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The role of prison in relation to national security

Abstract

This article analyses the role prisons play within the structure of the state in terms of national security. To this end, the purpose conferred on prisons by the Spanish Constitution is examined. In addition, the possibilities of obtaining information from inside correctional facilities for the purpose of compiling criminal intelligence are examined from a legal point of view.

Keywords

Prison, national security, security measures, information, criminal intelligence.

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National security: Conceptual aspects

Doctrinal perspective

In the course of modern history, the concept of national security has revealed its complex, multi-faceted and highly sensitive nature in the face of political and social changes. The resulting difficulty in reaching a doctrinal, widely-supported consensus regarding the definition of national security is one of the subjects of this analysis. Briefly, three schools of thought can be distinguished in relation to the concept of national security: traditionalist, widening and critical.¹

The common denominator in the various definitions following the traditionalist approach is the perceived existence of an external threat to the state. Along these lines, Lasswell conceptualised national security as the «freedom from foreign dictation»². In a similar way, although adding a wider notion, Lustgarten and Leigh understood it as the defence of «democratic practice from foreign manipulation along with the ability to defend the nation's independence and territory against military attack»³. The cited definitions of national security bear the hallmarks of Cold War political dynamics, where threats for the survival of states originated mainly from counterparts belonging to the opposing bloc. The result was a markedly militaristic character⁴ which reduced national security to its defensive aspect⁵ –even confounding the two– since the former was deemed to be upheld by an increase of military might.⁶

The widening of the notion of threats to national security caused a corresponding broader understanding of the meaning of national security itself. Thus, the widening approach considers that possible harmful factors for the state's immunity do not only originate from other nations. It extends to elements or actors located within its own borders (ecology, economy, vulnerable groups of people, identities, migratory flows, etc.); as well as external non-state actors with a transnational scope (particularly

1 MOLOEZNIK, P. «Seguridad Nacional» in DÍAZ FERNÁNDEZ, A. M. (dir.), *Conceptos fundamentales de inteligencia*. Valencia: Tirant lo Blanch, 2016, pp. 320-322.

2 LASSWELL, H. *National Security and Individual Freedom*. New York: Mc Graw-Hill Book, 1950, p. 51.

3 LUSTGARTEN, L. and LEIGH, I. *In From the Cold: National Security and Parliamentary Democracy*. New York: Oxford University Press, 1994, p. 26.

4 FERNÁNDEZ HERNÁNDEZ, A. «Ciberamenazas a la Seguridad Nacional», in González Cussac, J. L. and Cuerda Arnau, M. L. (dirs). *Nuevas amenazas a la seguridad nacional: terrorismo, criminalidad organizada y tecnologías de la información y la comunicación*. Valencia: Tirant lo Blanch, 2013, p. 164.

5 MOLOEZNIK, P. *Op. cit.*, p. 320.

6 BALLESTEROS MARTÍN, M. Á. *En busca de una Estrategia de Seguridad Nacional*. Madrid: Ministry of Defence, 2016, p. 58.

organised crime and terrorism).⁷ The heterogeneous character of potentially destabilising factors for national security thus entails an increase in the means deployed by the state for its preservation. The classical dyad of armed forces and security forces –designed to fight external and internal violent threats, respectively– turns out to be insufficient in the face of a concept of security that needs to provide answers to threats of an economic and environmental nature.⁸ Thus, diplomacy or humanitarian aid, to mention two examples, have been added to the heterogeneous list of state mechanisms designed to contribute to the difficult task of maintaining national security.⁹

National security has become subject to a high degree of uncertainty. The reasons for this are threefold: the emergence of non-traditional security challenges that originate outside the geopolitical-military domain, e.g. natural disasters; the need to factor in potential negative action by criminal non-state actors with worldwide operational capacity; and the high degree of mutual dependence brought about by globalisation. The state continues to maintain its basic commitment of providing the conditions of safety for its citizens. However, this safety is now further than ever from reaching an ultimately utopian absolute. Current security policies have to operate within an unstable context where certain threats are characteristically unpredictable. This situation underlies the current rise of the concept of resilience alongside national security. In case of a threat actually materialising, resilience would allow the continuity of the exercise of government and the re-establishment of a safe environment for citizens, ensuring the provision of any basic services affected.¹⁰

The new entries among the list of threats for the invulnerability of the state, along with their heterogeneous and uncertain nature, are completed by a third feature –in line with the widening approach to national security– consisting in the use of an intersubjective perspective which introduces public opinion as a determining agent for the security-relatedness of a given issue.¹¹ Involving society in determining the challenges for security presents a positive aspect in that it conceives state immunity as a collective undertaking which concerns all citizens. However, in the author's understanding this also entails a shift towards the unreal in the sense that such a high goal would only be attainable in an ideal society.¹² Reality brings out a negative aspect of

7 MOLOEZNIK, P. *Op. cit.*, p. 321.

8 FERNÁNDEZ HERNÁNDEZ, A. *Op. cit.*, p. 165.

9 GONZÁLEZ CUSSAC, J. L. and FLORES GIMÉNEZ, F. «Una metodología para el análisis de las amenazas a la seguridad, la evaluación de las respuestas y su impacto sobre los derechos fundamentales». *Cuadernos de Estrategia*, n.º 188, 2017, p. 18.

10 MORALES MORALES, S. «La resiliencia en el marco del sistema de seguridad nacional». *Cuadernos de Seguridad y Defensa*, n.º 77, 2018, pp. 83 ff.

11 MOLOEZNIK, P. *Op. cit.*, p. 321.

12 For the perception of citizens in relation to the relevance of their role regarding national security, see SANZ Y CALABRIA, A. «¿Por qué a la señora María le importa un rábano la estrategia de seguridad nacional?». *Documentos de Seguridad y Defensa*, n.º 63, 2014, pp. 113-130.

this involvement of citizens, made visible in the choice of issues included on the state security agenda and epitomised by the following question: are the threats perceived by society real? On the hierarchical pyramid of human needs, Maslow ranks security as the number one immaterial need of human beings.¹³ The human desire to develop one's existence within a safe environment is becoming especially problematic in the current historical era which is marked by the presence of countless blurred and diverse dangers. The uncontrollable nature of the risks looming for postmodern society has led sociologists to coin the term *risk society*.¹⁴ People of the postmodern age live in an essentially uncertain environment which gives rise to a feeling of vulnerability and, consequently, anxiety.¹⁵ Their representation of reality is conditioned by both internal and external factors. Together with people's direct perceptions, which are not free of a certain cognitive bias, there are other perceptions mediated by external agents. The much bandied-about phenomenon of *fake news*, which is propagated through certain communication media and spread by social networks, contributes to creating supposed threats, risks and dangers that can be perceived as real by society. Faced with this situation, citizens demand state action directed at neutralising such risks. However, failure to contain an unreal enemy created and disseminated by disinformation campaigns could entail a delegitimisation of the state, as well as of state institutions dedicated to safeguarding security.

