

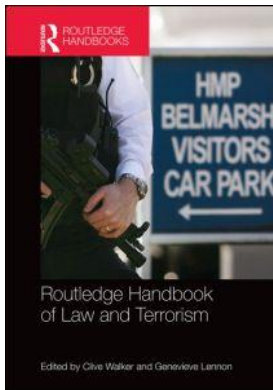
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On: 22 Sep 2020

Access details: *subscription number*

Publisher: *Routledge*

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## **Routledge Handbook of Law and Terrorism**

Genevieve Lennon, Clive Walker

### **Counter-terrorism, emergency, and national laws**

Publication details

<https://www.routledgehandbooks.com/doi/10.4324/9780203795835.ch3>

Mariona Llobet-Anglí, Aniceto Masferrer

**Published online on: 21 Jul 2015**

**How to cite :-** Mariona Llobet-Anglí, Aniceto Masferrer. 21 Jul 2015, *Counter-terrorism, emergency, and national laws from*: Routledge Handbook of Law and Terrorism Routledge

Accessed on: 22 Sep 2020

<https://www.routledgehandbooks.com/doi/10.4324/9780203795835.ch3>

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# Counter-terrorism, emergency, and national laws

*Mariona Llobet-Anglí and Aniceto Masferrer*

## In the name of security

Terrorism is a criminal phenomenon that has struck, and still does strike, all corners of the globe. Instances of local organisations abound, which, through death and destruction, submit certain societies to violence and coercion.<sup>1</sup> Spain and the UK are two of the countries that have experienced up close the barbarity of this form of criminality, at the hands of the armed groups Euskadi Ta Askatasuna (ETA)<sup>2</sup> and the Irish Republican Army (IRA),<sup>3</sup> respectively. Moreover, since the attacks of 11 September 2001, to that regional terrorism has been added a ‘global’ variety: ‘a limitless violence exerted by Islamic fundamentalists that threatens the maintenance of worldwide security’.<sup>4</sup> This global terrorism has vented its violence through the attacks in Madrid on 11 March 2004, and in London on 7 July 2005.

According to statistics, casualties inflicted by ETA amount to 829 up to the end of 2010.<sup>5</sup> Even worse, the Irish organisation IRA has caused the deaths of more than one and a half thousand victims in Northern Ireland.<sup>6</sup> As for the global terrorists, the attack of 11 March 2004 caused 190 fatalities,<sup>7</sup> whereas the attack of 7 July 2005 left 52 people dead in the explosions

- 1 It is not the purpose of this paper to examine the definition of terrorism, on which see Chapter 2 (Saul) in this book.
- 2 See M Cancio Meliá, *Los delitos de terrorismo: estructura típica e injusto* (Reus, Madrid, 2010) 21–22.
- 3 L Martínez-Peñas and M Fernández-Rodríguez, ‘Evolution of British Law on Terrorism: From Ulster to Global Terrorism (1970–2010)’ in A Masferrer (ed.), *Post 9/11 and the State of Permanent Legal Emergency* (Springer, New York, 2012) 201.
- 4 See F Reinares, *Terrorismo global* (Taurus, Madrid, 2003) 10.
- 5 See the statistics of the ‘Fundación Víctimas del Terrorismo’ in [www.fundacionvt.org/index.php?option=com\\_dbquery&Itemid=82&task=ExecuteQuery&qid=1&previousTask](http://www.fundacionvt.org/index.php?option=com_dbquery&Itemid=82&task=ExecuteQuery&qid=1&previousTask) accessed 7 February 2014.
- 6 See M Sutton ‘An Index of Deaths from the Conflict in Ireland’ <http://cain.ulst.ac.uk/sutton/> accessed 2 July 2014, according to which the IRA have killed 1,708 people, the ‘Official IRA’ fifty-three more and the ‘Real IRA,’ thirty-five. There have been, up to 2013, a total of 3,531 victims in the Northern Ireland conflict.
- 7 See the statistics of the ‘Fundación Víctimas del Terrorismo’ in [www.fundacionvt.org/index.php?option=com\\_content&task=view&id=124&Itemid=98](http://www.fundacionvt.org/index.php?option=com_content&task=view&id=124&Itemid=98) accessed 7 February 2014.

in London.<sup>8</sup> It goes without saying that, to all these murders, injuries, kidnappings and property damage must be added.

In this way, faced with such an alarming and long-lasting situation, terrorism has always been of utmost importance in the political agendas of the democratic governments of both countries, regardless of their ideology. Additionally, this struggle has affected the legal systems of the countries where two main essential principles, concerning both persons and the States themselves,<sup>9</sup> have conflicted with one another most profoundly: freedom and security.<sup>10</sup>

In the regulation of this conflict, there is an especially vehement collision of the guarantees of rights and of individual freedoms and the requirements of collective security,<sup>11</sup> insofar as terrorism is perceived as an assault on the foundations of liberal, constitutional systems. Consequently, governments present the eradication of terrorism as justified by a dire need to preserve the State<sup>12</sup> and link the effectiveness of such goal to the adoption of certain exceptional measures.<sup>13</sup>

Disparities between Spain and the UK in countering terrorism are primarily formal rather than substantial. The UK has reacted mostly with emergency legislation in the strict sense, meaning that legal dispositions have been created for a situation that is perceived as temporary or special.<sup>14</sup> Spain, by contrast, has apparently tried less drastic measures. There, legal reforms have been made within the ordinary Criminal Code and with indefinite duration.

Nevertheless, what unites both legal systems is that statutes have been approved in the spirit of the ‘criminal law of the enemy’ (*Feindstrafrecht*), and have gone beyond the boundaries of the classic criminal law. As is commonly known, a particular realm of criminal law has been in recent times defined as the ‘criminal law of the enemy’, which diametrically opposes the ‘criminal law of the citizen.’ The former is characterised by being ‘a criminal law that does not treat the offenders as citizens, that is, as subjects not having respected the minimum

8 See <http://straightstatistics.org/article/shameful-delays-registering-77-deaths> accessed on 7 February 2014.

9 On the one hand, terrorism threatens not only individuals but also the state; on the other hand, the principles involved – freedom and security – are important not just to individuals but also to states: we think that freedom is important to the state because it is important to individuals but we do not see any additional value of freedom, which only speaks to states.

10 See AI Pérez Cepeda, ‘El paradigma de la seguridad en la globalización: guerra, enemigos y orden penal’ in P Faraldo Cabana, LM Puente Aba and EM Souto García (eds), *Derecho Penal de excepción. Terrorismo e inmigración* (Tirant lo Blanch, Valencia, 2007) 95.

