

# SPAIN

**The outbreak of a new wave of killings by ETA, the Basque armed separatist group, has led to increased pressure from public opinion on Judges and Magistrates in cases concerning ETA members or activists whose activities have been imputed to them. Concerns have also arisen in recent years regarding media pressure on the judiciary in sensitive cases such as those concerning immigrants and the emergence of “celebrity judges.” Judges have also been burdened by excessive caseloads. As a response to these problems, the Government and the two main political parties have endorsed a programmatic declaration, the State Pact for the Reform of Justice, which sets common objectives and goals to improve the functioning of the judicial system.**

The Spanish Constitution was approved by popular referendum and adopted in December 1978. According to article 1, the Kingdom of Spain is "a social and democratic State, subject to the rule of law, and advocating as higher values of its legal order, liberty, justice, equality and political pluralism ". Spain is a parliamentary hereditary monarchy, with the King as Head of State. Article 56 (3) of the Constitution provides that "[t]he person of the King is inviolable and shall not be held accountable. His acts shall always be countersigned in the manner established in Article 64. Without such countersignature they shall not be valid, except as provided for under Article 65.2. " Thus, responsibility for the acts of the executive is shared by the Government.

The Government is headed by the President of the Government (Prime Minister), who is appointed by the King and receives investiture by the Congress of Deputies. Since May 1996, José María Aznar Lopez, head of the Conservative People's Party (*Partido Popular* or PP), has occupied this position. All the members of the Government are appointed and removed from office by the King on the proposal of the Prime Minister.

Legislative power is vested in the *Cortes Generales* or National Assembly. Title III of the Constitution provides for a bicameral system, consisting of the Congress of Deputies and the Senate. The Congress of Deputies is formed by a minimum of 300 and a maximum of 400 deputies, elected by universal free, equal, direct and secret suffrage. The number of deputies per province corresponds proportionally to the population. The tenure of the legislature is four years, unless an early dissolution intervenes. The Senate, which is the territorial representation organ, currently has 256 members serving terms mandated in general elections (four representatives per province) or nominated by the Autonomous Communities (one per Community and another for every million inhabitants in the corresponding region).

The Constitution provides for checks and balances between the executive and the legislative power. The person of the King cannot be held accountable for the acts of the executive, but the Government may be censured by the Congress of Deputies by means of the censure motion or constructive vote of censure. The Prime Minister is empowered to propose the dissolution of the Legislative Chambers and according to Article 62 b) of the Constitution, the Head of State has the capacity to "summon and dissolve the Cortes Generales and ... call elections under the terms provided in the Constitution".

## HUMAN RIGHTS BACKGROUND

Spain's human rights practice has given rise to concerns in relation to the Basque issue and to immigration matters. Since January 2000, there has arisen a spate of killings and attempted killings by the Basque armed separatist group *Euskadi Ta Askatasuna* (ETA), mainly against Spanish officials from the national ruling party, but also against other civilians. In November 1999, ETA ended its cease-fire, which it had declared in September 1998. ETA has perpetrated numerous acts of violence since 1968, including the killing of more than 780 people in Spain as well as other human rights abuses such as abductions and hostage-taking. During 2000, many civilians were murdered, sometimes for "strictly political" motives, as a subsequent ETA statement asserted. Examples include the journalist José Luis López de Lacalle, the PP member Jesús María Pedrosa Urquiza, the PP councillor José María Martín Carpena and Juan María Jáuregui, a Socialist and former governor of the Basque province of Guipúzcoa. María Korta Uranga, the president of Adegí, an employer's organisation in Guipúzcoa was murdered for her opposition to the payment of a "revolutionary tax" demanded under threat by ETA. Another modality of ETA action is street violence or "urban struggle" (*violencia callejera* or *kale borroka*). Politically-motivated street violence has been on the increase, aimed at intimidating councillors, judicial figures, teachers and professors, journalists, transport workers or others by means of attacks using explosive devices and related threats.

The escalation in human rights abuses by ETA, as well as the use of *kale borroka* has prompted the adoption of new anti-terrorist legislation and the arrest of Basques by the Spanish authorities. Some of these measures, including the increasing of penalties against juveniles convicted of politically motivated violence, have raised concerns as to their conformity with international human rights standards. The authorities have allegedly taken the commitment of persons to the concept of Basque sovereignty to be tantamount to support for, or membership of, ETA in order to justify arrests. Civil Guards or police officers have also allegedly resorted to torture in incommunicado detention. against alleged ETA suspects.

