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Directing Dissent: Governing Political Dissidence in Spanish Prisons

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Abstract

Under article 25.2 of the Spanish Constitution the incarceration of a person should aim to re-educate and socially rehabilitate. Along the same line, Art. 59.2 of the General Penitentiary Law of 21 September 1979 asserts that treatment in prisons, should aim to motivate the incarcerated to become law abiding and to respect themselves, their family, peers, and society. This is allegedly achieved by them serving their sentences under conditions that reflect their individualized scientific grade (Art. 72 GPL). How do these aims translate into practice for a group of individuals, ETA members, condemned for offenses committed in reaction to a perceived oppressive majoritarianism? It is hypothesized that the Spanish state either rehabilitates the deviants thus showing them the error of their ways and directs them to normality through a highly individualized assessment based on politically constructed common factors, or contains and civically and politically excludes those who resist.

A Foucauldian approach is used to analyze the mechanisms of power and, the security and penal apparatuses erected to manage and discipline this collective, more precisely of governmentality, normalization, and of biopower. Particular attention is paid to the techniques used to 'normalize' and govern this collective. At first sight, one would think that only disciplinary mechanisms in a penitentiary setting need be used to achieve the earlier stated aims given that they have a 'captive audience'; however, in reaction to an intransigent collective with an embedded political praxis, the State has adopted a hybridized system of power. The system combines individual and collective security mechanisms, and legal instruments to achieve this objective. In managing risk, the Spanish penal apparatus has adopted strategies that involve politically and civically castrating those that are deemed too high a risk and incorrigible.

Key words

Political prisoner; political praxis; normalization; fragmentation; risk management

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Introduction

If governance is "any attempt to control or manage any known object" (Hunt and Wickham 1994, p. 78), how does a government such as the Spanish state manage incarcerated irrational[1] deviants who contest the State apparatus such as *etarras*[2]?

Under the newly instated constitutional monarchy, the Spanish legislature opted to recognise that the offences committed by *etarras* were politically motivated but criminal. It maintained the position held under the dictatorship that this type of activity caused both public and constitutional disorder.[3] Initially, a strategy was adopted to normalise this deviant group through the use of the juridical mechanisms and successive amnesties and pardons (Clark 1990); however, when faced with continued collective resistance it introduced a hybrid model in attempt to fragment the group (Fonseca 1996, p. 299). This security apparatus was characteristic of a strategy of containment in conjunction with the pre-existing moralising attenuating tactic i.e. repentance. In 1989, realising that this was ineffective and a sizeable proportion of the collective were unwilling to abandon their political praxis, it again adapted the penal and security apparatuses (Ibid. p.302). This study focuses on the apparatuses that emerged as of 1989 that aimed to fragment and discipline the collective through their geographic dispersion and the rehabilitative attenuating tactic. Further, particular attention is paid to the recent Penal Code (PC)[4] amendment, in which the legislature uses an alleged abnormality to justify the introduction of a new post-custodial mechanism.

This collective is considered to have rejected the social contract. In response, it is hypothesized that the Spanish state either rehabilitates the deviants by 'showing them the error of their ways' and directs them to 'normality' through a highly individualised assessment that is based on politically constructed collective risk factors, or incapacitates and, civically and politically excludes the collective who retain their political praxis. In other words, the statecraft politically and socially exclude them through the use of accessory penalties and a new security apparatus, which "incapacitate them out of the circuit" (Foucault 2003, p. 244). Their alleged pathology is used to explain the statecraft´s inability to successfully break this 'abnormal' collective so as to sustain the legitimacy of its penal apparatus.

This will be achieved by examining the contested political status of this category of prisoner, through an analysis of the social construction of the notion; an assessment of whether the contested status has conditioned the penal apparatus or not, and if the apparatus is being used as a means to neutralise their political praxis; and by comparing on what basis abnormality i.e. dangerousness is being judged by different experts in two areas at different stages of their respective conflicts.

Finally, attention is paid to the Constitutional right to rehabilitation and reinsertion for all prisoners, as well as prison legislation recognising the right to individualised treatment, which are based on an assumptive standard of normality. This research topic is of particular pertinence given recent events.

On 8 January 2011, Euskadi ta Askatasuna (ETA) announced a unilateral cease-fire. As in past negotiations between ETA and the Spanish government, incarcerated members and their release will be one of the principal issues negotiated.[5] How both governments perceive their respective conflicts can be uncovered by comparing

[1] They are irrational in that they deviate from the pursuit of a hegemonic rational end.
[2] The term *etarra* will be used to refer to members of Euskadi ta Askatasuna.
[3] Terrorism criminal legislation was and remains under the section titled "Public Order"
[4] Unless otherwise indicated all references to the Spanish Penal Code are to OL 10/1995 of 23 November.
[5] For example, the release of prisoners and their transfer to prisons in the Basque Autonomous Community (BAC) were discussed at 'contacts' held in Algeria, Geneva and most recently, Liola (Clark 1990; Murua Uría 2010). On 31 December 2010, there were 503 men and 87 women *etarras* incarcerated in Spain (Ministerio del Interior 2011, p.235).

how risk assessments are carried out by Spanish Treatment Committees and the Sentence Commission in the North of Ireland (NI).

1. Risk, Governance and Terrorism

Risk is now commonly used as a "decorative flourish on the word danger" (Douglas 1992, p. 40) and in a prison setting, risk is closely associated with the likelihood of re-offending.[6] The majority of academic work on risk in this setting has focused on the risks presented by the ordinary common offender and the actuarial tools used to identify them (Bonta and Andrews 2007; Brown and Motiuk 2005). More recently, attempts have been made to develop a risk assessment for 'terrorists' (Roberts and Horgan 2008); however, as concluded by Taylor and Horgan (2006), Victoroff (2005) and Silkes (2002), 'terrorists' are not abnormal but are uncommon. This renders any tool based on actuarial estimates inaccurate due to low base lines. In Spain, prison treatment committees use two actuarial tables. The Risk Variable Table (RVT) to assess prisoners' likelihood of absconding whilst on furlough and the complementary Peculiar Consecutive Circumstances (PCC) table. Membership in an armed gang is a risk variable on both tables.[7] Neither are currently used with *etarras* and are useless given the weighted value attributed to 'membership'. Latterly, perhaps due to concerns over the values attributed to distinct variables, researchers critically assessed the aims of the risk agenda, in particular their moralistic, normative and liberal aspects, and why certain risk estimates are selected and legitimated rather than others (Hannah-Moffit 2005; Reiss 1992; O'Malley 2000; Rose 2000). Finally, the practical administration by the juridical apparatus of actuarial tools, the ability of these actuarial measurements to predict future behaviour and their accuracy are highly contested (Valvere et al. 2005; Morton 2009; Harcourt 2005).[8]

In the NI context, Sentence Commissioners prioritise collective qualitative risk factors such as political change when assessing the eligibility of applicants for the early release scheme (Dwyer 2007). Under the Northern Ireland (Sentence) Act 1998, the Commissioners were not given set criteria for assessing applicants who were serving life sentences (Baber 1998). In addition to the requirements that exist for all paramilitary prisoners, they assess if the prisoner has served a period sufficient to reflect the gravity of the offence and if there exists an unacceptable risk to the public. Dwyer (2007, p. 89) concluded that scientific discourse was used to camouflage assessments based on political judgement. This was preceded by close to three decades of alternative counter-insurgency strategies such as mass internment, loss of political status etc. The prisoners' resistance to these strategies is demonstrative of the underlying collective political praxis for these prisoners (Feldman 1991; Rodriguez 2006; Gormally et al. 1993).

In comparison, various regions that haven't reached this stage, have introduced rehabilitation programmes for radicalised prisoners. Accepting many prisoners will be released, governments in Colombia, Yemen, Indonesia and Saudi Arabia have introduced prison programmes to 'rehabilitate' convicted 'terrorists' (Horgan and Braddock 2010; Ribetti 2009); the People's Republic of China commits dangerous convicts such as counter revolutionists or recidivists to the Re-education Through Labour or Force Job Placement programme (Epstein and Hing-Yan Wong 1996).

[6] For instance, under section 229 1 (b) 'The assessment of dangerousness' of the Criminal Justice Act 2003, the court must assess if there is a 'significant risk to the members of the public or serious harm occasioned by the commission by him of further such offences'.

[7] In past, terrorist organizations were also referred to as armed gangs. Further, the RVT also considers a 1st grade classification or a closed regime categorisation to be indicative of high risk. Maximum security or Category A are the closest equivalents to the closed regime. These will be discussed at a later point. Ironically, prior the accelerated release programme in NI few paramilitary prisoners absconded whilst on furlough so as not to jeopardize the release of fellow paramilitaries (McEvoy 2001, p.298-9).

