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## Articles

# Counsel for the Accused: Metamorphosis in Spanish Constitutional Rights

HENRY W. MCGEE, JR.\*

*Sagrada es, sin duda, la causa de la Sociedad, pero no lo son menos los derechos individuales. En los pueblos verdaderamente libres, el ciudadano debe tener en su mano medios eficaces de defenderse y conservar su vida, su libertad, su dignidad, su honor . . . .*<sup>1</sup>

## I. INTRODUCTION

The Spanish Constitution of 1978 symbolizes the consolidation of liberal ideals openly ventilated in post-Franco Spain. At the same time, its substantive achievements are of signal consequence. For students both of human rights and of constitutionalism, the Spanish Constitution provides a unique and fascinating case study of the ways

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1. Peces-Barba del Brío, *La Asistencia Letrada al Detenido o Preso: Un Derecho Constitucional*, ACTUALIDAD JURIDICA 35, 36 (1981) (quoting Alonso Martínez) ("Without a doubt the cause of society is sacred, but no less so are individual rights. In nations truly free, the citizen must have in his hands effective means to defend and preserve his life, his liberty, his dignity, his honor . . ."). (All translations from Spanish to English are by the author unless otherwise noted.) Alonso Martínez was Minister of Justice in Spain at the time its Code of Criminal Procedure was adopted in 1882. The Code still constitutes the basis of Spain's criminal justice process.

in which political currents shape the growth of legal and constitutional rights. In the United States, the expansion of constitutional liberty has principally occurred through the process of judicial decision-making, which—although it appears to proceed inexorably from neutral principles—frequently conceals the impact of ideology and political persuasion.<sup>2</sup> The Spanish Constitution, in contrast, expressly allocates to the national legislature the resolution of critical issues of constitutional rights.<sup>3</sup>

The Constitution's declaration of the right of counsel in the criminal justice process, which is expressed without equivocation in article 17.3, contains the all-important proviso that:

Any person arrested must be informed immediately, and in a manner understandable to him, of his rights and of the grounds for his arrest, and may not be compelled to make a statement. The arrested person shall be guaranteed the assistance of a lawyer during the police inquiries and judicial proceedings, *under the terms to be laid down by the law.*<sup>4</sup>

The genesis of terms defining the right to legal assistance for those charged with a crime presents an excellent opportunity to trace the evolution of an ideal from initial conception to concrete articulation. The process of delineation has been essentially administrative and legislative, although the Spanish judiciary has provided some reinforcement of the underlying concept as it has exercised and affirmed its power of judicial review. This article, therefore, emphasizes the give and take in the political process that generated the amendments to the Code of Criminal Procedure which implement the constitutional right to counsel, rather than the process of judicial review which will continue to define that right.

The article begins with a discussion of the social and political background that influenced the emergence of the constitutionally

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2. American constitutional developments can be contrasted with both recent and past Spanish practice. See, e.g., *infra* text accompanying note 89.

3. CONSTITUCION [CONST.] art. 53, para. 1 (Spain) declares: "The rights and liberties recognized in Chapter Two are binding on all public authorities. The exercise of such rights and liberties, which shall be protected in accordance with the provision of article 161 [which provides for judicial review of the constitutionality of laws and regulations], may be regulated only by law, which shall, in any case, respect their essential content."

4. CONST. art. 17.3 (emphasis added). Article 17 provides for implementation of its provisions by legislation in three places. Apart from article 17.3, such provisions also appear in article 17.1 ("Every person has a right to freedom and security. No one may be deprived of his freedom except in accordance with the provisions of this article and only in the cases and in the manner provided by the law.") and article 17.4 ("A habeas corpus procedure shall be regulated by law in order to ensure the immediate handing over to the judicial authorities of any person arrested illegally.").

guaranteed right to counsel in Spanish law. Next, it traces the constitutional development and legislative refinements of the right to counsel. It then considers judicial refinements of that right. The article concludes with a comparison of the Spanish process of articulating the right to counsel with the parallel process in the United States—and what such differences bode for U.S. scholars.

## II. EMERGENCE OF THE RIGHT TO COUNSEL IN SOCIAL AND HISTORICAL CONTEXT

### A. *Adoption of the Spanish Constitution*

In the 1930s, the democratic government of Spain was overthrown by a right-wing regime led by Francisco Franco in a civil war which historians now regard as the prelude to the Second World War. Franco's death in 1975 ended four decades of government by decree.<sup>5</sup>

Formal work on the 1978 Constitution, the first to institutionalize democracy in Spain, commenced after the election of the Spanish Parliament, known as the Cortes, on June 15, 1977.<sup>6</sup> The date marked the first free parliamentary election in Spain in forty-one years.<sup>7</sup>

The 1978 Spanish Constitution was the product of cooperation among members of the country's four major national parties: the Unión de Centro Democrático (UCD), a centrist coalition of social democrats and liberals; the Partido Socialista Obrero Español (PSOE), a coalition of socialists and social democrats; the Partido Comunista de España (PCE), a communist party somewhat akin to other Western European communist parties; and the Alianza Popular (AP), a right-wing, pro-Franco party. Regional parties also figured prominently in the process: the Basque Nationalists (ETA) (the most prominent) and the Catalan Democrats (PNV).<sup>8</sup>

The PCE and the PSOE had existed in some form throughout the Franco regime. They thus entered the transition to democracy with previously established ideologies, organizational hierarchies, public images, and historical traditions. Their primary goal at this stage was to modify their public image from clandestine to legitimate in order to gain voter approval.<sup>9</sup>

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5. See generally H. THOMAS, *THE SPANISH CIVIL WAR* (1961).

6. R. GUNTHER, G. SANI & G. SHABAD, *SPAIN AFTER FRANCO: THE MAKING OF A COMPETITIVE PARTY SYSTEM* 37 (1986) [hereinafter *SPAIN AFTER FRANCO*].

7. Payne, *Representative Government in Spain: The Historical Background*, in *SPAIN AT THE POLLS, 1977, 1979, AND 1982* 26 (H. Penniman & E. Muijal-León eds. 1985) [hereinafter *SPAIN AT THE POLLS*].

8. *SPAIN AFTER FRANCO*, *supra* note 6, at 37-145.

9. *Id.* at 58-77.

In contrast to the PCE and the PSOE, the UCD and the AP had been created during the transitional period between Franco's death and the first elections. Neither group had any pre-existing organizational structure, ideology or public image. Without such constraints, the parties' options were greater but their internal decision-making process was also more complex.<sup>10</sup>

The UCD was hastily assembled at the last minute to capitalize on the enormous popularity of Adolfo Suárez, and to make a platform for his candidacy, which he announced on May 2, 1977.<sup>11</sup> The UCD was a broad coalition of groups which included the moderate opposition to Franco and the reformists who had actually been part of the Franco regime itself, as well as a wide variety of non-Marxist, liberal social democratic, Christian democratic and monarchist groups.<sup>12</sup> It was able to capitalize on the public's poor reception of the AP and to garner some of the left-of-center non-Marxist vote and part of the right-of-center conservative vote at the same time.<sup>13</sup>

Formed on October 9, 1976, the AP reflected a shift to the right after Suárez became Prime Minister, and was formed by the so-called "respectable right," who feared that the excessive liberalization of the UCD would undermine Spanish economic development and the sense of law and order considered to be one of Franco's greatest legacies.<sup>14</sup> The AP came to be perceived as a coalition of elite extremists. The party's platform was not very different from that of the UCD; what differed was the public's perception of the AP's leaders as elitist extremists who were part of the unpopular past.<sup>15</sup>

The Cortes appointed a seven-member committee, representing Spain's major political parties, to prepare the draft of the Constitution.<sup>16</sup> The committee consisted of three members of then Premier Adolfo Suárez's UCD, a rightist member of the opposition, a socialist, a communist, and a Catalan. In establishing this procedure, the Cortes intended the representatives from each party to discuss and debate each constitutional issue until they reconciled their differences and reached a consensus.<sup>17</sup> All the parliamentary parties, except the Basque Nationalist Party, which was not represented on the commit-

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10. *Id.* at 78-107.

11. E. ARANGO, *THE SPANISH POLITICAL SYSTEM: FRANCO'S LEGACY* 260 (1978).

12. SPAIN AFTER FRANCO, *supra* note 6, at 92-93.

13. *Id.* at 103; E. ARANGO, *supra* note 11, at 260-61.

14. SPAIN AFTER FRANCO, *supra* note 6, at 78-92.

15. *Id.* at 91-92.

16. *Id.* at 37-39.

17. Pina, *Shaping the Constitution*, in SPAIN AT THE POLLS, *supra* note 7, at 34-35.

tee, backed this strategy of consensus.<sup>18</sup>

This give-and-take approach to drafting a constitution was new to Spain. The last eight constitutions had been shaped primarily by the political party which happened to be in power at the time of drafting; those parties not in power had few legitimate means of voicing their opposition to particular provisions.

Attempting to draft a single document that satisfied a variety of political parties, however, was not without its problems. Reducing the demands of the different parties into a unified body of fundamental principles was a laborious process. Consensus was hard to reach—after the first draft was published, 1,133 amendments were offered.

On March 16, 1978, the committee finished its work on the draft and transmitted it to a constitutional commission of 36 parliamentary deputies. The commission approved its own draft of the Constitution in twenty-four sessions held between May 5 and June 20, 1978. On October 30, 1978, the Constitution was sent to the Cortes, where it was overwhelmingly approved. The lower house ratified the Constitution by a vote of 325 to 6, with 14 abstentions. The Senate vote was 228 to 5, with 8 abstentions. When the Constitution went before Spain's 21 million voters in a referendum, 87% of those who voted supported it. Less than 9% voted against it. King Juan Carlos signed the Constitution on December 27, 1978, and it took effect the following year. Approval and promulgation of the Constitution marked the official end of autocracy in Spain.<sup>19</sup>

The Constitution addresses several historically divisive issues: it defines the Spanish government as a parliamentary monarchy, establishes the relationship between church and state, specifies the degree of political and administrative autonomy of various regions, establishes freedom of the press, abolishes the death penalty, and legalizes divorce.<sup>20</sup>

### *B. Social and Political Turmoil*

Despite passage of the modern Constitution, the struggle between frustrated adherents to an authoritarian past and the forces of modernization, or "Europeanization,"<sup>21</sup> maintained a pervasive

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18. *Id.* at 31-32, 46. King Juan Carlos was instrumental in implementing this procedure, and it has subsequently been referred to as his method of "consensus politics." *Id.* at 31-33.

19. *See Parliament Firmly Backs New Charter for Spain*, Wash. Post, Nov. 1, 1978, at A24, col. 1.

20. SPAIN AFTER FRANCO, *supra* note 6, at 114-24.

21. The "Europeanization" of Spain had in fact begun more than a decade before Franco's death. Its roots can be traced back to the 1950s. While Francoist Spain was often isolated from cultural trends north of the Pyrenees, during the dictator's last years Spanish

undercurrent of friction in Spain's public and private life. Evidence of social modernization was apparent to the casual observer: pornography was openly displayed for sale at kiosks throughout Madrid and Barcelona;<sup>22</sup> topless bathing was the preference of more than half of female sunbathers on Spanish beaches;<sup>23</sup> and Spain was the first European nation to legalize the use of marijuana.<sup>24</sup> On a more fundamental level, the most repressive of Franco's laws were quickly abolished by the new government.<sup>25</sup>

Despite such changes in the social fabric, the Spanish transition from autocracy to democracy is far from complete. Moreover, the progress to date has not been without reversals. One writer has observed,

A striking aspect of Spain's transition from dictatorship to democracy has been its evolutionary pace. The old institutions—the civil service, the judiciary, the armed forces—remained in place . . . . Democracy has been achieved in small steps, by improvisation and consensus.

As a practical matter, this has meant that for a time the old order would exert a hidden influence. Many Spaniards sum up this sense of influence, of shadowy forces of reaction whose loyalty to the democratic Constitution is suspect, in the expression "poderes fáctitos"—the real powers. They are usually categorized into three groups—the church, the

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society experienced a gradual opening, particularly among the youth. This opening was due in large part to the influence of increasing numbers of tourists from Western Europe and the United States. With the institution of democracy, however, a still-cloistered Spanish society was overwhelmed with the excesses of the new cultural freedom, including punk rockers, and R- and X-rated movies and shows. R. CARR & J. FUSI, SPAIN: DICTATORSHIP TO DEMOCRACY 125 (1979). See also Putnam, *Madrid: The Change in Spain*, 169 NAT'L GEOGRAPHIC MAG. 142 (Feb. 1986). The last vestiges of isolation will be purged with the admission of Spain into NATO and the Common Market.

22. R. CARR & J. FUSI, *supra* note 21, at 132.

23. "During the 1940s and 1950s, the government campaigned against what it called 'disagreeable spectacles' at beaches and swimming pools . . . . Offenders were liable to a fine, arrest and detention. But in the summer of 1978, nearly three years after Franco's death, nude sunbathing was made legal in nature camps and Spain's gradual transition to democracy confirmed the vogue for the bikini and 'monokini.'" *Going Topless in Spain*, San Francisco Chron., July 27, 1983, at 12, col. 4.

24. "Spain became the first nation in Europe to legalize the use of marijuana. So far, the new drug law has been well received. Criticism from Spain's rightist opposition groups has been surprisingly muted, and the Roman Catholic Church has virtually ignored the whole issue." *Guess Which Country Has Legalized Pot*, NEWSWEEK, Aug. 1, 1983, at 40.

25. E. GIMBERNAT ORDEIG, INTRODUCCION A LA PARTE GENERAL DEL DERECHO PENAL ESPAÑOL 20 (1979) (The new government struck down laws that forbade criticism of the death penalty; lessened the penalty for the military offense of conscientious objection; repealed the crimes of adultery, homosexuality, and fornication; legalized the sale of contraceptives; and outlawed the death penalty.).

army and the financiers. The reason the transition has been so smooth for the most part, but also the reason there is doubt that it has been totally achieved, is that to some degree these powers remain.

"The political transition came to an end with the Socialist victory in October 1982," said Angel Viñas, a well-known political theorist. "For the first time in our political history the true antagonists to those in power came to power. Now we are in the period of structural change, the attempt to change the institutions, which is a more prolonged struggle."

