Organised Crime Control Policies in Spain: A 'Disorganised' Criminal Policy for 'Organised' Crime

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Organised Crime in Europe

Concepts, Patterns and Control Policies in the European Union and Beyond

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1. Introduction

As Alejandra Gómez-Céspedes and Per Stangeland establish in Part II, the official debate on organised crime in Spain is completely dominated by the debate on terrorism, one of Spain's two most serious problems, according to the surveys of the Spanish Centre for Sociological Research. Terrorism is frequently the object of different kinds of government initiatives aimed at reducing the (already slight) political support for ETA in the Basque Country and increasing the efficacy of police and judicial bodies, thus assuring victims' protection. These measures have also produced many legal results such as: anti-terrorism bills and acts, penal reforms, legislation on victim assistance and compensation. Institutional changes have been also brought about to improve the fight against terrorism.

The aim of this paper is not to review terrorism policies, but to study those directed against organised crime. Criminologically, terrorism is more complex than simply organised crime with a political purpose. There are indeed many links and overlaps between terrorism and organised crime (Bassiouni and Vetere, 1998: xl; Castillo et al., 1993: 493), but these two phenomena (Bassiouni, 1990: 5-9; García Rivas, 1998: 23) merit differing approaches even if exceptional legal measures introduced against terrorism are very often extended to lucrative organised crime.

The first section of this paper reconstructs the emergence of specific organised crime policies in Spain. The second section analyses the new legal instruments introduced in the field of substantive criminal law, criminal procedure and international police and judicial cooperation to enhance the repression of organised crime. The relevant institutional changes are reviewed in the third section. Some conclusions with a forecast of future trends follow.

2. The Emergence of Organised Crime Policies in Spain

The importance and extent of international organised crime, clearly different to traditional normal crime (Iglesias Río, 2001: 1445) is frequently tackled by way of a specific criminal policy, usually of 'emergence' (Iglesias Río, 1999: 124). Such is the case in Spain, where, according to B. Garzón (1997: 48), the generalised

development of organised crime is 'relatively recent' (1988-1989) and, although we can find some first legal references to it in 1983 –in the field of legal reform on drug trafficking (completely reformulated in 1988 and with an additional provision on money laundering related to it: Article 543*bis*(f))– judicial and police interventions only intensified after 1988. However, due to the prevalence of the fight against ETA, action against organised crime has mainly consisted of specific (one-off) interventions, principally focused upon illegal trafficking of drugs and money laundering connected to it (Núñez Paz, 2002: 157-8) and mostly provoked by international pressure, without a public debate and lacking a systematic approach.

Certainly, anti-organised crime operations have been frequently included as a priority in declarations made by the Ministry of the Interior[1]. However, it is only recently that organised crime appears really as an independent topic in the Ministry of Interior's official reports and plans; and regrettably official information is aimed much more at showing quantitative data, rather than at explaining the priorities, aims and objectives of official policies of crime prevention or reduction[2]. Very little information on this topic could be found, indeed, until recently, in the government periodical declarations and reports, and according to the opinion of the poi ice officers working specifically on organised crime, even the priority given to it inside the police organisation could not be considered high or very high (Mapelli Caffarena et al., 2001: 27).

The absence, until recently, of organised crime as an independent topic in the findings of official reports may also be the reason for the traditional inexistence of a positive legal definition of organised crime in Spanish domestic law. Belonging to a criminal organisation is foreseen by the Criminal Code as an aggravating circumstance in some crimes, but no definition at all of what it is, is provided. It is then the task of jurisprudence to establish the concept of 'criminal organisation', in particular in connection with drug trafficking, where since 1983 being the head of an organisation - even if only partially or occasionally devoted to this trafficking or transitorily constituted - has been considered an aggravating circumstance by the Spanish Criminal Code (Art. 369(6)(g))[3].

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[1] See, for instance, in 1996 <http://www.mir.es/oris/docus/balan96/textos/b96-p10. htm>.

[2] In 2001 the general director of the Spanish National Police, Mr. Cotino, announced a pilot plan to combat organised crime, based on the Police 2000 Plan. Cortes Generales, *Diario de Sesiones del Congreso de los Diputados. Comisiones*, VII Legislatura, A.2001, No. 153, 4390-3.

3 Three different concepts have been jurisprudentially developed in this way (Gallego Soler, 1999: 184): 1) organisation as an important and hierarchical structure around an established and well known decision centre, regardless of individual members, that can be interchangeable; 2) organisation as co-perpetratorship; 3) organisation as synonymous of a certain structure with distribution of functions among a plurality of persons and

Outside the Criminal Code, membership of a criminal organisation (with an internal discipline) is also considered by penitentiary legislation in order to classify inmates in the closed regime (Art. 102(4)(c) of the Penitentiary Penal Regulation). But here again no definition is provided.

It is only in the field of criminal law that a criminal definition can be found. Article 282*bis*(4) of the Spanish Criminal Code (after the reform introduced by Organic Act 5/1999 on the undercover agent) establishes that organised crime is the association of three or more people in order to commit, permanently or in a repeated manner, one or several of the following penal infractions specifically mentioned by the law: kidnapping, prostitution, property crimes and crimes against the social-economic order, crimes against historical treasures and heritage, crimes against workers rights, different forms of trafficking (drugs, protected animals and plants, nuclear materials, weapons), money counterfeiting and terrorism (critically, Delgado Martín, 2001: 39,68).

As Enrique Anarte Borrallo (1999: 31) points out, there are three elements in this concept:

- a *structural* one: association of persons
- a *finalistic* element: to commit one or several crimes
- a *temporal* one: permanently or, at least, not occasionally.

These three elements must be connected iri addition to a *numerus clausus* list of offences. Nevertheless, Article 282*bis*(4) definition cannot be considered as the Spanish criminal law concept of organised crime. Act 5/1999's aim was only to define the cases in which an undercover agent can intervene (Sánchez García de Paz, 2001: 665) and not to fix a general legal definition of criminal organisations within Spanish law.