[8] Many risk assessments tools are used by prison services ranging from a suicide risk assessment on reception to assessments that estimate the probability of recidivism towards the end of the custodial portion of the sentence.

Conversely and perhaps more in accordance with the Spanish context, Israel's penal apparatus is shaped by counter-insurgency strategies based on risk paradigms (Ajzenstadt and Barak 2008).

Following the publication of the 'Foucault Effect' by Burchell et al. (1991), a series of studies were completed analysing mechanisms to direct allegedly 'risky' conducts. O'Malley (1992, 2000), Rose (2000) and Valverde (1998) were the forerunners to analyse how conduct is being governed through heterogeneous mechanisms shaped by the risk paradigm. This along with earlier work on insurance (Ewald 1986) and psychiatry (Castel 1991), and governance paved the way for subsequent studies that assessed its exclusionary effects. For example, the network of security and welfare industries and the techno-scientific tools used to control and marginalise these 'risky' populations (Wacquant 2008).

Post-9/11, the risk paradigm and governmentality approach are increasingly used to analyse governmental policies, security apparatuses and their disciplinary effects, in particular to classify and identify 'terrorism attack' risks factors. Mythen and Walklate (2006, 2008) maintain we now govern through terrorism and the discourse on risk and precautionary approach now influence judicial decisions and limit courts' mandates. Their most recent work focuses on the association between risk, agency and reflexivity (Walklate and Mythen 2010). Similarly, Aradau and van Munster (2007) researched security apparatuses shaped by a discourse on risk that emerged in England following the July 2005 bombings. They demonstrated that policies adopted by the British government in the aftermath of terrorist attacks, such as stop and searches and preventative detentions are part of a government apparatus characterised by "zero risk, worst case scenario, shifting burden of proof and irreversible change" (Aradau and van Munster 2007, p. 103). Risk, how it is perceived and prioritised is undoubtedly relevant when prison policies, legislation and security are reviewed.

A Foucauldian approach is used to analyse the mechanisms of power and, more specifically, the security and penal apparatuses erected to manage and discipline this collective, more precisely of governmentality, normalisation, and of biopower.[9] Particular attention is paid to the techniques used to 'normalise' and govern this collective.

2. Methodology

The hypothesis was tested through an analysis of the social construction of the 'political prisoner', a review of existing penitentiary legislation and semi-structured interviews with jurists and psychologists working on Treatment Committees in Spanish penitentiaries and a member of the Sentence Commission in NI. These professionals are representative of the experts responsible for classifying and assessing prisoners and/or applications for furlough. As such, they assess the prisoners' supposed risk levels. The exceptional legal and non-legal practices help "explain how social agents create and use boundaries to demarcate that which is dangerous" (Clarke and Short 1993, p. 379).

The idea 'political prisoner' develops within a matrix. This matrix is "formed on a complex of institutions, advocates, newspaper articles, lawyers, court decisions" (Hacking 2001, p. 10). Examples of each of these are provided as well as case examples. This is buttressed by a review of present penitentiary legislation, exceptional penalties and treatment for this category of offender.

The individuals interviewed are not a random sample. The Sentence Commissioner was intentionally contacted due to the position they hold on the Commission and was interviewed on 28 June 2011. They requested that it not be divulged.[10] A

[9] Foucault clearly stated that biopower was not meant to be used in cases of ideology; nevertheless he then went on to use the concept of biopower to criticize the USSR.
[10] They are not involved in the discussions presently taking place in the BAC.

supervising prison judge agreed to be interviewed but subsequently cancelled twice due to their hectic schedule. Finally, the three jurists and two psychologists were accessed through a common contact and work in prisons in different autonomous communities and were interviewed on 18 November 2010 and 24 June 2011. With the exception of a jurist and a psychologist, all had held their position for over 10 years.

In one respect, this definitely conformed to one of the disadvantages of qualitative data analysis. Few people were interviewed due to time restraint, theirs as well as the actual study, rendering it difficult to make systematic comparisons due to different responses. With the exception of the phone interview completed with the Commissioner, all interviews were taped, transcribed and manually coded. Respondents signed a consent form clearly stating they maintained the right to suspend the interview and to retract their authorisation. Their contribution was imperative because although much of their responsibilities are set by law, how they actually fulfil and perceive them is not.

3. The Social Construction of the Political Prisoner

On 15 October 1977, the Spanish legislature enacted the Amnesty Law 46. Under the law all politically motivated offences and misdemeanours committed before 15 December 1976 were amnestied; whereas amnesties were only granted to comparable offences committed between 15 December 1976 and 15 June 1977 if they had not caused grievous bodily harm or physical integrity abuse. Consequently, many members of the ´élites` of the old Francoist regime simply reintegrated into the new democracy and became members of the organisations that subsequently became the Union Centro Democratica (UCD)[11] (Boyd and Crocker 2003, p. 3; Jaime-Jiménez, 1997, p. 63).

Following the enactment of a series of Royal Decree Laws in 1977 the Audiencia Nacional (AN) was created replacing the controversial Francoist regime's Public Order Tribunal (POT). All 'terrorism' cases are tried in the AN, a centralised Penal Court within the ordinary jurisdiction. Shortly after, the Spanish Constitution (SC) was drafted and a referendum was held to approve the Bill. Although the Spanish population as a whole voted overwhelmingly in favour, only approximately one third of the Basque population voted 'Yes' and 41% abstained (Woodward, 2001, p. 52).[12] Nonetheless on 6 December 1978, the SC was enacted having been endorsed by 88% of the electorate (Congreso de España n.d.).

The legitimacy and authority of both the Constitution and the AN are two recurring themes in discourses in which the 'political prisoner' is either proclaimed or denied. The following section presents the discourse and construction that has evolved since Franco's death. The social construction surrounding *etarra* prisoners in the judiciary, political, community and media contexts are analysed. The discourse of agents at the AN e.g. judges and state prosecutors, legislation and the examples reflect the juridical apparatus' posture. Manifestos and transcripts of interviews with Basque politicians and articles citing both Spanish and foreign politicians are the sources used in the political context. Finally, diverse sources are used to demonstrate the construction of *etarras* as 'political prisoners' in the community. These include texts produced by associations that have emerged in response to ETA and transcripts from community events at which the prisoners' status is vindicated. Many of these are taken from newspaper articles and therefore the media is discussed. The contested status of incarcerated *etarras* conditions the State´s penal apparatus and is demonstrative of attempts to either deny the truth of an idea or to

[11] The UCD was a coalition created following the death of Franco made up of centre and right-wing delegates some of whom were part of the Francoist Regime. It was led by Adolfo Suarez and governed Spain between 1977 and 1983.

[12] The total number of Basques that voted in favour of the SC was 31%, 10% voted against (Congreso de España, n.d.).

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determine its function (Mannheim 1952, p. 140), which is why it is not only a political problem but also scientific. By unmasking its function, we can access the interests of the agents and institutions involved and the conflicting interests behind the genesis of this scientific thought.

3.1. The Juridical Apparatus

Section 13.3 of the SC states "no extradition can be granted for political crimes... but acts of terrorism shall not be regarded as such."[13] Up until the recent amendments introduced to the PC in June 2010, 'terrorism' offences were committed "by members of armed gangs, or terrorist or rebellious elements." In an effort to fill a legal lacuna, the Constitutional Tribunal subsequently further clarified that 'terrorism' was a form of "socially or politically organised violence committed by organisations", which "put in danger the lives and integrity of persons and the constitutional order" (199/1987; Mestre Delgado 1993, p. 3). Legally it is therefore a social or political offence committed by a collective that causes disorder. Under the Francoist dictatorship these were tried in a court of exception; whereas, following the instatement of the constitutional monarchy they were transferred to an exceptional jurisdiction.

3.1.1. The Specialised Centralised Criminal Court

Up until the creation of the AN, 'terrorism' offences were tried in the POT under the Military Justice or the Penal Codes. The law that created the AN, Royal Decree Law 1/1977 of 4 January did not grant it jurisdiction over 'terrorism' offences. This was achieved through the simultaneous enactment of Royal Decree Law 2/1977 of 4 January, which abolished the POT and transferred competencies to the AN for 'terrorism' offences. Related offences in the Military Justice Code were soon after introduced as an annex to the PC.[14] The majority of persons accused of ETA membership and/or related activities refuse to acknowledge the authority of the Court and its employees e.g. judges, prosecutors etc., rarely respond when interrogated and on occasion refuse to stand before the judges.

