THE RIGHT TO A DEFENCE IN THE CRIMINAL PROCEDURE OF THE YOUNG SPANISH DEMOCRACY

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Abstract

Although the designated topic for discussion is the technical right to a defence in Spain, I consider it opportune to give a brief overview of the current criminal procedural situation in my country. Spain is a young democracy of only 35 years in which sovereignty was returned to the people with the 1978 constitution, the moment that marked the beginning of a period during which we have enjoyed the full range of freedoms.

Keywords: *right to a defence, criminal procedural law, constitutional rights*.

I. Spain, a constitutional monarchy

Allow me first to explain by way of introduction why it is that Spain is a democracy, not just on paper but also in reality. Spain has ratified all internationally approved legislation with respect to human rights, both at European and international and supranational levels. These international treaties are in full vigour and can be placed on the second rung of the hierarchical ladder, between the Constitution and the organic and ordinary laws. Article 10, section 2, of the Spanish Constitution clearly states that laws must be interpreted according to the principles of basic rights and freedoms recognised therein, in line with the Universal Bill of Human Rights and the international treaties and agreements ratified by Spain dealing with the same matters.

This means that, as these laws are in effect in Spain, any suspect, whatever the crime involved may be or his nationality, can appeal to these laws and the rights contained therein in their defence, and the authorities are obliged to respect and enforce these. The same is true of witnesses and insurance surveyors, as well as the victims of crime in such cases, as happens in Spain, where they are both the accusing party and the civil party in criminal procedure. And this is exactly what happens on a daily basis due to the cosmopolitan nature of my country (according to official statistics for 2011, there is a population of some 47 million Spanish residents and almost 57 million tourists visit annually, mainly from Germany, the UK, Italy, France and the US, with almost 6 million legal foreign immigrants registered, mainly from Latin America, Northern and Central Africa and Eastern Europe. The largest colony is made up of Rumanians with more than 9 hundred thousand people.

In order to understand the movement of criminal and criminal procedural legislative reform in Spain it helps to refer to the aforementioned democratic transformation. Following this, most major reforms of this nature since 1978 have essentially consisted of strengthening the range of guarantees for the defendant and adapting our criminal procedure to suit the postulates of accusatory criminal procedure, especially in the instruction stage. But these changes were not sufficient. A Law for Criminal Procedure was needed. *La Ley de Enjuiciamento Criminal* (henceforth to be abbreviated to LECRIM), was totally new and replaced the relic from 1882, a descendant of the Napoleonic *Coded'instruction criminelle* from 1808, and therefore describes a mixed accusatory system (or what the Germans call revised criminal procedure) and is worthy of the 1995 Criminal Code. The government plans to present the corresponding bill during the

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current term of office (2011-2015). One specific problem will be how to regulate the criminal procedural fight against terrorism within what remains an overall model of accusatory criminal proceedings - this will not be at all easy, as will be seen in the forthcoming pages.

Criminal procedural reforms since the reinstatement of democracy in Spain, the most important anyway, have affected not only the summary stage of Spanish criminal procedure, but also the regular process and the right to a defence, the area we are primarily concerned with here. Many of these reforms have not been brought about by procedural laws in the strict sense of the words, but rather through, for example, major reforms in the Criminal code. I will offer a fairly full list as some knowledge of the major reforms helps better understand our particular situation and allows for comparison at this time of such significant legislative reform in Rumania:

1) Legislation:

A. Changes which affect ordinary and special processes

a) Jurisdictional conflicts: The Organic Law (henceforth abbreviated to OL) 2/1987, from 18th May, annulled articles 48 to 50 of the LECRIM pending new legislation on the matter.

b) The creation in Spain of a National High Court. Almost two years prior to the Constitution a trial court was created specifically with the purpose of trying certain especially serious crimes such as terrorism, the National High Court (henceforth abbreviated to NHC). Its existence is sanctioned under articles 62 onwards in the Courts Act (henceforth abbreviated to CA).

c) Changes in jurisdictional authorities for the criminal courts. These were introduced following the LO 4/1988, from 25th May, relating to reform of the LECRIM, with the LO 7/1988, from 28th December, relating to criminal trial courts which modified various precepts from the LOPJ and the LECRIM, and with the Law 36/1998, from 10th November, which modified article 14, sections 1 and 3, of the LECRIM. A law from 2009 gave certain certain functional judicial authority to the court clerks.

d) New legislation was introduced to combat gender violence. The Law 27/2003, from 31st July, brought in the restraining order for cases of domestic violence, but it was the LO 1/2004 Full Protection against Gender Violence, from 28th December, which dealt in more detail with the civil and criminal regulation in cases of gender violence involving a man, either the husband or the sentimental partner, and a woman even when they do not cohabit. New criminal offences were introduced and other existing ones were modified. The great novelty was the creation of a new jurisdictional organ with specific responsibilities, the Trial Court for Violence against Women.

e) The demand for criminal accountability for corporations (Corporate Criminal Liability) in a criminal trial: The regulation of criminal accountability for corporations came into being for the first time in Spain through a 2010 law reforming the Criminal Code, which overlooked the need to provide trial entities to make these hearings possible. These provisions were introduced later in Law 37/2011, concerning *Medidas de Agilización Procesal* (Measures to Speed Procedure), from 10th October, and had a profound impact on the fight against terrorism as the front companies used by armed organisations, especially for financing their activities, could now also be brought to trial meaning that, either by collective or individual criminal trial, the results have been much better and more satisfactory for society.

f) New speedy criminal trials, hugely important as they are sufficient for less serious crimes and misdemeanours, which are the most numerous, were introduced, one through the LO 7/1988, from 28th December, and the other through Law 10/1992, from 30th April. These were subsequently reformed by the LO 2/1998, from 15th June, which meant modifications being

made to the Criminal Code and the LECRIM, and again by the LO7/2002, from 5th July, meaning partial reform to the LECRIM amongst other laws.

g) Misdemeanor trials. Law 10/1992, from 30th April, made significant changes to this ordinary process, one of those originally considered in the LECRIM.

h) Cassation review. In order to balance the situation concerning grounds for appeal in civil and criminal trials, Law 9/1985, from 27th March, and Law 21/1988, from 19th July, were passed. These have reformed the grounds for denial of the appeal. Law 21/1988, from 19th July, reformed articles 855, 876, 882 bis, 884, 885, 893 bis, a), and 898 of LECRIM.

