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Spain

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SPAIN

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I. The Historical and Political Background of the Spanish Military Law System

Few countries in Europe have had experiences with their armed forces similar to Spain's. With regard to the influence of military power on politics, its history is perhaps more like South America's than Europe's. During the 19th century, the military intervened constantly in domestic policy. In the 20th century, Spain experienced military dictatorships similar to those of Greece and Portugal, but of a longer duration (1923-29, 1936-75). The Spanish transition from dictatorship to democracy was also unique among European experiences, and largely determined the current nature of the constitutional and legal provisions regarding the military.

It is necessary to underline some characteristics of the Spanish armed forces which have formed the tradition of the last two centuries: general militarism and interventionism, a lack of civilian control, political partisanship within the military, control of the police and public order by soldiers, a significant distance between the values of the armed forces and those of respect for constitutional and democratic principles, belief in a centralised and monarchical Spain, and civilian-military dualism.

Spain was the fifth State in the world to develop a Constitution (1812), and because that event coincided with the liberation - by the Spanish military - from Napoleon's dominion, soldiers - at least a large proportion of them - were held by the general population to be identified with constitutional values.[1] However, with the return of absolutism under Fernando VII, these soldiers were persecuted and practically eliminated (1814-1833, with the exception of 1820-1823). Spain had more than five Constitutions (1812, Statute of 1834, 1837, 1848, 1869, 1876) in the 19th century, as each political party tried to impose its own convictions by means of a new constitutional text. However, the political parties represented bourgeois interests led by soldiers, not groups with structured political proposals. Up until the last third of that century, there was continuous military intervention in the government, and that period is known for this reason as the "period of long swords" (*la época de los espadones*). Each successive faction sought and took power through non-democratic methods (e.g. *coups d'Etat*), always accompanied by

[1] On constitutional evolution, see R. Sánchez Ferriz and L. Cotino Hueso, 'La Constitución de 1978, punto de inflexión en el constitucionalismo español', in VV.AA *Administraciones Públicas y Constitución. Reflexiones sobre el XX Aniversario de la Constitución Española de 1978*, (Madrid, 1998) pp. 43-70.

intrigue from the royal mansion. The soldiers' were only loyal to the King, not to the various Constitutions.

Nevertheless, it is important to remark that the military interventions of the 19th century were not the actions of a homogeneous group. Both the moderate and liberal factions had their soldiers, who represented and fought - politically and literally - for them.

Therefore, in spite of the many acts and juridical texts in which the norm of political neutrality of soldiers was declared it was, in fact, non-existent. Another blemish on Spanish constitutionalism was the failure to separate the armed forces and the police. Although in theory Spain followed the French system, it did not have a strong civil structure like France. For that reason, power tended to accrue to the strongest organisation: the army. Continuous political instability leading up to the 1950s required that the public order be entrusted to a specific organisation called the "Civil Guard": it was designed as a hybrid civilian-military organisation, but its nature was - and has always been - more military than civil. The military nature of this organisation meant in practice that the armed forces controlled the forces of public order and law enforcement. The army intervened directly only when absolutely necessary. In short, up until the introduction of the present democratic system, public order was a thoroughly militarised concept.

In the last third of the 19th century, after the first Republic, came the epoch of "Restoration" and the *Canovas Constitution* of 1876. It was a conservative period, influenced heavily by the societal oligarchy (i.e. soldiers, church, landowners, industrialists, bureaucracy, and bourgeoisie in general), and in that period at least the enemies of the political establishment were clear: on the one hand the proletariat and social movements, activists of the "social question" and radical democrats, on the other hand the regional and national tensions that sprang up between the liberal centralist construction of the State and the regional bourgeoisie.

It was during this period that the soldiers adopted a new role: they did not act directly on the government, but rather assumed the position of watchmen over a certain "patriotic essence" which they defined. They became indeed the backbone of Spain. To defend Spain was to defend an oligarchic, capitalist, and centralist Kingdom not identified with constitutional values. This created a remarkable understanding of "military neutrality": they were "neutral" as long as the "patriotic essence" remained intact. Cánovas's doctrinal tendency was to place the "historical Constitution and Kingdom" before the principles of liberty

and rights. The divergence between soldiers and civilians grew: the army recruited increasingly out of its own offspring, and a military class separated from society began to emerge. It is due to the emergence of this class that military intervention in politics took on its distinctive 20th century character: the military began to act as a homogeneous unit.

With the humiliating loss of Spain's colonies at the end of the 19th century, and with subsequent disastrous campaigns in Morocco and elsewhere, military morale was in crisis and military mistrust of civilian and constitutional power grew. The structures of the Restoration were not able to adapt themselves to the new century and its new requirements. The young King - Alfonso XIII - failed to learn his father's moderation, and moreover was especially fascinated with the army. It was under such conditions that the military conducted its first assault on the state under General Primo de Rivera (1923-1929). The King acquiesced, giving the regime a sort of legitimacy. Shortly afterward, both General and King fell in rapid succession. The brief democratic period of the Second Republic followed, but then another military rebellion took place.

Franco's army was the traditional example of an institutional armed force,[2] consolidating military values with non-democratic and centralistic values. The public order was dominated by soldiers (the forces for public order were explicitly incorporated into the armed forces).[3] A poorly paid and sadly out-of-date army was thus "compensated" with a central political and social role. The armed forces were oriented primarily internally rather than externally: their purpose was the control of society and its conception of "Spain".

With Franco's death, the soldiers played a reactionary role in the Spanish Transition, acting as a brake on democratisation. In the end, however, Franco's political testament was explicit: soldiers must follow orders by King Juan Carlos I, and this was a decisive factor in favour of Spain's democratisation, along with the adept performance of the First Minister Adolfo Suárez and his Minister of Defence, General Manuel Gutiérrez Mellado.

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[2] On Spanish military character, see R. Bañón and J. A. Olmeda, 'Las Fuerzas Armadas en España', in R. Bañón and J. A. Olmeda (eds.), *La institución militar en el Estado Contemporáneo* (Madrid, 1985), in particular pp. 323-324; C. Gil Muñoz, 'Las Fuerzas Armadas españolas desde la perspectiva institución/ocupación', in C. Moskos Jr. and F. R. Wood (eds.), *Lo militar: ¿más que una profesión?* (Madrid, 1991), p. 395.

[3] Art. 37 of the Organic Act of the State of 1967 (from Franco's regime) reads: "The Armed Forces of the Nation, constituted by the Navy, Army, and Air Forces, *and forces of Public Order*, guarantee the unity and independence of the Mother country, the integrity of her territory, the national security, and the defence of the *institutional order*."

This was, however, a transition - not a reform. For that reason, anti-democratic soldiers were able, with some exceptions, to remain in the ranks.[4] As a result, military ideology remained reactionary. The loyalty of the soldiers remained with the King, not with the Constitution. Soldiers had no direct influence on the constitutional process, but they could exercise influence in other ways, and were able to have some effect on the Constitution both in a general sense and in particular on the military aspects. Specifically, the presence of military pressure was decisive with respect to Article 2 of the Constitution:[5] its text has a martial spirit and form, and although a recognition of the nationalities' and regions' right to autonomy is there, the article affirms first and foremost "the indissoluble unity of the Spanish nation, the common and indivisible homeland of all Spaniards." The article's spirit is essential to the interpretation of other constitutional precepts. Also, the soldiers' influence on military subjects, especially on Article 8 and its extraordinary insertion into the preliminary title (the first nine articles), was an important juridical factor.

Before these articles are elaborated upon, however, some other circumstances affecting the constitutional and legal system should be discussed.

Even after the Constitution was approved the military continued to play an important political role. Given the situation of political instability - a result of the transition as well as of continuing Basque terrorism - and long-standing military tradition, it is not surprising that a coup was attempted. Fortunately, it was frustrated, and in great measure due to the adroit reaction of the King. This event showed decisively that the armed forces were more willing to submit to royal than to constitutional authority, but at the same time it propelled Spain further down the road to democracy. The subsequent socialist governments (beginning in 1982), and particularly Minister of Defence Narcís Serra, were committed to the establishment and preservation of civilian control.

The Organic Act 4/1980 was reformed in 1984 in order to reinforce the powers of the President and Minister of Defence, and to weaken the National Defence Council of Chiefs of the General Staff (*Junta de Jefes*

[4] The "UMD" (Democratic Military Union) was a clandestine democratic association that was persecuted by other soldiers during the Spanish transition. See J. Busquets, *Militares y demócratas. Memorias de un fundador de la UMD y diputado socialista* (Plaza Janés, 1999).

[5] Art. 2 [National Unity, Regional Autonomy]: "The Constitution is based on the indissoluble unity of the Spanish nation, the common and indivisible homeland of all Spaniards, and recognises and guarantees the right to autonomy of the nationalities and regions of which it consists, and the solidarity among all of them."

de Estado Mayor, hereafter the Chiefs of the General Staff or the National Defence Council). There were also important secondary rules to the same purpose. At the same time, Spain's entry into NATO in 1982[6] (Spain did not enter the NATO military structure until 1996) changed many soldiers' perspectives on the future. The weak and slow military machine left behind by Franco had to modernise in order to be at the level required by new international exigencies. This was well-received by the soldiers who, since the failed coup d'Etat, knew that their political aspirations were futile. Thus, for the first time in Spanish history, an effective civilian supremacy over the military emerged because the soldiers finally began to accept it, and did not choose to collectively express their discomfort at their diminished position.

The next step came at the beginning of Spanish participation in international and multinational operations. This occurred primarily during the 1990s. Because the Spanish historical and juridical context is different than the German, the constitutional discussion of multinational military operations has been unlike that in Germany, but nonetheless there is discussion. This has been true particularly since the intervention in Kosovo in the spring of 1999. These kinds of military operations (armed and unarmed) have been important in contributing to a change in the perception of the role of the Spanish military not only for other countries, but also for the Spanish people and the soldiers themselves.

Another decisive factor has been the process of professionalisation. During the 1989 political campaign, when the length of compulsory military service was twelve months, every party's platform contained proposals to reduce or abolish it. Since democratisation military service has not enjoyed high regard among the population,[7] and most

[6] The decision to join NATO was adopted by Congress (officially published in the "BOE" on 31 May 1982), during the Government of Mr. Calvo Sotelo, after the reluctance characterising the presidency of Mr. Suárez. The vote in Congress was 186 votes in favour (UCD, CD, PNV, CIU and UPN) and 146 against (PSOE, PCE, PSA, EE, IRC, PAR and UPC), with the abstention of the FN representative. In the Senate, the vote was 106 in favour, 60 against and one abstention. Later - in 1986 - as a result of the shift of position by the PSOE, the question of whether Spain would remain in NATO was put to a referendum, where the result was affirmative, as long as Spain remained outside NATO's military structure. In November of 1996, under the Government of Mr. Aznar, it was decided by Congress that Spain should also integrate into the military structure of NATO, this time with ample majorities and without a referendum. The resolution was approved by 293 votes for (PP, PSOE, CIU, PNV and UV) and 23 against (IU, BNG, EA, Rahola (former ERC)). Regarding this topic, see J. De Luis, 'Espagne: l'européanisation de la politique de sécurité', (diciembre de 1997 (1998)) No. 5064-5065 *Notes et études documentaires*, issue dedicated to P. Buffotot, in: VV.AA, *La défense en Europe. Les adaptations de l'après – guerre froide* (Paris, 1998), pp. 71-89, in particular pp. 77-79.

[7] In 1989, the population was divided almost equally for and against compulsory military service (43% yes / 44 % no), but by 1991 the numbers were 35% yes against 60% no, and in 1997 fully 80% opposed compulsory military service. These data are from the *Informe Identidad nacional y cultura de defensa*

especially among the youth: Spain has the highest level of conscientious objection in Europe. These factors converged with the trends of the modern army of personnel-reduction and increasingly educated personnel. At first, Spain planned to have a mixed army, founded on a fifty percent professional and fifty percent conscript force. However, the Aznar Government which was elected in March 1996 promised full professionalisation in its investiture speech to Parliament, and indeed has fulfilled this promise: the last conscript left the armed forces in December of 2001. Conscription will remain possible depending on the needs of national security, but is otherwise suspended. Professionalisation, of course, entails a number of consequences, but most important - especially in view of the "dignified role of individual soldiers" - it may result in a definite separation from the rest of society if it is not accompanied by greater recognition of soldiers' human rights. Compulsory military service was at least a bridge - perhaps a dysfunctional bridge, but a bridge nonetheless - to connect civil society with the armed forces.

With professionalisation, however, this connection will disappear. The legal and economic status of soldiers is not far distant from that of civil employees, but the level of recognition of soldiers' human rights in Spain is disproportionately low in relation to other public servants and to civilians in general. Furthermore, no commitment to change this situation seems to exist, and this may produce even more distance between soldiers and the democratic society that they have to defend.

In every national defence plan and directive since 1996, politicians have insisted on the importance of a "consciousness of defence" among the general population, as they seem to take very little interest in all military matters. This call, however, has not been accompanied by a so-called "convergence" model, where civilian and military grow more like one another. The actual situation perhaps more closely approximates "divergence," similar to what Samuel Huntington described in the U.S. However, these kinds of questions, raised by the end of conscription, do not seem all that important in the public consciousness. Spanish society is, in general, happy with the end of the "burden" of compulsory military service, and carefree about military matters in general.[8]

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realizado por la Asociación de Servicios Profesionales, with a group of studies from 1991 to 1997, http://www.mde.es/mde/cultura/concie/concie8.htm, (23/03/2001).

[8] See L. Cotino Hueso, 'El reto de la profesionalización total de la Administración militar', in VV. AA., *Constitución y el nuevo diseño de las Administraciones estatal y autonómica* (Madrid, 1998), pp. 289-312.

1. Parliamentary Control and the Dignified Role for the Individual Soldier

2. Democratic Control and Rights and Duties of Soldiers

a. The Constitution

In Spain, the negative experience of two centuries, if nothing else, justifies the large amount of legal text which is dedicated to the regulation of the military.[9] In addition, the rather abnormal status of Spanish democracy during the Transition was translated into some rather abnormal constitutional text, which tends to create problems for legislators and jurists.

The most significant element is that the main section regulating the armed forces - Article 8 - was placed in the preliminary title of the Constitution, where general principles (Articles 1, 2, 9), language (Article 3), the flag (Article 4), and the state capital (Article 5) are contemplated next to elements like political parties (Article 6), trade unions, and business organisations (Article 7). This positioning of the military article is exceptional in Europe (only Austria's Constitution is similar). From the very beginning of the constitutional process, this article occupied this position, and its contents have not been altered: it was indeed one of the examples of "consensus" in the Transition.

This prominent location has given rise to all sorts of interpretations. Apparently, it was originally conceived of as a "gift" to the military: a recognition of its important role in Spain. From a juridical point of view, however, this location has been the principal argument to support the nature of the armed forces as an institution rather than an administration (in particular, as the military administration that is mentioned in Article 97 under order of the Government). It is also necessary to note that the Spanish constitutional controversy over the nature of the armed forces is the converse of that in Germany. It is possible to interpret this institutional conception of the armed forces as meaning that they have a certain autonomy with respect to democratically legitimated authority.[10] Legally, an institutional concept presupposes some exceptions to the general constitutional rules and

[9] See especially C. Garrido López, 'Sobre las funciones constitucionales de las Fuerzas Armadas y su ejercicio', (primavera-verano de 1995) No. 11/12 *Cuadernos Constitucionales de la Cátedra Fadrique Furió Ceriol*, pp. 175-212, in particular pp. 178-179.

[10] See L. Cotino Hueso, 'El principio de supremacía civil: perspectiva histórica y recepción constitucional', (otoño de 1996 (1997)) No. 17 *Cuadernos Constitucionales de la Cátedra Fadrique Furió Ceriol*, pp. 89-136.

principles (human rights, for example).[11] The administrative conception, on the other hand, facilitates the subjection of the military to democratic and constitutional authority - specifically to the Government (Article 97).[12] An administrative conception also implies a stronger subjection of military law to constitutional exigencies.[13]

Reasonable explanations for the odd status of Article 8 have been offered, particularly that it has served to ease the military transition towards a constitutional State. Today, an objective interpretation, removed from the past cause and meaning of the location of Article 8 is necessary. Such an objective contemporary interpretation would justify the position of that article in the preliminary title by bearing in mind the high mission that the constitutional State confers on the armed forces, namely, the defence of the democratic system in extreme circumstances. Such an interpretation would retain the idea of a constitutional "distinction" - as being an administration with such an important mission - but without any anti-democratic meaning attached.

b. The Government

The Government did not have full practical control of the military until the middle of the 1980s. This fact, combined with Spanish military tradition, has naturally conditioned the democratic Government's perception of the armed forces. This has resulted on the one hand in a certain strictness of policy pertaining to soldiers' political liberties (freedom of expression, information, association, petition, etc.). Given the ideological inclinations which have tended to prevail in the military, the Government (with the assent of Parliament and the Constitutional Court) opted for the maximum possible restrictions - sometimes even more than seems constitutionally admissible. On the other hand, soldiers have been "compensated" with generous policies on staff re-

[11] The most extensive and recent work on this issue is L. Cotino Hueso, 'La plena sujeción del Derecho militar a la Constitución y la superación de clásicos dualismos sobre las Fuerzas Armadas', (2000) No. 51 *Revista de Derecho Político de la UNED*, pp. 119-187.

[12] "The Government directs domestic and foreign policy, civil and military administration, and the defence of the State. It exercises the executive function and regulatory power in accordance with the Constitution and the laws."

[13] C. Moskos, 'La nueva organización militar: ¿institucional, ocupacional o plural?', in Bañón and Olmeda, 'La Institución militar', *supra* n. 2, pp. 140-152. There are several interesting comparative works in Moskos Jr. and Wood, 'Lo militar', *supra* n. 2. For some decades, Sociologists have been showing a determined interest in the military. See G. Harries-Jenkins and C. Moskos Jr., *Las fuerzas armadas y la sociedad* (Madrid, 1984), with introduction by M. Alonso Baquer, with more than 600 titles on the matter; Bañón and Olmeda, 'La institución militar en el Estado Contemporáneo', *supra* n. 2; general, basic studies are: M. Janowitz, in Ministerio de Defensa (ed.), *El soldado profesional* (Madrid, 1990); S. P. Huntington, *El soldado y el Estado* (Buenos Aires, 1962); J. Busquets, *El militar de carrera en España*, (3rd edn, Barcelona, 1984) and in Moskos Jr. and Wood (eds.), 'Lo militar', *supra* n. 2.

structuring in the armed forces and with a hands-off approach by the Government toward basic elements like military discipline and education.[14] In particular, this type of "compensation" has meant that women's access to the armed forces was excessively delayed (it started in 1989, and completion took until 2000). Nevertheless, gradual change towards an occupational model began in the 1990s, when the social and political situation of the armed forces changed and the soldiers began to assume a more appropriately democratic role. The armed forces have been duly modernised, and their focus is now more external.

In spring of 2000, the first White Book (pertaining to the armed forces) in Spanish history was approved. Modernisation, professionalisation, and the new role of the Spanish defence forces in Europe and in international organisations like NATO were all examined. Furthermore, the Directive of National Defence 1/2000 codified the following principles regarding the armed forces: (1) the necessity of a "strategic revision" with the consensus of Parliament and social institutions, (2) participation in international initiatives, (3) the need to reinforce a culture of defence, "which perceives questions related to security, freedom, and the defence of interests as relevant to itself", (4) the consolidation of the professional model, (5) modernisation, (6) the improvement of the organisation with respect to new strategic concepts and conflicts, (7) the integration of the army, navy, and air force, and (8) the necessary adjustment to available resources.

The matter of soldiers' rights is not mentioned in this directive, but there are interesting comments about the new role of the armed forces. In particular, there is an emphasis on the fact that the purpose of the military's existence is the fulfilment of "the traditional missions of deterrence and, if necessary, territorial defence." It also points out that it is in the international context "where the value [of the armed forces] as an instrument in the external activities of the State has proven itself valuable for our presence in Europe and for the fulfilment of our commitments in the Mediterranean and the Atlantic." It goes on to say that "the execution of these new missions [humanitarian, peace-keeping, peace-making, etc.] oblige us to have at our disposal forces with

[14] On military education, see L. Cotino Hueso, 'Exigencia del conocimiento de los derechos humanos y los principios democráticos por los funcionarios militares', in L. Cotino Hueso (ed.), *Derechos, deberes y responsabilidades en la enseñanza. (Análisis jurídico-práctico a la luz de las exigencias constitucionales)* (Valencia, 2000), pp. 329-353.

different characteristics than those required by the traditional concept of defence."

Notwithstanding the fact that the military's role in society has improved, it remains a delicate and sensitive subject. A good example of this is the affair of the last two years about the Armed Forces Parade during the traditional "Armed Forces Week," celebrated annually since the beginning of the democratic period. In the year 2000, this parade was in Barcelona, and the nationalist Catalonian party CiU (*Convergència i Unió*) along with ecologist-pacifist movements, *inter alia*, vigorously opposed it. Finally, the parade had to be reduced in size, and there were actually more people at the alternative demonstration than in the parade. In 2001, due to such political pressure, this type of traditional parade was abolished, significantly discomfiting the soldiers.[15]

c. The Public

In the most surveys (coinciding with the twentieth anniversary of the failed *coup d'Etat*), 61% of Spanish people believe that democracy is definitely consolidated, only 10% do not. More important is that 65% of the Spanish people think that the armed forces have fully turned around from the time of the coup episode, only 10% disagree. When asked "do you think that today's military is integrated with the rest of democratic society?" 55% of the people answered "yes," and only 14.4 % said "no."[16]

Among ten other societal institutions, the armed forces fall about in the middle (5-6/10) in popular judgement, together with the Ombudsman or the regional governments, and they do better than the central government.[17]

Other surveys also offer interesting data: 58% of those surveyed consider soldiers to be well or sufficiently integrated into society, whereas 31% considers this not to be the case.[18] 44% think that soldiers' prestige has not changed in the last 10-15 years, a quarter of people surveyed believe that soldiers' prestige has increased, and the

[15] The title page of the newspaper *La Razón*, 1 July 2001, read: 'Los militares, molestos porque tampoco habrá desfile' (Soldiers React Negatively Because There Will Be No Parade). This newspaper is generally considered conservative.

[16] These data come from the "Pulsómetro" poll by the Instituto Opina for the "Cadena Ser" (the radio station with the largest number of listeners in Spain). It was published on 19 February 2001, (20/02/2001).

[17] These data are from the *Informe* 'Identidad nacional', *supra* n. 7, with a group of studies from 1991 to 1997, <http://www.mde.es./mde/cultura/concie/concie11.htm>, (23/03/2001).

[18] The information comes from *Informe especial de la Asociación de Servicios Profesionales sobre diversos aspectos relacionados con las Fuerzas Armadas y sus miembros* (1999), <http://www.mde.es./mde/cultura/concie/concie8.htm>, (23/03/2001).

other quarter thinks it has declined. 53% considered the changes to the armed forces necessary (as against 2%), and most believed that the changes have not been sufficient.
In regard to the types of missions appropriate to the armed forces, 61% cited defence against foreign invasion, 46% cited humanitarian activities, and 15% claimed that military force never needs to be used. It is notable in this context that, along with Italy, Spain had the second lowest acceptance level for the armed intervention in Kosovo.[19]
The evolution of Spain's position in NATO has been interesting: during the Gulf War 37% were in favour of NATO, against 27% opposed. In 1995, 90% reacted positively to Solana's nomination to the civil command of NATO, while in the same year more than 50% rejected the idea of integration into the military structure of NATO. After military integration in 1996, however, opposition to the idea diminished to around 33% - about equal to the percentage of supporters.
Finally, on the question of a European army: in 1997 37% (against 36%) were in favour of a European military with a unified command. However, 39% were opposed to the possibility of putting Spanish troops under the authority of a European commander (24% were in favour).[20]
On the whole, the noteworthy fact is the lack of interest in questions of defence, soldiers, and the military organisation, and the low perception of threat.

II. Basic Rules Concerning the Use of Armed Forces

1. The Mission of the Armed Forces

In the western democratic tradition, it is unusual to make explicit mention in the Constitution of the missions incumbent upon the armed forces. In South American practice, however, it is quite common. Indeed, in Europe, such mention is to be found only in Germany,[21] Austria,[22] Portugal,[23] and Spain - all of which have had negative experiences, and have consequently attempted to tie their armed forces to the Constitution and the democratic system through specific codification of the military mission.

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19 A poll by CIS (Sociologic Investigations Centre, official) showed 33% agreeing with the intervention and 32.1% not agreeing, 12.3% strongly disagreeing. Study 2324, April 1999, <http://www.cis.es>, (01/06/1999).

20 These data are from the *Informe* 'Identidad nacional', *supra* n. 7.

21 Art. 87a German Constitution.

22 Arts. 9 A and 79.

23 Before the constitutional reform of 1982, Arts. 3 (5), 7 and 14; now Art. 275.

Article 8 (1) says that "the armed forces, comprised of the Army, the Navy, and the Air Force, have as their mission the guarantee of the sovereignty and independence of Spain, and the defence of its territorial integrity and constitutional ordering."
What makes this rule so dangerous in the eyes of some is that it seems to give licence to the soldiers to take whatever actions they may deem necessary if they perceive a threat. It is arguable that there has already been an example of this: on 21 February 1981, there was the famous *coup d'Etat*, accompanied by loud affirmations that the goal was the maintenance of sovereignty, territorial integrity, and the constitutional code. Even today, in the context of the political and sociological debate about the splintering of Spain caused by Basque separatism, it is feared that the armed forces might act without government orders in the case of a constitutional separation.
Another juridical consequence of the prominent location and definition of the military's mission is the great difficulty of amendment. This preliminary title is "protected" by the most difficult amendment procedure (Article 168), although an amendment would indeed be the better route to facilitate integration into, for example, collective systems of defence. Unlike in Germany, any amendment of the Constitution is practically taboo, and even more so in the case of the first nine articles.
Article 8's meaning is questionable in a number of legal senses: is it a programmatic declaration or does it have a strictly legal meaning? Are the given missions the only missions the military may constitutionally undertake, or are these simply the missions the military *must* undertake, and there may be others allowed? Are the missions enumerated in a specific order of priority? Are these to be understood as facets of the same mission or as fundamentally different missions? All of these questions have a lot of practical and political relevance, including whether Spain may participate in peace or humanitarian operations outside its borders.
In my opinion, it does not seem suitable to conceive of the missions listed in Article 8 in a strict and limiting fashion, as most legal commentators do.[24] Article 8 must be interpreted as a guarantee against traditional militarism and as a statement in favour of a democratic tradition. Thus the missions ought to be understood as having a restricted and categorical character *in a political sense* - i.e. that the intention is to eradicate inappropriate use of the armed forces.

[24] To follow this question in Spain, see L. Cotino Hueso, 'El modelo constitucional de FAS' (Madrid, 2002).

However, the article does not imply that the enumerated missions are the *only* ones allowed by the Constitution, either internally or externally, armed or unarmed. Note that this does not mean that the Article 8 missions lack juridical contents or that they are simply declarative.[25]

2. Permissible Operations

In order to give a clear answer to the question of which missions are constitutionally permitted, it first seems advisable to first clarify the meaning of each of the functions explicitly assigned by Article 8. Then it will be possible to analyse the constitutionality of other possible missions not mentioned in the text.

a. The Missions Explicitly Assigned by the Constitution

aa. The "Guarantee of the Sovereignty and Independence of Spain"

The Constitution (Article 8, plus the Preamble and Articles 30, 97, and 149) excludes an expansionist or militarist policy, but does not exclude the possible use of weapons for the security of the state, nor does it automatically tie the state to the precepts of international law. As the Kosovo crisis has demonstrated, the explicit constitutional rules do not limit the participation of the armed forces in operations to defend generally recognised international values, nor do they tie the military to the pursuit of international law as the republican Constitution of 1931 did.[26] The Constitution, although characterised by its internationalist opening (see also Articles 1 and 93), does not codify a doctrine of the supremacy of international law.[27]

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[25] The declaratory character of this article has been affirmed by Lafuente Balle, 'Las Fuerzas Armadas en el artículo 8', *supra* n. 24; Garrido López, 'Las funciones constitucionales de las Fuerzas Armadas', *supra* n. 9, pp. 206 *et seq*., and in Garrido López, *Intervención militar en Serbia*, 2nd position against its unconstitutionality in the academy e-forum *Debates constitucionales*, in http://listserv.rediris.es/cgi-bin/wa?A2= ind9905&L = debatescons&F =&S=&P=858 (May, 1999, 277 lines, last seen 7/11/2002).

[26] Art. 6 declared that "Spain renounces the use of war as an instrument of national policy". This declaration took the form of a strong reduction of the presidential power to declare war. Thus, Art. 77 (which provoked such interest by Mirkine Guetzévitch) placed the president's power to declare war under international law and the auspices of the international community. Thus, it is unnecessary to subscribe to the restrictive vision which assumes that national defence can mean only those measures justified in Art. 51 of the UN Charter (as "individual or collective defence, in case of armed attack against a Member of the United Nations").

[27] This question is the object of doctrinal controversy, although, in my opinion, except in the case of the requirements of Art. 10 (2) ECHR, attention must indeed be paid to international law, but on grounds other than the Constitution. The question becomes less clear, however, when it is about whether *ius cogens* enjoys supremacy over the Constitution.

This being said, it is necessary to add that the meaning of the Preamble[28] is generally understood to imply that any action by public authorities which endangers international peace must be considered unconstitutional. Most commentators agree that resort to war is legal under the Spanish order only in strict self-defence in response to external aggression.[29] It is also clear from the Preamble that the propagation of warmongering doctrines by public authorities is constitutionally prohibited. Finally, the Preamble excludes the use of the military for political expansionism or for state interests that are opposed to the general peace.