A number of cases of human rights violations against immigrants by police officers have been reported, mainly involving nationals from African countries. These violations mostly consist of ill-treatment of detainees, but there have been cases of shooting and homicide as well. For example, in December 2001, the Algeciras court opened a judicial inquiry, and the Director General of the Civil Guard opened disciplinary proceedings, into the conduct of an officer who fired on and killed Abdelhadi Lamhamdi, an undocumented Moroccan national in Tarifa (Cadiz). In October 2000, another Moroccan national filed a judicial complaint against six officers of Madrid's municipal police on the grounds of ill-treatment. Also in October 2000, a judicial inquiry was opened into allegations that two Algerians, one a minor, had been severely ill-treated by municipal police officers in the Spanish North African enclave of Ceuta. Other human rights violations alleged concern inhuman and degrading treatment inflicted by Spanish authorities on African nationals, many from Nigeria, Senegal and Sierra Leone, who disembarked on the beaches of the Campo de Gibraltar and Canary Islands during the year 2000. Most of the immigrants were held in overcrowded, inappropriate and unsanitary conditions in Civil Guard barrack cells and a municipal sports centre, before being expelled. Some ferry captains alleged that police officers had pressed them to accept the Moroccans as cargo rather than as passengers.

## THE JUDICIARY

### Structure

Article one of the Constitution of Spain provides that Spain "constitutes itself into a social and democratic state of law which advocates liberty, justice, equality, and political pluralism as the superior values of its legal order". Under article 24, "all persons have the right to the effective protection of the judges and courts in the exercise of their rights and legitimate interests, and in no case may there be a lack of defence ... Likewise, all have the right to the ordinary judge predetermined by law, to defence and assistance of an attorney, to be informed of the accusation made against them, to a public trial without delays and with all the guarantees, to utilise the means of proof pertinent to their defence, to refrain from self-incrimination, to refrain from pleading guilty, and to the presumption of innocence." Articles 117 to 127 of the Constitution provide for the establishment of a Judiciary, which shall be " independent, irremovable, and liable and subject only to the rule of law". The Judicial system of Spain consists of two main parts, namely the Judicial Administration and the Administration of Justice.

### *Judicial Administration*

The Judicial Administration, which is the administrative part of the Judiciary, is headed by the General Council of the Judicial Power set up in Article 122 (2) and (3). This body consists of "the President of the Supreme Court, who shall preside it and of twenty members appointed by the King for a five-year period, amongst whom shall be twelve judges and magistrates of all judicial categories, under the terms established by the organic law; four nominated by the Congress of Deputies and four by the Senate, elected in both cases by three-fifths of their members from amongst lawyers and other jurists of acknowledged competence and over fifteen years' experience in the exercise of their profession". At the legislative level, the Organic Law of the Judicial Power (6/85) was modified in 1998 and in 2001. This second reform affected only the Judicial Administration and more precisely the composition of the General Council of the Judicial Power.

### *Administration of Justice*

The task of administering justice "both in passing judgement and having judgements executed, lies exclusively within the competence of the Courts and Tribunals laid down by the law, in accordance with the rules of jurisdiction and procedure which may be established therein ". In this regard, the Spanish judicial system has two main pillars.

The first pillar consists of *Judges and Magistrates*. Admission to the judiciary is by public competition supervised by the General Council of the judiciary (*Consejo General del Poder Judicial*). An applicant must be of Spanish nationality, of majority age and good character, and hold either a Bachelor or Doctor of Laws degree. Applicants must complete written and oral examinations on all aspects of the law. The top candidates are chosen and sent to a judicial school. Those who successfully complete the school are appointed to the judiciary after a two-year practical orientation. According to Article 127 (1) of the Constitution, "Judges and Magistrates, as well as Public Prosecutors, while actively in office, may not hold other public office nor belong to political parties or trade unions" . This pillar is headed by the Supreme Court (*Tribunal Supremo*) established by Article 123 of the Constitution which "with jurisdiction over the whole of Spain, is the highest judicial body in all branches of justice, except with regard to the provisions concerning

Constitutional guarantees ". In this latter matter, the highest authority is given to a Constitutional Court governed by Articles 159 to 165, with jurisdiction "over the whole of Spanish territory" .

The Supreme Court is the court of last resort in criminal, civil, administrative, social and military matters. It is divided into six chambers, each with its own president and judges: civil; criminal; litigation (two chambers); legal administration; and social and labour matters.. The President of the Supreme Court is formally appointed by the King, after being elected by the General Council of the judiciary. The Supreme Court hears petitions for cassation of judgements, which may be brought by the parties to a case or by the State, for an alleged breach of legal doctrine, law or procedure. It also hears petitions for the revision of judgements, which are filed in situations where crucial evidence or testimony either has been discovered or proven false.