A very interesting source to describe the main features of particular anti-crime policies is frequently scientific research. Usually, research conducted directly by official bodies (at least when conducted by the Ministry of Interior) is not published in Spain (or, if published, with very restricted circulation). The same applies very often to the scarce research officially sponsored. As for university research on organised crime, it is not really devoted to a general evaluation of organised crime policies, but mainly focuses on particular crimes (drug offences, human trafficking, money laundering, etc.) and legal issues. Empirical research is scarce. The research work of the Andalusian Institute of Criminology's sections of

around a criminal plan. The identification of the heads of the organisation is not necessary if their existence is more or less known (direction progressively dominant in the jurisprudence).

Malaga and Seville (Mapelli Caffarena et al., 2001) are really exceptions to this general trend[4].

3. The New Legal Instruments

Legal reform is frequently the most apparent product of a criminal policy on organised crime. In fact, as happens with terrorism, governmental agencies that fight against organised crime require the adoption of exceptional and emergency means, the application of which is only possible through legal reform. At the same time, although legal reform by itself produces no real result in the prevention and reduction of organised crime, in our modern system of social communication it functions as one of the best ways of reassuring public opinion. Reform requirements are especially demanded in the penal field.

Furthermore, the criminal justice system is often submitted to intense pressure to 'change focus' (Van den Wyngaert, 1999: 138): the aim of penal intervention should not only be the prosecution and punishment of offenders, but also the dismantling of the criminal organisations and the control of the proceeds of crime and the profits accumulated by criminal activities (De la Cuesta Arzamendi, 2001 a, 85).

Spanish organised crime policy is mostly reflected at a domestic level by several legal reforms, adopted without a global or systematic perspective of criminal policy. The main aim of these reforms has often been to provide a reply to the pressure of international or European instances and to help prosecuting authorities, avoiding the difficulties that traditional penal law and process law mechanisms apparently pose when preventing and repressing organised crime activities in an efficient way.

3.1. Substantive Criminal Law

Reforms in substantive criminal law have been specifically directed at introducing new tools to ensure the criminal responsibility of the heads of criminal organisations, who do not usually directly perpetrate the crimes they plan and/or order.

The *societas delinquere non potest* dogma is seen in many systems as an important barrier to the prosecution of the person really responsible for certain crimes, so the introduction of real possibilities of penal intervention against corporations is required as well.

[4] Falcone Project 2001/FAL/168 entitled: 'Illicit Practices in the Construction Industry: Vulnerability to Organised Crime and Corrupting Agents in Urban Planning and the Building Industry', concluded in April 2003. See the report of Gómez-Céspedes and Stangeland in Part II.

In the Special Part of the Criminal Code, priority is given to incriminating participation in organised criminal groups, and to the establishment of new crimes (as well as new kinds of trafficking). The criminalising of money laundering is also a priority issue and this is directly aimed at the proceeds and profits of criminal activity, which must materialise in any profit-making activity.

An increase in sanctions and the concession of legal rewards to those who dissociate from criminal groups and collaborate with the prosecuting authorities are also viewed as fundamental instruments for the legal treatment of organised crime.

3.1.1. Developments in the Special Part

Consistent with the absence of a comprehensive approach, the Spanish legislator's penal intervention in relation to organised crime has found its most important development in the Special Part of the Criminal Code. By clearly criminalising 'any social contact with organised crime' (Anarte Borrallo, 1999: 52), traditional crimes have been reformed and new incriminations have been introduced.

Participating in a criminal organisation -the penal sanction of which was required in an European Union Joint Action of 21 December 1998- is criminalised in Spain by the Criminal Code. Criminal organisations in Spain are considered illicit associations, and are punished not only if fully established, but also in the preparatory modalities of provocation, conspiracy and proposition (Art. 519). The following are considered as illicit organisations in Spain (Art. 515):

- those whose object is to commit a crime or that promote its committing after being established;
- armed gangs, terrorist organisations and groups:
- those that even though they have a licit objective, employ violent means or personality alteration or control to achieve said objective;
- organisations that promote or instigate discrimination, hate or violence against people, groups or associations because of their ideology, religion or beliefs, or because they come from an ethnic or racial group or nation, or for their gender, sexual orientation, family situation, illness or handicap;
- those that promote illicit trafficking of people.

It is only really the last category that has been recently added (Organic Act 4/2000, on the rights and freedoms of foreigners in Spain and their social integration). The other modalities were already envisaged in the former Criminal Code and, with a slightly different wording (except in the case of discrimination, where there are greater differences between the two Codes) were reproduced by the new Criminal Code in 1995.

As we know, the Criminal Code does not define actual illicit associations that can be identified with a non-sporadic human group (Quintero Olivares, 1999: 183). Jurisprudence usually adds certain elements to this: plurality of persons, permanence, division of work, existence of a leader, multiple criminal aims and, sometimes, use of weapons (Bueno Arús, 1999: 80). However, if there is to be a difference between preparatory acts (and especially, conspiracy[5]) and participation and integration or collaboration with illegal associations, the concept of organisation should require an organised power structure (or a network) of a certain importance, with a criminal programme and division of work, devoted to obtaining power and/or profits (De la Cuesta Arzamendi, 2001a: 114).

As for punishment, a difference is made between armed gangs and terrorist organisations or groups, and the founders, directors, presidents, active members and collaborators of other illicit associations, who are punished with 2-4 years imprisonment, a fine and legal incapacity -if they are presidents, directors or founders of the organisation- and 1-3 years imprisonment and a fine if active members or collaborators of an organisation (Art. 517-518).

Belonging to a criminal organisation was already considered as an aggravating circumstance for drug trafficking in 1983 (Art. 344 of the Criminal Code; Art. 369.6, 370, 371.2 new Criminal Code 1995) and progressively extended to other offences:

- prostitution and corruption of minors (Art. 187, 189)[6];
- money laundering (Art. 302);
- tax fraud and fraud of the social security administration (Art. 305, 307);
- illegal trafficking of immigrants (Art. 318*bis*(5)).

