



Basque Observatory of Human Rights

Bailen Kalea 15, 1º esk

48003 Bilbao

Bizkaia (Euskal Herria)

Tel: 0034 944155653

Fax: 0034 944163496

Email: info@behatokia.info

www.behatokia.info

Comments for the attention of the Universal Periodic Review of Spain November 2009

In this report, the Basque Observatory of Human Rights – Behatokia shall refer breaches of human rights contained in the Universal Declaration of Human Rights, which stem from the application of a number of exceptional measures that the state seeks to justify through the priorities of the fight against terrorism. Specifically, this Observatory will refer to breaches in the context of the Basque Country.

1.- Exceptionality in the Spanish system

As to the principle of equality set out in **Article 1 of the UDHR**, it is breached through the increasingly expansive implementation of exceptional measures. Chapter V of the Spanish Constitution establishes “the suspension of rights and freedoms [...] for certain persons, in relation to investigations of the activities of armed groups or terrorist elements”¹. Thus, protection of or –to the contrary- intervention against and violation of thousands of citizens’ human rights is left up to everyday executive practice. Precisely, the prolific use and exacerbated extension of the term “terrorism” means these measures are being applied against public and peaceful activities carried out by organizations that can by no means be linked to violent or criminal activities. This practice has come under criticism from various mechanisms in the UN System, which find Spain is on a “slippery slope”, as stated by Special Rapporteur Martin Scheinin in his report following his visit to Spain².

Through the reform of the Penal Code in 1995, the so-called “Code of the democracy” that substituted the obsolete Francoist Code of 1973, a catalogue of new crimes and sanctions was introduced. The tendency has been clearly directed at establishing an antiterrorist legislation within the ordinary legislation, at introducing new and tougher crimes of terrorism. The general characteristic of these new penal types is the extension to further sectors of society and the aggravation of the sanctions. That Code of 1995, created with a will of permanence and stability, started to suffer modifications linked to the needs of the “war on terrorism”: **the reform of the crime of slander or defamation against members of the Security Forces**, the new crime of insults to members of the local assemblies, glorification of **terrorism**, or the reform of the **Penal Responsibility of Minors criticised by the UN Committee on the Rights of the Child**³ for the

1 Spanish Constitution of 1978. Article 55.2

2 Report by the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Martin Scheinin. Mission to Spain. A/HRC/10/3/Add.2 16 December, 2008

3 Report of the **Committee on the Rights of the Child** E/CN.4/2002/76/Add.1, 1st of May 2002

treatment dispensed to children, often more severe than for adults. Some other examples of moves towards a tougher legislation will be mentioned below.

We believe that these practices violate the right to equal treatment enshrined in **Article 2**. Indeed, the new measures are based on discrimination based on “public opinion” or “national or social origin”, because this exceptional antiterrorist legislation and the restrictions it allows are only applied in the Basque context.

2.- Extra-judiciary executions and enforced disappearances

In regard to **Article 3**, the Spanish state has resorted to mechanisms of arbitrary, summary or extrajudicial executions carried out by the Security Forces. There have been hundreds of victims of the so-called “shoot to kill” policy, mostly in the 1980s, besides the more recent cases of Josu Zabala, José Luis Geresta and Arkaitz Otazua. Those cases were never properly investigated and the perpetrators were never brought to justice. We also have to mention paramilitary activity with the participation or collusion of members of the administration. The death squads AAA, ATE, BVE or GAL caused dozens of deaths. The Spanish justice system has insufficiently investigated these cases and has shown a special apathy towards the victims of state terrorism. Nevertheless, important members of Felipe Gonzalez’ government were involved in those actions, including the Minister of the Interior José Barrionuevo and the secretary of State for Security Rafael Vera. They served short periods of time in prison, before being definitively released under a Governmental pardon.

