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Report (final)

PENITENTIARY LAW AND CRIMES OF TERRORISM IN RELATIONSHIP WITH ETA

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1. Introduction: ten points and the making of the report

1.1. This report is the **final document** of a joint initiative of the Basque Universities (the University of the Basque Country, UPV/EHU, University of Deusto UD and Mondragon Unibertsitatea MU) with the Basque Autonomous Government (2013-16 Plan for Peace and Living Together of the Secretariat for Peace and Reconciliation) whereby the parties adopted a collaboration agreement to allow for a technical legal academic report on the situation of prisoners serving sentence for crimes of ETA terrorism. The report considers to what extent current penitentiary policy regarding those prisoners conforms to international and European standards and to what extent it might even be considered unconstitutional. The report also contains proposals for legislative change.

1.2. **Methodology and preparatory**. This report is the result of one year's work and the collaboration of over 20 leading academics from different European countries specialised in penitentiary law, and the law on terrorism and human rights, coordinated by Joxerramon Bengoetxea and Jon-Mirena Landa (both UPV/EHU).

In the first place a local team of criminal and penitentiary law experts was created with Juan Echano and Xabier Etxebarria from UD, and Enara Garro and Jon Landa, from UPV/EHU and coordinated by Landa. This team prepared a draft report in March 2014 (annex 1) with a view to gather and structure information on the current state of Spanish penitentiary policy and its application in practice. This report was then submitted for consideration and comments by Spanish and international experts who then prepared another report in response.

On 18 September 2014 a workshop On the Report Concerning Penitentiary Policy Applied to ETA Prisoners by Spanish Authorities was held at the Onati International Institute for the Sociology of Law. The different reports were discussed in this workshops, the first draft report by local experts (Annex 1), the *Comments on the Report on the current state of penitentiary law and its application to crimes of terrorism by ETA* by the international panel of experts coordinated by Prof Dr. Iur Frieder Dünkel of Greifswald University, Germany, Prof Tapio Lappi-Sepala from Helsinki and Prof Liora Lazarus, Oxford University (Annex 2), the *Comentarios sobre el Informe Preliminar* made by Prof Jose Manuel Gomez Benitez, of Complutense University of Madrid (Annex 3) and *Commentaires au rapport sur la situation pénitentiaire des membres de l'ETA*, by Prof Amane Gogorza, University of Bordeaux (Annex 4).

In the workshop, other experts made oral observations on the draft report. Contributions were made by Prof Elena Larrauri, of Pompeu Fabra University of Barcelona, who had previously taken part in a preparatory meeting at Oxford with Jon Landa and Liora Lazarus, by Prof Dr Iur Johannes Feest, Bremen University, Prof Dr Iur. Heike Jung, Saarland University, by Sharon Shalev, Oxford University,

by Gemma Varona (UPV/EHU), by Nekane San Miguel (Criminal Court of Biscay) and by Alison Hogg (Ph D candidate).

Last, not least, other professors who could not join the workshop also made important contributions in several discussions with Jon Landa in the UK during the Summer of 2014. These are Prof Nicola Padfield, Fitzwilliam College, Cambridge, and Prof van Zyl Smit, Prof Appelston, and Prof Dixon, Nottingham University and Prof. De Leon Villalba y Lopez Lorca, of Castilla La Mancha University

1.3. The workshop and the whole process of discussion leading to it, tried to identify some **shared perspectives and ideas** that would lead to the preparation of a final report that would present the major critical issues. This final report contains 10 points that reflect the contributions made during this process and synthesizes the points where there is agreement between all experts involved in the process. The aim is to contribute a document that can help design a penitentiary policy more in line with international human rights standards and can also be available to the public with a view to forming an informed opinion. This document or final report is to be interpreted in the light of the process described above and of the annex reports that help explain the details.

2. Ten Points towards a Human Rights informed Penitentiary Policy Towards prisoners convicted for crimes of ETA Terrorism

This 10 point document is divided in three sections. Section A contains two premises, section B contains seven specific points that follow from the premises and Section C contains a final synthesis with a proposal.