Different authors have questioned the mere existence of a specific crime of membership or collaboration with illegal organisations, mainly because of the risk of a certain 'hypertrophy of the penal reply' (Quintero Olivares, 1999: 181) and due to the distance from the juridical protected interest (Sánchez García de Paz, 2001: 678). Furthermore, in practice the application of these provisions tends to be quite difficult, because of the need to differentiate between the fact of belonging to a group and the mere informal adhesion or support of it, and because of the problems of proof. The 16th International Congress on Penal Law, acknowledging the need for autonomous provisions for participation in a criminal organisation, insisted on

[5] Jurisprudence has sometimes followed a reductionist perspective on illicit association identifying it with simple conspiracy (Choclán Montalvo, 2001: 256).

[6] It is very difficult to understand why illegal trafficking of persons with the aim of sexual exploitation is not covered.

the need to fully respect the principles of strict legality, real social harm (or danger), blame and proportionality (Revue Internationale de Droit Pénal, 70, 1999: 900).

Organised crime includes all kinds of criminal offences, but only some of them are normally qualified as 'typical' organised crime offences (Bueno Arús, 1999: 71; Van den Wyngaert, 1999: 247): corruption, fraud, and, mainly, illicit trafficking, smuggling and money laundering (Ottenhof, 1997: 51).

Within illicit trafficking, drug trafficking has always received special attention internationally and this is evident from the fact that alongside the Single Convention on Narcotic Drugs (1961) and the Convention of Psychotropic Substances (1971), the new Vienna Convention on Drug Trafficking was adopted by the United Nations in Vienna in 1988.

Trafficking of persons is also very important and has been the object of various Conventions like the Slavery Convention of 1923, the Convention on Forced Labour (1930), the 1950 Convention for the Suppression of Traffic of Persons and the Prostitution of Others, and the 1972 Convention on the Protection of World Cultural and Natural Heritage. The recent United Nations Convention on Transnational Organised Crime, adopted in Palermo (2000), is completed by three protocols: on the trafficking of immigrants, on the manufacturing and illicit trafficking of weapons, and on the prevention, repression and punishment of the trafficking of persons, in particular women and children.

Finally, intervention against money laundering is considered a fundamental weapon in the fight against organised crime (Van de Wyngaert, 1999: 158), in particular if combined with confiscation. The Council of Europe 1990 Convention and European Economic Community Directives 91/308 and 2001/97 are important instruments in this field.

Very much influenced by what is happening internationally, Spanish criminal policy has worked in recent years on these typical organised crime offences, and reflected this by including several reforms in its Criminal Code provisions (both the previous ones and those of the new Criminal Code of 1995) and the contents of the Smuggling Act (a new one was approved in 1995) to meet the requirements established at international and European level.

Corruption has also been the target of different reforms aimed at improving the penal treatment of corruption against European Union protected interests and in public administration (Ferré Olivé, 2002a, 2002c), and to implement the 1997 OECD Convention on International Commercial Transactions (Fabián Caparrós, 2002: 103). However, corruption in the private sector does not yet deserve any special attention by the Criminal Code (De la Cuesta Arzamendi and Blanco Cordero, 2002: 259).

3.1.2. Conspiracy

Placed between the Special Part and General Part of the Criminal Code, conspiracy as an independent crime is frequently adopted by many legislations in order to broaden the possibilities of intervention against organised crime. In the United States (Koenig, 1998: 311) (an example followed by an increasing number of countries) conspiracy does not require overt behaviour in application, and punishment is independent and not covered by the main crime (Blakesley, 1998: 88).

No special legal tools have been introduced in Spain to broaden the field of conspiracy related to organised crime. Conspiracy has been traditionally considered in Spain as a preparatory act. According to Article 17.3 of the Criminal Code (1995) conspiracy is only punished in the case of those crimes specifically laid down by the law[7]. Conspiracy requires: 1) a un ion of wills, 2) that is reflected in a complete, viable and finished plan of action, 3) oriented towards the commission of the same act, and 4) accompanied by a firm, intentional decision of execution.

3.1.3. General Part

In the General Part of the Criminal Code, international concern focuses on the introduction of new mechanisms to fight against this 'elusive phenomenon' (Weigend, 1997: 523) and to assure the criminal responsibility of perpetrators of those who lead the criminal organisation, even if they do not directly accomplish the particular crime. No special legal reforms have taken place in Spanish criminal law on perpetratorship and criminal participation.

According to Article 28 of the Spanish Criminal Code, perpetrators are those who commit the offence by themselves (direct perpetrator), together with others (co-perpetrator) or using another person as an instrument *(indirect perpetrator).*

Accomplices are regulated by Article 29 as those who contribute to the execution of the crime via previous or simultaneous acts that facilitate it, without being at the same time a *condition sine qua non* for the commission of the crime. Accomplices receive in Spanish criminal law a lower punishment than perpetrators.

Instigators and cooperators also participate in the crime or offence. Although they are not perpetrators in a strict sense, Article 28 gives them the same penal treatment as perpetrators. In this way the heads of organisations could receive in Spain the same punishment as the main perpetrators.

Nevertheless, the nature of participation is secondary and depends upon proof of commission by a perpetrator of an unjustified criminal act. Strict principles of legality require very precise and exact definitions of the punishable act. As a

[7] Attempted instigation is also only punishable in Spanish criminal law if it constitutes proposition or provocation.

consequence, the legal definition of a perpetrator tends to be traditionally restrictive
and this makes it sometimes very difficult to prosecute the heads of 'amorphous groups where responsibilities are blurred and where those who physically carry out the offence may lack full criminal responsibility, whereas those who plan and organise the criminal enterprise stay aloof from day-to-day operation' (Weigend, 1997: 526).