As to enforced disappearances, in 1995 two corpses buried in a pit in Alicante were identified as Jose Antonio Lasa and Jose Ignacio Zabala, members of the armed organisation ETA. The Supreme Court convicted the Civil Guard General responsible for antiterrorism in the province of Gipuzkoa, Rodriguez Galindo, as well as the Spanish Civil Governor in this province José Ramón Goñi Tirapu for the crimes of torture and murder of the two Basque citizens, sentencing them to seventy years of imprisonment. After serving 5 years, on the 1st October 2006, Rodriguez Galindo was released. Still today there are cases of Basque citizens disappeared in strange circumstances due to political reasons: Eduardo Moreno, Jose Miguel Etxeberria and the most recent case of Jon Anza. This person, who spent 21 years in prison, decided to settle in the part of the Basque Country under French administration as set out in Article 14 of the Declaration, due to harassment and persecution by the Spanish authorities. He disappeared on the 18th April, in French territory. Several sources have linked the disappearance to the Spanish police forces, which operate inside French territory with a high degree of freedom thanks to an antiterrorist cooperation agreement. Whilst the French authorities are investigating the case, the Spanish authorities have simply denied any responsibility in Mr. Anza’s disappearance.

3.- Torture under incommunicado detention

Spain has failed to respect the contents of **Article 5** by using incommunicado detention in accordance with the “antiterrorist law” explained above. The report submitted by Special Rapporteur on Torture Theo van Boven after his visit to Spain in October 2003⁴, recognizes that “torture is not systematic in Spain, but the system as it is practiced allows torture and ill treatment to take place, especially in cases of people placed in incommunicado detention in relation to terrorist activities”. That system means secret detention of suspects for up to five days during which, as stated by the United Nations Committee Against Torture in its last analysis of Spain⁵ “the detainee has no access to a lawyer or to a doctor of his choice nor is he able to notify his family”.

Over recent years, thousands of Basque citizens –many of them not involved in terrorist activities as proved in Court- have referred having been subjected to various methods of torture by all police forces operating in the Basque territory –Civil Guard, National Police and Basque Autonomous Police-. According to the reports compiled by the Basque Group Against Torture –Torturaren Aurkako Taldea- 656 people were put under this regime in the last 8 years. Of these, 445 have

4 Report E/CN.4/2004/56/Add.2 of the United Nations Special Rapporteur on the Question of Torture, after his visit to Spain from October 5 to October 10 in 2003, 6 February 2004.

5 United Nations Committee Against Torture. Twenty-eighth session CAT/C/CR/29/3, 23 December 2002

publicly denounced having suffered torture. 310 claims were taken before the Courts. None got as far as a public hearing. Institutions such as the office of the Special Rapporteur Against Torture or NGOs like Amnesty International have reported specific cases of torture of this nature. The European Council Committee for the Prevention of Torture⁶ interviewed a number of people detained under this regime: “several alleged that they had been ill-treated while held in the custody of the National Police and the Civil Guard. Their allegations included blows to various parts of the body and, in some cases, more severe forms of ill treatment. The latter included allegations of asphyxiation by placing a plastic bag over the head and, in the case of people detained by the Civil Guard, electric shocks. As in other previous visits, the delegation gathered ample evidence, including some of a medical nature, consistent with allegations of ill treatment received”.

As to the investigation and punishment of the crime of torture, action by courts, disciplinary procedures and other prevention mechanisms are absolutely inefficient. Mr. Theo van Boven expressed his concern at “the high level of silence which surrounds this issue and the refusal of the authorities to investigate allegations of torture”. The few cases that have been investigated and brought to a sentence have ended with the torturers being pardoned, thus compounding the lack of recognition and reparation for victims of torture.

All the international mechanisms have recommended the elimination of the five-day period of incommunicado detention, as it, “regardless of the legal safeguards for its application, facilitates the commission of acts of torture and ill-treatment”, as the CAT⁷ stated. In the words of the Rapporteur, it “creates conditions which facilitate the penetration of torture, and which in itself [incommunicado detention] may constitute a form of cruel, inhumane degrading treatment or even torture”. The Spanish authorities have taken no steps to end incommunicado detention, there has been no implementation of these recommendations, as demonstrated in the follow-up reports by the current Special Rapporteur on Torture Manfred Nowak⁸. Moreover, instead of eliminating or shortening the period of incommunicado detention, Statutory Law 15/2003 of the 25th of November has extended this period to a further eight days of incommunicado detention, this time not in police custody but in prison. The government even defended the extension of the incommunicado detention period to a total of 13 days and boasted that “we are proud of this reform and the good results it is achieving”⁹.