i) Retrial. Law 10/1992, from 30th April, reformed criminal review to make it suit the new demands imposed by the Spanish Constitutional Court (henceforth abbreviated to the CC).

j) Criminal procedure for speedy trials for certain crimes. Law 38/2002, from 24th October, created, along with other reforms, a new criminal procedure, the procedure for speedy and immediate trials in certain crimes and misdemeanours.

k) Safeguarding the basic rights recognised by the Constitution. Originally covered in the criminal domain in articles 1 to 5 of Law 62/1978, from 26th December, these governed the legal protection of basic human rights, but were annulled by Law 38/2002, from 24th October, meaning that there is now no specific legislation covering this area.

l) Victim protection. The LO 14/1999, from 9th June, modified the 1995 CC and the LECRIM concerning victim protection in cases of (domestic) abuse.

m) Terrorism. Given the importance of this issue, please refer to section IV of this text where it is dealt with separately.

n) Suppression of punishments. Law 6/1984, from 31st March, suppressed article 995 of the LECRIM which dealt with interdict penalty.

o) Increased penal fines, through the LO 8/1983, from 25th June, which reformed article 14 of the LECRIM, and through Law 10/1992, from 30th April, which reformed articles 175-5º, 420. 684 y 716 LECRIM.

p) New legislation on mediation. Mediation, a way resolving a conflict through negotiation so that both parties reach an agreement by accepting the proposal made by a neutral mediator who is authorised to draw up the agreement and to ensure that the conditions of the agreement are met, has finally been regulated in Spain under Law 5/2012, from 6th July, for mediation in civil and trade cases. Although this law does not include mediation in the criminal field for adults (though it is recognised for juveniles), future reform of the Criminal Code, being drawn up currently, could change some things (Bill for Criminal Code Reform, 2012), and so be binding on certain criminal procedural dispositions.

B. Changes affecting the pre-trial stage

Ordinary criminal procedure for serious criminal offences in Spain, the other procedure originally covered by the 1882 LECRIM, is divided legally into two separate phases. It is in the first of these two stages, that of criminal investigation, known as teh summary phase, where the most significant changes have been introduced since the Spanish Constitution was agreed in 1978.

a) The public nature of the pre-trial stage: The right to a public procedure, guaranteed in articles 24.2, 120.1 and 120.3 of the Constitution, is expressed under Law 53/1978, from 4th December, passed just a few days before the Constitution, but without a doubt grounded in that finished text.

b) Reform in the obligation to report a crime in international cases of drugs trafficking has come about through the LO 8/1992, from 23rd December, which added article 263 bis LECRIM.

c) New legislation on criminal "instruments and effects"(weapons, drugs etc. seized by the police) was brought in with Law 4/1984, from 9th March, which amended article 338 of the LECRIM.

d) Modifications were made to witness evidence legislation: OL 12/1991, from 10th July, which reformed articles 411, 412, 413, 414, 415, 70 and 703 of the LECRIM.

e**)** Changes were made to search and seizure legislation under Law 10/1992, from 30th April, a rewriting of article 569 of the LECRIM.

f) Reforms relating to illegal arrest came about with a reworking of article 17.4 of the Spanish Constitution, when OL 6/1984, from 24th May, set out in Spain the institution of "Habeas Corpus".

g) Reform over temporary custody pending trial. The right to personal liberty guaranteed under article 17.1 of the Spanish Constitution was further developed to ordinary level where criminal procedure is concerned, because, among other reasons, the Spanish Constitution itself had demanded regulation over the maximum duration of preventive imprisonment on more than one occasion, presumably due to the complexity of the issue. Thus, prior to current drafting of articles 503, 504 and 529 of the LECRIM, amongst others, found in OL 13/2003, from 24th October, which reformed the LECRIM guidelines on preventive prison, Law 16/1980, from 22nd April, OL 7/1983, from 23rd April, and OL 10/1984, from 26th December, were passed.

h) Investigating drug trafficking and other types of organised crime. OL 8/1992, from 23rd December, which modified the Criminal Code and the LECRIM in matters relating to drugs trafficking, needs mentioning. Law 21/1994, from 6th July, which brought changes to article 338 of the LECRIM pertinent to the destruction of confiscated drugs, and OL 5/1999, from 13th January, which modified the LECRIM on improving investigative action in cases of the illegal drugs trade and other illicit crimes, which acknowledged a new type of proactive investigation technique, that of the infiltrator policeman, so creating the figure of undercover agents in Spanish Law (article 282 bis LECRIM).

i) Collecting DNA evidence in criminal procedure is covered by articles 326 and 363 of the LECRIM, subsequently reformed by OL 15/2003, from 25th November.

2) Principles

The general principles which govern criminal procedure are those of the Democracy, adapted to suit this topic. Thus, when classified systematically and with normative reference to the Spanish Constitution, I have to say that our underlying laws have upheld the following principles:

1) Concerning the organisation and working of the criminal courts (Jurisdiction): a)The principle of unity (art. 117.5 of the Spanish Constitution), b) the principle of jurisdictional exclusivity (art. 117. 3 of the Spanish Constitution), c) the principle of judicial independence (art. 117.1 of the Spanish Constitution), d) the principle of the legal Judge (art. 24.2 of the Spanish Constitution) and e) the Jury (art. 125) reinstated in 1995.

2) Concerning the right of public access to the criminal courts. a) the right to uninhibited access to the courts of law (art. 24.1 of the Spanish Constitution, for those without financial means, art. 119 of the Spanish Constitution) and b) the prohibition of undue procedural delays (art. 24.2).

3) Finally, the principles relating to processes and procedures are Equality; contradiction or the right to be heard; the principle of observing due process guarantees (art. 24.2), which means as well as the constitutionalization in our country of the principle of due process of law, the maxim that can cover any constitutional omissions where other equally important procedural principles are concerned. The principle of presumed innocence is also upheld by article 24.2 of the Spanish Constitution, which is primarily of a criminal content - the oral presentation of proceedings, the public nature of proceedings, and the principle of prohibition of double punishment, amongst others.