In order to avoid these difficulties, new legislation in many countries has adopted a system of 'unitary perpetratorship', thus allowing all those who have contributed to the crime to be punished as main perpetrators, even though they may have only contributed marginally (Weigend, 1997: 526). Spanish criminal law maintains a strict concept of perpetratorship, but considers the specific crimes of the typical offences involved in organised crime (for instance drug trafficking, Article 369 ff; money laundering, Article 301). A clear trend can be observed towards extensive descriptions that lead all those who give a causal contribution (even an intellectual or moral one) to the crime to be considered as a perpetrator (De Figueiredo Dias, 1999: 100).

At the same time, Spanish literature also debates the extension of indirect perpetratorship, perfectly applicable if the executor was not criminally responsible (Ferré Olivé, 1999: 95), and proposed by Claus Roxin (1998: 61) as the best way to deal with real perpetratorship in relation to those crimes committed through an 'organised power apparatus', characterised by an intensive hierarchy and by the irrelevance of the identity of direct perpetrators, who are very easily substituted if they fail to execute orders. Indirect perpetratorship can be a way to prosecute as perpetrators the heads of organisations with a strong interna1 structure[8] that function outside the law (Muñoz Conde, 2000: 104)[9], but many difficulties can arise when trying to apply the concept of indirect perpetratorship inside organisations that are not so strict1y structured or whose features are not yet known or very difficult to prove. In order to avoid these difficulties, Francisco Muñoz Conde (2001: 510) proposes punishing the heads of organised crime as co-perpetrators, because their task is to plan inside an organisation with a division of roles, where the crimes are decided at a certain level and executed at another. According to his opinion, this way is opened in Spanish criminal law through Article 28 of the new Criminal Code[10].

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[8] 'Formal power apparatus' (Ambos, 1999: 158).

[9] This theoretical construction is, however, not necessary to punish a head of an organisation as the main perpetrator if he was already involved in the 'intellectual part' of the offence (Joshi Jubert, 1995: 678).

[10] See, however, José Luis Díez Ripollés (1996: 225).

3.1.4. The Introduction of New Sanctions

Increasing and introducing new sanctions is usually the easiest way, in the short-term, of convincing public opinion that efficient criminal policy decisions are being adopted to face a new criminal problem.

During the last 20 years different penal reforms have provided occasion to increase punishment in the field of the typical offences involved in organised crime. This is clearly the case in the different types of trafficking crimes, and especially the trafficking of hard drugs; penalties were already increased in 1988, due to international pressure, and were raised again with the new Criminal Code (eliminating at the same time the reduction of sentences with labour, almost automatically applied during the last 15 years of the old Criminal Code).

	*Imprisonment according to the Old PC**	*Imprisonment according to the 1995 PC*
'Hard drugs' trafficking	2 yrs 4 m – 8 yrs	3 – 9 yrs
Aggravated	8 yrs – 14 yrs 8 m	9 yrs – 13 yrs 6 m
Second level aggravation	14 yrs 8 m – 23 yrs 4 m	13 yrs 6 m – 20 yrs 3 m
Soft drugs trafficking	4 m – 4 yrs 2m	1 – 3 yrs
Aggravated	4 yrs 2m – 8 yrs	3 yrs – 4 yrs 6 m
Second level aggravation	8 yrs – 14 yrs 8 m	4 yrs 6 m – 6 yrs 9 m
Precursors	6 m – 6 yrs	3 – 6 yrs
Aggravated	4 yrs 2m – 6 yrs	4 y 6 m – 6 yrs
Second level aggravation	6 – 12 yrs	6 – 9 yrs
Disqualification:		
Absolute	6 – 12 yrs	10 – 20 yrs
Special	6 – 12 yrs	3 – 10 yrs

* In practice, with a nearly automatic reduction of 1/3.

The same applies to money laundering (Blanco Cordero, 2002; Ferré Olivé, 2002c: 13), first inserted in the Criminal Code in relation to drug offences and later extended to all kinds of proceeds from serious crimes[11].

[11] Serious crimes are those punished with a serious penalty, for instance more than three years imprisonment (Art. 13 and 33).

Money laundering	6 m – 6 yrs	3 yrs 3 m – 6 yrs
Aggravated	4 yrs 2 m – 6 yrs	4 yrs 7 m – 6 yrs
Heads, administrators…	6 -12 yrs	6 -9 yrs
Negligence	4 -6 m	6 m – 2 yrs

* In practice, with a nearly automatic reduction of 1/3.

Organised crime inmates regularly have certain specificities applied to their penitentiary treatment (Mapelli Caffarena, 1996: 53).

According to rule 3 of Article 102.5 of the Penitentiary Regulation (1996), belonging to a criminal organisation (except if dissociation takes place) serves indeed as a basis to send the inmate to a closed establishment or to a special department. These facilities are reserved for those classified in the first degree of penitentiary treatment, characterised by the respect of principles of security, order and discipline, and with an important restriction of common activities and the intervention of communications.

Furthermore, inmates with links to international crime and those accused or convicted of drug offences and other related behaviour (money laundering) committed by national or international organised groups, are listed in special files (FIES-5 CE, special characteristics, and FIES-2 NA, narco-traffickers, respectively) and are specifically monitored. The lack of legal support for these files is strongly denounced (Fernández Arévalo, 1994: 329; Téllez Aguilera, 1998: 119) and the consequences of being so classified are very harsh. Those inmates included in the FIES files suffer, in fact, a penitentiary regime much more restrictive than the one generally established by the Penitentiary Act (1979) and the Penitentiary Regulation (1996).