Section A. Premises

2.1. Principle of individual social rehabilitation, terrorism and discrimination

Prisoners serving sentence for ETA terrorism related crimes in Spain are the subject of a specifically targeted penitentiary policy, which differs from that applied to the other prisoners. The most recent aspects of this policy are the systematic intervention of communication, the politics of *dispersion* (i.e. scattering and distancing ETA prisoners) throughout all mainland prisons, the systematic refusal of exit permits, the automatic filing of the prisoners in a centralised registry (FIES) *confinement* (their initial systematic classification into so-called first grade treatment) and the requirement of three additional conditions in order to progress into third grade (open) treatment or to obtain parole: an *irreversible security period* – Article 36,2 Criminal Code CrC – *full completion of the sentence* – Article 78 CrC – and *abandonment and collaboration* – Article 72,6 Organic General Penitentiary Act OGPA. Maximum limits of serving prison are, according to the law, are applied only for crimes of terrorism or crimes committed in the framework of

criminal organisations (notwithstanding different transitional regimes that apply since the 1995 reform of the Criminal Code). Some of these special treatment conditions apply even to prisoners who have undergone self-criticism of their former activity, who have made petitions of pardon to the victims or have participated in personal restorative encounters, or who are facing up to their civil liability and have abandoned the discipline of the terrorist group (so called Nanclares way prisoners).

The application of a specific penitentiary regime depending on the crime of terrorism rather than on the personal features of each prisoner, and sometimes even disregarding the differences in the seriousness of the offences, amounts to a general policy for a specific category which contradicts the need to consider the administration of penal policy in an individualised way.

The emerging consensus in international human rights law concerning the conditions of penitentiary application and especially, of the European Court of Human Rights case-law (above all the case Vinter et. Al. v UK, 2013) requires that the application of the principle of social rehabilitation and its consequences be individualised for each prisoner taking into account their individual situation and their criminal dangerousness assessment. In a similar vein Article 72 OGPA of 1979 establishes the principle of scientific individuation. The Spanish Constitution SC does allow in Article 55, 2 for the individualised suspension of certain fundamental rights in relation to the operation of armed gangs or terrorist elements but only at the stage of criminal enquiry and not generally. A penitentiary policy that allocates a differentiated regime with higher restriction of fundamental rights for a particular category of prisoners cannot and should not rely on an extensive or analogical interpretation of that constitutional provision against the accused. But even if a special anti-terrorist penitentiary policy were to be found compatible with Article 55, 2 SC, the very doctrine of the Spanish Constitutional Court SCC (in judgment 25/1981) has established that an individual suspension of fundamental rights can only be compatible with the SC when it can be proved that the terrorist activity is provoking a sort of "legitimation crisis" that can jeopardise the free and peaceful enjoyment of fundamental rights in wide sectors of society. A general appeal to utilitarian aims or police effectiveness is not enough by way of justification of the suspension of constitutional rights in general. In a situation where a terrorist organisation like ETA has declared and observed a final ceasefire, and where the prisoners have declared their commitment to the ceasefire and their readiness to be subjected to the Spanish penitentiary legislation, it is difficult to see how the risk of criminal activity could be such as to consider that the conditions laid out by the SCC for a justified suspension of the rights may be fulfilled.

Therefore, a specific and exceptional antiterrorist penitentiary policy in fact – dispersing and systematically classifying into first grade - and in law – special ad hoc legislation for groups of prisoners depending on the crime committed - goes against the emerging human rights consensus on the meaning and implications of the principle of social rehabilitation in penitentiary policy. It is also contrary to the jurisprudence of the ECHR, to the Spanish Constitution and it goes plainly against

the very statutory model of scientific individuation and its related prohibition of discrimination (Article 3), as provided for by GOPA.

2.2. Aims of the penalty and their instantiation at the sentencing and application stage

Together with the principle of social rehabilitation as one of the aims of punishment, a growing consensus has been emerging and consolidating in European penitentiary law to distinguish the objectives or aims that must inform the judgment on the sentence – the punishment or penalty - from the aims or objectives that must inform the execution or application of the sentence in prison, and the administration of the sentence. In the sentencing judgment there are retribution, general prevention and special prevention aims, but at the stage of entering in prison the only aim that can legitimately determine the serving regime is that of social rehabilitation. Social rehabilitation is a human right of all prisoners and an obligation on the social and democratic Law-State to make sure that the prisoner will not commit new criminal acts. The State must therefore do all it can to facilitate rehabilitation. This is a non-coercive offering so that the prisoner can develop a responsible life away from crime after serving the sentence if the process of rehabilitation is successful (European Penitentiary Rule No 102.1 and Article 59, OGPA). In sum, those condemned are sent to prison *as* punishment, not *for* punishment.