3) The Defendant´s rights

It is important to highlight that the accusatory principle is not explicitly covered by the Spanish Constitution but the Constitutional Court has often repeated that it is present in and influences the constitutional legislation that governs our criminal procedure, making up part of the right to proceedings with all the guarantees of article 24.2 of the Spanish Constitution.

All of these principles are regulated by the Spanish Constitution and developed under the LECRIM. We will see as we continue which of them affect the defendant from differing perspectives.

In this respect and above all, the legal statute for the defendant, with the following characteristics, must be highlighted:

a) The defendant is a party in the process and as such is subject to a series of various procedural rights and obligations, depending on the stage of proceedings.

b) The defendant must appear before the trial court but is not obliged to testify. (art 24.2 SC, art. 520.2, a) and b) the LECRIM). The testimony of the defendant implies a voluntary act and a right but it is not an obligation. This is why any kind of coercion is forbidden (arts. 15 SC, and 387, 389, 393 y 520 the LECRIM). The obligation to appear at trial is sanctionable by arrest (art 487 the LECRIM).

c) The defendant can be used for the performing of certain means of proof, such as with the expert witness or for legal identification. Questioning of the defendant at trial is of the utmost importance both for evidentiary purposes and for him to exercise his right to a defence.

d) Finally, he or she is the holder of assets and rights upon which the enforcement of a judgement may be meted out. It is his freedom and assets which are subjected to cautionary measures to guarantee the possibility of enforcing a future sentence.

4) Spanish Constitutional Court Doctrine

Many aspects of legal reform have been analysed by our highest courts, especially the CC, which have declared as anti constitutional certain laws, such as –

1) S CC 10/2002, from 17th January, which found unconstitutional art 557 of LECRIM, referring to the entering and searching of hotel rooms.

2) S CC 71/1994, from 3rd March, which found unconstitutional art 504 bis LECRIM, dealing with certain prerogatives of the prosecuting attorney when challenging the provisional release of certain criminals of organised crime.

But on other occasions laws which affect issues dealt with in this presentation, already mentioned or referred to shortly, have been analysed and found constitutional. Worth highlighting is the finding by the S CC 48/2003, from 12th March, that the LO 6/2002 concerning Political Parties, from 27th June, which was applied in order to declare illegal the Basque nationalist political group *Herri Batasuna*, was constitutional.

All of the reforms mentioned above have been discussed line by line during their passage through parliament, as is fitting under our political legislation, and have also been at the centre of in-depth analysis by legal experts in journals, congresses and work shops.

Furthermore, it cannot be said that there is emergency doctrine, at least of a general nature, in this area of legislation, although it is true that the 1988 reforms, which came after a very difficult period in our history following Colonel Tejero´s attempted military coup on 23rd February 1981 and the series of fatal terrorist attacks towards the end of the decade, make some legal commentators form the opinion that indeed there is. This is because in reality certain basic rights of the defendant have been limited. That we have not been flooded with this type of legislation after the multiple terrorist attack in Madrid on 11th March 2004 which killed 191

people, is an unmistakeable indicator of the political – legislative desire to proceed with caution in the face of such provocation.

II. The almost total recognition of the right to a defence

Spain has opted for almost total recognition of the right to a defence, that is a defence prepared either by a lawyer of the defendant´s own choosing or a court-appointed lawyer in the case of less affluent individuals. This right has been recognised constitutionally in several precepts (arts. 17.3, 24.1, 24.2 y 119 of the Spanish Constitution). This is true primarily because the defendant has the right to counsel from the very moment of arrest (arts. 17.3 y 24.2 CE, y arts. 118, 520 y 767 LECRIM).

Several legal changes have been made to the right to counsel. Of particular note is Law 53/1978, from 4th December which meant changes to arts 520 and 522 of the LECRIM, and the LO 14/1983, from 12th December, which affected arts 520 and 527 of the LECRIM. This final article, hugely important in the fight against terrorism (see *infra*), was declared to be within the Constitution by our Constitutional Court (S 196/1987, from 11th December).

1) Appointment

The first important thing to consider is the question of when appointment of a defence attorney becomes procedurally compulsory. Spanish Law is a little unclear with respect to this, making an erroneous distinction between various systems depending on which is the relevant specific criminal procedure.

1. Compulsory appointment: the defendant must appoint a defence attorney (the lawyer who will defend him/her) and a legal representative, if he does not already have them (art. 545 CA) as soon as he is notified of the court summons, in regular procedures for serious crimes, once the hearing for the characterization of the defence is under way (art. 384, II and 652, II LECRIM). In summary procedures, the appointment must be made as soon as legal advice is required; in other words, the moment of arrest or the first formal accusation of a crime, and whatever else for the hearing (arts. 767 LECRIM). In speedy trials for certain crimes (art. 796.1-2nd LECRIM). If no defence attorney is named, a legal aid lawyer will be appointed by the court (art. 545, CA and art 118 III and IV, 520.2, c) 'in fine'. 552, II, and 767 LECRIM), because the authorities are bound to safeguard the defence and legal assistance for anyone who cannot afford a lawyer (art. 545 CA, referring to arts. 14, 17, 24 and 119 SC, and arts. 118 and ss, and concurrent LECRIM)

The Spanish Legal Aid Justice System does not make use of a public defenders' office as in the Anglo-saxon or Latin American systems, but rather decisions concerning the legal representation of indigent or poor defendants are made by the bar association in conjunction with public administration which reaches a decision concerning the defendant's financial status. However, in practice, any defendant who claims to have insufficient funds when arrested, will receive legal aid, and so will not have to pay a defence attorney.

2. Voluntary appointment: according to art 545.1 CA, parties, and therefore the defendant, can freely appoint the attorney of their choice as long as he or she has the qualifications required by the law, and there is no legal barrier to him or her acting in the defendant's defence (v. art. 527, a) LECRIM, declared as constitutional by the S CC 196/1987, from 11th December)

According to the new wording of art 520.2, c) LECRIM, every detainee or inmate has 'the right to name a lawyer and to request his presence at any police or legal statement proceedings or identity parades he or she is subject to...'. It is not thereforepurely decorative.