However, in the field of sanctions the requirement is not simply to be harsh or firm. Organised crime policy is increasingly required to give an efficient answer to the need to deprive offenders of all kind of profits and fruits connected to their criminal activities. The application of mechanisms of apprehension and freezing of the tools, products and proceeds of crime (mainly confiscation and forfeiture) becomes thus a priority in organised crime policy, and virtually the best way of getting behind the 'front men' to effectively reach the interests of the heads of the criminal organisation (Weigend, 1997: 537). In order to anticipate and to facilitate this intervention new regulations have been adopted internationally, once again following the example of the United States (Vervaele, 1999: 291), to allow confiscation and forfeiture before conviction, to facilitate evidence-gathering (for instance by the means of inverting the burden of proof) and to extend them

to all kinds of personal belongings, even if they have already been transmitted to third persons. These proposals have received strong criticism (Vervaele, 1998: 67) and there is international academic concern about the real nature of the punishment of confiscation, the need to prove the illicit origin of goods and assets, the rejection of universal confiscation and respect for the principle of proportionality[12].

Spanish legislation on confiscation *(comiso)* has also been reformed in order to reflect, to a certain extent, international developments in this field. The 1995 new Criminal Code removes confiscation from the list of punishments and inserts it among the 'accessory consequences' (Art. 127), a new category of sanctions whose nature and condition is still very much discussed in scientific circles (De la Cuesta Arzamendi, 2001 b: 976). Confiscation is foreseen for intentional offences and can be extended not only to the tools and the products of the offence, but al so to the profits and assets, even if they have been transformed and transmitted[13]. Only third parties, not responsible for the offence (and unaware of their illicit origin) who have acquired items in a legal way are protected against confiscation[14].

Confiscation connected to drug offences is covered by its own particular regulation, specially directed at guaranteeing the most comprehensive capture of the substances and equipment, materials, vehicles, airplanes and any good, product, effect or instrument of the offence and their products and profits, even if already transformed {Art. 374)[15]. The results of this kind of confiscation are adjudicated by the state and can be used by the police in their activities against illegal trafficking. In 1995 a special fund was created with these proceeds to finance the following initiatives: drug-dependence prevention programmes, assistance, social and labour market integration of drug addicts; improvements to the prevention, investigation, prosecution and repression of drug offences; and international cooperation activities.

Another field where organised crime policy is encouraged to intervene is in the implementation of adequate answers to face the increasing 'intercommunication between criminal organisations and companies' (Zúñiga Rodríguez, 1999: 60). Although academic discussion remains open (De la Cuesta Arzamendi, 200 l c: 65), Spanish criminal law maintains the traditional principle *societas delinquere non*

[12] See in this regard, the Resolution of Section I of the XVI International Congress of Penal Law (Budapest, 1999), *Revue Internationale de Droit Pénal/International Penal Law Review,* 70/3-4: 897.

[13] According to the Supreme Court, also to the profits derived from previous activities of those prosecuted (Choclán Montalvo, 2001: 259).

[14] Confiscated items are sold and their products are applied to cover the reparation of victims and all civil responsibilities of the convicted.

[15] Articles 5-10 of the Organic Act 12/1995 on smuggling also include a special regulation of confiscation.

potest. Nevertheless, the 1995 new Criminal Code has taken advantage of the new category of sanctions -'accessory consequences'- to include the possibility of adopting, in certain cases, decisions against corporations involved in criminal activities, in order to prevent their continuity and effects: closing the enterprise or establishments, dissolving the society, association or foundation, suspending its activities, prohibiting the performance of certain activities or business or ordering the intervention of the enterprise in order to guarantee the rights of workers or creditors.

A third way has been thus opened to allow interventions by the penal judge against legal entities. And even if the nature of the new accessory consequences is unclear and the limited regulations of the Code do not fix the conditions that must be fulfilled in order to apply them, by virtue of this, Spanish criminal law can impose on corporations very similar sanctions to those considered real punishments in other legal systems.

The offer of legal concessions to organised crime members who dissociate and collaborate with the authorities is another substantive instrument with relevant effects in the prevention and criminal prosecution of organised crime activities (Zaragoza Aguado, 2000: 88). Here again the apparent efficacy of these measures does not necessarily fit in with their compatibility with the constitutional and fundamental requirements and principles of a due criminal process (Muñoz Conde, 1996: 143), but the procedure has received the support of the European Union Council Resolution of 20 December 1996 (Musco, 1998: 35).

Desistance and spontaneous repentance have been always recognised by Spanish criminal law as ways of exemption from responsibility (desistance in attempt) or mitigation (spontaneous repentance). Consistent with this tradition would be the admission of dissociation as a method of desistance in connection with the offence of belonging to a criminal organisation.

Nevertheless, many systems go much further and admit a de facto impunity for any charge in favour of those members (frequently, the heads and the leaders) who dissociate and collaborate with the authorities, even during the prosecution[16].

Article 57 *bis*(b) of the former Criminal Code reserved this kind of concession for terrorism. The 1995 new Criminal Code limits the possibilities offered by former Article 57 *bis*(b), but includes concessions to drug traffickers[17]. The penalties envisaged can be

[16] See the critics of the Resolutions of Sections I and III of the XVI International Congress of Penal Law (1999), and the need to respect the principles of legality, judicial control and proportionality, as well as avoiding anonymity of *'pentiti'* and convictions only based on their confession, *Revue Internationale de Droit Pénal/International Review of Penal Law* 70/3-4: 897, 904.

[17] Article 427 (corruption) includes equally an exemption of punishment for private persons that denounce the corrupt offer (already accepted by them) during the next 10 days (Quintanar Díez, 1996).

substantially reduced if dissociation is accompanied by presentation to the authorities, confession and active collaboration in order to prevent the production of the offence or to obtain decisive evidence to identify or to capture other responsible persons, or to prevent the intervention or development of those gangs, organisations, associations or groups he belonged to or with which he collaborated[18].

3.2. Criminal Procedure

In the search for maximum efficacy in the prosecution of organised crime, many new intervention methods have been introduced at a: domes tic level thanks to international influence. Frequently, these present a serious risk of a police-driven penal process (Albrecht, 2001: 103), and their compatibility with the rule of law principles is often very questionable. These include such things as: inversions of the burden of proof, presumptions of gui1t, new techniques of proactive investigation, anonymous witnesses, etc. Expansion of jurisdiction by means of the extraterritoriality principle and improvements in police and judicial cooperation in this field are also promoted in this way (Prade1, 1998: 681; Van den Wyngaert, 1999: 164, 178, 192).