From this pellucid distinction between the aims, certain consequences follow particularly as regards the arguments and reasons that can legitimately determine the development and progress in the categorisation of prison treatment. Beyond a minimum period of prison time, considered indispensable, those reasons should be aimed at the principle of social rehabilitation based on an individualised dangerousness assessment and not on general prevention. In other words, the organisation of life in prison, and the different activities are to be arranged so as to allow and facilitate the rehabilitation process as far as possible, while making sure that purely retributive or general preventive reasons do not hinder that right or reduce it in any way. In conformity with the doctrine of the ECHR, at least in cases of life or equivalent sentences, the principle of social rehabilitation implies not only the individual right to a real possibility of a future parole but furthermore the right to have that possibility assessed, confirmed or rejected, on the basis of a judicial review. This means that in order to obtain possible pre-release or parole, a special review action and judicial procedure has to be put in place with all due process guarantees so that the individualised rehabilitation prognosis can be assessed in order to decide on progress in categorisation (development of prison terms). An action for executive pardon does not comply with the rehabilitation assessment review standard.

Section B. Corollaries.

2.3. Distancing (dispersion)

A blanket policy, as opposed to individualised, of systematic distancing of prisoners condemned for crimes of ETAS terrorism from their and their families' abode amounts to a violation of the principle of rehabilitation and goes against minimal European Rules (17,1) and also against the spirit of Article 12, 1 GOPA. A justification of such a distancing policy on security reasons has lost weight since the permanent or final ceasefire declaration.

At any rate, in the absence of a legal basis for this *de facto* policy in Spanish law, the case-law of the ECHR (case Khodorkovsky and Lebedev v. Russia 2013) is all the more pressing since it requires a more rigorous and individualised, case by case, control of the administrative situation in this field. Administrative decisions on distancing should not be arbitrary and control of arbitrariness extends to the reasons given for maintaining those distancing decisions permanently unchanged, with no possible review and no reduction of the distance as the process of rehabilitation progresses. The necessity and proportionality of the distancing measure should be analysed in relation to the balance between proximity to the place of residence and possible security reasons. Such scrutiny should be based on facts like the objective diminution of dangerousness of those prisoners as members of an organisation that has declared a permanent ceasefire, or the diminution of their internal dangerousness to the extent that the prisoners have accepted to be subjected to penitentiary legislation. A broad justification of distancing regardless of the individual situation or on the basis or retributive and preventive reasons would not comply with this standard because the distancing policy would then become arbitrary and discriminatory.

2.4. Systematic classification into first grade

A blanket policy of classification of ETA prisoners into so-called first grade (confinement) is incompatible with the case-law of the ECHR. The principle of proportionality of rights-restricting measures is thus breached and becomes ineffective when classification measures are generally applied to a category of offenders and not individualised, because it no longer becomes possible to assess the balance of necessity and proportionality that could justify confinement, which is a very restrictive measure. Again, the key to deciding on grade or treatment should be the individual assessment of rehabilitation and dangerousness and not the type of crime committed.

At any rate, there should be an effective review procedure that could assess progress in grade in the light of the development of the prisoner. Review of classification into first grade ought not to be confused with classification into third grade (open system) and it should not be based on those criteria. The conditions are not and should not be the same. To move away from first grade the condition is a lesser security and risk situation or a favourable development of the violent personality with the result that the objective need for separating the prisoner from the remaining inmates disappears. These should not be confused with the conditions for access to third grade. Therefore, rejection of the use of violence in the future (commitment to abandon armed struggle) or the acceptance of penitentiary legislation, as clear signs of having severed their links with the terrorist organisation and no longer accepting its discipline, should be sufficient

and inequivocal reasons to consider that it is longer necessary to separate and isolate the prisoner from the rest of the inmates..