In an effort to ensure a further standardisation of practice and centralisation of control, Organic Law 5/2003 of 27 May was enacted creating a supervising prison judge at the AN. Up until that point, the court had been solely responsible for investigating and sentencing the offences. In the preamble, the legislature claimed the "unintended dissociation" between the court and the entity responsible for their judicial enforcement had "weakened the overall effectiveness of the criminal policy" and justified the centralisation.

This administrative expansion was preceded by the enactment of new international and national legislation. Internationally, the United Nations' criminalisation of the financing of terrorism in 1999[15] is but one example. Since the transition Spain, a member of both the UN and the EU, has enacted or reformed existing legislation to bring it into line with existing frameworks. However, it has also been the forerunner in other legislative areas such as the criminalisation of the glorification and apology of 'terrorism' (Asua Battarita 1998). The number of charges laid over the last 10 years against Basque media, youth organisations, associations calling for an amnesty etc. led many to protest what they perceived as the AN's juridification of many nationalist social, cultural and political activities i.e. "everything is ETA." Another example is Organic Law 6/2002 of 27 June, the Law on Parties. Under this

[13] During the late-seventies and early eighties, the French government refused to extradite ETA members to Spain. In May 1981, President Mitterrand prevented the extradition of ETA member Tomas Linaza who had been charged with six murders, despite the courts having ruled in favour of the extradition. The French court had concluded that "odious nature of his crimes and their common nature could not be called political" (ABC 1981).
[14] Art. 294*bis* a), 294*bis*b) and 294*bis* c).
[15] International Convention for the Suppression of the Financing of Terrorism, New York of 9 December 1999.

law, a political party will be illegalised if it "promotes, justifies or excuses attempts against the lives or physical integrity or persons, or their exclusion or persecution for ideological reasons..." (Art. 2a)). Further, a party can be illegalised for repeatedly including in its directing bodies and on its electoral list persons who have been convicted of 'terrorist' crimes who have not renounced the aims or means used by a 'terrorist organisation'. Numerous parties have been illegalised under this law.[16] With the exception of illegalising political parties which is a civil matter, all of these trials are held in the AN.

Case example:

In a recent trial held in the AN much of the above was evident. Arnaldo Otegi, a past director of the illegalised left-wing nationalist party Batasuna, was accused of glorifying terrorism for attending a tribute to a prisoner and publicly proclaiming "we owe it to the Basque political prisoners, refugees and many comrades that we have lost in this struggle..." He also compared the prisoner to Nelson Mandela. In response to his comparison with Mandela, the judge stated "Nelson Mandela was an authentic hero that remained in prison for ideological reasons, exclusively for that, but he never used violence... he was a political prisoner; whereas, Sagardui has been condemned for serious offences characterised as terrorism." She insisted that to refer to ETA's prisoners as 'political prisoners' was a "conceptual blunder" (Audiencia Nacional, Sentencia nº 13/2010). Along the same line, the Supreme Court in a decision handed down on the posting of photos of prisoners concluded that there existed a "conscious confusion between the independence option and the extermination of the dissident, which is clearly displayed by the attribution by a social setting that supports terrorism to ETA´s terrorists the status of ´political prisoner´" (STS 3338/2011). Mr. Otegi received the highest corresponding sentence for glorification, a two year custodial sentence and a suspension from civil service i.e. holding public office for 16 years.[17] Earlier attempts were made within the political setting in an effort to give a semblance of minimising this overlap.

3.2. Politics and Social Division

Law 82 (1978) was the first attempt to legally distance the offences from all possible political connotations by referring only to concrete acts e.g. possession of explosives, murder of a Head of State (Art. 17.3) and intent – to "cause alarm" (Art. 249bis) (Lamarca Pérez 1985, p. 175). The law was the product of a series of meetings held by the UCD in October 1977 during which the document the 'Pactos de la Moncloa' was drafted. Chapter VIII in the Section titled 'Public Order' states: "Public order will have an explicit and current projection in so far as the protection of progress in the consolidation of democracy, and the defence against attacks of all kinds and especially terrorist ones. The criminalization of terrorism offences in the PC, so as to eliminate what is featured in respect to the special laws and not congruent with the general criteria upheld in the International Treaties and other occidental countries" (Section Public Order Art.2, para. 2 Chapt. VIII; Lamarca Pérez 1985, p. 162; Asua Batarrita 2002, p. 72). This was perhaps the first political cornerstone following the enactment of the Constitution in which the legislature stated outright that the offences were to be treated as common offences, believing that the issue was now relegated to the past; however as the following recent political settings demonstrate, it is far from the case.

On 14 November 2009, the left-wing nationalist movement held an assembly in Altsasu at which a new manifesto was presented. They stated that the continued restriction on the Basque nation's rights was a "scenario that perpetuates the political and armed conflict", a context that prolonged "the situation of violence and

[16] Herri Batasuna, Euskal Herriadetako Alderdi Komunista, Eusko Abertzale Ekintza, to name but a few.
[17] The sentence was appealed and annulled by the Spanish SupremeTribunal. On 22 July 2011, the AN in a re-trial decided that he had not glorified the acts for which the prisoner had been condemned and absolved him of those charges (AN Sentencia nº 18/2011).

armed confrontation with human and political costs." To change scenarios, "a process of negotiation between Euskadi ta Askatasuna and the Spanish State on the demilitarisation of the country, the release of Basque political prisoners..." must occur. Close to a year later, Arnaldo Otegi granted an interview whilst on remand to the Spanish newspaper, El País. When asked why he justified ETA's violence, he responded that the left-wing nationalist movement believe that "the existence and persistence of political violence in our country is due to reasons of strictly a political nature" (Carlin 2010). Finally, while in prison, he joined the Basque Collective of Political Prisoners Collective's (EPPK) hunger strike - a group that represents ETA's prisoners (ABC 2010).

Within Europe, various political parties and individual politicians have voiced their opinion. The Friendship group was created in 2005 by 11 Members of European Parliament, to support and partake in a conflict resolution in the Basque Country. In response to the cease-fire declared by ETA in March 2006, Friendship petitioned the Spanish and French Governments "to respect civil, political and human rights for all Basque citizens with no exception. Including the rights for political prisoners" (European Basque Friendship Bulletin 2008, p. 17).

In contrast, the two main political parties in Spain only make reference to the use of the term 'political prisoner' to contest it and to vindicate democracy and the rule of law. In response to a solidarity march held in January 2011 for ETA's prisoners, the Basque Socialist Party (PSE) spokesman proclaimed "() they committed offences in the name of ETA and for that reason they are not political prisoners" (Deia 2011). Along the same line, Leopoldo Barreda of the People's Party (PP), claimed the international committee presently assessing the possibility of an end to the Basque conflict "are unable to call the terrorists, terrorists with impunity against the democratic majority" (La Vanguardia 2011). Similarly, only days before his official nomination as lehendakari[18], Patxi López a member of the PSE announced all future subsidies to prisoner associations would be conditioned to them condemning terrorism and the creation of a new education programme, which "socially, politically and ethically" delegitimizes terrorism and defends democratic values (Aizpeolea 2009). There are comparable polar opposites in the community setting, which reflect the conflicting views regarding the legitimacy of the violence as well as the individual and collective elements involved.

3.3. Communal Discord

The first Spanish victims of terrorism association, Asociación de Victimas del Terrorismo (AVT), was created in 1981 by the victims of ETA's violence to "rescue all victims of terrorism abandoned by the State and their marginalisation" (Asociación Víctimas del Terrorismo n.d.). Since then, over twenty have been created.[19] Some attend and partake as witnesses and as complainants in trials against ETA and activities that they maintain are related to the organisation. On 23 November 2010, 22 associations and foundations endorsed a document titled "Guiding Principles for a Model to end ETA without Impunity." The document states "Prison policy for the group of ETA prisoners should not be seen as an instrument... because the law does not allow it. The 1978 Constitution, the General Penitentiary Law, the Penal Code and Prison Rules are our points of reference on this issue..." (Reunión de Asociaciones y Fundaciones de Victimas del Terrorismo 2010, p. 8-9). They reject collective negotiations; the individual 'terrorist' must repent and believe that people killed at the hands of ETA were "taken by the murderers to be an obstacle to achieving their political end" (Ibid. p.1). In a presentation given at the Symposium on Victims of Terrorism at the United Nations headquarters in New York on 9 September 2008, the president of the AVT Juan Antonio Garcia Casquero

[18] Basque for Prime Minister.
[19] ETA has been held responsible for the death of 829 persons, 486 of which were members of law enforcement (Ministerio del Interior, n.d.).

demanded that the media refrain from mentioning the political aims of terrorist groups. “ETA is not a ‘separatist group’, ‘a revolutionary group’ or a ‘liberation movement’, as we read in the press outside the Spanish borders.” He continued “It is simply a terrorist group that uses violence or calculated threats of violence to inspire terror and to create an atmosphere of alarm, which can eventually break the structures of democratic countries” (García Casquero 2009)

At the other end of the spectrum, there are associations who support or represent incarcerated etarras and collectives who demand the flexing of the rule of law, or rather a ‘normalisation’ of the current criminal legislation.

