Universiteit
Leiden
The Netherlands

Terrorism and anti-terror legislation - the terrorised legislator? A comparison of counter-terrorism legislation and its implications on human rights in the legal systems of the United Kingdom, Spain, Germany, and France

Oehmichen, A.

Citation
Oehmichen, A. (2009, June 16). *Terrorism and anti-terror legislation - the terrorised legislator? A comparison of counter-terrorism legislation and its implications on human rights in the legal systems of the United Kingdom, Spain, Germany, and France*. Retrieved from https://hdl.handle.net/1887/13852

Version:	Not Applicable (or Unknown)
License:	Licence agreement concerning inclusion of doctoral thesis in the Institutional Repository of the University of Leiden
Downloaded from:	https://hdl.handle.net/1887/13852

Note: To cite this publication please use the final published version (if applicable).

2. Anti-Terror Legislation in Spain

(...) desde la legitimidad de la sociedad a defenderse del terror, esta defensa sólo puede llevarse a cabo desde el respeto de los valores que definen el Estado de Derecho, y por tanto sin violar lo que se afirma defender. [1]

(From the perspective of the legitimacy of society to defend itself against terror, this defence can only take place within the respect of values that define a State governed by the rule of law, and thus without violating those which they claim to defend.)

[1] Spanish Supreme Court (*Tribunal Supremo),* Judgment of 20 July 2001, Criminal Chamber (*Sala de lo Penal),* STS 1179/2001.

Contents

2. Anti-Terror Legislation in Spain 164
2.1. Introduction 167
2.2. Relevant legal sources 168
2.3. Anti-terror legislation prior to September 11th 170
2.3.1. Early anti-terror laws: Era Franco 170
2.3.2. Transition to democracy 174
2.3.3. Spanish Constitution of 1978 and first years of democracy 176
2.3.4. Legislative activity in 1980 and 1981 178
2.3.5. The 1980s 180
2.3.6. The 1990s: Penitentiary politics, fight against organised crime, and a new criminal code 189
2.4. Post September 11th anti-terror legislation 195
2.4.1. Prohibition of political parties 195
2.4.2. Implementation of EU and international law 196
2.4.3. Abbreviated proceedings 197
2.4.4. Legislative activism in 2003 197
2.4.5. Improvement of detention on remand (*prisión provisional*) 201
2.4.6. Torture allegations in Strasbourg 203
2.4.7. 11 March ("*11-M*") attacks on Madrid trains 205
2.5. Current developments 206
2.6. Summary 207
2.6.1. Main developments 207
2.6.2. General observations 210

2.1. Introduction

Of all examined countries, Spain stands out as the youngest democracy, and, for this reason, disposes also of the youngest – and consequently most modern – Constitution (***Constitución Española, CE***). However, the history of legislation against terrorism is much older in Spain; it dates back to the end of the nineteenth century, when the European-wide 'Anarchist wave' of terrorism arrived in Spain.[2] Under General

[2] An exhaustive overview on Spanish anti-terror legislation is provided by Lamarca Perez (1985). Here a short summary of the most important developments prior to Franco's regime: In the end of the nineteenth century, like practically everywhere in Europe at that time, anarchist movements posed a main threat to the Spanish rulers. In 1893 Pallas tried to assassinate General Martinez Campos, but the attempt failed. In the same year, Santiago Salvador installed two bombs in the Opera house "*Liceo de Barcelona*" during a performance. The attack led to the suspension of constitutional guarantees in Barcelona. Subsequently, the first anti-terrorism law was adopted: the ***Law of 10 of July of 1894 on "attacks against persons or harm to property by means of explosive substances or devices"***. It specifically criminalised the use of explosives, and sanctioned it with either life-long imprisonment or death penalty (in the case of lethal consequences). Also, conspiracy and proposition of certain criminal acts became criminal (Art. 4), and, for the first time, glorification (*apología*) became a crime (Art. 7). Only two years later, another terror wave started: The assassination at *Calle de Cambios Nuevos*, of 7 June 1896, led to the death of twelve persons and left forty-four injured. This incident triggered the adoption of the ***Law of 2 September 1896***. The authors of the attacks were tried in the "*Proceso de Montjuich*", during which torture and mass detentions (of 400 persons) were vastly applied, and the five suspects were convicted and executed on 4 May 1897. In revenge to this process, *Angiolillo* assassinated on 8 August 1897 the then President *Canovas Del Castillo*. The new law of 1896 mainly modified and tightened the existing legislation, in a more repressive manner (e.g. by suppressing anarchist newspapers and closing anarchist establishments). In the following period, many attempts were made to adopt new anti-terror laws, but only slight amendments took place extending the competences of military jurisdiction. Military tribunals obtained more power than ever under the dictatorship of General *Primo de Rivera* (1923-1930). By ***Real Decree of 25 December 1925***, war and marine tribunals were attributed jurisdiction for all crimes comprised in the law of 1895, i.e. those committed by means of explosives. In the following Second Republic of 1930, the ***Criminal Code of 1928***, together with other laws adopted during the dictatorship of Primo de Rivera, were annulled. Thus, the Criminal Code of 1870 and the Law of 10 July 1894 governing crimes related to explosives were reintroduced. Time was again characterised by social and political conflicts. Many strikes took place, either a state of emergency or a state of war was declared frequently, and in this climate, a ***Law for the Defence of the Republic*** was adopted. It was an exceptional Law, triggered by the special situation of emergency. The Law criminalised 'acts of aggression against the Republic', which were defined in an extremely broad way, including the 'glorification of the monarchist regime' (Art. 1(6)), the 'unjustified alteration of prices of things' (Art. 1(10)), 'incitement to resist or disobey the law or legitimate orders by the authorities' (Art. 1(1)). The Law was in force until 1933, when it was replaced by the ***Law of 28 July of 1933 of Public Order***. By Act of 9 November 1932, the Criminal Code was reformed. Its most innovative reformation was the abolition of the death penalty. After November 1933, when the Radical Party (*Partido Radical)* and the Spanish Confederation of the Autonomous Right (*Confederación Española de Derechas Autónomas, CEDA*) gained elections, Spain was constantly ruled by emergency legislation; the two following years, either a state of prevention, alarm, or war was declared. The most important anti-terror law adopted during the Second Republic is probably the ***Law of 11 October 1934 on crimes committed by means of explosives and armed thefts***. It was enacted in response to a country-wide strike that led to vast rebellion, especially in Catalonia and Asturias. The rebellion resulted in 2,000 deaths and more than 40,000 people detained, including the principal leaders of the political left. By the Law of 11 October 1934, death penalty was reintroduced in the Criminal Code. Moreover, for the first time in Spanish legislation, the special subjective element of a specific purpose was required for terrorist offences (the purpose to disturb public order, terrorise the inhabitants of a population, or to perform any kind of social revenge, see Art. 1 of the Law). During the Civil War, the ***Law of 9 February of 1939*** established political responsibility of both juridical and natural persons who had supported the republic and who had been opposed to the Nationalist Movement. With this Law, any political opposition was repressed on a large-scale. The legislation was characterised by the insecurity and ambiguity of the norms, the excessive rigor of the sentences, and by the reiterated creation of special jurisdictions, such as military jurisdiction.

Francisco Franco's dictatorship, the suppression of political opposition was crucial for the maintenance of power. The respective anti-terror laws of these days were correspondingly draconian. During and after the transition to democracy, the Spanish legislator was torn between two contrary urgent needs: on the one hand, the need for democratic values and freedoms was stronger than ever; the drafters of the Constitution of 1978 paid carefully attention to the protection of fundamental freedoms, including many very concrete rights that, in this detailed form, cannot be found easily in other constitutions (for example, Art. 17(2) of the *CE* establishing a maximum length of seventy-two hours for pre-trial detention).[3] Similarly, a Constitutional Court (*Tribunal Constitucional*),[4] equipped with procedures to protect individual human rights (similar to the German *Bundesverfassungsgericht)* was established. On the other hand, terrorist activity did not cease when the country became democratic, but, quite the contrary, increased dramatically. Therefore, the need for strong counter-terrorism legislation was very present as well. It is against this background that Art. 55(2) *CE* was adopted, which allows the suspension of certain fundamental freedoms in the course of investigations related to terrorist activities. No other of the compared countries has a similar constitutional provision.

Besides the role of the Constitution and of the Constitutional Court,[5] it is important to be aware of the sources of law, which in Spain are ordered strictly hierarchically (cf. Art. 9(3) of the *CE)*.

2.2. Relevant legal sources

The Spanish law follows a hierarchical order established in Art. 1 of the Civil Code (***Código Civil***) which states that the sources of the legal system are the law (*la ley*), customs (*la costumbre*) and general legal principles (*principios generales del derecho*). Thus if a legal norm exists it has to be applied. In the absence of any legal norm, customary law applies, and only in the absence of both a legal norm and customs, general legal principles apply. The law itself is again categorised in different classes of different hierarchical value: 1st Constitution[6], 2nd Organic Laws (*Leyes Orgánicas*),[7] 3rd Ordinary Laws (*Leyes ordinarias, leyes*),[8] and 4th Decrees (*Decretos Leyes*)[9]. Besides

[3] The strong impact of the Constitution on all lower-rank laws is also evident in the – among law students – popular edition of the Penal and Civil Code (Aranzadi Editorial) which contains, besides the relevant criminal/civil laws, a copy of the Constitution.

[4] See www.tribunalconstitucional.es. The judgments of the Constitutional Court since 1980 are available at: http://www.boe.es/g/es/bases_datos/tc.php.

[5] See above, Introduction, 1.2.2.2.

[6] The Constitution is of the highest legal rank in Spain. If any conflict of laws arises, an interpretation conform to the Constitution must be adopted.

[7] See Art. 81 *CE*. Organic Laws are laws that regulate subjects of major importance, for instance limitations of fundamental rights and freedoms, the statutes of the Autonomous Communities, and the general electoral regime. They need to be adopted by the two Chambers (*Cortes Generales*), and require absolute majority of the Congress (*Congreso*).

[8] These laws are of lower rank than the Organic Laws and regulate subjects which do not require organic legislation. For their entering into force, only a simple majority of both chambers (*Congreso* and *Senado*) is necessary.

[9] See Art. 86 CE. The *Decretos Leyes* have the same legal rank as ordinary laws, but they are adopted by the *executive* power (Council of Minsters, *Consejo de Ministros*). They concern areas which in principle would require ordinary legislation, but are urgently needed and can therefore be adopted by the government. It is important to note that the material scope of application of these decrees is limited: they

these main sources, there are also the standing orders of the different parliaments, unwritten constitutional law, case-law (especially that of the *Tribunal Constitucional*, whose importance is underlined by the fact that it must be published in the Official State Bulletin (*Boletín Oficial del Estado, BOE)*, see Art. 164 *CE*, but also the case-law of the Supreme Court, the *Tribunal Supremo*[10]), and international treaties.[11] The case-law of the European Court of Human Rights is not mentioned. However, in its judgment of 15 June 1981 the Constitutional Court established that the "fundamental rights respond to a universal system of values and principles that underlie the Universal Declaration and the different international human rights treaties ratified by Spain, which, accepted as a basic constitutional decision, have to orient our whole judicial order".[12] It follows that the European Convention of Human Rights does not form part of the core constitutional law, but that Spanish constitutional law is to be interpreted in accordance with the Convention.[13]

Criminal law is regulated mainly by the Criminal Code (***Código Penal***, *CP*) and by the Code of Criminal Prosecution (***Ley de Enjuiciamiento Criminal,*** *LECrim*). In addition, some general principles of criminal law are enshrined in the Constitution.[14] Since criminal law restricts and limits fundamental freedoms,[15] it needs to be regulated by an organic law. The present Spanish Criminal Code of 1995 is such an organic law. Terrorism offences are regulated in Book II.[16] Special anti terror provisions concerning the criminal procedure can be found under Arts. 520bis and 527 *LECrim* (regulating incommunicado detention), Arts. 553 (house searches), 579(4) (control of communications) and 384bis *LECrim* (automatic suspension of public charges for suspects of terrorism in detention on remand).

---

may not affect the order of the basic State institutions, or the rights, duties and liberties of the citizen as regulated under Title 1 of the Constitution, neither may they affect the regime of the Autonomous Communities or the general election regime (see Art. 86(1) *CE*). After these laws have been adopted by the government, they are immediately submitted to the Chambers where they can be either confirmed or derogated, within a time limit of thirty days. Of less importance for the present study, but, for the sake of completeness, it cannot be left unmentioned that there are more types of legislation than the ones mentioned up to now. There are Legislative Decrees (*Decretos Legislativos*), which have the same rank as ordinary laws, and emanate from the government. They also concern the same areas as ordinary laws, but are adopted by the executive because they are very technical and regulate the details, so that it is advisable for the Chambers to delegate the powers of regulating these affairs. Finally, there are other administrative laws and regulations of lower rank (*decretos, órdenes, resoluciones, circulares, instrucciones*).

[10] Its judgments can be retrieved online at: http://www.poderjudicial.es/jurisprudencia/.

[11] Prakke (2004), at 738.

[12] *Sala Primera del Tribunal Constitucional, Fundamento Jurídico* 10°.

[13] Carrillo Salcedo (1994), at 190.

[14] E.g. the prohibition of torture and of the death penalty (Art. 15 *CE*), the temporary limitation of pre-trial custody for up to seventy-two hours (Art. 17(2) *CE*), the detained person's right to be informed immediately of his rights and of the reasons for his detention, as well as the right to effective defense (Art. 17(2) *CE*) and *habeas corpus* (Art. 17(3) *CE*). See also Art. 24 *CE*, which grants the right to an ordinary judge established by law and other procedural rights, and Art. 25 *CE* establishing the principle of *nulla poena sine lege*, as well as the principle that prison sentences be oriented towards reeducation and social reinsertion of the prisoner.

[15] See above, note 7.

[16] Title XXII, Chapter V (Arts. 563-80).

The ***European Convention of Human Rights*** (ECHR) has been ratified by Spain on 4 October 1979. It is directly applicable under the Spanish monist system since its publication in the Official Bulletin (*BOE*), cf. Art. 96 *CE*.[17] Rules of these treaties that have a constitutional nature are also a source of Spanish constitutional law.[18] Under Art. 10(2) *CE*, (the opening Article of the First Title of the Constitution relating to fundamental rights) the rules governing fundamental rights and freedoms recognised by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and international treaties and agreements on the same subjects, ratified by Spain (thus also including the European Convention on Human Rights). The importance of the universal system of values and principles has been further reiterated by the Spanish Constitutional Court.[19] From Art. 10(2) *CE*, read in conjunction with Art. 45 ECHR, García de Enterría deduces that the ECtHR's case-law must be taken into account when interpreting the constitutional provisions relating to fundamental rights and freedoms.[20] This also derives from Art. 53(2) *CE*, which clearly restricts the scope of protection of the Constitutional Courts to the rights conferred by the Constitution itself.[21] However, the Constitutional Court has manifested that Art. 10(2) *CE* does not mean that the rights conferred under the ECHR have constitutional value by themselves; it only means that when interpreting a *constitutional* right or freedom, the ECHR must be taken into account.[22] As all national legal remedies must have been exhausted before a case can be brought to Strasbourg, and as the Constitutional Court is a last national remedy, relatively few cases against Spain were brought before the Strasbourg Court (another reason being, of course, that Spain has ratified the ECHR comparatively late).[23]

2.3. Anti-terror legislation prior to September 11th

2.3.1. Early anti-terror laws: Era Franco

Although the present study concentrates on *democratic* legislation adopted against terrorism, in Spain the legislation adopted under the regime of General Francisco Franco ought to be briefly discussed, as it was partially on basis of this legislation that subsequent laws were adopted. Under Franco, terrorism and political crimes became the central targets of Spain's criminal law system. Any conduct that could affect this regime was thus qualified either as terrorism or as a political offence, and in many

[17] Art. 96(1) *CE* states that validly concluded international treaties, once officially published in Spain, form part of Spanish law.
[18] Prakke (2004), at 743 et seq.
[19] Judgment of 15 June 1981, in which the Court stipulated that the international principles and values have to influence the whole Spanish legislation.
[20] García de Enterría (1988), at 223.
[21] Carrillo Salcedo (1994), at 191. See also STC 84/1989, where the Constitutional Court held that the existence of a fundamental norm outside of the Constitution would amount to a violation of Art. 53(2) *CE*.
[22] See STC 36/1991, of 14 February 1991.
[23] Spanish legislation can be retrieved online at the web page of the Official State Bulletin at http://www.boe.es/g/es/bases_datos/iberlex.php; furthermore, both Spanish case-law and legislation are also available at http://noticias.juridicas.com (both last visited on 1 October 2008).

cases, both notions were used synonymously.[24] According to Mestre Delgado, the attacks committed by explosives and for political or social reasons were repressed with exceptional strictness including the imposition of capital punishment as unique punishment if the act caused death or serious injuries. Jurisdiction was military, extremely short (*sumarísimo*) the proceedings.[25]

A few legislative examples may illustrate the political climate after the civil war in Spain: The ***Law of 23 September of 1939 of 'reverse amnesty'*** was adopted. It granted generous amnesty to all people who had committed whatever crimes (including homicide) for political reasons, as long as they identified themselves with the nationalist ideology, thus with the winners of the Civil War.[26] The ***Law of 1 March 1940 on 'Masonry and Communism'*** prohibited the membership to communist and other clandestine organisations – basically any organisation other than the ruling party. By ***Law of 29 March 1941 on State Security,*** crimes against internal and external security and against the government were created, characterised by the specific purpose to attack state security or to change public order.[27] The ***Criminal Code of 1944*** was the first criminal code that codified the crime of terrorism, and thus provided a juridical concept for it.[28] With this Code, also new offences of conspiracy, incitement and provocation were created.[29] Finally, the ***Public Order Law of 30 July 1959*** should be mentioned, as it presented the basic normative instrument to face political opposition until the end of the regime. According to its Art. 2, acts against public order were, *inter alia*, 'those that go against the spiritual, national, political and social unity of Spain', as well as 'all those by which subversion is advertised, recommended or provoked, or by which violence or any other way to reach violence is glorified'.[30]

Precisely one day after the Act had been enacted, ETA was founded. Until 1962, its activities were limited to mural inscriptions; violence started at a later stage.