Francoism is almost dead as an ideology. But it lives on in the institutional lethargy in the civil service, a sense of autonomy in the conservative military establishment, and an old-boy network of entrepreneurs accustomed to taking shortcuts in financial dealings. There is also a nostalgic longing among some Spaniards for a strong hand to deal with mounting economic problems, rising crime, looser morality, and demands for greater self-rule by Basques and other groups.<sup>26</sup>

Occasionally the conflict between competing interests would erupt openly. The most dramatic incident was an attempted coup d'état in 1981. During the attempted coup, led by Civil Guard Lt. Colonel Antonio Tejero Molina, members of the legislature and cabinet were held hostage for some eighteen hours before the government, led by King Juan Carlos, succeeded in defusing the situation. The attempted coup was described as "el golpe, the blow from hard-line franquista officers that had hung like a shadow over Spanish political life since the transition to parliamentary government began with Franco's death. While the rest of Spanish society has been caught in a rapid whirl of liberalization, the military establishment has remained almost untouched, a monument to the past."<sup>27</sup> The suppression of the

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26. Darnton, *A Modern Spain by Evolution*, N.Y. Times, June 24, 1984, § 4, at 4, col. 3. See generally, R. CARR & J. FUSI, *supra* note 21; J. TOHARIA, *MODERNIZATION, AUTHORITARIANISM AND ADMINISTRATION OF JUSTICE IN SPAIN* (1974).

27. TIME, Mar. 9, 1981, at 8, 9 (Atlantic ed.). See generally J. BELLVER, *EL EJERCITO CALLA* (1981); J. BUSQUETS, *1932 - EL GOLPE* (1981); L. MARTIN PRIETO, *1944 - TECNICA DE UN GALOPE DE ESTADO* (1982); P. URBANO, *CON LA VENIA—YO INDAGUE EL 23-F* (1982). As the attack commenced, the deputies in the 350-member Congreso were attempting to resolve a crisis triggered by the unexpected resignation of Prime Minister Adolfo Suárez the month before. The Congreso was about to confirm a new Prime Minister—Leopoldo Calvo-Sotelo from Suárez's ruling UCD—when the armed gunmen led by Lt. Col. Tejero Molina stormed into the chamber. Calvo-Sotelo, who had been expected before the coup to gain confirmation by less than a majority, won an absolute majority after the suppression of the coup



insurrection—and the conviction and imprisonment of its leader—did not end the schism between liberal and authoritarian Spain.<sup>28</sup>

There were also widespread allegations of police brutality and the torture of prisoners.<sup>29</sup> In the summer of 1975 (several months before Franco's death), Amnesty International called upon Spanish authorities to halt both abuses in the judicial process and widespread torture of prisoners.<sup>30</sup> Amnesty International had found such abuses consistently practiced by anti-terrorist forces battling the independence movement in the Basque provinces.<sup>31</sup> In 1979, Amnesty International again investigated the criminal justice process in Spain and found that the struggle against terrorism had continued to involve human rights abuses.<sup>32</sup> Noting that Spain had ratified the Interna-

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because of the backing of regional parties which had previously abstained from voting. Even the opposition Socialists led by Felipe Gonzalez offered to join the government. The offer was declined. See *The Night of the Generals*, NEWSWEEK, Mar. 9, 1981, at 34.

The next year the Socialists swept all of Spain in a triumphant, unprecedented and extraordinary victory. In five years, the Socialists increased their vote from 5 to 10 million, reflecting an increase from 30% of the total votes cast in 1979 to 46% of those cast in 1982. The centrist UCD collapsed completely: their vote fell from 35% in 1979 to 7% in 1982. The Communist Party also fell apart: their vote likewise plummeted from 11% in 1979 to 4% in 1982. Only the right-wing AP, led by former Franco cabinet member Manuel Fraga, gained strength during this period: its portion of the vote increased from 6% to 25%. Barnes, McDonough & Pina, *The Development of Partisanship in New Democracies: The Case of Spain*, 29 AM. J. POL. SCI. 695 (1985).

28. On June 3, 1982, the Supreme Council of Military Justice sentenced 22 army and civil guard officers to sentences ranging from 1 year to 30 years. Army Lt. General Jaime Milans del Bosch and Civil Guard Lt. Col. Antonio Tejero Molina both received sentences of 30 years. Milans del Bosch had served in Franco's Blue Division on the German-Russian Front in World War II, and was related to Tejero Molina by marriage. Milans del Bosch, Tejero Molina and eight other officers were expelled from the military. *El Pais*, June 4, 1982, at 1, col. 1.

Reaction to the sentence was mixed. The left-wing journal *Diario 16* concluded that the sentence was too light. *Diario 16*, June 4, 1982, at 1, col. 5. A columnist for the right-wing paper, *El Alcazar*, declared the sentence too heavy for "men that the prosecution reported were moved by the love of their country." *El Alcazar*, June 4, 1982, at 1, col. 3. And in an editorial expressing general dissatisfaction with the outcome of the proceedings, *El Pais*, the left of center newspaper widely considered the paper of record in Spain, commented: "[I]t would be an offense to the patriotism of democratic Spaniards that anyone would speak well of the rebels of February 23 who could kidnap the representatives of the nation using the name of Spain as an excuse for their crime." *Sentence for a Military Rebellion*, *El Pais*, June 5, 1982, at 10, col. 3.

29. AMNESTY INTERNATIONAL, REPORT OF AN AMNESTY INTERNATIONAL MISSION TO SPAIN 3 (1975).

30. *Id.* at 14.

31. *Id.* at 6-7. A U.S. lawyer and a German philosophy professor undertook the investigations for Amnesty International. Requests to interview prisoners who were alleged torture victims in the city of Bilbao were denied, and the report of the investigators expressed their regret that they did not obtain the opportunity "to test some of the most damaging allegations of torture." *Id.* at 3-4.

32. AMNESTY INTERNATIONAL, REPORT OF AN AMNESTY INTERNATIONAL MISSION TO SPAIN 1, 52 (1980). The second study occurred in October 1979. The investigative team

tional Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, and had signed the European Convention on Human Rights in April 1977, and that Spanish legislation enacted in 1978 had outlawed torture, Amnesty International criticized the continued maltreatment of prisoners and the prolonged delay in bringing suspects to court after arrest.<sup>33</sup> The 1979 report pointed to some improvement in the treatment of prisoners in the period of amnesty following Juan Carlos' accession to the Spanish throne, but noted a significant subsequent deterioration in the human rights situation.<sup>34</sup>

Within three years of Amnesty International's second investigation, a study by the prestigious Spanish Human Rights Association found that torture by both the Civil Guard and local police persisted.<sup>35</sup> The organization regarded as indispensable the abolition of legal rules that authorized detention for ten days prior to a judicial hearing. More importantly, it insisted that the right to counsel needed to be made "*irrenunciable*" (*i.e.*, not subject to waiver).<sup>36</sup> By 1983, judicial investigations were underway in Madrid to determine circumstances of alleged brutality in several unrelated cases.<sup>37</sup>

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consisted of two Danish physicians and their interpreter, a German lawyer, and an Amnesty International investigator whose nationality was not disclosed, but who was evidently fluent in Spanish. *Id.* at 2.

33. *Id.* at 1-2. The report acknowledged that the dramatic change in political institutions in Spain had involved intense and bloody struggles between extremists on the left and on the right, and between regional nationalists and the army. Amnesty International condemned both the practice of assassination employed by various armed groups and the torture of those detained by the forces of the state. *Id.* at 1.

34. *Id.* at 2. This deterioration was thought to have resulted from the implementation of laws designed to cope with terrorist activities. *Id.* Between 1969 and 1980, terrorist assassinations caused 328 deaths. A. KRASIKOV, FROM DICTATORSHIP TO DEMOCRACY 136 (1984). Another source put the number killed between 1968 and 1983 at 558. L.A. Times, Feb. 25, 1984, § 1, at 12, col. 1. Most terrorist acts occurred in northern provinces such as the Basque country and Catalonia. A. KRASIKOV, *supra*, at 135-37. Attacks on police and public facilities were not uncommon in other parts of Spain, including Madrid. *See id.* at 136.

35. Report of the Spanish Association for Human Rights (1982), summarized in El Pais, Dec. 10, 1982, at 18, col. 1.

36. *Id.* The demand was to be codified in article 520.5 of the judicial code. *See infra* text accompanying notes 111-20.

37. For example, one prisoner alleged that he had been threatened that his wife would be forced to abort, and that electrodes had been applied to his genitals. Another asserted that he had been hung alternately by his hands and by his feet, which had then been burned. Medical evidence was offered to corroborate the nature and extent of his injuries. El Pais, Mar. 30, 1983, at 13, col. 1. The alleged victims were all denied lawyers until after they had been presented to an examining magistrate.

### C. *Emergence of the Right to Counsel*

#### 1. Historical Antecedents

No antecedent to article 17.3 of the 1978 Constitution guaranteeing the right to counsel<sup>38</sup> can be found in any of Spain's previous constitutions. The most closely analogous safeguards required that notice of imprisonment be given to the family members of the accused within seventy-two hours,<sup>39</sup> and that the accused be informed of the charge against him and the name of his accuser within twenty-four hours of his imprisonment.<sup>40</sup> Aside from these few rights, Spanish constitutions and laws were silent on the right to counsel.

Nonetheless, one Spanish scholar, Gregorio Peces-Barba del Brío, has called the right to counsel an "old aspiration" of the Bar of Spain.<sup>41</sup> The "foundation" of the right is said to be the presumption of innocence recognized in article 24 of the 1978 Constitution.<sup>42</sup> Some eight years before the present Constitution took effect, a congress of Spanish lawyers declared that lawyers should be present at the inception of the criminal justice process to assist those arrested.<sup>43</sup> This conception of the rights of the accused was affirmed in the Code of Criminal Procedure of December 1978, which was enacted shortly before the Constitution was promulgated.<sup>44</sup> The Code provides that as soon as a person is detained, he has the right to designate a lawyer for his defense and to demand the lawyer's presence during any interrogation that might ensue.<sup>45</sup>

Despite the Code provisions, police typically notified the suspect's lawyer of the detention but did not allow the lawyer access to

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38. See *supra* note 4 and accompanying text.

39. CONSTITUCION (1931) [1931 CONST.] art. 29 (Spain). The provision was a repetition of Article 3 of the 1869 Constitution.

40. *Id.*

41. Peces-Barba del Brío, *supra* note 1, at 35.

42. See generally J.M. SERRANO ALBERCA, COMENTARIOS A LA CONSTITUCION 219 (1980).

43. Peces-Barba del Brío, *supra* note 1, at 35, 40.

44. LEY DE ENJUICIAMIENTO CRIMINAL (Code of Criminal Procedure) [L.E. CRIM.] (Spain). Articles 520 and 527 of the Code of Criminal Procedure were adopted December 4, 1978, and became effective on December 9, 1978, three weeks before the Constitution was promulgated. They were then conformed to the Constitution by the legislation which is the subject of this article. See Joaquin Llobel Muedra, *La Modificación de los Arts. 520 y 527 de la Ley de Enjuiciamiento Criminal por la Ley Organica 14/1983, de 12 de Diciembre*, LA LEY, May 15, 1984, at 1 (Año 5, Número 937). The General Prison Law of September 26, 1979 established related laws applicable to prisoners.

45. L.E. CRIM. art. 520.2 requires: "From the moment his detention is carried out or his imprisonment is determined, the person affected has the right to designate his attorney and to ask that he be present at the place of custody in order to assist him during the interrogation, to request the reading of this Article and to participate in any process of identification of which he may be the object."

the suspect. If the suspect was released, the police and the lawyer would ordinarily not come into contact again.<sup>46</sup> Only in the case of continued detention would the suspect receive the assistance of counsel and, even then, a substantial number of prisoners rejected offers of legal assistance even though lawyers were actually present.<sup>47</sup> As will be explored subsequently, "*No hablaré si esta mi abogado*" has been a depressing refrain in Spanish police stations.<sup>48</sup>

Thus, during the period in which legislation was under consideration, the role of the lawyer in the criminal process was anything but clear, and dissatisfaction with the contradiction between constitutional principle and contemporary police practice was pervasive, at least among the organized bar.

## 2. Police Practices with Respect to Detainees

Scarcely had the Spanish Code of Criminal Procedure been amended to provide for the assistance of counsel in the initial stages of police and judicial proceedings,<sup>49</sup> when there began a steady decline in the ratio of prisoners who accepted legal representation to those who rejected counsel.<sup>50</sup> Indeed, two phenomena emerged during the

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46. El Pais, Mar. 30, 1983, at 1, col. 1.

47. A 1982 Report of the Spanish Human Rights Association revealed that in Madrid, 46% of detainees, "having been induced for the most part to believe that they could be prejudiced [if they accepted legal assistance]," waived the right to counsel. The report added that more than 80% of detainees waived the right to counsel in other areas of Spain. El Pais, Dec. 10, 1982, at 18, col. 1 (original emphasis).

48. "If this is my lawyer, I won't talk." El Pais, May 16, 1982, at 22, col. 1. On the occasion of the first anniversary of socialist rule, 159 lawyers signed a newspaper opinion column entitled "Against the Minister of the Interior," which declared:

We, lawyers involved in the defense of individual and collective rights of the citizens, wish to express our deep concern with the regressive role the Minister of the Interior, Señor Barrionuevo, has played all year through his actions relative to public order.

After citing several acts of the Minister and drawing parallels to incidents which occurred under Franco's rule, the lawyers argued that:

the initiatives and acts are inseparable from a determined state policy, denominated *citizen security*, that the Socialist government shares in its entirety and whose deep sense is to force the establishment of a new social consensus based on the subordination, accepted seriously, by the citizens. For us, lawyers daily engaged in the difficult task of defending liberty, especially intolerable is the continued erosion of democratic rights and liberties in the name of a logic of repression understood as the only answer possible to the social, economic and national contradictions levied by the Spanish state.

M. Teresa Aguado Hernández, *Contra el Ministerio del Interior*, El Pais, Dec. 10, 1983, at 16, col. 1 (original emphasis).

49. L.E. CRIM. arts. 520, 527. See *supra* note 44.

50. See Gor, *Progressive Increase in "Waivers" of Legal Assistance by Detainees Concerns Legal Establishment*, El Pais, Apr. 2, 1982, at 30, col. 1. The number of prisoners who accepted legal representation fell from a peak of 817 in March 1979, a year after the law was

period from 1979 to 1981. The number of prisoners who accepted lawyers dipped overall, and although there were seasonal variations, the monthly total generally remained in the five hundreds. However, with slight fluctuations, the number of detainees rejecting counsel increased steadily so that after March 1981, the number of persons who declined representation continually outnumbered those who accepted legal assistance.<sup>51</sup>

The rising number of detainees rejecting counsel coincided with a rise in the number of detentions. In 1982, one Spanish jurist termed detention "almost a national sport," and in suggesting that the police should be auxiliaries of the judiciary, implied that the reverse was the case.<sup>52</sup> Statistics paint a bleak picture. In December 1978, the very month the Constitution was promulgated, there were 10,483 persons in prison. More than 20,000 were in Spanish prisons by the end of 1980. Thus, the prison population doubled in little more than two years.<sup>53</sup> One commentator noted that "this dizzying number of prisoners, without precedent in peace-time Spain, has no counterpart in Western Europe."<sup>54</sup> As the crime rate increased,<sup>55</sup> the criminal justice machinery began to creak under the strain of a growing prison population. It was not uncommon to hear that the relatively few prisoners in the relatively crime-free Franco era had received better treat-

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promulgated, to a low of 365 in September of the same year. During 1980, the highest figure was in March, when 648 prisoners accepted legal assistance; this figure dipped to a low of 382 in April. The following year, the number of acceptances oscillated between 567 and 394. But the number of persons who *rejected* lawyers rose steadily from 227 in January 1979 to 689 in November 1981. *Id.*

51. In November 1981, there were 689 refusals and 557 acceptances. *Id.*

52. This criticism of detention was expressed by Jesús Vicente Chamorro, fiscal of the Supreme Tribunal, in an address sharply critical of the anti-terrorist laws, which he delivered to an international conference of lawyers in Vitoria on December 15, 1982. *El Pais*, Dec. 16, 1982, at 19, col. 1.