Assuming that the initial classification into and continuation in first grade could be justified on the basis of the prisoner's submission to or "compliance with the internal discipline of the terrorist organisation" (Article 102, 5 of Penitentiary Regulation PR), this justification would not hold for cases where the prisoner is not a member of the organisation but is sentenced for crimes of collaboration or glorification (apology). Similarly, prisoner support organisations have been banned and their members sentenced although they are neither criminal groups nor armed gangs and therefore a restrictive interpretation in favour of the accused is required when it comes to constructing the criterion of "compliance with submission to the internal discipline of the terrorist organisation". An extensive, contra reo interpretation of compliance or submission to criminalise the whole spectrum of the left wing Basque nationalists who sympathise or do not condemn ETA would be unacceptable. But at any rate, a prisoner's submission to internal discipline cannot be a formal criterion that automatically determines first grade, it must rather be established that in the instant case this submission or compliance makes it impossible, on security grounds, to apply the ordinary prison regime.

For those extreme, but not exceptional, cases where confinement is prolonged for years, and when it is applied as solitary confinement of 20 hours or more with no common activities and denying the possibility of access to programmes aimed at a rehabilitation process, this situation can amount to inhuman or degrading treatment prohibited by Article 3 of the European Convention on Human Rights. It would not be unreasonable to require that an excessive and abusive extension of first grade should lead to a special time discount of the type 2 days for one served, reducing the duration of the sentence, through compensatory penitentiary benefits, taking into account the intensity of the prison regime in such cases.

2.5. Maximum and Minimum limits of serving sentence: the security period

In the laws of the Contracting States of the Council of Europe a prison sentence of up to 30 years for a single crime and especially of 40 years for concurrent crimes is really exceptional. It is true that Spain does not provide for life sentence whereas other European States do. However, an in depth analysis of the effective ways of enforcing and applying long sentences in Spain shows that the Spanish regime is at least as hard, if not harder, than those where a life sentence is declared. This conclusion can be backed by analysing not only the formal maximum time in prison (which should not exceed 30 years taking as the reference international criminal law – Article 77,1 of the Rome Statute) but also the minimum time of service and the conditions for accessing open or semi-open regimes.

In the case of life sentences, the ECHR (*Vinter*) has placed the threshold of the minimum serving time at 25 years although a prison sentence longer than 15 years makes it very difficult, if not impossible to organise rehabilitation in prison in any meaningful and effective way.

That is why a rigid system of time service that does not allow for review and blocks access to regimes of quasi-liberty until the minimum period of 32 or 35 years has lapsed (Article 76/78 CrC) is in flagrant contradiction with the principle of rehabilitation. It exacerbates retribution and general preventive aims which hinder, prevent and ultimately deny rehabilitation.

Beyond those extreme cases of Articles 76/78 CrC, the minimal and maximal prison periods define the scope where retributive and general preventive aims give way and retreat in favour of rehabilitation. If the minimal service or security period is excessively prolonged the rehabilitation process gets blocked and becomes unachievable.

That is why penitentiary regulation should allow – as for the rest of the prisoners - at least a reduction of security periods, which for the time being are compulsory, - not discretional - for prisoners related to terrorism and organised crime. The essence of the system of scientific individuation should imply the possibility of judicial review so that the security period could be cancelled if the rehabilitation assessment is favourable. This would require a legislative amendment of Articles 36 and 76/78 CrC, (according to some sort of transitional justice for the process of dismantling and dissolving ETA allowing for the retroactive application pro reo) or at least, as an alternative an expansive interpretation pro reo of the principle of flexibility (Article 100 PR). At any rate, minimal periods of service for long prison sentences should not exceed the threshold of 15 years and should incorporate review criteria independent of retributive or general preventive considerations.

To sum up, security periods that are as long, non-reversible and rigid, as those imposed by Spanish legislation discourage rehabilitation and should be shortened and made flexible, if not dismantled, in order to allow for the system of individuation to apply to prisoners according to the principle of rehabilitation and non-discrimination.

2.6. Abandonment, Severing the Links and Collaboration with Justice, and their accreditation

On top of the security period additional requisites are the abandonment of armed struggle and collaboration with justice system. The law foresees different means for accrediting these conditions. First and foremost the technical reports on the severing of links with the terrorist organisation.

In order to establish the standard of severing of links it is useful to distinguish between severance in a strict sense – i.e. dissociation with the organisation to the effect that no violent action ("behaviour") will be engaged in - and de-radicalisation, which goes well beyond and implies the prisoners taking distance from the terrorist group and changing their minds ("attitude").

Whereas it might be reasonable and compatible with the principle of individual rehabilitation assessment to require a severance understood as dissociation, it would seem excessive to interpret severance as a change of mind-set or attitude.