---

[24] Please note Lamarca Perez' interesting observation on this point: In opposition to terrorist crimes in democratic regimes, in the case of dictatorships the criminalisation of a terrorist activity targets mainly the terrorist intention or purpose, whereas under democracy, the purpose itself is legitimate, and only becomes a crime if violence is applied to promote this purpose. Thus, while in dictatorships, the intent is an essential element to be criminalised as a threat to the ruling party (the violence only enhances this danger that comes from the political intent), in democracies, it is the harmful action, although according to some laws of the Spanish democracy, a 'terrorist intent' is also required (but there, the intent only reiterates the danger deriving from the action, in the first place). Lamarca Perez (1985), at 125 et seq.

[25] Mestre Delgado (1987), at 70.

[26] Lamarca Perez (1985), at 128.

[27] The law was derogated by the Criminal Code of 1944. Ibid. at 128-32.

[28] Art. 260 enumerated a large list of acts which were criminalised as terrorist offences, ending with referring to '*otros hechos análogos*' (or other similar acts), thus extending the criminal responsibility excessively (and violating the prohibition of analogy, a fundamental principle of modern criminal law). Art. 268 created the offence of glorification (*apología*) terrorism. Moreover, jurisdiction in terrorist affairs was conferred to ordinary tribunals (Ibid. at 132-8).

[29] Villiers (1999), at 99.

[30] '*Los que atenten contra la unidad espiritual, nacional, política y social de España'*, and '*todos aquellos por los cuales se propague, recomiende o provoque la subversión o se haga la apología de la violencia o de cualquier otro medio para llegar a ella'*). Upon breach of these regulations, administrative sanctions are possible: up to 30 days arrest (thus imposing a real prison punishment that can be ordered by the government, and thereby depriving the detained of his necessary procedural guarantees). Lamarca Perez (1985), at 138-43.

In the following years, two Decrees were adopted, in response to specific threats emerging from guerrilla groups and other opposing political organizations. [31] Terrorist crimes (which equalled under Franco any political opposition) were tried by military tribunals. However, a different approach was followed in the 1960s. Precisely to limit the attribution of competencies to the military jurisdiction, the ***Law of 2 December of 1963 on the Creation of a Tribunal of Public Order*** was created. The Law was adopted in response to wide-spread criticism against military jurisdiction.[32] By this Law, a large number of offences against internal and external security were attributed to the special jurisdiction of 'public order', so that in fact this jurisdiction 'converted into ordinary jurisdiction of political justice'.[33]

From 1963 onwards, a series of liberalising dispositions were adopted, promoting, *inter alia*, the freedom of press and the freedom of associations. Among these laws were the ***Law of Associations of 24 December 1964***, the ***Law of the Press of 18 March 1966***, as well as the ***Organic Law of the State of 10 January 1967***.

A step back in this process of liberalisation presented the ***Decree 9/1968 of 16 August***, which attributed once more all offences regulated by the Decree of 1960[34] again to military jurisdiction. This Decree was adopted in reaction to an ETA attack against the inspector of the Political Social Brigade of San Sebastián, *Meliton Manzanas*, of 2 August 1968.

It was under this legislation that the famous Burgos trial took place against sixteen ETA members. The trial had wide national and international repercussions, and contributed substantially to the mystification of ETA as a political organisation violently opposing the Franco regime. The War Counsel (*Consejo de Guerra*) condemned nine of the sixteen accused to death. From the 1970s onwards, ETA and other well-structured, violent political groups, e.g. the extremist left-wing GRAPO (*Grupos de Resistencia Antifascista Primero de Octubre*, Anti-Fascist Resistance

[31] These decrees were:

- The ***Decree on Banditry and Terrorism of 19 April 1947 (Decreto-Ley de 19 de avril de 1947 sobre bandidaje y terrorismo)***
- This decree was adopted in response to republican guerrilla groups, "*maquis*", which presented the greatest danger to the Franco-regime in the first years of the new government. By the decree, jurisdiction for terrorism and banditry was again attributed to military courts. The purpose of the law was less precisely formulated: the crime consisted in 'attacking public security' without defining the latter. Sentence reductions and leniency were provided for those who assisted in catching other criminals or who informed immediately the public forces (Art. 8).
- **The *Decree 17/94 of 21 September 1960 on Military Rebellion, Banditry, and Terrorism, and the Appearance of Terrorist Organisations (Decreto 17/94 de 21 de septiembre de 1960 sobre rebelión militar, bandidaje y terrorismo y la aparación de las organisaciones terroristas)***

This decree was adopted in response to the emergence of more and more violent political organisations in the 1960s. It was adopted 'to repress efficiently subversive or dangerous activities which produce or may produce serious results, either for political-social or for terrorist reasons or simply for impulses of singular criminality'. Both substantively and procedurally, the law does not bring about significant changes. A main criticism to the law was that it mixed two substantially different concepts: banditry and terrorism (Mestre Delgado (1987), at 70).

[32] The International Law Commission published a critical report in Geneva in 1962. Moreover, international protests arose when Julian Grimau, a member of the Communist Party, was executed under military jurisdiction. See Lamarca Perez (1985), at 144 (note 193), with further references.

[33] Peces Barba, cited by Ibid. at 145, note 197 (196).

[34] See above, note 31.

Groups of the first of October),[35] emerged, so that the anti-terror legislation became more and more focussed on combating and preventing their actions.[36]

Following the Burgos trial, two new laws, adopted on 15 November 1971, reformed the terrorist legislation in Spain: By ***Law 42/1971***, another Chapter concerning terrorist crimes was added to the Military Code (***Código de justicia militar***). Second, the ***Law 44/1971***, *inter alia*, revised the terrorist offences of the Criminal Code. By the conjunction of the two new laws, terrorism became doubly criminalised – the same acts qualified as a criminal offence both under the Military Code and under the Criminal Code. At the same time, people became more and more engaged in political activity against the regime, both pacifically and also with violence. Demonstrations and strikes, but also terror attacks took place, among them the killing of Admiral Carrero Blanco, President of Franco's government, on 20 December 1973 (perpetrated by ETA).

The last anti-terror law before Franco's death was the ***Decree 10/1975 of 26 August, on the prevention of terrorism***. The penal repression of terrorism was tightened again by the aggravation of sentences (enhanced in particular when directed against civil servants, including death penalty), prolonged[37] detention on remand (*prisión provisional*),[38] and creation of new terrorist offences.[39] Moreover, individual guarantees were reduced, and summary proceedings created. This was seriously criticised by the doctrine, as elementary rights of the person and basic principles of criminal law and criminal procedure were not respected.[40] Moreover, the law went against fundamental constitutional principles, such as legality, juridical certainty and retroactivity only of the more favourable law.[41] In particular, Arts. 13 and 14 of the Act were problematic as they limited the rights to personal freedom and inviolability of the

[35] This group appeared, for the first time, on 1 October 1975, when they attacked four police officers in Madrid. They have been active until June 2007, when their supposed ring leaders were arrested in Barcelona.

[36] Lamarca Perez (1985), at 143-7.

[37] Prolonged to five days, and, if authorised by judge, to ten days.

[38] It is important not to confuse the 'false friends' of the English term 'detention' and the Spanish word '*detención'*. The Spanish '*detención'* refers to the act of arresting a person temporarily on the grounds that this person has just committed or is about to commit a crime. This form of arrest can be carried out by police officers and civilians. The arrested person has to be brought before a judicial authority immediately, and can only be deprived of his liberty for the time absolutely necessary. The Spanish law distinguishes three classes of arrest: the arrest by civilians (*detención por particulares*), the arrest ordered by judicial authority (*detención judicial)*, and, most importantly for the present study, the arrest carried out by police officers (*detención policial preventiva*), subsequently translated as 'police custody' or 'police arrest'. In principle, the Constitution establishes that this police arrest cannot last longer than seventy-two hours, cf. Art. 17(2). However, during a state of emergency, the person can be arrested for up to ten days, if there are founded reasons to suspect him or her to disturb public order (arts. 16 and 32 of the Organic Law 4/1981). In addition, if the person is arrested because of a crime related to terrorist or armed groups, the detention can be prolonged for forty-eight hours longer (cf. Art. 520bis (1) *LECrim*), so that the maximum period of arrest for terrorist suspects amounts to five days. The *detención preventiva* has to be distinguished from the so-called '*prisión provisional'*, which describes the fact of detaining a suspect prior to his conviction, in order to ensure his presence at the time his sentence is issued, known in English law as 'detention on remand' (in German law *Untersuchungshaft*, in French law *détention provisoire*). See Moreno Catena and Cortés Domínguez (2005), at 273 et seqq.

[39] See Arts. 13 and 14.

[40] Mestre Delgado (1987), at 72 (note 241), citing Beristain, la violencia como desafío en Espana y en el País Vasco, 1936-1977 (Constataciones de un penalista), at 276.

[41] Barbero Santos (1977), at 86 et seq.

home, and, in a certain way, constituted precedence for the suspension of fundamental rights now enshrined in Art. 55(2) *CE*.[42] According to these provisions, police custody could last for up to five days without being brought before a judge and up to ten days if the judge authorised it. For house searches, an administrative authorisation sufficed if it was presumed that terrorist suspects might be in that house.[43]

The repressive anti-terror legislation was applied most rigidly; many political trials were carried out, in which maximum sentences were issued.[44]

2.3.2. Transition to democracy

After Francisco Franco's death on 20 November 1975 Prince Juan Carlos became head of state (designated as such by Franco) and led the Spanish country into democracy. During the transition to democracy, the ***Decree 2/1976, of 18 February***, was adopted, which removed terrorist crimes practically completely from military law.[45] Another fundamental change took place on 4 January 1977, with respect to jurisdiction, when three ***Decrees (1/1977, 2/1977 and 3/1977)*** were adopted. By these Decrees, a new central tribunal was created to deal with serious organised crime and terrorist offences: the National Audience (*Audiencia Nacional, AN*). A special prosecutor (*fiscalía adscrita a la AN*) should prosecute in these cases. In parallel, the Public Order Tribunals were abolished.

During the transition political violence did not cease, but, rather, to the contrary, increased. Politicians had to take account of this. During the Political Agreements (*Acuerdos Politicos),* which were adopted in the so-called Moncloa Pacts (*Pactos de Moncloa*), the legislative treatment of terrorism was of primal importance for the posterior development; it initiated the process of removing the special character of the anti-terrorist legislation, by placing it inside of the ordinary criminal law system (*destipificacion*). The concept of terrorism was thus systematically put into the ordinary Criminal Code, special legislation concerning this matter was eliminated, and criteria were adopted that were generally accepted by international treaties and Western states.[46]

In spite of Spain's democratisation, the year of 1978 presented a culminating point of terrorist violence: in the first nine months of 1978, 27 people died as a consequence of terrorist attacks.[47] To respond to this growing violence, the ***Decree 21/1978*** was adopted, by Aranda Ocaña described as the first exceptional legislation of

---

[42] López Garrido (1987), at 80.
[43] Lamarca Perez (1985), at 147-158.
[44] Thus on 2 May 1974 the anarchist Salvador Puig Antich was executed, and on 27 September 1975, under the legislation of the then applicable *Decreto-Ley* 10/1975, the ETA members Angel Otaegui and Juan Paredes Manot were fusilated, as well as José Luis Sanchez Bravo, José Humberto Baena and Ramon Garcia Sanz, all members of the *Frente Revolucionario Antifascista y Patriota (FRAP*). Ibid. at 153.
[45] Most provisions of the former Decree on the Prevention of Terrorism were derogated, but the controversial Arts. 13 and 14 were kept (concerning exceptional police powers in the area of detention and registration).
[46] Lamarca Perez (1985), at 162.
[47] *Datos presentados por el diputado Sr. FRAGA, en: Diario de Sesiones del Congreso de los Diputados núm. 133. Debate general sobre orden público de 8 de noviembre 1978*, at 5271 (cited by Ibid. at 166, note 273).

Spain's young democracy.[48] By this Decree, the competences of the *Audiencia Nacional* were extended to other crimes. The maximum period of police custody was expanded (Art. 2): before (as regulated by Decree of 1975), the ordinary time period of three days could be prolonged within 48 hours to up to ten days, provided judicial authorisation. According to the new Decree, in principle, it could be prolonged *indefinitely*; the administrative authority had to request the custody within 72 hours, and the judicial authority had to approve. However, if the judge did not react within 72 hours, it was presumed that he had tacitly accepted. Moreover, house searches needed no longer previous judicial authorisation (since the crimes comprised in the Decree were always presumed to be red-handed). Also, the secrecy of communications was significantly restricted,[49] the proceedings were accelerated (high priority in terrorist cases), and for terrorists legal benefits (such as amnesties, sentence reductions etc.) were no longer available.[50]

The Law was in force for only six months.[51] Nonetheless, it had severe practical implications: Since many anti-terrorist measures were applied during the pre-trial phase, they concerned not only those who were actually members of a terrorist group, but also others, because the anti-terrorist measures served only to determine whether the suspect was indeed a member of a terrorist group or not. Moreover, they also applied to those members of armed groups who had committed common crimes, not only 'terrorist crimes'.[52] The Law was soon derogated by the ***Law 56/1978, of 4 December,***[53] the first denominated terrorism law of Spanish democracy, adopted a few days before the approval of the Constitution.[54] Besides abolishing the former Decree, the law referred no longer to terrorist crimes, but to a list of conducts for which special measures could apply. The duration of police custody was reduced to ten days maximum, and judicial authorisation had to be explicitly given (thus the judge's silence was not interpreted as approval any more). According to its Art. 2, incommunicado detention was allowed for a maximum duration of up to ten days. It could be ordered either by the police or by a judge, for as long as deemed necessary, but 'without affecting the right to defence'.[55] Mail correspondence, telecommunications and telegraphs could be controlled (on order of the Ministry of the Interior) for a maximum time period of three months (prolongable again for three months, respectively);[56] the order was to be confirmed or revoked by a judge *ex post.* The Law permitted house searches to be carried out without prior judicial order or authorisation.[57] The

[48] Aranda Ocaña (2005), at 370.
[49] Without any prior judicial authorisation, the executive authority could order postal, telegraphic and telephone observation of those who were presumed to be integrated in armed groups. The judge had to be informed of this measure and could confirm or revoke it *ex post*, see Art. 4.
[50] Pursuant to Art. 6 the convicts of the listed crimes could not enjoy any particular or general act of grace, neither any other sentencing benefits (release on parole etc.) (Lamarca Perez (1985), at 167-168).
[51] Mestre Delgado (1987), at 73 note 246.
[52] Lamarca Perez (1985), at 168-9.
[53] *Ley 56/1978 de 4 de dicembre, de medidas especiales en relación con los delitos de terrorismo cometidos por grupos armados.*
[54] Aranda Ocaña (2005), at 370.
[55] Mestre Delgado (1987), at 74.
[56] See Art. 4.
[57] Aranda Ocaña (2005), at 370.

government had to report every three months on the application of the law.[58] A sunset clause limited its duration to one year. However, it was prolonged for one more year.[59]

The application of the anti-terror legislation under the Law 56/1978 gave rise to a complaint before the European Court of Human Rights (Case of *Barberà, Messegué and Jabardo v Spain*).[60] The applicants alleged that they had not had a fair trial before an independent and impartial tribunal; in particular, they alleged that they were convicted on no evidence except their confessions, which had been extracted by torture. They invoked Arts. 6(1), 6(2), ECHR. In the proceedings before the Commission, they also contended that the *Audiencia Nacional* was a special court, but both the Commission and the Strasbourg Court considered that the *Audiencia Nacional* was an ordinary court. Several irregularities during the trial (belated transfer of the applicants, unexpected replacement in the court's membership immediately before the hearing opened, brevity of the trial, and the fact that very important pieces of evidence were not adequately adduced and discussed at the trial in the applicants' presence) led the Court to the conclusion that the proceedings did indeed not satisfy the requirements of a fair and public hearing, within the meaning of Art. 6(1), ECHR.[61] The applicants' allegations as to a violation of the presumption of innocence (Art. 6(2), ECHR) were rejected.[62]

2.3.3. Spanish Constitution of 1978 and first years of democracy

On 6 December 1978 the Spanish Constitution was ratified. With respect to terrorism, its Art. 55 is of major importance: This provision foresees the possibility of establishing, by means of an Organic Law, the conditions and the occasions where, in a given individual case and with a compulsory judiciary warrant and the appropriate parliamentary control, the rights of certain persons can be suspended, in relation to the prosecution of the activities of armed bands or terrorist organisations. In particular, with respect to armed bands and terrorist groups, three fundamental rights can be suspended: the right to liberty (maximum period of arrest), the inviolability of one's home, and the privacy of communications (privacy of correspondence, telegraphic and telephone conversations).[63] The first law to concretise this constitutional provision was the *Organic Law 11/1980*.[64]

The anti-terror legislation of 1978 consisted of special laws to combat a *common* crime. As Lamarca Perez thoroughly explains, terrorism presented indeed a

[58] Art. 6.
[59] It was renewed by Royal Legislative Decree no. 19 of 23 November 1979 (see ECtHR, *Barberà, Messegué and Jabardo v Spain*, Judgment of 6 December 1988, application no. 10590/83, at para. 46).
[60] Judgment of 6 December 1988 (application no. 10590/83).
[61] Ibid, at para. 89.
[62] At the time of the Judgment, the issue of the award of just satisfaction was not yet ready for Decision, so that the Court reserved the whole of this question for a later judgment. See *Barberà, Messeguè and Jabardo v Spain (Art. 50)*, Judgment of 13 June 1994 (application no. 10588/83; 10589/83; 10590/83).
[63] The Article had a predecessor from 1873: Title IV (on the suspension of constitutional guarantees) of the "Elements of political, penal and procedural law of Spain, the area of constitutional guarantees (*Elementos del derecho politico, penal, y de procedimientos de España en material de garantías constitucionales*, de Emilio Ayllon y Altolaguirre, Madrid 1873) allowed to suspend certain civil rights provided that the suspension was temporary, that it was adopted by law, and that state security and extraordinary circumstances demanded it.
[64] See below at 2.3.4.