53. G. Martínez-Fresneda, *Las Garantías de la Defensa en los Juicios Penales*, 1 (July, 1981) (unpublished manuscript on file with the *Columbia Journal of Transnational Law*).

54. *Id.*

55. See generally Morenilla Rodríguez, *Tendencias del Delito y Estrategia para su Prevención en España*, in *CUADERNOS DE POLÍTICA CRIMINAL* 49 (1981). Dr. Morenilla Rodríguez writes that:

[T]here exists in Spain the general belief that crime has experienced an "alarming" growth in the last five years [since 1976]. Mediums of social communication, the attitudes of the public in large cities and the activity of the institutions to uphold the law and the administration of criminal justice daily reveal this view.

*Id.*

His article confirms the perceived rise in crime and predicts even higher crime rates in the 1980s because of the persistence of socio-political and socio-economic problems that attended the growth in crime between 1975 and 1979. As Letrado of the Ministry of Justice, Dr. Morenilla Rodríguez was a major architect of the research and drafting that formed the basis of the pre-socialist governmental proposals to implement article 17.3 of the Constitution of 1978.

ment, at least in the course of non-political prosecutions, than prisoners under the democratic and ostensibly more liberal criminal justice system of the constitutional era.<sup>56</sup>

### 3. Activism by the Organized Bar

Spain's struggle to deal effectively with its crime rate and the integrity of the criminal justice system was carried out in the midst of wrenching social and political transformation. Human rights abuses and heavy-handed police tactics brought about a progressive worsening in relations between the organized bar and the police forces. Evidence of the change may be seen in the reaction of Spanish lawyers to what were widely perceived as repressive aspects of the criminal justice system. The deteriorating relationship between defense lawyers and police prompted more than a hundred lawyers belonging to the Young Lawyers of the Madrid Colegio (Grupo de Abogados Jovenes Colegio de Madrid) to lock themselves up in the office of the Colegio de Abogados de Madrid in protest of (1) the detention by police of a lawyer who attempted to mediate a dispute between police and some citizens who were eventually arrested, (2) a mass arrest of some five hundred persons, less than a hundred of whose cases were eventually referred for judicial disposition, and especially (3) police practices which made the defense of those charged with crimes nearly impossible.<sup>57</sup> The demonstration occurred shortly after publication of a full-page advertisement in Spain's most influential newspaper, *El Pais*, in which the Second National Congress of Young Lawyers decried the downgrading of the function of defense attorneys and the tendency to identify advocates with their clients. The advertisement demanded that the right of assistance of counsel be made unwaivable.<sup>58</sup>

Even after the compromise which resulted in passage, by the Socialist-dominated Cortes, of legislation guaranteeing the right to counsel in criminal cases, Spanish lawyers remained a significant source of agitation to complete the revolution in criminal procedure commenced by the 1978 Constitution and its implementing legislation. By 1982, lawyers were openly protesting what they regarded as intolerable restrictions on the practice of criminal law. In January 1982, the Colegio de Abogados de Madrid urged the adoption of measures that would protect the representation of accused persons in the police precincts of the city and in the detention facilities for sus-

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56. G. Martinez-Fresneda, *supra* note 53, at 17. Martinez-Fresneda actually compares the conditions which existed in the late 1970s to the secret prisons of the Spanish Inquisition. See also J. LLORENTE, 1 *HISTORIA CRITICA DE LA INQUISICION EN ESPAÑA* 229-30 (1980).

57. *El Pais*, May 19, 1982, at 29, col. 1.

58. *El Pais*, Apr. 3, 1982, at 19, col 1.

pected terrorists.<sup>59</sup> Their demands underscored the depth of the distrust that existed between the bar and the law enforcement establishment.

Essentially, defense lawyers sought untrammelled access to their clients and an active role in police processes. They were joined in what became a sort of legal rights movement by those forces on the left which sought greater liberalization of Spanish society and by political groups from beyond Madrid which sought greater autonomy. In many ways, the struggle over the right to counsel became a part of the larger struggle for liberation from the vestiges of authoritarianism.

An editorial which appeared in *El Pais* declared that the lawyers were not just vindicating professional self-interest and that "eradication of torture is one of the imperatives of a civilized society," and charged that "torture continues, dressed anew in the euphemism 'maltreatment,' and that faced with torture, the public authorities, most prominently the Minister of the Interior, take no firm action."<sup>60</sup> The editorial found it "difficult to comprehend" the restrictions on the right to counsel proposed by the government, when the presence of lawyers would place in the hands of the authorities "an instrument coherent with the demands of the Constitution and the same moral principles of public function that figure in the socialist program of which Prime Minister Felipe Gonzalez has proclaimed himself a committed servant."<sup>61</sup> *El Pais* harshly criticized the government's proposal for reform, which included a provision limiting the presence of the lawyer to the formal declaration and identification of the detainee, and which failed to provide for immediate legal assistance, thereby leaving an interval between detention and appearance of the lawyer during which maltreatment could occur.<sup>62</sup> The editorial's fervent espousal of the use of counsel as a prophylactic against maltreatment of detainees echoed arguments which had been advanced by legal commentators for some time.<sup>63</sup>

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59. *El Pais*, Jan. 31, 1982, at 32, col. 1. The lawyers also demanded that the authorities replace the glass partitions in interview booths with windows that would not impede effective communication and rapport between lawyer and client. *Id.* Attention was also directed to the use of metal detectors, which were ostensibly used to prevent the smuggling of arms into prisons, but which in fact were used only on defense lawyers or the families of prisoners. Martinez-Fresneda also mentions metal detectors and similar obstructions such as the necessity of communicating with prisoners through microphones. G. Martinez-Fresneda, *supra* note 53, at 16. The Colegio de Abogados also charged that despite protracted waiting by attorneys, the prisoners were often not made available to them. *El Pais*, Jan. 31, 1982, at 32, col. 1.

60. *Las Torturas y La Asistencia Letrada*, *El Pais*, Apr. 1, 1983, at 6, col. 1.

61. *Id.*

62. *Id.*

63. See, e.g., Martinez-Fresneda, *Vigilar los Interrogatorios*, *El Pais*, Jan. 17, 1981, at 19, col. 1.

This complex pattern of turbulent social and political currents provided the backdrop to the four-year debate over the terms of assistance of counsel. Public perception of the unraveling of Spain's social fabric, as evidenced by renewed irredentism in the Basque provinces<sup>64</sup> and the long-standing demands for autonomy in Catalonia,<sup>65</sup> as well as changing moral attitudes and a general breakdown of the reigning social order, was reinforced by the steadily mounting body count of civil guards and policemen.

### III. CONSTITUTIONAL DEVELOPMENT AND THE LEGISLATIVE PROCESS

Immediacy of legal assistance, the prisoner's ability to waive the right to counsel, and the function of the lawyer during the initial stages of the investigation were the three major issues confronting the Spanish Parliament as it discharged its constitutionally imposed obligation to set out the terms of the law with respect to article 17.3 of the 1978 Constitution. The desire to affirm basic values of human dignity and autonomy<sup>66</sup> and the new constitutionalism<sup>67</sup> came into conflict with the concomitant belief that the fragility of Spanish democracy required the self-protective capacity to isolate and punish the socially dangerous.<sup>68</sup> In a social order in which deviance and dissent had been synonyms for disloyalty, rapid identification and isolation of offenders who were thought to be dangerous remained an important and conscious goal of the criminal justice system.

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64. See A. KRASIKOV, *supra* note 34, at 137-38.

"Almost all the killing [in the Basque country] took place after the death of Franco as ETA . . . tried to exact a separate Basque state from the new democratically elected government of Spain." L.A. Times, Feb. 25, 1984, § 1, at 12, col. 1. See also A. MUNOZ ALONSO, *EL TERRORISMO EN ESPAÑA* (1982).

65. See F. MERCADE, *CATALUÑA, INTELLECTUALES POLITICOS Y LA CUESTION NACIONAL* (1982); P. DORADO MONTERO, *LOS PARTIDOS POLITICOS EN CATALUÑA: OPINIONES Y PROGRAMAS ANTES DE LAS ELECCIONES DE 15 JUNIO 1977* (1978); B. OLTRA, *LA IDEOLOGIA NACIONAL CATALAÑA* (1981).

66. Compare the treatment of human dignity as an element in the discussion of the history of police brutality in *Miranda v. Arizona*, 384 U.S. 436, 445-58 (1966).

67. See G. MARTINEZ-FRESNEDA, *LA CONSTITUCION DE 1978 EN LA HISTORIA DEL CONSTITUCIONALISMO ESPANOL* 1-2 (1982) for the view that the Franco era was an aberrant episode in Spanish history and that post-Franco reforms are consistent with European history generally.

68. Gonzalo Martinez-Fresneda has argued that the rise in the number of prisoners in Spain (at a rate which he suggests is vertiginous) is not caused by a crisis of criminality in Europe or Spain. Instead, he contends that the rise in the prison population has more to do with a deliberate political policy of incarceration which sabotages both the older liberal institutions and the newer constitutional ones "which in theory are the insurmountable redoubt of the citizen confronting power." G. Martinez-Fresneda, *supra* note 53, at 2. See also *El Pais*, Mar. 23, 1983, at 4, col. 2.



### A. *Articles 520 and 527 of the Code of Criminal Procedure*

Before reviewing and analyzing the debates and the ensuing compromise that culminated in the legislation which fleshes out the mandate of assistance of counsel found in article 17.3 of the Constitution, it is useful at the outset to present a digest of the provisions of sections 520 and 527 of the Code of Criminal Procedure.<sup>69</sup>

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69. L.E. CRIM. art. 520 provides, in its entirety:

1. The detention and provisional detention must be practiced in the manner least prejudicial to the person, reputation and family name of the detainee or prisoner.

Preventive detention shall not last longer than the time strictly necessary to conduct the investigations which would tend to clarify the facts. Within the time periods established in the present legislation, and, in any case, a maximum of 72 hours, the detainee must be freed or put at the disposition of the judicial authorities.

2. Any person detained or incarcerated shall be informed, immediately and in a comprehensible fashion, regarding the actions attributed to him, and pertaining to the reason for depriving him of his liberty, as well as his rights, especially the following:

a) The right to remain silent, not making a statement if he does so desire, and not answering any question(s) put to him, or making statements only before a Judge.

b) The right not to incriminate himself.

c) The right to counsel and to request his presence at police precincts and judicial proceedings so that he may intervene in any identification proceedings to which he may be submitted. If the detainee does not designate an attorney, a court appointed attorney shall be designated.

d) The right to contact family or anyone he may desire regarding the detention and location where he is held in custody at any given time. Foreign nationals shall have the right to have the above-mentioned circumstances made known to the Consular Office of their country.

e) The right to be assisted by a free interpreter when dealing with a foreign national who does not understand or speak Spanish.

f) The right to a medical examination by a forensic physician or a legal substitute, or in the absence of such by the Institution in which he is found or by any other State or Public Official.

3. Whenever dealing with a minor or incapacitated individual, the authorities in whose custody the detained or incarcerated individual is found in the circumstances noted in subsection 2(d) will communicate to whoever may be the parents or guardians of the same, and if these cannot be located, the "Ministerio Fiscal" will be notified immediately. If a minor or an incapacitated arrestee is a foreign national, the fact of his detention will be communicated to the Consular office of his country.

4. The judicial authority or functionaries in whose custody the detained or incarcerated individual finds himself will refrain from recommendations regarding the selection of a counsel and will communicate in a verifiable fashion the name of the designated attorney to the Bar so that he may appear or petition to be designated counsel. The Bar will notify the designated attorney of the selection so that he may accept or decline to represent the accused. In the event that the designated attorney does not accept the petition, is not located, or does not appear, the Bar will proceed to name qualified counsel. The designated attorney will appear at the place of detainment as soon as possible and in any case within eight hours, beginning from such time as the Bar is informed.

If eight hours from the time of communication with the Bar has transpired and

A key aspect of article 520.1 is its requirement that detention last no longer than necessary to carry out the proceedings designed to clarify the facts, and that without fail the prisoner must be set free or taken to court within seventy-two hours. Of equal importance are the requirements of article 520.2 that those detained be informed immediately about the facts that led to their arrest and that they be advised of their rights, including the right to remain silent, the right to designate a lawyer and ask for his presence in the proceedings both at the police station and before the court (and if no lawyer is requested that one shall be designated *de oficio*), the right to have family or friends notified of the detention, and the right to be examined by a medical doctor upon detention.<sup>70</sup>

Article 520.4 requires that the authorities not suggest a lawyer for the detainee, but that the Colegio de Abogados be given the opportunity to assign a lawyer to represent the accused when he has not asked for a specific attorney.<sup>71</sup> The lawyer is required to appear at the place of detention within eight hours after he has been notified of his responsibilities. Most importantly, if the lawyer does not appear

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no lawyer has arrived at the place of detention without cause, declarations or identification of the detainee may proceed with the consent of the detainee, if the detainee consents without prejudice to the responsibilities of the designated attorney.

5. Notwithstanding, the detainee or incarcerated individual may renounce the assistance of counsel if the detention was based on facts susceptible to qualification exclusively as traffic offenses.

6. Assistance of counsel shall consist of:

a) Requesting that the detainee or incarcerated individual be informed of his rights as established in subsection 2 of this Article and that the medical examination indicated in paragraph (f) proceed.

b) Requesting the clarification or amplification of the measures considered appropriate as well as to state in writing any incident which may have taken place during the employment of said measures.

c) Interviewing the detainee in private upon the cessation of the interrogation in which he has participated.

This discussion does not dwell on what U.S. readers might view as oratorical flourishes, such as the requirement of article 520.1 that a detention be carried out in a manner which least damages the prisoner's person, reputation, or family name. Such provisions are certainly important as affirmations of cultural values, but it would not serve the purpose of this article to explore the cultural trappings in which the legislation is dressed.

70. Article 520.2(d)-(e) also provides for free interpreters when the accused does not speak Spanish, and, if the detainee is a minor, for notification of the family, the guardian, or person exercising parental authority. If the minor is a foreigner, the Consul of the minor's nation shall also be advised.