11 As noted by M Cancio Meliá, the question posed is ‘whether our society is willing to *succumb* to the risks derived from terrorism or will be, otherwise, prepared to assume *cutbacks in freedoms*’ (‘Algunas consideraciones preliminares sobre los delitos de terrorismo: eficacia y contaminación’) in P Faraldo Cabana, LM Puente Aba and EM Souto García (eds), *Derecho Penal de excepción. Terrorismo e inmigración* (Tirant lo Blanch, Valencia, 2007) 163. See also A Masferrer (ed.), *Estado de Derecho y derechos fundamentales en la lucha contra el terrorismo. Una aproximación multidisciplinar (histórica, jurídico-comparada, filosófica y económica)* (Thomson Aranzadi, Cizur Menor, 2011); A Masferrer (ed.), *Post 9/11 and the State of Permanent Legal Emergency* (Springer, New York, 2012).

12 J Terradillos Basoco, *Terrorismo y Derecho* (Tecnos, Madrid, 1988) 22.

13 See J Moran, ‘Myths and misunderstandings about security, rights and liberty in the United Kingdom’ in A Masferrer and C Walker (eds), *Counter-Terrorism, Human Rights and the Rule of Law* (Edward Elgar, Cheltenham, 2013) 61.

14 On the measures adopted by the UK during the conflict in Northern Ireland see G Hogan and C Walker, *Political Violence and the Law in Ireland* (Manchester University Press, Manchester, 1989) *passim*. On legislation following the attacks of 9/11 and 7/7 see C Walker, *Terrorism and the Law* (Oxford University Press, Oxford, 2011). Concerning the evolution of British counter-terrorist legislation from 1970 to 2010, see Martínez-Peñas and Fernández-Rodríguez (n 3) 201.

requirements for coexistence enshrined in the criminal norms and precepts and who must be convicted, but in lieu of that, as enemies, as sheer sources of danger which must be neutralised however.<sup>15</sup> The latter denotes a criminal law that violates those citizens' fundamental rights whose protection is supposed to constitute the *raison d'être* of the state itself.

Furthermore, both in Spain and the UK, there has been a concealed agenda or dirty tricks against terrorism, encompassing activity from torture<sup>16</sup> to the creation of semi-official groups (namely the Grupos Antiterroristas de Liberación in Spain).<sup>17</sup> As a consequence, the freedom–security dichotomy in terms of terrorism has always tilted more to the side of security, reaching its apex at the beginning of this century due to the attacks of 11 September.<sup>18</sup>

In this chapter, we shall first expound the characteristics of the Spanish legal and judicial system, in order to underline that counter-terrorist legislation is exceptional in substance, albeit ordinary in form, which means that, in factual terms, it does not differ from British exceptional legislation. Second, we shall take a stand regarding the (il)legitimacy of a criminal law exclusively focused on combating dangers and pointing at the other (the enemy).

### Legislation, legal reforms (or amendments) and case law for the 'enemy'

Counter-terrorism laws in Spain display unique features, not only in their procedural ambit, but also in their substantive and penitentiary features. Still, no exceptional or emergency laws exist. The laws governing the particularities of the terrorist phenomenon are located in the *corpora leges* common to all criminal matters. Those are: the Criminal Code,<sup>19</sup> concerning substantive questions; the Criminal Procedural Law,<sup>20</sup> which deals with procedural norms and the General Penitentiary Organic Act,<sup>21</sup> regulating the execution of custodial sentences. All of

15 M Cancio Meliá, "'Derecho penal" del enemigo y delitos de terrorismo' (2002) 44 *Jueces para la Democracia* 19, 20.

16 See, for example, RS Gerstein, 'Tienen derechos los terroristas?' in DC Rapoport (ed.), *La moral del terrorismo* (Ariel, Barcelona, 1985) 104, who alludes to the use of sensorial deprivation used during the questioning of IRA suspects by the armed security forces in Northern Ireland, originating in the events of 9 August 1971 (see Sir Compton *Report of the enquiry into allegations against the Security Forces of physical brutality in Northern Ireland, arising out of the events of 9th August, 1971* (Cm 4823, London, 1971) 15–17; Lord Diplock *Report of the commission to consider legal procedures to deal with terrorist activities in Northern Ireland* (Cmnd 5185, London, 1972). In Spain, many people have been allegedly tortured (Amnesty, *Poner Fin a la Detención Incomunicada en España* (2009). Available at: [www.amnesty.org/es/appeals-for-action/poner-fin-detencion-incomunicada-espana](http://www.amnesty.org/es/appeals-for-action/poner-fin-detencion-incomunicada-espana) accessed 14 July 2014.

17 See M Llobet-Anglí, *Derecho Penal del terrorismo* (La Ley, Madrid, 2010) 118.

18 Similarly, R Bergalli, 'Libertad y seguridad: Un equilibrio extraviado en la Modernidad tardía' in MG Losano and F Muñoz Conde (eds), *El derecho ante la globalización y el terrorismo* (Tirant lo Blanch, Valencia, 2004) 32; F Muñoz Conde, 'El nuevo Derecho Penal autoritario: consideraciones sobre el llamado "Derecho Penal Enemigo"' in G Portilla Contreras (ed.), *Mutaciones de Leviatán: legitimación de los nuevos modelos penales* (Akal, Madrid, 2005) 170; C Prittwitz, 'La desigual competencia entre seguridad y libertad' (2007) 7 *Revista General de Derecho Penal* 6; A Remiro Brotons, 'Terrorismo internacional, principios agitados' in A Cuerda Riezu and F Jiménez García (eds), *Nuevos desafíos del Derecho Penal Internacional. Terrorismo, crímenes internacionales y derechos fundamentales* (Tecnos, Madrid, 2009) 18; and JL González Cussac, 'El Derecho Penal frente al terrorismo Cuestiones y perspectivas' in JL Gómez Colomer and JL González Cussac (eds), *Terrorismo y proceso penal acusatorio* (Tirant lo Blanch, Valencia, 2006) 59.

19 Ley Orgánica (LO) 10/1995, of 23 November (Código Penal – CP).

20 Royal Decree of 14 September 1882 (Ley de Enjuiciamiento Criminal – LECrim).

21 LO 1/1979, of 26 September (Ley Orgánica General Penitenciaria – LOGP).

them have undergone three sweeping modifications with regard to terrorism since 2000 although none of these stemmed from the attacks of 11 March.<sup>22</sup> In Spain, the stiffening of penalties has always been a reaction against the activity of ETA.

First, many of the legislative reforms have been mainly symbolic, that is, they belong to what has been called 'symbolic criminal law', by seeking to 'transmit a message or value judgments to society', without being able to 'modify the social reality by preventing the commission of undesired behaviours'.<sup>23</sup> Thus, these laws do not aim at the protection of legal goods but to have a calming effect on society.