As opposed to the restrictive or widening concepts of national security (created, respectively, by the traditionalist and widening currents), the camp referred to as critical does not question the content of national security but rather its nature. For this school of thought national security is essentially a political discourse. As such, it is designed for the defence and protection of purely institutional interests which vary depending on the context the discourse is embedded in.¹⁶

For the purposes of this article, national security is treated in the wider sense, following the understanding of the widening school of thought which encompasses the protection of certain interests which are objectively essential to any democratic state, beyond mere political discourse. Thus, national security is understood «the present and future level of peace, integration, concord, rights and well-being of the citizens comprised in a national community at a given time.»¹⁷ Through

13 MASLOW A. H. *Motivación y personalidad*. Madrid: Ediciones Díaz de Santos, 1991, pp. 25-26.

14 BECK, U. *La sociedad del riesgo. Hacia una nueva modernidad*. Barcelona: Paidós, 2006.

15 CABELLO, A. M. / Hormigos Ruiz, J. «La sociedad del riesgo y la necesidad moderna de Seguridad». *BARATARIA, Revista Castellano-Manchega de Ciencias Sociales*, n.º 7. 2005-2006, p. 35.

16 MOLOEZNİK, P. *Op. cit.*, p. 322.

17 This definition was agreed by the working group organised by the Centre for National Defence Studies (CESEDEN) whose members were: GARCÍA SERVET, R. C.; SANZ Y CALABRIA, A.; FAURA MATEU, F.; ALDECOA LUZÁRRAGA, F.; ECHEVERRÍA, C.; SÁNCHEZ DE ROJAS DÍAZ, E. For this, see GARCÍA SERVET, R. C. «Introducción general». *Documentos de Seguridad y Defensa*, n.º 63, 2014 p. 10.

national security, the state aims to ensure «that the underlying values of its constitution are effectively applied, including the survival of the state, the protection of its citizens» life and integrity, of the free exercise of rights and freedoms and of their well-being.»¹⁸

The definition created by BALLESTEROS can be adopted in the same sense:

«National security is the situation where the normal course of life of a nation is protected from external and internal risks, dangers and threats and which allows the country to defend its national interests, fulfil its international commitments and contribute to international peace and stability.»¹⁹

Regulatory perspective

The *Act on National Security (Ley 36/2015, de 28 de septiembre, de Seguridad Nacional)*²⁰ embraces a widening approach reaching beyond a strictly military scope and encompassing a dynamic, global and interdisciplinary understanding. Its preamble states:

«The national security challenges that affect society are in some cases fraught with great complexity, extending beyond the boundaries of traditional categories such as defence, public safety, foreign action and intelligence, and also of more recent additions to the list of security concerns, such as the environment, energy, transport, cyberspace and economic stability.»

This line of argument is further supported where the act highlights that «in today's world, and in the foreseeable future, the actors and circumstances posing a threat to security are subject to constant change, and it is the public authorities responsibility to equip themselves with the regulations, procedures and resources allowing them to effectively respond to these security challenges.» Thus, the underlying intention of this act is to coordinate and harmonise existing regulatory provisions to be found in different parts of the Spanish legal order and whose common purpose is to regulate state measures for the provision of security to its citizens. These regulations bear upon quite heterogeneous aspects such as: states of alert, emergency and siege, national defence, security forces and bodies, citizen safety, the protection of critical infrastructures, civil defence, external state action, the foreign service or private security, criminal law and international treaties and commitments entered into by Spain.

¹⁸ GARCÍA SERVET, R. C. *Op. cit.*, p. 10.

¹⁹ BALLESTEROS MARTÍN, M. Á. *Op. cit.*, p. 63.

²⁰ BOE n.º 233, 29 September 2015.

In keeping with everything stated in the previous paragraph, article 3 of the act states:

«For the purposes of this law, national security is taken to mean state action targeted at protecting the freedom, rights and well-being of citizens; at guaranteeing the defence of Spain and its constitutional principles and values; and at contributing together with our partners and allies to international security in compliance with the commitments undertaken».

In the Constitutional Court's view, this state activity, described under article 3 of the National Security Act, does not constitute a new area of competence, but merges with existing state competences relating to defence and public security,²¹ which are detailed, respectively, under sections 4 and 29 of article 149.1 of the Spanish constitution.²² Regarding this item, Constitutional Court ruling 184/2016, of November 3, explains: «the exclusive state competence in matters of defence and of the armed forces (art. 149.1.4 CE), in accordance with constitutional article 8, comprises actions whose objective is the defence of Spain's territorial integrity and the constitutional order.» In relation to public security, the aforementioned Constitutional Court ruling states that it refers to (citing previous decisions):

«activity directed at the protection of persons and goods (security in a strict sense) and upholding public peace and order»; although it is not limited to regulating «specific actions of what is known as the security police», since «policing activity is a part of the broader matter of public security» which «encompasses a wide range of administrative actions» (Constitutional Court ruling STC 86/2014, of May 29, legal bases 2 and 4, amongst others) and includes «a broad and diverse range of actions, which –though different in nature and content– are all oriented towards the goal of protecting the legal asset thus defined» (Constitutional Court ruling STC 235/2001, of December 13, legal basis 6, and those mentioned therein).

Security as a right

Security is not a phenomenon that materialises in any real sense. It is neither tangible nor can it be proven by empirical methods. On the contrary, security belongs to

21 STC 184/2016, 3 November, FJ 3.

22 Spanish Constitution, *BOE* n.º 311, 29 December 1978.

Art. 149.1.4 and 29 of the Spanish Constitution:

«1. The State holds exclusive competence over the following matters:

4. defence and the Armed Forces;

29. public safety, without prejudice to the possibility of the creation of police forces by the Autonomous Communities, in the manner to be laid down in their respective Statutes and within the framework to be established by an organic law.»

the realm of hypothesis, construed as a human judgement of probability in relation to future events.²³ Despite its immaterial nature, security represents a basic need for people –as was pointed out earlier– to the point where it constitutes a legal asset worthy of protection. The Declaration of the Rights of Man and of the Citizen of 1789 recognised security as a natural and imprescriptible right of man and, along with liberty, equality and fraternity, became one of the fundamental values of the French Revolution.²⁴

On an individual level, security is included in the Spanish Constitution within the category of an individual's fundamental rights. Thus, article 17.1 stipulates that «every person has the right to freedom and security». Its nature as a fundamental right leaves no doubt whatsoever, since article 17 is systematised under Section 1, Chapter 2 of Part I, titled «Fundamental Rights and Duties». Security as a constitutionally recognised right forms part of another constitutional category, public order,²⁵ which may occasionally override other rights and freedoms stated elsewhere in the Constitution, as set out by articles 16.1²⁶ and 21.2.²⁷ The interconnections between the right to security and public order have been enlarged upon in Act 325/1994, December 12, of the Constitutional Court, according to which:

«There is another kind of security which is the support and companion of personal freedom (art. 17, Spanish Constitution) and whose essence lies since ancient times in the peace of mind brought about by absence of fear. [...] This security in turn is connected to the third kind, namely public safety (art. 149.1.29, Spanish Constitution), also known as citizens security, as an equivalent of peace in the streets. In short, this security was already called “public order” in the past century, and was understood as a situation of normality which rules a state and the lives of its citizens when its various collective activities take place without disturbances or conflict.»

Based on the aforementioned considerations about the concept, content and interrelations of security as an individual's fundamental right, one may regard national

23 PAREDES CASTAÑÓN, J. M. «La seguridad como objetivo político-criminal del sistema penal». *Eguzkilore*, n.º 20, 2006, p. 132.