71. On the local level, assistance to detainees is carried out through the district Colegios de Abogados. The offices are located in the Juzgados de Instrucción (court of first instance) or other legal center of the district. Detainees have been critical of the lawyers in the program, often claiming that they generally are too young and inexperienced. On the other hand, many police officials, "out of ignorance and fear," allow themselves to be manipulated by the attending lawyers. Letter from Madrid lawyer Juan M. Cruz Palacios to Professor McGee (Nov. 15, 1986) (on file with the *Columbia Journal of Transnational Law*).

within eight hours, the authorities may commence the examination of the detainee upon his consent. Finally, the detainee may waive or reject the assistance of counsel only in traffic offenses.

The final subsection of article 520 defines "assistance of counsel" as consisting of advising the prisoner of the rights described in article 520.2 (which have presumably been brought to his attention by the police), asking the authorities to clarify or amplify any material that may have been dealt with during the interrogation, and thereafter privately and confidentially interviewing the prisoner after the proceedings have been terminated.<sup>72</sup>

Article 527<sup>73</sup> provides that those persons detained *incommunicado* pursuant to the antiterrorist law<sup>74</sup> shall have the right to a lawyer designated by the Colegio de Abogados and the right to a confidential interview but shall not have the other rights set out above.

### B. *Legislative History*

The crucial aspects of the law on the right to counsel are the provisions which permit the police to proceed with interrogation of the suspect before the lawyer arrives at the station, but which make the right to counsel a right which can not be waived.<sup>75</sup> The provision

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72. L.E. CRIM. art. 520.6.

73. L.E. CRIM. art. 527. The article provides, in its entirety:

The detainee or prisoner, while being held *incommunicado*, shall not enjoy the rights expressed in the present chapter, with the exception of those rights established in Article 520, with the following modifications:

- a) An attorney shall be appointed in all cases.
- b) The detainee shall not have the right of communication provided for in subsection d) of number 2.
- c) Neither shall the detainee have the right of consultation with his attorney provided for in subsection c) of number 5.

74. The relationship between the right to counsel and those held *incommunicado* pursuant to the laws against terrorism was perhaps the focus of the debate on the use of lawyers for those accused of crimes. This article deals only peripherally with the larger issue of terrorism, which has few parallels in the United States. The treatment of the detainee held *incommunicado* constantly inflamed discussion about the right to counsel. For example, *El Pais* decried as the "great failure" of article 527 its augmentation of the possibility of torture by the extended delay of 10 days in presenting the detainee to a judge and the lack of legal assistance. The newspaper bitterly charged that the Socialists had changed their position on the use of habeas corpus as a legal device to prevent torture and charged that the government's reliance on the presumption of innocence to protect such detainees was "totally inconsistent." Finally, the paper condemned as the "second great failure of the law" its stripping of those charged as armed terrorists of the right to have their families notified or, more seriously, the right to designate their lawyers. The government's rationale that "the defense of society" required the extraordinary exceptions was scorned as impugning the presumed good faith of lawyers as a class. Finally, the paper called for a challenge to the legislation before the constitutional tribunal if it should pass. *El Pais*, Oct. 5, 1983, at 10, col. 1.

75. L.E. CRIM. art. 520.2(c) gives the detainee the right to designate an attorney, and if

permitting interrogation of the suspect prior to the appearance of the lawyer has a curious history. The original version of article 520, which was passed the year the Constitution took effect, provided that the suspect had the right to designate a lawyer to assist him from the moment of his arrest.<sup>76</sup> The emphasis was on immediacy. The Ministry of Justice first proposed to strengthen this emphasis by adding language that would have required all declarations to be made in the presence of counsel for the accused. The proposal would also have made the right to counsel unwaivable.<sup>77</sup> But the Ministry of the Interior, concerned more with civil disorder than civil liberties, objected to this relatively progressive position of the Ministry of Justice.<sup>78</sup> As a compromise, the Ministry of Justice eliminated any requirement that the lawyer be present before declarations were made.<sup>79</sup> Instead, the proposed legislation left the possibility of a time period in which discussions could be had with the suspect without the presence of a lawyer, and in which maltreatment could conceivably occur.<sup>80</sup>

The government's proposed legislation won over even those sectors of the organized bar that had previously called for an absolute ban on waiver of the right to counsel.<sup>81</sup> Lawyers who had been critical of the government drew comfort and pride from their claims that Spain would be alone among Western states in its provision for a

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one is not so named, one will be appointed *de oficio*. Article 520.5 describes the assistance as "required," but permits renunciation in minor cases.

76. See *supra* notes 44 and 49 and accompanying text.

77. El Pais, Dec. 26, 1982, at 13, col. 2. The Spanish term *irrenunciabilidad* is translated as "unwaivable" in textual discussions in this article.

78. El Pais, Mar. 30, 1983, at 13, col. 1. While the proposals of the two Ministries were being reconciled, Jose Maria Mohedano, President of the Association for Human Rights, held a press conference in which he indicated that protest would be registered if the proposals were unsatisfactory and did not contribute "to the eradication of the torture that continues in Spain." El Pais, Mar. 24, 1983, at 16, col. 3. He described as "Machiavellian" a rumored proposal which would have divided the initial period in which lawyers would not be present but from which statements made by the defendant could not be used against him, and a subsequent period in which the lawyer would be present. The initial period would have facilitated investigation without any risk to the defendant of self-incrimination. *Id.* at col. 5.

79. Report of Minister of Justice Ledesma Bartret to the Comision de Justicia e Interior, Cortes Generales, DIARIO DE SESIONES DEL CONGRESO DE LOS DIPUTADOS [hereinafter D. CONG.], No. 8, Feb. 11, 1983, at 8, col. 3.

80. This period could occur if the lawyer does not appear within eight hours of notification, since the authorities may then begin their examination if the detainee consents. As El Pais noted, "the lack of immediacy leaves an interval of time that does not guarantee against maltreatment of those detained . . ." *Las torturas y las asistencia letrada*, El Pais, Apr. 1, 1983, at 6, col. 3.

81. In making the right to counsel unwaivable at the time of the formal declaration, the government won the support of the organized Bar for its legislation; this eliminated much of the organizational base of the opposition. El Pais, Mar. 30, 1983, at 13, col. 1; El Pais, Mar. 27, 1983, at 18, col. 1. This legislative proposal reflected a retreat from previous drafts by the

mandatory, non-waivable right to counsel,<sup>82</sup> which even surpassed protection provided in the United States.<sup>83</sup>

Because of the extraordinarily high waiver rate prior to the legislation,<sup>84</sup> and the situation in which a defendant released before seeing a judge never met with an attorney, the Bar Association may have believed that the benefits of the compromise solution of mandatory lawyer participation outweighed the danger that police would outmaneuver the system by interrogating suspects before lawyers arrived from the Colegio de Abogados.<sup>85</sup> The repeated claims that the right to

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Ministry of Justice which had provided for the assistance of lawyers from the moment of detention. *El Pais*, Dec. 26, 1982, at 13, col. 2.

Jose Mohedano was consulted shortly before announcement of the compromise legislation and assessed the solution as "positive in its entirety." *El Pais*, Mar. 30, 1983, at 13, col. 1.

Speaking to the Congreso in the Cortes, Minister of Justice Ledesma Bartret proclaimed:

I think the most outstanding effect of this project is the surpassing of the objective character that the right to counsel has had until the present, enduring it with a content that converts it to an authentic subjective public right; moreover, into a juridical-procedural guarantee recognized in our Constitution and required as essential by our juridical order. And this is so . . . because the fundamental characteristic of the subjective public rights . . . is precisely irrenunciability; irrenunciability that owes so much to the necessity to avoid unexpected pressures that impel the renunciation, as much as, and above all, that does not permit the possibility of renouncing something considered as a right inherent to human dignity.

[T]he project makes the assistance of counsel an irrenouncable right, with that they consecrated the right to search for and obtain justice, with full and efficacious counsel, as an element consubstantial with the person and as a good socially assumed and recognized in the legal order.

D. CONG., No. 60, Sept. 29, 1983, at 2820.

82. According to Ledesma Bartret, the proposed law was "one of the most advanced existing in comparative law . . . . There are three countries in the Council of Europe that make obligatory the presence of a lawyer in police investigations and only four in which the right to counsel is unwaivable." D. CONG., No. 60, Sept. 29, 1983, at 2821, col. 1.

In fact, article 520 is very similar to the analogous provision in Italian law. The present Code of Italian Criminal Procedure was amended in 1955 to provide that "the counsel for the defendant had the right to be present at the various stages of the [fact-finding procedures], such as confrontations . . . , expert testimony . . . , searches . . . , and lineups . . . . Defense counsel was also entitled to inspect and copy documents pertaining to the case, such as transcripts of the defendant's interrogation." M. CAPPELLETTI & W. COHEN, *COMPARATIVE CONSTITUTIONAL LAW* 397 (1979). See also Judgment of July 5, 1968, Corte costituzionale, Italy, 28 Rac. uff. corte cost. 77, 91 Foro It. I, 1681 (*Amaducci et al.*), where the Italian Constitutional Court extended the protection of formal processes.

83. See *Faretta v. California*, 422 U.S. 816 (1975) (condemning defendants to the right of self-representation). In Italy as in Spain, the influence of the Warren Court made itself felt. In praising the *Amaducci* decision, Professor Paolo Barile said that the Constitutional Court "seems to draw on those modern and democratic elements of the decisions of the Supreme Court of the United States. The 'accusatory' system is in fact entering our practice; the rules of 'due process' are being adapted by us in the sense of insuring a fair hearing to all . . . , assuring the effectiveness of the right of defense." Barile, *I diritti dell'imputatio*, in *L'ESPRESSO*, July 18, 1968, cited in M. CAPPELLETTI & W. COHEN, *supra* note 82, at 403.

84. See *supra* text accompanying notes 50-56.

85. Presumably, narrow professional or economic considerations did not influence the decision to live with the government's compromise, though in the debates on the bill derisive

counsel would be an expansive one provided further consolation to the government's critics. In his presentation of proposed laws to the Cortes in February 1983, Ledesma Bartret, the Minister of Justice, declared that the lawyer would not be a "mere spectator" and that the right to counsel would be "dynamic."<sup>86</sup> The Minister's presentation contemplated that the lawyer would participate in the initial processes by insuring that the prisoner was aware that he did not have to implicate himself and that the police did not overlook facts that might exculpate the suspect.<sup>87</sup> In a subsequent presentation to the Senate, the Minister called the law a significant advance with respect to the right to counsel because under the existing statute, "the lawyer assisted passively" and contributed "practically nothing."<sup>88</sup>

Yet, despite the government's assurances, the debates revealed that widespread concerns about the fate of prisoners in the hands of the police persisted. The transition from right-wing dictatorship to socialist government was unable to exorcise the ghosts of repression. As a brief recital of the major arguments will show, human rights are not created *ex nihilo*; on the contrary, the implementation of broad concepts of constitutional liberty frequently involves a lengthy and arduous process of compromise and reconciliation. What makes the Spanish experience uniquely instructive is that the process involved open debate mandated by the Constitution itself. Unlike the constitutional experience in the United States, the final phase in the metamorphosis of the right to counsel in Spain was shaped not by lawyers and judges, but by popularly elected representatives from a cross-section of Spanish society.<sup>89</sup>

### C. Central Issues in the Debate over the Right to Counsel

#### 1. Immediate Legal Assistance

As adopted, article 520.4 provides that the authorities should not make any recommendations about the selection of an attorney, but should either communicate the name of the lawyer selected by the detainee pursuant to his rights under article 520.2(c) to the Colegio de

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allusion was made to the impact the amended code would have on jobs for lawyers. See *supra* text accompanying note 71.

86. D. CONG., No. 8, Feb. 11, 1983, at 7, col. 1.

87. *Id.*

88. Cortes Generales, DIARIO DE SESIONES DEL SENADO [hereinafter D. SEN.], No. 36, Nov. 22, 1983, at 1736, col. 2.

89. The Minister of Justice, Ledesma Bartret, said as much when he declared that the governmental process which shaped the proposals reconciling the Code of Criminal Procedure with the demands of the 1978 Constitution "pre-supposes the culmination of an enlarged political process." D. CONG., No. 60, Nov. 22, 1983, at 2821, col. 2.

Abogados or request that a lawyer be designated *de oficio* in the event none is named by the detainee. But unless the lawyer appears at the place of detention within eight hours, the police may proceed with their inquiries without the attorney's presence. When the attorney does arrive, he has the right to review the proceedings and request that additional questions be addressed to the detainee.

There was at first widespread sentiment in the Cortes that legal assistance or presentment to a magistrate should be immediate.<sup>90</sup> But this sentiment did not prevail over the government's proposal, which was essentially to adopt the language of the Constitution which requires that "in any case the person arrested must be set free or handed over to the judicial authorities within a maximum period of seventy-two hours."<sup>91</sup> The government argued that the detainee was sufficiently protected by the intervention of the magistrate within seventy-two hours since the detainee is read his rights upon detention.<sup>92</sup> In the government's view, the presence of the lawyer would not significantly enhance the protection of the detainee against maltreatment.

More importantly, the government argued not only that "the corresponding obligations of the judicial police" would be impeded by any immediacy requirement for legal assistance, but also that the detainee's civil rights could be prejudiced if the police had to wait for a lawyer before they could clear a detainee through routine questioning.<sup>93</sup> A corollary of this argument was the suggestion that some investigation should precede intervention by the lawyer, because the requirement of delaying the investigation until the attorney's arrival would mean summoning a lawyer to render legal assistance before there is any apparent reason to do so.<sup>94</sup>

The government's principal argument, though not entirely responsive to the objections of the opposition, did carry great weight in a society that up to the time of the debates—and indeed during them—had been torn by alternating periods of suppression and disorder. Its argument was based on the security consideration that police

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90. The Grupo Parlamentario Mixto (GPM) proposed language requiring that a detainee "immediately be placed before a magistrate, but under no circumstances will detention exceed seventy-two hours." D. CONG., No. 60, Nov. 22, 1983, at 2836, col. 2. The Congreso eventually rejected the proposal by a vote of 21 in favor, 243 against and 7 abstentions. D. CONG., No. 60, Sept. 29, 1983, at 2847, col. 2.

91. CONST. art. 17.2.

92. See D. CONG., No. 60, Nov. 22, 1983, at 2845, col. 2, which reports the argument of Socialist deputy Castellano Cardalliagué, who drew a distinction between the right to legal assistance and the exercise of the right and argued that article 17 of the Constitution is much broader than the exercise of the right to counsel.