Second, the aforementioned reforms have permanently expanded the crimes and penalties related to terrorism.<sup>24</sup> That is why it could be said that, even assuming that Spanish counter-terrorism legislation is an 'ordinary exceptionality' in form, it is, in the cold light of day, exceptional in substance. In this vein, some criminal lawyers have clearly highlighted that such legislation constitutes a prime example of the 'criminal law of the enemy',<sup>25</sup> as it presents the attributes, according to Jakobs,<sup>26</sup> inherent to such criminal law: 'slackening or suspension of certain procedural safeguards', 'remarkable comparative increment of penalties face to ordinary criminal law' and 'wide anticipation of punishability'.<sup>27</sup>

Likewise, Spanish courts have recently passed judgments that have also brought into question principles and classic safeguards of liberal criminal law, by expanding quantitatively and qualitatively the definition of the terrorist crime.<sup>28</sup> This can be viewed as 'a legal Guantánamo', since it entails effects akin to the ones seen in the Guantánamo Bay Naval Base, but purporting to veil it under legal legitimacy, as expanded upon below.

This established, we shall proceed to expose, first, the most significant exceptions existing in counter-terrorist matter, despite the fact that, as previously remarked, they are embedded within common legal texts. At a second stage, we shall analyse the 'criminal case-law of the enemy', whose scope is so wide that it even includes the 'friends' of the aforesaid.

22 Note that the legislative reactions by the British and Spanish governments following the attacks in London and Madrid, differ quantitatively and qualitatively. About the reforms after the 7th July bombings see Walker (n 14) and Martínez-Peñas and Fernández-Rodríguez (n 3) at 214.

23 JL Díez Ripollés, 'El derecho penal simbólico y los efectos de la pena' (2001) 1 *Actualidad Penal* 3.

24 First, the LO 7/2000, of 22 December, reintroduced as crimes statements in support of terrorism (art 578 CP). Second, the LO 7/2003, of 30 June, on the Whole and Effective Execution of Sentences, was elaborated to tighten both the amount and the execution of prison penalties for terrorist criminals. Last, the LO 5/2010, of 22 June, on the reform of the Criminal Code, introduced probation.

25 A Asúa Batarrita, 'El discurso del enemigo y su infiltración en el Derecho Penal. Delitos de terrorismo, 'finalidades terroristas' y conductas periféricas' in M Cancio Meliá and C Gómez-Jara Díez (eds), *Derecho Penal del enemigo. El discurso penal de la exclusión I* (Edisofer, Madrid, 2006) 248; Cancio Meliá *Los delitos de terrorismo* (n 1) 77; J Damián Moreno, 'Un Derecho Procesal de enemigos?' in M Cancio Meliá and C Gómez-Jara Díez (eds), *Derecho Penal del enemigo. El discurso penal de la exclusión I* (Edisofer, Madrid, 2006) 463; and G Jakobs, 'Derecho Penal del ciudadano y Derecho penal del enemigo' in G Jakobs and M Cancio Meliá, *Derecho penal del enemigo* (2nd edn, Civitas, Navarra, 2006) 46.

26 An author who, in three stages, has instituted this term in recent theoretical discussion: 1985, 1999/2000 and 2003/2005. Cf M Cancio Meliá, 'De nuevo: 'Derecho penal' del enemigo?' in G Jakobs and M Cancio Meliá, *Derecho penal del enemigo* (2nd edn, Civitas, Navarra, 2006), 88, fn 1 and 111, fn 40.

27 Cancio Meliá 'Algunas consideraciones preliminares sobre los delitos de terrorismo' (n 11) 21; Cancio Meliá 'De nuevo' (n 26) 79–81, fns 34–35.

28 Reinares, *Terrorismo global* (n 4).

## Ordinary exceptionality

### *Relativisation of procedural rights*

In the province of criminal procedure, as is the case for the Spanish Constitution (CE),<sup>29</sup> ordinary legality foresees a series of exceptions in relation to the investigation of terrorism crimes. Therefore, certain fundamental rights and procedural safeguards of the terrorists are subject to norms less tightly drawn than those for other crimes. Thus, preventive detention can extend up to 48 hours more than the normal limit (72 hours), reaching thus five days.<sup>30</sup> Similarly, there is a possibility of dispensing with the ordinary requirements of judicial authorisation previous to search and seizure orders and the wire tapping of conversations (*para entradas y registros del domicilio y para la intervención de las comunicaciones*).<sup>31</sup>

In addition, the five days of police custody can take place in conditions of incommunicado detention, which can reach up to thirteen days, the last eight being carried out in a provisional detention incommunicado regime (that is, under court authority rather than in the police headquarters). It is, ultimately, an exceptional, bitterly criticised regime that might facilitate the practice of torture.<sup>32</sup>

### *The extreme severity of penalties in terrorism-related crimes*

Currently, the severity of punishment in the ambit of terrorism is threefold: first, penalties for common offences committed in the framework of these circumstances augment; second, the upper limit in cases where multiple crimes were committed is fixed at forty years; and, third, once the prison sentence ends further probation measures are imposed.

In terms of the augmentation of penalties for common offences, all common offences committed by those belonging to, or collaborating with, a terrorist organisation are subject to aggravated penalties under Articles 572 to 574 of the Criminal Code (CP). That is how, for example, an ordinary homicide (article 138 CP) carries a prison sentence of ten to fifteen years, whereas a terrorist homicide is punished with a sentence of twenty to thirty years.

<sup>29</sup> See Constitución Española (CE) art 55.

<sup>30</sup> See art 509 LECrim.

<sup>31</sup> See art 55.2 CE and the LO 4/1988, 25 May, on the reform of the Criminal Procedural Act, which develops that precept. The decision of the Spanish Constitutional Court (STC 717/1994, of 3 March) determines the requisites so that the legal development of art. 55 CE is constitutional. See M Catalina Benavente, 'Los supuestos de detención en los casos de terrorismo: propuesta para una reforma' in P Faraldo Cabana, LM Puente Aba and EM Souto García (eds), *Derecho Penal de excepción. Terrorismo e inmigración* (Tirant lo Blanch, Valencia, 2007) 171.

<sup>32</sup> I Sánchez García de Paz, 'Alternativas al Derecho Penal del enemigo desde el Derecho Penal del ciudadano' in M Cancio Meliá and C Gómez-Jara Díez (eds), *Derecho Penal del enemigo. El discurso penal de la exclusión II* (Edisofer, Madrid, 2006) 874; I Sánchez García de Paz, 'Problemas de legitimidad de una respuesta excepcional frente a las organizaciones criminales' in M Cancio Meliá and L Pozuelo Pérez (eds), *Política criminal en vanguardia. Inmigración clandestina, terrorismo, criminalidad organizada* (Civitas, Navarra, 2008) 485; H Olásolo Alonso and I Pérez Cepeda, *Terrorismo internacional y conflicto armado* (Tirant lo Blanch, Valencia, 2008) 68; and AI Pérez Machío, 'La detención incomunicada en los supuestos de terrorismo: una medida lesiva de derechos humanos?' in JL De La Cuesta and I Muñagorri, *Aplicación de la normativa antiterrorista* (Instituto Vasco de Criminología, Donostia-San Sebastián, 2008) 176 and 184. See also (n 16).