The majority of ETA’s prisoners are members of the EPPK. They announced in a communiqué that they would hold a hunger strike 25 January 2010 to pressurise the State into recognising their “rightful political status" (GARA 2010). In a letter signed “total amnesty”, published in GARA on 17 April 2011, EEPK accused the Spanish State of killing a prisoner through the use “of war measures against Basque political prisoners.” On 27 September, Gudari eguna –the day of the soldier is celebrated in various Basque towns. Although originally held to commemorate the last two members of ETA executed under Francoist regime, it now commemorates “all soldiers who have lost their lives in the struggle.” On his return to his hometown, having served 30 years and 9 months in prison, Mr. Saguardi Moja was welcomed by a crowd that cheered “Gudari [*Soldier*], the country is with you” (Villaverde 2011).

3.3.1 Social Accord: The Gernika Accord

As in the case of victim associations, groups representing a cross-section of Basque society have emerged so as not to remain on the periphery and to be actively involved in the conflict transformation. On 25 September 2010, a group of representatives from Basque social and political associations, and unions drafted a document titled “Agreement for a Scenario of Peace and Democratic Solutions” also known as the Gernika Accord. In this document the group listed a number of conditions necessary for achieving their goal. One of these conditions includes “the recognition of civil and political rights”, the “cessation of the ongoing penitentiary policy against Basque political prisoners” and “the closure of special jurisdictions and tribunals” (2010, p. 1).

In addition to the direct citations from the groups and associations above, the media itself has contributed to the construction by recognising or overlooking the political prisoner.

3.4. The Transmitters: Local, State and Continental Media

Discourse used in the media vary and reflect to a large degree the journalists’ personal stance, which has been under closer scrutiny since 9/11. For instance, Tara Conlan (2005) reported that the *BBC* released a new internal guidance following the attacks on 7 July 2005, in which staff was advised “to take care when using the term ‘terrorist’.” That said, Linda Pressly (2009) in an article published as part of The Report ‘Basque Troubles’, used the terms prisoners of the “Basque separatist group ETA” and “ETA militants.” In an interview cited in the article, a teen opines that prisoners “are not heroes but soldiers for Basque freedom.” Comparatively, the French newspaper *Libération* portrays ETA as an independent Basque organisation as well as Basques terrorists. Their Madrid correspondent, François Musseau (2010), reported the Minister of the Interior and ETA specialists believed that ETA declared a cease-fire because it “has its back up against the wall, the majority of its leaders are incarcerated... ( ) and six military cells have been dismantled in the last four years.”

Finally, the discourse in the Basque and Spanish newspapers reflect the political affiliations of the respective papers and the politically aspirations of its readership. With the exception of the partial cease-fire declared in September 2010, ETA sends

all of its manifestos to the Basque nationalist newspaper, GARA. GARA refers to ETA's prisoners as either the repressed or political prisoners; whereas ABC, a conservative Spanish newspaper, makes no mention of political motivation. They are prisoners of the Basque terrorist organisation or simply ETA.

3.5. Analysis: The Social Construction of the political prisoner

There are progressive examples demonstrating that the Spanish legislature has consciously worked towards criminalising or rather depoliticising ETA's activity; thus, using the penal apparatus as a counter-insurgency apparatus (Feldman 1991, p. 87). First, an appendix was created in the PC for this type of offence and trials were transferred from the military to the ordinary jurisdiction, both aimed at having a normalising effect. Second, the Pactos de Moncloa and the Constitution were enacted clearly stating political offences and prisoners no longer existed in Spain because Spain is a democracy and majoritarian. In this case, law as a subcomponent of the state was "driven by the imperative of cohesion" and served a directing function to obtain and maintain consensus (Devlin 1993, p. 161). Through the use of amnesties and the subsequent enactment of a Constitution endorsed by 88% of the electorate, the legislature assumed that it could rule by "virtue of legality" and that the state apparatus would be obediently endorsed because it is based on "rational rules" (Weber 2004, p. 34).

In the case of the Pactos de Moncloa, the legislature made a direct reference to existing international legal norms. Cohen (2001) describes this as denial based on ´magical legalism´. There are no political prisoners in Spain because that would be illegal and irrational (p. 104, 108). Finally, the illegalisation of political parties and those who hope to create an offshoot are blatant examples of efforts to coalesce i.e. to fuse the criminal and ideological labels (Hall 1974, p. 64). As seen in the case against Otegi and the TS decision against the posting of photos of prisoners, legal arguments are forwarded to minimise or delegitimize claims to a political status e.g. conceptual blunder or conscious confusion. These are examples of explicit interpretative denial. They are prisoners but not political prisoners, it isn´t what you call it (Cohen 2001, p. 7). In short, to recognise the acts as political violence would undermine the legitimacy of the State.

The Gardiner report published in 1975, recommended the Special Category Status granted to paramilitary prisoners in NI be abolished because it had led the prisoners to conclude that they could obtain an amnesty (Feldman 1991, p. 149). Demands for an amnesty are a separate but evident factor. If the offences are perceived as acts of war, under international law Additional Protocol II would come into effect. ETA, EPPK and Otegi directly imply that it is a state of war. Similarly, the teen interviewed in the BBC article refers to the prisoners as soldiers. Further, those who are incarcerated as well as those killed in action are referred to as ´gudari´, soldier. Guda is Basque for war. In addition, the French journalist makes direct reference to military cells. It isn't a disorganised group of hooligans, it has a military structure. Finally, as was the case of the republican prisoners in NI, Otegi and the EPPK's hunger strike was a collective technique to resist the state apparatus. Article 10.5 of the Additional Protocol II states "At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict..." An outcome that is inconceivable for most of the victim associations. The victims associations are against collective negotiation and demand that cases be reviewed in conformity with the law and on an individual basis.

With the exception of certain politicians cited and the recent reform to the PC, there is a ready acceptance that ETA's activity is politically motivated; however, it is the legitimacy of the acts that is in question. They and the victim associations make repeated reference to democracy, Rule of Law and the Constitution. This conforms to a Weberian understanding of legitimate physical violence and the modern state.

More importantly, "that if the state is to survive, those who are ruled over must always acquiesce in the authority that is claimed by the rulers of the day" (Weber, opt. cit.). Those who do not acquiesce undermine public order or rather create disorder and are irrational. As was the case under the Francoist dictatorship, 'terrorism' legislation is found in the section on Public Order. Although the criminal jurisdiction has changed, the perceived outcome of these acts and the justification for suppressing them has remained the same, and it is under this term that it is defended by a sector of the politicians cited – to maintain public order –or established order. Criminal law is fundamental to that order (Quinney 1970, p. 59). Behaviour such as the refusal of ETA members to recognise the authority of the AN should therefore come as no surprise if this is indicative as argued by Hall (1974, p. 64) of a "process of politicization of deviant subcultures" who aim to "alter the shape of the hierarchy."

Thus, there remain minute traces of political motivation in existing legislation, but the State and members of the majority do not recognise the legitimacy of the methods used or the prisoners' aspirations. Conversely, those who do not feel part of nor aspire to be part of this majoritarian have their right to dissent contested as the deviant group and political activist merge into one and the same (Horowitz and Liebowitz 1968).

We therefore have a collective that is incomprehensible because it does not endorse the state nor the penal apparatus, two allegedly rational constructions. Those who advocate the present system are opting to govern security through punishment and their rule of law, under which an individual must be responsible and can be reformed. "The prison thus returns to the frontline of institutions entrusted with maintaining social order" (Wacquant 2001, p. 81).

4. Prison Rules[20] and Policy: Strategies to Isolate or Normalise

As in the case of criminal legislation there are examples of 'magical legalism' in existing penitentiary legislation. The General Penitentiary Law (GPL) was argued to have brought Spanish penitentiary legislation in accordance with existing international legislation e.g. United Nations Standard Minimum Rules for the Treatment of Prisoners (García Valdés 1989).