serious problem in Spanish society, thus had to be treated legislatively, but, at the same time, the democratic legislator, based on the experience of the past, did not want to give it any political character, and therefore identified it as a 'common' crime.[65] An example for this tendency, aiming at de-stigmatising terrorist crimes, was the ***Law 82/1978 of 28 December, modifying the Criminal Code in terrorist matters.*** By this Law, terrorist offences became ordinary offences, i.e. terrorism was rather defined by the (objective) criminal actions than by the (subjective) 'bad' intentions behind them.[66] Moreover, the offences were no longer labelled 'terrorist offences', but the notion was substituted by the respective specific conduct typical for this type of crime.[67] Besides these changes in substantive criminal law, possibilities of detention were extended, and the judicial control over searches of domicile and interception of private communications was limited.[68]

The subsequent ***Decree 3/1979, on Security of the Citizen***, which was adopted in response to ETA's increasing violence, tightened again anti-terror legislation. It was contradictory to the former Law 82/1978, since the former one took out terrorism as a term in criminal law, while the present Decree reintroduced it.[69] The Decree was one of the most controversial anti-terror laws adopted in Spain.[70] According to its preamble, the adopted measures aimed to give an adequate response both to the terrorist phenomenon and to other types of crime which, for their frequency, threatened the citizen's security. Thus, the term 'terrorism', which had carefully been avoided in the first democratic anti-terror laws, reappeared again. Moreover, the Preamble showed how the legislator openly accepted that the provisions of criminal law and criminal procedural law which addressed terrorism now also applied to other forms of crime. Besides prolonging the previous law, it introduced new forms of participation, including *apología* (glorification) and other collaboration acts that 'favour' the commission of crimes.[71] These forms of participation were particularly problematic as the glorified or assisted act itself could be punished less severely than its apologia or assistance.[72] Moreover, the Decree extended urgency criminal proceedings[73] to many offences.[74] It also extended the competence of the *Audiencia Nacional* to all offences committed by armed groups, including apologia. Further, possibilities of remedies were eliminated. The Decree also abolished the release of some prisoners (charged and convicted) whose release had already been approved before the Decree had been adopted.[75] It was harshly criticised. There were doubts as to its constitutionality both on

[65] Lamarca Perez (1985), at 166.
[66] Ibid. at 162, and López Garrido (1987), at 81.
[67] These could be crimes of assassination, serious bodily harm, kidnapping on ransom or any other imposed condition, simulation of public functions, storage of weapons or munitions, possession of explosives, destructions and crimes connected to the previous ones, wherever they were committed by persons integrated in organised and armed groups.
[68] Reinares (2003), at 64.
[69] Mestre Delgado (1987), at 75.
[70] Lamarca Perez (1985), at 180.
[71] See Art. 2.
[72] Lamarca Perez (1985), at 179, 180.
[73] Title III, Book IV of the *LECrim*.
[74] In principle all that are related to armed or organised groups, plus more crimes (e.g. robbery, Art. 500 *CP*, or illegal detention, Art. 481bis *CP*).
[75] The following three conditions needed to be fulfilled:

formal and on material questions. Formally, by creating new types of crimes (Arts. 1 and 2) and introducing administrative sanctions (Arts. 8 and 9), which restricted some fundamental rights, the law broke the constitutionally established legislative hierarchy.[76] Materially, the Decree violated the principle of non-retroactivity of unfavourable norms,[77] by allowing the suspension of the release of prisoners whose release previously had already been approved.[78] In addition, it was doubtful whether there was such an extraordinary and urgent necessity that justified the adoption in form of a Decree. In 1986, the Constitutional Court had occasion to rule on the constitutionality of the crimes created by the Decree. By Judgment of 16 December 1986, the Court stated that the conviction for the crimes created by the Decree constituted a violation of the constitutionally guaranteed right to liberty (Art. 17(1) *CE*), insofar as the respective provisions of the Decree did not meet all the constitutionally necessary requirements, i.e., the adoption in the form of Organic Law.[79]

The subsequent ***Decree 19/1979 of 23 November*** modified the Decree of 4 of January 1977 on the creation of the *Audiencia Nacional*, by extending the competences of the latter. Moreover, it prolonged the Law 56/1978 on suspension of guarantees in relation to terrorism. The Decree was of transitory character. Lamarca Perez considered it clearly unconstitutional for formal reasons; it appeared difficult to her to justify the required extraordinary and urgent necessity since the Decree only regulated competences of the *AN*.[80] Further, for the prolongation of Law 56/1978 adequate legislative instruments could be used, but not the emergency-law type of Decree.[81] In 1982, the Constitutional Court ruled on the problem of Decrees which were used by the executive power habitually, and, therefore, abusively.[82] The Court reiterated the exceptional nature of Decrees, pointing to the requirement of exceptional and extraordinary necessity.

2.3.4. Legislative activity in 1980 and 1981

In 1980, three important legislative instruments were adopted with respect to terrorism:

(1) Organic Law 4/1980 of 21 May, modifying the Criminal Code in the area of freedom of expression, meeting and association

(1) the judgment was not final,
(2) the appellant was the public prosecutor, and
(3) the detainees were accused of crimes committed by armed groups (Aranda Ocaña (2005), at 371).

[76] The law contravened Art. 86(1) *CE*, under which no law of a lower rank than a "*Ley*" could introduce new criminal offences and limit the exercise of individual rights. (Ibid. at 371).
Lamarca Perez (1985), at 177; Aranda Ocaña (2005), at 371.

[77] As enshrined in Art. 9.3. *CE*.

[78] Aranda Ocaña (2005), at 371; Lamarca Perez (1985), at 177.

[79] STC 159/1986, Judgment of 16 December 1986 (*recurso de amparo*).

[80] Lamarca Perez (1985), at 180 et seq.

[81] Moreover, according to its Arts. 2 and 3, the areas which were regulated by the Decree were outside the scope of matters that could be regulated by Decree, see Art. 86.1. *CE* (ibid).

[82] STC 29/1982, Judgment of 31 May (*Recurso de inconstitucionalidad*), at 14.

(2) Organic Law 11/1980 of 1 December, on the Suspension of Constitutional Rights provided for in Art. 55(2) CE,[83] which developed Art. 55(2) *CE*

(3) Organic Law 2/1981, of 4 May on the Protection of the Spanish Constitution and Terrorist Matters

Ad (1):

By the ***Organic Law 4/1980***, illegal associations were newly typified.[84] Also, the crime of apologia was extended, no longer referring only to the crimes under Title II, but also to all those that were committed by organised groups; punishment depended now on the basic crime for which apologia was made, and was slightly lower than the punishment for that crime. Thus the previously unfair situation[85] was corrected now.

Ad (2):

The ***Organic Law 11/1980***, which implemented Art. 55(2) *CE*, provided for the suspension of rights of persons who were suspected to be integrated or related to 'terrorist elements', or to armed gangs that seriously disturbed the citizens' security. The Law offered no definition for the notion of 'terrorist elements'. It extended the catalogue of crimes for which fundamental rights could be suspended, including crimes against external state security, as well as crimes against life and physical integrity. The Law also prolonged the duration of police custody for up to seven days, as well as incommunicado detention for the 'time that the authority deems necessary'.[86] Pursuant to Art. 4 of the Law, state security forces were authorised to immediately detain persons who were presumed to be responsible of certain criminal actions defined in Art. 1, irrespective at which place or at whose home they were hiding or seeking refugee.[87]

This time, the law was based on political consensus and thus, in principle, had permanent character. Its constitutionality was doubted in regard of its Art. 6, which granted exclusive competence of the Central Investigations Chamber (*Juzgado Central de Instrucción*), and of the *Audiencia Nacional* for the respective crimes, thus limiting the right to a natural judge predetermined by law as enshrined in Art. 24(2) *CE*.[88] The Organic Law 11/1980 was subjected to a constitutional review (*recurso de inconstitucionalidad*), on application of the Basque Parliament.[89] However, the remedy was rejected on the grounds that the Basque Parliament was not legitimated to raise the remedy.[90]

---

[83] *Ley Orgánica 11/1980, de 1 de diciembre, sobre Suspensión de Derechos Constitucionales en los supuestos previstos en el Art. 55.2 de la CE.*

[84] The previous types concerning associations contrary to public moral were abolished, and new ones introduced: clandestine or paramilitary organizations.

[85] Before, it had been possible that apologia to a terrorist act was punished more severely than the act itself, see above at 2.3.3.

[86] *Por el tiempo que la autoridad estime necesario*, Art. 3(1) and 3(3).

[87] '*Los miembros de cuerpos y fuerzas de seguridad del estado podrán proceder, sin necesidad de autorización o mandato judicial previo, a la inmediata detención de los presuntos responsables de las acciones a que se refiere el artículo primero, cualquiera que fuese el lugar o domicilio donde se ocultasen o refugiasen*'.

[88] Aranda Ocaña (2005), at 372.

[89] STC 25/1981, Judgment of 14 July (*recurso de inconstitucionalidad*).

[90] See ibid. (cited by Aranda Ocaña (2005), at 371, 372.

Ad (3):
Just one year later, in direct response to the *coup d'état* of 23 February 1981, ***Organic Law 2/1981 of 4 May on the Protection of the Spanish Constitution and Terrorist Matters***,[91] was adopted, the so-called "Law of the Defence of Democracy".[92] It was transmitted by urgency proceedings[93] and could therefore be adopted in the record time of only one month. The Law reformed the offences concerning rebellion,[94] created common dispositions for terrorism and rebellion, with regard to conspiracy, proposition, provocation and apologia, as well as precautions for matters of press.[95] It introduced new crimes concerning the association in armed groups, including the participation in terrorist training camps or cooperation with foreign terrorist armed groups.[96] Similarly, new forms of collaboration to terrorism were introduced, including '*any other act of collaboration* that favours *'the organisation or the activities of an armed group or the commission of any crime by the latter'*.[97] The Law also provided leniency provisions for collaborators of justice.[98] Art. 174bis (b), criminalising any other act of collaboration, was formulated in a very wide manner; it is doubtful whether the formulation "any other act of collaboration" complies with the principle of certainty of the law. Another issue of unconstitutionality within the same provision was raised by Arroyo Zapatero, who pointed out that Art. 174bis (b), sub-paragraph (b), second sentence of the law violated the constitutional principles of culpability and equality, since it provided for higher sentences in the case that the activity of the armed group (which the accused himself does not carry out, but only 'favours') had as a consequence the death of one or more persons. Moreover, the principle of equality is violated since this way a person who only commits preparatory acts for an offence which results in the death of a person is punished as severely as the main perpetrator of the offence himself, namely with major punishment (*pena de reclusion mayor*, which presented, at that time, under the Criminal Code of 1944, as amended in 1973, the highest level of punishment before death penalty, i.e. 20 to 30 years).[99]

2.3.5. The 1980s

2.3.5.1. Relations with France and dirty war

In the early years of Spanish democracy, Rodolfo Martín Villa (presiding the Ministry of the Interior between 1976 and 1978) created the first anti-terrorism police units in

[91] *Ley Orgánica 2/81 de 4 de mayo en materia de defensa de la Constitución espanola y en materia de terrorismo.*
[92] Aranda Ocaña (2005), at 373.
[93] Cf. Arts. 103 and 105 of *Reglamento Provisional del Congreso*, now abolished.
[94] Art. 214(1)(1), (4), and (5), Art. 217.
[95] Arts. 216 bis (a) – (b).
[96] Art. 174 bis (a).
[97] Art. 174bis (b).
[98] Art. 174 bis (c).
[99] Arroyo Zapatero (1981), at 412 et seqq. Zapatero elaborates that the principle of culpability establishes that a person may only be convicted on the basis of facts that can be reproached to him or her both objectively and subjectively. This principle is violated if a person receives higher punishment for a death, without the requirement that this person has objectively committed the homicide, and without the requirement that this person had the necessary *mens rea* with respect to this death.

the new democracy.[100] These units were paramilitary anti-terrorist groups that combated ETA illegally, such as the Anti-Terrorist Liberation Groups (*Grupos Antiterroristas de Liberación, GAL*), or the Rural Anti-Terrorist Groups (*Grupos Antiterroristas Rurales, GAR*). Between 1983 and 1986, these groups led a 'dirty war' against ETA. For instance, when a subdivision of ETA kidnapped and assassinated the pharmaceutical captain Alberto Martín Barrios in 1983, the Ministry of the Interior responded by allowing the Spanish antiterrorist group GAL to kidnap an ETA leader in France. This attempt was a complete failure, as the Spanish GAL was caught red-handed by their French colleagues. According to Elorza and others, between 1983 and 1986, the GAL assassinated 27 people.[101] Martínez Soría points out that this included ten persons with no connections to ETA.[102]

The activity of Spanish paramilitaries on French territory must be seen in the context of France's policy in the first years of democracy, until 1986. Before and during the first years of transition in Spain, France adopted a supportive policy towards ETA, whom they then seemed to still consider as political refugees and main combatants of Franco's dictatorship (although Franco's totalitarian regime had ceased to exist already for several years). In fact, France granted many ETA members political asylum, so that French territory became sanctuary. However, Spanish-French relations improved in 1984, and the two Ministers of the Interior signed the Agreements of Castellana (*Acuerdos de la Castellana*). In spite of this, GAL continued their activities for two more years, mainly in French Basque country. They stopped in 1986 – precisely the time when France adopted a more vigorous extradition policy, and started to extradite ETA members to Spain.[103] ETA reacted to this change of policy from France by an attack campaign against the interests of France: French trucks were attacked first by Molotov cocktails, then by shootings. At this time, six extradition petitions concerning ETA members from Spain to France were pending. When ETA rejected the invitation of the French and Spanish governments to meet and negotiate, France extradited three ETA members to Spain and tightened their policy against ETA. In consequence, ETA intensified their campaign against French interests, until around 1990. According to Elorza et al., the campaign against France 1984-90 comprised a total of 310 attacks.[104]

Lamarca Perez draws attention to the fact that neither the government nor the governing Socialist Party (PSOE) have ever acknowledged responsibility for the GAL, but the Supreme Court has convicted most of the senior members of the 1980s anti-terrorist high command, up to and including the Interior Minister, *José Barrionuevo*, for GAL-related crimes.[105] Because of the political goals of the GAL, the *Audiencia Nacional*, in its judgment 30/91, did not qualify the founders of the GAL as terrorists. The judges argued that the GAL did not carry out subversive terrorism, i.e. terrorism with the intention to destruct the state, but, on the contrary, they acted with the

[100] Elorza, Garmendia, Jáuregui and Domínguez (2000), at 310.
[101] Ibid. at 318.
[102] Martínez Soria (2004), at 520, with further references.
[103] Ibid. at 521.
[104] Elorza, Garmendia, Jáuregui and Domínguez (2000), at 321.
[105] Lamarca Pérez (2007), at 3; see STS Judgment 2/1998, Criminal Chamber (*Sala de lo Penal*), *Causa Especial* No. 2530/95.

intention to preserve or defend the state, although by using legally reproachable means. Lamarca Perez is right when she considers this assessment as contrary to the principles of a state governed by the rule of law (*Estado de Derecho*), because in the authentic state governed by the rule of law the political intention behind a criminal act should be completely irrelevant, no matter how radical or heterodox it might be. An organisation can only be penalised for *using violence* to achieve its political goals, i.e. for not using democratic means, irrespective of the direction of the political goals.[106]
As Martínez Soría notes, ironically, the GAL was a major factor in ensuring ETA's survival well into the 1990s and beyond, because "the use of state terrorism by Madrid" was a convenient propaganda tool for the supporters of radical nationalist terrorism.[107]

2.3.5.2. Criminal law reform, regulations on arrest (*detención preventiva*) and exit programmes for ex-etarras ("*arrepentidos*")

While not of particular relevance for terrorist legislation, the ***Organic Law 8/1983 of 25 June reforming urgently and partially the Criminal Code*** deserves to be briefly mentioned, as this law was fundamental for the development of an *état de droit* in Spanish Criminal Law, introducing basic rule of law principles.[108]

By the ***Organic Law 14/1983*** of 12 December Art. 17(3) *CE* was implemented into organic legislation. Thus the legal assistance of arrested and detained persons - and its limitations - were regulated, by modifying Arts. 520 and 527 *LECrim*, both of which are still in force today. Art. 520 *LECrim* stipulates certain basic procedural rights that persons in detention – covering both temporary arrest and detention on remand – enjoy, such as the right to silence, the right against self-incrimination, and the right to effective defence, among others. Art. 527 *LECrim* provides an exception to this rule for incommunicado detainees: During the time of incommunicado detention (*incomunicación)*, the prisoner is subject to the following restrictions:

- he has no right of free choice of lawyer (but is entitled to have a counsel *ex oficio*), [109]
- he is not entitled to communicate in privacy with his lawyer,
- he is entitled to be examined only by a medical examiner appointed by the court, and
- he is not entitled to inform his relatives or another person of his choice of the fact or the place of his detention

As Zuñiga Rodríguez points out, the rights restricted by Art. 520bis – right to access to the lawyer at any moment during the detention; right to notify a family member or other chosen person about detention; right to be examined by a chosen medical doctor – are