This would be too intrusive, coercive and in breach of the fundamental rights of the prisoner (freedom of conscience and thought). The penitentiary model corresponding to a democratic criminal law as the criminal law of acts – not of the author – must be oriented to reintegration in society and ensuring that the external behaviour of the prisoner will be criminal law abiding. The purpose cannot be to change the prisoner's internal sphere. Severance of links should be concerned with facts not attitudes or thoughts and must be reflected in the drastic reduction or elimination of criminal dangerousness as the most reliable evidence for progress in treatment or grade.

This is why severance of links in a strict sense should inspire the interpretation of the law in the following way: (i) at the very most, severance can be required in relation to the unlawful or criminal association environment, (i.e. as regards terrorist organisations in a legal sense or banned political parties) but should not be required as regards other organisations of the ideological and sociological spectrum of the so-called Basque nationalist left-wing including groups of prisoners or prisoner-support organisations: (ii) the statutory reference to the "aims" is not to be interpreted as ideological severance or 'de-radicalisation' but rather as severance or distancing from the use of terrorist ends and means , i.e. refusal to resort to violence in order to pursue political ends such upheaval or overturning of the constitutional order or disrupting public peace.

Accrediting or certifying severance implies the credible statement of a prognosis of non-resort to violence in the future. Dissociation from the organisation materialises when the prisoners deny, refuse and abandon their former organised will to resort to violence with the aims of pursuing political ends. Any further requirement of ideological retraction or any prohibition to display sympathy would directly breach fundamental rights.

Accrediting severance in the strict sense already amounts to a form of collaboration with justice. Taking collaboration further into broader aims like concrete collaboration with the authorities, or *delation*, in order to reveal relevant information concerning facts and persons cannot be required in a penitentiary policy context as a necessary condition of recategorisation. Nevertheless, such extraordinary collaboration should make it possible to obtain special benefits, as is the case at the sentencing stage (Article 579,4 CrC).

2.7. Abandonment, collaboration and their accreditation (II): Pardon, Repudiation of Violence and Civil Liability

Abandonment and collaboration can be accredited through other means that are formally distinguishable from severance, like an express declaration of repudiation of violent activities and abandonment of violence or the express petition of pardon to the victims of the crime.

As regards repudiation, it is linked to the individualised assessment of criminal dangerousness. If the statement is credible it will favourably affect the assessment towards social rehabilitation. The prisoner will be capable of leading a future life in

liberty free of crime and free of resort to violence. It is the substance – rejection of violence in the future - not the form – the written statement - that is the key. And the substance can also be accredited by the process of dissociation.

As regards the petition of pardon, this has more to do with the acknowledgment of the harm caused as an element that can reveal a personal transformation of the prisoner towards future conduct, thus making it possible to conclude that the risk of recidivism has disappeared. The petition of pardon should not be interpreted as a sine qua non condition for progress in grade. Nor would it be legitimate to interpret it as a requirement of repent or a change of mind-set and attitudes. This would be too intrusive and contrary to the fundamental rights of the prisoner. The genuine and spontaneous petition of pardon is a positive factor that should never be discouraged, it could serve as the basis not only for recategorisation but also for obtaining redemption or executive pardon, depending on the circumstances. But the absence of a petition of pardon should not block recategorisation because this could go against the process of social rehabilitation, confusing it again with retributive or general-preventive considerations.

As regards civil liability, acknowledgment of the harm caused can be expressed also through an express petition of pardon or else through the assumption of civil liability, which is a statutory requirement for progress to third grade (Article 72,5 GOPA). As in the case of pardon, a spontaneous and genuine acknowledgment and a disposition in favour of facing up to civil liability is a positive factor towards the victim and should bring along not only recategorisation of grade but also additional benefits or even executive pardon, depending on the circumstances. However, to block access to quasi-freedom or open regimes until civil liability is actually satisfied would clearly go against the principle of social rehabilitation and would involve interference of retributive and general preventive considerations with rehabilitation as the sole aim of penitentiary application.

A legislative reform is necessary as regards civil liability, in order to prevent it from blocking the principle of rehabilitation. The courts are already adopting a flexible interpretation in this direction and pending such reform an extensive interpretation of Article 100, 2 PR and its model of flexible execution could be an interim solution.

2.8. The situation in France

There are almost one hundred ETA prisoners in French prisons. There are some differences and some similarities with Spain as regards their penitentiary treatment.