24 PECES-BARBA MARTÍNEZ, G. «La Constitución española y la seguridad», in CAVINO, M., LOSANO, M.G. AND TRIPODINA, C. (edit.), *Lotta al terrorismo e tutela dei diritti costituzionali, Atti del Convegno dell'Associazione di Diritto pubblico comparato ed europeo. Alessandria, Università degli Studi, 9 maggio 2008*. Torino: Giappichelli, 2009, p. 39.

25 PAREJO ALFONSO, L. «Sobre el binomio libertad y seguridad en el derecho». *Iusta*, n.º 45, 2016, p. 113.

26 Article 16.1 of the SPANISH CONSTITUTION: «Freedom of ideology, religion and worship of individuals and communities is guaranteed, with no other restriction on their expression than may be necessary to maintain public order as protected by law.»

27 Article 21.2 of the SPANISH CONSTITUTION: «In the event of meetings in public places and of demonstrations, prior notification shall be given to the authorities, who may ban them only when there are well founded grounds to expect a breach of public order, involving danger to persons or property.»

security as a collective expression of this fundamental right, as stipulated by article 17 of the Spanish Constitution.

Theoretically, the right to security –if defined as the minimum state of normality necessary to effectively implement the rights of the individual²⁸– is also the indispensable condition for the preservation of constitutional democratic order (the latter in turn protecting the remaining rights) and, finally, of a person's freedom. Although on an intellectual level, security and freedom are mutually contingent –as reflected by the fact that the Spanish Constitution regulates them under the same precept– on a practical level, tensions may arise between the two. To what extent can rights be restricted for the sake of maintaining security without eroding freedom to an unacceptable degree in the context of a democratic state? The answer to this is not simple, especially in the current historical context.

The risk society referred to earlier is characterised by confronting human beings with numerous threats of various kinds and intensity. Economic and financial instability, natural disasters, the vulnerability of critical infrastructures, cyberattacks, terrorism or organised crime require a security response from the state. This state reaction inevitably requires the application of measures that partially restrict certain fundamental rights. Paradoxically, in order to protect the free and effective exercise of citizens' rights, the state finds itself forced to restrict them. As was aptly pointed out by González Cussac and Flores Giménez, this can lead to an absurd situation where the destruction of the rule of law does not result from the threats that the latter tries to neutralise, but from a disproportionate internal reaction bent on preserving security.²⁹ In this sense, it is worth remembering the doctrine adopted by the Constitutional Court according to which:

«The limits imposed on the exercise of fundamental rights must be established, interpreted and applied with restraint, and in any case must not be harsher than necessary to preserve constitutionally protected assets or rights. Restrictions must be kept to the minimum required and are therefore subject to the principle of proportionality so as to avoid unnecessary or excessive sacrifices of said rights.»³⁰

The purposes of prison

Rehabilitation and social reintegration as guiding criteria of correctional enforcement

The first paragraph of article 25.2 of the Spanish Constitution asserts: «*Punishments entailing imprisonment and security measures shall be aimed at re-education and social*

28 PAREJO ALFONSO, L. *Op. cit.*, p. 113.

29 GONZÁLEZ CUSSAC, J. L. and FLORES GIMÉNEZ, F. *Op. cit.*, p. 8.

30 STC 151/1997, 29 September, FJ 5.

rehabilitation [...]». Far from expressing the aim of the state's punitive mechanism in unequivocal terms, this precept, which was initially intended to be the cornerstone on which to build the legislative framework of the Spanish Prison Law, actually uses rather laconic and confusing wording giving rise to a number of doubts as to the Constitution's exact final intent in this matter.³¹

The fact that article 25.2 is systematised under Section 1 of Chapter 2 of Part I of the Spanish Constitution, which contains fundamental rights, raises the essential question relating to the nature of this provision, i.e. whether it can be regarded as a right of convicted persons. The jurisprudence of the Constitutional Court rejects this idea finding that said precept merely embodies «a mandate from the Constitution to the legislators and to the prison administration to provide guidelines for the enforcement of custodial sentences.»³² The author fully agrees with this evaluation of the Constitutional Court,³³ for various reasons.

Firstly, it should not automatically be inferred from the inclusion of constitutional article 25.2 under Section 1 of Chapter 2 of Part I that the rehabilitation and social reintegration of inmates constitutes a fundamental right. The cited section includes a series of provisions of varying kinds, which –although they in some cases encompass fundamental rights– also include organisational criteria, principles of order, constitutional principles or institutional and procedural guarantees.³⁴

Secondly, the conceptualisation of reintegration and rehabilitation as fundamental rights would entail the impossibility of enforcing prison sentences. One needs to remember that a major part of the aspects relating to order and security would become inapplicable, because they would restrict or prevent the exercise of these presumed rights of constitutional article 25.2.³⁵ A paradigmatic example of this issue are the prison rules on isolating detainees, be it partial as in the case of closed centres or total as in the case of solitary confinement, whose immediate objective is to stop detainees from causing harm.

³¹ CAROU-GARCÍA, S. *Primer grado penitenciario y Estado de derecho. El estatus jurídico de los reclusos en régimen de máxima seguridad*. Barcelona: Bosch, 2017, pp. 273 ff.

³² STC 299/2005, 21 November, FJ 2.

³³ It needs to be highlighted that a large part of criminal law doctrine favours the view that rehabilitation and social reintegration constitute fundamental rights of prisoners. In this sense, see COBO DEL ROSAL, M. and QUINTANAR DÍEZ, M., «Comentario al artículo 25. Garantía penal», in ALZAGA VILLAAMIL, O. (dir.). *Comentarios a la Constitución española de 1978*, vol. III. Madrid: Editoriales de Derecho Reunidas, 1996, p. 141; MAPELLI CAFFARENA, B. *Principios fundamentales del sistema penitenciario español*. Barcelona: Bosch, 1983, pp. 154 ff; TÉLLEZ AGUILERA, A. «Retos del siglo XXI para el sistema penitenciario español». *Anuario de Derecho Penal y Ciencias Penales*, vol. LII. 1999, p. 334.

³⁴ DELGADO DEL RINCÓN, L. «El artículo 25.2 CE: algunas consideraciones interpretativas sobre la reeducación y reinserción social como fin de las penas privativas de libertad». *Revista Jurídica de Castilla y León*, n.º extraordinario. 2004, p. 352.

³⁵ CAROU-GARCÍA, S. *Op. cit.*, p. 277.

Thirdly, full rehabilitation and social reintegration is materially unachievable, meaning that the state could never provide an individual with all the necessary conditions to allow this fundamental right to be truly effective. Rehabilitation as referred to by constitutional article 25.2 applies to action aimed at eliminating certain behaviours or personality traits of the inmate which intervene in their criminal activity. This is to allow subsequent reintegration in their customary social and family surroundings.³⁶ Reintegration, for its part, would encompass the means needed so that the person can lead a dignified life following their release.³⁷ Certain social or cultural deficits undeniably play a relevant role in fostering criminal activity. However, it is illusory to think that the state can guarantee the exercise of a fundamental right that offers relief in this context, since these deficiencies frequently are not of a transitory but rather a structural nature and with root causes that extend beyond the national boundaries of specific state policies. Economic inequalities, lack of employment, or social marginalisation –to mention a few– can be alleviated or mitigated to a certain degree through state action. However, the state cannot abolish them altogether, as they are influenced by global economic and political factors.