93. D. CONG., No. 50, June 30, 1983, at 1804, col. 2.

94. "[T]o say that the attorney will be notified immediately has no meaning; the attorney must be notified for a reason." D. CONG., No. 60, Sept. 29, 1983, at 2841, col. 2.

investigations should not be unnecessarily impeded by the need to await the arrival of an attorney. This position is not without irony since it emanated from the former opponents of a dictatorship which had justified its rule largely by its ability to keep Spain pacified. Socialist deputy Castellano Cardalliaguet discussed the interests of the state:

In any case, it is obvious that every possibility must be closed, with absolute respect to the profession of the lawyers, to resolute behavior of an obstructionist character, through mere failure to appear, putting in danger what must be the fulfillment on the part of the judicial police, of their obligations with respect to society.<sup>95</sup>

Opponents raised a wide range of objections to the government's proposal to permit the police to interrogate the detainee eight hours after the Colegio de Abogados was asked to assign an attorney. Nearly all of the political parties (except the governing Socialist party) opposed the government's position that the police should be able to proceed without an attorney.<sup>96</sup> But perhaps the most telling argument was that of the Basques, one of whom explained their position in this way: unless the law required immediate assistance, "the attorney would be simply a guest of stone" in the proceedings.<sup>97</sup> A similar argument has been made in numerous cases concerning the right to counsel in the United States;<sup>98</sup> unless the attorney is present

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95. D. CONG., No. 50, June 30, 1983, at 1804, col. 2.

96. Amendment 32, submitted by the Basques, proposed that the right to counsel be afforded in all situations. Under their proposal, incommunicados would share the same privileges as ordinary criminals. Attention was drawn to article 17.3 of the Constitution which "guaranteed the right of counsel to all who are detained . . . according to the terms established by law." In addition, article 53.1 of the Constitution provides that rights and liberties can be regulated, but its essential context must be respected. The Basques argued that the right of counsel has a dual purpose: to guarantee that a detainee is not coerced into an involuntary confession and to ensure the immediate assistance of counsel. The justification for amendment 32 was that in the Socialist-drafted article 527.2, only the former is guaranteed, but not the latter. In the end, the Socialists prevailed, so the law distinguishes between the rights of ordinary criminals and of "terrorists." Amendment 32 was defeated in Congress with only three votes in favor of its adoption. *Id.* at 1813, col. 1.

97. D. SEN., No. 36, Nov. 22, 1983, at 1745, col. 2.

98. See, e.g., *Esobedo v. Illinois*, 378 U.S. 478 (1964); *Powell v. Alabama*, 287 U.S. 45, 57 (1932) (the period from arraignment to trial is "perhaps the most critical period of the proceedings . . ." during which the accused requires "the aid of counsel . . ."). In *Esobedo*, the Court declared:

In *Gideon v. Wainwright*, we held that every person accused of a crime, whether state or federal, is entitled to a lawyer at trial. . . . [But the] "right to use counsel at the formal trial [would be] a very hollow thing [if], for all practical purposes, the conviction is already assured by pretrial examination." "One can imagine a cynical prosecutor saying: 'Let them have the most illustrious counsel, now. They can't escape the



from the inception of police interrogation, the decisive trial will happen before lawyers and court officials are present, and all that happens subsequently will only serve to confirm what the police have already achieved. Put another way, if the police can interrogate the detainee and proceed without the lawyer's presence, there is little point in having the lawyer present after an uncounseled defendant has already convicted himself before the police.

There were still other objections. Aguilera Bermudez of the Grupo Popular argued that permitting the police to proceed after the eight-hour period would undercut the right to counsel, since the law did not provide for appointment of a second lawyer if the first did not appear.<sup>99</sup> In essence, a waiver which the detainee could not himself effect would be accomplished by the mere passage of time. Attempting to steer a middle course between the advocates of immediacy and the government, the Grupo Popular argued that if the attorney did not arrive within the prescribed time period, the suspect should be placed before a magistrate before interrogation could continue.<sup>100</sup>

Given the huge Socialist majority in Parliament, it was no surprise that the view of the government prevailed.<sup>101</sup> The compromise between the Ministries of Justice and the Interior resulted in a resolution that plainly tilted toward security. Under the final compromise, situations could arise in which the lawyer would arrive after the detainee has already "convicted" himself; in such circumstances, the lawyer would be capable of doing little more than ratifying a *fait accompli*.

Despite the Socialist government's success in establishing the

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noose. There is nothing that counsel can do for them at the trial.' " (citations omitted).

378 U.S. at 487, 488. See also *Oregon v. Elstad*, 105 S. Ct. 1285, 1298 (1985) (Brennan, J., dissenting).

99. The Grupo Popular's amendment 12 read: "If eight hours have transpired from the time the Colegio de Abogados was contacted, and the lawyer unjustifiably does not appear at the place the detainee finds himself, such shall be communicated to the judicial authority, which for a period of eight hours and in agreement with the Colegio de Abogados will provide *de oficio* assistance to the detainee." D. SEN., No. 36, Nov. 22, 1983, at 1751, col. 1. The Grupo Popular's amendment was rejected by a vote of 48 to 113 with 2 abstentions. *Id.* at 1716, col. 2.

100. *Id.*

101. D. CONG., No. 50, June 3, 1983, at 1811, col. 1. The Grupo Popular's amendment received considerable support from the Socialists, although not nearly enough to carry it. The amendment was rejected by the Senate by a vote count of 48 in favor, 113 against and 2 abstentions. Speaking for the Socialists, Remis Rebassa stated in the Senate hearings: "[I] would very much have preferred never to have had to offer this article in the first place, and would have preferred that the sociological situation in this nation had permitted its omission, but, that not being the case, my group, at least, is going to firmly support its legal enactment." D. SEN., No. 37, Nov. 23, 1983, at 1764, col. 2.

eight-hour time limit, opposition parties were successful in providing some relief from the tyranny of the clock. The Grupo Popular succeeded in including a provision that limits the commencement of police interrogation after eight hours to situations in which the lawyer's failure to appear within the prescribed time is unjustified.<sup>102</sup> The wording of article 520.4 on this point is not unambiguous, however. It declares that the police will be able to examine the suspect "if the lawyer unjustifiably does not appear at the place where the detainee or prisoner can be found." Article 520.4 also seems to provide for some additional delay in situations where the lawyer might have to travel from places like Madrid or Barcelona to more isolated districts where lawyers may be difficult to locate. The government, anxious to ensure that the police did not lose the right to examine the suspect because the lawyer did not appear, was willing to accept language allowing the possibility of some delay in special circumstances, so long as it did not undercut the right of the police to examine the suspect eventually.

Another major argument of the opposition to the government's proposal was that allowing the police to delay notification of the Colegio de Abogados for eight hours before the seventy-two hour time limit for presentation before a magistrate started running not only effectively isolates the detainee from legal assistance, but also allows the police to wear down his capacity to resist—at least psychologically, if not physically as well.<sup>103</sup> On this score, a few sentences of Francoist history are worth a volume of logical explanation. The Spanish left has historically mistrusted the police, and after the experience of the dictatorship, the left viewed no prophylactic measure as excessive or ill-advised. Ironically, however, the accession to power of the Socialists caused them to be confronted for the first time with the responsibility for controlling increasing crime and avoiding fragmentation of the social order through political violence. Disorder and irridentism had in effect made the Socialists legatees of Francoist concerns about law and order. The compromise between the Ministries of Justice and the Interior resulted in the imposition of a process in which the practical needs of law enforcement prevailed over the Socialists' historical antipathy for both the ordinary police and the Guardia Civil.<sup>104</sup>

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102. D. SEN., No. 42b (Serie II: Textos Legislativos), Oct. 27, 1983, at 10, col. 1, reproduces amendment 12, which was incorporated and passed as the second paragraph of Article 520.4.

103. Bandres Molet made this argument in the Congreso debates. See D. CONG., No. 60, Sept. 29, 1983, at 2824, col. 2.

104. The Guardia Civil, now a 58,000-person paramilitary national police force, became the embodiment of Francoist rule. To this day they guard important installations in Madrid and elsewhere with automatic weapons at the ready.

## 2. The Lawyer's Function in the Initial Investigation

Article 520.6 charges the attorney with the responsibility for: (1) informing the detainee of his rights, including his privilege not to give evidence against himself; (2) arranging a medical examination of the detainee; (3) clarifying any declarations or identifications previously made by the detainee; (4) interviewing the detainee in a "reserved" manner; and (5) ensuring that the detainee is either released or taken to a magistrate within seventy-two hours of arrest.<sup>105</sup> Clearly, the overarching controversy was about how active the intervention by lawyers should be. This difference in opinion manifested itself in attempts to amend the legislation.

Subsection 6(a) of article 520 provides that the attorney should inform the detainee of his rights as set out in subsection 2. The government argued that this prophylactic routine would give the defendant protection against police overreaching. It was thought that an informed defendant could not be coerced, especially if his lawyer was present as an observer. To the Socialist government, the lawyer served as the principal protector of the rights of the defendant. As Perez Solano, who spoke for the government before the Congress, suggested: "The presence and activity of an attorney who assists [the arrested individual] at the moment of detention should exercise the law in such a manner as to assure the fulfillment of the detainee's rights, and if there is an irregularity, the attorney is obligated to note such incidents in the transcript."<sup>106</sup>

The Grupo Parlamentario Mixto (GPM), a coalition group in the Cortes composed mainly of regional interests, attempted to expand the attorney's role beyond that proposed by the government. Its proposal provided for a private interview with the client without a time limitation. The GPM also suggested that it be made clear that the lawyer could participate in the interrogation, counseling the accused as to which questions should or should not be answered. Indeed, the GPM argued that the attorney should be able to actively intervene in all legal processes on behalf of the detainee.<sup>107</sup> Relying

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105. L.E. CRIM. art. 520.6.

106. D. CONG., No. 60, Sept. 29, 1983, at 2830, col 2.

107. Amendment 36, as proposed by the GPM, would have required that the attorney insist that the detainee be informed of his rights and that he receive a medical examination; that the attorney and detainee be afforded a private and personal interview as may be necessary, whether or not the detainee has made a declaration; that the lawyer be capable of representing the detainee in all interrogations; that he be able to cross-examine the witness in investigations; and that the attorney shall be granted all rights under other laws and regulations of the bar. D. CONG., No. 50, June 30, 1983, at 1809, col. 1.

upon the U.S. experience, Bandres Molet, GPM spokesperson before the Constitutional Commission, declared:

I believe that the Socialist party and those who vote [for the government proposal] will have great difficulty in explaining to the suffering Spanish television viewer why the Spanish justice system is inferior to that of the American justice system . . . . We will have to explain to the voter and to justify in the future, that besides more dollars, more petroleum, more information, more machines, [the Americans] have better justice than ours.<sup>108</sup>

The government, however, addressed a more fundamental concern among the Spanish, namely, the specter of physical abuse, a fear which also pervaded the attempts by the opposition to clarify the right to medical examination.<sup>109</sup> In the view of the Socialists, the reci-

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108. *Id.*

109. Indirectly related to the right of counsel was the right to have a medical doctor examine the arrested person before and after his release. The medical doctor, much like the attorney, was to assume the role of an observer, assuring that the detained person was not physically abused or under the influence of drugs or alcohol.

The right to request a medical examination was enacted as subsections 2(f) and 6(c) of article 520. Under subsection 2(f), a detained person has the right to an examination by a medical doctor or his legal equivalent at the place of custody. Where the detainee cannot secure the services of his own physician, an examination may be performed by a publicly-paid physician. Subsection 6(a) provides that an attorney may request that the defendant be examined.

The Basques were instrumental in ensuring that the right to a medical examination was absolute and would not prejudice the detainee. The Basques and Communists attempted to clarify these two issues by amendment. The proposed amendments were directed at two issues: when the examination could be requested and whether the person in custody could request a medical doctor of his choice. The Communists proposed that the person detained should have a right to be examined by a medical doctor at the moment of arrest or detention as well as when released. The main thrust of this amendment, the Communists argued, was to assure that the person was not under the influence of drugs, medication or alcohol during detention. Should the person be found in such a state, interrogations and any identification proceedings would have to cease, since a person under such conditions might not comprehend his rights. The Communists also proposed that the attorney conferring with the detainee should have the right to summon a physician if he believed the detainee was, in medical terms, unable to proceed with the formal declaration or the identification process. If this request was denied by police bent on proceeding, a record would be made of the request and denial. The Communist Party's amendment never passed the Congress.

The Socialist party preferred Basque amendment 23, which was partly adopted. The Basques were more concerned with the process by which the doctor was selected. They proposed that the person under custody or detention have the right to be examined by a medical doctor of his choice. Should the doctor designated by the detainee not be available, then and only then would the detainee be limited to the right to be examined by a public or institutional doctor. The Basques convinced the Cortes to accept this proposal by arguing that personal medical doctors are better qualified to attest to the possible drug effects caused by medication that they themselves have prescribed. The examination by a personal medical doctor would also assure that no declarations were taken of drugged or medicated detainees.

tation of rights in the government proposal provided sufficient assurance that the defendant would not involuntarily answer questions and legally precluded any prejudgment as to guilt because of failure to respond. The Socialists also felt that if the mere presence of the lawyer was not sufficient to discourage physical abuse, active participation by attorneys would provide no greater protection against law enforcement authorities bent on inflicting torture on detainees.

In an unsuccessful defense of the GPM's proposals, Bandres Molet argued that the lawyer should be able both to counsel the defendant not to answer certain questions and to actually participate in the interrogation by interjecting questions which might be more favorable to the accused.<sup>110</sup> In the legislation eventually adopted, however, the lawyer's presence is required only at the formal declaration, and his ability to actively participate during the proceedings is circumscribed.

### 3. The Mandatory Right to Counsel

By making the right to counsel mandatory, the government was able to suggest that it strongly supported human rights, and thereby gain the support of the organized bar, traditionally a strong source of opposition to police power. As suggested earlier,<sup>111</sup> waiver of counsel by intimidated prisoners upon presentation before the magistrate had been a serious problem that adversely impacted both the civil liberties of those arrested, and, not unimportantly, the practice of law. By championing the prescriptive right to counsel, the government was able to shift attention from the vital role of the lawyer during the interrogation process to his largely ceremonial function before the magistrate.

The government's position was captured in Ledesma Bartret's opening statements to the Congress in September 1983. He declared: "[T]he fundamental characteristic of the right [to counsel] . . . is its unwaivability. The unwaivability exists to avoid the pressures which impel waiver, but above all, not to permit the possibility of renouncing something considered inherent to human dignity."<sup>112</sup> Put in such a theoretical and lofty way, there was little counter-argument from the opposition, which was left to struggle over whether the right to counsel—meaningful or not—would extend to minor offenses such as traffic violations.

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110. D. CONG., No. 60, Sept. 29, 1983, at 2825, col. 2. The GPM proposal also provided for the recording and retention of any observations the lawyer had about the initial inquiry.