Incarcerated *etarras* are held in non-segregated[21] wards and are theoretically subject to standardised treatment. However, they are also subject to very distinct prison policy, policies that were initially created in response to their increasing presence in the prison system, which have gradually been exported and applied to the general prison population.[22] Nevertheless, they are not political prisoners, they are dangerous ones.

Spanish legal doctrine has formally stated since the dictatorship that prison should serve to rehabilitate the offender. The right to individualization of treatment was introduced under the Francoist regime.[23] Under the newly formed constitutional monarchy rehabilitation became a constitutional right. Article 25.2 of the CE states

[20] Unless otherwise indicated all reference to the Prison Rules refers to RD 190/1996 of 9 February and in the case of the General Penitentiary Law to the Organic Law 1/1979 of 21 September.
[21] They are in non-segregated wards in that they are not separated from 'ordinary decent criminals'.
[22] Accessing consistent statistical data on incarcerated *etarras* is difficult because depending on the aims of the Ministry whether Justice or the Interior -both have held this mandate, more or less detailed information is published. Nonetheless, based on statistics provided in Egin – a Basque newspaper that was illegalized, 220 persons were remanded in custody in 1986 and 1987, which represents a sizeable drop e.g. 1879 in 1984 (Egin 1988, p.163-164). According to the Ministry of Justice, there were 284 convicts and 155 remand prisoners on 31 December 1984 for terrorism offences and/or the possession of explosives; whereas, there were 344 convicts and 251 remand prisoners on 1 February 1988, which is a sizeable jump (Ministry of Justice 1985, 1989). However, the Ministry does not break these statistics down into specific groups.
[23] Individualisation was introduced in 1968 as part of the reforms introduced to the 1956 Prison Services Rules.

the primary motive for incarcerating an individual is to re-educate and socially rehabilitate them i.e. to annul or modify behaviour. This was soon after accompanied by Art. 59.2 GPL, which asserts that treatment in prisons, should aim to motivate the incarcerated to become law abiding and to respect themselves, their family, peers, and society. This is allegedly achieved by them serving their sentences under conditions that reflect their individualised scientific grade (Art. 72 GPL). There therefore exists a progressive legislative move towards normalising all prisoners.

Unlike other prisoners, a complete individualised assessment is not completed on persons condemned for a 'terrorism' offence. First, with few exceptions, ETA's prisoners refuse to cooperate for reasons that are similar to those mentioned earlier regarding legitimacy and the AN (Perez Cepeda 1995; Sanz Mula 1988). Second, regardless of the nature of their involvement due to their membership in an illicit organisation they are allegedly dangerous and are automatically classified in the first grade. Inmates classified in the first grade allegedly manifest "*criminological dangerousness and maladjustment to the ordinary or open units*" and are consequently incarcerated in closed units (Art. 10.1 GPL), which are governed under Art. 10 of the GPL 1/1979 and Art. 89-95 of the Prison Rules(PR) and are characterized by tighter controls over communal activities and surveillance (Art. 10.3, GPL; Art. 90.2, PR).[24] The PR consider "*membership in a criminal organization or an armed gang unless having given clear signs of having abandoned the internal discipline of such organisations and gangs*" and offences committed throughout the criminal trajectory of the inmate that demonstrate "*aggression, violence or antisocial*" traits to be factors that qualify "*extreme dangerousness and inadaptability to the ordinary unit*" (Art. 102.5 a) and c) PR).[25] Finally, 'terrorists' can have their visits restricted or denied. These restrictions do not apply to immediate family but to persons "with who there is an ideological bond" that may prevent or complicate their rehabilitation i.e. normalisation (Art. 43ii PR).

4.1. Governing Political Dissidence: Telling Accessory Penalties

Custodial sentences of more than ten years are automatically accompanied by an accessory penalty of complete disqualification for the duration of the sentence (Art. 55 PC); however, some accessory penalties are longer than the actual custodial portion e.g. Otegi's glorification of terrorism case. For custodial sentences of under five years, the accessory penalties must be "directly related to the offence committed" (Art. 56 PC). Nevertheless, the Spanish Supreme Tribunal has repeatedly concluded that in the case of the suspension of public office, profession, industry or commerce, the court is not obliged to establish a direct link with the offence.[26]

Although the PC makes no direct reference to the political motivation of offenders it indirectly does through the suspension of certain rights. For instance, persons convicted of sedition can have their right to stand for public office disqualified and

[24] Prisoners held in the first grade are subject to daily cell searches and bodily if necessary, are entitled to at least 3 hours of time in the yard with a maximum of two prisoners at a time (may have up to an additional 3 hours added and with only up to 5 prisoners at a time) and are held in single cells (Art. 101.3 PR 1996).

[25] The PR 1201/1981 considered membership to a criminal organizations and the number and nature of the offences to be two of the four global factors that demonstrated the inmate in question was 'extremely dangerous' (Art. 43.3 a)). Art. 102.5 c) of the present PR (Royal Decree 1990/1996) states that "membership to a criminal organization or an armed gang" is to be considered a factor, unless they have demonstrated that they "have abandoned the organization in question."

[26] E.g. STS 13/3/01 and 18/9/01. Spanish legal theorists are divided. Some argue the penalties should be viewed solely as an accessory penalty (Manzanares Samaniego 1975); whereas others argue that they are safety measures. In the context discussed in this dissertation, they are only used as a safety measure because they are always used to accompany a custodial sentence and therefore play a dual role (Choclan 1997; Quintano 1997). The custodial portion of the sentence serves to sanction the act committed, whereas the accessory penalties are precursory and aim and to reduce the opportunity to re-offend.

to be a civil servant suspended for four to eight years; whereas, persons condemned for manufacturing, trafficking or maintaining deposits of arms or ammunitions for weapons such as cluster bombs, are prohibited from working in a related field or possessing a weapon but not from holding public office (Art. 545.2 PC; Art. 566 PC). In comparison, persons convicted for promoting, constituting or directing a terrorist organisation or group are disqualified from holding public office for 8 to 15 years (Art. 571 PC); however, if an individual is condemned for the same offence who is not a member of an illicit organisation, they can receive the same custodial sentence and receive the same automatic disqualification as do all convicts, but are not disqualified from holding public office subsequently. It can therefore be concluded that the offences committed by ETA and the prison population stemming from its activities are directly related to politics and their access to this arena is considered particularly risky i.e. dangerous.

Under the recent reform to the PC -OL 5/2010 of 22 June, persons convicted of sex offences or 'terrorism' offences may be placed on conditional release for up to 10 years. They will be electronically monitored and may receive one or all of the following requirements: restraining order, exclusion order from up to an entire territory, house arrest, proscribed activities, participation in specified activities or therapy. The conditions are not set at the time of sentence but are solicited afterwards by the supervising prison judge. In the preamble, the legislature justified this new security apparatus by claiming that these two groups of offenders were dangerous because they suffered from a pathology.

4.2. Directing Dissent: Strategies to cut it off at the Root

Since the late 1980s, the Spanish Ministries of Justice and Interior have used prisons as a counter-insurgency mechanism. This involved the introduction of policies such as dispersion, telephone wire tapping and a Basque correspondence translation service in 1989 (Garrido Guzman 1988, p. 191).[27] Shortly after, a Register of Inmates of Special Supervision (FIES) [28] was created for inmates who risked destabilizing penitentiaries and who were felt to present a complex form of criminality (Prison Instruction 21/1996). Information on their criminal antecedents, type of offence, associations and penal trajectory are documented in their register (Rios Martin 1998, p. 1-2). Detained and convicted *etarras* are classified as FIES-3.

Under the policy of dispersion, up to seven male prisoners and one woman from the same organisation can be incarcerated in the same prison.[29] *Etarras* who resist this massive socialising onslaught (Goffman, 1961, p. 18-24) and refuse to modify or abandon their political praxis are incarcerated in prisons the furthest from the Basque Autonomous Community (BAC). If the prisoner is unwilling to demonstrate that they are distancing themselves from the organisation and its supporters, prison administration literally does it for them. The group is therefore fragmented and individuals are isolated and placed under heightened surveillance. If concluded to be incorrigible they are to remain politically and civically marginalised.

In 2008, then acting Minister of the Interior, Alfredo Rubalcaba claimed two strategies were used with ETA's prisoners. The first which in his opinion is "inescapable and affects all prisoners equally, is the law." The second involves the individual "singling out" of ETA's prisoners who meet the conditions listed in Art. 78.3 PC (Libertad Digital España 2008). Recently, when questioned on the transfer

[27] Up until May 1989 *etarras* were held at the same prisons and exempt from general penal policy. They were not recognised as such as political prisoners but received much of the status (Garcia Valdes 1989, p.223).