Hence, if we disregard rehabilitation and social reintegration as fundamental rights, they can be seen as «a beacon for prison policies within the regulatory framework and during its implementation [...]».³⁸ At the same time, they are more than just a policy statement. They stand as a legally binding mandate for both lawmakers and the prison administration.³⁹

Setting aside the doctrinal and jurisprudential debate over the nature of the constitutional endorsement of rehabilitation and social reintegration of offenders and moving back to the field of national security, it must be mentioned that the stated provisions of constitutional article 25.2 also play a role in this area. One of the classic menaces for the state's indemnity and, by extension, for its citizens stems from crime. That is why crime policy is relevant in this matter. If the purpose of national security consists in mitigating risk to the extent possible, avoiding repeat offenses must form part of the acquis of measures designed for this purpose. In this respect, crime prevention has two facets. On the one hand, early detection of intended criminal action, thereby averting it – in this regard, the work of the security forces and law-enforcement bodies is fundamental. On the other hand, avoiding a repetition of criminal behaviour by previous offenders. At this level, state activity takes on the shape of socially-oriented services (inside and outside of prisons) that are able to provide the offending individual with the required means of assistance to overcome the negative

36 ARMENTA GONZÁLEZ-PALENZUELA, F. J. AND RODRÍGUEZ RAMÍREZ, V. *Reglamento Penitenciario. Análisis sistemático, comentarios, jurisprudencia*. Madrid: Colex, 2009, p. 82.

37 SEGOVIA BERNABÉ, J. L. «Problemática en torno a la reinserción social». *Cuadernos de Derecho Judicial*, n.º 17. 2003, p. 579.

38 See, among others, ruling SSTC 19/1988, 16 February, FJ. 9, and 209/1993, 28 June, FJ 4.

39 CAROU-GARCÍA, S. *Op. cit.*, p. 278.

social or personal circumstances that have had a direct bearing on their criminal activity and that lie beyond the scope of their volitional capacity.

Detention and custody of detainees

Constitutional article 25.2 was drafted in accordance with the *General Prison Organic Law* of 26/09/1979 (*Ley Orgánica 1/1979, de 26 de septiembre, General Penitenciaria*),⁴⁰ henceforth GPOL. Article 1 of this law assigns the duty of detention and custody of detained, imprisoned or convicted persons to the prison institutions. This precept also confers the goal of rehabilitation and social reintegration of prisoners on the prison service.

The two objectives –reintegration and security– are not always easily compatible. Rather, the whole structure of prison law reveals a tension between them which is closely reflected in the basic pillars of prison activity: regime⁴¹ and treatment.⁴² This tension between the two underlying elements of prison law cannot be resolved by granting one priority over the other. In this sense, article 73.3 of the *Prison Regulations*⁴³ states that «the activities pertaining to treatment and regime, though guided by a principle of specialisation, must be coordinated in due manner.»

As pointed out earlier, the reference of the constitution to the positive aspect of special prevention –social reintegration and rehabilitation– cannot be construed as a subjective right of the convicted person. But neither can it be regarded as constitutional law-making in favour of a specific punitive aim.⁴⁴ This line of argument informs the Constitutional Court's jurisprudence, according to which:

«[...] constitutional article 25.2 does not settle the question regarding how closely or loosely the possible effects of the sentence echo the Spanish Consti-

40 BOE n.º 239, 5 October 1979.

41 According to article 73.1 of the prison regulations «prison regime refers to the set of rules or measures intended to achieve a well-ordered and peaceful coexistence that enables an adequate environment which is conducive to a successful outcome of the treatment as well as the detention and custody of prisoners.»

42 The concept of treatment is explained in article 59 of the GPOL:

«1. Prison treatment comprises all the activities aimed directly at achieving the rehabilitation and social reintegration of convicts.

2. The treatment is intended to be conducive towards the inmate becoming a person that wants and is able to live in compliance with criminal law and to meet their own needs. To this end, building an attitude of self-respect and individual and social responsibility towards their family, fellow citizens and society in general is encouraged to the extent possible.»

43 Royal Decree RD 190/1996, 9 February, which approves the Prison Regulations. BOE n.º 40, 15 February 1996.

44 CAROU-GARCÍA, S. *Op. cit.*, p. 282 ff.

tion's system of values. Neither does the article constitute a blueprint for determining the specific function of the sentence –general prevention, special prevention, retribution, reintegration, etc.– within Spanish criminal law. As confirmed by this court on other occasions, article 25.2 of the Spanish Constitution implies a mandate directed at the prison law-making bodies and their associated administrative bodies to provide guidance on how to put prison sentences into effect (by way of examples, Constitutional Court rulings SSTC 19/1988 and 28/1988), but does not rule that rehabilitation and social reintegration are the only legitimate aims of prison sentences.»⁴⁵

Therefore, the positive and negative sides of special prevention have to be harmonised for the duration of the prison sentence.

Neither would the aims of detention and custody be misplaced within the heterogeneous tool-set used in pursuit of national security. Their effects play out both inside and outside of prisons.

Concerning life inside prison, negative special prevention aims at maintaining the minimum levels of order and security to allow the punitive system to function. This is not reduced to repressive aspects devoid of any ultimate goal. Upholding order inside prison premises contributes to safeguarding such fundamental rights of detainees as have not been restricted by their sentence. The prison population does not lose its status as citizens once the prison threshold is crossed. Thus, convicts continue to enjoy fundamental rights whose protection is entrusted to the state. This statement is not invalidated by the fact that there is a special relationship of subjection between detainees and the prison administration. Prison is a kind of legal microcosm which needs to provide answers to a series of demands which do not exist outside of prisons (security, order, discipline, effectiveness of treatment, etc.). However, one cannot lose sight of the fact that this peculiar prison world is embedded within the general legal framework of the state, and as such needs to respect the principles and rights laid down by the Constitution.⁴⁶

Along this line, article 3 of the GPOL establishes that penitentiary activity has to follow its course respecting the detainees' human personality as well as such rights as are not restricted by their sentence. Likewise, the precept mentioned imposes a duty on the administration to protect the detainees' lives, well-being and health. Therefore, any state action aimed at protecting the freedom, rights and well-being of citizens, as laid down by article 3 of the Act on National Security, also extends to the segment of the population serving prison sentences.

Order and security inside prisons can be threatened by detainees acting alone and whose personality is particularly prone to violence. Likewise, the presence of members

⁴⁵ STC 150/1991, 4 July, FJ 4.

⁴⁶ CAROU-GARCÍA, S. «El principio de legalidad en el Derecho penitenciario español». *Indret: Revista para el Análisis del Derecho*, n.º 4, 2017, p. 16.

of organised crime gangs⁴⁷ or of terrorist groups inside Spanish prisons constitutes a serious problem for the internal security of prisons and thus also for the rights of detainees who are not involved in these gangs' activities.