Therefore, the Constitution is eminently defensive, but not in a strict sense:[30] Spanish national defence does not have to mean solely the guarantee of Spanish territorial integrity; it can also include the defence of diverse Spanish strategic interests, which implies military actions taking place outside Spanish territory. Furthermore, the Preamble clause on "collaboration in peaceful relations" clearly leaves room for the constitutionality of peace-keeping and peace-making operations, as was concretely demonstrated by the Spanish participation in the Kosovo crisis.[31]

That combat operations can be justified as an action to obtain peace and stability in a zone of crisis next to the Spanish and European geo-strategic interests is thus, in the author's opinion, clear. It is notable that nobody doubted the legitimacy of the warlike intervention of NATO (with the participation of the Spanish Air Force) against the Serbian forces in Bosnia, since that action had the approval of the UN Security Council.[32] This shows that the true problem in the matter is not with external

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[28] Where it says "the Spanish nation [...] in the exercise of its sovereignty, proclaims its intention to [...] collaborate in the strengthening of peaceful relations and of effective cooperation among all the nations of the Earth."

[29] D. Blanquer Criado, *Ciudadano y soldado. La Constitución y el servicio militar* (Madrid, 1996), especially pp. 360 and 364 (perhaps the best legal study on the military). Without going into the argument of the constitutional Preamble, most of the doctrine maintains that the use of the armed forces is justified only to repel aggression: G. Suárez Pertierra, 'Regulación jurídico-constitucional de las Fuerzas Armadas', in Ministerio de Justicia, (ed.), *Jornadas de Estudio sobre el Título Preliminar de la Cosntitución* (Madrid, 1988), Tomo IV, pp. 2360-2414, in particular p. 2385; J. M. Muñoz Alonso, *Derecho administrativo militar, vol. I (Introducción. Organización administrativa* (Madrid, 1988), pp. 319-320.

[30] The strict sense would require something like the binding of a declaration of war to international law.

[31] Two days after the beginning of the NATO bombings of Serbia, the representative of the Popular Parliamentary Group, F. de Mesa Diaz del Río, in the Congressional Commission of Defence, indicated that "we are not in an operation of 'peace-keeping', that is to say, to keep the peace, or of maintenance of peace, we are in a mission called 'peace-making', to make peace. (DSCD, No. 660, Session No. 38, 26 March, 1999), pp. 1920 *et seq.*

[32] As a result of Security Council Resolutions 816, 820, and 836, and the resolutions taken by the Atlantic Council, Spain sent an air force detachment, and Spanish airplanes were used in actions against the Serbian forces.

warlike operations *per se*, but conformity or non-conformity with international law.

bb. The Defence of Territorial Integrity

Article 8 charges the armed forces with the defence of territorial integrity. As noted above, some have argued that this mission is as much internal as external.[33] It could be maintained that, when the attack on territorial integrity comes from the outside, the constitutional mission is the guarantee of the sovereignty and independence of Spain. Conversely, when the attack to integrity comes from the interior, the constitutional mission is the defence of the constitutional ordering. In the author's opinion, this merely proves the deep interconnection of the three examples with which Article 8 indicates the essential constitutional purpose: the defence of Spain's existence as a constitutional, democratic state. Sovereignty, territorial integrity, and constitutional ordering are simply the concrete facets thereof.

cc. The Defence of the Constitutional Ordering

The minority opinion which would like to mediate through its interpretation of the Constitution a return to the militaristic past, and the majority which is obstinate in keeping the maximum limits on this possibility, both confuse the aims of Article 8 with the constitutional distribution of powers. It is necessary to remember that the purposes for which the armed forces may be used, and the question of who has the authority to decide when and how military force ought to be used, are two very different issues.

The selection of the word "ordering" rather than "order" in this chapter is intended to avoid any confusion with the idea of "public order," a mission which was traditionally carried out by the armed forces in the undemocratic past. The guarantee of the "constitutional ordering" is distanced, then, from the guarantee of public security, understood as the exercise of rights and liberties and the security of the citizen.[34]

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[33] This has been argued for example in the constituent courts by the *diputado socialista Múgica*, see Cortes Generales, *Constitución española*. *Trabajos Parlamentarios* (Madrid, 1980), p. 2379. This position is common in the doctrine.

[34] Art. 104 [Security Forces and Corps]:

" (1) The Security Forces and Corps which are instruments of the Government shall have the mission of protecting the free exercise of rights and liberties and that of guaranteeing the security of the citizens.

(2) An Organic Law shall determine the functions, basic principles of action, and the Statues of the Security Forces and Corps."

The Spanish Constitution affirms that one mission of the armed forces is the defence of the constitutional ordering. To identify what this means, it is useful to note what kinds of conduct are punished as crimes of rebellion ("Crimes against the Constitution", in the Criminal Code),[35] because it is these regulations which are meant to protect the constitutional ordering. Among crimes classified as rebellion are attempts to countermand, to suspend, or to modify totally or partially the Constitution, to remove the constitutional powers of the Government or the King, or to force him/them to act against the Government's will, to dissolve the national or regional Assemblies, to declare the independence of a part of the national territory, to replace, or to prevent the actions of, the national or regional Governments, etc. It may also be helpful to examine the conditions the Legislature has established as constituting a State of Emergency allowing for a declaration of Martial Law.[36] The defence of the constitutional ordering is also tied in with the situations described by Article 155 of the Constitution, which states that the armed forces are the defenders of the Constitution in extreme cases.

b. The Use of the Armed Forces for the Maintenance of the Unity and Indivisibility of the Spanish Nation: A Constitutional Mission that is not Expressly Stated in Article 8

Article 8 (1) does not expressly confer on the armed forces the responsibility of guaranteeing the unity and indivisibility of Spain. However, it is undisputed that the armed forces can be used with the constitutional aim of defending the Spanish nation, and therefore, maintaining its unity and indivisibility, because the very foundation of the Constitution is indeed the existence of the Spanish nation (Article 2 of the Constitution).[37] The text of Article 2 of the Organic Act 6/1980 of Basic Criteria of the National Defence and Military Organisation

[35] The Penal Code of 1995 regulates rebellion in Book II, Title XXI (Crimes against the Constitution), First Chapter (Arts. 472-484); See also N. García Rivas, *La rebelión militar en Derecho penal (La conducta punible en el delito de rebelión)* (Albacete, 1990), pp. 138 *et seqq.*

[36] The Constitution does not fix in Art. 116 of the Constitution the circumstances under which the adoption of exceptional measures is justified. That task was undertaken by Organic Law 4/1981 of 1 June 1981, which regulates the execution of the measures contemplated in Art. 116 (1) of the Constitution, on the states of alarm, exception, and siege (see especially Art. 32 (1): "When an insurrection or act of force against […] the Constitutional Ordering occurs or threatens to occur, and cannot be solved by other instruments, the Government, in accordance with section four of Art. 116 of the Constitution, may propose to the Congress of the Deputies the declaration of a State of Siege.")

[37] " (2) An Organic Law shall regulate the bases of the military organisation in conformity with the principles of the present Constitution."

(LODNOM), modified by the Organic Act 1/1984, expressly includes the guarantee of the unity of Spain.[38]
However, it is necessary to remember that the defence of this "Spanish nation" has little or nothing to do with the "defence of the mother country" that has served throughout history to justify a number of undemocratic activities of the Spanish armed forces. The defence of "Spain" must be identified with the defence of a constitutional State, and no other political organisation. Despite the fact that adherence to this doctrine has not been consistent, it seems to be assumed by the representatives of the nation.[39] Note in this context the substance of the reform to the Spanish soldier's oath of allegiance, where they swear to "maintain the Constitution as the fundamental law of the State" (Article 3 of 17/1999 Act, Regime of the Personnel of the Armed Forces).

c. The Use of the Armed Forces for Other Missions

The armed forces can be used for purposes that are not found in Article 8 (1), as long as they are not contrary to the Constitution. For instance: on the one hand, external missions like humanitarian intervention, peace-keeping, or the rescue of Spanish (or European) citizens, and, on the other, internal activity in the case of natural, human, or ecological emergencies. Again, the fear of an independent military has caused Spanish doctrine to approach the matter with an excessive amount of distrust, and for that reason all possibilities that the missions of the armed forces could exceed those expressed in Article 8 (1) had long been excluded from consideration.

d. The Performance of Internal Missions not Enumerated in Article 8 (1): Humanitarian Aid and Natural Disasters

An express constitutional reference has not been considered necessary to justify the internal use of the armed forces in the case of natural or other disaster. Despite the fact that the "civil defence" is under the express jurisdiction and responsibility of the civilian authorities, this does not constitute a rejection of the possible use of the armed forces.

[38] Art. 2 (LODNOM): "The national defence [...] has as its purpose the permanent guarantee of the unity, sovereignty, and independence of Spain, its territorial integrity and the constitutional ordering, protecting the life of the population and the interests of the Mother country, within the framework of Art. 97 of the Constitution."

[39] It has been shown several times, as in the Opinion of the Mixed Commission of the Congress and Senate, that the purpose of the enumerated missions was to establish the terms by which the total professionalisation of the armed forces was to be reached (28 May 1998, para. 2); and in the recent 17/1999 Act, Regime of the Personnel of the Armed Forces (introductory explanation, para. 1).

The "defence of Spain" of Article 30[40] includes military and civil defence. The Constitution understands that civil defence is not incumbent on the armed forces, although collaboration with civilian authorities is not prohibited. This possible collaboration, however, is not seen as involving the armed capacities of the armed forces, but rather its human, material, and organisational elements. This leaves a margin for the Legislature to make specific arrangements as it sees fit, always within the bounds of the Constitution.

The Spanish Legislature assumed from the beginning that the armed forces could be used internally for the purposes of Article 8 (1), where one possible use is for a collaboration with civilian officials which does not suppose the use of the military's armed potential.[41] The military has acted on diverse occasions, and not only in collaboration with fire-fighters, but also in 1982 with military medical facilities on the occasions of the Pope's visit and the celebration of the World Cup.[42] More recently, the military was used in the Biescas camping tragedy (Huesca, August of 1997) and in the ecological disaster of Aznalcóllar (Seville, April of 1998).

Nevertheless, during the first ten years of the Constitution, no author of Spanish legal doctrine admitted that the armed forces could act beyond the functions expressed in Article 8 (1).[43] The situation changed thanks to Lopez Ramon's excellent study, in which he affirmed in 1988 that Article 8 (1) did not categorically limit the field of performance of the

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[40] Art. 30 [Military, Civilian, Emergency Duties]:

" (1) Citizens have the right and the duty to defend Spain.

(2) The law shall determine the military obligations of Spaniards and shall regulate, with all due guarantees, conscientious objection as well as other causes for exemption from compulsory military service and it may, when appropriate, impose a substitute social service.

(3) A civilian service may be established for the accomplishment of objectives of general interest.

(4) The duties of citizens in cases of serious risk, catastrophe, or public calamity may be regulated by law."

[41] There are basically three legal instruments which deal with the use of the armed forces for situations of serious risk: Royal Decree 1125/1976, Organic Law 4/1981 on the Declaration of Emergency, and Law 2/1985 of 21 January 1985, on Civil Protection.

[42] State military medical units were put on alert prior to the gathering of large masses of people for these events. The operations were named ICARO, PAX, and ICARO NARANJA.

[43] Thus, until the work of F. López Ramón, most of the doctrine affirmed the *numerus clausus* character of the missions enunciated in Article 8, including a denial of the possibility that the armed forces might be used for internal relief missions not involving the use of arms. Thus, Blanco Valdés, 'La ordenación constitucional de la defensa', *supra* n. 24, p. 70 confidently stated that "If one thing is clear from this article, it is that the armed forces [...] can be used only by the Executive, and only in the missions expressly – if not terribly clearly – set out in the Constitution". See also Espín Templado, 'El régimen constitucional españo', *supra* n. 24, pp. 268-275; Sanchez Agesta, 'El sistema político de la Constitución española de 1978', *supra* n. 24, pp. 254-257; Serrano Alberca, 'Comentario al artículo octavo', *supra* n. 24, pp. 120-122; Alzaga Vilaamil, 'La Constitución española de 1978', *supra* n. 24, pp. 129-130; Casado Burbano, 'Las Fuerzas Armadas en la nueva Constitución Española', *supra* n. 24, pp. 30-33.

armed forces, and that it was constitutionally permissible to use them for "functions that could not at any moment require the use of arms."[44] Such reasoning has been assumed by later doctrine.[45]

e. The Performance of External Missions not Enumerated in Article 8 (1): Crisis Management, Humanitarian Aid, Evacuation, etc.

The Spanish *pouvoir constituant* chose specifically not to mention the possible external use of the military in humanitarian or peace-keeping missions. However, not to be specifically mentioned does not imply active exclusion. Article 9 of the "Royal Ordinances"[46], approved at the same time as the Constitution affirms that "when Spanish military units collaborate in such missions, which aim at the maintenance of peace and international security, their service to such elevated purposes will cause them to feel like noble instruments of the Mother country."

By the late 1980s, Spanish armed forces had begun to participate in these types of missions, sometimes even armed. Nevertheless, Spanish doctrine denied the constitutionality of such external use of the armed forces, and only slowly and gradually have such missions been admitted. Originally, it was said that the only constitutional missions of the armed forces were those taking place within Spanish territory.[47] Shortly thereafter, the constitutionality of border actions was recognised.[48] In 1993 - years after Spain's first international operations - the constitutionality of humanitarian and peace-keeping operations

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[44] López Ramón, in 'La caracterización jurídica de las Fuerzas Armadas', *supra* n. 24, p. 328.

[45] See especially Blanco Valdés, 'La ordenación constitucional de la defensa', *supra* n. 24, pp. 75-76; later works are Fernández Segado, 'La posición constitucional de las Fuerzas Armadas', *supra* n. 29, pp. 59-60; Lafuente Balle 'Las Fuerzas Armadas en el artículo 8', *supra* n. 24, p. 70, affirms that Art. 30 (4) of the Constitution does not exclude the armed forces from the duties of citizenship in the event of serious risk, catastrophe, or public calamity; more recently Garrido López, 'Las funciones constitucionales de las Fuerzas Armadas', *supra* n. 9, p. 207; R. Martínez and A. Díaz Fernández, *El papel del Ejército ante situaciones de grave riesgo, catástrofe y calamidad* in (1999) 15 *Revista Aragonesa de Administración Pública*, pp. 391-403.

[46] "Royal Ordinances" (*Reales Ordenanzas*) is the name employed for the "Royal Ordinances of the Armed Forces." Despite the plural, it is only one act, approved by the Legislature by Law 85/1978. It is the traditional name of the basic regulation of military discipline and Regime. This name is different from the "Royal Decrees" (*Reales Decretos*), approved by the Government.

Each service (army, navy, air force) has its own Royal Ordinances. They do not have legal standing and were approved by the Government, not the Parliament. These regulations are mentioned in a few cases, and I always indicate when I am referring to the Royal Ordinances of a particular service as opposed to the Royal Ordinances (of the Armed Forces).

[47] J. Blanco Ande, *Defensa Nacional y Fuerzas Armadas* (Madrid, 1987), p. 162.

[48] R. Sotomayor Sáez, 'Ejércitos supranacionales y actuaciones fuera de área', in (Universidad Hispanoamerica de Santa María de la Rábida de 7 y 8 mayo 1992/Presidente Javier Pérez Royo, ed.), *Posición constitucional de las Fuerzas Armadas en Iberoamérica y España-Jornadas de estudio .."Constitución y Fueras Armadas"* (Madrid, 1992).

was affirmed, but only as long as they were not warlike and did not involve the use of arms beyond legitimate self-defence.[49] Later, others affirmed that external military actions would be constitutional whenever they occurred under the auspices and authority of the United Nations, and this position has been maintained.[50]

f. Terrorism and the Armed Forces

In the author's opinion, it is permissible to use the armed forces in the fight against terrorism, but only when the situation is so grave as to threaten the very foundations of democratic society. As indicated by the Constitutional Court, "rebellion is the most serious possible criminal action made or attempted by an armed band."[51] Could not the democratic powers use the armed forces if the effective danger to the constitutional regime came from a terrorist organisation? If this situation were to arise, the answer, without a doubt, would be affirmative. This type of decision is legally within the competence of the constitutional state. However, from the author's point of view, no situation has as yet actually justified the use of the armed forces, although they have indeed been called upon from time to time.[52]

3. Limitations on Operations Undertaken Jointly with the Armed Forces of Another Country

The present situation does not create excessive constitutional problems. Spanish membership in NATO is not contrary to the Constitution. This is primarily because integration into NATO was

[49] Fernández Segado, 'La posición constitucional de las Fuerzas Armadas', *supra* n. 29, p. 61.

[50] J. Sánchez del Río Sierra, 'Fuerzas Armadas y asistencia humanitaria', (March 1994) *Revista Española de Defensa*, p. 43; J. L. Rodriguez-Villasante y Prieto, 'Problemática del empleo del personal militar en acciones fuera del territorio nacional', *supra* n. 27, p. 189; Garrido López, 'Las funciones constitucionales de las Fuerzas Armadas', *supra* n. 9., p. 209; J. Díez de Nicolás, 'Opinión pública y participación española en la seguridad Internacional', (enero-febrero de 1994) No. 85 *Cuenta y Razón del pensamiento actual*, pp. 56-61; C. Horacio Cerda, 'Las operaciones militares de paz y el Derecho Internacional Humanitario', (enero-junio 1995) No. 65 *Revista Española de Derecho Militar*, pp. 307-344; J. L. Doménech Omedas, 'Las operaciones de paz en las Fuerzas Armadas españolas', (enero-junio 1995) *No.* 65 *Revista Española de Derecho Militar*, pp. 431-456; F. Pignatelli Meca in his communication 'La dimensión internacional de la profesionalización de las Fuerzas Armadas', presented at the meeting on the El Escorial summer courses, Universidad Complutense (Complutense, August 1997).

[51] Ruling 199/1987 of 16 December 1987, para. 4.

[52] In the summer of 1981, the Government of Calvo Sotelo ordered the deployment of the Army to the Navarre region of the Pyrenees to close the border to prevent the possible infiltration of ETA commandos. Also, during several months of 1992, and as a result of diverse threats of attacks, Spanish military units were used by decision of the Ministry of Defence in the monitoring and protection of some facilities and train lines (Madrid-Seville) related to the events of the Universal Exhibition of Seville (EXPO 92).

accomplished on an explicit constitutional basis (Article 94).[53] This did not, however, imply the cessation of the exercise of sovereign jurisdiction or responsibility.

The present situation in the evolution of European defence does not arouse concerns over possible conflicts between the missions for which the Spanish armed forces can constitutionally be used and the missions for which Spanish units might be used in a European Defence Force.

Accession to the European Union took place through Article 93 of the Constitution, which implies that the exercise of sovereign jurisdiction has been ceded. Spain yielded the *exercise* of sovereign jurisdiction and responsibility in favour of the Community institutions, and, as Araceli Mangas has indicated, "in those yielded areas, the Constitution will no longer govern."[54] It must at the same time be kept in mind that a yielding of the exercise of sovereign jurisdiction indicates that the Spanish state continues to be the body holding the ultimate right to exercise sovereign jurisdiction. The very nature of military defence implies limits on the possible extent of the yielded powers. "The Spanish Constitution does not allow the uncontrolled or unlimited attribution of jurisdictions or responsibilities, as that could endanger the survival of Spain as a democratic state, sovereign and independent […] The limits, which the present Constitution makes very difficult to overcome, prohibit the attribution of any exercise of sovereignty that would endanger the survival of the Constitution or of the State by affecting their essential elements."[55] Consequently, any conceivable conflict must, at the present time, be resolved in favour of the Spanish Constitution and its criteria of admissibility for the military's missions.

It is in any case indisputable that the Constitution was never intended to lend itself to the redefinition which has been applied to it lately. In the author's opinion, should the evolution of European defence reach that level of organisation which was intended for the European Defence

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[53] On participation in international organisations through this channel, see J. Cardona Llorens, 'La manifestación del consentimiento del Estado para obligarse internacionalmente por medio de tratados en la Constitución española: Balance de diez años de práctica internacional', in E. Álvarez Conde (ed.), *Diez años de régimen constitucional* (Madrid, 1989), pp. 299-312; A. Remiro Brotons, 'La Constitución y el Derecho Internacional', in Instituto Nacional de Administración Pública (ed.), *Administraciones Públicas y Constitución. Reflexiones sobre el XX Aniversario de la Constitución Española de 1978* (Madrid, 1998), pp. 227-257.

[54] A. Mangas Martín, 'La Constitución y el Derecho comunitario', in Instituto Nacional de Administración Pública (ed.), *Administraciones Públicas y Constitución. Reflexiones sobre el XX Aniversario de la Constitución Española de 1978*, *supra* n. 53, p. 182.

[55] Mangas Martín, 'La Constitución', *ibid*, p. 184, affirms that this position was maintained before by S. Muñoz Machado, *El Estado, el Derecho interno y la Comunidad Europea* (Madrid, 1986), pp. 264 *et seqq*. More recent is S. Muñoz Machado, *La Unión Europea y las mutaciones del Estado* (Madrid, 1993).

Community, it would be necessary to consult with the Constitutional Court (under Article 95 (2)),[56] and the most advisable thing would be to reform or amend the Constitution. This was indeed the position taken recently by Serra Rexach, the Minister of Defence, when he pleaded for a reform of Article 8 to include the European construction. [57] However, the subject is still not popularly discussed.

4. Constitutional Powers

a. The Position of the Head of State

Article 62 (h) of the 1978 Constitution says that the King is the Commander-in-Chief of the armed forces.[58] With some small disagreement, most authors agree that the constitutional attribution of primary command to the Monarch is not different from the rest of his functions; functions which they agree have a merely symbolic nature.[59] To some extent, however, it is deceptive to think of this competence as an attribution similar to all the others ascribed to the Monarch.

Most of the doctrine supposes that the royal prerogative of command is a formal and honorary function, including a number of acts in which the Monarch acts as arbitrator or moderator, without that implying any effective power of direction. Such a role is considered appropriate, given the King's supra-political position, as equipping him with moral authority over the armed forces; it is at any rate the position normally occupied by the Monarch in a parliamentary monarchy (see Article 1 (3))[60] with the regulation of the ministerial countersignature (see Article

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[56] Art. 95 [Conflict With the Constitution]:

" (1) The conclusion of an international treaty which contains stipulations contrary to the Constitution shall require a prior constitutional revision.

(2) The Government or either of the Chambers may request the Constitutional Court to declare whether or not such a contradiction exists."

[57] Minister of Defence E. Serra at the same time indicated the possible necessity of reforming the Constitution to adapt to the future exigencies of the European construction in the scope of defence. "If some day we have a united Europe, we will probably have to modify some part of Art. 8," he declared on Antenna 3 (television programme of 13 October 1998), and was referenced as *Serra no excluye la futura reforma del artículo 8 de la Carta Magna*, in *El País*, 14 de octubre, doc. No. 894, <http://www.elpais.es>, (16/10/1998).

[58] On the power of the King and the *coup d'Etat* experience, see L. Cotino Hueso, 'La posición del Rey durante la situación vivida el pasado 21 de febrero de 1981', in Congreso de los Diputados-Secretaría General, in VV.AA., *VII Jornadas de Derecho parlametario. El Título II de la Constitución. La monarquía parlamentaria* (Madrid, 2002), pp. 539-585.

[59] See Lafuente Balle *et. al.*, *El Rey militares: los militares en el cambio de régimen político en España (1969-1982)* (Madrid, 1998).

[60] "The political form of the Spanish State is a parliamentary monarchy."

56 (3) and Article 64).[61] Without going into the matter of the King's prerogative, De Otto maintains that it is within the royal powers to issue orders, but that the King has neither the legal jurisdiction nor the responsibility to exert this competence either in peace-time or in war. The King is an official without power located at the peak of the military hierarchy.[62]

There are indeed other authors who take a different position: Herrero Rodríguez de Miñón has defended the attribution of substantive and material power to the King, maintaining that the King could assume the effective control of the military and great strategic decisions even in war-time.[63] García de Enterría[64] defends the existence of a reserve of power compatible with the state's democratic character - like the monarch's military prerogative in the United Kingdom,[65] which is not necessarily given express form.

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[61] Art. 56 (3) "The person of the King is inviolable and is not accountable to anyone. His acts shall always be in the manner established in Art. 64 and shall lack validity without countersignature, except as provided for by Article 65 (2)."

Art. 64 [Countersignature]:

" (1) The actions of the King shall be countersigned by the President of the Government and, when appropriate, by the competent ministers. The nomination and appointment of the President of the Government and the dissolution provided for in Art. 93 shall be countersigned by the President of the House of Representatives.

(2) The persons who countersign the acts of the King shall be responsible for them."

[62] De Otto y Ignacio Pardo, 'El mando supremo de las Fuerzas Armadas', (1988) No. 23 *Revista Española de Derecho Constitucional*, pp. 11-43, in particular p. 37 *et seqq.* Sharing this position are, among others, Fernández Segado, 'La posición constitucional de las Fuerzas Armadas', *supra* n. 29, pp. 35-36; and, partially, J. M. Lafuente Balle, *La Jefatura Militar del Rey*, in VV.AA. Monarquía y Constitución (I), (Madrid, 2001), pp. 582-583. The latter considers it unconstitutional for the monarch to exercise the post of Captain-General of the Armies in regard to a legal norm.

In the recent Act 17/1999 of 18 May 1999, of the Regulations of the Personnel of the Armed Forces, the Legislature took another position: the King's post as Captain-General of the Armies is a consequence not merely of a legal proposition, but of the constitutional commandment. Art. 12 of this act states that "the King has the military post of Captain-General of the Army, Air Force, and Navy, the maximum military rank, which confers upon him the position of exclusive Top Command of the Armed Forces."

[63] Thus, *El principio monárquico. (Un estudio sobre la soberanía en las leyes fundamentales)* (Madrid, 1972) – this position was obviously taken prior to the present Constitution; Herrero y M. Rodríguez de Miñón, 'El Rey y las Fuerzas Armadas', (1980) No. 7 *Revista del Departamento de Derecho Político*, pp. 39, in particular p. 55; *idem*, 'La posición constitucional de la Corona', in VV.AA *Estudios sobre la Constitución española. Homenaje al profesor Eduardo García de Enterría* (Madrid, 1991), vol. II, in particular, pp. 2936-2939. Somewhat sharing this position is L. Sánchez Agesta, 'Significado y poderes de la Corona en el proyecto constitucional', in VV. AA, *Estudios sobre el Proyecto de Constitución* (Mardrid, 1978) pp. 110-111.

[64] E. García de Enterría, in the introduction to López Ramón: 'La caracterización juridical', *supra* n. 44, pp. XXI-XXV.

[65] On the British regal prerogative, see M. J. Cando Somoano, 'La prerrogativa real británica', (invierno-primavera de 1997) No. 18/19 *Cuadernos constitucionales de la Cátedra Fadrique Furió Ceriol*, pp. 131-160.

It is necessary to understand some of the background of the special position of the Monarch. We must remember that on 23 February 1981, a Lieutenant-Colonel of the Civil Guard seized control of the Parliament in session as well as the national radio and television service. The Commander-in-Chief of III Military Region (Valencia) proclaimed a State of Siege and martial law, and suspended or dismissed the relevant authorities. On 23 - 24 February, however, the King did not remain passive: he issued numerous orders to the military administration, but his most memorable act was the television address that he delivered to the nation at dawn on 24 February, in which he wore the uniform of the rebellious Army forces and ordered them to end the rebellion.

The February coup of 1981 evoked the requirement for the legal principle of necessity.[66] That is to say, circumstances occurred that demanded the adoption, by the most suitable and effective institution, of precise measures to achieve the purposes demanded by the Constitution. By virtue of the nature, circumstances, and urgency of the events, the King acquired the constitutional obligation to act in defence of the democratic system, and to do it in the most effective way without harming constitutional principles.

On 23 February 1981, effective control over the armed forces was assumed by the one person who, under the circumstances of unconsolidated democracy, still had an *autoritas* over them. That evening, the "empty" constitutional power over the military was filled by virtue of the necessity principle: the King was the only suitable device through which military orders could be issued and through which constitutional normality could be restored. The survival of the tradition that the military respect the Constitution only if the King does, was - for the last time, we hope - verified. Here, the monarch, unlike the rebellious military, fulfilling his constitutional role, had the extraordinary opportunity to demonstrate respect for a norm above himself. Thus his *autoritas* increased greatly, but this time under democratic auspices.

The King's exceptional performance during the coup teaches us the sociological importance of his position above the military, and also shows us that the legal attribution of the primary command of the armed forces (Article 62 (h)) can, in exceptional situations, turn out to have more substance than is generally thought. This alone is enough to raise doubts that, during periods of constitutional normality, the Monarch enjoys mere symbolic and honorary control of the armed forces.

[66] On the King's power and the *coup d'Etat* experience, see Cotino Hueso, 'La posición del Rey durante la situación vivida el pasado 21 de febrero de 1981', *supra* n. 58, pp. 539-585.

b. The Powers of the Government

Article 97 of the Constitution states that "the Government directs domestic and foreign policy, civil and military administration, and the defence of the State. It exercises the executive function and regulatory power in accordance with the Constitution and the laws."

The difficulties of the constitutional text have already been indicated; they demand a certain interpretive effort to avoid the impression that they grant an independent power to the armed forces. The constitutional foundations of the Government's power over the armed forces reside in Article 97. In Spain, unlike in Germany, the best way to reaffirm the subjection of the military to the Government is in fact to understand the armed forces as being integrated completely with the military administration.