[28] Initially, the practice was only used to track detained or convicted 'terrorists' and dangerous offenders; however its scope has been broadened and now is sub-divided into five categories: FIES 1: Especially dangerous inmates, FIES 2: Drug dealers, FIES 3: Armed Gangs, which includes members of terrorism organizations, FIES 4: Law enforcements agents and the military and FIES 5: Inmates with Special Characteristics which is an odd conglomeration.

[29] At present, there are 68 Spanish penitentiaries.

of certain prisoners and the 'special treatment of ETA's prisoners', he responded "we are making some movements amongst the prisons through the use of a geographic dispersion that reflects the positions of one and others" (Europe press 2010).

4.3. Repentance, Restoration and Reincorporation

As is the case with classification, under Art. 76.1 d) of the PC, penitentiary benefits for persons convicted of membership in a terrorist organisation are conditioned to them publicly renouncing the use of violence. Under this law access to the third grade and parole are heavily restricted. Convicted terrorists can only access the third grade[30] once having served four-fifths of their sentence, and conditional release once having served seven-eighths (Art. 78.3 PC). They must also manifest unequivocal signs of having abandoned the aims and means used by the organisation, actively collaborate with the authorities to prevent other crimes by the organisation, mitigate the effects of the crime, or identify, capture and prosecute the perpetrators and obtain evidence on the organisation to prevent it from carrying out its activities, in order to demonstrate their abandonment. Finally, they have to apologise to the victim(s) of their crime(s). Their disassociation from the organisation, the setting, the activities carried out by related illegal associations and groups, and their collaboration with the authorities must be attested for in their technical reports drafted by the Treatment Committee (Art. 90 PC).

Etarras who meet the aforementioned requirements are now transferred to prisons located closer to or in the BAC regardless of whether they have completed the legally required portion of their custodial sentence or not. The nearing and distancing of prisoners is a strategy that has been used on numerous occasions during cease-fires and in periods of heightened tension. An example of the latter was the reclassification and transfer of prisoners to distant prisons the day of the train bombings in Madrid.[31]

At a press conference held at the International University of Menéndez Pelayo, Mr. Rubalcaba stated there were no *etarras* incarcerated in any prison in the BAC. "All who are in these prisons were members of ETA but have renounced the armed struggle or have been expelled from the terrorist gang." Two prisoners were now under "the personalised penitentiary programme" and can now receive furlough and work in the community (El País 2010). This is a good example of what Devlin (1993, p. 167) refers to as law as ideology. The persuasive power of law as ideology is evidenced through the "converted terrorist" who confesses and repents their erred way. In this respect, the recanted members have conformed to and sustained the State´s interpretation and definitions of events, and whether intentionally or not have contributed towards the survival of the hegemony (Oliverio and Lauderdale 2005, p. 157).

Case examples:

In 2011, two *etarras* serving their sentences at Nanclares de la Oca, a prison in the Basque province of Alava, applied for permits to leave the precinct. The first application submitted by Mr. Figeroa Fernandez, who will have served his complete custodial sentence in December 2024 and suffers from a chronic illness, was denied. The State Prosecutor was against the request and the AN's supervising prison judge concluded that although Mr. Figeroa met the objective legal

[30] Although not identical, the closest Anglo-Saxon equivalent is Category C or minimum security.

[31] On March 12 2004, the day after the bombing of trains in Madrid, 53 *etarras* received a regression in classification to closed units and subsequently, days later, six more were subjected to a similar regression. A parliamentary deputy asked for the justification of the aforementioned to which the Secretary of State responded that the decision to regress inmates to closed units, some of which had resulted in transfers to different prisons, had been done on an individual basis by a competent organ within the General Director of Penitentiary Institutions (DGIP) and the inmates' respective treatment committees citing Article 102.5 of the NPR (Written question to Congress, 184/000173).

requirements, he had not unconditionally repented citing the Spanish Royal Academy's definition of repentance. The definition used made reference to emotional disgust and shame, which he claimed was not evidenced in his written apology (Permisos 0000790/2003 0002). In comparison, the application submitted by Mr. Lizzaralde Izaguirre who applied for a re-classification in grades and permits to leave the precinct to attend job training, and will have completely served his custodial sentence in May 2022 was granted (Clasificacíon 0001359/2003 0002). Unlike Mr. Figeroa, he claims to have disassociated himself from the organisation, the EPPK's internal discipline and to have hired an independent solicitor. Further, he reported having been ostracized by fellow prisoners and members of his community. Both agreed to financially indemnify the victims of their offences.

Both applicants were convicted under the previous PC and have consecutive sentences that exceed the maximum custodial sentence of 30 years.[32] Mr. Lizzalde's gravest conviction was for murder whereas Mr. Figeroa was for the possession of explosives.[33] The prison's treatment committee, the experts, reported that Mr. Figeroa did not pose a danger to the public given his state of health; however, the security apparatus concluded that Mr. Lizzalde was a lesser risk. He was a lesser risk despite his criminal antecedents because he was now docile. In this respect "the emphasis on factors, probabilities and categories of sub-populations does not efface the pathological individual as a key object of attention and intervention" (Rose 2000, p. 333).

In the strictest sense, they are entitled to free association; however according to the GPL they are dangerous because of their membership in an illicit organisation. This has a domino effect because it is then rationalised that they should be isolated- the first grade and geographically dispersed, and their right to an individualised treatment is suspended. The right is suspended up until they disassociate themselves from the organisation i.e. become docile and prudential by conforming with the requirements listed in Art. 78.3 PC. It is a policy that is "directed towards transforming or destroying the 'roots' of a particular social formation" (Rodriguez 2006, p. 7). Nonetheless, the Ministry of the Interior continues to insist that the incarcerated *etarra* are not exceptional and that the law also applies to them.

As far as assessments are concerned, they are collectively a danger but individually a low risk. The introduction of "attenuating circumstances" allowing for the penal apparatus "to modify the sentence according to the supposed degrees of illness or the forms of semi-insanity...even if it is formulated in terms of legal punishment" is a judgement of normality (Foucault 1995 p.20). This judgement is made by a group of experts. The following section presents their involvement and posture regarding the role they play.

5. The Experts: The Knowledge Producers

As aforementioned, all applications for conditional release must be approved by the supervising prison judge at the AN; however, the assessments are carried out by the treatment team at the prison where the prisoner is serving their sentence. The treatment committee at each prison consists of jurists, psychologists, social workers and educators. What was of particular interest was if they were meeting the legal requirement to an individualised treatment and how they assess risk or danger in this context and how.

[32] The previous PC was the amended Penal Code of 23 December 1944. This maximum time served was increased to 35 years under the new PC. Following the enactment of Organic Law 7/2003 of 30 June it was further increased to 40 years.

[33] Mr. Figeroa was previously sentenced to serve an addition 75 days for disobedience and causing injuries to prison staff.

5.1. Members of Treatment Committees in Spain

5.1.1. Jurists:[34]

The first jurist interviewed recognised that due to the present prison over-population that their work has become more managerial, unless there are causes such as a transfer or incident to motivate a closer assessment. Decisions to grant permits are taken before having completed the actuarial table. They complete the table out of obligation and consider it to be "ill-conceived", and base their decisions on "common sense." Nonetheless, all view their contribution to the meetings held between members of the treatment team as objective because they are legal 'facts' –very quantitative and positivistic.

One jurist had a differential association theoretical perception of deviance. At one point, he stated that if you change the prisoner's social and familial settings, you can change the prisoner because prison is an artificial or exceptional setting and does not represent how the person will behave on release. His co-workers advocate and rationalise a medical intervention model but are against the use of indeterminate sentences because they generate 'juridical insecurity'. The rational public must know its PC, the consequences of its actions and not be left in doubt; however, all are in favour of the new post-custodial security apparatus.

Given they have little contact with the prisoners and base their decisions on quantitative values, they are the most evident examples of juridical thought. It is the norm that brings 'lost souls' into line with normality. The citizen is responsible for knowing the rules of the game and being prudential, and maintaining social order.