111. See *supra* text accompanying notes 49-56.

112. D. CONG., No. 60, Sept. 29, 1983, at 2820, col. 1.

Here, opposition efforts to extend the legislation were not only unavailing, but were actually greeted somewhat derisively by the government, which suggested that the proponents of a right to counsel without exception might in fact be advocating special-interest legislation. Ramis Rebassa, spokesperson for the Socialist Party in the Senate, stated: "[I] am absolutely convinced that all attorneys in Spain, especially those who have recently graduated from law school, would support the Grupo Popular's proposal [to extend the right to counsel] because it will be the only means, in these times of severe inflation, to assure that they will be employed."<sup>113</sup> On another occasion, Castellano Cardalliaguet argued against an absolute right to counsel in all cases regardless of the severity of the offense, on the ground that it would unduly burden the judicial system and might lead to the institutionalization of attorneys in every facet of Spanish legal practice. Such a right, he argued, could create a "new figure known as the permanent attorney companion."<sup>114</sup>

Despite the sarcasm and veiled derision with which the Socialists greeted attempts to extend the right to counsel to all offenses, there were significant attempts to delete the traffic offense exception. Bandres Molet of the Grupo Parlamentario Mixto expressed worry about the tendency of the police to rely on confessions to resolve crimes:

[U]nfortunately, the police . . . are not sufficiently scientific and prefer confessions because with them their mission is completed. The confession will continue to be sought through incommunicado processes or whatever and if the attorney is not present at the time and moment in which one is needed, the day will come when we will view on television people confessing to murdering who knows whom.<sup>115</sup>

Bandres Molet also suggested that, aside from the impact that such traffic offense procedures might have on police practices generally, the practical effect of such procedures would be to permit special police forces, especially the Guardia Civil, to use statements obtained during traffic arrests as evidence upon which to obtain criminal convictions. He argued that it was not uncommon for testimony obtained by the

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113. D. SEN., No. 37, Nov. 23, 1983, at 1766, col. 1. Amendment 14, proposed by the Grupo Parlamentario Popular, would have guaranteed all persons charged with a crime the right to an attorney during arraignment. In addition, the attorney, again acting more as an observer than an adversary, could make a declaration on behalf of the detainee recording any wrongdoing or abuse of power by the police authorities during the interrogation proceedings. The Amendment was rejected by a vote of 37 in favor and 111 against. D. SEN., No. 37, Nov. 23, 1983, at 1767, col. 1.

114. D. CONG., No. 60, Sept. 29, 1983, at 2828, col. 1.

115. *Id.* at col. 2.

Guardia Civil in traffic matters to be the principal evidence at the time of the verdict in a later criminal trial because of the excessive workload of the courts.<sup>116</sup>

The attempts to expand the right to counsel to cover all offenses, no matter how inconsequential on the surface, were based on a mixture of serious theoretical and practical objections. At the theoretical level, the opposition was concerned about the precedential effect that permitting the police to operate without a guarantee of counsel for the detainee would inevitably have on procedures governing more serious offenses. Many feared that it would not be possible to compartmentalize exceptions to the right to counsel. At the practical level, the opposition regarded the minor offense category as a significant area in which police abuse might still adversely impact civil liberties.

On the question of policing the police, the Socialists argued that the provision requiring that detainees be advised of their rights, which was applicable to serious as well as trivial offenses, sufficed to protect those arrested from self-incrimination, and enabled them to request a lawyer, be examined medically, and contact family members.<sup>117</sup> Moreover, the Socialists argued, the prisoner's capacity to resist police pressure was buttressed by the sanctions of the penal code. In Castellano Cardalliaguet's words: "If the police commit an offense, let the weight of the law fall upon them."<sup>118</sup> In effect, therefore, the Socialists asked the opposition to let the system work in its entirety, and not to overload the right to counsel provision, which, in any case, could not alone guarantee the protection of human rights.

The Spanish security forces might be said to have won a significant victory in the debates, and from an unexpected quarter.<sup>119</sup> The police were given the power to question suspects, and defendants could not completely forestall this power by demanding an attorney. The police were placed in a position where in practical terms they could sew up the case before the lawyer entered. In effect, the lawyer's role was reduced to that of an observer rather than an effective intermediary. In the end, the lawyer's only indispensable function was to attend the courtroom ceremony after the case had been "con-

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116. D. CONG., No. 50, June 30, 1983 at 1790, col. 2. Bandres Molet was particularly concerned about the Guardia Civil which, because of its paramilitary status, was permitted to conduct routine road inspections without a search warrant, and could use any evidence obtained in such searches against the detainee. Furthermore, the Guardia Civil could at any time stop and question an automobile driver without probable cause.

117. D. CONG., No. 60, Sept. 29, 1983, at 2827, col. 2.

118. *Id.* at 2829, col. 2.

119. On the irony of Socialist identification with the imperatives of security, see *supra* text accompanying note 104; *Inocentes, pero menos*, El Pais, Oct. 5, 1983, at 10, col. 3.

cluded" at the police station.<sup>120</sup>

#### 4. Incommunicados and the Right to Counsel

Despite the attention given to the prosecution of ordinary offenses, there was greater concern in Spain regarding the treatment of incommunicados, largely those accused of terrorist or political offenses. Incommunicados are prisoners who are insulated from contact with persons who are not detained, thus restricting the capacity of the prisoner to further cooperate with co-conspirators.<sup>121</sup> Since there is no real analogue to this Spanish practice in the criminal justice system of the United States,<sup>122</sup> and since this article and the research upon which it is predicated concentrate on procedures

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120. Cf. Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, in Y. KAMISAR, F. INBAU & T. ARNOLD, *CRIMINAL JUSTICE IN OUR TIME* 19 (A. Howard ed. 1965) (parallel description of lawyers' role in U.S. legal system).

121. See article III, Organic Law of 1980, section 17 *et seq.* for the incommunicado law. See also L.E. CRIM. art. 506 *et seq.*

122. But see the recurrent clamoring for preventive detention, which peaked during the Nixon era. 116 CONG. REC. 16,884, 16,885-88 (May 25, 1970) (statement of Sen. Ervin, in opposition to S.2600 (Dept. of Justice preventive detention proposal)); Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, 55 VA. L. REV. 1223 (1969). Recently, the Supreme Court upheld the New York practice of detaining juveniles to prevent them from committing additional offenses. *Schall v. Martin*, 467 U.S. 253 (1984). Last term, the Court handed down its decision in *United States v. Salerno*, 107 S. Ct. 2095 (1987), affirming the constitutionality of the federal Bail Reform Act, 18 U.S.C. § 3142(e) (Supp. III 1982), which authorizes pretrial detention on the basis of future dangerousness.

In *New York v. Quarles*, 467 U.S. 649 (1984), the Supreme Court came one step closer to the Spanish perspective by recognizing a public safety exception to the *Miranda* requirements. In *Quarles*, a woman claimed to have been raped by an armed assailant, and stated that she had last seen the man enter a nearby supermarket. Two police officers entered the market, and when the suspect (*Quarles*) fled, they gave chase. Upon apprehending *Quarles*, the police frisked him, found an empty shoulder holster, and asked him where the gun was. *Quarles* told the police where the gun was, and the police then formally arrested him and advised him of his *Miranda* rights.

The New York Court of Appeals refused to recognize an emergency exception to the *Miranda* requirements, but the United States Supreme Court reversed, holding that in this case there was a public safety exception to the *Miranda* requirements and that the gun was admissible evidence. 467 U.S. at 655-56. The majority opinion, written by Justice Rehnquist, emphasized the needs of police in "special" situations. While agreeing with the New York Court of Appeals that *Quarles* was in custody for *Miranda* purposes, the Court rejected any presumption that *Quarles'* statements were coerced. *Id.* at 654. Instead, the Court held that in a "kaleidoscopic situation" such as this one, public safety concerns justified not requiring *Miranda* warnings. *Id.* at 656.

Justice Rehnquist's opinion declared that the potential dangers resulting from a dangerous weapon concealed in a public area outweighed the necessity of protecting a suspect's Fifth Amendment rights. *Id.* at 657. *Quarles* may severely reduce the deterrent effect of *Miranda* and encourage the development of police procedures similar to the Spanish treatment of incommunicados. By holding that the motives of the police officers involved were irrelevant to the exception, the Court invited *ex post facto* justification of future violations of suspects' rights. If, under the *Quarles* standard, a single unarmed suspect, handcuffed and surrounded by police officers, presents a sufficient threat to public safety because of a handgun concealed



employed in connection with "common crimes," the Spanish treatment of terrorists, though of decisive significance in Spain,<sup>123</sup> will be analysed only insofar as it illuminates the general detention legislation.<sup>124</sup>

According to the Spanish government, incommunicado status constitutes the principal legal engine in the fight to suppress terrorism. The powerful forces of separatism compel each government of Spain to confront the ineluctable reality that there is not one Spain, but several.<sup>125</sup> Efforts to increase autonomy from Madrid range from distributing leaflets to murdering government officials and their sympathizers. Despite the reality of separatist conflict and strong opposition from the representatives of political groups such as the Basques, and despite its arguable conflict with the seemingly unqualified sweep of the Constitution's language about a right to counsel, article 527 was nevertheless enacted.<sup>126</sup>

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nearby, then most terrorist situations will surely fall under the same exception to the rule of *Miranda*.

123. In Spain, of course, the question of treatment of captured terrorists and other prisoners from the potential breakaway provinces in the Basque country and in Catalonia is an important issue. Terrorism in Spain has its roots in the guerilla warfare which sprang from the Francoist victory in the Civil War. In the 1960s, a new form of terrorism sprang up, particularly in the Basque provinces, Galicia, and Cataluña. The catalyst for these movements was Franco's repression of regional minorities, whose cultural expression and languages were strictly forbidden. While most Spaniards believed that terrorism would disappear with the coming of democracy, the reverse proved to be the case, as ETA (Basque Homeland and Freedom) and the lesser terrorist organizations sought to destabilize the parliamentary regime in its infancy. Even after the issuance of a political amnesty decree on October 15, 1977 and the granting of regional autonomy, the killings continued. The feeling of horror and impotence in the face of mounting attacks played a great part in the adoption of stringent anti-terrorism legislation in a desperate attempt to deal with the problem.

In the minority provinces, especially in the Basque country, the questions of political liberty, independence, and law enforcement are so inextricably interwoven that it is impossible to do justice to the complexity of the controversy in this article. For example, although ETA efforts to overthrow the dominance of Madrid are extremist, the desire for independence or autonomy is shared by many Basques. Indeed, the passage of the Constitution itself was delayed in part because of Basque opposition. The Basques wanted responsibility for maintaining local law and order to be vested in the autonomous Basque government, which already had an embryonic police force. The Spanish army and police officials rejected the idea of allowing regional authorities to control security and public order; as they saw it, the tightly centralized police system that democratic Spain had inherited from Franco was an invaluable asset. See L.A. Times, Oct. 8, 1978, § 1, at 18, col. 3.

124. It should be noted, however, that growing concerns about acts of terrorism directed against Americans abroad and scattered acts of terrorism within the United States have prompted suggestions that it is necessary to enact laws dealing with such terrorism.

125. The provinces of Galicia, Catalonia, Viscaya, Balencia and Mallorca all have their own languages and culture, and the degree of political integration with Central and Southern Spain varies markedly from one province to the next.

126. L.E. CRIM. art. 527, text *supra* at note 73 (denying incommunicados the right of communication with their attorneys provided in art. 520). See *supra* notes 73-74 and accompanying text.

Under current law, prisoners may be held incommunicado for up to ten days and do not enjoy any of the rights granted under article 520, with the exception of some qualified rights guaranteed by subsection 2. An incommunicado cannot: (1) retain his own counsel (though counsel is assigned to him); (2) communicate with third persons under article 520.2(d); or (3) speak with his own attorney, as otherwise permitted by article 520.6(c).<sup>127</sup> Debate concerning article 527 focused on the detainee's right to select his attorney; the status of the incommunicado seemed to be accepted without argument. The Basques argued that resolution of the conflict between the general presumption of innocence in criminal cases and the incommunicado's "presumption of culpability" required granting an individual held incommunicado the same rights and privileges granted to any other detainee under article 520.<sup>128</sup> While a *de oficio* attorney is capable of assuring that the defendant is not coerced or forced to make a formal declaration, the Basques argued that the appointment of such an attorney in many cases nevertheless would preclude an individual from getting the best representation possible.<sup>129</sup>

The Basque representative before Congress, Echeberria Monteberria, stated that the right to counsel has a dual purpose: to prevent the coercion of a formal declaration against the prisoner's will, and to assure that the prisoner gets the best representation and

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127. L.E. CRIM. art. 527, text *supra* at note 73. Except for the added provisions concerning appointment of a *de oficio* attorney and the right to an interview with the lawyer, the current version of article 527 generally follows the language of the statute passed in 1978. The revised article 527 is the most recent contribution to the body of anti-terrorist legislation that extends back to a decree for the prevention of terrorism of August 26, 1975. Royal decree 21 of June 30, 1978, which outlined measures to deal with crimes of armed bands, and which was enacted into law on July 4, 1978, vested jurisdiction over terrorist offenses in the Audiencia Nacional, the highest court with jurisdiction over criminal cases, sitting in Madrid. On December 4, 1978, another law was passed to deal with armed bands. Though its duration was limited to one year, it was extended until superseded by legislation known as the Antiterrorist Law of December 1, 1980.

Royal decree 3 of January 26, 1979 was perhaps the most comprehensive of the anti-terrorist laws. Governing the "protection of civic safety" (*protección de Seguridad Ciudadana*), the decree established a series of exceptional procedural norms, applicable not only to crimes of terrorism but also to all forms of robbery and picketing at unlawful strikes. In some of the provinces, however, prosecutors were reluctant to avail themselves of the law where the crime was not in fact terrorist in origin. Most importantly, the law permitted the magistrates to impose provisional or temporary detainment and incommunicado status even for minor offenses if they had been committed for terrorist purposes. The decree was regulated procedurally by articles 502-19 of the Code of Criminal Procedure, which concern temporary imprisonment, and articles 520-27, which govern the right to counsel, the subject of this article.

128. D. CONG., No. 50, June 30, 1983, at 1810, col. 2.

129. *Id.*

advice possible.<sup>130</sup> The appointment of a *de oficio* attorney guarantees the former goal, but not the latter, given that fulfillment of the latter requires that the lawyer have knowledge of the detained person's situation and that the detainee have confidence in the attorney's ability and sincerity; these elements are likely to be lacking where the state appoints a *de oficio* attorney for the detainee.<sup>131</sup> The Basques suggested that a person who is suspected of committing a crime against the state should receive more, rather than less, protection of his rights, since he is effectively treated as guilty rather than presumed innocent upon detention. Greater protection, it was argued, could only be achieved by selecting an attorney already known to the detainee or allowing the detainee to select his own attorney.<sup>132</sup>

Finally, the Basques were concerned about when the Colegio de Abogados would be contacted and at what stage incommunicados would have the right to an attorney. The Grupo Parlamentario Mixto argued that the right to counsel presupposed an immediate communication to the Colegio de Abogados. Its spokesman Bandres Molet commented that, whatever the time limit, the Colegio de Abogados was likely to be notified only five or six hours before the incommunicado period expired.<sup>133</sup>

The Socialists offered several justifications for their version of article 527.<sup>134</sup> Initially, the Socialists argued that incommunicado status was needed to assure national security. Responding to charges that incommunicado status facilitated abuse by the police forces of their security responsibilities, the Socialists argued that four elements assured that the Constitution would not be violated. First, the law does not permit the imposition of incommunicado status until the detainee appears before a magistrate who must weigh the sufficiency and probative value of the evidence presented against the defendant: "it is the judge who decrees the incommunication" and it is "the judge who fixes the limits of the incommunication."<sup>135</sup> Second, once the judge has rendered an individual an incommunicado, an attorney, albeit *de oficio*, is appointed to be present during formal declarations. "The incommunicado enjoys at all times the assistance of an attorney," it was argued in the Senate.<sup>136</sup> In the Congress, it was also noted that the *de oficio* attorney is not selected by the police but by

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130. See *supra* note 96.