[106] Lamarca Pérez (2007), at 3.
[107] Martínez Soria (2004), at 521, with further references.
[108] For instance, it established the principle of guilt and the principle *nulla crimen, nulla poena sine culpa* (Art. 1 *CP*). Besides other modifications of the General Part of the Criminal Code, it reformed some chapters of the Special Part of the Criminal Code (e.g. with respect to penal protection of the freedom of conscience, Chapter II of Title II of Book II of the Criminal Code, and of public health or the environment, Chapter II of Title V of Book II of the Code). Furthermore, it modified the penitentiary system (see Arts. 8-10 *CP*). For further information, see Sáinz Cantero (1983); Fernández Albor (1984).
[109] For a critical analysis, see Gómez Colomer (1988).

all rights that aim at the prevention of maltreatment and torture.[110] In consequence, suspension of these rights reduces the control on the authorities, and, in this sense, extends the opportunities to apply torture. Thereby, it increases the risk of torture. Besides, it is also counterproductive in that it offers ETA members and other political offenders a plain opportunity to freely raise allegations of torture without that the contrary may be proven. Accordingly, various criminal complaints were brought before the Spanish Supreme Court, alleging torture, maltreatment, and even deaths.[111]

Subsequently, another organic law was adopted, this time with the aim to implement Art. 55(2) CE: the ***Organic Law 9/1984 of 26 December 1984 against the activity of armed bands and terrorist elements, developing Art. 55(2) CE***.[112] Art. 6[113] of this Law presented a major cornerstone of Spain's counter-terrorist strategy: based on Italy's successful experience with repentance laws in the fight against the Red Brigades, Art. 6 of the Law provided for social reinsertion of repentant terrorists.[114] The Law was first only addressed to prisoners, but later extended also to active ETA members. As a result of this policy, by 1990 nearly 250 former militants and collaborators in the various ETA factions had requested and benefited from these social reinsertion measures.[115] However, the programme also triggered fatal acts of revenge: in September 1986, two ETA gunmen killed a female former member of the terrorist directorate who had decided to accept the social reinsertion measures in 1985. This and other incidents increased significantly the threat to members willing to reinsert.[116]

Besides the social exit programme, the Law contained other specific anti-terror measures: For instance, the 1984 Law chose not to define concretely a terrorist offence, but to give, in its Art. 1, an almost endless enumeration of criminal acts which, when committed by persons "integrated/concerned with armed groups or related to terrorist or rebel activities" would trigger the application of aggravated punishments.[117] Cooperation with these groups[118] and apologia[119] to these acts were likewise criminalised.[120] Moreover, pursuant to Art. 5, the activities of associations or entities could be suspended; they could also be declared illegal and be dissolved.[121] With

[110] See Zúñiga Rodríguez (2007), at 5, and 10.
[111] See e.g. Judgment no. (STS) 2051/2002 of 11 December; STS 1725/2001 of 3 October; STS 701/2001 of 23 April; STS 1326/1998 of 3 November; STS 1644/2002 of 9 October.
[112] *Ley Orgánica 9/1984, de 26 diciembre contra la actuación de bandas armadas y elementos terroristas, de desarrollo del art. 55.2 CE*, BOE of 29 December 1984). For details on the Law, see Lamarca Perez (1985), at 193-357.
[113] The provision provided for a sentence reduction by one or two degrees if there the concerned person abandoned voluntarily his or her criminal activities and confessed, and if, by doing so, a dangerous situation was avoided or the danger was reduced, and the result prevented ('*cuando el sujeto abandone voluntariamente sus actividades delictivas y confiese, que dicho abandono evite o haga disminuir una situación de peligro, impida la produccion de un resultado*')).
[114] For the situation of collaborators of justice under current Spanish law and a comparative overview of the institution of "pentiti" as such, see Sánchez García de Paz (2005).
[115] Reinares (2003), at 60.
[116] Ibid. at 60.
[117] López Garrido (1987), at 84.
[118] Arts. 7 and 9.
[119] As defined in Art. 10 of the same Law.
[120] see Arts. 1(1), 10.
[121] see Art. 20.

respect to procedural modifications, Art. 13 of the Law permitted police custody (*detención preventiva*) for up to ten days, and Art. 15 allowed that prisoners could be held incommunicado for a practically undefined period ('reasonable time period'). Both provisions were found unconstitutional by STC 199/1987 of 16 December of 1987.[122]

Art. 16 of the Law gave members of the security forces and corps of the state again the power to detain suspects "wherever they sought refugee", and those places, including the home, could be searched; objects found there could be confiscated.[123] Cruz Villalón already pointed out in reference to the preceding law that by virtue of such regulations the anti-terrorism legislation offered less guarantees for the protection of the privacy of home than emergency legislation.[124] In 1993 the Constitutional Court clarified that police needed in any case a court-ordered warrant to enter homes; otherwise, the fundamental right to respect one's home was violated.[125]

Other provisions widened police powers with respect to observation of correspondence, telegraphic and phone conversations.[126] These could be ordered by a judge, or, in case of emergency, by the Ministry of the Interior - to be confirmed or revoked by the competent judge within the subsequent 72 hours. Lopez Garrido notes that the guarantee of judicial intervention in all these cases was very limited: the judge was faced with the given situation and had normally no other option than to confirm it; moreover, he could only intervene before the action had taken place in one case, namely the prolongation of police custody; in the other cases it "did not make too much sense, according to the philosophy of counter-terrorism law".[127] Another provision questionable from a constitutional point of view was Art. 21, again[128] providing for the – not only temporary – closure of media channels, which was ordered practically automatically once a complaint had been presented by the prosecution.[129] This provision was considerably restricting freedom of expression and also underwent constitutional scrutiny in 1987.[130] Also, Art. 22 deserves to be mentioned, by which the accused of one of the offences regulated by this Law was automatically removed from any public office. The automatic nature of this measure was strongly criticised since thereby the special circumstances of the case could not be taken into account; the courts could not intervene in any cases. The doctrine qualified this rule as a violation of the principle of the presumption of innocence.[131] Finally, Art. 19(3) of the Law was

[122] See also below at 2.3.5.3. More details on this decision: Aranda Ocaña (2005), at 376-7.
[123] A judicial order was not necessary - these actions would be communicated to the judge, in consequence, only after they had been performed (López Garrido (1987), at 85).
[124] Ibid. at 85, citing: Pedro Cruz Villalón, Estados excepcionales y suspensión de garantías, 1984, 160.
[125] Martínez Soria (2004), at 542, citing Judgment No. 341 of 18 Nov 1993, BOE of 10 December 1993.
[126] See Art. 17.
[127] López Garrido (1987), at 85.
[128] A similar provision already appeared in Organic Law 4/1981.
[129] López Garrido (1987), at 86.
[130] See below at 2.3.5.3.
[131] Moreover, the extent of the concept of 'public position' was problematic. However, the Constitutional Court (STC 71/1994, judgment of 3 March 1994, *recurso de inconstitucionalidad)* found that even the function of a Parliamentarian was a public position in this sense, because '*the exceptional threat that this criminal activity entails for our democratic State justifies, without any doubt, a provisional measure, such as the suspension of the parliamentarian functions.'* Thus, the *Audiencia National* (Decision of the Criminal Chamber - *Sala de lo Penal* - of 3 February 1999) confirmed the suspension of an ETA

dubious: according to this provision, the competent judge could not release prisoners even if he had already determined prior to the adoption of this Law that they should be released, provided that his decision was not final, and that the Public Prosecutor was the appealing party.[132] The same provision, which was only valid during two years, was reintroduced as Art. 504bis into the Spanish Code of Criminal Prosecution by means of the Organic Law 4/1988.[133]

Given the infringing nature of many of those rules, the second final disposition limited the validity of Arts. 4-6, 19, 20 and 22 for two years. They indeed lost their validity on 1 January 1987. In addition, many of the remaining special anti-terrorist provisions were derogated in May 1988 (by Organic Law 4/1988). Some of the non-controversial provisions contained in the derogated special legislation were subsequently incorporated in ordinary legislation. For example, Arts. 571-80 within Chapter V of the new Criminal Code approved in November 1995 are devoted to terrorist crimes.[134]

2.3.5.3. 1985-1990: Constitutional Court ruling of 1987 and another criminal law reform

By means of the ***Organic Law 6/1985 of 1 July 1985 on the Judiciary*** Spanish courts were granted universal jurisdiction in terrorist cases. This is a Spanish particularity no other of the examined countries shares. In its judgment of 25 February 2005, the Constitutional Court further reiterated the importance of this principle and criticises the restrictive interpretation of the respective provision (Article 23(4) of the Organic Judiciary Law (*Ley Orgánica del Poder Judicial, LOPJ*) by the *AN*.[135]

By the end of 1987, the Constitutional Court adopted a landmark decision on terrorist legislation: by judgment no. 199/1987 of 16 December 1987[136], the Court had to discuss the constitutionality of many provisions established by the Organic Law 9/1984. In this Decision the Court established that it was unconstitutional that those who only made apologia to terrorist acts could be subjected to the suspension of rights under Art. 55(2) *CE*. Moreover, the Court held that both the Central Investigation Courts (*Juzgados Centrales de Instrucción*) and the *AN* were to be considered as 'ordinary judges', in accordance with the Constitution.[137] In the same judgment, the Constitutional Court also declared the police custody (*detención preventiva* or *gubernativa*) of ten days, without any previous judicial authorisation, as unconstitutional, ruling that a detention exceeding 72 hours without previous explicit judicial authorisation could not comply with Arts. 17(2) and 55(2) *CE*.[138] Moreover, the

---

prisoner's status as a member of the Basque Parliament in 1999 (Martínez Soria (2004), at 540, with further references).

[132] Aranda Ocaña (2005), at 374.

[133] See below.

[134] Reinares (2003), at 64.

[135] See also the comment by Rodríguez Fernandez and Echarri Casi (13 December 2005).

[136] STC 199/1987, Judgment of 16 December 1987 (*recurso de inconstitucionalidad).*

[137] It based this assessment also on the fact that the European Commission of Human Rights had recognised them as such, in its report of 16 October 1986 on the case *Barberá and others vs. Spain*.

[138] The Court stated: "*the triplication of the maximum term of 72 hours recognised by our Constitution (...) is excessive and leads to additional and unjustified pressure on the prisoner, incompatible with his rights to refuse testimony and to not incriminate himself.* (…) *This broadness of arrest permitted by Art.*

Court stressed that the law needed to provide for a maximum duration of this extended detention.[139] With respect to the incommunicado detention,[140] the Court ruled that the respective provisions were contrary to the Constitution insofar as they allowed the governmental authority (*autoridad gubernativa*) to order the incommunicado detention for the first 72 hours, without any judicial intervention required during this time.[141] Moreover, the Court also declared Art. 21(1) of the Organic Law (which regulated the possible closure of mass media) as unconstitutional, for restricting too much the freedom of expression enshrined in Art. 20 *CE*, and, additionally, for violating Arts. 24 and 117 *CE*.[142] Besides, the Constitutional Court also declared that Art. 553 *LECrim*, authorising police officers to detain suspected terrorists in whatever place or domicile they might be hiding, and to conduct searches in those places and seize the instruments they may find there, could only comply with the exigencies of Art. 18(2) *CE* (the right to privacy of the home) if specific exceptional circumstances were present.[143]

This Decision, together with the critics raised against the LO 9/1984 and the political consensus on anti-terrorist measures reached early in 1988, when the main political parties of Spain as a whole and in particular those of the Basque country signed the Ajuria Enea Agreements, led to a new reform of the Criminal Code and of the Code of Criminal Prosecution.[144]

Thus, the ***Organic Law 3/1988, reforming the Criminal Code,***[145] was adopted. It abolished Art. 13 and 15(1) of the Organic Law 9/1984, relating to police custody of up to ten days, and to incommunicado detention. Other important changes include:

(1) Art. 57bis a), establishing automatic maximum punishment for crimes related to the activity of armed groups or terrorist or rebel elements
(2) Art. 57bis b), which provided sentence reductions and even complete sentence removal for *arrepentidos*[146]

13, when exceeding the aforementioned limits, can present an additional punishment and an added and unjustified moral coercion on the detainee, incompatible with his right not to incriminate himself" ("*Debe tenerse en cuenta, además, que esa amplitud de la detención preventiva que permite el art. 13 (…) puede suponer (…) una penosidad adicional y una coacción moral, añadida e injustificada, sobre el detenido, incompatible con sus derechos a no declarar contra sí mismo y a no confesarse culpable. (…) esa amplitud de la detención preventiva que permite el art. 13, en cuanto excede de los limites antes senalados, puede suponer… una penosidad adicional y una coacción moral, anadida e injustificada, sobre el detenido, incompatible con sus derechos a no declarar contra si mismo y a no confesarese culpable".)*

[139] To determine the maximum detention length, provisions of international treaties, such as Art. 9(3) of the International Covenant of Civil and Political Rights (ICCPR), or Art. 5(3) of the ECHR (both ratified by Spain) had to be taken into account, both requiring that the accused be taken "promptly" before a judge.

[140] Art. 15 of Organic Law 9/1984.

[141] However, the Court considered that a provisional incommunicado order by the governmental authority could be constitutional, as long as the authority had requested, at the same time, a judicial decision on the matter.

[142] STC 199/1987, Judgment of 16 December 1987 (*recurso de inconstitucionalidad)*, at I. 5. 6.

[143] These circumstances must force the police to act urgently so that there is no time left to seek previous judicial authorisation (Martínez Soria (2004), at 552).

[144] Aranda Ocaña (2005), at 378.

[145] See, for details: Terradillos Basoco (1988).

(3) Art. 174bis a), which defines acts of collaboration

On the same date, in order to make these modifications effective, the following law was adopted:

Organic Law 4/1988 of 25 May 1988 reforming the Code of Criminal Prosecution. It introduced new provisions into the Code of Criminal Prosecution (*LECrim*), which are – with the exception of Art. 504bis – still in force today:

- Art. 384bis provides that already the indictment and the order of detention on suspicion in cases of terrorist crimes lead automatically to the suspension of the rights to exercise public functions or public offices, for as long as the detention lasts.
- Art. 504bis suspends the judicial decision to release a prisoner, suspected of a terrorist offence, for a maximum period of one month, provided that his decision is not final, and that the public prosecutor was the appealing party.[147]
- Art. 520bis regulates that a person arrested for detention on remand has to be brought before a judge within 72 hours, or, exceptionally (for terrorist suspects), within five days. The same Article reintroduced incommunicado detention.
- Art. 553, which regulated the detention of terrorist suspects (including the seizure of objects) at any place where they might be, was modified, requiring now, as a consequence of the Constitutional Court's ruling of 1987, 'exceptional or urgent necessity' ('*excepcional o urgente necesidad'*) in order to meet the requirements of Art. 18 (2) *CE*.
- Art. 579 allowed for observation of private, postal or telegraphic correspondence, which could be ordered by the administrative authority,[148] in relation to investigations concerning armed bands or terrorist elements.[149]

We can observe that the new laws, on the one hand, took into account the Constitutional Court's ruling, but that, on the other hand, some of the criticised previous

[146] *Arrepentidos* were defined as those who voluntarily abandoned their criminal activities and confessed the acts which they had taken part in, provided that their action had removed or diminished a situation of peril, or that they had efficiently helped in the securing of evidence.

[147] Art. 504bis read as follows: 'If, based on the two preceding articles, the liberty of the detained persons to which Art. 384bis refers has been ordered, their release shall be suspended for the maximum of one month, provided that the decision is not final, and that the public prosecution is the appellant. This suspension does not apply if the time limits of Art. 504 (and, if applicable, the corresponding prolongations) have been exhausted completely during the detention on remand.' *('Cuando, en virtud de lo dispuesto en los dos artículos anteriores, se hubiere acordado la libertad de presos o detenidos por los delitos a que se refiere el art. 384 bis, la excarcelación se suspenderá por un período máximo de un mes, en tanto la resolución no sea firme, cuando el recurrente fuese el Ministerio Fiscal. Dicha suspensión no se aplicará cuando se hayan agotado en su totalidad los plazos previstos en el art. 504 y las correspondientes prórrogas, en su caso, para la duración de la situación de prisión provisional.')*

[148] I.e. the Minister of the Interior, or, if he is unavailable, the Director for State Security.

[149] 'Eavesdropping is allowed when ordered by the Minister of the Interior or, in his absence, by the Director of State Security; the relevant order must be immediately transmitted in writing to the competent judge, who must either revoke or confirm it within a maximum period of 72 hours, clearly stating the reasons for his decision' (Art. 579 (4) *LECrim*). See Martínez Soria (2004), who cites J. Rojas Caro, *La intervencion judicial y gubernativa de las comunicaciones en la Ley de enjuiciamiento criminal*, in: M. Cobo del Rosal (ed.), Comentarios a la legislación penal 1990, 495-536).

provisions, such as the automatic removal from public functions under terrorist suspicion, the suspension of the judicial decision on release of a suspected terrorist offender, or the observation of private, postal or telegraphic correspondence, as well as the incommunicado detention, were again adopted in the course of these reforms.

The Basque Parliament initiated two Constitutional Reviews (*recurso de inconstitucionalidad*) against both reforming laws.[150] In their first application against the Organic Law 3/1988, the applicants challenged the constitutionality of several of the new terrorist offences, in view of Arts. 1(1), 9(3) and 25(1) of the Constitution (principle of legality and certainty – *legalidad y tipicidad*). They argued that the reformed terrorist offences, i.e. the notions of "terrorist elements" (*elementos terroristas*) or "terrorist organisations" (*organizaciones terroristas*), violated the principle of legality as they did not provide any concept or legal definition of terrorism. The Constitutional Court rejected this view. Referring to Arts. 13(1) and 55(2) *CE*, the Court held that the Constitution itself used such notions, without defining them, and that one had to admit that "these constitutional expressions referred to realities (in the given case, a criminal branch) unfortunately present in the constituting situation, and still in the present one, realities (…) which cannot be qualified today (…) as indiscernible or radically undetermined".[151] Moreover, the *Tribunal Constitucional* had already had occasion to rule on these notions in earlier judgments, where it interpreted and specified them.[152] The Court also argued that these notions had already been used in former national[153] and even international[154] laws.