Since 2003, the upper limit of a term of imprisonment is, exceptionally, albeit not only for terrorism offences, forty years (instead of thirty years, as hitherto). Specifically, this is applicable in the event of the commission of two or more terrorism crimes, at least one of them being homicide (article 71.1.d. CP). Moreover, given that parole is discretionary (in cases of conviction for terrorism crimes, articles 90 ff. CP), terrorists may be kept imprisoned for the whole duration of their sentence.<sup>33</sup> Concretely, the requisites that must be fulfilled (in cases of terrorism crimes) for obtaining parole are an express declaration renouncing, and repudiating, violence and the issuing of an apology to the victims.<sup>34</sup>

As can be observed, these criteria are susceptible to criticism from a perspective that is consistent with the bedrock of a democratic State,<sup>35</sup> in which re-socialisation should merely imply 'that in the future a subject does not commit crimes again in the society independently of what they might personally think in one way or another.'<sup>36</sup> In other words, in order to obtain parole in cases of terrorism crimes, it should be pivotal not to renounce past behaviour but to compromise future behaviour.

Turning to probation, since the enactment of the Ley Orgánica (LO) 5/2010, it is possible to impose probation measures of up to ten years that oblige those convicted of terrorism crimes to always be traceable, be it by means of electronic devices or otherwise (article 106.1 CP), at the end of the prison sentence (article 579.3 CP). It naturally follows that it is possible for someone to be sentenced for terrorism for up to fifty years (meaning forty years' imprisonment and an additional ten years when they must be traceable at all times).

### *Pre-emptive punishment*

Spanish law not only punishes the effective commission of terrorist acts, but also behaviour that comes nowhere near to causing effective harm to individual interests (*efectiva lesión de bienes jurídicos individuales*), hence raising doubts about their legitimacy.<sup>37</sup> Thus, article 571 CP

<sup>33</sup> This way, exceptions are introduced that can well be termed 'Prison Law of the enemy' (cf Sánchez García de Paz 'Alternativas al derecho penal del enemigo' (n 32) 878; P Faraldo Cabana, 'Un derecho penal de enemigos para los integrantes de organizaciones criminales' in P Faraldo Cabana (ed.), *Nuevos retos del derecho penal en la era de la globalización* (Tirant lo Blanch, Valencia, 2004) 299; and L Gracia Martín, 'Consideraciones críticas sobre el actualmente denominado "Derecho penal del enemigo"' (2005) 07–02 *Revista Electrónica de Ciencia Penal y Criminología* 11.

<sup>34</sup> See P Faraldo Cabana 'Medidas premiales durante la ejecución de condenas por terrorismo y delincuencia organizada: consolidación de un subsistema penitenciario de excepción' in M Cancio Meliá and C Gómez-Jara Díez (eds), *Derecho Penal del enemigo. El discurso penal de la exclusión I* (Edisofer, Madrid, 2006) 784; JM Landa Gorostiza, 'Delitos de terrorismo y reformas penitenciarias (1996–2004)' in M Cancio Meliá and C Gómez-Jara Díez (eds), *Derecho Penal del enemigo. El discurso penal de la exclusión II* (Edisofer, Madrid, 2006) 198; and NJ De la Mata Barranco, 'Las reformas penales de 2003' in P Faraldo Cabana, LM Puente Aba and EM Souto García (eds), *Derecho Penal de excepción. Terrorismo e inmigración* (Tirant lo Blanch, Valencia, 2007) 23–24.

<sup>35</sup> See L Ferrajoli, 'La legge sulla dissociazione: un nuovo prodotto della cultura dell'emergenza' (1987) 2 *Questione giustizial* 271.

<sup>36</sup> M Acale Sánchez, 'Terrorismo, delincuencia organizada y sistema de penas' in P Faraldo Cabana (ed.), *Nuevos retos del derecho penal en la era de la globalización* (Tirant lo Blanch, Valencia, 2004) 366, text and fn 62.

<sup>37</sup> Cf JM Silva Sánchez, "'Pertenenencia" o "intervención"? Del delito de "pertenencia a una organización criminal" a la figura de la "participación a través de organización" en el delito' in E Octavio de Toledo y Ubieto, M Gurdíel Sierra and E Cortés Bechiarelli (eds), *Estudios penales en recuerdo del profesor Ruíz Antón* (Tirant lo Blanch, Valencia, 2004) 1.069.

punishes the members of terrorist organisations regardless of their participation in, or connection to, specific crime. The penalties set for these crimes are very high: six to twelve years of imprisonment for ordinary members and eight to fourteen years for the directors and promoters.

Article 576 CP criminalises collaboration with armed bands. Again, it is a crime for anyone, even if not a member, to make contributions to the activities undertaken by a terrorist organisation, regardless of the commission of a specific crime or whether such a crime's existence cannot be proven or demonstrated. Thus, sentences of between five and ten years' imprisonment are imposed for acts of collaboration with terrorist groups including information on, or surveillance of, persons, property or installations; construction, conditioning, assignment or use of accommodation or storage facilities; concealment or transport of individuals related to terrorist organisations or groups; and organisation of training practices or attending them and, in general, any other equivalent form of co-operation, aid or mediation, economic or of any other kind whatsoever, with the activities of those terrorist organisations or groups.

Together with the material contributions offence above, article 578 CP specifies apology (*enaltecimiento* or *justificación*) of terrorism crimes or of their perpetrators. It is consequently a crime of opinion.<sup>38</sup> The legislator punishes the expression of ideas in favour of terrorism crimes and their authors, that is, it criminalises the thought that exalts or justifies violence as a means of political struggle. As it stands, its central, insoluble problem is that it sanctions political dissidence that is publicly demonstrated,<sup>39</sup> undermining freedom of expression both in its manifestation as an individual basic liberty and in its configuration as a constituting element of the political, democratic system.<sup>40</sup>

Furthermore, Spanish Courts have interpreted this offence widely in relation to events in which there are 'rituals of cohesion of the social segment identified with the legitimacy' of ETA,<sup>41</sup> to include: issuing statements that identify the demonstrator with ETA's armed struggle thesis as a way to attain the right to self-determination;<sup>42</sup> paying homage to a member and leader of the terrorist organisation ETA, as well as defender and ideologist of the free determination of the Basque Countries;<sup>43</sup> and extolling ETA prisoners for not having surrendered to the Spanish ideology.<sup>44</sup>

38 In this line, Cancio Meliá *Los delitos de terrorismo* (n 2) 286; C Lamarca Pérez, 'Apología: un residuo de incriminación de la disidencia' (2007) 28 *La Ley Penal: Revista de Derecho Penal, Procesal y Penitenciario* 41; and Terradillos Basoco (n 12) 19.