Some of the common and critical aspects relate to the policy of dispersing and distancing. The same incompatibility with European human rights standards, especially after the final ceasefire, could be predicated here.

As in Spain, the primacy of the rehabilitation principle in penitentiary policy is not so clear in France either. It also suffers interferences from retributive schemes and interpretations, even of general preventive considerations.

Like Spain, France also has long security periods of 18, 22, even 30 years in cases of life sentence and even permanent security periods in some cases and this is in the most extreme cases also incompatible with the case-law of the ECHR (*Vinter*).

The big difference is the absence, in France, of a specific ad hoc blanket treatment for persons condemned for ETA-related terrorism. There is indeed an anti-terrorist policy with added severity in the substantive and procedural criminal law and even a centralised jurisdiction in Paris for these crimes also as concerns administration of sentences (Art 706-22-1 CPP and Art 49-75 CPP), but it does not extend to penitentiary policy in the sense that procedural specificities do not affect, as such, the conditions for accessing individualisation measures. The same conditions and requisites that apply to ordinary prisoners apply for terrorism related prisoners, and these are (i) the time actually served as a condition to progress towards quasi-liberty or parole treatment, usually half the time of sentence with some exceptions related to life sentences, and (ii) the individualised dangerousness assessment for which there are no additional statutory conditions that could block progress like those applicable in Spain related to abandonment, collaboration, and pardon. Rather than blocking progress these criteria serve to justify penitentiary benefits.

Finally, it is also necessary to refer to a specific situation as regards the trans-frontier and extraterritorial treatment of crimes of terrorism perpetrated by ETA members on both sides of the frontier. Until now, the rule for sentences or judicial actions on both countries was not to take into account sentences fully served in France for the purpose of calculating the accumulation of multiple crimes in Spain even where the crimes were connected (as regards sentences in countries like Thailand or Andorra where the Supreme Court has admitted accumulation). In other words, instead of considering sentences served in France in conformity with Framework Decision 2008/675/JAI of the Council of 24/07/2008, Spain refused to take them into account, on the basis that the Framework Decision had not been transposed internally. Although the Spanish Supreme Court (SSC) ruled in favour of accumulation of sentences (judgment STS 186/2014 of 13 March 2014), Organic Law 7/2014 of 12 November implementing the Framework Decision has drastically limited accumulation (Articles 14 and 86) explicitly excluding French sentences adopted before 15 August 2010 (Single Additional Clause and First Transitional Clause) with the result that maximum limits of serving sentence (20, 25, 30 or 40 years) will be prolonged in fact because time already served in France will not be deducted[1].

[1] The Spanish Supreme Court met on 16 December 2014 in order decide on an appeal by one ETA prisoner against the decision of the Third Chamber of the AN refusing to accumulate the time served in French prisons and to unify doctrine concerning this issue. Unification of doctrine was considered given that a different Chamber of the Audiencia Nacional, the First Chamber, had decided to accumulate the time served by other ETA members in French prisons, but the Second Chamber, like the Third, had also refused accumulation in the case of another ETA member. The plenary criminal section of the AN was divided on the issue, 9 votes for accumulation and 9 votes against, and decided to have the cases decided by different chambers, which came up with different interpretations. The Supreme Court decided to postpone its uniformity decision for a month, in order to hear the parties concerned.

2.9. Victims

Victims of terrorism have an ample set of rights in conformity with European law (Directive 2012/29/UE) and especially Spanish law (Act 29/2011 and regional laws) but also in French law for all victims (Code of Criminal Procedure)

At the stage of prison administration however, their rights have to be balanced against respect for the principle of social rehabilitation. There is no reason why all the relevant information should not be provided to the victims of crimes, or why special measures should not adopted to protect the victims in the event of release if there is any risk for them. But going beyond those rights of protection and information, victims should not be given the prerogative to block release, recategorisation or the process of rehabilitation.

Complementing this point, in the administration of the prison sentence, any initiative, behaviour or attitude on the part of the prisoners toward reconciliation with their victims or with victims generally should be promoted if they are beneficial to victims. General programs for material or symbolic restoration, including mediation or restorative justice measures, or satisfying civil liability, even petitions of pardon, explicit public and sincere acknowledgment of responsibility, repent and self-criticism for the harm caused, all these are worth pursuing and promoting, as grounds for penitentiary benefits even for executive pardon, provided they are the result of an autonomous unconstrained choice. But they should not be turned into exclusionary reasons that can block rehabilitation assessment and thus any recategorisation into more open grades. Giving the victim the right to intervene in the process of prison administration and the right to appeal against decisions of recategorisation is an unjustifiable interference with rehabilitation rights.