Concerning the reality outside prisons, detention and custody of persons in breach of criminal law constitutes the most visible sign of the commitment of the prison system to defending society. Segregating individuals who have undermined the legal assets of their fellow-citizens contributes to preserving the fundamental right to security and to maintaining social order and peace. In its explanatory memorandum, the GPOL refers to «*the rigour in defending order inside the facilities, which is warranted by the needs arising from internment itself and by the social demand for peace*».

However, it should be borne in mind that detention and custody alone are not enough to safeguard the invulnerability of national security. They need to be combined with an approach to reintegration which –theoretically– reduces the chances of prisoners re-offending after their release. The rehabilitation potential is not realised in all cases. As mentioned before, the successful return of ex-convicts to society is influenced by structural factors, which are beyond the state's control. Moreover, there are cases of ex-convicts who are absolutely recalcitrant to social rehabilitation treatments and who re-offend in full conscience and with undiminished volitional capacity after their release. Even in those extreme cases, prison at least temporarily prevents them from causing harm and thereby protects the fundamental rights of the rest of the population. In such cases, an indeterminate sentence may be more effective, since the mechanisms to review the convict's progress within their treatment programme prevent the release of prisoners convicted for serious crimes, unless there are minimum guarantees that they will not re-offend. Notwithstanding the need to improve certain technical and legal aspects of this type of prison sentence, its regulated use nevertheless allows the constitutional mandate of the reintegrating role of prisons to be combined with the need to protect society from offenders who cannot be reintegrated.⁴⁸

The provisions issued by the prison administration itself, i.e. the instructions of the General Secretariat of Prison Institutions, also refer to this commitment to defending society. Recent years have seen an upsurge in calls for more efforts as a consequence of the emergence of Jihadist terrorism. *Instruction 02/2016 «on the framework programme on intervention in cases of violent radicalisation of Islamist convicts»* points out that this prison programme has a bearing «both on aspects of reha-

47 For repercussions of organised crime on prison security, see: SANSÓ-RUBERT PASCUAL, D. «Inteligencia criminal y sistemas penitenciarios: algunas reflexiones». *URVIO. Revista Latinoamericana de Estudios sobre Seguridad*, n.º 15, 2014.

48 About indeterminate prison sentences, see: LANDA GOROSTIZA, J. M. «Fines de la pena en fase de ejecución penitenciaria: reflexiones a la luz de la prisión permanente revisable». *Revista de Derecho Penal y Criminología*, 3.ª Época, n.º 18, 2017; ARRIBAS LÓPEZ, E. «Prisión permanente revisable y reinserción social». *Diario LA LEY*, n.º 9144, 2018.

bilitation of convicts and defending the prison institution and society in general.» On the other hand, *Instruction 8/2014, which sets out the «programme for the prevention of radicalisation inside prison facilities»*, highlights among its aims «*supporting the efforts which are taking place on a general level both nationally and internationally to address this form of terrorism and to fight this type of crime in an effective, solidary and coordinated way.*»

Criminal intelligence in prisons

To ensure its effectiveness, state activity aimed at safeguarding the invulnerability of fundamental rights, the constitutional order and international security –which embodies the concept of national security– needs to respond to the principles of efficiency, foresight and prevention, amongst others.⁴⁹ Given the broad scope of the aim of national security, it is necessary to delimit certain areas of special interest. For this reason, article 10 of the Act on National Security considers these areas to be «*those that require specific attention as a result of their basic role in preserving rights and freedoms, as well as citizens' well-being, besides guaranteeing the provision and supply of essential services and resources.*»

As was pointed out in the previous section, the security and rehabilitation objectives of prison are reflected in the action aimed at maintaining national security, since these goals in one way or another affect the fundamental rights of society inside and outside of prisons. Thus, prison must be understood as an area of special interest. The prison system as a whole is one of its instruments, through which the state can address the threats posed by criminal offences.⁵⁰

Prison walls contain a swath of population which reflects different shades of criminal reality, comprising anything from individual delinquency, to organised gangs or terrorist groups with international operating capacities. Detaining and keeping these individuals in prison allows them to be monitored 24 hours a day, thus making it possible to collect a significant amount of data. This is where intelligence comes into play. The concept of intelligence when referring to national security has been defined in different ways. In 1949, Kent⁵¹ regarded it as knowledge –supplied by the intelligence services– which highly-placed civilians and military men must have to safeguard international interests and national welfare. For the Spanish National Intelligence Centre it is «the result of evaluating, analysing, integrating and inter-

49 The principles mentioned are set out in art. 4.2 of the Act on National Security, together with those offering guidance on unity of action, sustainability in the use of resources, capacity of resistance and recovery, coordination and cooperation.

50 SANSÓ-RUBERT PASCUAL, D. *Op. cit.*, p. 10.

51 KENT, S. *Strategic Intelligence for American World Policy*. Princeton: Princeton University Press, 2015, pp. 3-10.

preting information».⁵² LLAVADOR PIQUERAS and LLAVADOR CISTERNES⁵³ conceive it as:

«information that has been handled, treated or processed using scientifically suited methods and which is transformed into knowledge that is offered to its intended legal recipients, usually the president of the government or top (civilian or military) government authorities.»

From the three proposed definitions it is apparent that information and intelligence are closely connected, with information constituting the starting point from which to formulate intelligence.⁵⁴

The broad concept of intelligence gives rise to a subcategory: criminal intelligence. According to SANSÓ-RUBERT this is:

«merely a type of intelligence that is useful in obtaining, evaluating and interpreting information and in disseminating the intelligence required to protect and promote national interests of any kind (political, commercial, business) in the face of organised crime, in order to forestall, detect or neutralise those criminal activities, groups or people that jeopardise, threaten or breach the constitutional order or fundamental rights and freedoms, due to their nature, magnitude, foreseeable consequences, degree of danger or ways of operating.»

Criminal intelligence is not allocated to a specific government body; on the contrary, its broad scope, together with its proactive character, warrant the combined efforts of different entities such as security forces and law-enforcement bodies, customs authorities and prison services. The fact that criminal intelligence partly draws on information from within the prison environment must not lead to the confusion of calling it prison intelligence. The latter is restricted to:

«direct or indirect management and protection of the prison system (detainees, infrastructures, classification of prisoners, institutional strategies, prison policies) and the safety of its staff, both inside and outside the facilities, in support of public security initiatives.»⁵⁵

The first time the law explicitly mentioned prisons as part of the state structures aimed at maintaining national security (through their role as sources of information and intelligence) was in 2011. This saw the amendment of the prison regulations

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53 LLAVADOR PIQUERAS, J. and LLAVADOR CISTERNES, H. *El régimen jurídico de los servicios de inteligencia en España*. Valencia: Tirant lo Blanch, 2015, p. 30.

54 LLAVADOR PIQUERAS, J. and LLAVADOR CISTERNES, H. *Op. cit.*, p. 30.

55 SANSÓ-RUBERT PASCUAL, D. *Op. cit.*, pp. 11&12.

through Royal Decree 419/2011, 25 of March,⁵⁶ which included the following declaration in its explanatory memorandum:

«The prison system constitutes one of the instruments available to the state in confronting the security threats and risks posed by, in particular, terrorism and organised crime. Together with prosecution and protection activities, prevention demands the drafting of a structured strategy of improvement of the information and intelligence services, as well as an adoption of organisational standards of surveillance, control and intervention to counteract attempts by prisoners to continue their criminal activities within prison facilities.»