Art. 118 LECRIM refers to legal situations at arrest or prison, whilst art. 520 LECRIM is related to police activity prior to the procedure. In this way, as the constitutional right to legal defence is the same, both possibilities are taken into account in order to fully guarantee the appointment. But this should not lead to any misunderstanding; the basic right to a legal defence is the same and it is applied throughout the entirety of criminal procedure. It must be the same defence lawyer from start (the arrest) to finish (sentencing) as is the case in speedy criminal trials (see arts. 767 and 796. 1-2nd LECRIM). Furthermore, art. 118 LECRIM is applicable even when there is no arrest, nor prison, since there are times when a citizen is informed of a case against him/her, but no arrest is made.

2) Legal System

Concerning the legal system for legal representation, the following general points are worthy of mention:

a) Once the defendant has been informed of his/her right to name a defence attorney (art. 520.2, c) LECRIM), and this lawyer is present, he/she can request that the defendant be informed of his/her rights (art. 520.6, a) LECRIM); that the contents of the record of questioning, or any events that took place during questioning, be extended or modified (art. 520.6, b) LECRIM); and finally, that he be granted a private audience with the defendant subsequent to the end of questioning or any other legal proceeding (art. 520.6, c) LECRIM), although in speedy trials he/she can meet with the defendant before hand as well (art. 775, II LECRIM).

b) Any legal aid lawyer asked to act on behalf of the defendant is bound to respond to the Bar Association's summons within eight hours (art. 520.4, I LECRIM, even though the police questioning can take place if he/she does not appear within this time), and will be held responsible if he/she fails to (art. 520.4, II LECRIM).

c) The right to legal representation can be renounced, but only in cases of traffic offences, including driving under the influence (art. 520.5 LECRIM).

d) If the procedural situation requires solitary confinement (which is usually the case in arrests of suspected terrorists, rebels or major criminals, see gr, drug smugglers, arts. 407, 408, 509, 510 and 520 bis 2 LECRIM), the defendant does not have the right to choose his/her own defence attorney, but rather one will be assigned to him/her; he/she can not contact relatives; nor does he/she have the right to a private audience after the procedure in question (art. 527 LECRIM).

The law grants limited capacity for the defendant to name a lawyer in certain cases: 1) In summary trials (art. 967 LECRIM); 2) Proposal of a motion to challenge whilst in solitary confinement (art. 58 LECRIM); 3) To request the reinstatement of the writ to elevate the arrest to confinement (art. 501 LECRIM); 4) To propose procedures in his favour when entering a plea during the pre-trial stage (art. 396, I LECRIM); and 5) the right to 'the final word', the most genuine demonstration of the right to the defend oneself, at the end of the celebration of the trial (art. 739 LECRIM).

3) Other contents

The defendant is also granted other rights during this first stage of Spanish criminal procedure, such as: the right to have mitigating circumstances recorded and to be informed of his/her rights (arts. 17.3 SC, 2 and 767 LECRIM); the right to be informed of summary proceedings, as long as the these have not formally been declared secret/confidential (art. 302 LECRIM); the right to "habeas corpus" (arts. 17.4 SC, 286 LECRIM, and OL 6/1984, from 24th May, which governs this right); the right to be issued with a formal indictment summons, in other words, the order to stand

trial if relevant (art. 384, I LECRIM); the right to make an initial statement before the judge regarding the facts of the case, within 24 hours of arrest, if he/she has been charged (art. 386 LECRIM); the right not to make a general statement or be made to incriminate oneself and the right to declare oneself not guilty, that is to say, the right to remain silent (art 17.3 and 24.2 SC); the right not to be compelled to tell the truth (art. 387 LECRIM); the right not to be led by suggestive questioning (art. 389, II LECRIM); the right to an interpreter (arts. 398, 440, 441, 520.2, e) and 762-8ª LECRIM); the right not to be the subject of torture, coaction or threats in order to make a statement (art. 15 SC and arts. 389, III; 391, III and 394 LECRIM, and 1984 New York Convention); the right to be presumed innocent (art. 24.2 SC); the right to challenge expert witnesses (art. 469 LECRIM); the right to be heard when accused of a criminal offence (arts. 24 SC and 486 LECRIM); the right to a proper arrest according to all the formal legal requirements (arts. 17.1 SC and 489 LECRIM); the right to be sent to have the arrest increased to prison or to be released within 72 hours (arts. 17.2 SC, 497 and 499, I LECRIM); the right that the committal be confirmed or annulled within 72 hours of imprisonment if relevant (art. 516 LECRIM); the right to immediate release once innocence has been established (art. 528, II LECRIM); the right for his/her home not to be searched unless the law stipulates otherwise (arts. 18.2 SC, and 545 LECRIM, and art. 21 LSC); the right to be informed concerning the preliminary findings (art. 623 LECRIM), etc.

4) Constitutional rights on the presumption of innocence and protection against self-incrimination

The presumption of innocence, as well as the right of the suspect, detainee or defendant, to remain silent, and the protection against self-incrimination or pleading guilty, are basic rights for the detainee or defendant in criminal Spanish procedure, and as such, are constitutional rights as stated in Art. 24 of the SC. They form an integral part of the right to a defence in that they protect the individual against the State, but the individual's legal treatment is independent of this.

A. The presumption of innocence is not really a presumption at all, but rather an evidentiary rule which is given this high status due to the way in which it affects the legal trial system one would expect in a democracy. It plays a less important part in criminal procedure, as an accusatory system tends to consider the defendant as innocent unless certain suspicions or well grounded evidence indicates the contrary. This is why the defendant enjoys the basic right to demonstrate his/her innocence from the very moment of arrest (art. 24.2 SC), but does not have to do so in order to be acquitted. Where the presumption of innocence is paramount is at the moment of handing down the sentence. Spanish constitutional jurisprudence has seen how, on many occasions, the presumption of innocence has required the acquittal of the defendant.

1) If no evidence has been produced during the trial;

2) If evidence has been provided but this is not substantial, in other words, the prosecution has not produced incriminating evidence; and

3) If there is substantial evidence but this is not considered to be sufficient to overrule the presumption of innocence, for instance, if it is no more than a piece of circumstantial evidence.

In conjunction with another evidentiary rule, the maxim that *in dubio pro reo*, not expressly recognised by law but recognised by legal doctrine, which refers to substantial evidence with uncertain conclusions concerning either criminal activity, or the defendant's participation in said activity, it can be concluded that the presumption of innocence plays a very important part in Spanish legal practice.