39 See further: P Sánchez-Ostiz Gutiérrez, 'La tipificación de conductas de apología del delito' in M Cancio Meliá and C Gómez-Jara Díez (eds), *Derecho Penal del enemigo. El discurso penal de la exclusión II* (Edisofer, Madrid, 2006) 910. B Feijóo Sánchez, 'Recensión a *Die Strafbarkeit des Auschwitz-Leugnens*' (2000) 53 *Anuario de Derecho Penal y Ciencias Penales* 1.187.

40 See STC 235/2007, of 7 November.

41 Cancio Meliá *Los delitos de terrorismo* (n 2) 278.

42 STSJ-País Vasco of 31 March 2004 (although the SAN of 23 March 2007 absolved that subject because the prosecution withdrew the accusation; on the case, see JA Ramos Vázquez, 'Sobre la particular lógica de los procesos por delitos de terrorismo' in P Faraldo Cabana, LM Puente Aba and EM Souto García (eds), *Derecho Penal de excepción. Terrorismo e inmigración* (Tirant lo Blanch, Valencia, 2007) 371.

43 Spanish *Tribunal Supremo*, STS of 20 June 2007.

44 STS of 26 February 2007 (see the commentary by M Llobet-Anglí, 'El fin justifica los medios?' (2007) 60 *Anuario de Derecho Penal y Ciencias Penales* 497.



## 'Criminal case-law of the enemy': The 'legal Guantánamo'

It is crucial to show that, along with these legal reforms, there have been changes in the interpretation of certain legal provisions in Spain so that some of the most distinctive, counter-terrorism measures taken in recent years have not come from 'ordinary' legal changes, but from case law that has interpreted in a broader way legal dispositions that have not been changed in the most recent legal reforms.

In this way, case-law has widened terrorism offences, expanding both the scope of the crimes and the penalties that can be awarded. What is more, scope and penalty are precepts freely interpreted by the judge.<sup>45</sup> This means that the legality principle is in serious jeopardy, from its *lex certa* perspective, which peremptorily requests legal security, and its *lex praevia*, which proscribes unfavourable retroactivity.

Particularly, two types of judgments can be distinguished: a first group has aimed to keep imprisoned individuals sentenced for terrorism years ago and who, by application of penitentiary laws applying at the moment of the commission of their felonies, have seen their effective imprisonment shortened. In essence, this first class of judgments is destined to combat the captured enemies, the most resounding example being the *Parot* case. A second group of judgments is intended to fight the 'enemies' friends', that is to say, the subjects and networks that share terrorist means and ends.<sup>46</sup> That is why, in practice, after 2000, the fight against terrorism has included the prosecution of the ideological and political networks linked to terrorist groups, such as the so-called '*izquierda abertzale*' (patriotic left [in Basque]) or Movimiento de Liberación Nacional Vasco (MLNV) (Free Basque Nation Movement).

### *The Parot case: The illegal detention of a terrorist*

The *Parot* case is a tale with legal drama but luckily with a happy ending. The Spanish *Tribunal Supremo* (TS), in its judgment of 28 February 2006, reinterpreted the method of calculating the remission of sentences. Until 1995, when the previous sentence adjustment (*beneficio*) was abrogated (article 100 CP 1973), prisoners could shorten their term of imprisonment by one day for every two days of prison work. This was applied without reference to the nature of the offence that had resulted in imprisonment, or to the prior criminal record of the prisoner. So, in practice, any prison sentence was reduced by a third of its original duration, no matter the criminal record of the convicted (by means of an illustration, the death of hundreds of people, as occurred in the cases of the most murderous ETA terrorists). As a consequence, though under the operation of the 1973 Criminal Code, the maximum legal conviction was thirty years, the remission of sentence for work triggered release after twenty years, having fulfilled two-thirds of the sentence.

The *Parot* doctrine changed this grant of remission. In particular, it sought to reinstate the full range of sentencing terms, up to the thirty-year maximum. According to this new approach, sentence adjustments and remissions were no longer to be applied to the maximum term of imprisonment (*condena*) of thirty years, but successively to each of the sentences (*pena*) imposed. With this new interpretation, the TS strayed from all previous precedents. Previously the doctrine of the courts had been unanimous, as had the practice of the other legal operators

45 See I Ortiz de Urbina Gimeno, '¿Leyes taxativas interpretadas libérrimamente? Principio de legalidad e interpretación del Derecho Penal' in JP Montiel (ed.), *La crisis del principio de legalidad en el nuevo Derecho Penal* (Marcial Pons, Madrid, 2012) 173.

46 Cf Asúa Batarrita (n 25) 255, text and fn 50.

(particularly prison officers) that unanimously considered the final term to be served to be thirty years, for prison fulfilment purposes.<sup>47</sup> Be that as it may, the ‘*Parot doctrine*’ was endorsed by the Constitutional Court.<sup>48</sup>

Notwithstanding the views of the Spanish judges, the ECtHR drew a different conclusion, as it inferred that such doctrine had encroached upon the principle of legality (Article 7 ECHR) and the right to liberty (Article 5 ECHR).<sup>49</sup> In brief, the Strasbourg Court ruled that, since the interpretative change of direction by the TS in the *Parot* case had been unforeseeable and had brought about the unfavourable modification of her penalty, there had been a violation of the right to legal certainty in criminal matters (by applying an unfavourable disposition retroactively). It equally considered the right to freedom to have been infringed, as the detention following the date when the release applied did not respect legality (it was not a regular privation subsumable within article 5 ECHR).<sup>50</sup>

### *Criminal law of the ‘enemies’ friends’: Ideological belonging*

In principle in liberal criminal law, ‘belonging’ to a terrorist (or criminal) organisation must mean more than embracing the ideology of the group. Correspondingly, formal integration should not be punished,<sup>51</sup> but there should be some kind of material or logistical support instead, either through facts or experiences.<sup>52</sup> From this standpoint, for the attribution of criminal responsibility, the subjects must engage in some conduct contributing to the criminal activities of the armed group.<sup>53</sup> a member must be an active one.<sup>54</sup> The category of those merely affiliated cannot be legitimately punished, as they would be situated in the orbit of a criminal law more focused upon supposed criminals than upon criminal offences (*derecho penal de autor* in Spanish; *täterstrafrecht* in German).<sup>55</sup>

Likewise, groups merely supporting, either politically or through the media, a political terrorist organisation can be deemed neither as a criminal nor as a terrorist organisation, much as they share ends or ideology – although such assertions do not imply that they must be

47 Cf M Llobet-Anglí, ‘El caso Parot’ in P Sánchez-Ostiz Gutiérrez (ed.), *Casos que hicieron doctrina en Derecho Penal* (La Ley, Las Rozas, 2011) 895.

48 ATC 179/2010.

49 *Del Río Prada v Spain*, App No 42750/09, 10 July 2012 (Third Section), 21 October 2013 (Grand Chamber) (2014) 58 EHRR 37.