In its application against the Organic Law 4/1988, the Basque Parliament argued that the Law violated Art. 55(2) *CE*. It further found that the new Art. 384bis *LECrim* infringed Arts. 23 and 24 *CE*. Thirdly, they challenged the constitutionality of the new Art. 504bis *LECrim*, which in their view was contrary to Arts. 24(2), 117(1) and 124(1) *CE*. While the Constitutional Court dismissed the first two claims, it allowed the complaint with regard to Art. 504bis *LECrim*, declaring it as unconstitutional. The Court held that the right to liberty enshrined in Art. 17 *CE* comprised the right of the prisoner that the decision about his release or maintenance in prison was taken by a judge. Therefore, Art. 504bis *LECrim*, which deprived the judge of this competence, was considered as contrary to the Constitution.

---

[150] See Judgment of 12 March 1993, STC 89/1993, and Judgment of 3 March 1994**,** STC 71/1994 (*recursos de inconstitucionalidad).* The latter judgment also established the requirements needed so that the development of Art. 55 *CE* was constitutional. (Llobet Anglí (2005), at 126).

[151] STC 89/1993, Judgment of 12 March 1993, at II. 3.a): '*aquellas expresiones constitucionales remiten a realidades (en este caso, a un área de la criminalidad) lamentablemente presentes en la situación constituyente y aún en la actual, realidades (...) que no pueden hoy calificarse (...) de indiscernibles o de radicalmente indeterminadas.'*

[152] STC 199/1987, *fundamentos jurídicos* 2. y 4.

[153] Art. 1 of Organic Law 11/1980 mentions "*elementos terroristas*", and Arts. 2(1), 7(1) and 8(1) of the Organic Law 9/1984 speak of "*organizaciones terroristas*".

[154] European Convention for the Repression of Terrorism, of 27 January 1977, ratified by Spain on 8 October 1980.

2.3.6. The 1990s: Penitentiary politics, fight against organised crime, and a new criminal code

2.3.6.1. Prison policies: Dispersion

As the effectiveness of social reinsertion measures declined, in 1989 the Spanish government introduced an important penitentiary measure to dissociate ETA members from their terrorist organisation, the so-called 'dispersion' of ETA prisoners across the Spanish territory. As Basque terrorists were suspected to continue and even direct their activities from within the prison walls, the Spanish government attempted to impede their contacts to other ETA members by subdividing presumed ETA members into small groups and distributing them across the entire Spanish territory. They were thus separated from other presumed ETA members, but also from their family and friends. This policy became known as dispersion.[155]

ETA continuously attacked the dispersion, arguing that it was inhuman to separate prisoners from their friends and family.[156] In their fight against dispersion, ETA abducted a prison officer, José Antonio Ortega Lara, on 17 January 1996. The officer was held in an underground bunker and deprived of light for 532 days (the longest kidnapping in the history of ETA). A few months after the incident, ETA kidnapped a local councillor, Miguel Angel Blanco. This kidnapping and ETA's threat to kill Blanco, if the government did not change their penitentiary policy of dispersion, raised an immense wave of public protest, both in the Basque country and abroad. In spite of this, Miguel Ángel Blanco was assassinated by ETA.[157]

As to the question whether the politics of dispersion comply with human rights, the Human Rights Commissioner Álvaro Gil-Robles stated that there was no constitutional or penitentiary right for prisoners to be detained close to their residence, but on the contrary, the reinsertion of the convicted was one of the primary goals of prison policy.[158] The question to be discussed is thus whether the objective of reinsertion can effectively be achieved by distributing prisoners all over the Spanish territory. On the one hand, the dispersion will certainly facilitate repentant offenders to break the links to their criminal organisation more easily. In this context, account must

[155] Martínez Soria (2004), at 526 et seq.
[156] Iniciativa Ciudadana Basta Ya! (5 October 2003).
[157] Elorza, Garmendia, Jáuregui and Domínguez (2000), at 406 et seqq.
[158] Also enshrined in the Spanish Constitution, see Art. 25(2) *CE*. This assessment is also reflected by the Spanish penitentiary law, under which re-education and social reinsertion are the primary aims of the execution of sentences (Art. 1 of the Spanish General Penitentiary Law - *Ley Orgánica 1/1979, de 26 septiembre, General Penitenciaria.).* In this respect, the German law goes even further, by stipulating that the *open* prison shall be the general rule (§ 10 *Strafvollzugsgesetz*, Penitentiary Law), and that the execution of sentences shall be as close to the general life conditions (outside the prison) as possible (German Penitentiary Law, § 3(1)). Moreover, the *Bundesverfassungsgericht* stated in its decision on life-long imprisonment that prisoners were actually *entitled* to re-socialisation, which it considers as the main goal of the execution of sentences by the German *Bundesverfassungsgericht* (see *BVerfGE* 45, 187; see also *BVerfGE* 98, 169, 200 et seq.; Calliess and Müller-Dietz (2008)). In this context the Spanish *Tribunal Constitutional* deviated from the German ruling by interpreting its own Constitution (Art. 25(2) establishes that prison policies are to be oriented towards social reinsertion) restrictively, stating that social reinsertion was only a guideline, not a positive right of the individual prisoner (cf. STC 65/1986, of 22 May. See also STC 2/1987, of 21 January, STC 19/1988, of 16 February, STC 28/1988, of 23 February, and STC 75/1988, of 31 March. See also above, 2.4.4.).

be taken to the fact that also the family members of many ETA prisoners are involved in ETA activities, so that the link to the closest family members may in fact hamper social reinsertion. On the other hand, the long distances to – also non-terrorist – relatives and friends can be equally counterproductive for the process of reintegration. To isolate a prisoner from these most fundamental links to his family and, in the worst case, thereby break family ties and social ties to the outside world will certainly not raise his motivation to leave prison and re-enter the society. Quite the contrary, criminological studies have proven that a stable social network, which can only be developed by maintaining contacts to friends and family while in prison, is fundamental for a successful reinsertion.[159] Admittedly, this finding is subject to the precondition that friends and family members are not involved in terrorist activities. If they are supportive of terrorism rather than condemning it (and this is not seldom the case among friends and family of ETA activists), maintaining close contact to those people will not help the prisoner at all to abandon criminal activity. Quite the contrary, only if located far away from the Basque country will it be possible to defy ETA's control. From this point of view, the dispersion may have been for many former "ETArras" the only way out of terrorist delinquency.

2.3.6.2. Fight against terrorism, drugs and organised crime

In the 1990s, two other legal Acts are of relevance in Spain's combat against terrorism, although these laws are not restricted to terrorist offences:

(1) ***Organic Law 1/1992 of 21 February on the Protection of Public Safety***
(2) ***Law 19/1993, of 28 December, on determined measures for the prevention of money laundering***

Ad (1):
With the adoption of ***Organic Law No. 1/1992 of 21 February on the Protection of Public Safety,***[160] which is still in force, the competent authorities were generally authorised to carry out actions aimed at maintaining or restoring public safety.[161] Police was equipped with more coercive powers, such as the closing of premises, the evacuation of buildings, or the suspension of shows and spectacles. Pursuant to Art. 16, the movement or presence in streets or public places can be limited or restricted. Art. 20 of the Law allows the police, while exercising their functions of protecting citizens' security, to request any person to identify himself. If the person so requested fails to produce proof of identity, or refuses to do so he may be taken to the police station and be "detained".[162]

[159] Göppinger (2008), at 203 and 225, citing also Laub/Samson: *Shared Beginnings, Divergent Lives, Delinquent Boys to Age 70*, Harvard University Press 2003.
[160] BOE of 22 February 1992 (*Ley de Seguridad Ciudadana*).
[161] Art 14.
[162] In order to make the detention legal, the conditions of Art. 490 *LECrim* must be present (flagrant commission of crime). If not, the detention is illegal, because Art. 20 cannot derogate from Art. 490 *LECrim* and even less from Arts. 25(3), 17(2) *CE*. (Merino-Blanco (2006), at 156 et seq.).

Ad (2)

As reflected in the ***Law 19/1993, of 28 December, on determined measures for the prevention of money laundering***[163], Spain's criminal law policy followed the same approach as other countries in the beginning of the 1990s: a unified approach towards organised crime, terrorism, and illegal drug-trafficking. In Spain, this was done, for instance, by creating a Commission for the Prevention of Money Laundering and Monetary Offences[164] with which credit institutions, insurance companies, and other institutions involved in the movement of capital are obliged to cooperate and to report to.

2.2.6.3. Revision of anti-terror legislation in the new Criminal Code of 1995

The ***Organic Law 10/1995 of 23 November*** reformed the Spanish Criminal Code substantially, and, at the same time, revised the hitherto existing counter-terrorism legislation.[165] Since then, Arts. 571 – 580[166] of the Criminal Code deal exclusively with

[163] *Ley 19/1993, de 28 diciembre, sobre determinadas medidas de prevención del blanqueo de capitales*, BOE of 29 December 1993.

[164] *Comisión para la Prevención del Blanqueo de Capitales e Infracciones Monetarias*, see Arts. 13-16 of the Law.

[165] *Ley Orgánica 10/1995*, BOE No. 281 of 24 November 1995.

[166] **Art. 571 *CP*** criminalises the commission of arson (Art. 351 *CP*) or destruction (Art. 346 *CP*) by a member of an armed group or organisation whose goal it is to subvert the constitutional order or to seriously affect public peace. **Art. 572 *CP*** raises the sentences for acts against the life, health or freedom of any person when committed by a member of such group, to up to thirty years. Under **Art. 573 *CP***, the storing, manufacturing, dealing, transporting or providing of explosives, flammable, incendiary or asphyxiating substances or devices is punished, provided that the actor is a member of an armed group or terrorist organisation. **Art. 574 *CP*** criminalises any crime that is not specifically described in the Criminal Code but that has the same conditions and the same goals as the rest of the crimes of terrorism. **Art. 575 *CP*** includes as a "crime of terrorism" the attempts to steal property with the goal of funding terrorist organisations. The provision outlines the sanctions for crimes against property that are committed in order to aid or support a terrorist organisation. **Art. 576 *CP*** regulates a terrorist-specific form of participation: the *collaboration* with an armed group or terrorist organisation. A crime of 'collaboration' generally implies every act of surveillance over persons, goods or installations. Also included under 'collaboration' are the following: To build, arrange, use or cease lodging or depots; to hide or transport persons who are linked to an armed group or terrorist organisation; to organise or assist in training; and, in general terms, any other method of collaboration, help or cooperation with these groups and with their activities. The crime of collaboration with an armed group or terrorist organisation is punishable by five to ten years of imprisonment, which can be higher if the collaboration risks the life, health, freedom or property of any person especially if such actions result in an actual injury. For recent case-law on this provision, see Delitos de colaboración con banda armada (2007). **Art. 577 *CP*** concerns acts designed to disturb the constitutional order and the public peace. The perpetrator of such acts does not necessarily have to act as a member of an armed group or a terrorist organisation. In fact, if a person commits a serious crime (such as homicide, personal injury, destruction, arson, illegal detention, threats, and others) but does not belong to an armed group or terrorist organisation, this person will be punished under the standard sanctions. However, if the goal of the perpetrator is to disturb the public order and peace, the penalty will be increased by one half (this provision was modified in 2000). Under **Art. 578 *CP***, special forms of participation, such as provocation, conspiracy and proposition, to the crimes listed in Arts. 571-7 are criminalised. **Art. 579 *CP*** provides sentence reductions for those who voluntarily abandon their criminal activity and confess the deeds before the authorities, if, additionally, they actively cooperate with the authorities by either (a) impeding the production of a crime, or (b) efficiently helping in securing decisive evidence for the identification or capture of other perpetrators, or (c) impeding the actions or the development of armed groups or terrorist organisations. **Art. 580 *CP*** clarifies that the convictions for terrorist crimes by foreign judges or courts will be considered equal to the sentences of Spanish judges or courts.

terrorist and related offences. Moreover, Arts. 517 and 518 *CP*[167] are relevant, as they prohibit terrorist groups and the membership to such groups. Art. 520 *CP* enables the court to dissolve an illicit association and to impose other accessory consequences enumerated in Art. 129 *CP*.[168]

A special provision reducing the sentences in cases of former terrorists collaborating with the authorities has also been adopted.[169] Furthermore, the criminal figure of the '*arrepentido'* has been extended to drug trafficking (Art. 376).[170]

The whole of terrorist offences created by the Organic Law of 1995 cannot be discussed here at length, as the focus of the present study does not lie on substantive criminal law. Only two provisions should be mentioned that were formulated during the reform, because of their concerning contents, while with respect to the other new provisions, the reader may consult other sources:[171]

Of some concern is Art. 574 *CP* because it presents a *residue* regulation that criminalises any person who belongs to or collaborates with a terrorist organisation, and who commits '*any other crime'* that is not specifically described in the Criminal Code, but that '*has the same conditions and the same goals as expressed under Art. 571 CP'*. Such a formulation is quite blurry and raises doubts as to its conformity with the principle of legal certainty and the prohibition to apply criminal law analogously.

Second, the criminalisation of collaboration of terrorism (Art. 576 *CP*) raised the doctrinal problem as to whether the payment of the so-called 'revolutionary tax' extorted by ETA from Basque businesses constituted collaboration by means of economic cooperation. Although the doctrine differs over the legal reasoning, there is general agreement that the payment of this 'tax' cannot be subject to punishment.[172]

2.2.6.4. Reintroduction of the jury system

In the same year, Spain reintroduced the jury system, by the ***Organic Law of the Jury Tribunal***.[173] Trial by jury had already been provided for in the Constitution of 1978 (cf. Art. 125), but between 1978 and 1995, the majority of Spanish lawyers doubted whether the classic jury system was really appropriate for their criminal justice.[174] The Law of 1995 provoked calls to repeal it or to at least suspend it for the Basque Country when Mikel Otegi, a Basque citizen charged with the murder of two Basque policemen, was acquitted by a jury on 7 March 1997, on the grounds of diminished capacity caused by intoxication and uncontrollable rage provoked by alleged previous police harassment.[175]

---

[167] Both revised by Organic Law 4/2000 of 11 January on rights and freedoms of foreigners in Spain and their Social Integration.
[168] In Spain a political party is simply considered as an association to which these criminal law provisions apply (Martínez Soria (2004), at 547).
[169] Art. 579(3) *CP*.
[170] Aranda Ocaña (2005), at 380.
[171] E.g. IbidCobo del Rosal and Quintanar Díez (2005)Llobet Anglí (2005)Serrano Gómez and Serrano Maíllo (2005); Calderón and Choclán (2005)Llobet Anglí (2006); with respect to Art. 576 *CP*, see: Delitos de colaboración con banda armada (2007).
[172] Martínez Soria (2004). at 536.
[173] *Ley Orgánica del Tribunal del Jurado*, BOE 1995, 122 (amended by LO BOE 1995, 275).
[174] Thaman (1999), at 237.
[175] Ibid. at 236.

2.2.6.5. Further anti-terror policies and ETA's temporary cease-fire

In 1998, many proceedings were instituted in Basque country against private, formerly considered legal groups, organisations, and companies, accusing them of terrorism. These proceedings became known as the '**Legal Proceedings 18/98' (*sumario 18/98*) or '***'caso Ekin'*[176] and received wide-spread media attention. Without any change of the criminal legislation, a number of (mostly political) organisations that formerly had been considered as legal were now accused of being linked to ETA. According to the Basque Observatory of Human Rights, the leading judge, Baltazar Garzón Real (famous for his legal actions against the Chilean totalitarian leader Augusto Pinochet), accused 64 people of being members of or collaborating with a terrorist organisation.[177] On 19 December 2007, the *Audiencia Nacional*[178] convicted 47 people of collaborating with ETA. The people belonged to the organisations KAS,[179] EKIN[180] and XAKI, which the Court described as being the 'entrails and the heart of ETA'. Basque politicians accused the judges of being inspired by political motives. Some even compared the macro-trial with the Burgos trial under Franco in 1970.[181] The judges considered the multiple allegations of politicisation, but maintained that their decision was exclusively juridical, and that the convicted people were not convicted for their political ideas, but for their proven membership or collaboration with ETA.[182]

Between December 1998 and December 1999, the government negotiated with ETA leaders. On 16 September 1998 ETA declared an indefinite **truce.**[183] However, the cease-fire lasted only until 21 January 2000, when the lieutenant-colonel Antonio García Blanco was assassinated by a car bomb installed by ETA in Madrid. On 8 December 2000, Spain's two major political parties, the PSOE (Socialist Workers Party) and the PP (Popular Party), adopted an Agreement in Favour of Liberty and against Terrorism (*Acuerdo por las libertades y contra el terrorismo*), [184] with the aim to cooperate and coordinate state response to ETA.