The Constitution neither indicates the concrete structure of the Ministry of Defence, nor determines the faculties that can accrue to the President, the Government, or the Ministry of Defence, nor does it insist on the existence of a National Defence Council of the Chiefs of the General Staff. The Constitution does not, in general, regulate administrative agencies. That is done by the Legislature (and, sometimes, the Government). Nevertheless, it is clear that the Government is to assume control of the military administration and thus of the military itself. What the Constitution excludes is a normative determination that it must imply a recognition of autonomous power for the armed forces as such, because they are neither a power of the state, nor a constitutional device, nor a device of constitutional relevance. [67]

At present,[68] the Political Directorate of the Defence is under the authority of the President of the Government (Article 98 of the Constitution). The directorate includes the "authority to order, to coordinate, and to direct the performance of the armed forces" (Article 8 LODNOM), and this position has been ratified in the Government Act 50/1997. The Chiefs of the General Staff fill a consultative role.[69]

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[67] On the meaning of these concepts, see R. Canosa Usera, 'Órganos Constitucionales', and G. Gómez Orfanel, 'voz Órganos del Estrado', in P. Lucas Verdú (ed.), *Prontuario de Derecho Constitucional* (Granada, 1996), pp. 300 *et seqq*.

[68] See P. de Santayana Coloma, J. R. and others, 'La estructura de la Defensa', in VV. AA. *La defensa de España ante el siglo XXI*, (Madrid, 1997) in particular pp. 155-175 and 195-271; and the several documents on <http://www.mde.es> about the legislation itself.

[69] Art. 9 LODNOM:

"1. The National Defence Council is the advisory and consultative superior organ of the Government in the matter of national defence. It fulfils an advisory function towards His Majesty the King and the President of the Government. The Council normally consists of the President of the Government, the

The direction of war is a power of the President of the Government (by Article 8 (2) LODNOM). In this case, concentration of power is shown by the omission of the intermediate step represented by the Minister of Defence. In such situations it is fully possible that the authority to direct combat operations be placed in the Chief of the General Staff (*Jefe del Estado Mayor de la Defensa*), but always under the authority of the President of the Government.[70]

c. The Functions of the Minister of Defence

The command powers of the President of the Government are delegated to the Minister of Defence. This delegation is expressed in an absolute form, giving rise to doubts among some as to who is in fact the person ultimately in charge.[71]

The Minister of Defence has the powers conferred on him by the Organic Act of Basic Criteria of the National Defence and Military Organisation 6/1980 (LODNOM), modified by Organic Act 1/1984. Along with the Act of Legal Regime of the Administration of the State, the Act of Organisation and Operation of the General Administration of the State 6/1997, and other general dispositions - in particular Article 10 of LODNOM - these determine that the Minister of Defence shall:

- direct, by delegation of the President of the Government, the policy of defence,
- propose the objectives of defence policy,

Vice-Presidents (if there are any), the Minister of Defence, the Chief of the General Staff of the Defence, the competent Chiefs of Staff of the Army, Navy, and Air Force, and Ministers in the areas of Foreign Office and Interior, as well as any others that the President of the Government considers appropriate. The Council is presided over by the President of the Government, when His Majesty the King is not present.

2. The National Defence Council will produce reports on those subjects on which the Government wishes to consult concerning the national defence, and will advise on the military policy directives processed by the Minister of Defence.

3. The Council will undertake the study of and offer proposals to the Government on those subjects related to the national defence which, affecting several Ministries, demand joint proposals.

4. It will assist the President of the Government in the direction of the war and the functions that section 3 of Art. 8 assigns to him or her."

[70] By virtue of Art. 8 (2), the conduct of war is the responsibility of the President of the Government. Art. 11 (B) (3) further states: "The Government, in case of war, may transfer the power of Chief of Operational Control of the Armed Forces to the Chief of the General Staff of the Defence (*General Jefe del Mando operativo de las Fuerzas Armadas al Jefe del Estado Mayor de la Defensa*), who may then, under the authority of the President, undertake the actual direction of military combat operations".

[71] Pardo de Santayana Coloma and others, 'La estructura de la Defensa', *supra* n. 68, p. 161.

- exercise all the functions derived from the defence policy which are not reserved to the President, or which the President does not specifically delegate to a Vice-President,
- process, determine, and execute military policy,
- formulate the Joint Strategic Plan (*Plan Estratégico Conjunto*, PEC) and determine the Objective of Force (*Objetivo de Fuerza Conjunto*, OFC), and present them to the Government for its approval,
- direct, by delegation of the President of the Government, the performance of the armed forces,
- supervise the training and operative effectiveness of the armed forces,
- direct, by delegation of the president of the Government, the military administration,
- propose a budget to the Government, and direct and control its implementation,
- direct and coordinate the acquisition and administration of resources, and regulate the production and distribution of arms and material, in accordance with the PEC-OFC,
- direct, coordinate, and control the personnel policy of the armed forces, supervising military education and administering social programs,
- encourage and coordinate scientific research in matters affecting national security.
- exercise the disciplinary powers that the laws assign to him.

It is also incumbent upon him to approve as necessary the operative and logistics directors for the planning of operations by the Operative Controls (*Mandos Operativos*) developed in the PEC. Finally, it is his responsibility (under Article 13 of the Organic Act of Basic Criteria (LODNOM)) to coordinate the performance of the rest of the ministerial departments in matters of defence.

d. The Participation of Parliament in the Decision to Deploy the Armed Forces

The 1978 Constitution balances the Government's powers of direction of defence policy with the general legislative and budgetary power and control of the Assemblies (Article 66). The declaration of war, although officially the duty of the Monarch, must have the prior authorisation of the Assemblies (Article 63 (3)). The prior authorisation of Parliament is also required for the approval of any international treaties concerning the exercise of sovereign jurisdiction or responsibility (Article 93) - for

instance, European Union defence developments - or having military character (Article 94 (1) (b)).
The Legislature also holds the power to declare exceptional states (of disaster, emergency, etc.).[72] Although the President has the ability to declare a state of "alarm" (Article 116), the *a posteriori* authorisation of Parliament is required to extend the state of alarm beyond fifteen days. In the case of all other "exceptional" states, Parliament's authorisation must be obtained before the declaration. Only Parliament may declare a state of "siege" (i.e. martial law).
In principle, this constitutes the normal democratic arrangement of balance of power over the armed forces between the Executive and Legislative branches. However, one must also look at both the legislative development and some special factors which could weaken this system. First, it is possible to question the real effectiveness of the Legislature's activities. Second, the prior authorisation of Parliament for the declaration of war has become an empty power since combat operations are routinely practiced without this formality.

aa. The Spanish Participation in the Kosovo Operations

On 24 March 1999, NATO Secretary General Javier Solana gave the order to activate Operation "Allied Force." The President of Spain had given his consent for the use of Spanish armed forces in the military intervention at the moment that he considered opportune.[73] On the 30th of that month, the Plenary Session of the Spanish Parliament endorsed the allied decision, intended to take place mainly in Serbia. The possibility of a ground invasion was planned for throughout the conflict, and the President indicated that "he would appear immediately before the Assembly"[74] in such a case. That is to say, it was apparently not considered necessary to seek Parliament's prior authorisation. Since the ground invasion never took place, the controversy was never revived [...] or resolved. The immense majority of the members of

[72] See P. Cruz Villalón, *Estados excepcionales y suspensión de garantías* (Madrid, 1984); see also Organic Law 4/1981 of 1 June 1981.
[73] It was affirmed by the President of the Government in his first appearance in Congress after the bombings, on 30 March 1999: "On Sunday, 21 March, the Secretary General of NATO consulted with the President of the Government on the necessity of initiating the said operations. In other words, he requested the authorisation of Spain for the activation of military intervention, should it be necessary; a decision which belongs in a strict sense only to the Secretary General of NATO. The President of the Government of Spain gave that authorisation." (*DSCD,* Pleno VI Leg., No. 226, 30 March, 12.052 *et seqq*.)
[74] The quotation is from the President's answer to an oral question put to him on 12 May 1999 (*DSCD*, Pleno, IV Leg., No. 238, 12 May, 12.688).

Parliament were in favour of the actions undertaken against the Milosevic regime.

This situation raises the following questions: in the case of Kosovo, was a formal declaration of war and, therefore, the prior authorisation of Parliament, necessary for Spanish participation in the allied actions? Could the legitimate Government authorise a ground invasion involving Spanish troops without the previous permission of Parliament?[75]

The King also made no formal declaration of any kind - which declaration also would have required the prior authorisation of Parliament by virtue of Article 63 (3). Diverse commentators have considered the participation of Spain in Kosovo to be unconstitutional because it lacked the mandatory declaration of war.[76]

Garrido has been insistent in pointing out that the declaration of war and the related notion of a "State of War" are institutions in crisis, to which states are resorting with less and less frequency. He notes that a major part of the problem is that there is no definition of the concept of "war" in the Constitution (see Articles 15, 63, and 169). He denies the necessity of a formal declaration of war in every situation in which Spain participates materially in a war, as in the case of Kosovo. He notes that it would be a different question altogether should the Legislature see fit to pass a law requiring the formal declaration of war referred to in Article 63.[77] At the moment, however, the law only

[75] At the conclusion of the national Congress of the Spanish Association of Constitutional Law and Theory of the State, celebrated in Alicante from 28-29 April 1999, a certain amount of tension arose in regard to the presentation of a paper which argued for the unconstitutionality of the action. This paper did not constitute an official declaration of the Association, although it resulted in the formation of a virtual forum where arguments for and against the constitutionality of the Spanish participation in Kosovo were presented. *Debate sobre los aspectos constitucionales de la intervención militar española en Serbia*, mayo 1999, <http://www.constitucion.rediris.es/Princip.html>. However, only three professors participated in this debate: F. J. Bastida Freijedo, C. Ruiz Miguel and C. Garrido Lopez, and all three considered the action unconstitutional.

An opposing view can be found in L. Cotino Hueso, "La constitucionalidad de la participación española en la crisis de Kosovo", in (A. Colomer Viadel, ed.) *El nuevo orden jurídico internacional y la solución de conflictos. La clave del Mediterráneo* (Madrid, 2000).

[76] F. J. Bastida Freijedo, "Intervención militar en Serbia, 2 inconstitucionalidad" (166 lines) and C. Ruiz Miguel, "Intervención militar en Serbia, 2 inconstitucionalidad" (100 lines), both in *Debate sobre los aspectos constitucionales de la intervención militar española en Serbia*, *ibid.*

[77] Recall the Proposal of Law 122/000274, Modification of Organic Law 6/1980, presented by the federal Parliamentary Group of the United Left (*Izquierda Unida*), on 11 May 1999 (in *BOCG, Congress of the Deputies*, 24 May 1999, Series B, No. 306-1, pp. 1-2). Art. 6 (4) of this proposal stated that "Any use of the armed forces upon another State must be preceded by a declaration of war from Spain to that State." This proposal was admitted to the proceeding, although it later expired without having been deliberated upon.

demands that Parliament be "informed" if conscripts will be present in units destined for external missions involving the use of force.[78]

The Government's lack of attention to Parliament has been criticised in diverse political sectors. The Government's performance during the crisis could be criticised from the point of view of political responsibility. One could say, for example, that such questions ought to be considered by Parliament due to Article 108 of the Constitution - but could not, however, be criticised from the legal nor even the strict constitutional perspective, since the present regulation on the matter permits these actions of the Government. Something like the Government's failure to consult with Parliament can be considered allowable under the unanimous agreement of the *Camera* of 24 October 1995, which stated that, for the participation of Spanish forces in missions outside the borders of Spain - it being understood that only humanitarian or peace-keeping missions were acceptable - it was necessary to act under the authority of the United Nations. It is difficult to argue that the Spanish performance in Serbia did not violate this agreement, but that does not mean that either the Constitution or any other Spanish law was violated. Without a doubt, the ignoring of such a legislative decision gave the Parliament good grounds for demanding political responsibility from the Government; however, the ample *a posteriori* support of the representatives for the Government's measures seem to have closed the question.[79]

The position of Parliament in the Kosovo crisis was thus relegated practically to the control of the performance of the Government. Most of the parliamentary activity occurred in the Lower House,[80] but there was, of course, also some activity in the Senate. In spite of harsh protests during Kosovo, the subject of parliamentary control has not been a focus of discussion either in doctrinal development or in Parliament itself.

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[78] Art. 27 of Organic Law 13/1991 of 20 December 1991, which regulates military service, states: "In the exceptional case that a unit to which [conscripts] are assigned is designated for a mission involving the use of force outside the borders of Spain, the Government will inform the Congress of Deputies [*Congreso*]". Some naval vessels (*Aragón* and *Pizarro*) which were tasked with transporting troops and material to the zone of conflict had a small number of conscripts aboard, but none of the troops being moved to the conflict zone were conscripts.

[79] See Garrido López, 'Intervención militar en Serbia', *supra* n. 25.

[80] The President made four appearances before the Plenary Session of Congress relating to the Kosovo conflict and the participation of Spanish armed forces, three of those appearances directly about the matter at hand.

bb. Internal Use of the Armed Forces

In the case of unarmed actions (natural disasters, etc.), Parliament enjoys only generic control of the Government's decisions. Thus, unless a State of Alert is declared, the normal constitutional regulations apply. If the Government decides to declare a State of Alert, Parliament would have a bit more say, in that it would have to debate whether the situation should be allowed to continue beyond fifteen days.

In the case of armed internal functions, however, the controversy becomes heated. Fortunately, there has been no such experience during the constitutional period. The basic question is whether the Constitution demands the declaration of a State of Siege, which would require the consent of an absolute majority of the Congress (Lower House).[81] Most doctrine maintains that the armed use of the military, without the previous declaration of the State of Siege,[82] would be unconstitutional, but there has been disagreement.

In particular, doubts have been provoked by Article 155 (1), which indicates that a majority of the Senate (Upper House, "for the territorial representation") must vote to give prior authorisation to the adoption of "necessary measures" to reassert control over a Region that "refuses to fulfil the obligations imposed upon it by the Constitution or other laws, or which acts so as to endanger seriously the general interest of Spain." Doctrine is divided on whether this clause implies that some use of

[81] See *inter alia* Cruz Villalón, 'Estados excepcionales y suspensión de garantías', *supra* n. 72, pp. 112-116; J. M. Serrano Alberca, 'Comentario al artículo 116', in F. Garrido Falla (ed.), *Comentarios a la Constitución* (2ª edn, Madrid, 1985), pp. 1555-1599, in particular p. 1168; F. Fernández Segado, 'La Ley Orgánica de los estados de alarma, excepción y sitio', (1981) No. 11 *Revista de Derecho Político de la UNED*, pp. 83-116, in particular pp. 113-114.

[82] Suárez Pertierra, 'Regulación jurídico-constitucional de las Fuerzas Armadas', *supra* n. 29, pp. 2389-2390; F. Fernández Segado, 'La participación militar en el estado de sitio y el modelo de régimen democrático', (1984) No. 96-97 *Revista de Derecho Público*, pp. 479-539, in particular pp. 518-520; *idem*, in 'La posición constitucional de las Fuerzas Armadas', *supra* n. 29, pp. 57-59; F. Trillo-Figueroa, 'Las Fuerzas Armadas en la Constitución española (Esbozo de una construcción institucional)', (1983) No. 12 *Revista de Estudios Políticos,* pp. 105-140, in particular p. 124; Serrano Alberca, 'Comentario al artículo octavo', *supra* n. 24, p. 122; M. Ballbé, *Orden público y militarismo en la España constitucional* (Madrid, 1983), p. 463; J. Barcelona Llop, 'La organización militar: apuntes jurídico-constitucionales sobre una realidad estatal', (mayo-agosto de 1986) 110 *Revista de Administración Pública*, pp. 55-105, in particular p. 99; R. L. Blanco Valdés Rey, Cortes y fuerza armada en los orígenes de la España liberal, 1802-1823, (Valencia-Madrid, 1988), pp. 72-74; Lafuente Balle 'Las Fuerzas Armadas en el artículo 8', *supra* n. 24, p. 70; F. López Ramón, 'La posición constitucional de las Fuerzas Armadas', (enero-diciembre de 1983) 100-102 *Revista de Administración Pública,* pp. 949- 971, in particular p. 951; A. Porras Nadales, 'La Defensa, poder militar y régimen constitucional', (septiembre-octubre de 1983) No. 35 *Revista de Estudios Políticos,* pp. 183-234, in particular p. 233.

force must have taken place (or be imminent) in order to legitimise a declaration of the state of siege.[83]

e. The Role of the Military Leadership

As was mentioned above, Spain has had a long tradition of militarist interventionism, including both military influence over weak civilian governments and direct military dictatorships. The last episode of interventionism, however, was the 1981 coup, and there has been no expression of military insubordination since 1986. Democracy seems consolidated; the military seems to have lost its "ancient" institutional character, and it is no longer conceivable for Spanish society that the military might serve a non-democratic role. The position of the military leaders should now be understood to be the same as in most other democratic states, where the military is no more and no less than a bureaucratic pressure group. However, they are still a group whose rights to expression and political participation are severely limited by the laws, perhaps even excessively so.

The Chief of the General Staff is, as indicated in Royal Decree 1883/1996, "the military authority through whom the Minister of Defence exercises his authority" (Article 11 LODNOM).[84] Also, each of the Chiefs of the General Staff of each of the service branches exercises both the control organic to his service and the operative control which the Chief of the General Staff determines for him, under the authority of the Minister of Defence.[85]

5. Parliamentary Control

a. The Parliament's Powers to Control the Armed Forces

The legislative development with respect to the responsibilities and powers of Parliament in military and defence matters[86] shows a clear

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[83] See V. J. Calafell Ferra, 'La compulsión o coerción estatal' (estudio del artículo 155 de la Constitucion española), (2000) No. 48-49 *Revista de Derecho político*, pp. 99-146.

[84] Royal Decree 265/1996, of 16 February 1996, further determines the position of the Chief of the General Staff, with a clear tendency to the establishment of his status as head of the armed forces in both an administrative and operational sense, within the directives and means received from the Government. The basic regulations are to be found in Art. 7 *et seqq.* of Royal Decree 1883/1996 of 2 August 1996. On the changes produced in 1996, see Ministry of Defence, Organisation of the Defence Ministry, in <http://www.mde.es>, 145 lines (10/10/1999).

[85] Art. 12 (1). Under the authority and direct dependency of the Minister of Defence, the Chief of Staff of the Army, the Chief of Staff of the Navy, and the Chief of Staff of the Air Force exercise control over their respective service branches. For the fulfilment of their missions, each one of them has the support of a Headquarters unit.

[86] L. Cotino Hueso, 'La posición de las Cortes en el ámbito militar y de la defensa. (Atención particular a la reciente experiencia de la crisis de Kosovo)', pp. 30 *et seqq*., in *Corts. Anuario de Derecho Parlamentario*, (2000) No. 9, pp. 253-282; J. García Fernández, 'Guerra y Derecho constitucional. La

tendency towards the concentration of power in the Executive. While the constitutional limits have been respected, the Legislature has avoided the exercise of its prerogatives as much as possible. The initial project of the UCD Government - the Organic Act of the Basic Criteria of the National Defence and Military Organisation 4/1980 (LODNOM) - did not mention Parliament as an authority. After a hard political battle, the opposition managed merely to introduce Parliament as one of the authorities, but still with the minimum faculties required by the Constitution.

Article 6 of Act 4/1980 (LODNOM), states that:

> Parliament will approve acts and budgets relating to defence, and oversee the control of combat operations by the Government and military administration. Parliament must authorise actions taken under Article 63 (3) of the Constitution, and must give prior authorisation for all treaties of military character, in accordance with Article 94 of the Constitution.

Additionally, there was a clause which did not merely repeat what was in the Constitution, namely that:

> "Parliament will debate [note: not "approve"] the general lines of the defence policy and armaments programs, with the corresponding investments, for the short-, mid-, and long-term. The total strength of the armed forces and their units will be adjusted to the forecasts determined in the special Endowments Act and to the Budgets Act, and will not exceed the limits fixed therein."

By virtue of Articles 22 and 25 of the LODNOM, Parliament's faculties are conditioned by the plans and objectives of the Government. The later Governments did not vary this regulation when they reformed the Act, although when they were in the opposition they criticised it with intensity. Lopez Garrido's pre-1985 analysis exposed the weakness of parliamentary control with respect to defence policy.[87] Busquets emphasises the incredible fact that, until democracy was well-consolidated, the military budget was exempt from Parliament's control.[88] Nevertheless, since the Government's control over the military became effective in 1986, parliamentary performance on matters of defence has been more standardised and is certainly not insignificant.

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formalizacion del inicio de la guerra mediante su declaración en Derecho internacional y en Derecho interno', (2001) No. 32 *Cuadernos Constitucionales de la Catedra Fadrique Furió Ceriol*, pp. 5-46.

[87] D. López Garrido, 'Algunos datos sobre el control de las políticas de defensa y la Administración militar en el congreso de los Diputados 1977-1986', (1986) No. 36 *Revista española de investigaciones sociológicas*, R. Blanco Valdés, La ordenación constitucional de la defensa, (Madrid, 1988), pp. 155-158.

[88] See especially Busquets, 'Militares y demócratas', *supra* n. 4, p. 300.

The 1986 referendum ratifying Spanish integration into NATO increased political interest in the matter, and this was reflected in parliamentary activity.[89] In fact, there have been several laws made since 1985 which were designed to bring the constitutional and military systems closer to one another - an arduous legislative undertaking. Military questions were at the forefront of political debate in 1989, after elections in which the subject was the object of a clear partisan divide. Due to this heightened political interest, a law regulating military service and proposing a mixed model military arose by consensus in 1991.[90]

Another phenomenon which increased the work of parliamentary control began around this time: the participation of the Spanish military in international missions.[91] The Gulf crisis of 1990-91 attracted parliamentary attention, and since then, the number of international missions in which Spanish forces participated has grown perceptibly, especially with the Balkan crises.[92]

The 1993 integration of Spain into NATO's military structure also quite naturally created controversy in Parliament over military questions. During the 1996-2000 legislative period, military and defence matters again became the objects of important parliamentary work, mostly because of the process of downsising the Ministry of Defence, and the 1996 professionalisation of the armed forces. Besides the important work of the Joint Commission created for that particular purpose,[93] Parliament also exercised control over all measures taken by the executive regarding the process of professionalisation. Three laws have been approved accompanying this process.[94] The one of greatest legal interest was the Regulating Act 17/1999, of the Regulations of the

[89] Organic Law 12/1985 of 9 December 1985, Disciplinary Regulations of the Armed Forces; Organic law 13/1985 of 9 December 1985, approving the Military Penal Code; Organic Law 4/1987 of 15 July 1987, on the Competences and Organisation of Military Jurisdiction; Organic Law 2/1989 of 13 May 1989, on Military Procedure; and Law 17/1989 of 19 July 1989, which determines the regulations regarding the professional soldier. Obviously, all this legislation represents a good deal of parliamentary work and attention.

[90] Organic Law 13/1991 of 20 December 1991, regulating military service.

[91] Ministerio de Defensa, 'Diez años de participación española en misiones de paz', agosto de 1998, <http://www.mde.es/mde/mision/mision3.htm>, (12/1/2000).

[92] Following Security Council Resolutions 816, 820 and 836, and the resolutions taken by the Atlantic Council, Spain sent an Air Force detachment, and Spanish airplanes took part in combat actions against the Bosnian Serb forces.

[93] The Joint Congress-Senate Commission issued an opinion endorsing the establishment of the formula and terms for the total professionalisation of the armed forces. This was approved in plenary session of the Congress of Deputies on 28 May 1998, and in plenary session of the Senate on 9 June 1998 (*BOCG, Congress of the Deputies*, 21 May 1998, No. 209, pp. 2 *et seqq.*).

[94] Organic Law of the Disciplinary Regulations of the Armed Forces 8/1998 of 2 December 1998; Law 17/1999 of 18 May 1999, of the Regulations of the Personnel of the Armed Forces and Law 26/1999 of 9 July 1999, on Measures of Support for the Geographic Mobility of Members of the Armed Forces.

Professional Soldier. In its latest period, parliamentary interest in defence matters was monopolised completely by Kosovo and by the participation of the Spanish military in warlike activities.

b. Special Forms of Parliamentary Control over the Military, Ombudspersons

There is no military Ombudsperson in Spain. However, there is a constitutionally regulated office of the Ombudsperson (*Defensor del Pueblo*) (Article 54), who is supposed to supervise the activity of the "administration".[95]

In Article 14 of Organic Law 3/1981, the Defender of the Public, it is stated:

> "The Ombudsperson will safeguard the respect of the rights proclaimed in the first title of the Constitution, and in the scope of the military administration, but his actions on these matters may not involve any interference in the control of the national defence."

Article 26 says "the Ombudsperson will be able, without the assistance of others, to exercise civil action for damages against all the authorities, *civil* employees, and agents [non-military] of the governmental or administrative order, even local, without which a previous claim in writing would be necessary."

Some authors have denied that the Ombudsperson can supervise the armed forces, because they are distinct from the "military administration".[96] The practice of more than twenty years, however, confirms that the Ombudsperson has supervised not only purely administrative activities, but all violations of fundamental rights in the armed forces. This can be verified in the annual information that the Ombudsperson presents to Parliament.[97]

The main question regarding the Ombudsperson's role *vis à vis* the military administration is, what are the meaning and the extent of the "non-interference in the control of the national defence?" (Article 14).

Since his office was created, the Ombudsperson has praised the aid he has received from the military administration in the course of performing

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[95] J. María Peñarrubia Iza, *Ombudsman militar y defensor del pueblo. Estudio de derecho comparado y español* (Madrid, 2001).

[96] J. L. Martínez López-Muñiz, 'Fuerzas Armadas y administración pública', in Ministerio de Justicia (ed.), *Jornadas de Estudio sobre el Título Preliminar de la Constitución*, (Madrid, 1988), Tomo IV, pp. 2701-2725. This article maintains the more belligerent institutionalist position, the best account of which is to be found on pp. 2718-2719.

[97] All reports since 1995 are available online at <http://www.defensordelpueblo.es/>, (16/03/2001).

his duties, and recognised the military institution's readiness to correct possible irregularities which he detected.
As an aside, there is also a well-known non-governmental organisation called the "Office of the Defender of the Soldier" to which the mass media, through ignorance, has sometimes attributed institutional character.[98]

c. Court of Auditors and Comparable Institutions

The financial management of the military administration is checked by the National Audit Office (*Tribunal de Cuentas*) which is established by Article 136 of the Spanish Constitution: According to Art 136 (1), the National Audit Office is the highest organ for checking the financial and economic management of the State and the public sector, and it is directly responsible to Parliament. The National Audit Office has its own jurisdiction and gives an annual report to the Parliament listing any violations or misconduct. The modalities of its composition, organisation, and operation are regulated by two organic laws.[99]

III. The Structure of the Armed Forces

1. The Armed Forces and their Administration

As noted above, the situation in Spain has been to a certain extent exactly opposite to that in Germany. Article 8 says that the military is comprised of three armed forces, whereas Article 97 says that the "military administration" is under the control of the Government. Although there is a serious doctrinal debate, the majority of commentators maintain that the armed forces are indeed integrated into the "military administration" through the Ministry of Defence. This understanding facilitates a greater subjection of the armed forces not only to the Government, but to the constitutional ordering as a whole. The opposing position, which claims that the armed forces are an independent institution, cannot seem to explain the meaning of the term "military administration." In any case, it is indisputable that the army, navy, and air force constitute the armed forces under Article 8 (1), and they are integrated into the Ministry of Defence, and therefore with the

[98] Its central seat is in Madrid, and it maintains offices elsewhere in Spain. For information, see <http://www.civilia.es/ods>, (2/8/2001).

[99] See Organic Act 2/1982 of 12 May 1982, on the National Audit Office. Later, Act 7/1988 of 5 April 1988, on the Operation of the National Audit Office, was approved. It was then modified by Laws 31/1991 and 22/1993. Unlike the Act on the Ombudsman, these acts regulating the National Audit Office contain no particular provisions relating to the armed forces. There is no doubt, however, that the armed forces also fall under their jurisdiction.

public administration. Therefore, when the material subject is the management of the armed forces, it must be maintained that in Spain there is a military administration clearly special and different from the civilian, as Article 97 emphasises and as has been developed in the jurisprudence.[100]

This is so despite the fact that civilians are also employed by the military administration (its composition remains mostly military). Since 1982, no Minister of Defence has been a soldier, but most of the Undersecretaries of State and the Chiefs of Main Directorates of the Ministry have been soldiers, and these are the people who do the proper "administrative" work for the Ministry. Early on, the socialist Governments ensured that all the high positions were occupied by civilians,[101] but with the Government of the Popular Party, the number of civilians in high positions in the Ministry of Defence is decreasing.[102]

The tasks of the Ministry of Defence are clear from its structure: it fills diverse advisory and consultative roles and, of course, is included in the Cabinet. In addition, the General Defence Staff (*Estado Mayor de la Defensa*) is a distinct entity, with its own administrative sections. "Administrative" tasks are in particular the responsibility of the Secretariat of State for Defence (*Secretaría de Estado de Defensa*), covering the Main Directorate of Armaments and Materiea, the Main Economic Directorate, the Main Directorate of Infrastructure, and the National Institute of Aerospace Technology (*Dirección General de Armamento y Material*, *Dirección General de Asuntos Económicos*, *Dirección General de Infraestructura*, and *Instituto Nacional de Técnica Aeroespacial*). The Office of the Undersecretary for Defence,

[100] A good, exhaustive, and rigorous evaluation of the 1978 Constitution's regulation of the structure of the military administration can be found in Ministerio de Defensa (ed.), 'Historia del Ministerio de Defensa', <http://www.mde.es/mde/organiza/org4bis.htm>, (20/12/2000). The treatment is divided into five periods: *Etapa Constitutiva* (Constitution period) (1977-1981), *Etapa de normalización* (normalisation period) (1982-1986), *Etapa de consolidación* (consolidation period) (1987-1990), *Etapa de desarrollo* (development period) (1991-1996), *Etapa de profesionalización de las Fuerzas Armadas* (professionalisation period) (1996).