50 Agreement of the Second Chamber of the TS, of 11 November 2013. On the *Parot* case, see D Rodríguez Horcajo, “Nulla poena sine lege”, materialismo y retroactividad de cambios jurisprudenciales: la “doctrina Parot” y la STEDH as. Del Río Prada c. España (21/10/2013) como banco de pruebas’ (2014) XLI-1 Revista de Ciencias Penales 219.

51 See further: Cancio Meliá *Los delitos de terrorismo* (n 2) 159–160; Silva Sánchez ““Pertenenencia” o “intervención”?” (n 37) 1.076, with further references; Sánchez García de Paz ‘Alternativas al Derecho Penal del enemigo’ (n 32) 473; and JM Paredes Castañón, ‘Límites sustantivos y procesales en la aplicación de los delitos de integración y de colaboración con banda armada’ (2008) 6.906 *La Ley* 3.

52 Silva Sánchez ““Pertenenencia” o “intervención”?” (n 37) 1.077–1.078; and Paredes Castañón (n 51) 3.

53 See further: A García-Pablos de Molina, ‘Asociaciones ilícitas y terroristas’ in M Cobo del Rosal and M Bajo Fernández (eds), *Comentarios a la Legislación Penal. El Derecho Penal del Estado Democrático II* (Edersa, Madrid, 1983) 158.

54 As M Cancio Meliá notes, in a criminal organisation ‘no one registers filling in a form and paying the first membership fees,’ unlike in ‘an association for hamster breeders’ (‘El injusto de los delitos de organización’ (2007) 8 *Revista General de Derecho Penal* 33.) Similarly, Paredes Castañón (n 51) 2.

55 For another opinion see N Pastor Muñoz, *Los delitos de posesión y los delitos de estatus* (Atelier, Barcelona, 2005) 62.

allowed to partake in political life.<sup>56</sup> Nevertheless, Spanish Courts (especially the Audiencia Nacional) follow, *de facto*, a very formal conception of the crime of belonging to, and collaboration with, terrorist organisation to punish the ‘enemies’ friends’, namely sympathisers with ETA terrorists.

First and foremost, the Sentencia de Audiencia Nacional (SAN) of 19 December 2007 declared the structure *Koordinadora Abertzale Sozialista-Ekin* (KAS-EKIN) – which managed the political, international and media apparatus of ETA – a terrorist organisation, because it was resolved that its activities ‘directly purported to contribute to the *ends* of the armed wing’ of ETA.<sup>57</sup> Equally, yet the same result followed for the *Egin* newspaper, which embodied ETA’s mass-media power, broadcasting the propaganda of their secessionist ends and publishing their communiqués. Thereupon, the members were convicted on the grounds of belonging to and collaboration with a terrorist organisation,<sup>58</sup> by virtue of the help provided for the purposes of ETA.

Second, the SAN of 15 September 2008<sup>59</sup> branded the group *Gestoras Pro-Amnistia*, which facilitated the relationship between ETA and its imprisoned members, and which conveyed a public message about the reality of this group (being, in the eyes of the judgment, misleading and pursuing the attraction of new adepts), as a terrorist organisation. As a result, notwithstanding the fact that the acts of helping the prisoners constituted no activity stimulating the commission of felonies (or that could not be proved), penalties of eight years were imposed on the members and of ten years on the leaders, for having undertaken, as the judgment puts it, ‘activities on behalf of ETA’s subversive ends.’

Lastly, the political group *Herri Batasuna* (HB) has been regarded as terrorist. In effect, the courts have assumed that HB and ETA comprise a unique terrorist organisation, since HB, beyond accomplishing a political function,<sup>60</sup> cooperated materially with ETA – a matter that remains obscure, given that the presumed contribution is not proven in any manner of resolution.<sup>61</sup> For this reason, forty-one of its members are on trial for belonging to a terrorist organisation.<sup>62</sup> In conjunction with that condemnation, the *Auto Del Juzgado Central de Instrucción* of 5 February 2008 impeached the representatives of a new, pro-independence, Basque party, *Acción Nacionalista Vasca* (ANV), on the grounds of integration in a terrorist band, as well as collaboration with armed band by lending money to HB.

56 In Spain, see LO 6/2002, of 27 June, on Political Parties, (*de Partidos Políticos*) and its analysis by F Herrero-Tejedor Algar, ‘La ilegalización de partidos políticos del entorno terrorista’ in JL Gómez Colomer and JL González Cussac (eds), *Terrorismo y proceso penal acusatorio* (Tirant lo Blanch, Valencia, 2006) 199; and the STS 27 March 2003, criminalising *Herri Batasuna*, *Euskal Herriarrok* and *Batasuna*.

57 For a very critical analysis see Paredes Castañón (n 51) 1.

58 The STS of 22 May 2009 absolves some alleged members. Nonetheless, it still considers KAS-EKIN as a terrorist organisation and maintains the sentence on the majority of the accused, despite with slightly inferior penalties (six to eleven years of imprisonment).

59 Confirmed by the STS of 13 October 2009, except concerning one of the sentenced who was ultimately acquitted.

60 The AJCI [Auto del Juzgado Central de Instrucción] of 26 August 2002 establishes that HB is constituted to ‘materialise politically the illegal independence plans and projects ETA cannot tackle as a clandestine organisation.’

61 In the AJCI of 26 August 2002, ETA is accused of funding HB until 1992, but not vice versa. See also: AJCI of 16 October 2002; STS of 27 March 2003; AJCI of 25 January 2005; and AJCI of 7 October 2007 (on all these resolutions in the framework of the judicial investigation 35/2002, see A Fernández Hernández, *Ley de partidos políticos y derecho penal* (Tirant lo Blanch, Valencia, 2008) 210.

62 AJCI of 25 January 2005.

In short, no proper distinction is being made, between legal and illegal activities performed by the groups revolving around ETA or the ideology of Basque independence. On the contrary, all help, either individual or collective, is treated as terrorism. Certainly, 'all organisations constituting the MLNV can be categorised as terrorist organisations for being regarded as "groups of ETA."' <sup>63</sup>

### *'Criminal law of the enemy': A contradiction in its own terms?*

In the paragraphs above, it has been emphasised that both Spanish legislation and case-law have encroached, and continue to encroach, on liberal principles and safeguards of the criminal law. The reason – rather the excuse – behind which rulers and judges entrench or take refuge themselves, is the efficacy (and fairness) of the fight against terrorism. Yet is it possible to defend as legitimate even a legislative provision that is effective or necessary to fight against terrorism, if it impinges on those principles and safeguards?