5.1.2. Psychologists:[35]

Both psychologists advocated a medical model in that they focused on the dynamic factors which may have contributed to the offending and whether or not these had been attenuated whilst in prison by attending therapy. In this regard, they are functioning as agents for the state's tinkering service (Goffman 1961, p. 340). The psychologist in the smaller prison believes that they can provide individualised treatment; whereas, the other recognised that they are unable to work on a case to case basis due to prison over-population. Both are against the use of the TVR and CCP or comparable actuarial tools because they are too general; however they use various clinical tools based on scales of perceived normality e.g. DSM, Millon. More importantly, when asked to explain why the legislature used the clinical term pathology to qualify dangerousness, it was opined that they were making reference to offenders who refused to repent, respect authority and treat the factors that led them to offend. One was asked specifically about 'nationalist terrorists', they believed the underlying criminogenic factor was their ideology, but that there does not exist in Spanish prisons a treatment programme to attenuate it. For this group of prisoners, they must base their assessments of "concrete standards" stipulated by the government and formalised in law.

[34] Initially, an interview commenced with a jurist who had worked previously as a prison guard but had been in this position for over eleven years. He was much more forthcoming with information and also admitted human error and an inability to meet the stated protocols due to the present problems of prison over-population. His co-workers entered the office mid-way and the most senior jurist took over from that point onwards. He was loyal to the internal practices stipulated in circulars and the actuarial table. Although his two co-workers thought that the supervising prison judge decided against 20% of their recommendations or decisions, he thought it was far less, 10%. The most recent addition to the team was a woman who had also worked as a prison guard beforehand and had gained this promotion only four months earlier. She frequently turned to the senior jurist for his approval when providing her answers and was the first to degrade the judgements of those who had less 'objective' criteria than the jurists and had closer contact with the inmates.

[35] The first psychologist interviewed was employed as prison psychologist for close to two years. This was their first job in this field and in a prison setting. The second psychologist has worked as a psychologist in various prisons across the State since the early nineties. The first works in a prison with over 1500 prisoners and the latter in a prison with under 400.

Assessments -whether juridical or psychological are based on arbitrary and subjective variables. The jurists claimed to be using objective 'facts' but base their assessments on 'common-sense'. Conversely the psychologists still make attempts to individualise their assessments. Their ability to do so is dependent upon the prison size. There was an overall consensus regardless of their specialisation and the geographical location that dangerousness in this context referred to the probability of re-offending and secondly that the one instrument that they are legally obliged to use is not used to predict the likelihood of abscondment. It is completed once having granted or negated a permit and only if their decision is appealed. They believe the tables are 'ill-conceived' and/or 'outdated'. Finally, both valued different factors. The jurists minimised the relevance of the prisoners' behaviour in prison; whereas, the psychologists considered the offence itself of lesser importance, it was their motivation to change and modify the causes that was prioritised. Nevertheless, there are no programmes to treat 'pathological' ideology and the criteria used to assess the risk posed by incarcerated *etarras* are fixed values that are not personalised but standardised.

5.2. Sentence Commissioner

In NI as in Spain, danger to the public represents the likelihood of re-offending; however, Sentence Commissioners do not use the same standards for assessing the risk posed by paramilitaries as parole boards do for common offenders. A hybridised assessment is completed based on individual and collective factors. The factor given greatest importance is whether or not their organisation signed up to and upholds their cease-fire, which is subsequently confirmed by the Secretary of State. The Commissioner recognises that traditional reports and actuarial assessments used to assess common offenders such the HCR-20 are of no use with this group. Accessing the necessary information to complete these tables is curtailed given the majority of incarcerated paramilitaries, like *etarras*, do not engage with the penal apparatus. Further, members of paramilitary organisations do not present the psycho-pathologies observable in the common prison population. Although they may suffer from the effects of their incarceration, they did not enlist in paramilitary activity as a result of one. The applicant's contacts, associates and behaviour were used to assess their commitment to the cease-fire as well as their ideological posture. In the case of lifers, risk assessments also take into consideration the prisoner's criminal antecedents and affiliates that are not related to the conflict. Finally, those released are not under the same probation requirements as are common offenders. As the Commissioner commented, "How can they evaluate re-engagement to terrorism?"

5.3. Similar and Yet Fundamentally Different

Based upon the information provided by the experts, governments are using a hybridised system to manage or discipline these groups of prisoners. One of the key differences between the assessments being carried out in both regions is their field of comparison. The British government accepted paramilitaries would not conform to the existing State apparatus and that the risk posed could only marginally be assessed based on individual factors. The Northern Ireland (Sentence) Act 1998 was but one piece of the puzzle. The prisoners are being released predominantly based on a collective extraneous variable, their group's commitment to the cease-fire. In comparison, the Spanish government is using solely variables based on the individual's conduct - intraneous variables that are directed at neutralising the external collective. In an area in which there is now an officially recognised conflict transformation occurring such as NI, the State is utilising different ways of assessing whether or not the threshold is being met.

6. Analysis

Undeterred by the backlash from Martinson's 'Nothing Works', eager to conform with existing international conventions and perhaps in an effort to gain a certain credibility as it exited from close to 40 years of dictatorship, the legislature enacted a SC, PC, GPL and PR based on an alleged rehabilitative ideal and supposedly a common social contract. But, the Constitutional article drafted to guarantee this right was soon shown to be ineffective for a group of prisoners that questioned the social and constitutional order. In response, Spanish prison administration under the shield of the Ministries of Justice and Interior successively modified existing prison policy in hopes of neutralising their political praxis. The first is typical of disciplinary power and for all intents and purpose, resembles the common prison regime; however, the second is characteristic of a distinct security apparatus and retains not only disciplinary tactics but also remnants of Foucault's *biopolitics*. The conflicting interpretations discussed in the section on the social construction of the political prisoner are also present in both models as well as the function served.

Members of an illicit group condemned for offences under Title XXII such as *etarras* are legally held individually responsible; however, from that point onwards their collective political aggregate traits are prioritised. When arrested and condemned, *etarras* are labelled as 'dangerous' due to a collective characteristic, their membership in an illicit organisation that causes disorder and their offences are labelled 'terrorist', which is a highly contested moral and subjective judgement (Mythen and Walklate 2006, p. 381). To recognise them as political prisoners would undermine the State's dominion and penal apparatus. 'Terrorism' in itself puts in question the State's ability to secure order and control over its territory (Garland 1996, p. 448). Consequently, strategies were engineered to rehabilitate individual members of the collective by physically and morally fragmenting i.e. dehumanising them. These served to reify the treatment model and the State's hegemonic order, and to prevent contagion.[36] Efforts whether disciplinary or managerial to initiate a process of fragmentation produces social identities that distinguish the legitimate 'normal' from the dangerous 'abnormal'. These identities are inevitably based on a baseline of what ought to be desirable. In accordance with Oliverio (1998, p. 33) "Each type of terrorism is defined in relation to its challenge or threat to the normal order or conception (assumptive standard) of "normal" people living in a "normal" society." The therapy available for this group is not clinical, it is political. The prisoner will only have their positive rights re-instated and gain their human status once they are rendered politically docile. Their citizenship "becomes conditioned on conduct" (Rose 2000, p. 335). In this regard, biopower dovetails disciplinary mechanisms.

6.1. Discipline and Severance

Foucault describes the disciplinary apparatus as centripetal apparatus, which "concentrates, focuses and encloses" everything (Foucault 2007, pp.44-45). It is a system based on a series of proscribed and prescribed conducts that reintegrates the excluded through treatment. In a penitentiary setting and particularly this context, it is coercive treatment. Once identified, individualised and classified, the inmate enters a process that is organised to achieve a specific goal, docility or rather 'normality'. In this instance, the norm is used to normalise through discipline. It is only through the shaping of individuals into a homogeneous population that order can be reproduced.

If the penal apparatus succeeds in breaking away certain members from the population, these prisoners are treated as individual common offenders, which conditions efforts to reinsert them. They are transferred to prisons located near

[36] The PR was recently reformed through the enactment of RD 419/2011 of 25 March. The reforms were directed at legally formalizing administrative practices such as the FIES that previous were found in circulars and instructions and targeted concerns regarding the recruiting of 'jihadist terrorists' in prison.

their residency and have their requirements to access conditional release brought in line with that available to common offenders. The Minister of Interior no longer considers them to be 'terrorists' but individual common offenders and to whom common legislation should apply. However, as demonstrated in the autos presented on two *etarras*, in order to fully benefit from all of these common provisions, they must 'knife-off'[37] from the pathological illicit group, accept the existing majoritarian system and repent their past desires. In addition, they must agree to assume all civil indemnities. In certain respects, the State expects the *etarra* to subject themselves to a process similar to the 'truth-therapies' used with the psychiatric patients described by Foucault (2007*b*) in *The Politics of Truth*. They have been modified and recognise the democratic majority and its institutions, and rendered 'useful' by paying indemnities and docile through their repentance (Foucault 2003, p. 249). In turn, they can regain certain rights such as the right to civic life and political life (Ibid., p. 256, 258); however, they may also become ostracized by not only fellow prisoners but also their community. Therefore it is not reinsertion in its strictest sense.