131. D. CONG., No. 60, Sept. 29, 1983, at 2838, col. 2.

132. *Id.*

133. *Id.* at 2824, col. 2.

134. *Id.* at 1811, col. 1. See also *supra* note 101.

135. D. CONG., No. 50, June 30, 1983, at 1811, col. 1. See L.E. CRIM. art. 502 *et seq.*

136. D. SEN., No. 36, Nov. 22, 1983, at 1757, col. 1.

the Colegio de Abogados, an institution without links to the security forces.<sup>137</sup> Third, a medical doctor can "visit the detained person every time he is requested to do so."<sup>138</sup> The physician thus reinforces one of the roles of the lawyer whose presence assures—in the government's view—that the detainee will not be abused or tortured. Fourth, the Socialists argued, *incommunicado* status was already established in Spanish law and was therefore not an invention of the present regime.<sup>139</sup>

Secondarily, the Socialists also contended that the reading of a person's rights under article 520.2 was in itself an assurance that rights would not be violated, especially since a detained person had a right to remain silent and not to incriminate himself.<sup>140</sup> Left unanswered, however, was the criticism that this was essentially an evasion, because it gave the police forces the opportunity to justify any coerced statements by merely arguing that the defendant had "voluntarily" communicated such statements.

The opposition stressed the potential for abuse under articles 520.2(a) and 527, the probable unconstitutionality of the entire "*incommunicado*" concept, and the violation of international treaties on human rights.<sup>141</sup> Before the Congress, Perez Rojo, speaking for the Grupo Parlamentario Mixto, expressed the view that international human rights organizations have accepted the right of those charged as terrorists to be interviewed by an attorney of his or her choice. He declared:

[T]he contents of this norm should be interpreted in conformance with Article 10.2 of the Spanish Constitution in light of international treaties and Article 14.3(b) of the International Covenant on Civil and Political Rights, [which] recognize the right of communication with an attorney of one's own election, an expression which repeats itself in Article 14.3(d) of the above mentioned Article and is articulated in Article 6.3(c) of the European Convention for the Protection of Fundamental Liberties and Human Rights.<sup>142</sup>

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137. D. CONG., No. 50, June 30, 1983, at 1812, col. 2.

138. D. SEN., No. 36, Nov. 22, 1983, at 1757, col. 1.

139. Cf. D. SEN., No. 37, Nov. 23, 1983, at 1767, col. 1.

140. D. CONG., No. 60, Sept. 29, 1983, at 2820, col. 1.

141. Portabella I. Rafols, speaking on behalf of the GPM, argued that a detainee, denied the right to an interview with his attorney as permitted for those charged with ordinary crimes, was vulnerable to abuse under articles 520.6(c) and 527. D. SEN., No. 37, Nov. 23, 1983, at 1765, col. 2.

142. D. CONG., No. 60, Sept. 29, 1983, at 2839, col. 2.

Perez Rojo concluded that nothing would be lost if the detained person is allowed an interview with his attorney immediately upon detention and is then taken to a formal declaration. Perez Rojo believed that by permitting a detainee to select his own attorney, greater pressure would be placed on the detainee to make a formal declaration as soon as possible.<sup>143</sup> The GPM also expressed the view that article 527 does not conform with article 55.1 of the Spanish Constitution, which guarantees to all citizens certain fundamental rights, which cannot be suspended except in "*un estado de excepción o de sitio*" (a state of emergency or martial law).<sup>144</sup>

It is difficult to explain adequately the intensity of the debate over the incommunicado issue in an article devoted to defense of prisoners charged with ordinary violations of the Criminal Code. The value of this discussion may lie in what it suggests about how the right to counsel was viewed apart from its relevance to terrorism. It is a testament to the faith of Spaniards in the institutions of liberal democracy that they believe the interposition of lawyers would make a difference in the highly charged and volatile political situation of the incommunicados. Arguably, the debate involved more than an attempt at obstructing or embarrassing the will of the dominant political party. Just as plausibly, it reflects a widespread movement in Spain to liberalize the institutions of social and political control.

In a sense, much of the debate involved opposing sides talking past each other. The opposition wanted a guarantee that would dispel the ghosts of the Francoist past. The government argued that the new democratic order provided sufficient assurance that human rights would be protected—a proposition impossible to disprove except by future events. Throughout the debates, the government said "trust me," while the opposition said "show me." The government believed that independent institutions like the Colegio de Abogados could be entrusted with the responsibility of appointing lawyers for the incommunicados. Indeed, in the government's view, permitting the Colegio de Abogados to assign a lawyer was itself a progressive stance on the right to counsel for incommunicados, since article 17.3, strictly read, does not require that the lawyer be elected by the accused, but only provides generally for the assistance of counsel. But to the opposition this was a regressive position because, in its view, the right of the accused to name and confer with his lawyer was an inherent aspect of the right to counsel. Of greatest importance to the opposition was the defendant's right to name a lawyer who would represent him from the

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143. *Id.* at 2845, col. 1.

144. *Id.* at 2839, col. 2.

initial contact at the police station through trial and any appeal. The opposition disparaged the "double figure of an initial lawyer, notary, [a] mute witness . . . and then later the lawyer who is defender."<sup>145</sup>

The government's ultimate rejoinder was the strength of its sweeping victory in the parliamentary elections preceding the debate. On the question of internal security—the issue overshadowing the debate on the incommunicados—the government swept aside all proposals to modify its legislation, and article 527 was enacted as submitted.

#### IV. THE RIGHT TO COUNSEL AS A FUNDAMENTAL NORM IN SPANISH JUDICIAL REVIEW: *UN RUMBO MAS PROGRESIVO*?<sup>146</sup>

While the Spanish Parliament debated the scope of the right to counsel, the judiciary affirmed the constitutional principle of assistance of counsel as a fundamental norm, thereby invalidating convictions in which defendants had not been represented by counsel. The discussion thus far has emphasized the legislative process and constitutional development. But the rise of judicial review in Spain—the growth of constitutionalism—is an important development of nearly equal significance, and one which suggests a more liberal and progressive route toward protecting the rights of the accused.<sup>147</sup>

Given the importance of parliamentary supremacy in continental

145. This exchange between the spokesman for the government and the leader of the GPM is reported in D. CONG., No. 50, June 30, 1983, at 1813, col. 1. See also *id.* at 1819, col. 2.

146. *Un rumbo más progresivo* might be translated as "a more progressive way" or "a more progressive route."

147. With this more progressive policy, Spain thus joins the post-war constitutionalist movements eloquently discussed by Professor Mauro Cappelletti. See Cappelletti, *The Significance of Judicial Review of Legislation in the Contemporary World*, in 1 IUS PRIVATUM GENITIUM 147 (1969). Elsewhere, Professor Cappelletti has written:

One of the essential legal developments of our time is, for a growing number of civil law countries, the introduction of judicial review of the constitutionality of legislation. Although this institution has ancient historical precedents, the matrix of its modern growth may certainly be seen, in part, in the American model. Developments in this field are cutting across the boundaries of legal families . . .

Judicial review of legislation, a rarely encountered institution until recent times, has been introduced in the last few decades in various countries throughout the world. Since the last World War, the growth of this institution has experienced what could well be called a worldwide explosion. It almost appears as if no Western, or even Eastern, country purporting to be a modern democracy, can resist the temptation to adopt some form of control—judicial or otherwise—of the constitutionality of legislation. The phenomenon, of course, is particularly interesting where the power of control is entrusted to a judicial body, with the emergence of an interplay between two different and independent powers.

M. CAPPELLETTI & W. COHEN, *supra* note 82, at 12-15.

theory and practice,<sup>148</sup> recent applications of the constitutional right to counsel by a judiciary not historically renowned for its independence serve to legitimate the proposition that a democratic order requires fundamental equality between the state and the accused in the criminal justice process, and that assistance of counsel is critical to the equation.<sup>149</sup> The Spanish cases suggest that while the work of the Cortes was both important and constitutionally required, criminal convictions might be pervasively subject to judicial invalidation if defendants are denied legal assistance.

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148. See J. MERRYMAN, *THE CIVIL LAW TRADITION* (2d ed. 1985); compare Barker, *Constitutional Adjudication in Costa Rica: A Latin American Model*, 17 U. MIAMI INTER-AM. L. REV. 249, 250-52 (1986) (little judicial control over the other branches of government in the traditional continental systems).

149. Justice Sutherland's opinion in *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932), remains among the most trenchant statements of the necessity for counsel in criminal cases prosecuted in a democratic order which values human rights:

It has never been doubted by this court, or any other so far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment, and that they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirements of due process of law . . . .

What, then, does a hearing include? Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be denial of a hearing, and, therefore, of due process in the constitutional sense.

The impact of the American constitutional tradition upon contemporary Spain can be seen in the importance Spanish scholars attach to developments in the United States. A leading Spanish commentator has written: "The technique of attributing to the Constitution a superior normative value, immune to ordinary laws and determining their validity, its superior judicial protection, is the most important creation, along with the federal system, of North American constitutionalism and its great innovation from the English tradition from which it emerged." E. GARCIA DE ENTERRIA, *LA CONSTITUCION COMO NORMA Y EL TRIBUNAL CONSTITUCIONAL* [THE CONSTITUTION AS NORM AND THE CONSTITUTIONAL TRIBUNAL] 51 (1981).

### A. Constitutional Court Powers

Before commencing a discussion of the cases, some consideration of the power of the Constitutional Court and its position relative to the Cortes is warranted. The Constitution of 1978 explicitly makes the Constitutional Court supreme in matters of constitutional interpretation. The critical articles of the Constitution are 161, 163 and 164, which are set out in relevant part below:

#### *Article 161*

1. The Constitutional Court has jurisdiction over the whole of Spanish territory and is competent to hear:

a) Appeals against the alleged unconstitutionality of laws and regulations having the force of law. A declaration of unconstitutionality of a legal provision with the force of law, interpreted by jurisprudence shall also affect the latter, although the sentence or sentences handed down shall not lose their status or *res judicata*.

#### *Article 163*

If a judicial body considers, in some action, that a regulation with the status of law which is applicable thereto and upon the validity of which the judgment depends, may be contrary to the Constitution, it may bring the matter before the Constitutional Court in the circumstances, manner and subject to the consequences to be laid down by law, which shall in no case be suspensive.

#### *Article 164*

1. The judgments of the Constitutional Court . . . shall have the validity of *res judicata* from the day following their publication, and no appeal may be brought against them. Those which declare the unconstitutionality of a law or a rule with the force of law, and all those which are not limited to the subjective acknowledgement of a right, shall be fully binding on all persons.<sup>150</sup>

With far greater precision and clarity than the U.S. Constitution, the Spanish Constitution made the Constitutional Tribunal supreme.<sup>151</sup> Though its legal system is firmly rooted in the civil law tradition,<sup>152</sup> Spain "opted for a concentrated system of constitutional adjudication, with exclusive jurisdiction to decide constitutional ques-

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150. CONST. arts. 161, 163, 164.

151. Note, *The Spanish Constitutional Tribunal in Theory and Practice*, 18 STAN. INT'L L.J. 435 (1982) [hereinafter Note, *Constitutional Tribunal*].

152. For an excellent background work on civil law, see J. MERRYMAN, *supra* note 148.



tions vested in a small politically-appointed body composed primarily of law professors with no prior judicial experience.”<sup>153</sup> Indeed, so important was this principal of constitutional supremacy that the first organic law passed by the Cortes after it adopted the Constitutional Tribunal was the Organic Law of the Constitutional Tribunal (LOTCT).<sup>154</sup> The LOTCT specifies the powers and responsibilities of the Tribunal, satisfying the constitutional mandate that: “An organic law shall regulate the functioning of the Constitutional Court, the statutes of its members, the procedure to be followed before it, and the conditions governing actions brought before it.”<sup>155</sup>

While the Cortes was fulfilling its constitutionally-imposed duty to define the requirements of the Constitution with respect to the right to counsel, the Constitutional Tribunal, armed with the powers granted to it under the LOTCT, was already applying the Constitution to cases before it which could not await the enactment of implementing legislation. Indeed, the LOTCT provides for speedy judicial review which has been described as “blinding.”<sup>156</sup> Of course, the implementing legislation itself, eventually passed without reference to these decisions of the Court—some of which were *sub judice* while the Cortes debated the right to counsel provisions—is also subject to future scrutiny by the Constitutional Tribunal.<sup>157</sup>

### B. Selected Case Law

In December 1982, the Second Constitutional Tribunal, sitting in Pamplona, annulled sentences of nine to eighteen years given to three alleged ETA Commandos.<sup>158</sup> The only proof of the crimes of violence charged against the defendants were statements that they had made at the police commissary upon their arrest. When they eventually appeared in court, the prisoners repudiated those statements.

The Court held that declarations made without the guarantees of article 17 of the Constitution—that is, without the assistance of counsel—“did not have the character of proof.”<sup>159</sup> The Court declared

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153. Note, *Constitutional Tribunal*, *supra* note 151, at 435-36.

154. *Leyes Organicas Del Tribunal Constitucional [LOTCT] (Spain)*; Note, *Constitutional Tribunal*, *supra* note 151, at 437-39.

155. CONST. art. 165.

156. LOTCT arts. 63-68. See also Note, *Constitutional Tribunal*, *supra* note 151, at 445-46.

157. Ironically, the Socialists, now the ruling party in Spain, threatened to have the LOTCT declared unconstitutional shortly after its adoption by the Cortes. The PSOE feared that the Constitutional Tribunal had too much power, and that it constituted a third branch of the Cortes. See generally *El Pais*, July 29, 1979, at 9, col. 1.

158. *El Pais*, Dec. 3, 1982, at 34, col. 2.

159. *Id.*

that: "The only proof that served to condemn the defendants was their confessions to the police, which were obtained without the constitutional guarantees which suppose the presence of counsel. In the present case it is evident that only the confessions before the police undercut the presumption of innocence."<sup>160</sup> The Court held that the confessions would have been sufficient to serve as the basis of the sentence imposed only if they had been repeated and ratified in open court.