In reaction to widespread popular mobilisations against ETA inside the Basque country, ETA leaders designed a plan to complement terrorist actions such as car bombs or assassinations perpetrated by formal militants with other kinds of violent activities. They designated teenagers, socialised within a subculture of hatred and exclusion, to commit urban violence during the weekends. The purpose was to

---

[176] In reference to one of the organisations banned in the context of these proceedings. See also the case before the ECtHR, *Association Ekin v France*, Judgment of 17 July 2001 (application no. 39288/98), below, Part II Ch. 4, 4.3.1.).
[177] Basque Observatory of Human Rights (2007).
[178] The enormous judgment (1182 pages!) is online available at http://www.elpais.com/elpaismedia/ultimahora/media/200712/19/espana/20071219elpepunac_1_Pes_PDF.doc (last visited 1 October 2008).
[179] KAS stands for *Koordinadora Abertzale Sozialista*, meaning Patriot Socialist Coordinator.
[180] EKIN means in Basque language "to begin" or "to insist".
[181] El País (online edition) (12 December 2007): *Ibarretxe asegura que la sentencia contra Ekin carece de "principios jurídicos"*.
[182] Judgment of 19 December 2007, *Audiencia Nacional, Sección Tercera, Sala de lo Penal, Sumario 18/98, Juzgado central Cinco, Sentencia Núm.* 73, at 360 et seqq. See note 179.
[183] Aranda Ocaña (2005), at 381.
[184] Document published at http://www.elmundo.es/eta/documentos/pacto_libertades.html, last visited on 20-11-08.

systematically harass Basque citizens who declared themselves not to be nationalists.[185] This strategy was called street violence (***kale borroka, violencia callejera).***[186] The teenagers who carried out the action were not necessarily members of an armed group or a terrorist organisation. Their acts aimed at creating an atmosphere of intimidation and fear. The autonomous Basque Police Force remained mostly passive against these actions.[187]

The legislator responded to this new type of 'low intensity'[188] terrorism by adopting two laws: the ***Organic Law 2/1998 of 15 June, modifying the Criminal Code and the Code of Criminal Prosecution,*** and the ***Organic Law 5/2000 of 12 January on the Penal Responsibility of Minors,***[189] which was modified soon after by the Organic Laws 7/2000 and 9/2000, of 22 December.[190] The first of these laws criminalised so-called counter demonstrations (acts aimed at disturbing the order of a legal demonstration),[191] as well as the holding of meetings and assemblies which had been previously prohibited, provided that these meetings had an objective coinciding with the objectives of armed groups or terrorist entities.[192] In addition, some provisions of the *LECrim* were modified, in order to intensify the application of summary proceedings.[193]

The Law on the Responsibility of Minors regulated the criminal liability of minors in relation to terrorism. In particular, the length of detention for minors convicted of terrorist offences in "closed conditions"[194] was increased. This is especially worrisome since in Spain, there is no infrastructure for an effective criminal law for young offenders, such as juvenile penitentiary centres or security measures appropriate for young people.[195] Furthermore, the same Law created a special centralised judge for minor offenders in the *Audiencia Nacional (Juez Central de Menores*). Moreover, Arts. 577 (introducing the offence of 'urban terrorism'),[196] 578,[197]

---

[185] Reinares (2003), at 64 et seq.
[186] Martínez Soria (2004), at 525.
[187] Ibid.
[188] Aranda Ocaña (2005), at 381.
[189] *Ley Orgánica 5/2000, de 12 enero, sobre la responsabilidad penal de menores,* BOE of 13 January 2000.
[190] *Ley Orgánica 7/2000, de 22 de diciembre, de modificación de la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal, y de la Ley Orgánica 5/2000, de 12 de enero, reguladora de la Responsabilidad Penal de los Menores, en relación con los delitos de terrorismo,* BOE no. 307 of 23 December 2000.
[191] See new Art. 514(4) *CP*.
[192] Art. 514(5) *CP*.
[193] Art. 790(1) *LECrim*.
[194] The Spanish penitentiary law provides for two types within the closed regime, named 'closed module' (*módulo cerrado*) and 'special department' (departamento especial). The first one is habitually applied to terrorist inmates classified under the first prison degree. Under this regime, the daily minimum time spent in community is four hours, during which at least five inmates carry out activities together (Santos Alónso (2006), at 368).
[195] Villiers (1999), at 103.
[196] This provision addresses the problem of so-called "urban terrorism". It criminalises those who, without belonging to an armed group, carry out actions with the aim to subvert the constitutional order or severely affect public peace. The novelty of the law of 2000 is now that the offender must contribute to those goals by "intimidating the inhabitants of a population or the members of a social, political or professional collective" ("*contribuir a estos fines atemorizando a los habitantes de una población o a los miembros de un colectivo social, político o profesional*"). Aranda Ocaña (2005), at 381 et seq.

and 579 *CP* were modified. The Law was again modified in 2006, by the Organic Law 8/2006, of 4 December, following the governmental evaluation of the Law 5/2000.[198]

2.4. Post September 11th anti-terror legislation

Unlike in most other countries world-wide, Spain did not react to the events of September 11th by rushing through new special anti-terror laws. No fundamental changes took place in the *immediate* aftermath of September 11th. The legislative development rather suggests that in spite of the Islamist terrorism threat perceived by the world, the Spanish legislator continued to amend and introduce anti-terror legislation mainly in view of Basque terrorism.

2.4.1. Prohibition of political parties

The adoption of the ***Organic Law 6/2002 of 27 June on Political Parties*** demonstrates that in Spain, even after September 11th, counter-terrorism efforts were still focussed more on nationalist Basque violence than on international Islamic terrorism. The underlying motive of the Law on Political Parties was to 'differentiate spotlessly those organisations that defend and promote their ideas and programmes with the scrupulous respect of democratic methods and principles from those that support their political actions with the connivance of violence, terror, discrimination, exclusion and violation of rights and freedoms'.[199] The Law was clearly designed to prohibit especially one particular party, i.e. *Batasuna*, which has the reputation of being linked directly to ETA.[200] According to its Art. 9, a party will be declared illegal and can be dissolved if

---

[197] A new form of collaboration is introduced: "exaltation of terrorism", to punish those who glorify or justify publicly terrorist crimes or members of terrorist groups. Moreover, also those who discredit or humiliate terrorist victims or their family members can now be punished.

[198] See ***Organic Law 8/2006, of 4 December, modifying Organic Law 5/2000, of 12 January, regulating the criminal liability of minors.*** The reform emphasises that the measures stated in the Organic Law 5/2000 will not apply to delinquents between 18 and 21 years of age, and that they will be tried according to the general penitentiary regime.

[199] *Exposición de Motivos* of the Law.

[200] The prohibition of Batasuna is a subject of high political sensitivity, mainly reflecting the conflict between the Spanish central government and the government of the Basque autonomous community. Thus, when the Supreme Court requested the Basque parliament to enforce Batasuna's dissolution, the president of the Basque parliament, Juan Maria Atutxa, stated that he rather withdrew from his post than 'abandon his obligation to defend the dignity of this parliament' (El Mundo (online edition) (23 May 2003): *Atutxa dice que dimitirá si no puede 'defender hasta el final la dignidad del Parlamento vasco'*). Under the support of Basque nationalist parties, Atutxa has since then refused to follow the order of the Supreme Court to dissolve the parliamentary group of Batasuna. The Head of the Basque government, Ibarretxe, has offered to negotiate this issue politically, but the Spanish government rejected this solution, arguing that the executive powers could not change or modify judicial decisions. In the regional and local elections of 25 May 2003, Batasuna tried to present candidate lists under another name. The Supreme Court removed 241 candidates from the electoral lists on the grounds that they were ex-Batasuna activists concealing themselves under other party names (*Tribunal Supremo,* Special Chamber (*Sala Especial)* Judgment of 3 May 2003, *Recursos contencioso-electorales* 1-2003 and 2-2003). The Constitutional Court later reinstated 126, six of whom won the elections (STC 85/2003, judgment of 8 May) (see Martínez Soria (2004), at 545). Batasuna is the first political party prohibited in Spain after the death of Franco in 1975 (ibid, at 546). According to López, the prohibition of Batasuna on the basis of this law was justified also in the light of the case-law of the ECtHR (López (2003). It seems that the European Union agreed with the assessment to classify Batasuna as a terrorist organisation: In June 2003 the European Union, on request of the Spanish government, added Batasuna to its list of terrorist organisations (Council Common Position 2003/402/CFSP of 5 June 2003 updating Common Position

it fails to respect democratic principles and constitutional values, i.e. if it systematically harms fundamental rights and freedoms by promoting, justifying or exonerating attacks against the right to life and the integrity of the individual, if it foments, facilitates or legitimises violence, or complements and supports the actions of 'terrorist organisations'.[201] It is problematic that there is no legal remedy for the affected political party against the decision on the dissolution. Only individuals, not legal entities like political parties can raise a complaint for infringement of fundamental rights before the Constitutional Court.[202]

In 2003, on the basis of this new Law, the Special Chamber of the Supreme Court held that Batasuna was unlawful.[203] Subsequently, the Basque government lodged a constitutional review (*recurso de inconstitucionalidad*) against the Law. However, in its Judgment of 12 March 2003, the Constitutional Court dismissed the remedy as unfounded.[204]

2.4.2. Implementation of EU and international law

By ***Law 34/2002 of 11 July on Services of the Information Society***[205] internet suppliers and telecommunications operators are obliged to store the data related to electronic communications for a period of twelve months. This obligation also applies to criminal investigations and, hence, also to any investigations connected with terrorist crimes. Police, however, needs judicial authorisation in order to access the data. The Law was adopted in order to transpose the EU Directive 2000/31/EC into national law.[206]

The ***Law 3/2003 of 14 March on the European Arrest Warrant and Surrender Procedures***, and its complementary ***Organic Law 2/2003*** of the same date, serve the purpose to incorporate the European Council Framework Decision of 13 June 2002 on a European Arrest Warrant into Spanish Law. By this Law, *inter alia*, the principle of mutual recognition is established.[207]

Two months later, the ***Laws 11/2003***[208] *and* ***12/2003***[209] ***of 21 May*** were adopted, introducing joint investigation teams (JIT) into Spanish Law, and providing new measures for the prevention and freezing of terrorist funding. By the latter Law, the government is now enabled to block financial accounts and operations when it considers that this might prevent terrorist activities (before, such a measure could only be taken by a judge).[210] However, all the decisions adopted in the application of this

2001/931/CFSP on the application of specific measures to combat terrorism and repealing Common Position 2002/976/CFSP, OJ L 139 6.6.2003, at 35.).

[201] Gómez-Céspedes and Cerezo Domínguez (2006), appendix II, at 46.

[202] Martínez Soria (2004), at 545.

[203] Judgment of March 27, 2003, joint cases nº 6/2002 y 7/2002.

[204] STC 48/2003, Judgment of 12 March 2003.

[205] *Ley de servicios de la sociedad de la información y de comercio electrónico*, BOE No. 166 of 12 July 2002.

[206] See *exposición de motivos* of the Law.

[207] For procedural aspects of this law, see Jimeno Bulnes (19 March 2004).

[208] *Ley 11/2003, de 21 de mayo, reguladora de los equipos conjuntos de investigación penal en el ámbito de la Unión Europea*.

[209] *Ley 12/2003, de 21 de mayo, de prevención y bloqueo de la financiación del terrorismo.* BOE No. 122 of 22 May 2003.

[210] See Martínez Soria (2004), at 544.

law shall be under the ordinary control of the judicial authority.[211] Moreover, a Commission for the Surveillance of Activities of Terrorist Funding was created. The Law was enacted as a consequence of the successive recommendations of the Security Council of the United Nations since 1999 in which Member States were urged to adopt necessary measures to prevent and repress terrorist crimes.[212]

2.4.3. Abbreviated proceedings

On 24 October 2002, the ***Law 38/2002*** was adopted, reforming partially the Code of Criminal Prosecution, ***on speedy and immediate proceedings of certain felonies or misdemeanours and on modification of the abbreviated proceedings***. The Law was complemented by ***Law 8/2002*** of the same date. It was preceded by the Law 10/1992, of 30 April, on urgent measures for procedural reform, and by the Organic Law 2/1998, of 15 June, modifying the Criminal Code and the Code of Criminal Prosecution. These laws introduced and, respectively, amended, the so-called system of fast trials, in response to an increasing delinquency of minor offences, triggered by the Expo in Sevilla and the Olympic Games in Barcelona.[213] These fast proceedings apply both to minor offences (i.e. crimes punished by less than nine years, so the word "minor" is rather relative) and to flagrant crimes, thus also flagrant terrorist cases. In this context, the measure is questionable because terrorist offences carry serious sentences, and the proceedings usually are characterised by difficulties of inquiry and establishment of facts.[214]

2.4.4. Legislative activism in 2003

In 2003 a number of Laws with particular focus on security and terrorism were adopted. One of them is the ***Organic Law 1/2003 of 10 March, to guarantee town-hall democracy and town-councillors' security,***[215] by which Art. 505 of the Criminal Code 1995 was modified, criminalising with prison sentences of six months to one year those who, without being members of the local authorities, severely disturb the order of assemblies, or who cause disorder with the objective to support armed groups or terrorist groups or organisations. *Inter alia*, the law also amended Art. 3 of the Organic Law 3/1987, of 2 July, on the financing of political parties, by establishing that those political formations that have conducted an activity that may lead to their illegalisation will not receive public funding. Neither will they receive public funding if their election lists include persons convicted of rebellion, terrorism, or serious crimes against the State's institutions, even if their conviction is not final yet, unless these persons have publicly rejected the objectives and used means of their criminal acts.[216]

---

[211] Gómez-Céspedes and Cerezo Domínguez (2006).
[212] Aranda Ocaña (2005), at 387.
[213] Cossío Arribas (2005).
[214] Martínez Soria (2004), at 540 et seq.
[215] *Ley Orgánica 1/2003, de 10 de marzo, para garantizar la seguridad de los concejales y la democracia de los Ayuntamientos.*
[216] Two days later, the Organic Law 2/2003, of 14 March, is adopted, by which Arts. 65(4) and 88 of the Organic Law on the Judicial Power (*Ley Orgánica del Poder Judicial*) are amended, in order to give effect to Law 3/2003 (*Ley 3/2003, de 14 de marzo, sobre la orden europea de detención y entrega*), which implements the EU Council Framework Decision of 13 June 2002 on a European Arrest Warrant.

The subsequently adopted ***Organic Law 7/2003, of 30 June, on the Measures to Reform the Full and Effective Serving of Sentences***[217] presents maybe the most draconian measure of the Spanish legislator adopted after the events of September 11th. In his analysis, Sanz Delgado identified it as a "return to the nineteenth century", an "offence against the humanitarian principles and measures developed by Spanish penal and penitentiary legislation for decades".[218] It seems that the legislator was not motivated so much by the growing threat of international terrorism, but rather – again – by the internal problems with ETA prisoners. In the motives of the Law, the need for the new legislation was justified by the claim that interned terrorists did not fulfil their sentences completely and effectively. The following figure was given: Seventeen ETA members punished with high prison sentences had only fulfilled 37 % of their sentences when being released. However, this number was fictitious and tricking, because it used as a base the arithmetic total of the sentence and concerned people who had benefited from a reduction of sentences for work, a measure that at that time had already been abolished anyway. In reality, the applicable law until the Organic Law 7/2003 already impeded that terrorists who had not ceased their activity in armed groups could exit from prison while fulfilling their sentences.[219]

The main amendments concern Arts. 36, 76 and 78 of the Criminal Code. The Law makes the access to penitentiary benefits, including the passing to a third-degree status (i. e. confinement only at night)[220] more difficult for prisoners convicted for especially serious offences (including terrorism).[221] Moreover, the maximum limit for serving a sentence is extended to forty years in certain cases.[222]

The Law reformed the General Organic Penitentiary Law (***Ley Orgánica General Penitenciaria, LOGP***), subjecting the access to the third degree status for convicts for terrorism or organised crime to the condition that these convicts actively collaborated with the authorities (Art. 76 *LOGP*). Similarly, to concede conditional release (*libertad condicional*), under the new Art. 90 *CP* the convict must show unambiguous signs that he has abandoned terrorist goals and means and actively collaborate with the authorities in one of the forms outlined in Art. 76 *LOGP*. It follows that an imprisoned terrorist must in fact collaborate twice with the authorities, once to raise from the second to the third degree (i.e. from a status where he is imprisoned all the time to a status where he is only imprisoned at night), and, second, to raise from the third to the fourth degree (i.e. from night confinement to conditional release).[223] As

---

[217] *Ley Orgánica de medidas de reforma para el cumplimiento íntegro y efectivo de las penas*, BOE No. 156 of 1 July 2003.
[218] Sanz Delgado (2004).
[219] Llobet Anglí (2007), at 9.
[220] Under the Spanish penitentiary system, the prisoners are classified in different degrees (Art. 100(1) of the Spanish Penitentiary Regulation – *Reglamento Penitenciario, RP*), the last of which is conditional release (Art. 72(1) of the *LOGP*). In the first degree the control and security measures are very strict, in the second one they are ordinary, and the third degree is an open prison regime, in which the prisoner can leave the prison during the day (cf. Art. 86 of the *RP*). If a prisoner fulfills the requirements for another degree, he may pass from one degree to the next (see, for details, Arts. 100 et seqq of the *RP*).
[221] For details, see Gómez-Céspedes and Cerezo Domínguez (2006), at 51.
[222] I.e. where two or more terrorist offences have been committed, and one of them is sentenced by imprisonment of more than twenty years.
[223] Sánchez García de Paz (2005), at 27.

Sanchez García de Paz notes, it is doubtful whether the requirement that the convict publicly declares that he rejects and abandons his criminal activity is covered by the legitimate ends of criminal law, which, in principle, should be limited to protecting legal interests, and be free from moral or ideological judgments. After all, it is not the opinion of the terrorist which the criminal law strives to punish, but the violent acts by which this opinion is pushed through, which poses a threat to society.[224] Moreover, the new regulation does not merely grant special benefits to the collaborator of justice, but turns the collaboration with the authorities into the only way for the convict to avoid an exceptionally strict prison regime. Thereby, the new law diverges from the general principles established for the serving of sentences, and, in particular, from the constitutional principle[225] that a punishment which includes deprivation of liberty must be oriented towards the social reinsertion of the convicted person. Thereby, the collaborator of justice is not anymore *positively* discriminated (by allowing him benefits other inmates are not entitled to), but *negatively* (by impeding him from acceding benefits other inmates are entitled to).[226] Guillermo Portilla points out that this linkage of prison benefits and moral repentance actually suggests that the goal is rather the expiation of sins than social reinsertion.[227] To make the access to penitentiary benefits, which are designed to gradually facilitate social reinsertion and reintegration, dependent on active collaboration with the authorities makes social reinsertion, one of the constitutionally declared purposes of prison (cf. Art. 25(2) *CE*), much more difficult to obtain. However, in consideration of the interpretation of this Article by the Spanish Constitutional Court, which declared the purpose of reinsertion as a mere guideline, and not as a subjective enforceable right,[228] this measure will probably still be in line with the Spanish Constitution as interpreted by the *Tribunal Constitucional*.[229] Notwithstanding, the long-term success of making the access to penitentiary benefits more difficult remains, in view of the general penitentiary goal of social reinsertion, subject to serious doubts.