[101] Following F. Agüero, *Militares, Civiles y democracia. La España postfranquista en perspectiva comparada* (Madrid, 1995), p. 323; and the study by A. M. Díaz Fernández, 'La consolidación del poder civil en los órganos de alta responsabilidad política y técnica del ministerio de defensa en España: 1977-1999', working paper given to the author. He makes reference to both the Chiefs of Main Directorates (*Directores Generales*) and General Assistant Directors (*Subdirectores Generales*) as mentioned in Law 6/1997 on the Organisation and Operation of the General Administration of the State. Regarding civilians in high positions, the following numbers are given: 17% (1984), 27% (1987), 31% (1989), 45% (1993).

[102] The numbers of civilians in high positions has fallen from 45% during the last socialist Government to 24% in 1999. See e.g. *El país*, Un militar releva al penúltimo director general civil de Defensa of 29 August 1998, which notes that the only civilian (i.e. having never served in the military) in the Main Directorates of the Ministry was the person in charge of Recruitment and Education.

answerable directly to the Minister of Defence, deals with "administrative" tasks involving the General Health Inspectorate, the Defence Legal Consultant's Office, the Bureau of General Affairs, the Directorate of Recruitment and Education, the Directorate of Personnel, and the Subdivisions of Economic Services and Internal Affairs (*Inspección General de Sanidad*, *Asesoría Jurídica de la Defensa*, *Intervención General*, *Dirección de Reclutamiento y Enseñanza*, *Dirección de Personal*, and the *Subdirecciones de Servicios Económicos* and *de Régimen Interior*). The General Secretariat for Defence Policy includes the Main Directorate of Institutional Relations and the Main Directorate of Defence Policy.[103]

The three services are answerable directly to the Minister of Defence, and there have been continuous reforms since 1984 further integrating this dual military-public administration. This duality has served to conform what was a very reluctant institution to the emerging democratic structure. It should also be noted that each service has its own technical and logistical units which handle supply and maintenance.[104]

In short, there is an organic administrative group differentiated from the three services, and it is on this group that the tasks of military administration fall, but it is not a civilian administration. Furthermore, the military administration and each of the three services, are integrated into the public administration through the Ministry of Defence.

2. Involvement of the Civilian Administration in the Process of Procurement of Material and Supplies

As has already been explained, procurement is handled by the military administration, which is made up partly of military personnel and partly of civilians, and fully integrated into the constitutional civil order and distinct from the armed forces proper. The fact that the armed forces are in general subject to the regular administration, and in particular to the military administration, certainly implies the "civilianisation" of the management of the military.

[103] A clear explanation of the ministerial structure can be seen at <http://www.mde.es/mde/organiza/organ4.htm>, (28/04/2001).

[104] The organisational chart of the armed forces can be seen under <http://www.mde.es/mde/fuerzas/grafti2.htm> (army), <http://www.mde.es/mde/fuerzas/grafar2.htm> (navy), <http://www.mde.es/mde/fuerzas/grafair2.htm> (air force), (2/04/2001).

IV. Soldiers' Rights and Duties

1. Restrictions of Fundamental Rights of Soldiers

a. General Aspects: Fundamental Rights and Freedoms and their Limitations in the Spanish Constitutional System

Limitations on the fundamental rights of soldiers[105] are motivated (and constitutionally justified) by two basic causes: the exigencies of national security, which require, for example, discipline and hierarchy so that the armed forces can fulfil their aims effectively, and the need for political neutrality. The first will be treated here, and the second will be treated below. The constitutional values which these limitations on the rights and liberties of the soldier aim to preserve are the effectiveness of the military institution and the security of the State, etc.

This first cause is, practically speaking, sufficient to impose limits on all the fundamental rights of the military man. In practice, the limitations of rights by these causes are generally similar enough to those in other democratic countries that it seems to pose no serious problem. However, in a military like Spain's, which has traditionally had an institutional character, the conception of discipline and military values is more intense and, therefore, potentially more restrictive of the rights of soldiers. These differences are not always perceived in the text of the laws, but more easily seen in application. During Franco's dictatorship, the armed forces showed clear institutional characteristics, and in many units such characteristics have persisted. In addition, there exists in Spain an expectation that the military service member is on duty and available 24 hours a day (*concepción de servicio*), and this system conditions the life of the military man as much as any formal considerations.

The Spanish Constitution follows, in general, a model of guarantees of fundamental rights similar to the German. "Fundamental rights and public liberties" exist, they are inherent in the dignity of the person, and they are the foundation of the political order (Article 10 (1)). The Spanish Constitution is tied directly to international treaties on human rights. By virtue of Article 96, valid treaties become part of the legal order - subordinated to the Constitution. These international treaties are

[105] There are countless studies on soldiers' fundamental rights. Of these, the most recent and exhaustive are Blanquer Criado, 'Ciudadano y soldado', *supra* n. 29 (referring not only to conscript soldiers but career and professional too); J. M. Peñarrubia Iza, *Presupuestos constitucionales de la Función Militar* (Madrid, 2000). Complementary to these, and containing a particular analysis of the equality principle and military law, is L. Cotino Hueso, *La singularidad militar y el principio de igualdad: las posibilidades de este binomio ante las Fuerzas Armadas españolas del siglo XXI* (Madrid, 2000).

also guidelines for the interpretation of the Constitution with respect to fundamental rights (Article 10 (2)).

These rights are recognised in Title I of the Constitution (Article 14, 15-29, and 30-38). The rights that enjoy the maximum protection are laid out in Articles 14-29.[106] These fundamental rights enjoy direct effectiveness with no need of legislative development. These rights and liberties have an essential content that cannot be touched by the Legislature in the course of establishing their limits. Any regulation of them must be through law, and any legislative development of these rights must occur through a special "Organic Act" (*Ley Orgánica*), which needs a qualified majority in both Houses of Parliament (Article 81).[107] Furthermore, it is possible to suspend only certain rights, expressly enumerated, when states of emergency or siege are declared.

Derogations of these rights are subject not only to the "essential content" rule (Article 53), but also to the requirements of necessity, reasonableness, and proportionality (purpose, congruency, and proportionality). When a fundamental right is in conflict with another fundamental right, the solution of balancing is decided on the merits of the individual case. It is also possible for a fundamental right to come in conflict with another "term of constitutional relevance". This other term of constitutional relevance could be a "constitutional good" or "value," or a non-fundamental constitutional right. In the analysis of such conflicts it must be remembered that the principle of freedom demands that, if several alternatives for limitation exist, the least restrictive must be chosen. These conflicts are also resolved on a case by case basis.

In addition, these rights and liberties recognised in Articles 15-29 and the principle of equality (Article 14) have special jurisdictional protection (with legal preference and speed), and they can be referred to the Constitutional Court, once the ordinary channels and lower courts have been exhausted (Article 53 (2)).

Further fundamental rights are recognised in Articles 30-38. These rights enjoy all the privileges of the abovementioned rights, except that the Act affecting them need not be an organic act (Article 81), and the

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[106] On the issue of equality in the armed forces, see Cotino Hueso, 'La singularidad militar y el principio de igualdad', *supra* n. 105.

[107] Art. 81 [Organic Laws]:

" (1) Organic laws are those relative to the exercise of fundamental rights and public liberties, those approved by the Statutes of Autonomy and the general electoral system, and the others provided for in the Constitution.

(2) The approval, modification, or repeal of organic laws shall require an absolute majority of the House of Representatives in a final vote on the entire bill."

Government may, through its powers delegated by Parliament, regulate them. These rights do not fall under the special jurisdictional protection of Article 53 (2): preferred protection and recourse to the Constitutional Court (the only exception being the right to conscientious objection).
The Spanish Constitution contains some specific provisions limiting certain rights and capabilities including rights for military personnel (Articles 28, 29, 70).[108] Collective petition (Article 29) and standing for the office of deputy or senator (Article 70) are constitutionally excluded. Only in the case of the right to form or take part in trade unions (Article 29) does the Legislature retain the option of recognising this right to the soldiers or not. Even were this right to be legally recognised, the Legislature would not be required to respect the protection provided by the "essential content" rule with respect to it (Article 53 (1)). Furthermore, Article 22 (5) prohibits (to all citizens) the formation of associations of paramilitary character. The Legislature may attempt through indirect channels to mitigate the negative effects of these derogations.[109]
Although it is not explicit in the constitutional text, it tends to be understood that, for military personnel, all fundamental rights are

[108] Art. 28 [Unions, Strikes]:
" (1) All people have the right to unite freely. The law may limit or except from the exercise of this right the Armed Forces or Military Institutions, or other Corps subject to military discipline, and shall regulate the peculiarities of its exercise for political functionaries. The freedom to associate includes the right to found unions and to join the union of one's choice, as well as the right of the unions to form confederations, to found international union organisations, or to join them. No one may be forced to join a union [...].
Art. 29 [Petition]:
(1) All Spaniards shall have the right to personal and collective petition, in writing, in the form and with the effects the law shall define.
(2) Members of the Armed Forces, Institutions, or Corps subject to military discipline, may exercise this right only individually and in accordance with the provisions of their specific legislation."
Art. 70 [Ineligibility, Incompatibility]:
" (1) The electoral law shall determine the reasons for ineligibility and incompatibility of Deputies and Senators, which shall include in any case: […]
e) the professional military and members of the Armed Forces, Corps of Security, and Police on active duty."

[109] The Legislature can delimit concepts like the "professional soldier" (Art. 70 of the Constitution) or "paramilitary" (Art. 22 of the Constitution), as well as the criteria specifying when one accedes to or removes himself from these categories. It could in fact be affirmed that the regulation of Art. 29 (2) of the Constitution prevents the Legislature from considering the collective form of petition as an essential content of the right. Thus the supreme law allows the lesser legislation to develop the conditions of individual exercise of this right with a greater or lesser degree of effective recognition. It should not be forgotten that if the right to petition – as much historical importance as it has had – still enjoys any importance today, it is because of its singular practical importance in the scope of the armed forces. (Because of the effective negation of the exercise of the soldiers' public liberties, the exercise of the right to petition seems to be somewhat of an escape route).

subject to limitation.[110] These limitations are, however, themselves limited: they must fulfil all the abovementioned general requirements of the restriction of a fundamental right.

That being said, the general requirements on limitations of fundamental rights tend to be "relaxed" when it comes to the military. This aggravates the controversy over whether the armed forces are an administration or an institution, because it has troubling implications about the relationship of the armed forces with the Government (Article 97). Often, the mere assertion that something is necessary to fulfil the Article 8 missions of the military "institution" is enough for the Constitutional Court, and almost as if by magic the requirements of proportionality or the principle of legality are overcome or relativised.

Something similar has happened with the technique of the "special relations of subjection", which Spain in fact imported from Germany. This ploy is still used in Spain, although it has not been seen in Germany for decades. This is yet another technique for relaxing constitutional guarantees on fundamental rights (including the principle of *nebis in idem*). In the Constitutional Court, the "special relations" claim is no longer sufficient to relax the limitations on restrictions of rights, but in the ordinary courts it is still followed, and is not always applied with a suitable amount of respect for constitutional guidelines.

In short, the situation in Spain is two-sided. On the one hand, the Constitution expressly allows (or imposes) the limitation of specific rights, in respect of which the Legislature may legally do nothing but recognise the right to form trade unions, and it is not necessary to respect the essential content of that right. On the other hand, there are implicit limitations on all the rest of the rights and liberties of the soldier. Implicit limitations are by definition less concrete, and have been the subjects of a number of evasive techniques like the claim of "special relations" or the institutionalism barriers. The application of such methodology has been a problem for the development of a Statute of the Rights and Liberties of the Soldier, but has been clarified by the ruling of the Constitutional Court 151/1997, September 29:[111] the constitutional organs, within the scope of their jurisdiction, are

[110] The only exception being the right not to be subjected to torture; this right cannot be limited, as the Constitutional Court made clear in its ruling 151/1997 para. 5.

[111] This ruling definitely introduced the general techniques of limitation of soldiers' fundamental rights. The ruling dealt with a soldier who had been expelled in 1977 by an honour court because he had been unfaithful to his wife. The Court refused to employ such techniques as the "special relations" (i.e. legality principle) and used instead the justification of the general exigencies of the service for the limitation of the soldier's fundamental rights.

responsible for the gradual move toward a more democratic statute with fewer restrictions on soldiers' rights. The constitutional organs implied by this ruling are of course the Legislature, but also the Executive within its scope, and the Constitutional Court itself.

The regulation of soldiers' rights and freedoms is contained in the following Acts: 85/1978, approving the Royal Ordinances of the Armed Forces (OR); Organic Act 7/1980 on religious freedom, Organic Act 4/1981, complementing Article 116 (1) on states of "alert", "exception", and "siege", Organic Act 11/1985 on freedom to form trade unions, Organic Act 13/1985 approving the Military Criminal Code, Organic Act 2/1989 on Military Jurisdictional Procedure, Organic Act 13/1991 regulating military service, and more recently, Organic Act 8/1998 on the Disciplinary Regulations of the Armed Forces (RDFA) and Act 17/1999 on the Regulations Concerning Professional Soldiers.

b. Political Neutrality of Soldiers

If necessity is the first cause of constitutional restrictions on soldiers' rights and freedoms, the second is the need for military neutrality, i.e. the non-partisanship of the soldier and the principle of civilian supremacy.

Military subordination to democratic civilian authority is essential to any constitutional system. This does not mean that every country can or should take the same measures to achieve this goal. In Spain, the traditional way has been a severe limitation of the public liberties of the soldier. The Spanish military has never been famous for its democratic character, and this fact has strongly influenced the Statute of Rights and Duties of the Soldier.

Although military neutrality has been invoked ever since the 19th century, it has never been realised: the army's political interventionism was constant up until the present democratic period. Particularly after the Spanish Civil War (1936-1939), the armed forces were truly the backbone of the dictatorship. As Busquets and Ballbé point out, military neutrality was the exception: the rule was unshakable adhesion to the political principles of the movement and unconditional obedience to the person of the dictator.[112]

With the arrival of democracy, the political system - initially weak and afraid of confronting military power - desperately needed the political neutrality of the soldiers, and therefore justified limiting much of the exercise of their public liberties. It is for this reason that, ever since the

[112] Ballbé, 'Orden público y militarismo', *supra* n. 82, p. 438.

Transition, any political expression or political or union activity has been severely restricted. With reason, and with some irony, some have begun to affirm that "in truth, the rights and liberties of the members of the armed forces have been reduced to one: the possibility of voting in elections."[113] It is fashionable to note how, although the Legislature has decided on a convergence between the civilian and military servant in many aspects (occupational rewards, bureaucratic status), the one most important constitutional and sociological parcel has been left out of the deal: reform of the Statute of Rights and Liberties of the Soldier, which has not been substantially altered since 1978.[114]

The fear of military interventionism has been sufficient to justify such a restrictive position politically. Nevertheless, it is still not taken for granted that, once democracy has been consolidated in Spain, the best way to integrate soldiers into that democratic society will be to allow them to consider themselves members of it like anyone else in respect to the exercise of rights and liberties. The present situation is hardly an effective way of reaching the goal of a neutral military institution submissive to civilian authority, and must, in addition, be considered in many particularities unconstitutional. However, the Constitutional Court has generally been obliging and helpful when it came to military norms and practice.

aa. Restrictions on Freedom of Speech

Regulation of freedom of speech is a good example of the serious restrictions on soldiers' rights which are based on military necessity rather than neutrality:

> Article 178: military personnel have the right to freedom of expression, but must acquire prior authorisation for the exercise thereof when their statements concern issues which could harm or interfere with the protection of the national security, or when privileged data of a military nature (i.e. information that is known only because of the individual's position or duties in the armed forces) are involved.
>
> Article 179: members of the armed forces have a right to the possession and use of social mass media within military enclosures. However, when reasons of national security or exigencies of the

[113] C. Ollero Gómez, 'Constitución y Reales Ordenanzas', (febrero 1982) *Primeras Jornadas Fuerzas Armadas –Universidad*, p. 231.

[114] See i.a. P. T. Nevado Moreno, 'El modelo de función pública militar. Una reflexión sobre la Ley 17/1989 de 19 de julio, sobre régimen del personal militar profesional y en normativa de desarrollo', in Dominguez-Berrueta and others (eds.), *Constitución, Policía y Fuerzas Armadas* (Madrid, 1997), pp. 187-263, in particular pp. 261 *et seq*.

discipline or defence of the unit require it, the Minister of Defence - or, in case of emergency, the competent military authority, with the Minister's countersignature - may limit the exercise of these rights.

The following actions are crimes under the Military Penal Code:

Article 101: military personnel who, without having committed the crimes described in previous articles, compel, threaten, or injure a superior either in his presence, in writing, or publicly, shall be punished with no less than three months and a day and no more than two years in prison (note that this is not, strictly speaking, a limitation on the freedom of speech, since the Constitution does not grant freedom for compelling, threatening, or insulting speech),

Article 116: military personnel who violate the duties of discretion and reserve respecting military or national security subjects of serious importance shall be punished with no less than three months and a day and no more than three years of prison. If the importance of the exposed information is not serious, the soldier will be punished through disciplinary channels.

Some of the limitations in the service of military neutrality appear in the Organic Law of Disciplinary Regulations of Armed Forces 8/1998:

Article 7 Minor Offences:

8. Manifestations of indifference to or dissatisfaction with the service, and any complaints against the service or a commander's orders, as well as the toleration of such conduct in one's subordinates

11. Disclosure of information that could affect national security or defence, or the publication of data which could be known only by virtue of one's position or duties in the armed forces, when it does not constitute a crime

12. Lack of respect for a superior and, in particular, disrespectful argumentation or retort

14. The making of claims or requests in disrespectful terms or manner, or the circumvention of regulated channels

17. Offending a subordinate or peer with indecorous or undignified words or actions

18. The making of claims, requests, or declarations contrary to discipline or couched in false or misleading language; especially through the use of mass media or as a collective

25. The promotion of or participation in discussions that provoke antagonism between the different services or units of the armed forces

29. The public expression or toleration of opinions opposed to a superior; disrespectful action or the adoption of an attitude of contempt toward […] commanders or the military administration, when these do not constitute more serious infractions or crimes

> 31. The public expression of opinions implying an infraction of the duty of neutrality in relation to the various political parties or unions, or that affect the due respect to decisions of Courts of Justice.

Article 8: serious offences: […]

> 10. The failure to fulfil the duty of discretion on subjects of the service, without causing serious damage to military security
> 11. The disclosure of information that could affect national security or defence, or the publication of data which could be known only as a result of one's position or duties in the armed forces, when it does not constitute a crime
> 18. The making of claims, petitions, or declarations contrary to discipline or couched in false or misleading language, especially through the use of mass media or as a collective
> 25. The promotion of, or participation in, discussions that provoke antagonism between the different services or units of the armed forces
> 29. The public expression or toleration of opinions opposed to a superior; disrespectful action or the adoption of an attitude of contempt toward […] commanders or the military administration, when these do not constitute more serious infractions or crimes.
> 32. To emit or to tolerate manifestly and publicly expressions which they are in opposition, are offending contempt acts against the Constitution, the Crown and other organs, institutions or powers or the people and authorities that incarnate them, the Flag, Shield and National anthem and of the other representative institutions, as well as against the representatives of other nations, the Armed Forces and the Bodies that compose them and other Institutes or Bodies of military nature; as well as its commands and military authorities, when these acts do not constitute more serious infraction or crime.

Other restrictions are based on the political neutrality of soldiers. The new Organic Act 8/1998 on the Disciplinary Regulations of the Armed Forces repeats the old regulation on the matter of neutrality.

bb. Right to Membership in a Political Party

In Spain, professional soldiers are not allowed to become members of a political party:

> Article 182: members of the armed forces may take advantage of any political or association options which are allowed to them by the Constitution. Soldiers must, however, maintain their neutrality by not participating in significant political or union activities, and by not tolerating those who encourage or disseminate information encouraging participation in significant party or union activity within

military enclosures. Soldiers may not be affiliated with any type of political or union organisation, attend their meetings, or publicly express opinions on them. Conscripts and short-term soldiers may maintain any affiliations previously held, but must abstain from party or union activity during the time of service.

cc. The Restricted Possibility to be Elected

The Constitution explicitly limits the possibility for a soldier to be elected to such offices as deputy or senator (Article 70). However, it is possible for them to be elected to positions like that of councillor or regional deputy. Article 141 of Law 17/1999 Military Personnel regulates the situation of soldiers who run for election. These soldiers must be placed in the administrative situation of "voluntary leave" *(excedencia voluntaria)*, which means that the soldier is not active in this period and is not under the military legal statute until he comes back to active duty. If the soldier candidate is not elected, he returns to his previous status. If he or she is elected, his or her military status is suspended and he or she returns to his or her previous status when the representative mandate is finished. Indirect restrictions on soldiers' participation in political life also exist, however. For example, after two years of "voluntary leave", the soldier becomes ineligible for promotion until the elective mandate is over and he returns to military status. Time spent in this suspended status does not count toward time on duty, and during this period the soldier is not subject to the military regulations.

c. Restrictions on Freedom of Association

Restrictions on the freedom of association are included in the Royal Ordinances:

> Article 181 OR: members of the armed forces, whose interests are guarded by the State, shall not have the option of participating in unions or associations with [any] protest purpose. They shall not, under any circumstances, have the option of placing conditions on the fulfilment of their duties with a view to better satisfying their personal or professional interests; neither shall they have recourse to any form - direct or indirect - of strike. Soldiers may belong to other types of legally authorised associations such as those of a religious, cultural, sporting, or social character.[115]

[115] Note that the Constitutional Court has recently emphasised that the prohibition of trade unionism does not have anything to do with the restriction of associations (Ruling 219/2001, 31 October 2001).

The fact that the Legislature has the option of recognising the right to form or take part in trade unions (Article 28 of the Constitution) is important. It might be advisable to develop a limited legal right of trade union formation on the model of several other European countries. It might also be a positive step to facilitate the existence of a professional military association, similar to those of judges and lawyers (Article 127 (1) of the Constitution). The Constitutional Court has declared in ruling 219/2001, 31 October 2001, that there is a constitutional distinction between the prohibition of military trade unions and the permission for military personnel to form associations.[116]

d. Conscientious Objection

The right to conscientious objection is recognised by Article 30 of the Spanish Constitution.[117] Article 1 (3) of Law 22/1998, which regulates conscientious objection and civil service, states that:

> "An application for recognition as a conscientious objector may be submitted at any time before the date indicated by the Ministry of Defence for the individual's incorporation into the military service, or until that process is finalised, for persons already in the reserves." Thus, although it is possible to opt out of military service altogether, there is no option of exercising a right of conscientious objection once one is already in military service.

Despite the fact that conscription is no longer practised and therefore conscientious objection should no longer pose a social problem, the fact that soldiers on duty cannot object has still been an object of controversy. The majority of commentators believe this limitation to be unconstitutional. The Constitutional Court, however, upheld the restriction during military service in its important ruling 161/1987, of 27

[116] The case was caused by the refusal of the Ministry of the Interior to register in the Registry of Associations a modification of the statutes of the reformed "Military Fraternity of Personnel in Situations of Inactive Service". The refusal was based on the fact that one of the goals of the association was "to obtain for its members all economic, social, and moral benefits possible". The previous courts (Supreme Court, National Audience) considered this goal to be in opposition to Art. 181 OR, which prohibits soldiers' participation in unions and associations with possible protest purposes. The Constitutional Court considered that "nothing allows the conclusion that an association, by virtue of the fact that it intends to procure the satisfaction of the economic, social, or professional interests of its associates, becomes a trade union or can be compared to the same within the meaning of Article 28 (1) of the Constitution [Prohibiting Military Trade Unionism]". At the same time, the Constitutional Court insisted that the association's goals did not include "protest".

[117] Art. 30 (2): "The law shall fix the military obligations of Spanish citizens and will regulate, with the due guarantees, conscientious objection, as well as any other grounds for exemption from obligatory military service, retaining the option of imposing civil service in place of military service where appropriate." See especially G. Cámara Villar, *La objeción de conciencia al servicio militar (las dimensiones constitucionales del problema)* (Madrid, 1991); J. Oliver Araujo, *La objeción de conciencia al servicio militar obligatorio* (Madrid, 1993); more recently *idem*, 'Pasado, presente y futuro de la objeción de conciencia al servicio militar en España', (1997) No. 43 *Revista de Derecho Político de la UNED*, pp. 51-95.

October 1987. The Court considered it a justified limitation that did not affect the essential content of the right. However, there were three dissenting opinions to this judgement.

The question of conscientious objection in Spain has been very controversial (Spain had the highest average of conscientious objection in Europe), although with the suspension of obligatory military service its importance as an issue has fallen. Nevertheless, the full might of the anti-military movements has now been concentrated on this last case of conscientious objection during military service. The Organic Act of May 2002 has reformed the Military Criminal Code and General Criminal Code to remove crimes punishing soldiers who do not fulfil their military service obligations or the alternative social service obligation. The last persons imprisoned on such charges have been released.

A related question which has been to some extent controversial is the difficulty professional soldiers face in resigning their military status, because before Law 17/1999, the acceptance of a resignation was conditioned on the needs of the national defence and of the service. Article 147 of that law has provided a sort of solution by permitting the option of paying the state a compensation for the losses to the service occasioned by resignation. The most contentious cases have involved air force pilots of the Spanish Air Force who wanted to move to the private sector. Some of them appeared - with some success - at municipal elections to voice their concerns and get their situations addressed.

e. Equal Treatment: Women and Sexual Orientation

aa. Women

The incorporation of women into the armed forces was very late in comparison with other Western militaries, and the delay was not justified on constitutional grounds - on the contrary, it was all but required by the Constitution.[118] In a very traditional army, however, it was naturally a "sensitive" matter, which was why the Legislature (even the Socialist Party) delayed women's access as long as possible, until Law 17/1989 on the Professional Soldier. This foot-dragging was reprimanded by the Constitutional Court in a showy ruling of unconstitutionality default (ruling 216/1991). With the 1989 Act, the incorporation of women into the military, although incomplete, finally

[118] See Cotino Hueso, 'La singularidad militar y el principio de igualdad', *supra* n. 105, pp. 83-102.

became at least possible. On the one side, conscription continued to be imposed only on men. On the other, women continued to be excluded from some traditional units like the paratroopers, submarine units, and the "*Legión*".

This situation changed definitively with Law 17/1999 on Military Personnel, which removed all remaining obstacles to women's access to any unit of the Spanish Armed Forces. This law also incorporated terms of positive discrimination in the case of pregnancy or maternity. This aspect, however, is especially difficult with respect to those enlisted soldiers who are on a renewable contract: there have supposedly been cases in which a soldier's contract was not renewed due to her maternity.

There are approximately 6,000 women in the army (120,000 total personnel), the majority in the enlisted ranks (25% of enlistees are women). The integration of women in Spain has generally been positive and well received in the service branches. There are of course cases of dissatisfaction among the men, who perceive unfair advantages given to women, but this just shows how far the military has come from the days when the problem was sexual discrimination against women.

bb. Homosexuality

Unlike in the last pro-Franco army, where discriminatory laws against homosexuals existed, there is no longer any direct legal discrimination.[119] Homosexuals may legally join and remain in the Spanish armed forces, fill any position, and not be subject to any kind of differential treatment.

However, the traditional "macho" character of the army implies sociological and effective discrimination which has no basis in the law. This kind of social discrimination can also lead to the application of sanctions for real crimes under military law, such as "dishonest acts"[120] or "conduct prejudicial to military dignity"[121] for those soldiers who engage in homosexual conduct (as for example in the ruling of the Supreme Court of 11 April 1997). This is, of course, discrimination insofar as the same conduct by a heterosexual would not have been sanctioned. Diverse communications of the Legislature and the Government have condemned legal discrimination of this type.

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119 See Cotino Hueso, *ibid*, pp. 103-116.

120 Minor offences regulated as minor in Art. 7 (26) RDFA, and as serious offences in Art. 8 (23) RDFA.

121 Acts which are punishable by extraordinary sanction according to Art. 17 RDFA.

An important example of tolerance is found in Law 29/1999 of Measures for the Geographic Mobility of the Soldier. In Article 6, military housing is also subsidised for the partner of the soldier, even if that partner is of the same sex. This article is very symbolic, since the armed forces are the first institution of the Central Administration to confer rights by law to unmarried partners, and with them, those of the same sex.

f. Other Fundamental Rights and their Restrictions

With respect to fundamental rights in general:
Royal Ordinances (OR):
Article 169 OR: The soldier has all the civil and political rights recognised in the Constitution, without limitations other than those imposed by it [the Constitution], the dispositions that develop it, and these Ordinances.
Article 171 OR: The dignity and inviolable rights of the person are values that the soldier must respect and has the right to demand. No member of the armed forces may be made to undergo personal mistreatment in word or act, or to submit to any other humiliation or illegal limitation of his rights.
Article 172 OR: The soldier may be deprived of his freedoms or goods only in the cases anticipated by law and in the form it lays down. He must be immediately informed by the authority adopting the resolution of the reasons for it and the resources that, in accordance with the law, can be presented in his or her defence; in no case can the soldier be deprived of the passive rights due to him.
Article 174 OR: The privacy of the service member's personal and family life, as well as of his or her address and correspondence, are inviolable. Their papers, communications, or other documents may not be confiscated or interfered with. Any registration, investigation, or intervention must be ordered by the appropriate judicial or military authority.
Article 175 OR: The soldier's place of residence will be the place of his or her duty station. If special circumstances exist, it is possible to allow him or her to fix his or her residence elsewhere, on condition that he or she can still fulfil all obligations adequately. Within Spanish territory, the soldier may live somewhere other than his or her immediate duty station as long as he or she can report to regular duty on the terms fixed by the head of his or her unit. In addition to the documents required of normal citizens, the soldier must have authorisation from his

superiors in order to leave the country. The soldier must always inform his duty station of his temporary and/or permanent address, in order to allow his or her location by the unit if necessary.
Article 176 OR: Members of the armed forces are protected by law against threats, violence, or defamation incurred due to their condition or activity as service members.
Article 177 OR: All soldiers have the freedom of thought, conscience, and religion, including the right to individual or collective expression of such, public or private, subject only to limitations legally imposed for reasons of discipline or security.
Article 183 OR: Soldiers have the right to marry and form a family without any kind of special authorisation. This right cannot be limited except in extraordinary circumstances which are outlined in the law. It is, however, mandatory that the soldier inform his superiors immediately upon marriage.
Article 184 OR: Military commanders will ensure the accessibility of the facilities necessary to allow their soldiers the free exercise of the right to vote.
Article 185 OR: No member of the armed forces shall be the object of discrimination on account of his or her sex, race, birth, religion, opinion, or any other personal or social condition.