B. The rights to remain silent and the protection against self-incrimination, are manifestations of the right to counsel within an adversarial, although mixed, system as is still the case in Spain. The importance of its constitutional recognition in Spain, can be seen in the way it

affects the most delicate moment for the defendant; his/her sworn statement to the police. Art. 520 LECRIM further develops these safeguards.

Its practical efficacy lies in, on the one hand, the fact that the law enforcement agencies cannot force the answers during questioning, although they can continue to enquire if the defendant refuses to answer a question. Furthermore, if this right is not respected, the whole statement will be declared invalid, which could mean acquittal of the defendant due to lack of evidence once the answers obtained in this fashion have been excluded as evidence.

Since the solemn declaration of the Spanish Constitutional Court in its decision 99/1985 from 30th September, that being Spanish or foreign in Spain makes absolutely no difference in procedural questions, since the relevant rights correspond equally to Spanish and foreign individuals. This also applies to those basic individual rights as a person, not as a citizen, in other words, those rights which are necessary to guarantee human dignity which, according to art. 10.1 of our constitution, make up one of the foundations of Spanish political order. One of these basic rights guarantees that all people will receive effective protection from the Judges and Courts (art. 24.1 CE).

Of course, it is certainly not the case that there are two types of criminal rights, one for friends and one for enemies, nor is anyone considered less than a person under the Spanish body of laws. What is more, Spain is probably the country where the clearest and most explicit rejection of the German criminal procedural law professor Günther Jakobs' theories on the existence of a *Feindstrafrecht*.

5) Withdrawal of constitutional guarantees

The SC allows the withdrawal of certain human rights in situations which are extremely threatening to Spanish democracy. Therefore, Spain is among the countries which best distinguishes between revocable and non-revocable human rights in extreme political situations. This is done via two different possibilities:

A. In accordance with art. 55.1, the following listed rights can be temporarily withdrawn (revoked) when a state of exception or grave threat to public order has been declared.

a) Procedural rights whilst in police custody (the legality of the arrest, maximum duration, information, defence attorney and habeas corpus) recognised in art. 17 of the SC (although the right to be informed of the arrest and legal assistance can only be withdrawn in the case of grave threat to public order, art. 55.1 *in fine* SC);

b) The right to inviolability of the domicile, art. 18.2 SC;

c) The right to privacy in postal, telegraphic and telephonic communications, art. 18.3 SC;

and,

d) Other non-procedural rights covered in arts. 19 (freedom of movement and residence), 20.1, a) and d) (freedom of information and the Press), 20.5 (seizure of publications), 21 (assembly and demonstration), 28.2 (strike), 37.2 (collective disputes) SC.

The states of exception and of grave threat to public order are governed by art. 116.2 and 3 of the SC and in the OL 4/1981, from 1st June, covering states of alert, exception and grave threat to public order. These states are declared by the Government, following authorisation from the Spanish Congress. The corresponding rule must establish how far-reaching and long-lasting the limitations on these rights are.

Fortunately, we have never had the opportunity to test the efficiency of these rules in the defence of democracy.

B. Procedural rights during police custody (the legality of the arrest, maximum duration, information, defence attorney and habeas corpus) recognised in art. 17 of the SC (although the right to be informed of the arrest and legal assistance can only be withdrawn in the case of grave

threat to public order, art. 55.1 *in fine* SC); rights to inviolability of the domicile, art. 18.2 SC, and the right to privacy in postal, telegraphic and telephonic communications, art. 18.3 SC, can be withdrawn for certain individuals when the activity of armed groups or terrorist organizations is under investigation (art. 55.2, I SC).

Since this is a permanent criminal possibility, there is, logically, no time limit on this withdrawal. Statutes can be found in the LECRIM, in which the corresponding limits to these rights, authorised by art. 55.2 of the SC, are expounded.

In this second case, the withdrawal must be governed by organic law – as was originally the case with OL 9/1984, from 26th December, against armed groups and terrorist organisations, and as a further development of art. 55.2 of the SC, now repealed, and its provisions incorporated into the Criminal Code and the LECRIM through subsequent reforms, meeting the requirement of organic law approval. The key is legal authorisation, but art. 55.2, I of the SC requires parliamentary control of these measures and art. 55.2, II of the SC refers to the CC in the case of unjustified or abusive use of the powers recognised by the legislation and which, in the CC and LECRIM are destined to be used in the legal fight against organised crime and terrorism.

In both cases, those charged with hearing criminal procedure cases are the members of the ordinary judiciary: thus, such cases will never be tried by military courts.

Spanish criminal procedural legislation will under exceptional circumstances allow the investigation stage to be proclaimed secret for a limited period of time, and may forbid the use of documents declared to be secret for reasons of state. Secret legislation cannot be passed under any circumstances nor are there any secret justice officials, with the exception of undercover policemen (see *infra*). Also bear in mind the public nature of court proceedings (art. 120.1 of the SC), and, when these happen, of criminal trials, with very few exceptions (art. 680 of the LECRIM).

6) The public nature and secrecy of proceedings

A. The secrecy of proceedings is governed by art. 301 of the LECRIM, although what is really meant by this precept is that summary investigation proceedings are not open to the public, to third parties.

The ruling of secrecy that concerns us can be found in art. 302, II of the LECRIM. This makes it clear that neither the defendant nor his defence attorney are to be informed of the investigation proceedings being carried out by the public law enforcement agencies (chiefly the police and the prosecutor, but also the investigating judge). The prosecution, although a party in the trial, is not excluded from hearing the information following the secrecy declaration of the investigating judge. This is therefore an exception to the adversarial principle, the unconstitutionality of which has not been admitted.

In practice, the declaration of secrecy in summary proceedings is frequently called into use, especially in the investigation phase of proceedings against members of organised crime, in Spain mainly mafiosos and drug traffickers, and against terrorists.

B. With respect to reserved or secret documents, with the exception of diplomats, who are protected under international law, and those papers that are protected by Spanish legislation for different reasons, such as those of the defence attorney (arts. 25 and 32 of the General Regulations for the Spanish Bar from 2001), those of notaries and property registrars (art. 578 of the LECRIM), the basic regulation can be found in the Spanish Law of Civil Procedure from 2000, which in art. 332.2 forbids the procedural use of any documents that have been deemed secret or reserved, governed by the Official Secrets Act 9/1968, from 5th April, subsequently modified by Law 48/1978, from 7th October.