As has been shown, at present, there are two provisions that, because of their usefulness, Spain is using in the fight against terrorism. They are debated from the perspective of compliance with criminal law safeguards (*garantismo penal*). These provisions are: an enhanced penalty as a means to render the subject harmless (*inocuidización*) and extended preventive detention without charge. In relation to the latter, there is no doubt that the measures with more possibilities of combating terrorism efficaciously are linked with procedural investigation, <sup>64</sup> so the procedural ambit is where criminal *efficiency* is more rigorously expressed. <sup>65</sup> This explains why, nowadays, procedural law is the sector in which the norm of the 'criminal law of the enemy' abounds the most. <sup>66</sup>

### *Enhanced penalty as a means to render the subject harmless*

Nowadays, the reliability of the re-socialisation and preventive capacities of criminal law are undergoing a crisis. On one side, there is disillusion, whether well-grounded or not, concerning the possibilities of a re-socialising intervention by the State on the criminal (the crisis of the special positive prevention). <sup>67</sup> On the other side, there is little hope in the intimidating capacity of criminal law (crisis of the general negative prevention), and in its capacity to reaffirm among citizens the values underlying the legal system (crisis of the general positive prevention). <sup>68</sup> Therefore, the enhanced penalty is estimated to be the measure to render

<sup>63</sup> Fernández Hernández (n 58) 27.

<sup>64</sup> A Melchionda, 'La legislación italiana en materia de terrorismo' in JL Gómez Colomer and JL González Cussac (eds), *Terrorismo y proceso penal acusatorio* (Tirant lo Blanch, Valencia, 2006) 213. By contrast, the role played by material criminal legislation is less important.

<sup>65</sup> AD Aponte, *Guerra y derecho penal de enemigo* (Universidad de los Andes, Bogota, 1999) 13.

<sup>66</sup> In this sense see: Damián Moreno (n 25) 465; C Pérez del Valle, 'Derecho Penal del enemigo: Escarnio o prevención de peligros' in M Cancio Meliá and C Gómez-Jara Díez (eds), *Derecho Penal del enemigo. El discurso penal de la exclusión II* (Edisofer, Madrid, 2006) 550; W Perron, 'La legislación antiterrorista en el Derecho Penal material alemán' in JL Gómez Colomer and JL González Cussac (eds), *Terrorismo y proceso penal acusatorio* (Tirant lo Blanch, Valencia, 2006) 249; and Sánchez García de Paz 'Alternativas al Derecho Penal del enemigo' (n 32) 869.

<sup>67</sup> JM Silva Sánchez, *La expansión del Derecho Penal* (2nd edn, Civitas, Navarra, 2001) 145.

<sup>68</sup> See Pastor Muñoz (n 55) 25.

criminals innocuous;<sup>69</sup> having been spurned as ‘incorrigibles,’<sup>70</sup> they must be kept imprisoned for as long as possible. Such is a phenomenon that has been termed by Silva Sánchez ‘the return to innocuousness’ (*retorno de la inocuización*).<sup>71</sup> It involves the cognitive dimension of the penalty, that is, the assurance or prevention of future acts through the neutralisation of the criminal, monopolising the leading role. As a result, the criminal law of the penalty and the criminal law of the security measures draw closer together.<sup>72</sup>

In the context of terrorism, this trend gains special intensity, owing to the fact that, according to criminal law doctrine, terrorists are criminals as a matter of conviction,<sup>73</sup> hence they are incorrigibles whom it is impossible to intimidate or re-socialise.<sup>74</sup> To that end, the severity of the penalties foreseen for those offences are directed, essentially, to render their authors innocuous<sup>75</sup> and to hinder effectively the commission of further felonies by means of security measures.

Without doubt, terrorism crimes are more serious, which makes legitimate and proportional their more severe punishment.<sup>76</sup> Yet, the ‘criminal law of the enemy’ encompasses the penalty as a further means of rendering dangerous subjects innocuous,<sup>77</sup> in other words, by means of the part of the punishment based on a future forecast of riskiness of the author of an act.

It is probably a truism that dangerousness is not a ground for penalties, but for security measures. Therefore, a penalty whose duration exceeds the gravity of the criminal act on the basis of the criminal diagnosis of a subject cannot be legitimate. True, imprisonment fulfils a custodial, assurance function, but it must be proportional to the act performed, without further control, at least, under the appearance of a penalty.<sup>78</sup> Finally, from the liberal criminal law perspective, the portion of custodial sanctions based on a mere *a priori* prognosis of future dangerousness is wholly illegitimate, insofar as the increased gravity of punishment applicable to the convicted goes beyond to the culpability principle.<sup>79</sup>

69 Nonetheless, on the other side of the spectrum, there are other proposals, either abolitionists or reductionists of the criminal system (See E Demetrio Crespo, ‘Del “Derecho penal liberal” al “Derecho penal del enemigo”’ (2004) 14 *Revista de Derecho Penal y Criminología* 88 and 92.

70 F Von Listz, *La idea de fin en Derecho Penal* (Edeval, Valparaiso, 1994) 115.

71 See Silva Sánchez *La expansión del Derecho Penal* (n 67) 142; JM Silva Sánchez, ‘El retorno de la inocuización’ in A Nieto Martín (ed.), *Homenaje al Dr. Marino Barbero Santos*. In memoriam I (ediciones UCM-US, Cuenca, 2001) 699.

72 Pastor Muñoz (n 55) 25.

73 On this category, see J Baucells i Lladós, *La delincuencia por convicción* (Tirant lo Blanch, Valencia, 2000).

74 A Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (Yale University Press, New Haven, 2002); we used the Spanish version entitled *Por qué aumenta el terrorismo?* (Encuentro, Madrid, 2004) 35–36; González Cussac (n 18) 79; A Lascuráin Sánchez, ‘Qué les corten la cabeza?’ (2004) 145 *Claves de razón práctica*, 37; and G Quintero Olivares, *Adonde va el Derecho Penal* (Civitas, Navarra, 2004) 99–100.

75 Cf Pastor Muñoz (n 55) 29.

76 See Llobet-Anglí (n 17) 237.

77 See also Sánchez García de Paz ‘Alternativas al Derecho Penal del enemigo’ (n 32) 865.

78 Cf Jakobs (n 25) 44. It is utterly different from the precaution of after-crime security measures in cases of terrorists prone to recidivism.

79 Cf JM Silva Sánchez ‘El retorno de la inocuización’ (n 71) 146, fn 349.

*Prolonged detention without charge*<sup>80</sup>

As indicated, the relaxation of procedural safeguards, namely prolonged detention without filing charges for a term longer than foreseen for common criminality, is one of the distinctive characteristics of counter-terrorist legislation. Its *raison-d'être* is that such measures seem efficacious from two different views: the police can investigate presumed crimes for longer, while preventive detention can serve as a pre-criminal security measure, especially if indefinite, since anyone suspected of posing a risk to national security is neutralised.