The vast majority of information collected in the prison environment is obtained through human sources, i.e. the prisoners themselves. Handling these types of sources inside a closed environment such as a prison has substantial advantages while simultaneously posing serious challenges. On the positive side, there is the fact that the hermetic and regulated character of the prison context facilitates greater control and foresight concerning the process of obtaining information. The prisoners' routine takes place within the different parts of the prison premises. Their authorised prison leaves, if applicable, are known well in advance. In addition, all the prisoners' activities are subject to a specific time-schedule. Therefore, the source can be easily located at all times by those in charge of obtaining information. However, the rigid nature of prison life becomes an obstacle in cases where the process of gathering information requires a higher degree of flexibility.⁵⁷

Interior security measures

The security of prison facilities has traditionally been divided into internal and external security: these are regulated, respectively, in sections I and II of chapter VIII, part II, of the prison regulations.

External security is clearly focussed on the protection of society outside prisons and of the state itself as the custodian of justice. It is concerned with trying to avoid prison breaks, and by extension, the commission of further crimes. This type of security is also applies to ensuring due enforcement, as it is entrusted with seeing to it that sentences and court decisions involving restriction of movement take proper effect.⁵⁸

⁵⁶ Royal Decree R. D. 419/2011, 25 March, which modifies the Prison Regulations, approved by R. D. 190/1996, 9 February. *BOE* n.º 73, 26 March.

⁵⁷ SOLER PRIETO, C. «Aplicación en instituciones penitenciarias de la inteligencia criminal: manejo de fuentes humanas». *VIII Jornadas ATIP Almagro 2014*. Cáceres: ATIP (Asociación de Técnicos Superiores de Instituciones Penitenciarias), 2014, pp. 194 ff.

⁵⁸ FERNÁNDEZ ARÉVALO, L. and NISTAL BURÓN, J. *Manual de Derecho Penitenciario*. Cizur Menor: Thomson Reuters. Aranzadi, 2012, p. 476.

As laid down by article 63.1 of the prison regulations, competence in this matter rests with the security forces and law-enforcement bodies of Spain's autonomous regions. Although this exterior feature of prison security is clearly tied up with national security, in practice it offers little in the way of information that could be processed into criminal intelligence. In any case, external security strategies and protocols need to be designed on the basis of –among other things– the output of criminal intelligence.

Regarding internal security, the prison administration pursues three goals. Firstly, to ensure the detention and custody of convicts. Secondly, to safeguard the fundamental rights of the prison community, which could be jeopardised inside the prison facilities. For the purposes of this article, prison community is understood not only as convicts and remand prisoners, but also prison staff who work inside the prisons and towards whom the state has a duty of protection. Thirdly, internal security needs to contribute to preventing certain inmates from continuing their criminal activities within prison, or from using the facilities to recruit new members for their criminal organisation. The last two points refer to specific criminal activities, namely organised crime and terrorism, particularly of the Jihadist kind.⁵⁹

Achieving these three goals requires effective strategies to be put in place, with information gathering a crucial condition for their design. The measures regulated by article 65 of the prison regulations are particularly relevant in obtaining useful data for internal security – which also has an undeniable influence on external security, since the aim is to neutralise crime. These measures are specified as: observation of inmates, counting over of prisoners, searches, body checks, inspections, controls, cell changes, adequate allocation of prison or block, and appropriate activities and safeguards for outdoor recreation or day leaves. As can be seen, these actions concern both prisoners as individuals and the prison facilities as a whole.

The variable intensity of these actions depends on the level of danger of the detainees, with higher degrees applied to detainees belonging to terrorist groups, organised crime gangs or those rated as extremely dangerous.⁶⁰ The extent to which the interior security measures are applied is governed by the principles of proportionality and necessity, as well as respect of the detainees' dignity and fundamental rights, as per article 71 of the prison regulations, which article 65.2 itself also refers to. It is vital to set limits to the heightening of security measures. Exacerbating the security aspects inside prisons can have damaging effects. The dynamics operating inside prisons imply continuous repetition of numerous activities, including security-related procedures. The routine that comes with performing surveillance and control tasks can lead to

59 For further reading on prisons as a physical environment for Jihadist terrorist radicalisation and recruitment, see CAROU-GARCÍA, S. «Terrorismo yihadista y prisión: políticas penitenciarias de contención y prevención» in PÉREZ CEPEDA, A. I. (dir.). *Actas del Seminario Internacional El terrorismo en la actualidad: un nuevo enfoque político criminal*. Salamanca: Ratio Legis, 2017, pp. 197-207.

60 CAROU-GARCÍA, S. *Op. cit.*, p. 171.

a loss of perspective regarding the principles of necessity and proportionality of the measures, since mechanical procedures are averse to adapting to circumstances or context.⁶¹ Moreover, the psychological effects deriving from subjecting inmates to greater control and surveillance have to be considered. If placed under conditions of extreme control, inmates have limited options to exercise their personal autonomy, making them totally dependent on the prison system which in turn can cause them to become dysfunctional in terms of living in society.⁶²

According to the provisions of article 64 of the prison regulations, the competence for executing the measures of internal security lies with the state employees of the prison services. It is understood that this reference covers any civil servant belonging to any of the seven existing corps, i.e. assistants, special corps, healthcare professionals, qualified physicians, technicians and chaplains⁶³. Thus, theoretically, any of these groups could take part in obtaining information for the purpose of generating criminal intelligence. However, in practice this task is mainly restricted to the assistant corps. The codes of ethics or rules of confidentiality that apply to the activities of certain prison staff could be difficult to reconcile with the task of obtaining information from human sources. It needs to be remembered that a total instrumentalisation of detainees as information sources, depriving them of their human condition and their most basic rights, would represent a clear shift towards an understanding of prison law as posited by enemy criminal law.⁶⁴

The third paragraph of article 65 –included by virtue of the reform introduced through Royal Decree RD 419/2011– empowers the prison administration to create specialised groups of civil servants for the purpose of putting the interior security measures into practice. These are the so-called *Control and Monitoring Groups*, which are mainly focussed on prison management of organised and terrorist crime and thus on obtaining relevant data. These groups were created in 2007 through a *Reserved Instruction*. Following the 2011 reform they became an explicit and regulated item of the