2. Legal Obligations of Soldiers

The legal obligations of the soldier are many. Many of them are found in the Royal Ordinances, but they are to be found most comprehensively in the soldiers' disciplinary and penal norms. The Royal Decrees are also voluble on the subject, and require those military virtues known as *esprit* (discipline, honour, value, sacrifice, austerity, comradeship, self-denial, etc.). [122]

[122] The military spirit and values are referred to in the following Articles of the Royal Ordinances:

Art. 22 (to display exemplary conduct), Art. 27 (punctuality, exactitude), Art. 28 (discipline), Art. 29 (honour), Art. 30 (be ready and available for duty at any time), Art. 31 (enumerating a number of military values, such as self-denial, austerity, loyalty to the service, honest ambition, constant giving, etc.), Art. 35 (comradeship), Art. 36 (satisfactory fulfilment of duties), and Art. 48 (pride in the unit). Articles 49 *et seqq*. distinguish and specify further those values set out in the previous articles, especially as to how moral character is emphasised in the hierarchy: In the simple soldier (E-1 – E-2) (Art. 49), in the non-commissioned officer ranks (E-3 - E-5) (*cabo*) (Art. 65), in the staff non-commissioned officers (E-6 - E-10) (*suboficial*) (Art. 70) and in the officer (Art. 72). Art. 77 and following specify the military values which must be exemplified by commanders, including Art. 85 (loyalty to one's responsibilities), Art. 86 (initiative), Art. 101 (a spirit of teamwork). Virtues in combat are referred to in Articles 122 (aggressiveness, calm, courage), 126 (honour in bearing arms, exemplarity and prestige,

Among the duties of the soldier listed in the Royal Ordinances are:
Article 1 OR: These Royal Ordinances constitute the moral rule of the Military Institution and the frame that defines the obligations and rights of its members. This law is intended to demand and foment the exact fulfilment of duties inspired by the love of the Mother Country, honour, discipline, and virtue.
Article 10 OR: the armed forces form a disciplined, hierarchical, and united institution - all characteristics indispensable in obtaining maximal effectiveness in their activities.
Article 11 OR: The necessity for discipline and cohesion rests equally on all servicemembers, and high standards of performance will be demanded. The collective expression of discipline and cohesion is the observance of the Constitution, to which the military institution is subordinated.
Article 12 OR: The military hierarchic order defines the relative situation of all military personnel. It facilitates control, obedience, and responsibility.
Article 13 OR: The unity of the armed forces is the direct result of the harmony that should exist among the members of the three services. The military spirit, loyalty, and cohesion are the pillars on which the will to assume the responsibility of the defence is based.
Article 20 OR: The oath before the Spanish flag is an essential duty of the soldier; it is his contract of commitment to defend the Mother Country at the cost of his own life. Its formula will be fixed by law.
Article 25 OR: To live the professional military life, a pure vocation is required - one which will be developed through the habits of discipline and self-denial until the highest degree of subjection of self to the vocation is achieved.
Article 26 OR: All soldiers must understand and fulfil the obligations contained in the Constitution. Similarly, they must understand and fulfil the obligations contained in the Ordinances, in the individual regulations of his or her function, and in the general rules common to all the armed forces.

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and a creative spirit in education), and in 145 and 146. Art. 152 demands self-denial and a spirit of sacrifice in one's technical functions, Art. 160 demands the same on watch or in an administrative function. Art. 214 states that the career military person should evince the constant desire for personal promotion. Finally, the first duty of all soldiers is a constant readiness to give his life to and for the Mother Country (Art. 186).

Article 27 OR: Soldiers must display the virtues of punctual obedience and exactitude of service, even though this may entail personal sacrifice and even their lives in defence of the Mother Country.
Article 28 OR Discipline forces one to command responsibly and to obey when commanded. The rational adhesion of the soldier to the rule of discipline is the direct result of the subordination of the self to superior values, and guarantees the correctness of individual and collective conduct and the rigorous fulfilment of duties.
Article 32 OR: Whatever their rank, soldiers must accept the orders of their commanders. If a soldier considers it his or her duty to present some objection, he or she may formulate it in the presence of his or her immediate superior, as long as this does not harm the mission, in which case he or she will reserve the objection until the mission is completed.
Article 44 OR: The soldier will make an effort to achieve a solid moral and intellectual formation, a perfect knowledge of his or her profession, and a physical condition suitable to the fulfilment of his or her mission and to effectiveness in combat.
Article 45 OR: Soldiers must exercise discretion on all subjects relating to the service. They must observe with great fervour the effective dispositions and measures regarding official secrets. In no event may they use the mere fact of their military position to gain access to classified places or documents.
Article 168 OR: The soldier must respect the Constitution and fulfil the general duties of the citizen in an exemplary manner.
Article 186 OR: The soldier's first and most fundamental duty is to be ready at any moment to defend the Mother Country, even offering his or her life if necessary. This supreme duty must find its daily expression in the most exacting fulfilment of the rules contained in these Royal Ordinances.
This is only a partial list of the many legal duties of soldiers as laid down both in this and in other acts (including criminal and disciplinary law). To summarize, the duties of the soldier are submission to the Constitution, the laws, the democratic powers, and the orders of superior officers, of discipline and neutrality, respect for the armed forces and for the specific requirements of his or her function, personal preparation, the duties related to the functions of battle and the respect of "*ius belli*." All these duties must be fulfilled with great commitment and energy.

There is, however, no special explanation of the duties of soldiers stationed abroad, aside from the duties to greet foreign military authorities properly - as if they were Spanish.

There are diverse forms of conduct against military property that are punishable as minor offences,[123] serious offences,[124] and crimes.[125] The duty not to accept gifts, which is part of the general regulations for government officials, gives rise to diverse crimes in the Military Criminal Code, including abuse of office,[126] abuse of command authority,[127] and offence against military property.[128]

Particular debate has surrounded the duty of sobriety during service. Drunkenness is harshly sanctioned by disciplinary and criminal law. In fact, the Disciplinary Law of 1998 elevated the sanction to the level of extraordinary sanction, which could result in expulsion from the service. Alcohol consumption is prohibited during duty hours and on military establishments, and is punished if it affects the image of the armed forces. The most important case in Spain was the "Miravete" case in which a sergeant by that name killed a soldier in a bar by playing negligently with a weapon while drunk. This sergeant already had a conviction for a previous negligent homicide, for which he had served only one year of prison. The pressure of public opinion caused a hardening of the sanctions and penalties on alcohol consumption, including the possibility of expulsion from the military.

The most showy cases relative to property and corruption have not happened in the armed forces proper, but in military institutions like the Civil Guard (military police). These cases concerned immense corruption on the part of the Chief of a Main Directorate of the Civil

[123] Art. 7 mentions as minor offences: "negligence in the storage and maintenance of weapons, material and equipment", "to allow the deterioration of official property, or to acquire or possess official property with knowledge of its illicit origin, or to facilitate such possession to third parties", "petty larceny or slight damages in or to military quarters or the fixtures therein, military bases, ships, airplanes, or other establishments, or in acts on watch, when it does not constitute a more serious infraction or crime."

[124] Art. 8 mentions as serious offences: "to use instruments or resources of official character for personal purposes, or to facilitate such use to third parties, when it does not constitute a crime", "to destroy, to lose/misplace, to allow to deteriorate, or to remove money, material, or effects of official character when by its quantity it does not constitute a crime; to acquire or possess such material or effects with knowledge of its illicit origin, or to facilitate such acquisition or possession to third parties."

[125] More serious offences are punished by the Military Criminal Code, especially in Arts. 57-62 (Chapter IV, "attacks against the means or resources of the national defence"), and Arts. 189-197 (Title 9, "Crimes Against State Property in The Military Scope").

[126] Art. 103, the use of command position to force a subordinate to carry out services of a personal character not related with the military service.

[127] Art. 140, the use of force when it is not justified by the needs or purposes of the service, and Art. 141, the use or attempted use of guards or force for exclusively personal purposes.

[128] Art. 189 (the attempt to solicit money under false pretence of service necessities), Art. 190 (the use of military means for personal purposes), Art. 191 (to contract with the military administration for profit from the military condition) and Art. 192 (to alter or change military material under one's supervision).

Guard "*Director general de la Guardia Civil*", he was not military man, but there were soldiers implicated), and involved more than 30 million Euros, particularly in terms of building contracts for quarters and the misuse of funds earmarked for security matters. Although there have been no major cases concerning corruption in the military in the last decade, in July 2001, a Colonel was implicated in a civilian financial affair, for receiving favours to invest the funds of orphaned children in a company that was in bankrupt.

3. The Power of Command and the Duty to Obey

a. The Power of Command

The power to command is conferred by the person's rank and function (function is determined by the duty or service to which the soldier is assigned). The responsibility of the commander cannot be resigned or transferred (Article 79 OR). The attributions of the commander are determined by the unit or service in its doctrine, the applicable technical and tactical regulations, and in all the applicable law (Article 13 ORE). Command may, within limits, be delegated, but this does not imply the transfer or diminution of responsibility, which always remains with the competent command. The person to whom command power has been delegated cannot delegate it further (Article 17 ORE). The commander cannot be excused for the errors of subordinates who were or should have been under his supervision. Command power usually must be executed through immediate subordinates (Article 95 OR).

b. The Duty to Obey

This question is especially complex in a country with a history of numerous coups d'Etat and the negative experience of a forty-year military dictatorship, beginning with an army revolt.

As opposed to the blind and unconscious obedience to orders characteristic of the armies of the *ancien regime*, since the 19th century a certain reflectiveness in the process of obedience has become desirable. The continental principle that "the armed forces cannot deliberate" was not meant to imply blind obedience to the commander's orders: as the case of Spain in the 19th century so amply demonstrates, those orders often required an attack on the constitutional system. The contrary practice of reflective obedience began to take shape in legal texts during the so-called "*Trienio Liberal*" (three years of liberal

government, 1820-1823). The implication is that it may be necessary to disobey, even if the orders come from the King or the Government.[129]
This reflective obedience is implicit in the clause "to the benefit of the democratic and constitutional system." Spain has never lacked manipulative visions of this reflective obedience. These badly-intentioned and undemocratic visions proclaim the responsibility of the soldier to reflect on his orders before he obeys, not to the benefit of democracy or the constitutional system, but to the benefit of "Spain", the Mother Country. This is a "Spain" in a traditional centralist and non-democratic sense.[130] This interpretation served to justify the military revolt in 1936, which demolished the democratic republic "because it had endangered Spain." It must also be remembered that the secessionist tendency in Spain is, while latent, still very real. Military disobedience is justified only when it supports the constitutional order; a particular manifestation of the "*ius resistendi*" of all citizens.
The Royal Ordinances of the Armed Forces state in Article 34 that no soldier is required to obey an order to execute acts "that manifestly […] constitute a crime, in itself or against the Constitution […] in any case he or she will assume the serious responsibility of his or her action or omission." Article 84 states that "all commanders must have the right to demand obedience from their subordinates, and the right to have their authority respected, but they may not order acts opposed to the laws and customs of war, or which could constitute a crime." The Military Penal Code of 1985, created after the experience of the 1981 coup, indicates in Article 21 that "to have committed an act in obedience to orders, when those orders included the execution of acts manifestly constituting crime ... will not be considered as an exemption or as extenuating circumstances." All the construction of the crimes of rebellion (see Articles 79, 81-84) and disobedience is coherent with this principle (see Articles 19, 63, 102). However, the conclusion that the democratic powers have betrayed the Constitution is based necessarily on a value judgement, and according to the Constitutional Court, it must

[129] Decree VI was approved as law on 17 April 1821; see especially Art. 20. Later, Arts. 7 and 8 of the Constituent Law of the Army (Decree of Courts ("Decreto de Cortes") of 9 June 1821) came into effect. See P. Casado Burbano, *Las Fuerzas Armadas en el inicio del constitucionalismo español* (Madrid, 1982), p. 190; R. L. Blanco Valdés *Rey, Cortes y fuerza armada en los orígenes de la España liberal, 180-1823* (Valencia-Madrid, 1988), pp. 385 *et seqq*.

[130] For an example of this non-democratic sense, see H. Oehling, *La función política del Ejército* (Madrid, 1967), pp. 100 *et seqq*.; L. García Arias, 'Las Fuerzas Armadas en la Ley Orgánica del Estado', (marzo-abril 1967) No. 151 *Revista de Estudios Políticos*, pp. 137-156; R. Pellón, 'La libertad de opinión en las Fuerzas Armadas', (enero-junio de 1979) No. 37 *Revista Española de Derecho Militar*, pp. 15-91; there is also a recently published study which probably would be prohibited in Germany: Á. D'Ors, *La violencia y el orden* (Madrid, 1998), pp. 123 *et seq*.

be so clear that "an absolute idiot with minimum intelligence could make it."[131]

The question of due obedience was addressed - during the pro-Franco regime - by the important jurist Rodriguez Devesa.[132] In that period it was considered that the duty of obedience was negated if the order included the commission of a crime. The current focus of attention is on orders which could oppose the constitutional political system. Diverse legal authors and criminologists have tended to agree that the possibility of legitimate disobedience arises when absolutely no doubt of the *un*constitutionality of the received order can be provoked.[133] Thus, for example, the crime of military rebellion (Article 79 Military Penal Code) constitutes a clear example of orders that do not have to be obeyed. Other examples are orders to countermand, to suspend, or to modify partially or wholly the Constitution, to dismiss the Head of State or to force him to execute an act in opposition to his will; to prevent the occurrence of free elections, to dissolve any of the Assemblies: i.e. (the Congress of the Deputies, the Senate, or the Legislative Assembly of any of the Autonomous Regions), or to prevent the congregation or deliberation thereof, to declare the independence of a part of the national territory, or to remove from the national authority any class of armed forces; to replace the Government or the Cabinet of the Nation or of an Autonomous Region, to use, or to strip the National or Autonomous Government or anyone of its members of their faculties, or to prevent or limit their free exercise. Any of the above orders, whether from the Government or the military administration, need not even be considered by the soldier. Their unconstitutionality is not in doubt. They not only can be but must be disobeyed.

It must also be pointed out, however, that the possibility of disobedience applies only to the individual soldier; it is not a group decision. "The very serious responsibility for his or her action or omission" (Article 28 OR) is an individual responsibility. Although Article 34 OR allows deliberation of the received order, it does not imply the

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131 In effect, the Supreme Court severely criticised the resolution of the Supreme Council of Military Justice. In section 138, the Court affirmed that the lieutenants of the Civil Guard had already been informed [...] by their superiors of the quartering [...] of the object of the actions which they undertook, *the illegality of which was so clear that it must have induced them to disobey immediately the received orders*; they did not need to await the arrival of dawn on the 24th to be convinced that they had contributed to and completed a military uprising, because in [...] militarily occupying the [Parliament] building and the Chamber, it was understood that this was an act perpetrating the crime of military rebellion.

132 J. M. Rodríguez Devesa, 'La obediencia debida en el Derecho penal militar', (enero-junio de 1957) No. 2 *Revista Española de Derecho Militar*, pp. 29-79.

133 P. Casado Burbano, *Iniciación al Derecho Constitucional militar* (Madrid, 1986), p. 47.

recognition of any kind of autonomy of the armed forces collectively to evaluate the orders of the constitutional powers.[134]

The entire structure of the military organisation seems to fall apart when obedience to commands is no longer sacred; however, disobedience must be legitimate in some exceptional cases. These cases are clear when the orders are contrary to the Constitution, but greater doubts appear when the orders seem illegal, but are neither contrary to the laws or customs of war, nor expressly criminal. Can a soldier disobey an order that restricts his or her fundamental rights without justification?

This question has not yet gained the social relevance that the subject of disobedience to unconstitutional orders has had. It has, however, proved to be a very complex jurisprudential issue, having been addressed by two conflicting judgements: the one by the Constitutional Court and the other by the Military Central Court. In November of 1993 a sergeant - along with others - was ordered to join the honour company that was to form the military parade in honour of the Virgin of Desamparados. Not until after a test run had already been conducted on the day before the parade did the sergeant report that his attendance at such a celebration would violate his conscience. On the following day - the day of the parade - he asked to be released from the duty to attend or to be allowed to leave the formation if the event acquired any type of religious content. The commander's first reaction was to indicate that attendance at the event was voluntary. This produced the effect that twenty-four of those summoned to participate suddenly reported reasons of conscience to excuse themselves. Before any of them could actually leave, the commander ordered that the service was to be performed exactly as it had been arranged. As the event was beginning, four sergeants asked for permission to leave the formation, and were denied. When the entrance of the image of the Virgin was announced, the original sergeant asked for permission to leave the formation. When he received no response, he saluted and fell out of the formation, returning later when the formation had moved to another location to continue the event. In the interim, inquiries were made as to the whereabouts of the sergeant, and when he returned to ask for further non-attendance at the next phase of the event, he was denied, but remained outside the formation anyway. The same thing happened on the following day while religious events were celebrated. For these acts, the sergeant was subjected to a disciplinary sanction of

[134] López Ramón, 'Principios de la ordenación constitucional de las Fuerzas Armadas', *supra* n. 24, pp. 2596 *et seq*.

sixty days of detention for committing the serious offence of "insubordination not constituting a crime" (Article 9 (16) of the Disciplinary Regulations of 1985).

However, in ruling 177/1996, the Constitutional Court recognised that the order violated the negative side of the fundamental right to religious freedom, and that no violation deserving a penal sanction had been made.[135] Therefore, the Court recognised the illegal character of the orders that the sergeant had disobeyed. However, because it had not been at issue in the deliberations, the Court did not declare the invalidity of the disciplinary sanctions.

The validity of the disciplinary sanctions was the object of the Military Central Court's deliberations on 12 March 1997. The State's counsel argued that the law excuses disobedience only when obedience would have constituted a crime or been manifestly contrary to the laws and customs of war. He was following the ruling of the Supreme Military Court of 1992: "the duty to fulfil an order is inviolable, even if the order is not legitimate, unless the illegal character of the order is evident." In its judgement, the Central Court pointed out that an order has the juridical presumption of validity and is binding if it satisfies the established formal requirements of jurisdiction, responsibility, and form.[136] Nevertheless, this presumption of validity depends on "the order not manifestly injuring the legal order, harming the Constitution, or imposing a behaviour that is harmful to human dignity. In any of these cases, the presumption of the legitimacy of the order and its binding character on the subordinate does not obtain." Therefore, in these situations, they are orders with only formal, not material, legitimacy, which is why breaching them cannot be punished. The Court considers, however, the necessity that the general norm of obedience to orders not become defunct through the loophole of "illegal mandates", and concedes that the duty to obey still exists in "the non-important cases." This naturally creates a certain ambiguity with respect to which illegal orders can be disobeyed and which are "non-important cases."

The criterion established by their judgement is formally clear: "those illegal mandates are not obligatory which contain a violation of constitutionally guaranteed fundamental rights, even when the action

135 Constitutional Court, Judgement 177/1996, para. 11.

136 Art. 19: An "order" within the meaning of the Code is any mandate issued by a military superior and relating to the service, as long as it is given in the proper form and is within the legal competence of the superior officer, and it requires a subordinate to carry out or to omit a particular performative act.

required is not criminal, or when the orders are not contrary to the laws and customs of war."

No general rule like the one affirmed in the Court's resolution can be derived. With respect to the possible disobedience of orders that do not imply crime, I understand that the following guidelines must be followed:

- in time of war, the disobedience of orders restricting fundamental rights is permissible only when these orders imply crime or disobedience of the laws of war.
- if there is no emergency, it is necessary to try at all costs to allay doubts of the constitutionality of the restriction on a fundamental right involved, and to disobey it only if there is not even the slightest doubt of its *un*constitutionality.
- to justify disobedience, the violation of the fundamental right must be well-known and obvious to the soldier's judgement, according to objectively deducible criteria on the basis of his or her professional and cultural formation.[137]

Clearly, these guidelines mean that, except for the most exceptional cases, it is necessary to obey even illegal orders. It should not be forgotten that, in the case of a serious and unjustified restriction of a fundamental right, that fact would be constituent of a crime and the value of the fundamental right would prevail over principles or constitutional values such as discipline. The special nature of military discipline is fragile, and would crack if the smallest of doubts were sufficient grounds for questioning a superior's orders. However, in the matter of rights and liberties in the quarters, such doubts are almost unavoidable even for the most experienced jurists.

There are further categories of orders, contravening considerations of "good military reason", or the law of the host state, or lying outside the superior's competence, which may or may not be followed.

If orders contravene considerations of "good military reason", the first thing to be remembered is that all orders made by the commander within his authority are, in principle, legitimate and must be obeyed by subordinates. However, it is possible for the order to be unconstitutional, contrary to humanitarian law, or contrary to the general or military penal laws (which protect military interests). In these cases, the orders can be disobeyed; any subordinate who obeys such orders assumes "grave responsibility" for the action.

[137] This is an application of the usual legal standards of Criminal Law, like those relating to ignorance of the criminal regulation and error of prohibition (Art. 14 of the General Penal Code).

It is also possible for the orders to be lawful according to the above-named statutes, but contrary to "military interests". In such cases, the subordinate must always obey the orders. For example, an order could be lawful but contradictory to military doctrine. Orders which are contrary to a military interest, but which are not crimes, must, in principle, be obeyed. The commander issuing the order, however, may be subject to disciplinary proceedings for "inexactitude" or "negligence".
If orders contravene the law of the host state, without contradicting the international dispositions and agreements that affect each particular international mission, the only allowable justification for disobeying an order is that it is contrary to the Spanish Constitution or penal laws, or humanitarian military treaties. If the received order is not contrary to these norms, but only to the laws of the host state, it must be obeyed. However, it is possible that the commander issuing such an order could be subject to disciplinary procedures for violating the laws of the host state.
Lastly, if orders lie outside the superior's competence, it is necessary to keep in mind that an order is legitimate only if the person issuing the order has the appropriate rank/position and jurisdiction to issue it. This is why sentries ought to obey the commands of higher officers, except in the context of security matters, where the sentries themselves are the authorities. It is obligatory to obey the orders of all superior soldiers with respect to general rules of order and behaviour, unless these orders interfere with the mission with which the soldier has been entrusted.
A soldier infringing on the jurisdiction of another soldier may be considered to have committed an offence or military crime. The Military Penal Code defines "orders" as "all mandates relating to military service given by a superior soldier, in the suitable form and within the legal authority of that soldier, to a subordinate soldier, so that the subordinate either carries out or omits a concrete performance." This is why an order issued outside the competence of the superior soldier is not an order for the purposes of the Penal Code, and may legitimately be disobeyed.
To summarize, a soldier may disobey when apparently legitimate orders are contrary to the Constitution, humanitarian or military treaties, or against the general or military penal laws. If the soldier disobeys such orders, he or she assumes "grave responsibility" for the result, in the case that it turns out that the order was legal. On the other hand, if one obeys such orders, one also assumes "grave responsibility," and

cannot use the defence of superior orders. Soldiers may also disobey orders which are by nature illegal because they lie outside the jurisdiction of the ordering soldier, except when the situation is one in which security is paramount or the order agrees with the general rules of order and good conduct. Even in this case, however, soldiers may disobey these orders if they interfere with the mission. If the situation is ambiguous, the best rule for the soldier is to obey, because the legal position will be better for his or her defence.
Concerning the problem of raising objections to an order, Article 32 OR states that "Every [soldier] will accept the orders of his or her commanders. If a soldier considers it necessary to present some objection, he or she will first object to his or her immediate military superior, always on the understanding that the objection must not compromise the unit's ability to carry out the mission entrusted to it. If raising an objection would indeed interfere with the fulfilment of the mission, the soldier will reserve his or her claim until he or she has completed the mission".

4. Social Rights of Soldiers and their Families

The military administration has a General Health Corps and a specialised independent institute for the management of the social security of its members called ISFAS. There is an important network of military hospitals for the use of the soldiers and their families. The military system of remuneration has changed since 1990, moving from an institutional system with payments in kind (housing, recreation, education, food, etc.) towards a more occupational system of monetary compensation. A new regulation has been approved: Royal Decree 662/2001, of 22 June 2001, regulating the Rules of Payment of Armed Forces Personnel. This law includes new regulations concerning soldiers abroad: according to Article 16, soldiers stationed abroad will have the same payment conditions as other civil employees, (following Royal Decree 6/1995, of 13 January 1995, regulating the Payment Regimen of Civil Employees Stationed Abroad). Soldiers who participate or cooperate in peacekeeping, humanitarian, or evacuation missions abroad will receive compensation, the amount of which will be fixed by the particular conditions of the mission and country. Such compensation can amount to 100% of the soldier's base salary (Article 17, Royal Decree 662/2001).

a. Basic Regulation of Social Rights of the Soldiers

In Articles 194-196 OR, there is a generic regulation of soldiers' social rights.

More importantly, general aspects of the social protection and health of the soldiers are regulated in Act 17/1999 of the Regulations of the Professional Soldier:

Article 155: General Principles

1. The social protection of the professional military person, including medical assistance, will be covered by the Special Regulation on the Social Security of the Armed Forces.

2. The Regulation on Retired State Employees (*régimen de clases pasivas*) will be applied to professional soldiers who have rendered a service of career (permanent) character.

3. Professional soldiers who render a service of temporary character will also be covered by the Regulation on Retired State Employees if any of the following conditions arise during their active duty:

a) They become permanently physically incapable of employment of any kind, and therefore must retire. They will receive the corresponding usual or special pension.

b) They become permanently physically incapable of military service. In this case, they will leave the service and receive one-time indemnifications, determined to be compatible with the protection against unemployment mentioned in Article 158 of this Law.

c) They die or are declared deceased. Their relatives will then enjoy a right to the full pension.

Article 156: Military Health

1. Independent of the medical benefit to which military personnel have the right by virtue of the Special Regulation on the Social Security of the Armed Forces, the soldier enjoys the medical assistance of the Military Health Service in the case of accident or illness occurring in the course of duty.

2. The Military Health Service is the only authority competent to determine the existence and nature of the precise psychological or physical conditions respecting the contents of Article 63 (3) and Article 83 (1), as well as to consider the temporary or permanent sufficiency of these conditions to justify removal from service or, as it says in Article 107, the inability to occupy certain positions, or retirement by permanent incapacity for service.

Article 157: Temporary Incapacity due to Psychological or Physical Conditions

1. The professional soldier who is found to be incapable of service due to psychological or physical reasons, whether the result of illness or injury, will remain in the administrative situation in which he is.
2. If the affected person is a career or professional soldier whose service is of a permanent character, at the moment at which the incapacity mentioned in the previous section is declared to be definitive or a period of two years has passed since it occurred, the course of action in Article 107 of this Act will be set in motion. The soldier will stay at his duty station and will remain in the same administrative situation until the conclusion of the referred file.
3. If the affected person is a soldier with a temporary contract of service, at the moment at which the incapacity mentioned in section 1 of this article is declared to be definitive or a period of one year has passed since the decision, or when finalising the contract that he signed, the expedient regulated in Article 107 of this act will be set in motion. The soldier will stay at his duty station and will remain in the same administrative situation, which will self-prorogue until the conclusion of the referred file.
If retirement was not justified and the contract or its prorogation by insufficiency of psycho-physical conditions were finished, the soldier will then fall under the care of the National Health System, unless he is ineligible, in which case he will continue to be cared for by the Military Health Service. If he continues in active service, the general laws on the signature of successive temporary contracts will be applicable.
Article 158: Protection from unemployment
Reservists and professional military personnel whose term of service is temporary will have a right to protection against unemployment in accordance with the effective legislation.

b. Basic Regulation of Military Social Security

Social security is managed through the Social Institute of the Armed Forces (*Instituto Social de las Fuerzas Armadas,* ISFAS), an autonomous public organ with legal personality assigned to the Ministry of Defence.[138] The Royal Legislative Decree 1/2000 of ISFAS states in Article 3 that the special system of social security is applied to career

[138] The Social Institute of the Armed Forces (ISFAS) is regulated by Law 28/75, on the Social Security of the Armed Forces; its General Regulation, approved by Royal Decree 2330/1978, is the managing organ of this special regime of social security. This regulation has been revised, modernised and unified by a regulation with the force of law: Royal Legislative Decree 1/2000, which approved the revised text of the Social Security of the Armed Forces Act. The ISFAS is assigned to the Office of the Undersecretary of Defence by Art. 12 (8) (a) of Royal Decree 1883/1996, the Basic Organic Structure of the Ministry of Defence.

military as well as to reservists, temporary professional troops during their term of service, and students at any of the military institutions of education. This act also applies to members of the Civil Guard and to civilian employees of the Ministry of Defence.