III. The absence of prisoners of conscience

In my country, citizens therefore enjoy total political and civil freedom. Thus, there are no prisoners of conscience, nor can there be, since every individual has the right to express his or her views through pacific methods, the only limitations being that other citizens' rights must be respected and no-one may incite or support violent or subversive activities against the democracy. This is a right guaranteed not only to Spanish nationals but also to the significant number of foreign residents in the country.

This statement of fact requires some qualification, however, for in Spain, since before the beginning of the democracy, that is to say since the 1960s, there has been a serious problem with terrorism, still not definitively resolved. This terrorist threat is mainly comprised of the organisation ETA, although in our more recent history other groups have been active (we remember the terrorist attack in Madrid on the 11th of March, 1994, which caused 191 deaths, work of an Islamic terrorist group).The criminal organisation, ETA, has, for decades now, used violence with the aim of gaining independence for the Basque country, "El Pais Vasco", an area of exceptional beauty in the North of Spain which shares a partial border with France. To hide the problem would not be good for democracy, nor would it be wise to allow this terrorist group to express their unfounded criticisms of the State of Spain throughout the world without issuing a categorical condemnation. Towards the end of this presentation I will say a few words on the new situation that has arisen since the armed group´s cease fire one year ago.

The reason for which there are no prisoners of conscience in Spain is neither political, nor sociological, nor is it cultural; it is quite simply legal. Not a single individual in Spain can be detained or imprisoned due to their ethnic origin, their gender, the colour of their skin, the language they speak, their social status, their financial situation or their sexual orientation. Neither can anyone be imprisoned for expressing their ideas.

The Constitution, by consecrating in the letter of the law and through practising the principle of equality in reality, forbids, on the one hand, any type of discrimination and as such, will not permit imprisonment for any of these reasons. Furthermore, by establishing freedom of ideology and thought, the constitution also safeguards against any administrative or criminal prosecution for the ideas that one may hold. Also, the fact that freedom of information and freedom of the press, almost absolute where I am from, are basic and fundamental rights means that journalists cannot be detained and tried for providing information on issues that may not be popular with the government or which pursue an ideological path different from that of the political party in power.

Anyone who uses violence to achieve certain ends, mainly political in nature, is outside the law if they commit a violent act classified as a crime under existing legislation, and also on occasions if they are seen to advocate the use of violence or offer ideological support of the perpetrators.

It is precisely the violent nature of these acts in a democracy that means that those responsible cannot be considered political prisoners, although no doubt members of the terrorist organisation argue to the contrary through their shameful legal lying. Spanish governments since the earliest days of the democracy are right when they say that in Spain there are no political prisoners. These people are simply criminals upon whom the full weight of the Criminal Code must be brought to bear in a fair trial as guaranteed by the Constitution. They do not even constitute a threat to the democracy, since it is now so robust, and they will never achieve what they set out to do; to gain Independence through the use of violence, in the face of total rejection by the Spanish population, including the vast majority of Basque society.

But this does not mean that the State should not deal seriously with this problem and defend itself against terrorist attacks, which have been especially worrying, as you will know, in

Spain in recent years. I will now go on to consider this question from a procedural perspective, with reference to legislation from my specialist area of knowledge.

IV. Democracy's fight against those who threaten it; the legal problem of terrorism and the right to a defence

Before I continue – and now that we have seen that there are no political prisoners in Spain, nor can there be, and that the only possible problem in this respect would be that of terrorism, a problem to which I have alluded several times already in this text, since in the eyes of the perpetrators there are political issues at stake – it is worth highlighting that the State's reaction in its fight against this threat to date has not been to pass new anti-terrorist legislation. This shows how the Spanish authorities consider terrorists simply as criminals, albeit guilty of serious crimes, but when all is said and done, nothing more than criminals. That is why, and here I must insist, there are no special or emergency criminal laws against them, nor is there a special criminal procedure for their trial. The rules governing this area from a substantive perspective are to be found in the Criminal Code, and those describing procedure in the Criminal Procedure Act. There is, therefore, no special criminal procedure specific to instances of terrorism; the same Criminal Code and the same Criminal Procedural Code are applied to terrorists as to all citizens. One last point: under no circumstances are military tribunals employed instead of the ordinary trial courts.

There was, however, special legislation in the past, most notably during Franco's dictatorship and in the early days of the democracy. But the scourge of terrorism has forced constant reform both in terms of substantive and procedural law, in an attempt to provide the most efficient legal response to the inadmissible challenge that such terrorist groups represent, especially within the framework of a democracy.

The first anti-terrorist law was passed in Spain in 1968, during the times of the Franco dictatorship, although there were some precedents. This made terrorist and "militia/bandit" activity fall under the jurisdiction of the military courts. Franco´s final anti terrorist law, in August of 1975, three months before he died, made certain terrorist activities punishable by the death penalty, and others were to be given very heavy sentences, but they were no longer to be tried by the military courts. Some were tried by the now sadly famous, or infamous, *Tribunal de Orden Publico*. One of the first laws passed under the Monarchy, in February of 1976, nullified the most significant legislation from the times of Franco in this area, and under the leadership of President Suarez almost all trials for suspected cases of terrorist activity were moved under the authority of the ordinary jurisdiction in January 1977. Important new legislation in this area was passed in 1978, 1979, 1980, 1981, 1984 and 1988, the worst years of escalating terrorist activity in the newly born democracy, and again in 1995, 1998, 2000, 2002, 2003 and 2005, for different reasons but now in a slightly less tense atmosphere.