The Constitutional Court is composed of twelve members appointed by the King pursuant to nominations by the *Cortes*, the Government and the General Council of the Judicial Power. Members are appointed for a nine-year term, with three members retiring every three years. The Constitutional Court hears appeals grounded upon the unconstitutionality of laws or regulations; appeals grounded upon violations of basic constitutional rights and liberties; and conflicts of authority between different Autonomous Communities or between an Autonomous Community and the State. A State body (a chamber of the *Cortes*, the Government or the General Council of the Judicial Power) is entitled to appeal to the Constitutional Court when it considers that another State body is violating its constitutional authority. The Constitutional Court also has the power to review, upon request, the constitutionality of Organic Laws, Statutes of Autonomy and international treaties not yet ratified. According to Article 164 (1) of the Constitution, the judgements of the Constitutional Court "have the validity of *res iudicata* from the day following their publication, and no appeal may be brought against them".

There are three types of High Courts, namely Provincial, Territorial and National High Courts. Concerning the first type, there are fifty Provincial High Courts (one per province), which sit in three-judge panels to hear cases. They deal primarily with criminal matters, as an appeal body against decisions of Courts of Instruction and acting as trial courts for crimes of a certain importance. Concerning the second type, there are seventeen Territorial High Courts, which sit in panels composed of three to five judges. These courts hear appeals from matters in which the Courts of First Instance exercised original jurisdiction. Their decisions, as well as those from Provincial High Courts, are not subject to appeal, although a petition for cassation of a judgement may be addressed to the Supreme Court. The third type was introduced in 1977 to supplement the functions of the Supreme Court and the Territorial High Courts. The National High Court is composed of an administrative chamber and a criminal chamber, each with its own judges and president. The Court has jurisdiction over crimes associated with a modern industrial society, such as currency offences. Three Central Courts of Proceeding are attached to this court.

Three types of Courts provide the lower level. Courts of Peace are headed by a lay justice of the peace that sits alone and deal with small infractions and disputes. They are found in communities that are too small to have a Municipal Court. Municipal Courts have jurisdiction to administer justice in areas with populations of 30,000 or more. They are composed of one judge who sits alone and have competence to hear small civil and criminal matters. Their decisions may be appealed to the Courts of First Instance and Instruction. These latter courts consist of one judge who sits alone. Courts of First Instance have original jurisdiction over all civil matters not specifically reserved to other courts. Their decisions may be appealed to the corresponding Territorial High Courts. Criminal matters are treated by Courts of Instruction, which have original jurisdiction over minor

crimes and prepare major criminal cases to be tried at the Provincial High Court level. Decisions of these courts may be appealed to the corresponding Provincial High Court.

The second pillar consists of *Procurators*. This institution is found at every level of the Spanish judicial system. The main function of Procurators is to prosecute criminal cases. More generally their mission is "that of promoting the working of justice in the defence of the rule of law, of citizen's rights and of the public interest as safeguarded by the law ... as well as that of protecting the independence of the Courts and securing through them the satisfaction of social interest ". The State Public Prosecutor, which is the highest authority "shall be appointed by the King on being proposed by the Government, after consultation with the General Council of the judiciary ". The Office of the Public Prosecutor is exceedingly hierarchical. This characteristic, as explained below, constitutes a source of difficulty with regard to the independence of the judiciary.

### **The functioning of the system**

Although many Judges have expressed their satisfaction as to the guarantees of stability and independence of their posts, there are many concerns that have arisen in recent years as to the functioning of the judicial system. First, pressure from the media is often intense in respect of delicate issues, such as immigration, extradition demands for international criminal suspects, Basque terrorism and trials involving high officials. Also, the politicisation of justice (*politicización de la justicia*) remains problematic. During the period covered by this chapter, a case arose involving a Spanish Minister in which the Prosecutor was dismissed from the case by the Attorney General. (see cases below).

Other concerns include the emergence of "celebrity Judges" (*jueces estrella*), such as Baltazar Garzón, who became internationally famous following his request for extradition of General Augusto Pinochet, and the spectacular increase in the number of cases, which raises doubt concerning the capacity of the Spanish State to adapt the judiciary to social changes.

These many problems have led to the adoption of a State Pact for the Reform of Justice (*Pacto de Estado para la Reforma de la Justicia*), endorsed by the Spanish Government and two political parties, namely the Conservative People's Party (PP) and the Socialist Party (*Partido Socialista Obrero Español*, PSOE). This Pact is a programmatic declaration on how to reform the judicial system and represented the first time that the two main parties agreed on a substantial and coordinated reform of the judiciary since the return of Spain to democracy. The pact also constitutes an historic agreement as during the several negotiations that preceded the Spanish Constitution, no agreement on the judiciary was reached. The pact also provides democratic support for the reforms to be undertaken and a joint view of the objectives and goals of the reform. This latter consists of several points such as: reform of the procedure of election of vocals in the General Council of the Judicial Power, which is the most controversial issue of the reform and has been translated into a modification of the Organic Law (6/85); the idea of bringing justice closer to citizens, including expedition of procedures, enhancing the transparency of judicial offices and adoption of a Charter on the rights of citizens; the modernisation of the judicial career by increasing the number and preparation of Judges and Magistrates and relating promotions to productivity criteria; the establishment of new procedures that enable the overcoming of the backlog suffered by Spanish courts; reform of the judicial procedures to make them faster (without affecting judicial guarantees) , and promote alternative dispute resolution methods; and incorporation of new technologies.