In practice, the legislation was applied very rigorously. As Llobet Anglí notes, the new law disadvantaged rather those who had broken their ties to a terrorist organisation than those who had remained 'faithful'. Only those who stayed in touch with the terrorist organisation were able to collaborate actively with the authorities throughout the years, and benefit from the collaboration by reducing their time in prison.[230]

Moreover, the law 7/2003 reduced the hitherto existing flexibility in the application of penalties, which had been beneficial for the treatment of prisoners, and, consequently, their social reinsertion. Sanz Delgado notes that thereby, the Spanish penitentiary regime, which had achieved to be one of the most progressive and humanitarian ones of Europe, converted into one of the most repressive ones

[224] Ibid. with further references.
[225] Art. 25(2) *CE*.
[226] Sánchez García de Paz (2005), at 28.
[227] Guillermo Portilla, Criminal Law Profesor of Jaén, cited by: El País (online edition) (18 February 2003): *Catedráticos de Derecho Penal califican la reforma del Código como un "brindis al sol"*.
[228] STC No. 2/1987, of 21 January.
[229] Sanz Delgado (2004).
[230] Llobet Anglí (2007), at 21.

(concerning certain areas). He draws attention to the consequence of an alarming increase of the prison population, which can only jeopardise the efforts of the penitentiary staff and the achievement of the constitutional purposes of sentencing (i.e. social reinsertion and integration). Sanz Delgado notes that this development means a step back to penitentiary law of the nineteenth century, i.e. the rigorous Spanish Penal Code of 1848, which was also focussing on the locking up of prisoners, and also led to a severe increase of the prison population of these days. [231]

The law 7/2003 was also criticised for the extreme high maximum sentences. The maximum sentence period of forty years was characterised as the 'civil death' of the concerned person, contrary to the standards of international treaties which consider a prison sentence of more than fifteen years as inhumane and degrading.[232] The European Court of Human Rights stated on various occasions that a prison sentence of 40 years constituted materially a life long sentence.[233] In view of Art. 25(2) of the Spanish Constitution, which establishes as a principle that prison sentences shall be oriented towards social reinsertion, doubts of the constitutionality of the Law were raised. Similarly, it is discussable whether such a high prison sentence can still be reconciled with the prohibition of inhuman and degrading punishment enshrined in Art. 15 *CE*.[234] In spite of these considerations, the Constitutional Court held that Art. 25(2) *CE* (establishing the goal of social reinsertion for prison sentences) did not constitute a positive right, but a mere guideline for the legislator with respect to criminal and penitentiary policy.[235] Further, the Constitutional Court found that the quality of degrading or inhuman punishment did not depend so much on the length of the sentence, but rather on its contents.[236] With respect to this, the *Tribunal Constitucional* coincides with the jurisprudence of the ECtHR on the compatibility of long prison sentences with Art. 3 ECHR (prohibition of torture and inhuman or degrading treatment or punishment).[237]

In spite of these considerations, we should not forget that there is no criminological basis at all to suggest that longer sentences bring about a better prevention of serious crimes. The only advantage lies in the fact that the concerned individuals are separated from society for a longer period. But this is a road with a dead end, because, as García del Blanco, rightfully asks, once their punishment is completed,

[231] Sanz Delgado (2004).
[232] Borja Mapelli Caffarena, Criminal Law Profesor of Sevilla, cited by: El País (online edition) (18 February 2003): *Catedráticos de Derecho Penal califican la reforma del Código como un "brindis al sol"*.
[233] García del Blanco (2007), at 4.
[234] García del Blanco (2007), at 4.
[235] STC 65/1986, of 22 May. See also STC 2/1987, of 21 January, STC 19/1988, of 16 February, STC 28/1988, of 23 Februrary, and STC 75/1988, of 31 March. [cited by ibid.]
[236] STC 65/1986, *fundamento jurídico* 4.
[237] *Case Léger v France*, Judgment of 11 April 2006 (application no. 19324/02). In this decision, the Strasbourg Court held that imprisonment of more than 40 years did not constitute inhuman or degrading treatment, as long as the prisoner was not deprived of the possibilities to obtain penitentiary benefits or sentence reductions.

do we have to change the law again and augment maximum punishments for another forty years, for the prevention of crime?[238]

Incidentally, the same line of increasing sentence periods was followed by the Supreme Court in its so-called *Parot Doctrine* in 2006.[239] According to this doctrine, penitentiary benefits can only be granted after the maximum period of thirty years has been served.[240]

Another problem of the law of 2003 is its retroactivity. According to its only transitory disposition, the Articles regulating conditional release and the access to the third degree apply to any decision on these matters, irrespective of the time when the crimes of the concerned persons were committed. Considering that these retroactive provisions affect such a fundamental right as the liberty of the person, their constitutionality must be seriously doubted.[241]

2.4.5. Improvement of detention on remand (*prisión provisional*)

A positive development in Spain was the adoption of the ***Organic Law 13/2003 of 24 October reforming the Code of Criminal Prosecution in the area of detention on remand*** (*prisión provisional*).[242] The Law is not explicitly concerned with terrorism, but, by modifying the remand detention regime, it affected indirectly also terrorist legislation. The law aimed to reinforce the exceptional and proportional character of detention on remand, taking into account the precepts stated by the Constitutional Court in its Judgment of 17 February 2000.[243] In this Decision, the Court declared that Arts. 503 and 504 *LECrim* were contrary to Art. 17 *CE*, and thus unconstitutional. The Court summarised which requirements detention on remand needed to be fulfilled, in order to be "constitutionally legitimate", i.e. comply with Art. 17 *CE*.[244] E.g. Arts. 503 and 504 *LECrim* did not require the presence of a legitimate reason in order to adopt detention on remand, neither did they specify which reasons were to be considered constitutionally legitimate. These lacks already sufficed to justify a non-conformity of the provisions with Art. 17 *CE*.

The Law 13/2003 also amended Art. 504 *LECrim*, following allegations that the provision violated Art. 5(3) ECHR.[245] By virtue of the reform, the requirements for the

[238] García del Blanco (2007), at 5.
[239] Judgment 197/2006, of 28 February, concerning the case of the ETA member *Henri Parot*.
[240] See the critical comments of the magistrate of the Basque's Country's Supreme Court, Garbiñe Biurrun, in an interview of *Noticias de Álava*: "*La 'doctrina Parot' roza la inconstitucionalidad y lo único que consigue es posponer un problema político*""*Las víctimas son un arietemás en la lucha antiterrorista* " (Noticias de Álava (25 February 2006): *La 'doctrina Parot' roza la inconstitucionalidad y lo único que consigue es posponer un problema político*).
[241] Doubts of unconstitutionality are also raised by Sanz Delgado (2004).
[242] *Ley Orgánica 13/2003, de 24 octubre, de reforma de la Ley de Enjuiciamiento Criminal en materia de prisión provisional*; BOE, No. 257, of 27 October 2003.
[243] STC 47/2000, Judgment of 17 February 2000 (*recurso de amparo).*
[244] These were the requirements set out by the Court:
- there had to exist a constitutionally legitimate reason that justified the measure of detention on remand
- this reason had to be explicitly expressed in the order adopting detention on remand, and
- the measure had to be proportional, considering the gravity of the punishment that might be expected for the crime in question, as well as the special circumstances of the facts and of the suspected author of the crime. (STC 47/2000, at II (*fundamentos jurídicos*), 4).
[245] Merino-Blanco (2006), at 158.

adoption of detention on remand were changed notably; it is now required that the maximum punishment provided for the crime for which the suspect is held must principally[246] amount to at least two years imprisonment.[247] In view of the generally comparatively high maximum sentences inherent in the Spanish sentencing system, Kühne raised the question whether such a provision did not indeed violate Art. 9(3)(2) of the ICCPR, which precludes a general rule establishing that persons awaiting trial shall be detained in custody.[248] Moreover, legitimate reasons for detention are now clearly and exhaustively listed, i.e. that the suspect otherwise might evade justice, that he or she might hide, alter or destroy proofs, or that he or she might commit new crimes (if there are concrete indications for this). Absolute limits for the duration on detention on remand were established. If the charged crime is punished by three years or more, the detention can, in principle, last for up to two years, but may be prolonged once, for two more years, under special circumstances.[249] Moreover, the Law simplified and accelerated remedies. Finally, it also modified the incommunicado regime, by precisely establishing its requirements, duration and content. The legislator motivated this decision in a peculiar way: "As far as the modalities of detention on remand are concerned, on the one hand, the traditional attenuated detention on remand is preserved, and, on the other, the incommunicado detention is notably reformed. Thus, the requirements, duration and contents of the incommunicado detention are established, modernising a regulation which is clearly archaic and obsolete."[250] When reading this, one cannot help but wonder why the legislator did not decide to go a step further and abolish this archaic and obsolete provision completely. The reason is probably that opinions in parliament were strongly divided with respect to this issue. While some pleaded for the abolishment, others even wanted to prolong incommunicado detention for five more days.[251]

The political dissent on incommunicado detention is also reflected in the ***Organic Law 15/2003 of 25 November reforming the Criminal Code of 1995,*** which was adopted only one month later, and by which the maximum period of incommunicado detention was again enlarged, from five to up to thirteen days.[252] As Mestre Delgado notes, this extension is contrary to the explicit case-law of the *Tribunal*

[246] This general rule is subject to three exceptions:
- if the accused has previously been charged for a wilful offence (Art. 503(1)(1))
- if there have been at least two arrest warrants issued against the accused, within the last two years (Art. 503(1)(3)(a))
- if a wilful offence is at stake, and the background of the accused as well as the police data suggest that the criminal activity is being carried out by a criminal organisation, or that the offences are committed habitually (Art. 503(2))

See Moreno Catena and Cortés Domínguez (2005), at 288.

[247] This is the general rule; exceptions are possible if so regulated by law.

[248] Kühne (2006), at 728.

[249] These circumstances have to make it likely that the trial will not be concluded in the course of these two years.

[250] "*En lo que respecta a las modalidades de la prisión provisional, se mantiene, de un lado, la tradicional prisión atenuada y, de otro lado, se reforma notablemente la prisión incomunicada. Así, se establecen con precisión los presupuestos, duración y contenido de la incomunicación, modernizando una regulación claramente arcaica y obsoleta."*

[251] Zúñiga Rodríguez (2007), at 21.

[252] See *Disposición Final Primera* of the Law 15/2003.

Constitucional on this measure, which considered ten days of incommunicado detention already excessive, as well as against recommendations of international organisations, among them the Committee for the Prevention of Torture of the Council of Europe.[253]

Also, the ***Organic Law 19/2003, of 23 December, modifying Organic Law 6/1985 of 1 July on the Judiciary***, deserves to be mentioned, as this Law finally created an Appeals Chamber in the *AN*, in response to findings by the UN Human Rights Committee (HRC) that the previous right to appeal, involving limited review by the Supreme Court, was not complying with Spain's obligations under the ICCPR. In two separate individual complaints lodged against Spain, the Human Rights Committee ruled that "the inability of the Supreme Court, as the sole body of appeal, to review evidence submitted at first instance was tantamount…to a violation of Art. 14, paragraph 5."[254] In response to Spain's fourth periodic report on implementation of the ICCPR, the HRC had urged the Spanish government to institute a right of appeal against decisions by the *AN* in keeping with the requirements of Art. 14(5) of the ICCPR.[255]

Another legislative instrument adopted explicitly for the purpose of combating terrorism was the ***Organic Law 20/2003, of 23 December***, which "mostly offended the very essence of democracy"[256] because it criminalised (under prison sentence) a person for convoking a referendum. The Law was adopted in the very moment when the legality of the so-called *Plan Ibarretxe* was being discussed.[257] By means of this Law, three new provisions were included in the Criminal Code: Art. 506 bis, Art. 521 bis, and Art. 576 bis *CP*. Art. 506 bis and Art. 521 bis *CP* criminalised the organisation of a referendum without permission. This novelty targeted directly the president of the Basque autonomous government and his proposal for a popular question on the status of the Basque country. By Art. 576 bis *CP*, another new offence was created: economic support to organisations, associations or political parties which were suspended because of their links to terrorism. This provision was, however, abolished two years later in the ***Organic Law 2/2005***, in the attempt to promote again the principles of minimal intervention and proportionality.[258]

2.4.6. Torture allegations in Strasbourg

[253] Mestre Delgado (2007), at 2.
[254] Manuel Sineiro Fernández v. Spain, Communication No. 1007/2001, U.N. Doc. CCPR/C/78/D/1007/2001 (19 September 2001), para. 7 (online available at http://www1.umn.edu/humanrts/undocs/1007-2001.html, last visited on 20-11-08).
[255] Concluding observations of the Human Rights Committee: Spain. U.N. Doc CCPR/C/79/Add.61 (3 April 1996, online available at http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.79.Add.61.En?Opendocument) para. 19.
[256] Aranda Ocaña (2005), at 388.
[257] The Ibarretxe Plan is a proposal to change the Statute of Autonomy of the Basque Country in order to give the Basque Country a status of 'free association' to Spain. The plan is online available at http://www.nuevoestatutodeeuskadi.net/docs/dictamencomision20122004_eng.pdf (English) and http://www.nuevoestatutodeeuskadi.net/ (Spanish with further-going information, both sites last visited 20-11-08).
[258] Cobo del Rosal and Quintanar Díez (2005), at 1141 et seq.

In November 2004, the European Court of Human Rights criticised Spain for violating Art. 3 of the ECHR (prohibition of torture), in *Martinez Sala and Others v Spain*.[259] Fifteen Catalan suspected terrorists applied to the European Court, alleging that they had been subjected to torture during police custody in 1992. Their previous constitutional complaint before the *Tribunal Constitucional* had been unsuccessful, on the grounds of lack of evidence.[260] The Strasbourg Court held that the allegations concerning torture were difficult to prove, taking into account that the incidents had taken place several years ago. However, the Court found that Spain had violated Art. 3 of the ECHR by failing to investigate the torture allegations properly.[261]

In this context, we should also consider the Report of the UN Special Rapporteur of the Commission on Human Rights on torture and other cruel, inhuman or degrading treatment or punishment, Theo van Boven, of 1 September 2004. In this report, van Boven concluded that torture or ill-treatment was not systematic in Spain, but that the system as it was practised allowed torture or ill-treatment to occur, particularly with regard to persons detained incommunicado in connection with terrorist-related activities. The government defended itself by arguing that ETA members systematically made (false) torture allegations each time they were arrested, and that for this reason, the allegations were mostly rejected by the courts. The government presented to the Special Rapporteur a document reportedly found in the residence of members of the "ARABA/98" terrorist squad arrested on 19 March 1998. This document was said to provide instructions for filing torture allegations.[262] A representative of the Civil Guard also supported the thesis that the torture allegations raised by suspected ETA members were part of ETA's strategy against the State.[263] Notwithstanding, the fact that ETA may use false torture allegations as a strategy does certainly not mean that torture never takes place; each individual case requires therefore investigation to verify the facts.[264] Moreover, as van Boven noted, the civil guard's assumption that ETA uses torture allegations systematically upon arrest has led to the paradox and highly disturbing consequence that in some cases, arrested people became accused of a membership to ETA on the sole ground that they had alleged to be tortured during arrest.[265]

It is clear that under the existing conditions of incommunicado detention in Spain, torture and inhuman or degrading treatment can take place without leaving any

[259] Judgment of 2 November 2004, application no. 58438/00.
[260] See Decision of 29 November 1999 (see ECtHR, Judgment of 2 November 2004, at 109.)
[261] Para. 160 of the Judgment: *"En conclusion, eu égard à l'absence d'une enquête approfondie et effective au sujet des allégations défendables des requérants selon lesquelles ils avaient subi des mauvais traitements en garde à vue, la Cour estime qu'il y a eu violation de l'article 3 de la Convention."*
[262] United Nations Commission on Human Rights (6 February 2004), at 10.
[263] Ibid at 14.
[264] Ibid at 11.
[265] The Special Rapporteur speaks in his report of several cases, but refers, in particular, to the case of Martxelo Otamendi Egiguren, one of the directors of the newspaper *Euskaldunon Egunkaria*, which was closed by the *Audiencia Nacional* on the basis that it was financed and directed by ETA. After being released from detention in connection with the closure of *Egunkaria*, Martxelo Otamendi Egiguren claimed that he and others had been subjected to torture while being held incommunicado. Subsequently, the Government lodged a complaint with the *Audiencia Nacional*, accusing Martxelo Otamendi Egiguren and three other newspaper directors of "collaborating with an armed band" by making torture claims as part of an ETA-inspired strategy to undermine democratic institutions. (Ibid., at 10).

traces, and, at the same time, false allegations of torture are easy to make and difficult to refute. Both problems can only be solved by either abolishing the institute of incommunicado detention entirely (which seems difficult if not impossible to achieve, considering the controversial discussions on this subject in Spain), or by at least subjecting the days of incommunicado detention under additional external control, e.g. by allowing contacts to the lawyer during this time, or by video-taping during the incommunicado situation.[266]

2.4.7. 11 March ("*11-M*") attacks on Madrid trains

Only three days before the general elections of March 2004 several bombings on trains in Madrid caused the death of almost 200 people, and left many others injured. According to the first official version offered by the then Minister of the Interior, Sr. Ángel Acebes, the attacks were attributed to ETA. This statement was clearly given for purely strategic reasons, in view of the forthcoming elections, since the ruling PP (Popular Party) could only win elections if the attack had no Islamic background; in the other potential case (that international Islamic terrorists were responsible for the attack) President Aznar's former policy to invade Iraq in support of the US-led war against terrorism was seen as a complete failure, and the Popular Party had no chance to re-win elections. A few days after the Madrid bombings, more and more indications suggested rather an Islamist network than ETA behind the attacks.[267] In spite of this, the United Nations Security Council adopted a resolution which condemned the attacks whose author they called ETA, and the then Minister of External Affairs, Ana Palacio, issued a communication to the Spanish embassies to instruct them to stress the responsibility of ETA.[268] The matter was politicised to such an extent that in spite of the growing evidence for Islamic background to the attacks, until the very moment when the Judgment of the *AN* was published, on 31 October 2007, the then opposition party PP still claimed that the actors belonged to ETA. Media articles presented the Judgment of the *AN* as a final revelation of truth: *"El tribunal culpa a una célula islamista del 11-M, descarta a ETA y desmonta todos los bulos amparados por el PP*"[269] ("The Tribunal accuses an Islamist cell of the 11-March Bombings, discards ETA and dismantles all false reports protected by the PP").[270]

In direct reaction to the March bombings of 2004, the ***Organic Law 4/2005, of 10 October, amending Organic Law 10/1995 of 23 November (Criminal Code) regarding***

[266] Also the president of the *Audiencia Nacional* agreed that audio-visual recording would be useful to monitor the treatment of detainees and could be useful in refuting false allegations of torture. See ibid at 12.
[267] ETA called twice to EUSKAL TELEVISTA to reject their authorship. At the same time, a letter was published in an Arabic newspaper seated in London in which responsibility was claimed by the Islamic terrorist group Al-Qaida.
[268] Aranda Ocaña (2005), at 390.
[269] El País (online edition) (31 October 2007): *El tribunal culpa a una célula islamista del 11-M, descarta a ETA y desmonta todos los bulos amparados por el PP*. The political instrumentalisation of the whole subject went so far that even false testimonies were procured, linking the attacks to ETA; see El Mundo (online edition) (30 September 2006): *Imputados por falsedad los tres peritos que vincularon a ETA con los atentados del 11-M*.
[270] A thorough documentation on the 11-M bombings and the subsequent trial can be found at http://www.elmundo.es/documentos/2004/03/espana/atentados11m/sentencia/index.html (visited on 20 September 2008).

serious offences caused by explosives[271] was adopted. The terrorist attacks of 11 March 2004 had shown that the storages of explosives were not sufficiently controlled. For this reason, the penalties for those who violate safety regulations with respect to explosives were increased.[272] It is conspicuous that no more intrusive legislative changes were proposed, unlike this would have been the case probably in any of the other countries of examination. Perhaps it is Spain's recent experience with totalitarianism, combined with continued international criticism of Spain's human rights situation in the past, which made this country more careful with the reduction of human rights.