In comparison, those who resist and sustain their political praxis are incorrigible, are coercively fragmented and subjected to a distinct security apparatus. As in the case of paramilitaries incarcerated in Long Kesh prison and manifested in the EPPK's communiqué, to conform to the prison regime would be a form of depoliticization or rather "a breaking of their political will and identities" (Feldman 1991, p. 155). This population is not only a political problem but also a scientific one. Unable to penetrate this collective and bring its subjects into normality through the use of law, a non-legalistic tactic is adopted and these prisoners are administratively dedifferentiated. Although geographically fragmented they are not dealt with as individuals but as the subjects of a dangerous group. Nevertheless, the administration retains certain disciplinary tactics such as individualised judgements based on certain panopticon practices e.g. heightened security and tighter surveillance of behaviour and correspondence. Until they demonstrate a rupture with the collective, decisions made will reflect political collective risk factors. Further, knowledge on this group is standardised through the creation of a centralised prison judge at the AN. Incapable of rehabilitating these subjects, they are held in isolation in prisons on the peninsula at a considerable distance from their families and communities. This aims to cause "the death of the human" with "a logic of spirit killing and dehumanisation" (Rodriguez 2006, p. 149, 146).

Those who do not subscribe to the social contract are not members of the population and no longer exist (Foucault *2007a*, p. 43-4). Thus, resembling Agamben's *homo sacer* (1998, p. 76-77), they are subjects or human beings but are no longer citizens and cannot benefit from active rights, which may be in part why it is so difficult to define them politically. However, unlike in the case of common offenders, it is an internal and external exclusion, and a symbiotic relationship (Oliverio and Lauderdale 2005). There is a mutual refusal to accept the legitimacy of the other. Further, the severity of the sentences handed down, the policy of dispersion as well as the accessory penalties funnels "the socially and civically dead... into a structure of absence from normative discourse" (Rodriguez 2006, p. 144).

6.2. The Medical Model and a New Technology of Power

Members of this intransigent dangerous group are likely candidates for post-custodial measures such as electronic monitoring, a new technology of power erected to monitor and neutralise this abnormal group or rather, their antisocial and deviant political praxis. Electronic monitoring makes their lives more knowable and

[37] 'Knifing-off' refers to one of the changes that occur when an active offender progresses towards desistance. It refers to cutting-ties with past criminal associates and "even the past itself" (Maruna and Roy 2007, p.104).

thereby governable. Given their refusal to partake in interviews and accept their 'treatment' programme, the conclusions drawn are based on "a combination of abstract factors, which render more or less probable the occurrence of undesirable modes of behaviour" (Castel 1991 p.297).

The legislature now describes this type of membership and group activity as pathological; however, they are not physiologically ill, it isn't an organic pathology but rather a mental pathology -ideology. As shown in the AN´s auto, applicants must express unconditional disgust and shame. Goffman (1961, p. 365-66) foresaw the invasion of moral judgement in psychotherapy and was not surprised that psychotherapy now consisted of "holding the sins of the patient up to him and getting him to see the error of his ways." Although this may explain the AN's moralistic decision, it is does not explain the post-custodial measures now applied to this group.

Under the service or medical model "...every possible disorder can be fixed, depending only on how much of the original object is replaced with new parts..." (Goffman 1961, p. 243). The Spanish legislature claims that the pathology is manifested through the behaviour of this group of deviants but offers only a partially successful cure for the illness. Further, by making direct reference to a pathology, the legislature is stating outright that the offender´s behaviour and *desires* deviate from the norm.

Despite popular rhetoric, persons involved in this type of activity have not been demonstrated to suffer disproportionately from either an Axis I or an Axis II disorder (Silkes 2002; Victoroff 2005; Horgan 2006). Allegations of a sociopathy, "advanced without evidence" led Victoroff (2005, p. 13) to conclude that it had more to do with perceived antisocial or prosocial behaviour. As demonstrated in the BBC interview, sociality is subjective and the size of the group of identity must be considered when attesting prosocial collaboration (Victoroff, opt. cit.; della Porta 1988). The Commissioner similarly concluded that amongst those who enrolled in paramilitary activity "broadly speaking there was less evidence of a personality disorder" than in the general prison population. They like one of the psychologists interviewed recognised an underlying ideological motive. Further, the Spanish psychologist admitted that to their knowledge there are no therapeutic programmes available in Spanish prisons to change or 'attenuate' ideology.

6.3. Where does that leave us?

How do we explain the recent turn to a clinical terminology to justify the inclusion of a new technology of power? The impenetrability of this group of prisoners presents two separate problems for the State and prison administration. First, although both recognise and can explain the behaviour - political motivation, as in the case of mental illness but in contrast to 'normal' behaviour, it "resists all understanding" (Foucault 1987, p. 45). It is an unknown and misunderstood group for who no therapy exists and the inability to fragment the group renders them a political and scientific problem, and therefore dangerous. It is a scientific problem because there is no treatment available and they can't be clinically fixed, and a political problem because their collective incorrigibility and resistance to the prison regimen undermines the legitimacy and authority of both institutions, and more importantly the existing technologies of dominion (Rodriguez 1996, p. 147); thus, the need to invent new strategies to manage these anti-citizens, the most recent being electronic monitoring.

7. Conclusion

Incarcerated e*tarras* like paramilitary prisoners in the NI, "carry their political and ethnic solidarity" (Feldman 1991, p. 155). Strategies have been designed to break the solidarity of individual members by physically and morally fragmenting the group in effort to reify the treatment model and the State's hegemonic order. These

aim to neutralise the political praxis and also prevent contagion. However, the therapy is not clinical, it is political. The prisoner will only have their positive rights re-instated if they are rendered politically docile. The new technology of power introduced to neutralise those unwilling to sever the social and political roots of their pathology, has direct control over their body but makes no attempt to modify their thoughts or desires only to contain them.[38] Estimates will be based on factors deemed liable to produce risk, which represents a shift from the gaze to the "objective accumulation of facts" (Castel 1991, p. 282). Although, law is used as a tactic, the individual consciously and coercively modifies their behaviour under a new relationship of power, which is founded on a precautionary and cost-effective security apparatus to manage this incalculable risk. "Their mind set is unfathomable, because they are outside of reason, because they are outside of civilisation" (Loizidou 2004, p. 72).Their irrational behaviour is incomprehensible and unpredictable; they have breached the social contract and are particularly dangerous.

There is a general consensus by the specialists interviewed that risk in a penitentiary context refers to the probability of re-offending. That said, in Spain actuarial tools to assess the probability of abscondment are not being used to predict future behaviour for any prisoner. The psychologists interviewed are using clinical assessments to identify the risk factors and needs of inmates; whereas the jurists are basing their decisions on common-sense. The assessments are therefore not based on actuarial values but a mixture of expert knowledge with everyday knowledge (Valverde, Levy and Moore 2005). Regardless, the legislature has introduced a separate standardised list of factors for condemned 'terrorists' under Art. 78.3 PC. Although these must be met by the individual prisoner, they target the collective. They are a counter-insurgency strategy directed at the risks allegedly posed by the organization and not the incarcerated *etarra*.

The Belfast Agreement and the Northern Ireland (Sentence) Act 1998 are examples of conciliatory legislation and the latter was a formal recognition of the need to include prisoners in the process; however, the Spanish government continues to use prisons "to warehouse its most disruptive elements" (Wacquant 2008, p. 6) and to reaffirm the authority of the State by using the repented and 'useful' political prisoners as counter-insurgency pawns in an effort to bring to an end the conflict through the full penal apparatus. The Sentence Commission prioritises a collective external factor, the group's commitment to the cease-fire. Conversely, the supervising prison judge and experts in Spanish prisons demand that the individual disassociate themselves from the organisation and abandon their political praxis, despite the organisation's present cease-fire.

The risk posed by these anti-citizens is not being managed and neutralised in the name of law and order but to secure public and constitutional order (Rose 2000, p. 330). The security apparatus erected by Spain is directed at breaking their solidarity by directing dissidents through security mechanisms such as isolation or repentance. This is done under the guise of governing the risk posed by the individual member; but, is directed at the collective political praxis. NI presently is in a conflict transformation whilst the Spanish government is still managing this collective as though they are in direct confrontation.

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[38] In many countries, the physical castration of sex offenders is used as a precautionary mechanism. It is not a coincidence that the Spanish law is directed at both groups.

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