Similarly to other countries, several reforms have progressively[19] brought about institutional changes in Spain and introduced specific new instruments of a different nature and scope (Delgado Martín, 2001; Esparza Leibar and Saiz Garitaonandia, 2001: 248; Zaragoza Aguado, 1999: 61).[20]

In order to ensure better protection for those who collaborate with judicial authorities, the Organic Act 19/1994 established a system of protection of witnesses and experts (García Pérez, 2001: 269; Moreno Catena, 1999: 135), recognising the clear influence of internationa1 and comparative law and remembering that this is a system admitted by the European Court of Human Rights (Preamble). The special protection assured by the law for those persons whose 1ife or properties (or those of their relatives) are in serious danger is decided by the investigation judge and may consist of police protection, the hiding of identity data (also in the proceedings) and the prevention of visual identification (Art. 2).

[18] For instance, a prison sentence, initially foreseen from 8 to 12 years, would be reduced to 4-8 years, or to 2-4 years.

[19] Gradually, and not really in a systematic way (Esparza Leibar and Saiz Garitaonandia, 2001: 246).

[20] By virtue of the Organic Act 11/1999, double incrimination will no longer be a condition of the extraterritorial application of Spanish jurisdiction based on the principle of personality, if by means of an international instrument or a decision of an international organisation of which Spain is a party, it becomes unnecessary (Blanco Cordero and Sánchez García de Paz, 1999: 39).

These measures can be maintained after the trial and if it is considered necessary a new identity can be facilitated (Art. 4.1).

Some provisions try to make witness protection compatible with the principles of due process and fundamental rights. According to the Constitutional Court and the Supreme Court, the Spanish system does not allow anonymous testimonies. Thus, contradiction is always possible, and if a party in the proceedings demands it, the judge must give the name of the protected person (Art. 4) whose testimony or report, in order to constitute evidence, must be ratified during the hearing (Art. 4.5) (Granados Pérez, 2001: 99).

Confidantes and undercover agents can also benefit from the witness and experts protection system. However, undercover agents used as a form of police infiltration (Gascón Inchausti, 2001) have recently been given new legal treatment by the Organic Act 5/1999, which modified Spanish criminal procedural law with regard to the investigation of illegal drug trafficking, and introduced different legal measures to combat organised crime (Gutiérrez-Alviz Conradi, 2001: 29).

Jurisprudence already makes a clear difference (as is broadly admitted by Pradel, 1998: 686) between provocation of a crime and police provocation and infiltration, considering the latter not illegal if not directed at originating a new crime (this would be a source of a policeman's criminal responsibility), but to facilitate the collection of evidence of an offence already previously constituted (Muñoz Sánchez, 1995: 111; Pérez Arroyo, 2000: 1765; Ruiz Antón, 1994: 333)[21].

However, the new Article 282*bis*, introduced in 1999 and heavily criticised in literature (Anarte, 1999: 53; Delgado Martín, 2000; Queralt Jiménez, 1999: 125; Rodríguez Fernández, 1999: 91), regulates the procedure to authorise the intervention of undercover agents in connection with organised crime (Sequeros Sazatornil, 2000: 765) and allows the investigating judge (or the prosecutor) to accept the false identity of agents, who can acquire and transport objects, effects and instruments of the offence without incurring criminal responsibility by the fact of deferring their confiscation, as long as the proportionality principle is respected. Authors discuss if, in order to constitute evidence, the statements of undercover agents (who can intervene under false identity without problems during the investigation phase) can be fully ratified in the hearings without discovering the agent's true identity (Giménez García, 1994: 729; Zaragoza Aguado, 1999: 64).

Similar to the undercover agent's intervention, controlled circulation or delivery is also an important measure, promoted by international bodies, used to deal with organised crime (mainly the trafficking of drugs). Following Article 73 of the Schengen Convention and

[21] See Constitutional Court Decision 12l/1983 (Delgado García, 1996: 69; García Valdés. 1993).

Articles 3.1 and 11 of the United Nations Convention on narcotic drugs (1988), the Spanish Code of Criminal Procedure was reformed in 1992, inserting a special provision that was broadly considered the first legitimisation of police provocation[22]. Article *263bis* (Rey Huidobro, 1995: 185) presented several disfunctions (Granados Pérez, 2001: 77) and was subject to a very restrictive judicial interpretation (Montero Aroca, 2000: 23) and has been recently reformed by Organic Act 5/1999.

The aim of me new reform is to facilitate the application of controlled delivery not only in the case of drug trafficking, but also for other manifestations of organised crime, in order to discover or to identify participants. It can be ordered by the investigating judge, by the prosecutor or by me judicial police chiefs, but it is always controlled by a judicial authority.

3.3. Administrative Measures

Among me administrative steps specially taken in Spain to prevent organised crime, exceptions to the general ru1e of bank and data protection have been introduced concerning those files opened to investigate terrorism and serious forms of organised crime (Organic Act 15/1999)[23].

In addition, measures in connection with money laundering merit a special mention. Having ratified the most important international conventions, and in order to incorporate into Spanish law the contents of the above-mentioned Directive 91/308/CEE, Act 19/1993 estab1ished different measures for the prevention of money laundering: fundamentally, the creation of technical bodies (the commission to prevent money laundering and monetary infractions and the executive service for the prevention of money laundering); and the introduction of a system of official communication of certain transactions and operations (Choclán Montalvo, 2000: 16).

Act 19/1993 was followed by Roya1 Decree 925/1995 and other regulations implementing or developing it. By means of these norms, money-changing establishments, investment corporations and special public officials whose intervention is formally required to transmit properties or values are subjected to special administrative sanctions, and eventually to criminal responsibility, in cases of serious breaches relating to money laundering regulations (Blanco Cordero, 1999: 75)[24].