The Court thus applied the rather general language of the Constitution to strike down a conviction in which it was undisputed that the defendants had confessed without the presence of counsel. The defendants, suspected terrorists, had been held pursuant to the statute which permitted incommunicado detention, and had claimed in court that the statements they made were induced by torture.<sup>161</sup>

This decision may sweep aside many of the technical qualifications placed on the right to counsel by article 520 of the Code of Criminal Procedure. While the statute permits statements to be made without legal assistance if the lawyer fails to arrive within eight hours of notification and makes counsel mandatory only at the formal declaration, this decision, if read broadly, might invalidate all statements not made in the presence of counsel.<sup>162</sup> Of course, the case was decided while the amendments were still under consideration, and it is conceivable that subsequent decisions will hold that the qualifications imposed on article 17.3 of the Constitution by the revised article 520 pass muster under the Spanish Constitution.

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160. *Id.* at col. 3.

161. A U.S. court might well have reversed the conviction on the ground that the confessions were uncorroborated. See *Opper v. United States*, 348 U.S. 84 (1954); Comment, *Corroboration of Extrajudicial Statements*, 7 STAN. L. REV. 378 (1955). In addition, there is the possibility of constitutional infirmity based on cases that prohibit the taking of statements without the advice of rights and an informed waiver. See *Oregon v. Bradshaw*, 462 U.S. 1039 (1983); *Edwards v. Arizona*, 451 U.S. 477 (1981); *Michigan v. Mosley*, 423 U.S. 96 (1975).

When to require a waiver and what constitutes a valid waiver are issues that have challenged U.S. courts. See *North Carolina v. Butler*, 441 U.S. 369 (1979) (*Miranda* does not require an express waiver, and waiver may be inferred from the circumstances). See also *State v. Carter*, 296 N.C. 344, 250 S.E.2d 263 (1979) (where the defendant voluntarily accompanied police to station, submitted to questioning and implicated himself in a murder, the North Carolina Supreme Court looked at the totality of the circumstances and held the written confession obtained as a result of the questioning admissible). Cf. *United States v. Gillyard*, 726 F.2d 1426 (9th Cir. 1984) (suspect who waived *Miranda* rights before taking polygraph test must be readvised of rights before post-polygraph interrogation).

162. However, the Spanish bench may hold, as U.S. courts have, that some police statements do not rise to the level of interrogation, and that statements volunteered by a suspect are admissible. See *Rhode Island v. Innis*, 446 U.S. 291 (1980) (where the Court held that police statements made after the defendant had requested counsel were not designed to elicit an incriminating response from defendant and were thus not interrogation).

In a subsequent decision, the same division of the Constitutional Tribunal gave added force to the concept of assistance of counsel when it set aside an appellate judgment affirming a conviction for "dangerousness," where the defendant filed his appeal without the assistance of counsel.<sup>163</sup> Although the defendant elected to appeal his sentence without his lawyer, apparently because he could not locate him, the Court nullified the conviction. It found that the principle of equality between the state and the defendant demanded that the defendant receive legal assistance in the appellate process.<sup>164</sup>

The Court reached its conclusion by interpreting constitutional and statutory provisions. Article 24.2 of the 1978 Constitution gives all persons the right "to the defense and assistance of a lawyer."<sup>165</sup> This article reflected prevailing Spanish criminal procedure, which provided a right of defense to all charged with punishable offenses and required legal representation for defendants.<sup>166</sup> The Court held that the appeal was unconstitutionally denied when it was rejected because it had not been made in the form required by law. Since the defendant had no lawyer, he could not effectively pursue the appeal, and the requirement that he bring the appeal within three days or be barred from bringing it later violated his right to a defense and to legal assistance in presenting his appeal.

Though this case deals with a phase beyond the initial confrontation between police and those suspected of crime, it does suggest that the Spanish Constitutional Tribunal is prepared to implement expansively the human rights guarantees of the Constitution. It also indicates that at least some Spanish judges regard the assistance of counsel as fundamental in the scheme of human rights, and are prepared to measure its scope not only in accordance with Spanish jurisprudence, but indeed as the Constitution itself mandates in article 10.2: "in accordance with the Universal Declaration of Human Rights."<sup>167</sup>

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163. STC 42/1982, de 5 de julio (Sala Segunda). Recurso de amparo num. 366/1981 (RA-56), 16-17 BOLETIN JURISPRUDENCIA CONSTITUCIONAL 630 (Aug.-Sept. 1982).

164. *Id.*

165. In the United States, the emphasis on the unique protection afforded by the presence of an attorney (rather than another individual) was highlighted in *Fare v. Michael C.*, 21 Cal.3d 471, 579 P.2d 7, 146 Cal. Rptr. 358 (1978). In *Michael C.*, a juvenile requested the presence of his probation officer, and the court held that this was not an invocation of the *Miranda* right to remain silent. The court emphasized that only an attorney can effectively protect a suspect's rights during interrogation and alleviate the inherently coercive nature of police questioning.

166. L.E. CRIM. art. 118, which fleshes out this right, is reinforced by article 860 of the Criminal Code, which requires appointment of counsel in those cases where defendants are insolvent or otherwise unable to afford an attorney.

167. CONST. art. 10, para. 2 reads: "The principles relating to the fundamental rights

A 1981 case in which the First Division of the Constitutional Tribunal annulled a robbery conviction sheds further light on the Spanish judiciary's perception of the importance of article 17.3. The First Division's decision was predicated on the presumption of innocence guaranteed by article 24.2 of the Constitution and the guarantee of assistance of counsel of article 17.2.<sup>168</sup> The conviction had been obtained on the basis of a confession taken without assistance of counsel, and the trial took place in 1976, two years prior to the adoption of the Constitution. Even so, the Court annulled the conviction, holding that the principles expressed by the Constitution were already part of the criminal justice process, and a confession taken without the presence of counsel could not therefore offset the presumption of innocence, an overriding tenet of the present constitutional order.

Presumed innocent, the defendant could not be imprisoned or fined without evidence that he had committed a crime. For an item of proof to be considered evidence, the Court reasoned, it would have to be tested judicially. Police testimony concerning statements alleged to have been made by the defendant had the value of an accusation only. In order to be admissible, such a confession would have to be reiterated in court, at which time counsel would be present. In short, the statement would have to be received with the protections afforded by formal proceedings.

The opinion of the Court, and particularly its apparent retroactivity,<sup>169</sup> suggest that the Spanish Constitutional Tribunal may, in the future, measure convictions by a standard that would moot the questions debated by the Cortes. More likely, the Tribunal will moderate its position relative to cases heard before passage of the legislation, and overrule convictions only in cases where the defendant is unrepresented at the formal declaration, or where the rules set out in article 520 or article 527 have been violated. In all events, it seems likely that if the Spanish judiciary continues on its way, it, like the United States Supreme Court, will have the final word as to the nature and extent of the right to counsel.

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and liberties recognized by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements thereon ratified by Spain."

168. STC de 28 de julio de 1981 (Sala Primera). Recurso de amparo num. 113/1980 (RA-23), *BOLETIN JURISPRUDENCIA CONSTITUCIONAL* 439 (Oct. 6, 1981).

169. The opinion is rather confusing on the question of retroactivity. Certainly, none of the detailed exposition which may be found in many U.S. decisions on this question appears in the opinion. See *United States v. Johnson*, 457 U.S. 537 (1982).

## V. CONCLUSION

The United States Supreme Court declared in *Miranda v. Arizona* that it was "impossible . . . to foresee the potential alteration which might be devised by Congress or the States in the exercise of their creative rule-making capacities," and that it could not say "that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process."<sup>170</sup> The Court "encourag[ed] Congress and the States to continue the laudable search for increasingly effective ways of protecting the rights of the individuals while promoting efficient enforcement of [the] criminal laws."<sup>171</sup> With this language, the *Miranda* Court acknowledged the importance of the legislative process in the implementation of the U.S. Constitution. Nonetheless, in the United States, the legislative role in shaping the development of constitutional rights is peripheral. "[T]he Constitution is what the judges say it is,"<sup>172</sup> and there is, at least in terms of tradition, no explicit role in the United States Constitution for congressional participation beyond the amendment process,<sup>173</sup> rulemaking,<sup>174</sup> withdrawing jurisdiction,<sup>175</sup> and confirmation or impeachment of judges.<sup>176</sup>

Spain presents a different situation, in which the role of the national legislature in determining constitutional rights is more significant than that of the U.S. Congress.<sup>177</sup> Study of legislative deliberations is thus more important to an appreciation of the extent of constitutional rights in Spain than it is in the United States. As in statutory construction in the United States, ascertaining legislative intent is important in determining the meaning of the Spanish Constitution, in a way unknown in U.S. jurisprudence.<sup>178</sup>

Theoretical positions maintained prior to the legislative debates went through a metamorphosis. The Socialists, burdened with the responsibility of government, permitted internal security considera-

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170. *Miranda v. Arizona*, 384 U.S. 436, 467 (1966).

171. *Id.*

172. The phrase is that of Chief Justice Hughes, from a speech given on May 3, 1907 when he was Governor of New York. Hughes declared: "We are under a Constitution, but the Constitution is what the judges say it is . . ." L. FRIEDMAN & F. ISRAEL, *THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969* Vol. III, 1896 (1969).

173. U.S. CONST. art. V.

174. *Cf. Hanna v. Plumer*, 380 U.S. 460 (1965).

175. U.S. CONST. art. III, § 2, para. 2.

176. *Id.* art. II, § 2, para. 2.

177. Of course, the first few judicial decisions under the constitutional regime suggest that Spanish judges are likely to move considerably further and faster with the engine of judicial review than the compromise-derived legislation of the Spanish Parliament. *See supra* notes 158-69 and accompanying text.

178. *See Solem v. Helm*, 463 U.S. 277 (1983); *Furman v. Georgia*, 408 U.S. 238 (1972).

tions to play a major role in shaping their legislative proposals for fixing the terms of the right to counsel. This shift can be seen in the difference between the initial proposals of the Ministry of Justice, which favored defendants, and the subsequent compromise with the Ministry of the Interior. As a result of this compromise, police security operations are not hampered by a process designed to insulate the defendant from police overreaching at all costs, as they might have been under the Ministry of Justice proposal.

The origins and sympathies of the political factions which sought to amend the government's proposals were instrumental in shaping their law enforcement agenda. On the extreme left, the Communists either proposed legislation or attempted amendments which radically departed from the practices of the Francoist era.<sup>179</sup> The Communist Party's proposals, if adopted, would have led to a position most consistent with a regime of personal liberty. The regionalist parties, such as the Grupo Parlamentario Mixto and the Basques, were naturally supportive of measures which would loosen the grip of the Madrid government on the other provinces of Spain. But a genuine belief in liberal democracy and its institutions was also undoubtedly an important motivation in regionalist support for protection of suspects. In addition, as the debates demonstrated, the old fear of the forces of internal security and of Francoist hegemony insured support for laws which would check the power of the police. As the Socialists wanted to insure their capacity to govern and to prevent the disintegration of Spain, so the regionalists wanted a Spain in which, except for the Francoist era, autonomy and non-intervention were characteristic of the Spanish political experience.

This article has sought to describe these clashes of viewpoint and attempted to trace the confluence of positions as they merged into the legislation presently in force. While the commanding Socialist majorities in the Cortes make it difficult to calibrate the impact of minority points of view, it is beyond argument that some minority positions were influential. Specific modifications of the government's legislation were obtained. Moreover, the extent to which the government moderated its position in anticipation of objections from the minority parties

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179. The Communists' proposed amendments conformed to the traditional perception of "Eurocommunism." "Eurocommunism" is the term used to describe the type of communism typically espoused in Western European countries. This communism stresses civil and political rights. Moreover, unlike the communist ideology typified by the Soviet Union, Eurocommunism promotes change through existing systems of parliamentary democracy. *See generally* S. CARRILLO, *EUROCOMMUNISM AND THE STATE* (1978); CUNY CONFERENCE ON HISTORY AND POLITICS, 1978, *EUROCOMMUNISM, THE IDEOLOGICAL AND POLITICAL-THEORETICAL FOUNDATIONS* (G. Schwab ed. 1981). *See also* Mujal-León, *The Spanish Communists and the Search for Electoral Space*, in *SPAIN AT THE POLLS*, *supra* note 7, at 161, 170, 176.

can never be totally demonstrated, especially given the governing party's historically powerful position in the Cortes. Clearly, there was pressure from the left, including the press and political institutions, to nudge the government along the civil liberties path. Much of the government's presentation was defensive, and here again political positions were more important than reasoned analysis in fleshing out constitutional detail.

At least at the level of discourse, the Francoist legacy was largely discredited. The old dictator's institutions were overthrown seriatim, and ironically only the King survived attacks on the old order, as he saved the new government in its time of greatest danger.<sup>180</sup> Thus, legitimacy was, for most, measured by the distance from the authoritarian past. While there existed in some sectors a yearning for the romantic simplicity of fascist rule, most of the influential sections of Spanish society realized that time had passed Spain by, and that if Franco marked a stage along the road of modernization through consolidation of the Spanish nation, the old institutions of political domination were in every sense outmoded and out of step with the march of other Western nations.<sup>181</sup>

Unlike the U.S. experience, the Spanish Constitution's implementation was forged in the give and take of legislative exchange. Political considerations were thus not only implicit, as perhaps they are in the United States, but were expressed and linked to broader political agendas. The connection between political party and constitutional provision was direct in a way unknown in the U.S. experience.

The Spanish experience thus bears continued observation. Its nascent steps toward judicial review are part of the postwar drive toward constitutionalism, and can be expected, with the singularity and uniqueness characteristic of the Spanish, to significantly check parliamentary supremacy. But simultaneously, and of more consequence beyond Spain's frontiers, is the example of an elected parlia-

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180. See *The Franquista Coup that Failed*, TIME, Mar. 9, 1981, at 22, which chronicles the resourcefulness of Franco's handpicked heir in frustrating the ambitions of the dictator's latter-day adherents. In the end, the King literally rescinded the proclamation of martial law which had been designed to facilitate the overthrow of the constitutional regime. BOLETIN JURISPRUDENCIA CONSTITUCIONAL 439-45 (Oct. 6, 1981).

181. See *supra* text accompanying notes 21-27. Spanish achievement compares very favorably with reforms in other countries with a history of totalitarian rule. Compare the development of these rights in Germany, J. LANGBEIN, *COMPARATIVE CRIMINAL PROCEDURE: GERMANY* (1977); the U.S.S.R., Huskey, *The Politics of the Soviet Criminal Process: Expanding the Right to Counsel in Pre-Trial Proceedings*, 34 AM. J. COMP. L. 93 (1986); and the People's Republic of China, 73 J. CRIM. L. & CRIMINOLOGY 171 (1982) (a translation of the Criminal Procedure Law of the People's Republic of China).

ment shaping the contours of human liberty. The U.S. experience has largely been that of an elitist institution guarding the interests of political minorities. The Spanish adventure should test the capacity of majoritarian institutions both to protect human rights and to govern effectively.



