article 9) (68). The serious and repeated commission of certain acts, legally defined, is deemed to be a demonstration of this form of unlawful conduct. Evidence is provided by means of the repetition or accumulation of acts included in a long list such as: express or tacit support for terrorist acts, exculpating or minimizing the significance of terrorist acts, encouraging a culture of civil conflict and confrontation (or aimed at intimidating, reversing the opinion, neutralizing or socially isolating those who oppose terrorism), allowing individuals who have been found guilty of acts of terrorism and who have not publicly denounced terrorism to sit as members of the executive bodies of the party, including such individuals in their electoral lists or allowing individuals who have a dual political affinity to remain members of the party; using symbols,

⁵⁹ J.L.de la Cuesta, in *Estudios de Victimología. Actas del I Congreso español de victimología*, Valencia, 2005, 240.

⁶⁰ J.M.Silva Sanchez, *Aproximación al Derecho penal contemporáneo*, Barcelona, 1992, 305.

⁶¹ I.Berdugo Gomez de la Torre, in *Pena y Estado*, 1, 1991, 91 ff.

⁶² Silva Sánchez insist in the direct incidence of the respect of the rule of law in the justification of the modern penal law J.M.Silva Sanchez, *Aproximación*, cit., 210.

⁶³ J.L.Diez Ripollés, in *Actualidad penal*, 1, 2001, 15.

⁶⁴ M.C.Bassiouni, in *Revue*, cit., 24.

⁶⁵ M.C.Bassiouni, in *Revue*, cit., 11.

⁶⁶ M.Acale Sanchez, in *Nuevos retos del Derecho Penal en la era de la globalización*, cit., 379-380.

⁶⁷ C.Lamarca Pérez, in *Derecho penal, sociedad y nuevas tecnologías*, Madrid 2001, 101

⁶⁸ F.Herrero-Tejedor, in *Terrorismo y proceso acusatorio*, cit., 199-207.

messages or other items representing, or identified with, terrorism, violence or other associated conduct as tools for the party's activities; making over electoral rights or privileges enjoyed by political parties to terrorists or those collaborating with terrorists; regular collaboration with groups or entities acting systematically in concert with a violent or terrorist organization, or protecting or supporting terrorism or terrorists; giving support to terrorism through institutions of government by means of administrative, economic or other measures; promoting, giving coverage to, or participating in activities rewarding, paying homage to, or honoring terrorist or violent acts or those who commit them or collaborate with them; giving coverage to acts of disruption, intimidation or social duress relating to terrorism or violence.

On the basis of this new legislation –which is strongly criticized by civil liberty movements but nevertheless declared constitutional by the Constitutional Court (Judgment of March 12, 2003)– the Special Division of the Supreme Court (Judgment of March 27, 2003) formed for this purpose, held that *Batasuna*, the political party which forms part of the so-called Basque National Liberation Movement, of which ETA is a member, was unlawful.

10.2. Furthermore, the sheer number of victims of terrorism has driven those suffering directly from acts of assassination, injury, persecution and attacks (and their families, relations and friends) to get together, to find the human warmth and companionship that they need to try to transform their pain into something positive and to overcome their state of being victims. The social presence of such associations obviously raises the question of just how much social and political initiative should be afforded to the victims of terrorism (69), whose public behavior has always impacted the society as a whole (70).

Obviously, when decisions are to be taken in a social and democratic system governed by the rule of law, those social groups potentially most affected should always be consulted; and this not only to avoid making their circumstances even more difficult to bear, but also because to avoid social demoralization, individuals and groups of individuals must learn from the experience of being a victim, an essential perspective for a full understanding of the reality.

Furthermore, while waiting for the end of terrorism to come (and until this day arrives), the victims are essential to ensure that justice is done. Inside a justice system not merely vengeful or retaliatory, justice is never incompatible with generosity and forgiveness; it is incompatible with collective amnesia and renouncing truth.

⁶⁹ J.L.de la Cuesta, in *Bake Hitzak*, 49, X, 2003, 46-48.

⁷⁰ A.Beristain, in *Du monde pénal. Melanges en l'honneur de Pierre-Henri Bolle*, Bale, 2006, 367-379.