Irrefutably, the configuration of terrorism as an organised criminal modality triggers the complexity of the investigation of its activities, chiefly due to its hierarchical structure and task division. In that event, the elucidation of the crimes committed in its core may require the existence of measures adapted to that reality. In concrete terms, more time to detect the commission of the crime and determine the accountability of its perpetrators may be needed.<sup>81</sup>

For this reason, counter-terrorist legislation, which allows five days of custodial detention, instead of three, perfectly fits in the framework of a democratic state of law.<sup>82</sup> In the end, exceptions must also respect human rights to be legitimate, but there is no single procedural safeguard model.<sup>83</sup> Rather, the problem lies in those legal systems that allow the detention of a subject to be extended for too long or, even, indefinitely, without need for judicial review or criminal charges. Such legal conditions violate the right to liberty and make more likely the severe violation of human rights on the part of state security agencies.<sup>84</sup>

Nowadays, on the European stage, it is in the UK where this measure has been most sharply intensified. At one stage, executive detention even became indefinite.<sup>85</sup> Even today, police detention without charge extends up to 14 days.<sup>86</sup> Without question, in these scenarios, fundamental rights such as the presumption of innocence, freedom and human dignity are not respected, which means that those measures are illegitimate in the light of a criminal law based on legal and constitutional safeguards (or based on the rule of law). In this point there is now a sharp difference between the Spanish and British criminal law models after the 11 September attacks.

80 See also Chapters 11 (Vladeck and Walker) and 15 (Kremnizer and Saba) in this book.

81 See HJ Albrecht, 'Investigaciones sobre criminalidad económica en Europa' in *Modernas tendencias en la Ciencia del Derecho penal y en la Criminología* (Universidad Nacional de Educación a Distancia, Madrid, 2001) 263.

82 Of the same opinion, Catalina Benavente (n 31) 178. Cf E Gimbernat Ordeig, *Ensayos penales* (Tecnos, Madrid, 1999) 46–48; and G Portilla Contreras, 'El Derecho penal y procesal del "enemigo"' in J López Barja de Quiroga and JM Zugaldía Espinar (eds), *Dogmática y Ley Penal. Libro Homenaje a Enrique Bacigalupo I* (Marcial Pons, Madrid, 2004) 708, fn 67.

83 Sánchez García de Paz 'Alternativas al Derecho Penal del enemigo' (n 32) 864 and 'Problemas de legitimidad' (n 32) 479.

84 F Reinares, *Terrorismo y Antiterrorismo* (Paidós, Barcelona, 1998) 152, adduces the example of the death of an ETA member in Spain, in February 1981, because of the ill-treatment received during nine years he remained under police custody, precisely when Spanish counter-terrorist legislation allowed the extension of the term to 10 days. See also Gimbernat Ordeig (n 82) 46–47.

85 See Anti-terrorism, Crime and Security Act 2001, Part IV, repealed by the Prevention of Terrorism Act 2005, ss 16(2)–(4) following the House of Lords declaration of incompatibility in *A v Secretary of State for the Home Department* [2004] UKHL 56.

86 Protection of Freedoms Act 2012, s 57, meaning that the UK has the longest period of detention without charge in the EU.

## Conclusion

The fight against criminal behaviour must be restrained within the limits of a democratic State of law,<sup>87</sup> evident though the enmity between a subject and that legal order might be.<sup>88</sup> Democratic ethical commitments are universal and must be applied both to citizens and to enemies.<sup>89</sup> Consequently, fundamental rights (such as freedom or dignity<sup>90</sup>) and constitutional safeguards and principles are not disposable. Even if someone acts as an outlaw, the State is not allowed to accept them as having no legal personality or rights,<sup>91</sup> without impairing the bases upon which it is founded.<sup>92</sup> Ultimately, the risks posed by dangerous subjects must be divided into (or shared by) the whole democratic society, that is, we all must assume them,<sup>93</sup> as long as we desire to attach that denomination to ourselves.

Undoubtedly, Government might become more efficacious in forestalling terrorism and might provide greater safety for citizens if any dangerous subject were rendered ‘innocuous’ according to some of the methods outlined in this chapter.<sup>94</sup> Yet, that premise supplants our liberal democratic State model for another political kind of system,<sup>95</sup> bearing in mind that a democracy must prevail without betraying the values it represents.<sup>96</sup> To answer the question of whether a democratic State should use measures in relation to the ‘criminal law of the enemy’, either within ordinary (Spain) or extraordinary (the UK) law, the answer is always negative. Its utilisation would entail the impossibility to claim the aforesaid character to define their model of government.<sup>97</sup>

87 See S Mir Puig, *El Derecho penal en el Estado social y democrático de derecho* (Ariel, Barcelona, 1994) 115.

88 In the same line, F Muñoz Conde, ‘De nuevo sobre “el derecho penal del enemigo”’ (2005) 16 *Revista penal* 35.

89 See M Ignatieff, *El mal menor* (Taurus, Madrid, 2005) 23. The English language version is *The Lesser Evil* (Princeton University Press, New Jersey 2004).

90 JL González Cussac, ‘El renacimiento del pensamiento totalitario en el seno del estado de Derecho’ (2007) 19 *Revista Penal* 58.

91 See Gracia Martín (n 33) 38; and González Cussac (n 90) 59.

92 E Press, ‘In Torture We Trust?’ in KB Darmer, RM Baird and SE Rosenbaum (eds), *Civil Liberties v. National Security in a Post-9/11 World* (Prometheus Books, Amherst, 2004) 2.225; and S Mir Puig, ‘Principio de proporcionalidad y fines del Derecho penal’ in JI Echano Basaldúa (ed.), *Estudios jurídicos en Memoria de José María Lidón* (Universidad de Deusto, Bilbao, 2002) 349.

93 Silva Sánchez, ‘El retorno de la inocuización’ (n 71) 710, text and fn 46. Now, as highlighted by JL Díez Ripollés, the current ‘ideology of the distribution of risks between the individual and the society’ is translated into the fact that ‘society refuses to be burdened with the costs derived from the risks of criminal recidivism,’ for which the former criminal is responsible (‘De la sociedad del riesgo a la seguridad ciudadana’) in M Cancio Meliá and C Gómez-Jara Díez (eds), *Derecho Penal del enemigo. El discurso penal de la exclusión I* (Edisofer, Madrid, 2006) 575.

94 There are other authors who have highlighted the counter-producing effects of the ‘overreactions’; see U Beck, *Sobre el terrorismo y la guerra* (Paidós, Barcelona, 2003) 10–11; Reinares *Terrorismo y Antiterrorismo* (n 84) 166; Cancio Meliá ‘Algunas consideraciones preliminares sobre los delitos de terrorismo’ (n 11) 164, text and fn 11; and D Cole and J Lobel, *Less Safe, Less Free* (New Press, New York, 2007) 129.

95 See further R Rorty, ‘Fundamentalismo: enemigo a la vista’ (El País, Madrid, 29 March 2004) 11.

96 See Ignatieff (n 89) 22.

97 See also González Cussac (n 90) 60; and M Aguirre, ‘Hay dudas sobre la tortura?’ (*La Vanguardia*, Barcelona, 22 April 2005) 29.