The fight against terrorism in times of the democracy deserves closer attention. In accordance with art. 55.2 of the SC, antiterrorist legislation, if it needs to be passed, must regulate any judicial intervention in the phases of investigation and taking of precautionary measures which interferes with the defendant's or accused's rights; it must consider the cases in which and indeed the way in which it is used, and its application must be controlled by parliament, and if the conditions are met, the following rights can be limited or withheld – arts. 17.2 (length of arrest), 18.2 (inviolability of the domicile) and 18.3 (privacy of communications) of the SC, for certain individuals under suspicion of belonging to armed groups or terrorist organisations. It is worth noting that these basic rights can only be limited or withheld to the defendant. In accordance with this, the following legislation has been passed

1) Two very significant anti-terrorist laws, the Organic Laws 3/ and 4/1998, from 25th May, which have meant the formal repeal of anti-terrorism legislation, as I have already mentioned, but not in terms of meaning or effect. These are the result of the S CC 199/1987, from 16th December, which held that legislation partially unconstitutional. The opinion of both Spanish criminal and criminal procedural law scholars has been of the opinion, and not without reason, that this legislation exceeded itself with respect to the agreed content of art. 55.2 of the SC, thus making it an authentic piece of exceptional or emergency legislation.

2) Though not directly envisaged as part of the fight against terrorism, whilst still applicable to certain areas of the legal struggle against this pernicious phenomenon, as well as in drugs trafficking cases, OL 1/1992, from 21st February, on the Protection of Citizen Security, needs to be mentioned. This is an administrative law.

3) The laws passed in order to prevent and block the funding of terrorist organisations (OL 4/2003, from 21st May, and Law 12/2003, from 21st May), should also be alluded to. These were in line with international trends on the matter.

4) The CC of 1995 also contains procedurally important provisions in the fight against terror, even leaving aside the legislation referring to crimes of terrorism (arts. 571 to 580), especially the provisions concerning "those who have repented", that is to say those members of groups dedicated to organised crime who turn state´s witness and in turn receive substantial and procedural benefits, as long as they meet the strict legal requirements (arts. 90.1, 376 and 579 of the CC, to which art. 72 of the OL 1/1979, from 26th September, on the General Penitentiary should be added if we bear in mind the major reform of 2003). This sensitive topic is nothing new in our Law, but it has, over the past few years, gained greater legal and jurisprudential development, although it is yet to be accepted by legal scholars as it is not proving effective in practice.

5) The International agreements in the fight against terror, ratified by Spain, should also be mentioned (Strasbourg in 1977, New York in 1999, Prüm in 2005 and New York in 2005).

I should mention, incidentally, that legal scholars are of the opinion that the procedural criminal law struggle against organised crime, and more particularly against terrorism, affects the principle of procedural equality (art. 14 of the SC), also known as the principle of equality of weapons. This is due to the important role played by the police and the prosecution office in these procedures, as well as the restrictions on the right to a defence and the possibility of being kept in solitary confinementwhich give the government the upper hand in the fight against this type of crime, which affects the due process clause, one of the demands of which is this state of equality.

It is also worth highlighting that there are hundreds of sentences handed down by the CC in appeals brought by people convicted of terrorism, some of themin favour of the appellant, but I will not look at them in detail here as they deal with specific basic rights of the condemned, which the plaintiff argued at appeal had been violated.

Such legal reform has not only come about in the field of terrorism, but also in certain areas of organised crime; which is why the legal texts now talk of "armed groups", "terrorist individuals" and "rebels", to which "gangsters", "drug smugglers", "child pornography rings", "slave" and "women traders" should be added.

But there are legislative specialities which allow for a different treatment and certain procedural variations to the trial of a common or garden criminal. Examples where terrorist defendants are concerned would include a centralised jurisdiction, an increased period of custody, custody or imprisonment in solitary confinement, certain leeway concerning human rights during the criminal investigation, a specific police task force, alimited right to counsel, certain rules concerning witnesses, a restriction on inadmissible evidence, rulings with specific

sentences, and specific rules concerning the execution of the sentence. Some of these I shall explain shortly.

The special treatment in these cases shows how democracy is taking a tough line in the fight against organised crime, especially against terrorists, by limiting certain constitutional guarantees and giving a freer rein to the law enforcement and criminal investigation agencies, especially the police. Research shows that Spanish society in general, as desiring of security as it is fed up of terrorism, always understanding of the victims of terrorist attacks, usually accepts these stronger stances towards terrorism and applauds any reform that strengthens the arm of the State in the fight against these criminals.

Outside the strict framework of Criminal Law and Criminal Procedural Law, important measures have also been taken in the fight against organised crime in general, and terrorism in particular. I would draw your attention to the inclusion of international rules, especially from the European Union, in the Spanish legal system, and national laws aimed at detecting and putting an end to the financing of these groups. Internal legislation has also meant that certain political parties which do not respect the rules of a democracy can be declared illegal.

Such practices also aid the intended strengthening of the democracy since many of the sentences handed down by our highest courts (the Constitutional Court and the Supreme Court) over the past two decades endorse a less rights based approach, especially where the police are concerned, even pushing the limits towards the violation of such basic and hallowed rights as the presumption of innocence and the right to a fair trial. The restrictive evolution where inadmissible evidence is concerned in the latest Spanish jurisprudence undoubtedly shows this to be the case.

One specific problem is that of the victims. The State has established public funds, to be financed by State budgets, for the repair in so far as any is possible to the harm and damage done.

The state's right to defend itself against anyone who threatens to rock its solid democratic pillars currently resides in making certain legal modifications to decisive aspects of criminal procedure. The aim is to make it impossible for terrorists to make use of cracks and weaknesses in the system and so escape judicial action. I would like to draw particular attention to the following five aspects:

*1) Jurisdictional authority of the courts***:** The jurisdictional authority for the trial and handing down a sentence in criminal cases involving organised crime, especially those accused of terrorist activities, is centralised in one jurisdictional body, called the National Court ("Audiencia Nacional", in Spanish) based in Madrid but with territorial jurisdiction throughout the whole nation. Created in 1977, this is an ordinary trial court / court of first instance. Cassation in these cases is heard by the Supreme Court.

The Spanish Jury Court, reinstated in Spain, as I have said, in 1995, has the authority to try a limited group of crimes via special criminal procedure, but none of these crimes would come under the category of organised crime, although perhaps a murder committed by a drug trafficker or sympathiser of a terrorist organisation could be heard in the Jury Court, as has already happened in Spain in the latter case (The sentence of the Spanish Supreme Court, abbreviated henceforth to SC, number 364/1998, from 11th March, RA 2355, in the *Mikel Otegi Case*).

*2) Custody***:** Maximum time in custody (for questioning), normally a period of three days, is extended to five days if the detainee is suspected of having taken part in organised crime or some terrorist activity.