2.5. Current developments

In March 2006 ETA declared another cease-fire, followed by peace talks with the government. But ETA, frustrated with a lack of concessions, reverted back to violence: a car bombing at a Madrid airport parking garage in December 2006 killed two people sleeping in their vehicles. ETA declared that the deaths were unintended, and upheld the ceasefire. But in June 2007 they declared the truce formally over. Since then, ETA has committed more than a dozen bombings.[273]

On the level of legislation, except for a Bill to reform the appeal procedure and to generalise a double remedy in criminal matters,[274] there are currently no special anti terror bills pending.[275] But a criminal law reform is planned, occasioned by the tenth anniversary of the Spanish Criminal Code of 1995. The main focus of the reform lies on adapting the criminal justice system to the exigencies planted by European Union ("Third pillar") developments.[276]

With regards to jurisprudence, an important decision deserves to be mentioned: the Judgment adopted by the Spanish Supreme Court on 20 July 2006.[277] This judgment set an important precedence not only for Spain, but also for other states: the Court quashed the sentence of a former Guantánamo Bay detainee, who had been convicted to six years imprisonment by the Spanish *AN*, on the charge of integration in or

---

[271] *Ley Orgánica 4/2005, de 10 de octubre, por la que se modifica la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal, en materia de delitos de riesgo provocados por explosivos.*

[272] In particular, Art. 348 *CP* was amended, concerning the violation of the safety regulations regarding the manufacture, manipulation, transport, possession or marketing of (i) explosives, (ii) flammable, corrosive, toxic or asphyxiating substances, or (iii) any other matter, device or artifice that may cause destruction. Those who, in their duty of supervising and controlling the effective use of explosives, fail to report any loss or subtraction and/or conceal/forge any information related to the safety regulations in terms of explosives, are also held criminally responsible.

[273] Heckle (22 March 2008).

[274] *Proyecto de Ley Orgánica por la que se adapta la legislación procesal a la Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial*, se *reforma el recurso de casación y se generaliza la doble instancia penal*, BOE no. 69-1 of 27 January 2006.

[275] See the site of the Spanish Ministry of Justice, *actividad legislativa*, at http://www.mjusticia.es/cs/Satellite?pagename=Portal_del_Derecho/actlegislativa/FichaActividadLegislativa&tipoActividad=ET&modo=block&c=LiteralMJ&cid=ShM_InfJur_IniTra&menu_activo=1057821035222&p=1057821035222&lang=es_es (last visited on 20-09-2008).

[276] *Proyecto de ley, 121/000119 Orgánica por la que se modifica la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal.*

[277] Criminal Chamber, STS 4527/2006.

membership to a terrorist organisation. The Supreme Court rejected the charges against the accused on the basis of lack of evidence. The Court considered the evidence obtained in Guantánamo as void and inexistent. With respect to Guantánamo, the Court stated that

> "the detention of hundreds of people in Guantánamo, among them the appellant, without charges, without guarantees, and, therefore, without control and without limits, guarded by the army of the United States, constitutes a situation that is impossible to explain, and even less possible to justify, from the perspective of the legal and political reality of this situation.
>
> One might as well say that Guantánamo is a real "limbo" in the Legal Community defined by a multitude of treaties and conventions signed by the International Community. Guantánamo constitutes a broken example of what some scientific doctrine has defined as "Criminal Law of the Enemy". This criminal law of the enemy, opposed to the criminal law of the citizens, would stay reserved to those considered as responsible for attacking or jeopardising the fundaments of the co-existence and of a state governed by the rule of law.
>
> Precisely these attacks would turn them into aliens to the "polis", to the community of citizens, and as such, as enemies, thus excluded from the Community and persecuted precisely as if it was war. (…) Therefore, the criminal law of the enemy would be rather the negation of criminal law, insofar as it tries to deprive its potential target group of something that is inherent and not derogable: their condition as citizens of the 'polis'."

2.6. Summary

2.6.1. Main developments

In Spain, we can identify five important time periods with respect to terrorist legislation: the dictatorship until the late 1970s; the period of transition; the 1980s in which the Spanish democracy was built and developed, but in which terrorist violence increased, and in which anti-terror legislation was still criticisable for various reasons, many provisions being only slight improvements as compared to those adopted under Franco, and being declared as unconstitutional by the *Tribunal Constitucional* in 1987; the 1990s, when the policy of dispersion was created, the legal proceedings 18/98 took place and a new criminal code was adopted; and the legislation adopted after September 11th, particularly in 2003.

- During the Franco totalitarian regime, terrorism and other political offences were defined in a very wide manner, as "crimes against internal or external security and against the government". Legislation was draconian, aiming at the suppression of any potential political opposition, and including capital punishment in some cases. Moreover, terrorist crimes were tried by military courts, which were characterised by especially short proceedings and very few procedural rights of the accused. When the criticism against military jurisdiction

grew too strong, Public Order Tribunals were introduced for political crimes. In this climate of political oppression, ETA was formed in 1959. The movement was initially widely accepted by the population, as it presented one of the few clandestine organisations that attempted to dismantle the existing fascist and totalitarian system. Its growing support among the population led to the emergence of more anti-terror laws which tightened the already rigid legislation. The show trial of Burgos, convicting nine ETA members to death for having assassinated Meliton Mananas, was the prime example to show the Spanish citizens what could happen if they dared to oppose the regime.

- The following time period of transition was marked by profound political and legislative changes. Spain became a democratic republic, governed by the rule of law. A Constitution was adopted with a long list of fundamental rights Spanish citizens should enjoy. In order to ensure the effectiveness of these rights, the Constitutional Court was created, which allows individuals to legally challenge violations of their constitutional rights. Regarding terrorist jurisdiction, the Public Order Tribunals were replaced by the *Audiencia Nacional*. In spite of these developments, ETA's political violence increased during the years of transition. In the absence of a strong police presence and control of the public life, it was easier than ever to commit terrorist attacks, and thus terrorist attacks were committed *en masse*. The new democracy tried to react to these incidents in two ways: on the one hand, they had learnt from the past and did not want to have any more "political offences", so they adopted anti-terror laws which were aimed to de-stigmatise and depoliticise the offence of terrorism and treat it as any other ordinary crime. On the other hand, the concrete terrorist activism was also responded by exceptional legislation in form of decrees (e.g. Decree 21/1978 and Decree 3/1979), where extremely harsh measures (e.g. indefinite prolongation of police custody, house searches without any judicial warrant needed etc.) were adopted. The constitutionality of these decrees was questioned by many and the Constitutional Court confirmed in its Decision of 1982[278] that it was indeed unconstitutional to regulate these issues, which restricted fundamental freedoms, in the form of a decree, unless exceptional and extraordinary necessity required so.

- The legislators of the subsequent years were busy with meeting the rule of law exigencies demanded by their democratic Constitution. This work included developing certain Articles of the Constitution which required the adoption of the concrete modalities by organic law. With respect to terrorism, organic laws developing Art. 17 and Art. 55(2) *CE* were thus adopted. In parallel, the relics of the former police state continued in existence. Thus, paramilitary groups such as the GAL or the GAR fought against ETA beyond the legal and territorial boundaries of Spain. In France, where ETA members still enjoyed sanctuary as political refugees until 1986, a "dirty war" was carried out between ETA and

[278] STC 29/1982, Judgment of 31 May (*Recurso de inconstitucionalidad*).

Spanish paramilitary groups. Many of the involved GAL members were convicted by the Spanish Supreme Court later on for their acts.

A landmark decision for the development of procedural rights in Spanish legislation was the Constitutional Court's judgment 199/1987, of 16 December. In this ruling, the Court declared a number of anti-terror laws as unconstitutional and gave clear guidelines to the legislator how to conform to the constitutional exigencies in the future. *Inter alia*, the Court held that a suspect could not be detained longer than 72 hours before presented to a judge, and that incommunicado detention required at least the immediate request for judicial authorisation. The Constitutional Court's judgment led the legislator to reform both the Criminal Code and the Code of Criminal Prosecution (Organic Laws 3 and 4/1988).

- In the 1990s, a new prison policy was adopted – the dispersion of terrorist prisoners all over the Spanish territory. ETA reacted to the dispersion of its members with growing violence, including the abduction of Miguel Angel Blanco, who was eventually assassinated by ETA. This kidnapping met immense public protest. ETA responded to this growing protest by instituting a new type of violence: the street violence (*kale borroka*) of teenagers. The legislator responded to this form of terrorism by creating a new terrorist offence (cf. Art. 577), as well as new laws governing the penal responsibility of minors, including the raising of sentences for minors convicted of terrorist offences.

  The growing public protest against terrorism in Spain, including the Basque country, may have been one of the main reasons why the Legal Proceedings 18/98 were instituted in 1998, prosecuting a number of organisations for alleged links with terrorist groups – organisations which until then had been considered as legal.

  Besides these developments, we should also recall that in 1995 a new Criminal Code was adopted, which dedicated a whole new section to terrorist offences. As in other countries, Spain also started to adopt measures directed both at terrorism and at organised crime (e.g. money laundering, see Law 19/1993; repentance laws for terrorism and drug trafficking).

- Unlike in the other examined countries, Spain did not react to the events of September 11th by speedily adopting new legislation. No emergency decree was enacted, no new offence created. Until the 11 March bombings of 2004, the perceived threat from international Islamic terrorism seems to have been less severe in Spain than elsewhere – too present and real was the continuing Basque terrorist violence. Consequently, important post-2001 laws include the Organic Law 6/2002 of 27 June on the prohibition of political parties, and laws adopted in view of international and European legal developments (European arrest warrant, joint investigation teams, storage of email communication data for up to twelve months, and new laws for the prevention and freezing of terrorist funding). In 2003, a bulk of new security laws was adopted (Law 1/2003,

Organic Law 5/2003, Organic Law 7/2003, and Organic Law 15/2003), the most important of which is the Organic Law 7/2003, which increased the sentences for terrorist offences to up to forty years, and made the access to penitentiary benefits for terrorist prisoners dependent on their active collaboration with the authorities. Both provisions encountered severe criticism. The Organic Law 15/2003 increased the maximum period of incommunicado detention from five to up to thirteen days and thereby went against the explicit case-law established by the Constitutional Court, which considered already ten days excessive (see STC 199/1987). The 11 March attacks of 2004 were politically of major importance, as they took place three days before the general elections. The conservative Popular Party which held governmental power at that time claimed that the attacks had been committed by ETA, mainly because an Islamic origin would have severely damaged their prospects to be re-elected. However, they were not re-elected, and it turned out, eventually, that the attacks had been committed indeed by Islamic terrorists, not by ETA. On the legislative level, the attacks brought about the adoption of Organic Law 4/2005, which increased the punishment for violations of safety regulations with respect to explosives. As to current and future developments, there is no special anti-terror legislation planned, but only a general criminal law reform to take the EU exigencies with regard to the third pillar developments into account.

2.6.2. General observations

Spain has a very diverse anti-terror legislation. On the one hand, it disposes of some very restrictive laws, such as the incommunicado detention, during which certain fundamental defence rights are suspended, or the police's powers to search terrorist suspects wherever they seek refugee, even if this means entering private houses of uninvolved third parties. Until recent years, there were allegations of torture in some cases, including one that was put before the Strasbourg Court. Paramilitary activities against ETA further darken the picture of Spain's democratic development. These measures could be relics of the former dictatorship. On the other hand, they seem to be on their way to extinction. We see clear signs of an improved human rights situation; human rights are guaranteed by the Constitution, their effectiveness is monitored by a Constitutional Court, the rulings of which are often, but not always, taken into account by the legislator. We have seen that in 2003, the provisions governing detention on remand have been modified to better comply with the principles of necessity and proportionality of the measure, evidence obtained in Guantánamo is not admitted in court, etc. Most strikingly, at first sight, is that Spain did not deem it necessary to react neither to the events of September 11th nor to the 11 March bombings with the adoption of new intrusive laws, like so many other countries did, and like Spain also did in the 1980s.[279] However, in the immediate aftermath of September 11th, no particularly worrisome laws were adopted. It seems that a society confronted with a terrorist threat

[279] See e.g. the Decree 21/1978.

as real as the one from ETA had no time to worry about a potential future threat yet to be materialised. In the UK, the situation was slightly different as the conflict in Northern Ireland had just been overcome.

When considering the human rights involved in the fight against terrorism in Spain, there are three rights particularly at stake, and these are precisely the ones that the constitutional legislator has chosen to limit in certain cases (Art. 55(2) CE):

- the right to personal liberty;
- the freedom of communication; and
- the inviolability of one's home.

Under Spanish constitutional law, these fundamental rights may only be restricted by means of an organic law (cf. Art. 81 (1) CE)[280]. However, there have been a few cases in which the legislator deviated from this principle: one was the case of the coup in 1981, where a new law was enacted in urgency proceedings, and another one is the adoption of certain laws in the form of decrees, although this latter legislative technique was declared unconstitutional by the *Tribunal Constitucional.* [281]
More concretely, we observe that especially the following anti-terror measures have been favoured by the Spanish legislator throughout the years, although their modalities and scope changed from time to time.

- incommunicado detention, at times indefinitely (but this was declared unconstitutional by the Constitutional Court in its judgment 199/1987)
- prolonged police custody before the first contact with a judge (recently raised to fifteen days, although the Constitutional Court had ruled in its judgment 199/1987 that more than seventy-two hours were excessive)
- police powers to search places, including private homes, where terrorist suspects might seek refugee
- house searches with / without previous judicial authorisation
- aggravated, and longer sentences,
- modifications in penitentiary law, especially: making the access to penitentiary benefits more difficult in the case of terrorism

We can conclude from this that there seems to be a general tendency to confront the terrorist problem by locking up the – suspected or convicted – terrorists as long as possible. With respect to the changes concerning penitentiary law, and the aggravation of sentences, these may reflect the Spanish society's desire for revenge (which does not go along with the general goal of reinsertion of the Spanish General Penitentiary Law).[282]

[280] Art. 81(1) CE establishes that organic laws are those that concern the development of fundamental rights and public freedoms, which approve the statutes of autonomy and the general electoral regime, and other topics for which the Constitution establishes the adoption by organic law (*Son Leyes orgánicas las relativas al desarrollo de los derechos fundamentales y de las libertades públicas, las que aprueben los Estatutos de Autonomía y el régimen electoral general y las demás previstas en la Constitución).*
[281] STC 159/1986, Judgment of 16 December 1986 (*recurso de amparo*).
[282] Cases where ETA members were released from prison earlier than expected were accompanied by a public outcry. An overview on the reaction of society to execution of sentences of terrorists is given by Nieto García (2008).

At the same time, we note that the Constitutional Court has been quite active in condemning the most intrusive measures, by delineating their constitutional limits. The legislator, in most cases, has taken these rulings into account and changed legislation accordingly. The thesis that the Constitutional Court quite effectively watches over the compliance with human rights is further supported by the fact that relatively few cases have been brought to the European Court of Human Rights.

A final general observation is that in Spain, despite the efforts to depoliticise terrorist offences, terrorism is extremely closely linked to politics. This is shown e.g. by laws prohibiting political parties or denying them their funding or prohibition the convocation of a referendum. Also of political nature is the sanction of closing the media (although this measure was declared unconstitutional by the Constitutional Court and subsequently abandoned),[283] and the automatic removal from public offices in case of terrorist indictments. Last but not least, the political power of terrorism in Spain was most obviously shown in the elections of March 2004, when politicians from the then governing Popular Party claimed, for strategic reasons, that the bombings of Atocha had been committed by the ETA, not by Islamic terrorists.

[283] STC 199/1987 loc. cit.