According to Article 8, "The insured and, when appropriate, his relatives or people with the legal status of relatives, are protected in agreement with this Act in the following circumstances: a) necessity of medical assistance, b) temporary incapacity, whether derived from common illness, illness in the course of duty, accident, accident in the course of duty, or any of the results thereof, c) permanent incapacity for military service, or d) familial obligation."

Article 9 confers the following benefits on the insured or his beneficiaries: a) medical assistance, b) subsidy for temporary incapacity, in the case of civilian employees, c) economic benefits in the case of permanent incapacity for military service, including indemnification for injuries, mutilations, or permanent deformities, d) social services (e.g. financial assistance), e) social attendance (e.g. day-care, elderly care), f) benefits for each handicapped child, and g) special maternity benefits in the case of multiple childbirth.

Article 11 gives dependent relatives of the insured the right to medical assistance as in the general social security regime (there is no age limit on the dependents who may receive this benefit). The medical assistance consists of benefits providing ample coverage (Article 13): primary care, specialist care, pharmaceuticals (the patient usually pays around 40%).

This law also regulates care in case of disability (Articles 17-21) or incapacity for military service (Articles 21-23), and the protection of the family. This protection consists of the payment of a monetary benefit per child (periodic payment), and benefits for special circumstances such as multiple childbirth (one-time payment) (Articles 24-25).

The general Social Security system complements the activities of the Special Regulation on the Social Security of the Armed Forces. For all people falling under the social security of the armed forces, civilian facilities are secondary. That is to say, they are only for use in the case that it is impossible to utilize the military resources, or whenever its subsidiary use is regulated by decrees. Thus, Article 14 of Royal Legislative Decree 1/2000, which approved the reformulated text of the section on social security of the Armed Forces Act, affirms that benefits are to come from services of the Special Regime of Social Security for the Armed Forces. If one chooses to use non-military medical services

not specifically assigned by decree, those services will not be covered, except in very exceptional cases.
The Social Institute of the Armed Forces provides the insured and his beneficiaries with the economic aid and services available within the budget allowed (Article 26). Beneficiaries can be the spouse of the insured, children under the age of 21, handicapped children of any age, brothers and sisters under the age of 18 or, if handicapped, of any age, elderly parents of the insured or his or her spouse, widow(er)s of the insured, and orphans under the age of 21 or handicapped orphans of any age (Article 27).

c. Other Kinds of Social Protections

Numerous agreements with the Ministry of Education and with the Regional Governments exist for the educational benefit of soldiers' children.
There is also the matter of the regulation of military housing. The Housing Institute of the Armed Forces (*Instituto de Viviendas de las Fuerzas Armadas*) was created as an independent body in 1990 (by Royal Decree 1751/1990). Act 26/1999 also created measures to support servicemembers as they cope with the difficulties of constant mobility: specifically by means of economic compensation or, exceptionally, with special rental rates.
With regard to legal aid during legal proceedings, Law 1/1996, on Free Legal Counsel, regulates the presence of legal counsel at no expense to the accused. Free legal counsel is usually and generally granted to those whose income is less than twice the amount of the inter-professional minimum salary fixed annually (close to 500 Euros/month, so if one's income is less than 1000 Euros/month, one is eligible).
The right to counsel of some kind is guaranteed in criminal and disciplinary procedures. In criminal procedures, "as soon as any procedure with the potential to result in a determination of criminal liability is communicated to the accused", or whenever a detention, arrest, or other measure to restrict the movement of a suspect has been taken, the right to counsel becomes active and the accused can either designate his own counsel (for which he must pay) or ask for one from the military legal office (for free) (Article 125 of the Military Procedure Law).
In the case of serious disciplinary offences, the suspect may have the aid of a lawyer - either at his own expense or for free. In any case, the right to legal defence is considered to be respected even without

assistance from a lawyer if assistance from another soldier is given. If the soldier refuses to designate a lawyer, he is guaranteed assistance in the procedure from another soldier - not a lawyer - in his defence, for free. He can choose the soldier to assist him, but if the chosen person declines, or resigns, or if no one is designated, then someone will be nominated automatically (Article 53 of the Disciplinary Law).

5. Rules Governing Working Time

a. Working Time and Compensation for Overtime

Even the most recent Spanish laws on this topic follow the more traditional model, which expects the soldier to be a soldier and therefore available for service 24 hours a day, and therefore does not contemplate special compensation for overtime. However, Spanish soldiers generally work forty hours per week, like civil employees.
The Royal Ordinances contain articles relevant to the matter:
Article 218 OR: Soldiers have the right to periodic leave, as well as to emergency leave for reasons of personal or family necessity. However, the needs of the service are to be considered in the determination of the dates of departure and return and in the duration of the absence. If military circumstances demand it, the commander will have the right to demand the soldier's return to his duty station.
Article 221 OR: Career military personnel on active duty are liable to be called into service at any time.

b. Holidays and Special Leave

Act 17/1999 of the Regulation on the Professional Soldier reiterates this model of service: Article 154: The soldier's work schedule, leave, holidays, etc. are subject to the needs of the service.
1. Professional soldiers must be constantly available for duty. Their work schedules will be adapted to the operative needs of their units, etc.
2. Professional soldiers have the right to enjoy the same leave etc. described in the general regulations for public employees, with the understanding that these are to be adapted to the structure and specific functions of the armed forces as determined by the Minister of Defence. The needs of the service will prevail over the agreed dates and duration of leave granted. If military circumstances demand it, the commander of the unit, etc. will have the right to order the soldier to return to his duty station.

The idea of permanent availability of military personnel is also contained in the Law Regulating Military Service of 1991 (Article 25).[139] Like civil employees, soldiers have one month per year of paid holidays, and they also usually enjoy the possibility of leave for "private matters" (around eight days per year), but they do not always use this privilege, particularly in "institutional" units.

Conditions for granting leave and serving duty are usually more flexible after particularly demanding operations. However, there is nothing guaranteed by law and any such compensation is generally at the commander's discretion. There is no significant monetary remuneration either.

There is no compensation, not even monetary, for the disadvantage of service conditions in comparison to those in the civilian sector. From a legal point of view there is no discussion of this issue. The military function is a public function, but not necessarily in the same sense as the civilian public functions. Treatment of the two groups can be different as long as it does not become discriminatory, and the Constitutional Court has tended to consider the differences described thus far as being constitutionally justified. Neither unusually long hours nor guard duty draw extra pay. This exemplifies the prevailing opinion in Spain that military life is harder and rightly so. No serious complaints have emerged from the army; only the Civil Guard has produced politically significant complaints, but even those were minor.

6. Legal Remedies, Especially the Right to File a Complaint

a. General Right to File a Complaint

As may be expected from a system that denies soldiers the right to form trade unions on the grounds that the State is responsible for their well-

[139] Art. 25 (1): "The servicemember will be in permanent availability for the service. The habitual schedule of his activities will be based on a rational distribution of the working times and rest, and will be adapted to the necessities of service in the armed forces.

(2) The Minister of Defence will determine the general criteria to which the general system of schedules, guards, and services must adjust, the standing operational procedures in the units, and the regulation of leave of ordinary and extraordinary character.

(3) Those servicemembers not required to remain in quarters, ships, or bases overnight to carry out guard duty, instruction or training, other services, or to be subject to disciplinary measures, may be authorised to leave from the time the day's activity schedule is concluded until the beginning of the following duty day, as long as this does not compromise their permanent availability.

(4) Soldiers and sailors, when they are not on watch, will not be forced to wear their uniforms outside the quarters, ships, or bases, or when entering or leaving such."

being, the soldier's rights to file a complaint and to legal remedy are somewhat limited.
Royal Ordinances:
Article 181 OR: members of the armed forces, whose interests are guarded by the State, may not participate in unions or associations with a protest purpose. They may not under any circumstances place conditions on the fulfilment of their duties with a view to better satisfying their personal or professional interests, nor may they resort to any - direct or indirect - form of strike. The soldier may belong to other kinds of legally authorised associations such as those with a religious, cultural, sporting, or social character.
Article 201 OR: Soldiers who feel they have been wronged have recourse to their chain of command. Soldiers who still feel that they have not received satisfaction for the wrong done may appeal to the King.
Different types of claims exist, regulated in Articles 199-205 OR and in Articles 159-162 of Act 17/1999. Needless to say, the system is quite confusing. Furthermore, it must be kept in mind that claims by soldiers, if determined to be of a certain nature, can subject the claimant to disciplinary sanction. Recall Article 8 (18) of the Disciplinary Act: it is a serious offence "to make claims, requests, or declarations contrary to discipline or couched in false or misleading language; especially through the use of mass media or as a collective."

b. Different Channels for Complaint

A) Some of the claimant's channels, however, have the character of fundamental rights, e.g. the right of petition recognised in Constitutional Article 29 of the Constitution. Although petitions seem to be rather obsolete in civil society, in the military it remains quite significant. The Royal Ordinances recognise it in Article 199, but Act 17/1999 adds that "its exercise will never result in the recognition of rights which do not correspond to the established legal order."
B) In addition to the right of petition, the right of "ordinary complaint" through administrative channels is recognised. This right is regulated generally in Article 200 OR and specifically in Article 159 of Act 17/1999, which states that an ordinary complaint is possible:
1. Against any acts or resolutions adopted in the exercise of the jurisdictions and responsibilities attributed in this Act, the professional soldier will have the right to complain to his superiors.

2. Against any acts or resolutions adopted by the Cabinet or the Minister of Defence in the exercise of the jurisdictions and responsibilities attributed in this Act, which cannot be resolved through recourse to a superior, the soldier will have the right to administrative complaint (*recurso de reposición*) before resorting to proceedings before an administrative court, but need not make use of this right before initiating court proceedings.
3. In the case of a procedure concerning evaluations, classifications (of occupational speciality), promotions, duty stations, or compensation whose concession must be made at the request of the servicemember, if the administration has not notified the servicemember of its decision within a period of three months (or the time period established by the appropriate regulations for the given procedure), the request will be considered to have been denied.
C) An additional and slightly different system of "complaint" is set out in Article 161:
1. The professional soldier may present, within his or her unit, centre, etc., complaints relating to personnel practices or to conditions of life on ship, base, or in quarters, as long as he or she has not previously presented such a complaint, and the complaint is presented in accordance with Article 159 of this Act (Ordinary Administrative Recourse).
2. Complaints must go through the proper chain of command. However, if they are not sufficiently addressed, they may be brought directly before the Personnel Bureau of the corresponding service branch and, as a last resort, before the inspectorate of the Office of the Undersecretary for Defence in accordance with Article 6 of this Act.
3. If, in accordance with the prescribed terms and procedure, it has been determined that the complaint has still not received sufficient attention, the soldier has the right to the channel of recourse described in Article 159 of this Act.
This constitutes the first system of complaints to be codified in Spain, and it is noteworthy that complaint through the chain of command is not the only possible remedy.
D) Article 162 of Act 17/1999 states that "professional soldiers may individually complain directly to the Ombudsman, in accordance with Organic Law 3/1981."
E) The Royal Ordinances also contain diverse ways of formulating complaints and expressing professional dissatisfaction:

Article 203 OR: soldiers are allowed to direct "proposals" to their superiors, as long as they follow the chain of command and act as individuals. They are allowed, with the proper authorisation, to ask their peers for their opinions on the proposition. They are also allowed to "ask for general advice on subjects not relating to military service" from superiors within the chain of command, even if they are not immediate superiors. However, for the sake of courtesy, the immediate superior should be informed of the soldier's intention to go to another superior for advice (Article 202).

F) Article 205 OR: soldiers are allowed to "go to the superior in charge of the management and coordination of personnel and social services to raise questions relating to their profession, as long as those questions are not related to justice and discipline, organic equipment and material, or to military education and instruction."

In short: a soldier has the rights to individual petition, complaint before the King, ordinary complaint through the chain of command (*recurso de alzada*" and "*recurso de reposición*), "complaints", complaint before the Ombudsman, "proposals" to superiors, "advice on subjects not relating to military service," and to "advice on professional subjects".

c. The Choice of Appropriate Channel and the Possibility of a Hearing in a Court of Law

Given the multiplicity of channels for complaint, it is necessary to explain how a soldier is to know when he ought to use the procedure according to Articles 200 OR /159 Act 17/1999, and when he ought to use that in Article 161 Act 17/1999.

The soldier can present one complaint (called *queja*) in his or her unit, but he or she cannot present this complaint if he or she has already presented the administrative appeal referred to in Article 159 (to which Article 200 OR also makes reference as "administrative appeal"). An Article 161 complaint (*queja*) is the first recourse, and is a less official and more internal solution. However, if the complaint is not resolved to the plaintiff's satisfaction, he then has recourse to the Article 159 administrative appeal. The reference of the Royal Ordinances in Article 200 is a generic reference to "appeals", both administrative (like Article 159) and judicial.

In general, the complaints process begins with an administrative action adverse to an individual soldier's interests. The soldier's first recourse is against the organ that ordered the administrative act, or against the next superior administrative agency, as the soldier chooses. When the

administrative channel has been exhausted, the soldier can go before a court.
If the administrative act is issued directly by the Minister of Defence or the Cabinet, the soldier can either complain directly to that organ, or to go to the courts without having exhausted the administrative options.
If the matter is one of fundamental rights, there is also a specific channel by which it is possible to go directly to the courts, without having exhausted the administrative channel.
For example, if a soldier is being evaluated for a promotion, and he or she believes that the evaluation has been discriminatory, the soldier can go before the organ that has made the evaluation or, if he or she prefers, before the superior administrative agency. When the appeal has gone all the way up the administrative channel and is still not resolved to the soldier's satisfaction, the soldier can turn to the administrative courts.

d. Complaint about the Behaviour of Fellow Soldiers

In Spain, just as the channels for complaint are many, so are the possible grounds for complaint: military subjects, life in the unit, personnel regulations, professional questions, problems with the commanders, and also problems with other soldiers. In the case of a problem with other soldiers, the immediate course of action is to take the complaint to the chain of command, so the commander can make a decision. If the soldier thinks the commander has not addressed the problem sufficiently, he may then go outside the chain of command to one of the other options.

7. Rights of Institutional Representation

Until Act 17/1999, none of the usual mechanisms for institutional representation that exist in other countries existed in Spain. This law called for the creation of a "Council of Personnel Advisors" (*Consejos Asesores de Personal*), whose purpose would be to express to the relevant administration the dissatisfaction and proposals of military personnel relating to personnel practices and the conditions of military life. There are a total of four Councils of Personnel Advisors: one for each service branch plus one for the Common Corps, with another to be added later for the Civil Guard. Their functions are to be purely consultative and advisory. They will meet jointly when subjects relevant to all three services are to be considered. The most delicate aspect will be the selection of the members. It has been said that they will be

elected, but the Act itself left this question to be dealt with by a secondary rule which has not yet been approved. This would be something completely new in Spain, and it has been seen as the minimum first step in meeting the needs of the new professional and democratic military.

Act 17/1999: Article 151 [Council of Personnel Advisors]

1. Within the Staff Headquarters of each service, there is to be an Advisory Council (*Consejo Asesor*) which will analyse and evaluate any proposals or suggestions raised by professional military personnel relating to personnel practices of the armed forces or to the conditions of military life. Within the Main Directorate for Personnel of the Office of the Undersecretary for Defence, there is to be an Advisory Council formed by personnel of the Common Corps of the Armed Forces.
2. Professional (i.e. contractual) soldiers may go directly to the Council of Personnel Advisors of their respective service branches to present proposals, as described in the previous section. Excluded from the possibility of review are those requests, complaints, and recourses regulated in Chapter V of this Title.
3. The selection of the members and the composition of these Advisory Councils will be determined by secondary rules (decrees). Consideration will be given to the fact that these Councils must include soldiers in active service from every specialty, Corps, and rank of the respective service branch, or from the various groups of the Common Corps of the Armed Forces.
4. In order to discuss subjects generally relevant to the personnel of the armed forces, it shall be possible to convoke a joint meeting, with a form to be determined by secondary rules, representing the Advisory Councils of each of the service branches as well as that of the Common Corps of the Armed Forces.

As this study was being completed, Royal Decree 258/2002, 8 March 2002, Advisory Councils of Personnel of the Armed Forces, was being approved. This Royal Decree states that the goal of these Councils is the analysis and evaluation of proposals or suggestions concerning personnel matters and/or conditions of military life (Article 2 (1)). The members of the Council are placed for its purposes outside the chain of command (Article 2 (2)). The Decree 258/2002 also regulates the "election" procedure, in which those soldiers who have not deliberately withdrawn their names from consideration for this body will draw lots (Article 10). This of course makes it possible to avoid a situation in which soldiers must campaign and elect each other.

V. The Relationship of the Superior to Subordinate Personnel

While reading this section, the reader is also referred back to the section on "The Power of Command and the Duty to Obey" (under "Soldiers' Rights and Duties").

1. Legal Rules Concerning the Relationship between Superior and Subordinate

a. The Position of the Superior

The basic rules of military discipline are outlined in the Royal Ordinances, in particular in Articles 10, 11, 12 and 34.

Article 34 OR: "When orders involve the execution of acts that are manifestly contrary to the laws and customs of war or constitute a crime, specifically against the Constitution, no soldier is required to obey them; in any case he or she will assume full responsibility for his or her action or omission."

Hierarchic supremacy is conferred by rank in combination with the position occupied.[140] Soldiers must obey superiors, as superiors have the right to give orders.[141] In military activities which overlap to some extent with security activities (e.g. guard duty or in the military police), the relationship of obedience to superiors is slightly altered.[142] As is obvious, obedience must be dependent to some extent on the jurisdiction of the commander and the legality of the order;[143] a soldier

[140] e.g. in Art. 11 of the special Royal Ordinances of the Army (ORE), where it is stated that soldiers are all placed into the different levels of hierarchy, and their authority rests on their occupation, duty station, or speciality, and they exercise their authority by means of commands.

[141] Art. 50 of the Royal Decrees states: "From the moment of incorporation into the ranks, the soldier will obey and show respect to all officers and non-commissioned officers of any service branch; to the commanders of his own unit, ship, or dependency, and to all who are superior to those commanders, who are on guard duty, or who are otherwise attached in function of the service."

[142] If one disobeys orders issued by an inferior in rank but not in position (e.g. a guard or sentry), either disciplinary or criminal sanctions may apply. "Minor disobedience to the orders of the Military Police in its function as an agent of the authority" constitutes a minor offence (Art. 7 (13)), and "[t]o fail to fulfil the commands of a sentry, security guard, or other person entitled to give orders regarding arms or the transmission of arms, in time of peace, and if no serious damage to the service is caused" is a serious offence (Art. 8 (6)). Because of its greater gravity, misrepresenting oneself to a military person or to a security guard or sentry constitutes a crime by disobedience or resistance against sentry, armed forces, or military police, as described in Arts. 85 and 86 of the Military Penal Code. Art. 13 ORE states that: "The commander will issue commands in agreement with the Constitution, the legal ordering of the State, the Royal Decrees of the Armed Forces and those of the Army. He will have the attributions fixed for each position, duty station, or service in the doctrine, the relevant tactical and technical regulations, and the effective dispositions in the matter of discipline and administration." Furthermore, if the soldier does not respect the jurisdiction of the commander, this may constitute a mere minor offence (Art. 7 (18) RDFA, invasion of competence), a serious offence (Art. 8, sections 13 and 16, excesses of command and the use of servicemembers to one's personal benefit, respectively), or a serious crime (Art. 103 (1) Military Penal Code - abuse of authority; Arts. 138 to 141 – abuses; Art. 143 - usurpation and prolongation of a command relationship).

[143] See *supra* n. 142 for Art. 13 ORE.

or officer issuing commands for which he or she has no jurisdiction can be sanctioned or penalised.[144]

The particular Royal Ordinances of each service determine the basic attributions of each type of command: Chief of the General Staff of the Army, Commanding General of a Military Region (*Capitán general de Región militar*), commanders of Higher Units, Centres, and Organs, Tactical Group Commanders, Battalion, Group, Swarm, Company, Section, Squad Commanders, etc.

In cases of absence, emergency, or actions outside of regular duty hours, continuity of control is always assured. The Royal Ordinances determine the chain of command, and the Royal Ordinances of each service branch act as *lex specialis*.

Articles 81 and 190 OR must be considered in this context. According to Article 81, unless unit capabilities or training demand particular conditions, the general criteria for command succession are: rank, seniority of the soldier in that rank, and age of the soldier. These are listed in order of importance, and the older or more senior soldier takes precedence.

When units of different service branches are participating in a joint operation, if a second-in-command has been named, he or she is the successor to the commander. If no one has been named second-in-command, then command falls to the highest ranking person of the greatest seniority in his rank (Article 82 OR). However, in ships, airplanes, or transportation units, the command falls to the commander of that vehicle, regardless of the rank or seniority of the personnel being transported (Article 83 OR).

In combat situations, if all the commanders are killed or disabled, the "most capable" person must take control (Article 123 OR).

There are particular rules for the allocation and succession of command within each service (army, navy, air force), found in their respective Royal Ordinances. In the army, for example, it is regulated in Articles 87 *et seq.* of the special Royal Ordinances of the army (approved by government as Royal Decree,[145] not by Parliament as an Act).

Each unit has a template describing the necessary specialities and qualifications for each position in the unit. Personnel are assigned to jobs according to this template, and this is how it is decided who is given the jobs with command power. These templates also determine duty station.

144 See *supra* n. 142 for the description of offences relating to abuse of command.

145 Royal Decree 2945/1983 of 9 November 1983.

In any case, the chain of command must always be fixed so that it is in place in case of absence, whether temporary, accidental, or official. Command passes to that subordinate of the commander who has been designated "capable." "Capability" is determined based on the person's membership in certain units, grade levels, and/or specialities, and among those "capable," the most senior in rank succeeds to the command. If personnel are on the same roster, their position on the roster will determine precedence. If they are on different rosters, seniority is the deciding factor. If seniority is equivalent, then the earlier date of entry into service will take precedence, and as a final resort, the older soldier will have precedence (Article 93).
When a position is vacant, it will be filled temporarily or unofficially. If the vacancy is due to the death of the occupant, the substitute ought to have the same qualifications and responsibilities as the former occupant (Article 89). If the vacancy is caused by temporary official absence, the substitute is unofficial, and cannot modify the standing instructions on daily activities and regimen, unless he is expressly authorised to do so or there is an emergency (Article 90). With temporary absences, a substitute may be named and "charged with office" to deal with ongoing issues (Article 91).
Outside of normal duty hours, continuity of command authority is ensured by the guard/duty officer. If in this case there occurs "a situation of transcending importance," and an officer of higher rank than the ranking guard on duty is present, then the ranking officer must assume unofficial control of the situation (Article 92).
"Capability" to succeed to command depends on the type of unit, which is why it is generally necessary to belong to the particular military occupational specialty (cavalry, artillery, infantry, etc.) involved. For the most part, one must also already be a part of the group doing the activity, and, if it is so stated in the regulations, the person must also be qualified in a particular speciality (Articles 94-95).
Thus, seniority is actually a secondary consideration, after that of "capability". Among those having the requisite "capability", the next criterion is the soldier's rank, followed by the time he has served in that rank, followed by position on the promotion roster, followed by date of entry into service, followed finally by age.

b. Specific Duties of the Superior

In addition to the general duties as soldier, the legal ordering lays out the specific duties of the commander in three basic laws: with positive

form in the Royal Ordinances and, with greater relevance and negative character, in the penal and disciplinary law.
In the Royal Ordinances, the duties of the commander are usually regulated with quite open and flexible character, despite the fact that Article 1 thereof names the Royal Ordinances the "moral military law". Articles 49-167 OR regulate the hierarchical ordering of military personnel by both rank and function: non-comissioned officers (Articles 65-68 OR), staff non-comissioned officers (Articles 69-71 OR), officers (Articles 72-75 OR) and general officers (Article 76 OR).
The duties of the exercise of command are regulated in Articles 77-121 OR. Among those duties are the obligation to provide an example to subordinates and be constantly solicitous of their well-being (Article 77 OR), the duty to take responsibility for commands issued, which responsibility cannot be shared or evaded (Article 79 OR), the duty to carry out decrees and orders of a superior with exactitude (Article 80 OR), the prohibition on illegal orders, including those contrary to the laws and customs of war or those which require acts constituting crimes (Article 85 OR), the duty to implement discipline based on conviction and not on punishment_(Article 87 OR), the duty to have an exact knowledge of his or her own obligations and those of his or her subordinates (Article 88 OR), and the prohibition of abuse of subordinates (Article 91 OR). It is also law that, in general, the commander must follow the chain of command in issuing orders, and have them carried out through his or her immediate subordinates. Furthermore, except in exceptional circumstances, he must then respect the legitimacy of orders by his or her subordinates towards their subordinates (Article 95 OR). The commander should not interfere with the functions or jurisdiction of his or her subordinates (Article 98 OR), he or she has a duty to attempt to become somewhat familiar with his or her subordinates and their interests and living conditions (Article 99 OR), the commander must review his or her troops frequently (Article 103 OR), a commander should not reprimand a subordinate in the presence of a superior officer (Article 107 OR), and - barring exceptional cases - a commander ought not to reprimand a subordinate in front of that subordinate's own subordinates (Article 107 OR).
The Royal Ordinances also regulate the obligations of the soldier in aid of the commander (Articles 109-121 OR), the soldier in combat (Articles 122-142 OR), in training and instruction (Articles 142-150 OR), in technical work (Articles 151-158 OR), and in logistics administration (Articles 159-167 OR). Naturally, the duties of the commander in

combat have special relevance: maximum sacrifice (Article 123 OR), maximum rigor and exemplariness (Article 128 OR), special attention to the psychological effect of the enemy and the duty to avoid the demoralisation of his or her forces (Article 130 OR), protection of the civilian population (Article 137 OR), avoidance of the use of prohibited instruments of destruction and of the infliction of unnecessary sufferings, and respect for the human rights of military personnel (Article 139 OR).

The negative regulation of the duties of the command in the criminal and disciplinary law has even greater and more direct legal relevance. Non-compliance with the duties of command can be sanctioned as a minor or serious offence, according to the disciplinary law. A list of minor offences is included in Articles 7 and 8 RDFA. Exceptionally rigorous disciplinary punishment is applied to those who their use their elevated position in the hierarchy to pressure an equal or a subordinate into unwanted sexual activity (Article 17 (5)).

Chapter IV, Articles 130-143 of the Criminal Code regulate punishments for "non-compliance with the duties inherent to the commander". Among the crimes regulated are the surrender of command power (Article 130), and the failure to fight or to follow orders in combat (Article 131). A commander is also punished if he fails to take measures to prevent the loss of position or ground, and if he fails to pursue the enemy with sufficient vigour, if that failure should lead to the enemy's inflicting serious damage on Spanish forces or citizens (Articles 132 *et seqq.*). A commander may also be punished for separating his or her forces from the higher unit or formation to which he or she belongs (Article 134). In addition to Chapter IV, Articles 103-106 of the Criminal Code regulate abuse of office, and mistreatment of, injuries to, and cruel or degrading treatment of subordinates. It is a more serious offence for a commander to abuse drugs or alcohol while on watch than for a subordinate soldier (Article 148). It is considered a crime against military decorum and dignity for a general officer, officer, or staff non-commissioned officer to attack another soldier publicly. Diverse specific crimes of the Commander or the Officer of Guard of a ship or airplane are punished in Articles 165 to 173.

c. The Use of Force to Secure Compliance with Orders

According to the Constitutional Court, the only fundamental right which cannot be deviated from or limited in any way is the right to be free from cruel treatment.

Despite this, it must not be forgotten that the principle of proportionality applies and that there is the possibility that serious situations of emergency may arise where certain measures are necessary to maintain the essential discipline. In situations of this type, it is conceivable that the use of physical force might be legitimate. An article of the Royal Ordinances gives legal support to this position:

Article 128 (Combat Situations)

> "During a campaign, every commander has the responsibility to inspire his or her soldiers with the values and serenity necessary to confront the risks; he or she will dedicate ability and energy to conserve the morality of victory, the discipline and order, and *he or she will use maximum rigor with any soldier attempting to retreat unilaterally, leave his post, or disobey received orders.*"

In the present Spanish armed forces, under normal conditions (as yet there has been no experience of abnormal conditions), the use of physical force with subordinates has been abolished, and abuses have been prosecuted.

2. Subordination of Soldiers to the Command of a Superior of Foreign Armed Forces

There is no specific law in Spain on these subjects. They tend to be dealt with depending on the frame of the particular multinational unit and type of participation in a given situation. In the case of Spanish units assigned to permanent military organisations like NATO, EUROFOR, EURMARFOR, and EUROCORP, each organisation has its own legal system and rules regarding command and integration of the force. These are regulated by means of Agreements of Accession. Normally, a "transferral of authority" takes place between the Chief of the General Defence Staff and the head of the multinational organisation, and the jurisdictions, limitations, and attributions of each of the commanders are settled in that transferral document. Unless national authorisation from Spain is forthcoming, the agreed-upon terms of integration cannot be altered. Generally, the terms of integration consist of a mission, a spatial zone of performance, and a period of time.

Command of forces can be attributed to other entities on different levels (which are regulated in both NATO and UN documents). From most to least control, those levels are: operative command, operative control, tactical command, and tactical control.

Even so, many of the aspects of the attributions and jurisdictions must be established, operation by operation, in Status of Forces Agreements (SOFAs) where the conditions, rights, duties, and legislation applicable to the contingents are established. It is a general norm that the unit shall be responsible to its own national legislation with respect to disciplinary and criminal infractions.
The questions of command and of relations between superior and subordinate with respect to non-Spanish military personnel have been neither regulated nor legally analysed, and there is in fact a great deal of ignorance of and lack of interest in the question. Such questions, it tends to be assumed, are dealt with in the international legal documents and national decisions in Spain, but do not have legal standing and are often decisions made at the ministry level.