3.- Penitentiary Policy

The detention regime and penitentiary regulations operate in an absolutely discriminating way, violating **Articles 7 and 9 of the UDHR**. The State Security Forces have an unlimited framework for the detention of people under the slightest suspicion that can be used against broad sections of population in the Basque Provinces. Large police operations with dozens of people arrested and homes and premises searched, with most of the detainees finally being released with different cautionary provisions have often occurred.

The collective of 570 Basque citizens that are in prison in Spain due to their alleged connection to political crimes suffers special measures that arbitrarily affect living conditions. First, the law allows pre-trial detention to be extended for up to four years, in exceptional circumstances. Suspects of terrorism have been released after the four year term is up and still pending trial. In some cases they even have later been acquitted by the court. This contravenes the right to be presumed innocent until proven guilty as set out in **Article 11**. The Committee on Human Rights¹⁰ recently recommended the party State to “limit the length of police custody and pre-trial detention”.

6 European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). Report to the Spanish Government on the visit to Spain from 22 to 26 July 2001. CPT/Inf (2003) 22

7 COMMITTEE AGAINST TORTURE Twenty-eighth session **Spain. 23/12/2002. CAT/C/CR/29/3.**

8 Reports of the Special Rapporteur on Torture Manfred Nowak E/CN.4/2005/62/Add.2, E/CN.4/2006/6/Add.2 and A/HRC/4/33/Add.2

9 Debates of the Spanish Congress of the 25th of April 2006 and 19th of September 2006, for the abrogation of the incommunicado detention regime, with the opposition of the main parties -PSOE and PP-.

10 HUMAN RIGHTS COMMITTEE CCPR/C/ESP/CO/5 5 January 2009 Ninety-fourth session. Spain.

But the most evident measure and the core of this special treatment is the so called “dispersal policy”. Basque prisoners find themselves dispersed throughout 52 Spanish jails, some of which are thousands of kilometres from their home, whilst only 18 are in jails in the Basque Country. Diverse motives have been used to attempt to justify the application of these measures –the “benefits” to the prisoners themselves, to facilitate resocialization, problems of space and location in the Basque jails, security problems...- but they are just excuses to hide an arbitrary and abusive treatment, opposed to both domestic and international¹¹ rules for treating people under custody.

The policy of prisoner dispersal is an obstacle to the right to healthcare and effective medical assistance, it breaches the right to a defence, and it impedes the right to education and communication with prisoners’ relatives, who must travel long distances to visit them. This penitentiary policy includes long periods under isolation not as a result of a concrete punishment but as a systematic measure, thus becoming an evident source of harassment and physical abuse against Basque prisoners. The Spanish penitentiary policy has caused the deaths of 22 Basque prisoners for different reasons and 16 relatives have lost their lives in traffic accidents when travelling the long distances to visit the Basque prisoners. In view of these figures, Special Rapporteur on the Question of Torture, Theo van Boven¹² recommended that “in assigning prisoners from the Basque country to prisons, due consideration should be given to maintaining social relations between the prisoners and their families, in the best interests of the family and the prisoners' own social rehabilitation”. Several NGOs and Human Rights Institutions share the same opinion.

Contrary to this opinion, in recent times a number of changes in law and in court jurisdictions have restricted the living conditions of the prisoners even further, affecting their right to access to freedom. In 1995, the Penal Code was amended eliminating remission; this in turn was consolidated by the reform introduced by Statutory Law 7/2003 that increased the limits to effective sentence-serving time to 40 years, for crimes of terrorism. The compounded effect of these changes means that now there is a covert Life Sentence in Spanish law.