61 ARMENTA GONZÁLEZ-PALENZUELA, F. J. and RODRÍGUEZ RAMÍREZ, V. *Op. cit.*, p. 222.

62 SHALEV, S. *A Sourcebook on solitary confinement*. Oxford: Oxford University, 2009, pp. 30-31.

63 CAROU-GARCÍA, S. *Op. cit.*, p. 173.

64 The controversial model of enemy criminal law goes back to JAKOBS, G., «Kriminalisierung im Vorfeld einer Rechtsgutverletzung». *Zeitschrift für die gesammte Strafrechtswissenschaft*, n.º 97, 1985, pp. 751 ff. The amount of literature relating to this topic is colossal. To cite only a few studies: CANCIO MELIÁ, M. «De nuevo: ¿"Derecho Penal" del enemigo?» IN JAKOBS, G. and CANCIO MELIÁ, M. *Derecho penal del enemigo*. Madrid: Civitas, 2003, pp. 57 ff.; SILVA SÁNCHEZ, J. M. *La expansión del derecho penal. Aspectos de la política criminal en las sociedades postindustriales*. Madrid: Civitas, 2001, pp. 163 ff.; Gracia Martín, L. «Sobre la negación de la condición de persona como paradigma del "derecho penal del enemigo"». *Revista General de Derecho Penal*, n.º 2. 2004; PORTILLA CONTRERAS, G. «El derecho penal y procesal del "enemigo". Las viejas y nuevas políticas de seguridad frente a los peligros internos-externos», in ZUGALDÍA ESPINAR, J. M. and LÓPEZ BARJA DE QUIROGA, J. (coords.). *Dogmática y Ley penal. Libro homenaje a Enrique Bacigalupo*, vol. I. Madrid: Marcial Pons, 2004.

law. A *Central Group for the Coordination, Reception and Transmission of Information* was created as a coordinating body at *Central Services* level. Its mission is focussed on processing and integrating all the information sent by the *Centres* in order to obtain intelligence and to manage dissemination of the information to the units and areas involved.⁶⁵

File on detainees under special supervision

The primary target of the *Control and Monitoring Groups*’ work are those detainees who are in one way or another related to one of the principal threats for national security, namely organised and terrorist crime⁶⁶. Information relating to these convicts is systematically stored and ordered in the File on Detainees under Special Supervision (henceforth FoDuSS).

The creation of this file as well as its later amendments at a legislative level responds to the security challenges faced by the prison administration as a result of new forms of crime.⁶⁷ In 1989, a special monitoring and control programme was set in motion through *Administrative Circular* (henceforth AC) of 13 November 1989, targeted at detainees with links to armed gangs. Two years later, AC 06/03/1991 extended this programme to two further groups of prisoners: detainees considered especially dangerous under article 10 of the general prison law; and detainees linked to organised drug trafficking activities.⁶⁸ AC 06/03/1991 requires that all data obtained be classified within a single file,⁶⁹ thus giving rise to the FoDuSS file. In 1996 the prison administration engaged in harmonising the dispersed regulatory content of the FoDuSS by reason of the fourth *Transitory Provision* of the prison regulations. This revision is set down by *Instruction 21/1996*.

65 SOLER PRIETO, C. *Op. cit.*, p. 202; COMISIONES OBRERAS. *Informe sobre la situación actual de las instituciones penitenciarias*. 2016, p. 23.

Available on www.fsc.ccoo.es/dceo084362d95f6e112a21f118a82453000050.pdf. Consulted on 30/04/2019.

66 The challenge posed for national security by organised crime and terrorism is clearly reflected in the 2018 Annual Report on National Security.

Available on <https://www.dsn.gob.es/es/actualidad/sala.../informe-anual-seguridad-nacional-2018>. Last consulted 30/04/2019.

67 More on the regulatory developments concerning the FoDuSS file, see CAROU-GARCÍA, S. «La controvertida historia del Fichero de Internos de Especial Seguimiento: desde su nacimiento hasta la actualidad», in GONZÁLEZ GARCÍA, A. and FERNÁNDEZ BERMEJO, D. (coords.). *Cuestiones penitenciarias actuales. Criminología, derecho y práctica*. Madrid: Centro de Estudios Financieros, 2018, pp. 91-98.

68 ARRIBAS LÓPEZ, E. «Fichero de Internos de Especial Seguimiento (FIES) y régimen cerrado». *La ley penal: Revista de Derecho penal, procesal y penitenciario*, n.º 72. 2010, p. 193.

69 ARRIBAS LÓPEZ, E. *Op. cit.*, p. 194.

The fact that being included in the FoDuSS file leads to a restriction of rights has been the subject of several court cases. In 2009, the Spanish High Court ruled on the administrative regulation of the FoDuSS file. On 17 March 2009, the High Court ruling issued by the *Chamber for Contentious Administrative Proceedings* declared void the controversial subsection one of Instruction 21/1996, entitled «Security and control norms and norms on the prevention of incidents relating to highly disruptive and/or maladjusted detainees». In the resolution mentioned, the High Court concluded (legal basis 2) that the extent to which rights were affected by this subsection «oversteps the remit and purpose of the *administrative or organisational regulations* by entering the domain reserved to the law and its executive regulations, the latter having been drafted incorporating guarantees and disclosure requirements which the former lack.»

It needs to be said that the decision of the High Court does not question the inherent legality of the FoDuSS file as an instrument to gather and systematically order information. In the author's opinion it is not legally reprehensible to create an administrative file to compile data on convicts who are potentially destabilising for the prison order. Its existence is currently legally permissible under the provisions of chapter III of part II of the prison regulations – titled «protection of personal data in prison files». Furthermore, it is supported by the specific regulation for the protection of personal data, as laid down by Organic Law 3/2018 of December 5 on the *Protection of Personal Data and the Guarantee of Digital Rights*.⁷⁰ These two regulations are also underpinned by Order 1202/2011 of the Interior Ministry of May 4, regulating the Ministry's files containing personal data. On the other hand, article 6.4 of the prison regulations clears up any doubt as regards possible interference of the FoDuSS file with the prison regime currently applied:

«The prison administration is entitled to create files on detainees for the purpose of ensuring the security and correct functioning of the facility, as well as detainees' well-being. Being included in this file alone shall under no circumstance imply a different prison regime from that which legally applies.»

The current administrative regulation of the FoDuSS file can be found under Instruction 12/2011 which structures the file around five groups:⁷¹

- FoDuSS 1 CD (direct control) includes particularly disruptive and dangerous detainees, leaders and instigators of very serious disturbances of the prison regime with risks for the lives and well-being of prison staff, authorities, other inmates or external staff, whether inside or outside the prison, or during transfers, judicial proceedings or other procedures. The characteristics of these de-

⁷⁰ BOE n.º 294, 6 December 2018.

⁷¹ CAROU-GARCÍA, S. «La controvertida historia del Fichero de Internos de Especial Seguimiento: desde su nacimiento hasta la actualidad». *Op. cit.*, pp. 94 ff.

tainees concur with those established by article 91.3 of the prison regulations, which justify reallocation to special departments.