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[22] See, however, Guinarte Cabada (1995: 29).

[23] See for instance, Act 25/1995, facilitating transparency between the different administrations and prosecutors.

[24] A new draft on measures to control economic transactions with foreign countries and to prevent money laundering was published in December 2002. See *Boletín Oficial de las Cortes Generales. Congreso de los Diputados. VII Legislatura,* 127-1, 20 December 2002.

3.4. International Police and Judicial Cooperation

Spain forms part of most of the conventions on mutual assistance and extradition, particularly at European level[25]. What is more, because of concern about terrorism, it has played a very important role inside the European Union in preparing the latest measures for police and judicial cooperation.

Also, organised crime appears as a central matter for cooperation in most of the bilateral treaties of friendship and cooperation signed by Spain during the last decades: juridical cooperation provisions usually include a reference to bilateral and multilateral cooperation and coordination against terrorism, drug-trafficking, organised delinquency (including the trafficking of children and women and illegal immigration)[26].

Furthermore, Spain has bilateral conventions with different countries in the 'fight against organised crime': in this case the following crimes are considered to be 'organised crime': international terrorist acts; illegal trafficking of weapons, money, documents, drugs, national and cultural treasures and human beings; money laundering; smuggling; economic crimes; illegal immigration and other organised international offences[27]. Also special agreements on the rapid delivery of those accused of or convicted for organised crime activities have been signed with some European countries[28] and on drug trafficking with many Latin-American countries[29].

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[25] For instance, European Convention on mutual assistance in criminal matters (1959); European Convention on extradition (1957, 1975, and Protocols; 1995 and 1996); Schengen Agreement (1985); Schengen Convention (1990); European Convention on the transfer of proceedings in criminal matters (1972) and European Convention on the transfer of condemned persons to their country of origin (1983); European Un ion Convention on mutual assistance in criminal matters (2000); European Union Joint Actions on liaison magistrates (1996/4/22) and the European Judicial Network (1998/6/29); Eurojust (2000); European Convention on Europol (1995) and Protocol (1997). See *Estudios Jurídicos, Ministerio Fiscal,* 2001, vol. 11: 479-827; FGE (2001: 1032); Santos Alonso (2001: 33).

[26] See, for instance, Article 10 of the General Treaty of Friendship and Cooperation with the Philippines, concluded in Manila (30 June 2000).

[27] See, for instance, China (2000), Poland (2000), Slovakia (1999) and Bulgaria (1998).

[28] For instance, with Italy (28 November 2000) or the United Kingdom (21 May 2001): and on drug trafficking with Malta (28 May 1998).

[29] Dominican Republic (2000); Costa Rica (1999); Ecuador (1999); Guatemala (1999); Honduras (1999); Argentina (1998); Cuba (1998): Mexico (1998): Panama (1998); Peru (1998); Uruguay (1998): Bolivia (1997); Chile (1996): Venezuela (1996).

4. Institutional Changes

In Spain as elsewhere, legal reforms are often accompanied by institutional changes. Thus, the relevance and difficulties of the problem are enhanced (new and specialised institutions are needed).

The judicial system in Spain is a unitary one, established by the state. Judicial competence on organised crime is located in the *Audiencia Nacional* (Art. 65 Organic Act of the Judicial Power 1985) (Jiménez Villarejo, 2001: 355). This is a specialised Court in Madrid with jurisdiction over all Spanish territory on certain matters: such as terrorism and organised crime.

Two special prosecution offices have been created in connection with organised crime (Choclán Montalvo, 2001: 226; Jiménez Villarejo, 2001: 337):

- in 1988, the Special Prosecution Office to prevent and repress illicit drug trafficking (Act 5/1988);
- in 1995, the Special Prosecution Office to repress economic offences connected to corruption (Act 10/1995).

The special prosecutor for drug trafficking has the competence to investigate all kind of commercial and financial operations and patrimonies of persons suspected to be directly or indirectly related to illicit drug trafficking. There is no similar task definition concerning the special prosecutor against corruption (Esparza Leibar and Saiz Garitaonandia, 2001: 262, n. 23).

Spanish police structure is more complicated than its judicial one. There are two state police forces: Policía Nacional -a civil police in urban areas- and Guardia Civil -a police force subject to military discipline and present in rural areas. In addition, since Spain is politically divided into Autonomous Communities (by regions and nationalities), these communities -if the own statute of autonomy foresees it- can have their own police forces. The Basque police *(Ertzaintza)* therefore is competent for all police tasks in the Basque Country (except for supracommunity matters). Catalunya's *Mossos d'Esquadra* collaborates with the national police *forces* in the prevention and investigation of criminal offences.

Inside the Policía Nacional structure, the Judicial Police General Bureau is competent to investigate supraterritorial offences, and especially those related to drugs and organised crime; in the late 1990s a special unit *(Unidad de Droga y Crimen Organizado,* UDYCO)[30] was organised to investigate and prosecute criminal activities at national or transnational level connected to drug trafficking, organised crime, economic crimes and money

[30] <https://www.policia.es/policiahoy/reportaje3.htm>.

laundering[31]. This unit is also the one that coordinates the intervention of the different territorial unities (Royal Decree 1449/2000 and Order 10 September 2001) and the special sub-units at provincial and local level. According to the research developed by the Seville Section of the Andalusian Institute of Criminology (Mapelli Caffarena et al., 2001: 19), 41.79 per cent of the central UDYCO's officers think that medium priority is given to the fight against organised crime in the Policía Nacional; 25.37 per cent see it as being given high priority and 13.43 per cent perceive it to be very highly prioritised (Mapelli Caffarena et al., 2001: 26)[32]. In the General Bureau for Foreigners and Documentation, the unit against migration networks and falsification of documents (UCRIF) is the unit which fights against trafficking of persons and illegal immigration (Art. 8.2).