However, prisoners convicted under the previous Penal Code, the Francoist code of 1973 still benefited from remission from a maximum serving time of 30 years. A new interpretation introduced by the Supreme Court in verdict 197/2006 in order to create jurisprudence via the so called “Parot Doctrine” effectively cancels remission altogether. This new jurisprudence, which is being retroactively applied, has affected several prisoners that had received their release date, due in a few months, according to the prior legal interpretation will now have to serve 10 or 12 years more until they complete the 30 years limit.

4.- **Independence of the courts**

As to the right to be tried by an independent and impartial court established in **Article 10**, in recent times we have noticed a development of the use of criminal justice justified as a counter-terrorism necessity but in fact extending this definition to areas that have nothing to do with terrorism. In this regard, we have perceived a *judicialization* of political life, with interference by the judiciary in the everyday political debate and, coupled to this, a politicization of the judiciary, with decisions taken under political pressure or taking into account facts or elements of a political nature rather than a legal one. The involution in this field is a concern for most of the human rights organizations in the Spanish state, as can be seen in many of their statements.

The Spanish *Audiencia Nacional* is the most evident example of collusion between the executive and the judiciary. This Court substituted its predecessor, the Francoist *Tribunal de Orden Público*, and inherited its functions and many of its methods. It is in this atmosphere where the judiciary becomes the fundamental mechanism in the antiterrorist struggle. Consequently, the judges and magistrates working there are under continuous pressure from and due to political interests. Its jurisdictional

11 The European Penitentiary Rules adopted by the Council of Europe on 12 February 1987, article 43.1, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment of the United Nations, resolution 43/173 of 9 December 1988 Principle 19 Principle 20.

12 Report E/CN.4/2004/56/Add.2 of the Special Rapporteur on the question of torture of the United Nations, after his visit to Spain from October 5 to October 10 in 2003, 6 February 2004.

competency in the whole territory of Spain breaks the principle of the natural judge by giving jurisdiction in hearings for terrorist actions only to this special Court, centralized and based in Madrid.

We would like to highlight the lack of impartiality and independence of this Court through two elements: Firstly, as the *Audiencia Nacional* judges grant the Security Forces permission to use incommunicado detention, they should guarantee the security of detainees. The lack of investigation and the use of statements taken under torture in the trials held in the *Audiencia Nacional* is a fact. Secondly, we must bring attention to the involvement of the *Audiencia Nacional* in the investigation and prosecution of legal and public activities, in a new and expanded interpretation of the term of terrorism. The Human Rights Committee¹³ “expresses concern at the maintenance on a continuous basis of special legislation under which people suspected of belonging to or collaborating with armed groups [...] are judged by the *Audiencia Nacional* without the possibility of appealing”. Mr. Martin Scheinin, Special Rapporteur on the protection of Rights while Countering Terrorism, in his report after his recent visit to Spain¹⁴ mentions the “trend of broadening the scope of the practical application of the provisions on terrorist crimes by the *Audiencia Nacional*”. Therefore, he “requests the Spanish Government give consideration to the possibility of including terrorist crimes in the jurisdiction of ordinary territorial courts, instead of a single central specialized court, the *Audiencia Nacional*”.

5.- Political rights

As to the political rights set out in **Articles 18, 19 and 20**, there has been an attempt to extend the accusation of terrorist to cultural, political and social Basque organisations, newspapers and media companies, political parties and election candidatures that until that moment were working publicly, legally and freely and this activity was tolerated for decades by the Spanish administration. It leads us to conclude that, with these measures, freedom of expression and opinion, the right of association and the right to participate in democratic elections have seriously been violated in the Basque Country. This has also affected the civil rights of hundreds of political activists and human rights defenders who have been arrested, sometimes very violently, just for carrying out social, political or cultural activities. The Human Rights Committee¹⁵ refers to this situation: “the exercise of freedom of expression and association could be unjustifiably hindered by prosecutions before the National High Court for the offences of association and collaboration with terrorist groups”. In this regard, the Working Group on Arbitrary Detention¹⁶ has highlighted one case among dozens: that of Karmelo Landa, former Member of the European Parliament and currently in pre-trial detention. The WGAD considers that he is under arbitrary detention as the reasons why he was arrested are under the protection of the Articles 18, 19, 20 and 21 of the Universal Declaration.