Section C. Synthesis and Final Proposal

2. 10. Reform, re-interpretation and closing thought

1. De lege ferenda, as regards legislative reform. If the primacy of the principles of individualised rehabilitation and non-discrimination, and the consequences that follow were to be seriously considered, a legislative reform should follow in order to change some of the aspects of Spanish penitentiary law and policy that seriously breach fundamental rights. The changes concern precisely those aspects that were added by Organic Law 7/2003 concerning the full and effective completion of the sentence. The regulation of the security period should be modified and made more flexible and shorter and to make it discretionary and not mandatory in order to progress in grade and to assess dangerousness on an individual basis. Again, periods of security over 15 years, like maximum prison sentences over 30 years, are unacceptable.

Likewise, the regulation on civil liability and the requirements of abandonment and collaboration and their formal means of accreditation should be directed towards a single aim, i.e. to verify that the prisoner has abandoned violence and

crime and is fit to be reintegrated into society to lead a responsible life in liberty severed from the terrorist organisation and its program of criminal means to achieve political or other ends. Anything going beyond this future abandonment of violence and beyond dissociation – express petition of pardon, repent, acknowledgement of harm, assumption of civil liability, active collaboration with authorities, … - should be promoted in an individualised rehabilitation process but not required as an exclusionary condition that can prevent progress in grade. Such coercive requirements turn re-socialisation into an intrusive and imposed regime, as opposed to encouragement, and such rehabilitation curtails fundamental rights.

Similarly, systematic policies of dispersion and distancing and of classification into confinement should cease, or at least be transformed into strictly individualised measures justified on the basis of internal or external dangerousness. Keeping such policies in place breaches the European Convention of Human Rights.

Legal reforms should thus change the Spanish penitentiary model, its law, policy and interpretation, adapting it to the emerging international human rights law within the Council of Europe context, namely to the principles of social rehabilitation and non-discrimination. Such reforms could also serve as transitional justice measures in the process of dismantling and dissolution of ETA adapting the law to the new situation obtained after the final cessation of violence since October 2011.

2.De lege lata, as regards the interpretation of the existing law. The same aims and premises (full primacy given to the principles of social rehabilitation and non-discrimination) apply and could be reached by a pro reo interpretation inspired in the flexible model of prison administration well beyond the initial classification into first grade (Article 100,2 PR). This could temper the security periods and the excessive minimum times and would ensure that the whole plethora of requisites and conditions operate as mechanisms that help to verify the effective and individual abandonment of violence and dissociation from the terrorist organisation, thus facilitating and promoting penitentiary benefits but never as blocks to progress in grade and hindrances of the rehabilitation process. In the same vein, the policy of dispersing and distancing prisoners and of systematically classifying them into first grade should be discontinued.

This interpretation must be compatible with the creation of greater chances for conduct towards the victims and towards social reconciliation (pardon, repent, acknowledgement of harm caused, assumption of civil liability, restorative justice, mediation, …) in the penitentiary field. Such conduct is positive and should lead to benefits. For the time being such benefits, except for executive pardon, are excluded by the law for terrorism-related prisoners. A minimum time served in prison and abandonment of violence with dissociation from the organisation should be the basis for the process of social rehabilitation and recategorisation of grade. Any additional requirements should open the way for the granting of additional benefits.

3.Closing thought: a time for law

ETA as an organisation and its members have, for too long time, passively used Spanish penitentiary policy as part of their political struggle against the State. This attitude has also marginalised, as a collateral effect, any possibility to invoke and rely on the rights through legal action and thus to control penitentiary decisions before the courts. This legal passivity has not allowed for the law, and especially the emerging international law of human rights to fully deploy its potential of controlling Spanish penitentiary legislation and its application. Assuming and invoking penitentiary legislation, as recently announced by representatives of the greater group of prisoners should open up a new era. The time for law has come as a mechanism for solving conflicts. This should put an end to the former strategy of using penitentiary policy for political ends instead of following the principle of social rehabilitation which forms the absolute consensus of European penitentiary law.

Annexes

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