Inside the Guardia Civil, where in 2002 a plan was announced to fight organised crime (PACCO), whose full implementation is foreseen for 2003[33], the Information and Judicial Police Chief has: an Operation Central Unit to investigate and prosecute organised delinquency; anti-drug and organised crime teams (EDOA)[34] and teams to fight c1andestine immigration (ELIC)[35]. The members of this force operating at the borders have the task of organising and leading interventions to prevent and prosecute smuggling, drug-trafficking and other illegal trafficking activities (Royal Decree 1449/2000 and Order 29 October 2001).

According to Mapelli Caffarena et al. (2001: 31), collaboration between the Policía Nacional and Guardia Civil in connection with organised crime is perceived as low (29.85 per cent) or very low (28.35 per cent) Only 4.47 per cent of the officers of the central UDYCO think that this collaboration is high. The collaboration between the UDYCO and the regional police forces (in the Basque Country and Catalunya) is also perceived as very scarce. The main reason for this very limited collaboration is the absence of institutional mechanisms of coordination and information exchange, as well as the inadequate legal distribution of competencies.

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[31] The Judicial Police General Station also relies on a special Unit on Specialised and Violent Crime (UDEV) (Art. 6.3, Order 10 September 2001), competent to investigate national and transnational criminal activities related to cultural treasures, new technologies, crimes against minors and families, and crimes against life and integrity and sexual freedom. This Unit's activities often overlap with those of the UDYCO, although the Central Unit on Criminal Intelligence should serve as a means of coordination.

[32] Just over 44 per cent of Andalousian police officers think however that it receives a high priority (for just over 8 per cent, a very high priority).

[33] <http://www.siacorp.com/maseuropae003.htm>.

[34] General Order No. 9, 6 April 1997.

[35] General Order No. 18, 11 November 2002.

Furthermore, there are also some central regulatory agencies[36]:

- the Customs Survey Service, created in 1956 and restructured by Decree 319/1982, in charge of investigating and prosecuting smuggling offences (Act 12/1995);

- the Commission to Prevent Money Laundering and Monetary Infractions, established by Act 19/1993; and

- the government's National Delegation established for the National Plan on Drugs; this is the body legally designated to coordinate the intervention of the different state police forces against drug trafficking and money laundering, and coordinates forms of European Union cooperation developed in this field (Art. 8, Royal Decree 1449/2000)[37].

5. Future Trends and Conclusions

Organised crime policy in Spain is more the result of specific interventions than a comprehensive way of systematically approaching this complex phenomenon. Since social debate is completely absorbed by the terrorism issue, no special debate on organised crime policy can be found in the media.

Nevertheless, various legal reforms have been implemented, partly because of certain corruption scandals but mainly due to pressure from international organisations. New legal provisions have been adopted without important debate and, sometimes, literally copied from the principal international conventions and agreements. They contain contradictions (FGE, 1999: 230; Jiménez Villarejo, 2001: 352) and are widely criticised not only in academic circles (because of their difficult compatibility with the main constitutional principles and individual freedoms), but al so by police officers themselves, who demand more developed regulations and resources (Mapelli Caffarena et al., 2001: 52).

Certainly, prevention and punishment through criminal law is the dominant approach of organised crime policy. Nevertheless, there are also administrative tools in certain fields, particularly in connection to money laundering.

Furthermore, institutional reforms have been implemented, reserving for the Audiencia Nacional the jurisdictional competence and creating special public prosecutor offices and

[36] Very recently, after having detected some chatrooms devoted to drug trafficking, the Spanish government has also announced a project to establish an organised crime observatory for the Internet, <http://delitosinformaticos.com/noticias/l 01766096127069.shtml>.

[37] On the National Plan on Drugs for the period 2000-2008, see Royal Decree 1911/1999.

special police units. However, collaboration among the different instances (even between the two national police forces: the Policía Nacional and the Guardia Civil) is very problematic.

Although different instruments have greatly improved its regulation, international cooperation is still too bureaucratic and more coordinating efforts are deemed absolutely essential.

The year 2003 started with the announcement of four new penal reforms.

In order to increase penal pressure in the fight against terrorism, Organic Act Draft number 129[38], projects a reform of the Criminal Code, the Penitentiary Act and the Code of Criminal Procedure to ensure the complete and effective execution of sentences, which in the case of serious terrorism and recidivism will be increased to 40 years imprisonment[39]. As for the penitentiary classification of terrorists and organised crime members, most convicts imprisoned for terrorism and organised crime offences will be excluded from the application of open prison measures, penitentiary classification and parole. Only if they dissociate and collaborate with the authorities will the general regime once again be applicable to them.

Organic Act Draft number 130 to reform the Code of Criminal Procedure[40] broadens the application of provisional prison sentences. The preliminary draft on concrete measures against insecurity, domestic violence and the social integration of foreigners projects the reform of illegal trafficking of immigrants and foresees specific aggravating circumstances for those who collaborate with organisations or associations even transitorily dedicated to these activities.

Last, but not least, a preliminary draft reform of the Criminal Code extends the possibilities of confiscation as well as of the accessory consequences, and introduces new reforms on money laundering and drug trafficking.

All these initiatives are again one-off interventions that merely represent a new step in the Spanish 'emergency-policy' on organised crime. They do not really involve any change. The approach and main features continue to be the same.

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[38] *Boletín Oficial de las Cortes Generales. Congreso de los Diputados, VII Legislatura,* A, 14 February 2003. Another Draft (No. 127) is also pending in Parliament on foreign economic transactions and to modify Act 19/1993 on money laundering prevention *(Boletín Oficial de las Cortes Generales. Congreso de los Diputados, VII Legislatura,* A, 20 December 2002).

[39] The maximum Spanish prison sentence is now 20 years, and exceptionally, 25 or 30 years (Art. 76 Criminal Code).

[40] *Boletín Oficial de las Cortes Generales. Congreso de los Diputados*, VII Legislatura, A, 28 February 2003.

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