As to the right to vote and to be elected - **Article 21 UDHR**- a new Statutory Law, 6/2002 of 27th of June, reformed the Law of Political Parties. It is an administrative law that regulates access to the registration of political parties and, through it, their participation in elections and, more widely, in the democratic debate. Suffice to say at this point that the said law was established with the clear and stated aim of proceeding to ban the political party Batasuna. Article 9.1 of the new law foresees that “political parties should respect constitutional values”. Within the Spanish Constitution, in contrast with others, there is no intangibility clause, in the way that its content is subject to change¹⁷. In several of its verdicts, the Constitutional Court¹⁸ has established that “the positive obligation to comply with the Constitution does not necessarily mean ideological support or agreement with its whole content”.

However, by means of Law 6/2002 the so called Special Court on the article 61 at the Supreme

13 Human Rights Committee CCPR/C/79/Add.61,3 April 1996

14 HUMAN RIGHTS COUNCIL Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Martin Scheinin. MISSION TO SPAIN A/HRC/10/3/Add.2 16 December 2008.

15 HUMAN RIGHTS COMMITTEE CCPR/C/ESP/CO/5 5 January 2009 Ninety-fourth session. Spain.

16 Working Group on Arbitrary Detention, opinion N. 17/2009 (España), 28th of May 2009

17 Article 168 of the Spanish Constitution

18 Spanish Constitutional Court decisions STC 101/1983, STC 12/1983, STC 85/1886, STC 119/1990...

Court has decided the dissolution of several political parties as a chain: Herri Batasuna-HB, Euskal Herritarrok, Batasuna, Autodeterminazioen Biltzarrak-AuB, Herritarren Zerrenda-HZ, Aukera Guztiak, 246 electoral lists for City Council elections presented by Abertzale Sozialisten Batasuna-ASB, EHAK-PCTV, the historic EAE-ANV party. Spain's Supreme Court upholds the concept that individuals that have participated in illegal parties may not run for election as part of the so-called "theory of fraudulent succession". Strict application of this rule disqualifies around 19.000 Basque citizens that have participated in the aforementioned parties as candidates for election. Furthermore, their mere presence in electoral lists would be enough to illegalize these lists and prevent them from taking part in the electoral contest. The language used by the State Prosecutor's Office and State Legal Service, i.e. "contamination", "infiltration", "invasion", adds to the discrimination of a section of the citizenry in a persistent expansion of a policy that irreversibly precludes them from exercising their right to stand for election. The European Association of Democratic Lawyers –AED/EDL¹⁹ stated, "These people do not suffer this limitation of their right to passive suffrage on the basis of a judicial procedure with full guarantees. On the contrary, this limitation is a discretionary administrative measure aiming at creating ideological lists".

All those political parties and electoral candidatures have submitted appeals to the European Court of Human Rights, after exhausting the domestic judicial routes, on the basis of freedom of expression and freedom of association. The first decision of the court went to the Fifth Section of the ECHR and was to reject the claim of the banned parties²⁰. Their defences have appealed this decision to the Grand Chamber of the ECHR. The appeal is currently pending resolution.

Contrarily to the ECHR decision mentioned above, Amnesty International²¹ stated that "the ambiguity of some wording in the law could lead to the outlawing of parties with similar political goals to those of armed groups, but which do not advocate or use violence". In the same direction, the Special Rapporteur "is troubled that the broadly formulated provisions of the Law on Political Parties [...] might be interpreted to include any political party which through peaceful political means seeks similar political objectives as those pursued by terrorist groups". In this respect, he "reiterates that all limitations on the right to political participation must meet strict criteria in order to be compatible with international standards".

19 Statement approved at the Assembly of the European Association of Democratic Lawyers –AED/EDL in Munich, 21st of April, 2007

20 ECHR, Requête n° 25817/04, Sentence du 30 juin 2009

21 May 2002 "Comentarios de la sección española de Amnistía Internacional al proyecto de ley orgánica de partidos políticos" (Comments to the Political Parties Act by the Amnesty International Spanish Chapter).