*3) Solitary Confinement***:** In the case of organised crime, the law allows for the solitary confinement of the detainee or provisional inmate; this means he or she is denied any contact

with the outside world for a limited period of time, with access to his defence lawyer only, and even this is subject to the following proviso.

4) The right to a defence: The accused has the right to defence by counsel from the moment of arrest and throughout every step of the legal process, right up to its conclusion. But if the procedural situation is one of solitary confinement (usually the case where suspected terrorists are concerned, as I have just mentioned) the accused does not have the right to retained counsel but must rather be assigned a court-appointed lawyer, with whom the arrestee can only speak upon conclusion of police questioning. These provisions, which have precedents in both German and Italian law, have been severely criticised in Spanish legal doctrine because they restrict the individual´s right to counsel in ways not expressly prescribed in the constitution.

5) Completion of the sentence: The rules governing execution of the sentence have been interpreted in such a way that convicted terrorists leave prison later as their legally accrued prison benefits are minimised. Furthermore, the convict must first meet the requirements of civil responsibility and they must be judged to stand a good chance of social reinsertion. Under some circumstances, however, for humanitarian reasons the inmate might be granted time under house arrest, for example, if death is imminent.

I should remind you that the Constitution allows for certain human rights to be overruled in situations judged to be of extreme danger to the democracy. Spain therefore finds itself among those countries which distinguish at the highest level between non-revocable human rights and those that can be withdrawn in politically extreme situations. This is achieved by establishing two distinct possibilities: temporarily suspending certain rights for all citizens when a state of siege is declared or there is a grave threat to public order. Or, specific rights can be revoked for certain people when an investigation is underway for suspected terrorist activities. Fortunately, neither one of these two possibilities has been called for since the reinstatement of the democracy, not even in critical situations such as the attempted coup d'etat of the 23rd of February, 1981, or the spate of fatal terrorist attacks towards the end of the 1980s, or even after the aforementioned Madrid bombings of March, 2004.

This Spanish model is by no means unique in the world. Any state that suffers serious internal threats or conflict, including Azerbaijan if this is indeed the case, is entitled to take measures and impose certain restrictions upon criminal procedure involving those who threaten to break the peaceful existence or endanger the lives of the nation's citizens.

IV. Conclusions

To bring this paper to an end, I will say that the terrible scourge of terrorism that has afflicted Spain since the 1960s, mainly, though not solely, due to the activities of the terrorist organisation ETA, as there are unfortunately other terrorist groups operating among us, has driven constant legislative reform. This reform has been of both a substantive and procedural nature and the aim has been to heighten the effective legal response to this unacceptable challenge presented by these diverse groups, especially within the confines of the democracy. Since the 11th September 2001, there has been an increase in legislative reform in order to bring an end to these criminal groups.

As we have seen, legislative reform has not come about only with a view to terrorism, but also to certain sectors of organised crime. The major crimes that form part of organised criminal activity, and terrorism in particular, are in Spain subject to the exclusive authority of ordinary criminal jurisdiction and there is therefore no administrative (sanctioning) or military procedure under which responsibility can be sought for these acts.

As a consequence, the reforms which have come about have not established a special alternative procedural route other than that provided by the ordinary penal system since the

precepts that govern this area from a substantive point of view are now collected in the Criminal Code, and those that regulate the procedural aspect are to be found in the Law of Criminal Procedure (La Ley de Enjuiciamento Criminal).

It can therefore be said that there is no special criminal procedure for cases of terrorism. There are, however, legislative specialities which make it possible for certain procedural institutions affected by the new legislation to be treated separately and grouped together, and these have certain special characteristics when compared to the trial of a "normal" delinquent: centralised jurisdiction, a longer time limit on custody, solitary confinement during custody or the prison term, investigation of the crime and basic human rights, a specific police task force, limited right to a defence, special rules for witnesses, a limiting of the fruit of the poisonous tree doctrine, specific sentencing of prison terms.

These specialized treatments in specific cases mean that we can conclude that Democracy and the Government of Laws has strengthened its stance in the fight against organised crime, especially against terrorists, limiting certain constitutional safeguards and by providing law enforcement investigators and the prosecution, especially the police, with better means. It has been seen that Spanish society in general, so concerned about security and disgusted by terrorism, always empathetic towards the victims, usually receives these stronger stances with open arms and applaud reform when it gives more power to the Government in its struggle against these delinquents.

Outside the framework of what is strictly Criminal Law and Criminal Procedural Law, significant measures have also been adopted in the fight against organised crime, and especially against terrorism. I would draw particular attention to the way Spain has embraced the inclusion of international rules, especially from the European Union, in the Spanish legal system, and national laws aimed at detecting and putting an end to the financing of these groups, and internal legislation which makes it possible for political parties which do not respect the rules of a democracy to be declared illegal.

Practical applications have also helped with this intended strengthening of the state of democracy, since many sentences handed down by our highest courts (the Constitutional Court and the Supreme Court) over the past two decades have supported a methodology, especially by the Police, not entirely in line with safeguarding principles, even bordering on violation of such basic human rights as the presumption of innocence and the right to a fair trial (with all the safeguards this entails). The restrictive evolution concerning inadmissible evidence from recent Spanish jurisprudence shows this without doubt.

It seems that the armed activity of the main Spanish terrorist Group, ETA, has come to an end, once and for all, following their declaration on the 20th October 2011. There are well-grounded political reasons for such optimism that the cease in activity is permanent, and this will, little by little, change the legislative framework we now have in Spain to something closer to "normality". But as many other terrorist organisations are still at large, especially internationally, such as the Islamic groups which have hit my country so hard, most famously on March 11th, 2004, Spain will, in my opinion, continue with the same trend as in other countries threatened first hand by terrorism; that is a trend of severity and intolerance during a not-insignificant period of time. Anti-terrorist legislation will be kept in place and safeguards will be restricted especially where Police activity is concerned and efficiency can be heightened, the only limit being that nothing must clash directly with the literal overriding tenor of the Constitution itself. As a consequence, the evolution of the practical reality of these safeguards and guarantees in Spain, which entered a grey area some time ago, is in danger of continuing to do so, that is if the situation doesn´t get even darker for quite a long period of time.

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