VI. Possibilities for Sanctions

1. Disciplinary Law

a. Disciplinary Power

In 1985, the Military Criminal Code and Organic Law 12/1985 on the Disciplinary Regulations of the Armed Forces were approved practically simultaneously. The Organic Law distanced disciplinary law from criminal law, to some extent, and set down some constitutional guarantees. Before 1985 disciplinary law and penal law were not separated, as they still are not in the UK. The most important factor leading to the separation of the two was the existence of precedents. The previous law was from 1945 - in the middle of Franco's regime. This law regulated both substantive and procedural disciplinary and criminal matters, and did not include reference to fundamental rights. This law was somewhat reformed in the wake of the new Constitution of 1978, but the best solution was considered to be to move definitively away from the past, and one of the ways to do that was to follow the practice of other modern countries and differentiate between disciplinary, penal, and procedural law. The introduction of the Military Penal Code of 1985 states that "constitutional principles and the progress experienced by the science of penal law are factors that required not merely a reform of military penal law, but the promulgation of a new Military Criminal Code."
Organic Law 12/1985 of the Disciplinary Regulations - not the Military Criminal Code approved by Organic Law 13/1985 - has been superseded by Organic Law 8/1998 on the Disciplinary Regulations of

the Armed Forces.[146] While the new law has not attempted to redefine military disciplinary law, it has also avoided confronting all the questions raised by the more important doctrinal critics of the older version. What it has done is carry out technical corrections to the old law. As the Preamble states, "this Act is appropriate for professional armed forces with increasingly external missions".

However, there is in fact a lack of regulation on international operations. The above affirmation comes from the Preamble of the law, where the intention to be relevant to a military operating outside the home territory is generally affirmed. The specific provisions of law remain quite timid and relatively low-impact. The only particular provision very relevant to operations abroad is Article 39: "Commanders shall have the power to impose sanctions on personnel when outside the national territory, regardless of the designation of the person being sanctioned. The exercise of sanctioning power, temporary and circumscribed to the duration of the mission for which these units or groups were created, will depend on the organisation that these have according to the rules contained in previous articles."

The extent of disciplinary power does not depend only on the rank of the soldier, but also on the position that he occupies in the unit, the rank of the soldier being sanctioned, and the type of sanction being contemplated. Disciplinary power is regulated in Article 27ff. of the Disciplinary Law.

The Ministry of Defence has the power to reprimand, to impose arrest from one to thirty days, to impose arrest from one month and a day to two months, to deprive a soldier of duty station, and to impose extraordinary sanctions.

The Head of the General Staff of the Defence, the Undersecretary of Defence and the Secretaries of Army, Navy, and Air Force can: reprimand, arrest from one to thirty days, arrest from a month and a day to two months, and deprive a soldier of duty station. (The Undersecretary of Defence may also impose the sanction of expulsion from a military instructional institution.)

The flag officers, if they are commanders of a Division or higher, Commander of the Force or Head of the Support to the Force (officers directly subordinated to the respective Chiefs of Staff), and the

[146] A summary and evaluation of this law can be found in E. Montull Lavilla, 'La justicia y la disciplina en el seno de las Fuerzas Armadas', in F. López Ramón (ed.), *La función militar en el actual ordenamiento constitucional español* (Madrid, 1995), pp. 144-146; P. T. Nevado Moreno, *La función pública militar* (Madrid, 1997), pp. 77-86; *idem*, 'Reflexiones en torno al régimen disciplinario militar', in Dominguez-Berrueta, 'Constitución, Policía y Fuerzas Armadas', *supra* n. 114, pp. 265-302.

Commanders-in-Chief of the Operative Commands who are directly subordinated to the Chief of the General Staff, may sanction general officers, officers, staff non-commissioned officers (sergeants major) and troops and sailors who are assigned to the units under their command. These officers have the authority to impose reprimand or arrest from one to thirty days.
Commanders of battalions, groups, aerial swarms, or similar units may sanction the officers and staff non-commissioned officers under their orders, with either reprimand or arrest lasting up to eight days. They may also sanction their troops or ship's crew with reprimand, detention up to eight days, or arrest up to fourteen days.
Company commanders or their equivalents may sanction subordinate officers with reprimand or arrest lasting up to four days, or lasting up to eight days for staff NCOs. They may sanction their troops or ship's crew with reprimand, detention up to eight days, or arrest up to fourteen days.
Section Commanders or their equivalents may sanction staff NCOs with reprimand or arrest up to four days, and may punish troops or ship's crew with reprimand, detention up to five days, or arrest up to eight days.
Squad leaders or their equivalents with the rank of sergeant or above may sanction troops and ship's crew who are under their orders with reprimand, detention up to five days, or arrest up to four days.

b. Relation to Criminal Law

The relationship between military disciplinary law and criminal law is problematic. There are myriad sanctionable acts - including minor infractions - which can constitute crimes under the Military Code.
Of the 34 minor infractions regulated in Article 7 of Law 9/1998, the expression "when they do not constitute a more serious offence or crime" is used in three of them: numbers 24 (Alcohol Consumption), 28 (Petty Thefts and Damages), and 29 (Expressions and Acts Opposed to the Command Structure or the Government, National Symbols, or National Institutions).
Among the serious infractions regulated in Article 8, this phenomenon is multiplied. Of the 38 acts considered to be serious offences, twelve of them use the expression "when it does not constitute a crime": Numbers 2 (Failure to Perform Military Duties), 8 (Alcohol Consumption), 9 (Use or Possession of Drugs in Military Enclosures), 11 (Dissemination of Sensitive Information), 15 (Use of Official

Resources for private purposes), 17 (Limiting Another Soldier's Exercise of His Rights), 20 (Insubordination), 23 (Acts of Sexual Harassment, Sexual Assault, Indecency, etc.), 29 (Fraudulent Medical Evasion of Service), 30 (Destruction of Military Property or Equipment), 32 (Expressions and Acts Opposed to the Command Structure or the Government, National Symbols, or National Institutions), and 33 (Clandestine Meetings). But even in many of the serious offences in which this expression is not specifically used, a mere evaluation of the gravity of the offence can put it over the line into the criminal realm.

This possibility is made explicit in the regulations regarding conduct which could imply the concurrent commission of the so-called "extraordinary disciplinary sanctions", in Article 17 (2) (Acts Against Military Discipline, Service, or Integrity) and 17 (7) (Acts of Sexual Harassment, Sexual Assault, Indecency, etc.). Furthermore, although it is not explicitly stated, it is also possible to qualify the violations in sections 3 (Consumption of Alcohol or Drugs) and 4 (Expressions Against the Constitution or the King) as criminal offences.

Obviously, the boundary between disciplinary and criminal military law is complex and controversial. Behaviour can be classified as a minor infraction, serious infraction, extraordinary sanction, or crime. The only distinguishing criterion available is the gravity of the act, including the importance of its results. It would be impossible to list all the possible cases in which a line would have to be drawn between military disciplinary offences and crimes.

There is another problem associated with the relationship between disciplinary and criminal law. It consists of the possibility that a soldier condemned under general criminal laws may also be subject to extraordinary military sanction. In other words, a soldier may be punished by discharge from the service for a crime that ostensibly had nothing to do with his military status. This can happen only if the crime included malicious fraud and carries a mandatory sentence, or when the sentence is more than one year and the crime was one involving imprudent activity (Article 17 (6) of the Law of Disciplinary Regulations).

The question provokes problems from the perspective of the legality principle, because of the concrete principle of *nebis in idem* prohibiting double punishment for the same crime. Nevertheless, the Constitutional Court has recognised that there are in some of these cases different legally protected interests which the civil criminal sentencing process could not consider, and for that reason double sanctions are constitutionally permissible. This other legally protected interest is none

other than that of the military in sanctioning activity that is detrimental to the military service as such. The Constitutional Court considered the breach of public confidence implicit in a crime of, for example, fraud, to be incompatible with the character demands of a profession performing functions of the State and military defence.[147]
Disciplinary sanctions can, however, be deducted from a criminal sanction. Article 27 of the Military Criminal Code states: "Time spent in detention, disciplinary arrest, or rigorous or attenuated preventive imprisonment will count towards the service of a criminal sentence, if they were all related to the same offence."

c. The Purpose of Disciplinary Law

Measures taken by the military are generally rooted in the need for maximum effectiveness of the military defence of the constitutional State. Discipline and hierarchy are considered to be the most important instruments to this end. It cannot be over-emphasised that the armed forces themselves as well as their disciplinary regulations are instrumental in character, and if either of them is to be legitimised, it must be through the Constitution. Military discipline is not legitimate in and of itself, but only in its instrumental capacity. Yet it seems somehow necessary to leave a sort of mystery surrounding military discipline, and simply think of it as essential because an effective military is essential to the defence of the constitutional State. Discipline is merely a means to that end.[148]
It is interesting to see an excerpt from a Constitutional Court judgement of 2 March 1994, in which the Court decided that military discipline could not be valued above fundamental political rights, and that the traditional concept of discipline as an ultimate value must be excluded from a democratic social State:
"we cannot agree with the thesis that, in the military framework, a values hierarchy exists which, in terms of the general interest, deserves greater protection than fundamental political rights [...] The recognition and continued effectiveness of fundamental rights and public liberties, which constitute the essential nucleus of our legal order, protect not only individual interests, but also the general and fundamental interests of the community. Thus it is not possible to claim the existence of values - in a military framework or otherwise - which deserve greater protection than those rights and liberties. The importance of discipline

147 Note especially Constitutional Court, ruling 234/1991, of 10 and 2 December 1991.
148 See Blanquer Criado, 'Ciudadano y soldado' *supra* n. 29, p. 354.

for the armed forces can justify the existence of certain limitations on military personnel, but such limitations must be on the one hand proportional to the goal, and on the other in compliance with Article 53 (1) of the Constitution, which requires that the limitation respect the essential content of the right [...] we do not believe, then, that [...] this ruling endangers the essence of military discipline, it merely puts to rest a certain inappropriate concept of military discipline."[149]

With respect to the Criminal Code, the Constitutional Court has affirmed that "crimes against discipline are detrimental to the cohesion and maintenance of good order in the armed forces, which are necessary to their effectiveness in the accomplishment of their objectives."[150] Discipline "is the interest legally protected by the designation of crimes and minor offences."[151]

The Disciplinary Code is, first and foremost, concerned with the preservation of military discipline, whether within the institutional command structure[152] or the more general notion of subordination to the Constitution and democratically constituted government.[153] The general effectiveness of the armed forces, their specific need for security, their need for political neutrality, and their special equipment are all protected by the existence and explicitness of sanctionable conduct[154] - which is sometimes inseparable from disciplinary infractions - for example, cowardice[155], actions which compromise military dignity[156], or violations of the requirement of uniformity.[157] At the same time, the

[149] Particular Vote formulated by magistrates J. Villarejo (then President of the Chamber) and J. Sanchez of the Sierra Rio.

[150] Ruling of 22 March 1989, of the Fifth Chamber of Military Matters of the Supreme Court, para. 3.

[151] L. Álvarez Roldán and R. Fortún Esquifino, *La ley disciplinaria militar* (Pamplona, 1986), p. 47.

[152] Among those acts designated as minor or serious offences, some have a direct connection to the disciplinary order and the military hierarchy. Of the minor offences (Art. 7), sections 8, 12, 13, 14, 18, 19, 29 and 34 are relevant. Of the serious offences, sections 1, 13, 14, 18, 20 and 25 are relevant. Of the extraordinary sanctions, only Art. 17 (2) is relevant.

[153] The minor offence of Art. 7 (29) is serious in Art. 8 (32), and merits extraordinary sanction according to Art. 17 (4).

[154] See Art. 7, sections 1, 2, 9 and 20 for minor offences, and Art. 8, sections 2, 3, 4, 19, 22, and 25 for serious offences.

[155] Serious offence (Arts. 8 (3), 29). In the Military Criminal Code, cowardice is a crime in several situations: to flee the enemy, to desert the mission out of fear, to show fear, to seek medical excuse under false pretences, etc.

[156] Of the minor offences: Art. 7, sections 26 and 30; of the serious offences: Art. 8, sections 22 and 24. Art. 17 (1) (2) designates such conduct deserving extraordinary sanction.

[157] Minor offence (Art. 7 (6)).

rights and liberties of the members of the armed forces are guaranteed by the disciplinary law.[158]

d. Disciplinary Measures

According Article 9 RDFA, "1. The sanctions available for minor offences are: reprimand or warning,[159] detention (no leave from the unit) for up to eight days,[160] and arrest - lasting from one to thirty days, at home or at the unit.[161] 2. The sanctions available for serious offences are: arrest - lasting from a month and a day to two months in a military disciplinary establishment,[162] loss of duty station,[163] or expulsion from a military academic or training institution."[164]

Article 18 of this law also sets out the "extraordinary disciplinary sanctions: loss of one's place in the promotion list,[165] prohibition from upgrade or promotion,[166] and separation from the service (dismissal)."[167]

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[158] See the minor offences of sections 15-17 of Art. 7, and serious offences of sections 13, 17, 23, and 35 of Art. 8. Such conduct meriting extraordinary sanction is found in Art. 17 (7).

[159] According to Art. 11: "An admonition is express and written reprimand by the superior to the subordinate. A warning or verbal reprimand, which may best fulfil the commander's obligations to the service, does not constitute a disciplinary sanction."

[160] According to Art. 12: "Deprivation of the possibility to leave the military installation indicates that the servicemember may not leave his unit, quarters, base, ship, or other military establishment except as he may be required to stand watch for up to a maximum of eight days."

[161] According to Art. 13: "Arrest of one to thirty days consists of the restriction of freedom of the person sanctioned and indicates that he may not leave his home, unit, quarters, base, ship, or other military establishment specifically indicated for the duration of the arrest, except to participate in the activities of the Unit."

[162] According to Art. 14: "Arrest of a month and a day to two months consists of the deprivation of the freedom of the person sanctioned and commitment to a military disciplinary establishment for the duration of the arrest. The sanctioned soldier will not participate in the activities of the unit during this period. If justifying circumstances are present, and as long as it is not harmful to military discipline, the sanctioned soldier may be held in another military establishment not a military disciplinary establishment, under the same conditions."

[163] According to Art. 15: "The sanction of loss of duty station indicates that the sanctioned soldier will be removed from his unit, and for the next two years will not be able to request any new position with the unit, or within the locality or specific military territorial demarcation to which he belonged when he was sanctioned."

[164] According to Art. 16: "The sanction of expulsion from an institution of military training or instruction indicates the loss of the status of student and the loss of the military rank that he or she would have reached eventually, without affecting the military status that he or she had before becoming a student."

[165] According to Art. 19: "The loss of position in the roster indicates a setback in the promotion order, within his or her rank, of the number of positions that is determined in the resolution of the file, that could not be superior to fifth part of the number of the components of his or her corps, scale or rank."

[166] According to Art. 20: "The suspension of rank indicates suspension of all the natural functions of that rank for no less than one month and no more than one year, except in the case regulated in the sixth clause of Art. 17." Suspension in rank also indicates that the time spent in suspension will not be counted as time in service for the purposes of promotion. Immobilisation in rank is final and means the definitive loss of position.

[167] According to Art. 21: "Separation from the service indicates expulsion from the military, with no right of voluntary re-entry. This shall include the loss of all associated military rights, excepting only the

Note that in Spain there are no fines. Under the institutional and traditional concepts of the military function, money has no value for soldiers. Thus, because money is such a material thing and therefore of secondary importance to the soldier, it would be no real punishment to fine him. An example of this attitude was given in the opinion of one judge of the Constitutional Court: on the question of the difference between military and common criminal law, in particular the practice of release from prison for bail, he said: "The monetary guarantee does not have a place in an institution like that of the military, in which the feeling of honour is the highest reward for the most exact fulfilment of duty."

e. Disciplinary Law and the European Convention on Human Rights

Spain signed the European Convention on Human Rights in 1977, and deposited the Instrument of Ratification on 26 September 1979, but made a reservation with respect to Articles 5 and 6 ECHR regarding the disciplinary regulations of the armed forces. The reservation states that "Spain, in accordance with Article 64 of the Convention, makes reservation with respect to the application of Articles 5 and 6, if they are incompatible with the dispositions ... contained in Title XV of the Second Treatise and in Title XXIV of the Third Treatise of the Code of Military Justice." Since these Articles of the ECHR thus do not apply, the Resolution of 24 September 1986 established that the reservation must be understood in accordance with Organic Law 12/1985 on the Disciplinary Regulations. Since the Organic Law has since been superseded, the reservation must be understood as referring to the new Organic Law 9/1998 on the Disciplinary Regulations.

Even though the reservation prevents direct application of Articles 5 and 6 ECHR, the general ECHR standards are still applicable because Articles 14 and 24 of the Spanish Constitution correspond largely with Art 5 and 6 ECHR. Due to Article 10 (2) of the Constitution, Articles 17 and 24 must be interpreted in the light of the jurisprudence of the European Court. Thus, the reservation has only minimal significance. Therefore, I will concentrate below on those problems more commonly understood to be controversial as far as conflicts between disciplinary matters and fundamental rights.

Generally, the guarantees for fundamental rights found in the civil penal framework are also applied in the framework of military disciplinary law

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passive rights and the retention of the rank held at the time of expulsion. For those military personnel who were only on temporary contract, separation from the service indicates an end to the contract."

- and indeed with greater reason, because many of the sanctions there consist of restrictions on or deprivations of individual liberties. There is more than a little doubt as to whether these regulations of punishable conduct are actually legal.

Military disciplinary law is criticised in Spanish doctrine because it does not state in detail which acts are sanctioned thus depriving the citizen of the ability to predict the possible consequences of his conduct. Given that any action of a soldier may have an impact on military duties, it is extraordinarily difficult to regulate the duties in detail, as well as to find a concrete way to draw a line between minor and serious disciplinary infractions, extraordinary sanctions, and crimes. For that reason, broadly framed general clauses are used frequently. The criticism is directed against the use of general clauses such as "exactitude of service", "negligence in the fulfilment of orders", "lack of interest", "slight negligence of some duties", etc. Supporters of the disciplinary system insist that this practice does not infringe on the principle of legality.

Of course, it is possible to look to laws not having sanctioning or penal nature in order to discover whether a punishable act has indeed occurred. Thus, for example, some consider it unconstitutional that the law determining which conduct can be sanctioned is a Royal Ordinance and not an Organic Law (a law must be organic in order to have the authority to develop fundamental rights). It is also possible to refer to the particular Royal Ordinances of each service branch - which are not in fact law - for guidance on punishable acts, because they use concrete language to fix military duties.

An example of the ambiguity of expression used in the laws that regulate offences is Section 34 of Article 7 of the Military Disciplinary Regulations. This rule allows types of conduct not already explicitly defined to be considered minor offences: "34. [Minor offences are also all those offences] which, not being regulated in the previous sections, constitute minor failures to perform duties listed in the Royal Ordinances, regulations, and other dispositions governing the Military Institution."

Doubts with regard to the principle of legality might also arise due to the fact that the same conduct can be considered a minor offence, serious offence, offence deserving extraordinary sanction, or a crime.

However, the Constitutional Court considered the relaxation of the principle of legality as constitutional with regard to military law, in order to take account of the exigencies of military reality. For the Court, this

relaxation is permissible only if at the same time the organs applying the law demonstrate a fundamental responsibility: these organs must apply the disciplinary laws in the light of the agreed prevailing interpretation of the values and fundamental rights of the democratic State. This position received particular support in the important ruling 151/1997 of the Constitutional Court, in which there was extensive argumentation about this matter.[168]

There are also doubts about the Disciplinary Code's conformity with the principle of *nebis in idem* when conduct punished as a civil crime can also be sanctioned as a disciplinary offence. The principle - which is included explicitly in Article 25 of the Constitution - might also be violated by the fact that three minor offences committed concurrently can be sanctioned as a serious offence (Article 8 (38)), and that three serious offences can be punished by extraordinary sanction (Article 17 (5)). However, the Constitutional Court has not yet had to address this issue.

Military disciplinary law includes not only the usual guarantees with respect to legality, but also all the usual constitutional guarantees of a defendant recognised in Article 24 of the Constitution: due process, presumption of innocence, right to be informed of the charges against one, right to examine all pertinent evidence, right to appeal, etc. However, there have been doubts on these counts as well. Articles 67, 70, and 81 of the Law on Military Disciplinary Regulations, which deal with the executive nature of the sanctions and the various existing possibilities for deferment, have been especially troublesome: Article 67 says that sanctions will be carried out on the same day on which the accused is notified of the decision, and deferment of the punishment is very difficult - indeed, close to impossible in the case of a minor offence. Sanctions for serious offences can be delayed by high authorities, or the accused can demand a delay of implementation as part of his or her appeal, but a postponement can be granted only if it can be shown that it will not "be detrimental to military discipline" (see Articles 70 and 81).[169]

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[168] See also the rulings of the Constitutional Court 270/1994 of 17 October 1994, and 92/1995 of 11 June, 1995. The most important ruling remains 151/1997 of 29 October 1997, which dealt with an adulterous captain expelled by a Court of Honour.

[169] This regulation – very similar to the Former Disciplinary Law of 1985 – has been harshly criticised by Blanquer Criado, 'Ciudadano y soldado', *supra* n. 29, pp. 671-674, because it differs so drastically from the practice of all other parts of the Executive. In my opinion, however, this practice is constitutional, and were it to be otherwise, the effectiveness of the military defence of the constitutional State would be significantly damaged.

There is also some doubt as to the constitutionality of the classification of all military disciplinary files as sensitive information in time of peace,[170] and as to whether the execution of sanctions conforms with the principle of legality - particularly in the case of minor offences.[171] Furthermore, there is concern about the fact that a case that was sanctioned as a minor offence can be reviewed and increased to the status of a serious offence.[172]

f. The Disciplinary Procedure and Legal Remedies

There are two fundamental kinds of sanctions and disciplinary procedures: those for minor offences (conduct regulated in Article 7) and those for serious offences (conduct regulated in Article 8). In addition, there are government files for those offences known as extraordinary sanctions (conduct regulated in Article 17). The general provisions of the sanctioning procedure are regulated in Articles 44-48, the general provisions of the procedure for minor offences in Articles 49-50. The procedure for serious offences is regulated in Articles 51-55 (Initiation of Procedure for Serious Offences), 56-60 (Development) and 61-63 (Completion). Extraordinary sanctions are regulated in Articles 64-66.

Every soldier has the duty to impose sanctions if he or she has the authority to do so, or to inform the competent commander if he or she believes an infraction has occurred.

For the minor offences, the preferred procedure is oral, with verification of the facts, hearing of the presumed violator, and verification of its specification in Article 7. After that, the corresponding sanction must be determined according to the circumstances and the subject. The resolution must be put in writing with a brief description of the facts, indicating the paragraph of Article 7 infringed and the possible appeals. However, this communication could be replaced by a general publication in the unit.

The procedure for serious offences can be initiated only by the Minister of Defence, the Undersecretary of Defence, the Chiefs of the General Defence Staff, or the Service Chiefs. Specific generals and admirals in important operative positions may also initiate such proceedings. The

170 Blanquer Criado, *ibid.*, pp. 418 *et seqq*.

171 Blanquer Criado, *ibid.*, pp. 661 *et seqq*.

172 This is the effect of Art. 63. A period of 15 days after indictment for a minor offence is allowed in which the matter can either be sent to the appropriate authority, or the procedure for a serious offence can be instigated. If it should be decided to try for a serious offence, the previous ruling of a minor offence will be invalidated, and any penalty already imposed will be subtracted from the eventual penalty imposed for the serious offence. See Blanquer Criado, *ibid.*, pp. 623-665 *et seqq*.

procedure is in written form, and the process is limited to a maximum duration of three months. The process is "prosecuted" by an "Instructor", who is an officer, but not necessarily a lawyer. The Instructor is appointed, and the presumed violator has the right to the advice of a lawyer or of a soldier whom he or she designates as defender. The beginning of the procedure must be communicated to the Military Legal Public Prosecutor.

For the preservation of discipline, the presumed offender may be placed under preventive arrest, but this arrest cannot last longer than one month. It is possible to suspend the presumed offender from service for up to three months during the procedure, without economic or administrative effects - e.g. not affecting payment or promotion.

After the investigation, the Instructor formulates a position document stating the facts, legal qualifications, and possible sanctions. The defendant may respond to this document, and demand the evidence in the possession of the prosecution. Once reply has been received, the Instructor presents the evidence that he or she considers pertinent and formulates a motion of resolution, which sets out the facts, infractions, and proposed sanction. Allegations may also be attached to this document, and will be sent to the authorities charged with resolving the matter (the Minister, Undersecretary, etc.). This authority will impose the sanction that he considers appropriate, or will dismiss the motion, his decision depending partly on a non-binding corresponding report form his Legal Advisor. If this authority does not have the jurisdiction to impose the sanction because of the gravity of the offence, the file will be sent to the authority that has this jurisdiction. If the sanction could be administrative or criminal, it will be communicated to the administrative or judicial authorities or to the Military Prosecutor.

The resolution will present reasons and evidence; it will describe the facts, qualify them legally, determine who is responsible, and fix the appropriate sanction. The defendant must be notified of this resolution, with an indication of possible appeals and their terms.

In the case of extraordinary sanction, the governmental file is entered by an Official of the Military Legal Corps and it is necessary to hear both the Superior Council and the Superior Council of the defendant's unit before sanction can be imposed. After the allegations and the above-described documents have been presented to the defendant, the file is sent to the Minister of Defence, who is the only one who can impose extraordinary sanction. The Minister relies on the advice of the General Counsel's Office.

Diverse appeals against the disciplinary sanctions are possible. They can be of an administrative-disciplinary nature as well as judicial.
The administrative appeals in the administrative-disciplinary channel are regulated in Articles 75-81 of Law 9/1998. Those appeals must be in written form, always including an explanation of the causes of the decision, and never collective. They must follow the official channel to the commander who imposed the sanction. The appeal must be made within fifteen days from the notification of the sanction or within fifteen days of one's release from arrest.
If it is a minor offence, the appeal to the commander who imposed the sanction exhausts the administrative-disciplinary channel, except when the sanctioning authority is a company grade officer or below. In such a case, a second appeal can be made to the superior commander within fifteen days after the first appeal has failed.
There is a legal problem here, in that it is very difficult to get an appeal involving a minor offence into a court of law. Were it actually to be impossible, that would be unconstitutional (Article 24 of the Constitution). A superficial study seems to indicate that it is not possible to appeal in court against a minor offence, because the standard legal procedure is not applicable in these cases. However, there is a special procedure, instituted for the protection of fundamental constitutional rights.
According to the Disciplinary Law (Article 77 (3)), when the appeal has exhausted the administrative channel and the accused's exercise of his fundamental rights has been affected,[173] the accused may initiate a contentious-disciplinary judicial appeal, which must be privileged and brief in relation with other kind of processes (*preferencia* and *sumariedad*) according to Article 53 (2) of the Constitution. This special process for the protection of fundamental rights is regulated by Article 518 of Law 2/1989, Military Procedure. Thus there is no ordinary appeal for minor offences - as there is for major offences - there is only this special appeal demanded by the Constitution.
In any case, the effectiveness of the disciplinary or judicial appeals for minor offences is debatable, because those sanctions are effective immediately, which means, of course, that the sanction has already taken effect by the time the appeal and whatever outcome it engenders are completed. A favourably resolved appeal will thus accomplish nothing aside from striking the minor offence from the soldier's file.

[173] It would be difficult for a "restriction of personal freedom" not to affect the exercise of fundamental rights.

These difficulties are a matter of discussion in the academic literature, which is divided on the merits of the limitations on the appeals system.
In the case of serious offences, it is possible to appeal to the commander who imposed the sanction, again within the term of 15 days, and this appeal exhausts the administrative-disciplinary channel. The next step, again, is recourse to the judicial channel. In the case of extraordinary sanctions, however, it is possible to appeal to the Minister of Defence, within the term of one month. If that appeal fails, the accused may resort to the judicial channel to appeal the decision of the Minister. In the cases of both serious offences and extraordinary sanction, the appeal may include a request to suspend the punishment pending the outcome of the appeal.
Articles 448-517 of Organic Law 2/1989, Military Procedure, regulate the ordinary judicial appeals process. There is now a time limit of only two months in which to appeal - whereas before this law was passed, the limit was fifteen months.
Article 518 regulates the privileged and brief appeal for the special protection of fundamental rights. In order to initiate this form of appeal, it is not necessary to have exhausted the administrative channel in the case of serious offences or extraordinary sanctions; one may resort directly to the judicial channel.

g. Representation of the Armed Forces during Disciplinary Proceedings

As described above, military disciplinary proceedings take place entirely within the military context. The simplicity of the procedure of the minor offences indicates that no one beyond the alleged offender and the commander imposing the sanction need be involved. In the case of serious offences, an Instructor, designated by the person with the authority to impose the sanction, becomes involved, but the initiation of proceedings is communicated to the Military Legal Public Prosecutor not for him to become involved in those proceedings, but solely to determine whether a different kind of procedure (i.e. criminal) would be more appropriate. The Legal Counsel's Office merely formulates a non-binding opinion prior to the imposition of the sanction. Finally, in the case of the extraordinary sanctions, there is an "Instructor" - a legal officer - and it is necessary to hear the report of the defendant's unit and the report of the General Counsel's Office before the imposition of any sanction.

Therefore, unlike the penal processes, the direct participation of a military prosecutor does not occur, although there is some participation by a representative of the military administration through the report of the Legal Counsel's Office and, in the case of extraordinary sanction, by the unit to which the accused soldier belongs.

h. Measures of Commendation

"Disciplinary law also includes the forms of commendation; not by any convenience of scientific systematisation, but for the basic reason that commendation and punishment are two faces of the same coin."[174] Law 9/1998 of the Disciplinary Regulations is not the only law comprising the subset of the Disciplinary Law of the Armed Forces; all laws referring to military commendation must also be included.