- FoDuSS 2 DO (organised crime) includes a more precise definition of the detainees it encompasses. It refers to detainees sentenced in relation with crimes committed within criminal organisations or groups, in accordance with the concepts established by articles 570 “bis” and “ter” of the Criminal Code,⁷² «both in the case of independent offences related to participation in the same, and in the case of offences whose classification specifically includes a subtype of aggravation on the grounds of membership of an organisation. It also includes detainees who present a high risk due to their links to illegal organisations.»
- FIES-3 BA (armed gangs) comprises convicts «sentenced for links to armed gangs or terrorist organisations, and those who, according to reports from security forces, collaborate with or support such groups.» The reference to reports from security forces should be highlighted. This is not the case in the description of the other groups included in the FoDuSS file, which refer to crimes that have led to prison sentences and which have therefore been verified in court.
- FIES-4 FS (*Security Forces and Prison Staff*) includes detainees that belong or have belonged to these occupational groups, as certain precautions are required during their confinement.
- FIES-5 CE (*Special characteristics*) comprises a heterogeneous group of detainees whose common denominator is the need for special monitoring for security reasons. It is made up of:
 - a) «Detainees with a prison record of elevated disruptiveness, escapes and severe violence.»
 - b) «Perpetrators of serious crimes against persons or serious sexual offences, or crimes related to corruption having given rise to great social alarm.»
 - c) «Belonging to or linked with violent organisations or groups.» The reference to the vague concept of violent organisations or groups allows this category to be applied to those detainees who do not exactly fit the FIES-2 DO and FIES-3 BA groups.
 - d) «Convicts who –without having been tried or convicted for Islamist terrorism– stand out on account of their radical fanaticism, their affinity to the terrorist ethos, or as leaders or members of groups exercising pressure on or recruiting other inmates within the prison premises.» This group matches those classed as Group B and Group C by *Instruction 8/2014* –which regulates the New Programme for the prevention of radicalisation inside prisons– which were later renamed by *Instruction 2/2016* as FIES B and FIES C (this instruction lays down the framework programme on intervening in cases of violent radicalisation of Islamist detainees).

72 Organic law 10/1995, 23 November, of the Spanish Criminal Code. *BOE* n.º 281, 24 November, 1995.

- e) «Persons convicted by the International Court of Justice.»
- f) «Persons collaborating with the justice system against terrorist groups or other criminal organisations.» Similarly to FIES-4 FS, this item embodies a protective purpose, as these inmates can be exposed to acts of revenge by the criminal groups they have helped to bring to justice.

Conclusions

Apart from a few laudable exceptions, the subject of prisons has constantly been neglected by academic research, particularly by studies originating from a legal science environment. Most studies have focussed on the reintegration and rehabilitation of convicts. Although the need for reintegration and rehabilitation as part of the operating strategies of prisons is unquestionable, it is equally clear that prisons have further-ranging potential which deserves a doctrinal analysis. This is the case of the significance and role of prison enforcement in national security within a democratic and lawful state.

Article 3 of the Act on National Security defines national security as «state action targeted at protecting the freedom, rights and well-being of citizens; at guaranteeing the defence of Spain and its constitutional principles and values; and at contributing together with our partners and allies to international security in compliance with the commitments undertaken.» The norm adopts a widening approach which hints at a dynamic, global and interdisciplinary perspective. This approach acknowledges that the prison system has a certain potential that can be harnessed by the state in meeting the difficult challenge posed by national security.

National security could be defined as a collective expression of the fundamental right to security, as enshrined in article 17 of the Spanish Constitution. Theoretically, this right is defined as the minimum state of normality necessary to effectively implement the rights of the individual. Thus, security is an indispensable condition for the preservation of the constitutional order (which in turn acts as a bulwark for the remaining rights) and ultimately of personal freedom.

The purposes attributed to prison by the Spanish law are reflected in the realm of national security and are fully compatible with it. Social reintegration and rehabilitation, seen as the guiding principles of prison sentence enforcement and laid down by constitutional article 25.2, also have an influence in this context. If national security is tasked with averting to the extent possible risk-generating factors (crime amongst them), avoiding repeat criminal behaviour –as pursued by reintegration and rehabilitation– must form part of the range of measures deployed to achieve this. On the other hand, article 1 of the GPOL entrusts the prison service with the detention and custody of detainees, prisoners and convicts. This activity also contributes to safeguarding national security inside and outside of prisons. As an expression of special negative prevention, it aims to maintain a certain level of order and security inside prisons required to protect such fundamental rights as are not restricted by the

detainee's sentence and whose protection is entrusted to the state. The prison population does not lose its status as citizens upon entering prison. Detainees continue to enjoy such fundamental rights as do not stand in the way of enforcing their prison sentence. Therefore, all state action geared towards protecting the freedom, rights and well-being of citizens, as defined by article 3 of the Act on National Security, also includes those citizens serving prison sentences. In this sense, it should be remembered that coordinated action of criminal organisations inside prison facilities can put the lives or physical well-being of the other inmates at serious risk. As regards the situation outside prison, segregating individuals who have violated legally protected interests of their fellow citizens contributes to upholding the fundamental right to security, as well as social order and peace.

A fine balance needs to be struck between detention, custody, reintegration and rehabilitation in order to contribute effectively to national security.

In terms of generating criminal intelligence –an aspect which is inexorably linked to national security– prison services could potentially play a valuable role. Detention and custody allow 24-hour monitoring of inmates, thus allowing significant volumes of information to be gathered. In this sense, prison can be regarded as a channel for obtaining data which, once analysed, gives rise to criminal intelligence. The vast majority of information extracted from the prison environment comes from human sources, i.e. the inmates themselves. Applying the measures cited under article 65 of the prison regulations (aimed at maintaining internal security in prisons) yields numerous clues on the various kinds of criminal activities. However, any far-reaching use of these measures is limited by the principles of proportionality and necessity, as well as the respect for dignity and fundamental rights. The role of inmates as human sources of information must be limited by the respect for their rights. As citizens, inmates are still entitled to inalienable rights which the state has the duty to protect. For this reason, any information requirements derived from maintaining national security must be balanced with the inmates' condition of human beings and holders of rights that can be made effective against state action. The opposite would lead to an instrumentalisation of inmates for the sake of achieving a security objective more akin to interpretations of prison law that hark back to enemy criminal law.

It is the members of the Assistants Corps who are tasked with obtaining information (with relevance for national security) from within the prison environment. Assigning other prison staff members to information-gathering could infringe professional secrecy requirements or codes of ethics which regulate the different occupational areas. Training of prison staff entrusted with gathering data is essential. This must cover not only the techniques involved in handling human sources of information, but also the legal limits of this activity. It should be remembered that any action designed to maintain national security and hence protect the state from harm loses its legitimacy if the action itself undermines the basic pillars of the constitutional order.

The information obtained from inmates is systematically classified, stored and ordered in the FoDuSS file. Its existence is legally permissible under the provisions of

chapter III of part I of the prison regulations –titled «Protection of personal data in prison files»– as well as the specific regulations on personal data protection, as laid down by Organic Law 3/2018, of December 5, on the Protection of Personal Data and the Guarantee of Digital Rights.

The all-encompassing concept of national security, as outlined by article 3 of the Act on National Security, extends to many areas, including the prison system, which –due to its special characteristics as a *total institution*⁷³ – offers optimal conditions to contribute to the protection of the democratic state and the rule of law. However, it must always be remembered that the prison environment does not form a kind of legal limbo; i.e. all fundamental rights articulated by the Constitution and fully elaborated by domestic law apply. Therefore, national security and the inviolability of prisoners' rights have to be harmonised to avoid overzealous security efforts encroaching on the democratic values they are supposed to protect.

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73 Prison constitutes one of the paradigmatic examples of that which Goffman called a total institution, i.e. a «place of residence or work where a large number of people in the same situation and isolated from society for a significant length of time share a daily, formally supervised routine in their confinement.» See GOFFMAN, E. *Internados. Ensayos sobre la situación social de los enfermos mentales*. Buenos Aires: Amorrortu, 1970, p. 13.

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