## LEGAL PROFESSION

Article 36 of the Constitution provides that "the law shall regulate the special features of the legal status of the Professional Colleges and the exercise of the degree professions. The internal structure and operation of the Colleges must be democratic". The Organic law of Professional Colleges (2/74) was modified by Decree-Law 5/96, liberalising the system. More precisely, the Statute for the exercise of the law profession was approved by Royal Decree 2090/82. The system provides for two types of legal practitioners: the attorney (*procurador*) and the advocate (*abogado*), whose functions are similar to those of the English solicitor and barrister, respectively.

The attorney is retained by a party in a matter, given a power of attorney, and then handles the case, making sure to satisfy all procedural requirements such as filings and statutes of limitation. The attorney will retain an advocate if the matter is to go before a court. To be competent to practice, the attorney must be of legal age; be of good repute, hold Spanish nationality; hold at least a Bachelor of Laws degree; be licensed by the State; be part of the local bar association; have made out a financial responsibility bond; and have taken an oath before the highest local court.

Only advocates are entitled to appear in court. Several conditions are required to be able to practice: the person must meet the age, reputation, degree and nationality requirements of the attorney, and must enrol in the local bar association of advocates. In contrast to attorneys, advocates do not need a State license. Although no practical training is required from new advocates to exercise their profession, in practice they usually apprentice with experienced advocates or take advocacy courses. There is a local Bar in each Spanish Province, and all of these are federated in a General Council. There is also a General Council of Advocacy (*Consejo General de la Abogacía*), which federates all local Colleges at a national level.

## CASES

### *Victims of attacks by ETA*

There have been a number of death threats against a wide range of persons, including judicial figures and law enforcement officers, emanating from ETA or ETA-related extremist groups. In October 2001, some 79 judges and nine prosecutors were reported to be on a list of targets drawn up by ETA.

**José Francisco Querol Lombardero**, the Magistrate of the Military Chamber of the Spanish Supreme Court, was murdered when his car was blown up by an ETA device on 30 October 2000.

**Luis Portero**, the Chief-Procurator of the High Court of Andalucía, was shot on 9 October 2000 when he was preparing to take the elevator in the building of his residence.

**José María Lidón Corbi (Judge)** Mr. Lidón was a Magistrate of the Court of Bilbao (*Audencia de Bilbao*). Judge Lidón Corbi was shot by two gunmen three times in the presence of his wife and one of his children on 7 November 2001 in Gexto Municipality, near Bilbao. The gunmen were widely considered to have been acting on behalf of ETA. In a public statement, the ICJ condemned the attack as a serious assault against the independence of the judiciary and the rule of law in Spain and called on ETA immediately to cease such criminal practices.

### *The Ercros case*

In 1991, the company Ercros sold a subsidiary, Ertoil, to the French Oil Company, Elf, through the intermediary of the Luxembourgian firm GMH (General Mediterranean Holding). Reportedly, GMH acted as a cover for Elf in order to evade tax payments. Moreover, the French company retained a buying option over Ertoil, even though the Ministry of Industry had vetoed the operation. Eventually, an Elf-controlled company, Cepsa, bought Ertoil from GMH for 249 million Euros, thus avoiding the official veto of the sale.

At the time of the operation, Mr Josep Piqué, the current Spanish Foreign Affairs Minister, was the Director of Ercros. The involvement of Mr Piqué in this controversial operation led a Supreme Court Prosecutor, Mr Bartolomé Vargas, to write a report asserting that there was enough evidence for Piqué to be summoned as a suspect on the charges of funds embezzlement and tax evasion. This report apparently embarrassed the Spanish Prime Minister, José María Aznar, who until recently had viewed Mr Piqué both as his own protégé and as a leading light in his government. One of the more controversial points of the accusation was the fact that in 1998, Mr Piqué, at the time Minister of Industry and member of the Governmental Commission for Economic Matters, consented to the elimination of about 8 per cent of Ercros' debt to Government. The situation became more pressing after the majority of the Spanish Supreme Court's Prosecutors voted in favour of Mr Vargas' report. Piqué strongly denied the accusation and stated that his "conscience was clear".

The final decision on whether to call Piqué to face charges rested with the Spanish Attorney General, Jesús Cardenal. He recently dismissed Mr Vargas from the instruction of the case and transferred him to another section. At the same time, Mr Cardenal ordered the prestigious and independent Anti-corruption Prosecutor, Mr Carlos Jiménez Villarejo, not to request measures on the case without his previous authorisation. These actions seem to constitute a clear attack on the independence of the judiciary.