

# CRIMINAL LAW IN THE WAKE OF THE END OF ETA

(3rd edition)



# WOLVES WOUNDS

## SEMINAR

### INTRODUCTION

The participants in the seminar, who come from the worlds of the judiciary, legal practice, academia and public institutions, all have a shared background in law. Over and above our differences, previous editions have enabled us gradually to draw up a common body of principles in regard to the need to do away with the exceptional response which criminal law has shown in cases related to terrorism.

Following ETA's announcement of the permanent cessation of its criminal activities, and with the prospect of the organisation disappearing once and for all, an idea that the participants in the seminar deem to be fundamental takes on even more importance: the effects of criminal proceedings need to be consistent with the values of coexistence in freedom that they exist to defend. The superiority of the law must show itself in respect for the freedoms in whose name it acts: it is not in vain that a criminal law system is not defined by the rights that it proclaims but by those that it sacrifices. This goes



for the criminal law system as a whole, as this is not just a legal problem: it also affects practices at all levels of the apparatus of the state, and the courts of law.

The reflection that we have shared covers three main areas in which the exceptional nature of that response has shown up:

1. The shifting of the limits of criminal law protection to the point where the limits of the offences defined are vague and can be construed as including conduct that should be protected by the rights of freedom of ideology and expression.
2. Nuancing or reduction of assurances:
  - Precautionary measures during the investigation phase.
  - Respect for the rights of detainees.
  - The validity of certain evidence as regards setting aside the principle of the presumption of innocence: incrimination of the social environment based on police intelligence evidence, statements made by persons detained and held incommunicado, etc.
3. Exacerbation of sentences:
  - Sentences longer than merited for certain collateral actions.
  - Enforcement & “effective compliance”: prison classification, prison privileges & conditional release.

Based on this reflection, we have identified the following points of agreement:

## I. GUARANTEE OF DUE PROCESS

### • Detention & holding *incommunicado*

We advocate that the system of holding detainees *incommunicado* be done away with, especially in view of the explicit requirements made of the Spanish state in this regard by international human rights organisations and in the international agreements on the rights of detainees to which Spain has signed up.

The need to get away from an exceptional response also concerns the loss of guarantees in matters of privacy of communication and the inviolability of the home.

## II. SUBSTANTIVE LAW

### • Art. 577: The offence of terrorism without membership of an armed group

We advocate that the offence of terrorism without membership of or collaboration with an armed group be struck off the statute book and that such conduct be reassigned to the domain of common offences that may be committed by any individual.

### • Art. 578: The offence of glorification and justification of terrorism

This offence must be struck off the statute book, as in our opinion it clashes with the lawful exercise of a right that forms a basic part of the architecture of democratic coexistence, i.e. freedom of expression.

As regards the protection of the dignity of victims, we advocate for its exclusion from the penal code, for such protection to be placed outside the realm of criminal law and for their all-round protection to be located in the realms of administrative and civil law.

## III. CRIMINAL LAW ENFORCEMENT

### • Prison Law

The main guidelines for the enforcement of sentences should be the principle of reintegration. On the basis of this principle there is plenty of room for action in the field of prison administration and in jurisdictional matters to remove the obstacles that currently stand in the way of ETA

prisoners serving their sentences in accordance with general, universal criteria.

The participants in the seminar stress the importance, in terms of the individualisation of sentences at the legislative and judicial stages of proceedings, that must be attributed to the fact that ETA has put an end to its violent actions. This circumstance must affect the assessment of how potentially dangerous ETA prisoners are, and of how that assessment affects them during the enforcement of sentences in terms of permitting them to access living conditions more conducive to their reintegration, seen as the ability to live without committing further offences. In line with these principles, the participants propose the following:

- That ETA prisoners be allowed to serve their sentences in prisons close to their homes, thus fostering the process of peace and normalisation in and outside prisons.
- That the prison authorities facilitate the application of the regulations that envisage release from prison, with conditions when necessary, of those prisoners who are suffering from serious or incurable illnesses.
- That prisoners be classified according to individual assessments of the likelihood of their living in liberty without committing criminal offences, so that they can access the framework that is deemed most suitable in each case to foster their reintegration into society, work and family life.

### • The role of victims in the criminal enforcement stage

The participants in the seminar support the right of victims to truth, justice and due reparation, over and above the role to which they have conventionally been relegated by the process of criminal law. In view of their importance in terms of restorative justice, meetings arranged between some prisoners who have publicly rejected violence and their victims have been highly rated.

However the rights of the victims do not justify the exceptional measure comprised by increasing their right to bring legal actions during the enforcement of sentences. At that time the underlying principle should be not the seriousness of the crime but the reintegration of the perpetrator.