Article 197 of the Royal Ordinances of the Armed Forces states that "soldiers will be awarded due commendation on the grounds of merit, demonstrated command ability, distinguished performance in the fulfilment of duty, exemplary effectiveness, loyalty and impeccable conduct in the service, sacrifice of self for the unit, or other commendable acts."

The basic legal regulations are in an ending Disposition of Law 17/1999, Regulations of the Armed Forces Staff:

"1. The military commendations are: the Honoured Cross of San Fernando, Military Medal, Military Cross, Medal of the Army, Naval and Air Medals, Crosses of Military Merit, Naval Merit, and Air Merit, with red, blue, yellow, and white symbols, Citation as "distinguished" in the General Order, and Honorary Mention.

2. Loyalty to the service and the impeccable conduct of those members of the armed forces who belong to the ranks of senior officers, junior officers, and staff non-comissioned officers, and the members of the Civil Guard of the ranks of superiors, executives, and staff non-comissioned officers, will be commended with induction into the Royal and Military Order of San Hermenegildo, and in the case of career (i.e. long-term) soldiers or members of the Civil Guard, they will be commended with the Cross of Loyalty to the Service.

3. The facts or services and circumstances meriting commendation, as well as the procedure for award, will be determined by statute.

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[174] J. Rojas Caro, *Derecho disciplinario military* (Madrid, 1990), p. 63. In the same vein, see J. C. Alli Turillas, *La profesión militar* (Madrid, 2000), pp. 408 *et seq*.

4. Neither promotion nor acceleration of promotion will be granted as a form of commendation. Battlefield promotion of merit in times of war will be regulated by law."

Article 98 of this law also states that the service record will be "the objective document in which the facts and circumstances of each soldier since his entrance into service are recorded. It includes promotion records, duty stations, descriptions of commendable acts and accomplishments, specific commendations and personal or collective congratulations, as well as crimes or offences and the corresponding penalties or sanctions which have not been stricken from the record." Commendations which can be awarded only upon the request of the soldier may be appealed by virtue of Article 159 of this law, through the same system outlined above with respect to appeals of disciplinary sanctions.

It should also be noted that, according to Organic Law 2/1989, Military Procedure, Article 196 (2), the pensions attached to certain forms of commendation (including the Honoured Cross of San Fernando) are protected from garnisheeing in case of outstanding debt on the soldier's part.

2. Military Criminal Law

a. General Issues

The Legislature's role in this field has been very important. The Code of Military Justice of 17 June 1945[175] set the basic precedent. It regulated both criminal and disciplinary sanctions,[176] as well as the military justice system.[177] One may imagine how cumbersome the material and procedural frameworks in this law were, considering their origins and place in the authoritarian regime. However, in the process of constitution-building, this law was completely overhauled; one may even say it disappeared entirely. The first step was Organic Law 9/1980, reforming the Code of Military Justice.[178] The next step was affirmed in the Introduction to the Military Criminal Code approved by

[175] On military criminal law, see J. M. Rodríquez Devesa and A. Serrano Gómez, *Derecho penal Español*, *Parte General* (15th edn, Madrid, 1992), vol. II, section "Potencial Militar", pp. 1281-1309; A. Millán Garrido, *Notas al Código criminal Militar y legislación complementaria* (Madrid, 1992); J. F. Higuera Guimerá, *Curso de Derecho criminal Militar Español* (Barcelona, 1990), vols. I and II.

[176] See the mention of J. Villarejo, in Montull Lavilla, 'La justicia y la disciplina en el seno de las Fuerzas Armadas', *supra* n. 146, p. 110.

[177] A brief commentary on this reform is given in S. San Cristóbal Reales, *La jurisdicción militar. De jurisdicción especial a jurisdicción especializada* (Granada, 1996), pp. 71-82.

[178] See J. Valenciano Almoyna, *La Reforma del Código de Justicia Militar, Comentarios a la LO 9/1980* (Madrid, 1980).

Organic Law 13/1985: "[t]he constitutional principles and the progress of the science of criminal law are factors that require not merely the reform of the military penal laws, but the promulgation of a new Military Criminal Code." This Military Criminal Code of 1985 (CPM) is still in effect, and constitutes important new developments relative to the previous legislation.[179] However, it has seemed for some time that a significant reform of this Code is also due.[180]

b. Relation to General Criminal Law

The relationship between military criminal law and general criminal law is clearly influenced by the particularity of military special jurisdiction and its strict framework in regard to Article 117 (5) of the Constitution. Although judicial process is different depending on whether its character is military or general, they are not entirely separate: the reach of military jurisdiction is tied by the nature of the crime as ordinary or specifically military. The military character of a crime does not depend solely on the status of the perpetrator, the location of the crime, or the existence or non-existence of a State of Emergency, but on an integration of all these factors according to the understanding of the Legislature, subject to the exigencies of the Constitution.

The relations with general criminal law are diverse. For example, the General Criminal Code, approved by Organic Law 10/1995, especially by virtue of its Preliminary Title (Articles 1-9: "on penal guarantees and the application of the criminal law"), is applicable to the felonies and misdemeanours of the special laws. The General Criminal Code is

[179] This law removed as much disciplinary action from the procedural to the criminal law as possible. Among its more important effects is the fact that civilians can commit military crimes (crimes against a sentry, damage to a military establishment, crimes against the administration of military justice, aid to a soldier to escape lawful service, and the war-time regulations). This law also applied the general principles of criminal law, and decreed that time spent in detention before and during trial should be subtracted from the final penalty. The death penalty was abolished in peace-time, as was demanded by the Constitution. A summary and evaluation of this law can be found in J. M. Rodríquez Devesa and A. Serrano Gómez, *Derecho criminal Español*, *Parte Especial,* vol. II, pp. 1281-1309 (Madrid, 1992) ; Montull Lavilla, 'La justicia y la disciplina en el seno de las Fuerzas Armadas', *supra* n. 146, pp. 113-120.

[180] The author is in possession of a rough draft copy of this proposed reform, but its introduction and debate have been delayed by the present Legislature, without further action. See also M. González, *Defensa quiere que los jueces militares sean competentes en un mayor número de crimes El narcotráfico y las agresiones en los cuarteles pasarán a la jurisdicción castrense*, in *El País*, lunes 7 de diciembre de 1998. This article makes reference to the preferences of the Ministry of Defence, including the expansion of military jurisdiction, especially to include "crimes against the public health committed on military grounds", and to crimes of aggression, cruel treatment, or attacks against sexual freedom committed between personnel of the same rank (currently such crimes are regulated only insofar as a hierarchical relationship between aggressor and victim exists). The draft law would also extend regulation to so-called "hazing" incidents. The draft simplifies the 1985 text, and refers more crimes to the text of the Common Code, increasing the indicated penalties.

auxiliary and applies to everything not specifically anticipated by the special laws (Article 9), i.e. *lex specialis*.
Certain articles of the General Criminal Code relate directly to actions associated with military service. Examples include Articles 265 (Damages to Military Goods), 369 (Introduction of Illegal Drugs into Military Enclosures), and 476 (Failure to Contain the Rebellion of Subordinates or Failure to Denounce Same).
Articles 563 to 570 of the General Criminal Code regulate those actions considered offences against national and public security. Article 573 of the General Criminal Code also attempts to deal with terrorism, by regulating the possession of arms and explosives.
The same Military Criminal Code also includes references to the General Criminal Code, as in Article 5 (Subsidiary Application of the General Criminal Code), Article 21 (Application of the Causes of Exculpation of Charge of the General Criminal Code, Article 22 (Complementary Application of Extenuating Circumstances), and Article 34 (Penalties of Incapacitation, Suspension of Public Position, and Suspension of the Right of Suffrage will Produce the Consequences Indicated in the General Criminal Code). The procedure regarding the loss or confiscation of the instruments of the crime is also regulated by reference to the General Criminal Code (Article 37 CPM).
The Military Criminal Code sometimes refers to the General Criminal Code, for example in Articles 195 and 196.
It must also be remembered that soldiers convicted under the General Criminal Code may also be subject to extraordinary sanction.

c. Military Criminal Courts

The existence of a special military judicial system is traditional in Spain.[181] However, military justice has historically been used not for the satisfaction of the "defensive exigencies of the community,"[182] but as an instrument of political repression. The 1978 Constitution allowed this special jurisdiction to continue, albeit with important revisions and democratic guarantees. Military justice was constitutionalised in Article 117 (5) of the Constitution:

[181] An analysis of the legislative evolution of military jurisdiction can be found in Montull Lavilla, 'La justicia y la disciplina en el seno de las Fuerzas Armadas', *supra* n. 146, pp. 97-161. Among the most recent works on the subject are Blanquer Criado, 'Ciudadano y soldado', *supra* n. 29; San Cristóbal Reales, 'La jurisdicción militar', *supra* n. 177; F. Pérez Esteban, 'La unidad jurisdiccional y sus consecuencias en la jurisdicción militar', (julio-septiembre de 1999) No. 3 *Revista del Poder Judicial*, pp. 507-546.
[182] See e.g. section 3 of ruling 60/1991 of 14 March, 1991, or ruling 160/1987.

"[...] The law shall regulate the exercise of military justice within a strictly military framework and in the event of a State of Siege, in accordance with the principles of the Constitution."

Thus, Spain decided on a predominantly objective criterion for determining military jurisdiction - the "military framework" - but with the addition of a restriction through an indeterminate legal concept: a "*strictly* military frame work." The more flexible formula was chosen, but with the clear understanding that its purpose was to act as a brake on extreme extensions of jurisdiction.[183] The Legislature determines the "framework," and that is subject to review by the Constitutional Court, and different channels are available to oppose a legislative decision. Any violation of this restricted framework goes against not only Article 117.5 of the Constitution, but also against Article 24.2 of the Constitution, which guarantees "the right to an ordinary judge predetermined by law."

In Spain the real discussion centres on the issue of the lack of total independence suffered by the military judges who carry out the military judicial process. The scope of military jurisdiction is also debatable, but has been very much restricted by the laws promulgated in the last decade.

The evolution of the Constitutional Court's position in this matter has been important,[184] emphasising ruling 75/1982, in which the Court noted that the legislature does not have total freedom to determine the extent of military jurisdiction; that the basic requirement for the admissibility of military jurisdiction is the injury of legally protected interests of a military character that could affect the military's ability to

[183] E. Calderón Susín, 'En torno a los límites constitucionales de la competencia de la jurisdicción militar', (enero-junio de 1989) No. 53 *Revista Española de Derecho Militar*, pp. 81–106, in particular p. 100.

[184] A summary of the evolution of the High Court's position is found in section 4 of the opinion on ruling 113/1995 of 6 July 1995, by Magistrate T. S. Vives Antón:

> "At first, this Court had an objective conception, considering only the military nature of the legally protected interest that was injured (ruling of Constitutional Court 75/1982). However, this conception, which granted too great a scope to military jurisdiction, had to be replaced by another, not purely "objective" (that is, anchored in the nature of the legally protected interest), but also "subjective" (depending on the military character of the subject) and "functional" (depending on the military nature of the rights and obligations in the case) conception. The Constitutional Court's ruling 60/1991 affirmed that "as special penal jurisdiction, military jurisdiction must be reduced to include only those crimes which can be described as strictly military, a concept which must be tied to the nature of the crime, the legally protected interest (which must be strictly military), and must be based on the aims that constitutionally correspond to the armed forces […]" (Arts. 8 and 30 of the Constitution); with the military character of the obligations or duties whose non-fulfilment is considered a crime, and, in general, with the military condition of the active subject of the crime."

fulfil its trust, strictly interpreted; that the injury of such legally protected interests can be committed by any person, "soldier or civilian" that the criterion of the location in which the crime took place is not determining if it is not connected with the injury of those legally protected interests; and that the violation of the constitutionally restricted framework implies the violation of the right to a judge predetermined by the law (Article 24 (2) of the Constitution). Rulings 54/1983, 111/1984, 105/1985, and 4/1990 are also significant, and particularly rulings 69/1991 and 113/1995.

In the author's opinion, the more questionable aspect is the subjection of civilians to military justice. Presently, civilians who have committed one of the following crimes regulated by the Military Criminal Code are subject to military jurisdiction: violation of military enclosures or grounds (Article 61), crimes against a sentry or guard (Article 85), to incite, justify, or conceal the act of leaving one's duty station or residence without leave, or the act of desertion (Article 129), crimes against the administration of military justice (Articles 180 and 182-188), and receipt and/or possession of stolen military goods (Article 197).

Constitutionally, military judicial system cannot be abolished, at least formally. Nevertheless, it would be possible to drain military jurisdiction of its jurisdictional power or, for example, to limit it to the State of Siege. On the other hand, military justice could be created as a special judicial system like the administrative judicial system, or that pertaining to minors, etc., that is to say, a judicial system under the government of the General Council of the Judicial Power, and with judges and ordinary courts specialised in the matter. This last option is, however, only allowed by the Constitution, not required.

(i) Legal Regulation

After the Military Disciplinary Regulations and Military Criminal Code were approved in 1985, Organic Law 4/1987 on the Extent and Organisation of Military Jurisdiction, was approved on July 15th.[185] This

[185] Commentary can be found in San Cristóbal Reales, 'La jurisdicción militar', *supra* n. 177, p. 99-134; and Montull Lavilla, 'La justicia y la disciplina en el seno de las Fuerzas Armadas', *supra* n. 146, pp. 120-125. The main characteristics of the law, following these authors and the official rationale, are the following:

- exclusion of the military commander from judicial functions,
- recognition of a statute with general character, independence, permanence, responsibility, and under the rule of law, although the comment has been made that these principles are not present in the concrete development of the law, despite the fact that the Constitutional Court has ratified it,
- the establishment of permanent judicial organs, to safeguard the guarantee of a judge predetermined by the law,
- more legal qualification, although mixed composition of military jurists in the Courts is maintained,

law represented progress in the sense that it removed the judicial function from commanding officers, and it established permanent judicial organs in deference to the Constitutional provision guaranteeing the right to a judge predetermined by law. This law's redefinition of the framework of military jurisdiction carried enormous significance. However, there is still a negative side to it, and that is that even though the principle of judicial independence is safeguarded by this law, it appears to many that this provision has little substance. Mobility by means of promotion and the possible application of the Disciplinary Regulations to the military magistrates and judges (excepting members of the Military Chamber of the Supreme Court) creates serious doubts about their total independence. Despite the weight of the literature being behind this negative interpretation, the Constitutional Court has ratified the constitutionality of the status of the military judge developed in this law.

A year later, the legislative work culminated with the approval of Organic Law 2/1989, Military Procedure. In this act, the constitutional guarantees were achieved. Among its achievements were the introduction of the necessary presence of counsel from the first moment that an allegation with respect to a particular person could be made, and the creation of the positions of the person who accuses with private interest (*acusador particular*, who is a necessary part in a process where no public interest is involved), and the civilian actor (before the introduction of this law, civilians were not permitted to take part in procedures under military jurisdiction). The principle of equality of resources of the participants (public prosecutor, prosecuted, and private prosecutor) in the criminal process was also introduced - with some special regulations as compared to the general procedures. Oral procedure was also given primacy over written procedure. The figure of the Military Legal Public Prosecutor was created; and the judicial channel for appeals of disciplinary measures was regulated. It is in this law, too, where the special summary and brief procedure for appealing the violation of fundamental rights regulated in general in Article 53 of the Constitution appears. There was some debate about the fact that military justice was treated in the law as "ordinary justice" for this special process, but the Constitutional Court has supported that understanding, despite the critical commentary. The reach of jurisdictional control over the minor offences also provokes some

- redefinition of the scope of military jurisdiction.

individual doubts, but the Constitutional Court has chosen to stay silent on this matter.

With these laws, the Legislature has drastically reduced the extent of military justice. This reduction has been interpreted as a manifestation of the distaste with which the military judicial system is viewed.[186] It seems, then, that our Legislature is not convinced that true justice is possible within the military framework without compromising the needs of national security; true justice being a justice meted out by those who combine all the requirements of independence and impartiality, and are completely subordinate to the Constitution.

It ought to be pointed out that there has been a tendency of late to begin extending the framework of military jurisdiction again, which does not include a reform of the debatable status of military judges. There was a paper about the project to reform the Military Criminal Code, but it has not yet been carried through.

d. Relationship between Civilian and Military Courts

There is a boundary of competencies between military and civilian courts.

Organic Law 6/1985, of the Judicial Power, affirms in Article 3 (2) that "the competencies of military jurisdiction will be limited to the strictly military framework with respect to the facts regulated as military by the Military Criminal Code, and to the existence of a State of Siege, in agreement with the declaration of this situation and the organic law that regulates it."[187]

Organic Law 4/1987 specified the reach of military jurisdiction by means of Articles 12-18 ("Of the Extent and Competency of the Military Jurisdiction"):

Article 12: In time of peace, the military justice system will have jurisdiction over criminal matters to determine the following crimes and offences:

1. Those included in the Military Criminal Code.
2. Those assigned during the existence of a State of Siege, determined in the declaration of such state, according to the Organic Law that regulates it.

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[186] See J. M. Rodríquez Devesa, 'Algunas consideraciones sobre el Código criminal Militar español de 1985', No. 517-518 (1987) *Revista General de Derecho*, pp. 5704 *et seqq*.; Rodríquez Devesa and Serrano Gómez, 'Derecho criminal Español, Parte Especial', *supra* n. 179, pp. 1288-1302.

[187] Although Art. 9 (2) indicates that some specific questions of civil order may also fall under military jurisdiction.

3. Those that are indicated in agreements or international treaties to which Spain is a party, in the cases of permanent or temporary presence outside the national territory of Spanish Forces or units of any service branch.
4. In the cases mentioned under number 3, but when applicable treaties or agreements do not exist, all regulations of the Spanish Legislature shall apply whenever the accused is Spanish and the acts were committed in the course of duty or in sites occupied by Spanish forces or military units. In this case, if the accused agrees to return to national territory and there was no sentence, the organs of military jurisdiction will cede primacy to ordinary jurisdiction, except in cases regulated in numbers 1 and 2 of this article."
Article 14: "The [civilian or military] court that has competence to determine the crime incurring a more serious penalty, shall also have competence to determine lesser and related crimes even if they would not normally fall under its jurisdiction. If the procedure in relation to the crime with the more serious penalty is dismissed, the other connected crimes will once again fall to the courts normally having jurisdiction over those crimes."
Article 16: "The court that is competent to determine a procedure will also be competent to determine all its incidences."
Article 17: "Trusteeship of the due process rights of appellants against sanctions imposed in the application of the Organic Law of the Disciplinary Regulations of the Armed Forces falls under military jurisdiction."
Article18: "Military courts will also be competent to impose sanctions through the judicial disciplinary channel on anyone involved in a military judicial procedure, and on those who interfere with the court's police escort."
In the case of uncertainty as to who has jurisdiction, the question must be referred to the Supreme Court Chamber of Conflicts of Jurisdiction, according to Organic Law 6/1985, Judicial Powers, Article 39.[188]
The military justice system is special and separate from the ordinary justice system. Nevertheless, the two come together in the Fifth

[188] Art. 39: "1. A conflict of jurisdiction between the judge or court of any ordinary jurisdictional order and the judicial organs of the military will be resolved by the Courtroom of Conflicts of Jurisdiction, composed of the President of the Supreme Court (who will also preside over it), two magistrates of the Courtroom of the Supreme Court of the jurisdictional order involved in the conflict, and two magistrates of the Military Chamber, all of them designated by the plenary session of the General Council of the Judiciary. The Secretary of Government of the Supreme Court will act as Secretary for this Court. 2. The President will always have the tie-breaking vote."

Chamber, a special chamber unlike others of the Supreme Court. According to Organic Law 6/1985, Judicial Powers, this Chamber is presided over by a President and seven magistrates. Four of the eight members of the Courtroom will be career judges, and the other four will be Judge Advocates from the Legal Corps of the armed forces (Article 24). The president and the magistrates who are career judges are selected in the same manner as the rest of the Supreme Court justices (Articles 25-26), but the Judge Advocates are named by the Government upon a proposal by the General Council of the Judicial Power (Article 27). Unlike other military judges, the judges of the Fifth Chamber of the Supreme Court acquire the legal standing of ordinary judges (Article 28). Thus, although half of the magistrates are appointed by the Government, once they have been appointed, they begin to acquire a true independence that would be lacking in their capacity as military judges in military courts.
Finally, military cases can also arrive at the Constitutional Court.

e. Special Rules with Respect to Legal Procedure and the Sanctions System

The contentious disciplinary appeal is regulated in Articles 448-517 of Organic Act 2/1989, of Military Procedure.
According to the plaintiff's choice, the court competent to hear the appeal can be that which has jurisdiction over the commander who originally imposed the sanction, or the court which has jurisdiction over the duty station or domicile of the plaintiff. The procedure is free of cost.
The sanctioned can appeal within two months from the time of notification of the sanction which is being appealed. This term is extended until the sanctioned servicemember returns to Spanish territory, in the case that the notification occurred abroad.
The plaintiff can have lawyer, unless he chooses to represent himself. The military prosecutor does not participate. Once the written appeal is admitted to proceeding and admitted by the judge, the demand and reply are formulated. The parties or the court produce the evidence to be reviewed. In the end there is an oral review, for which written conclusions from the parties may be substituted. The facts are judged according to the allegations of the parties, and the judge can call on the evidence which he or she considers relevant. The court then decides whether to grant the appeal. The judicial organ competent to hear the appeal is also competent to control the execution of the sentence which follows.

If a fundamental right was violated, there is the possibility of going through the special procedure to protect fundamental rights (Article 518). The military prosecutor participates in this procedure. This appeal must be lodged within five days of the notification of sanction. All ordinary terms are reduced, and the sentence must be given within three days of the conclusions and deliberation.

f. The Military Prosecutor

The basic regulations for the Military Legal Public Prosecutor are found in Law 4/1987, on the Scope and Organisation of Military Jurisdiction, although Articles 121-122 of Organic Law 2/1989, Military Procedure, are also relevant. The 1987 law gave a new structure to the office of the Military Prosecutor. The Military Prosecutor is dependent upon the State's General Prosecutor, and the two are integrated in the Prosecutor's Office (*Ministerio Fiscal*). Military Prosecutors are organised into different levels according to possible function: Military Chamber of the Supreme Court, Central Military Court, or Territorial Military Courts.

The Military Prosecutor's legal functions are to promote justice in defence of the legal order and of the rights and interests protected by law, as well as to guard the independence of the military judicial organs (Articles 9 and 88 Law 4/1987). It must in this context be remembered that the principles of unit performance and hierarchical order have been made subject to the principles of legality and impartiality (Article 89 Law 4/1987).

Although the members of the Military Prosecutor's Office are formally integrated into the General Office of the Public Prosecutor of the State, they are all military officers belonging to the military Legal Corps (Article 90 Law 4/1987). They are appointed and dismissed by ministerial order (Article 101 Law 4/1987).

Although theoretically dependent on the General Prosecutor of the State, according to Articles 91 and 92 of Law 4/1987, the Military Prosecutors are directly subordinate to the Ministry of Defence and to military interests.[189] Thus, their day-to-day effective allegiance is to the

[189] Art. 91: "The Minister of Defence may suggest to the State Prosecutor General that he or she carry out before the Military Chamber of the Supreme Court the pertinent performances for the defence of the public interest in the military framework, according to the arrangements in the Statute of the Ministry of the Public Prosecutor, by consent of the Minister of Justice."

The relationship between the Ministry of Defence and the Public Prosecutor is clarified in Art. 92, where it says that "[t]he Minister of Defence may give orders and instructions to the Military Prosecutors with respect to their performance before the military courts in the interest of the best application of the laws

Ministry of Defence. Furthermore, as soldiers, they are subject to military disciplinary law, and this underlines their weak legal position (Article 122 Law 2/1989):[190] they are subject to command, except "when they are acting in the exercise of their official position [as prosecutors]."
As noted already, the Military Prosecutors do not play a part in disciplinary proceedings.

g. Sanctions for Non-Compliance with International Humanitarian Law

The Royal Ordinances of the Armed Forces state in Article 34 that no soldier is required to obey an order to execute acts which "are manifestly […] opposed to the laws and customs of war […] in any case he or she will assume responsibility for his or her action or omission."
The Military Criminal Code says in Article 21 that "a claim of following orders in the execution of acts that are manifestly opposed to the laws and customs of war, or which constitute a crime, in particular a crime against the Constitution, will not be considered an excuse or an extenuating circumstance."
In this Code, the following "crimes against the laws and customs of war" are punished (Articles 67-78): the mistreatment of an exhausted and/or defenceless enemy (Article 69), the use of prohibited weapons or the causing of unnecessary suffering (Article 70), the destruction of non-belligerent ships failing to adhere to international treaties (Article 71), the violation of a ceasefire (Article 72), unnecessary sackings and/or destruction in enemy zones, or the illegal capture of ships and airplanes (Articles 73 and 74), the deceitful use of symbols of neutral countries or of the Geneva Conventions (Article 75), killing, torturing, or otherwise cruel treatment of prisoners (Article 76), the violation of enemy dead, or to attack neutral people or failure to aid them (Article 77), and, finally, with general character, any act or order against the treaties dealing with laws of war (Article 78).

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and the defence of the public interest. Furthermore, as long as no legitimate impediment exists, the Minister of Defence may obtain information from the Military Prosecutor regarding the subjects of any procedure in which he is taking part."

[190] Art. 122 states: "The offences included in the Organic Law of Disciplinary Regulations of the Armed Forces that, *as soldiers and when they are not acting in the exercise of their positions*, are committed by the components of Military Courts, Military Judges, Prosecutors, and Secretaries, will be sanctioned in accordance with the abovementioned [disciplinary] law."

h. Ratification of the Rome Statute of the International Criminal Court

Spain signed the Statute on 18 July 1998. Organic Law 6/2000, authorising ratification by Spain, was then passed, the treaty was approved by the King on October 19, and the instruments of ratification were deposited on October 25. There were no "reservations", although there is an authorisation to make a "declaration" in the additional disposition of Organic Law 6/2000:

The following Declaration is authorised with respect to that which is anticipated in section b) of paragraph 1, Article 103 of the Statute:

"Spain declares that, at its discretion, it will arrange to receive prisoners condemned by the International Criminal Court for imprisonment in Spain, on condition that the duration of the imposed punishment does not exceed the maximum punishment allowed for any crime in accordance with Spanish law."

VII. Regulations Governing Guard Duties

The general regulations concerning guard duties are found in Articles 59-64 of the Royal Ordinances of the Armed Forces, with the more detailed regulations found in several lesser laws and in the disciplinary and criminal regulations.

These articles require the guard to be fully aware of his duties and to be qualified to react appropriately to danger (Article 59 OR), and they emphasise that all orders must issue from an immediate superior in the chain of command (although it is also possible for the commander of the guard to issue direct orders to guards and sentries) (Article 60 OR). Article 61 OR states that a warning must be issued before any use of a weapon, except in the case that a guard has a reasonable belief that an immediate threat exists. Article 63 OR stipulates that a guard or sentry may never under any circumstances leave or be without his or her weapon. Guards and sentries of restricted or confidential areas are obligated to deny entry to any person, military or civilian, who does not have express authorisation to enter the site (Article 64 OR).

More specific regulations are to be found in other laws, like the Royal Ordinances of the Army, Navy, and Air Force. The Royal Ordinances of the Army approved by Royal Decree 2945/1983 contains the regulation of guard and sentry duties; they are found particularly in Articles 326-414 ORE (see especially Articles 344-403 ORE), and the military police are regulated in Articles 404-414 ORE.

The Disciplinary Law 9/1998 contains diverse sanctions regarding guard duty. Minor offences are discussed in Article 7, especially sections 4 (Minor Negligence of Guard or Sentry Duties), 5 (Neglect or Abuse of One's Weapon), and 13 (Minor Insubordination with Respect to Military Police). The serious offences are found in Article 8, for example in sections 5 (Illegal Use of Weapons), and 6 (Serious Negligence of Guard or Sentry Duties not Resulting in Serious Harm or Damage).
The Military Criminal Code also contains diverse regulations on related conduct, such as crimes against sentries or military police (Articles 85-86), desertion of post (Articles 144-145), and misbehaviour of a sentry (Articles 146-147).
The superiors have a special role by law, the commander of the guard is an officer under the orders of the ordinary commander of the base or quarter, or the commander currently in charge. He or she is responsible for the fulfilment of the security regulations and the supervision of all subordinates.

1. Powers of Guards Towards Military Personnel as well as Towards Civilians

Article 61 OR requires a warning to be issued before the use of a weapon, unless there is a "reasonable suspicion" of threat that indicates that a warning would endanger certain persons.
The army has more specific regulations for guards in Articles 344-403 ORE. Article 383 ORE states:

> "The sentry observing an unidentifiable person or group approaching his or her position will call to him or her saying: "Stop! Who goes there?" If the answer is suspicious or not convincing, the sentry will issue the warning "Stop or I will fire!" and will warn the guard controlling the alarm system. If the individual or group fails to obey the sentry's commands, he will use his weapon in accordance with the regulations set down in Article 61 of Royal Ordinances of the Armed Forces."

The general criteria established by the jurisprudence for the use of arms by public agents must be followed: considerations of the tactical mission, necessity of force, and proportionality of force must be taken into account.
When considering the guard's conduct toward civilians, it must be recalled that the task of security personnel is "to protect military personnel, material, and installations, and under exceptional circumstances, civilian personnel, material, and installations." (Article

344 ORE). If the threat to the security of the military establishment comes from civilians, the guard has authority over them, though collaboration with the police forces is possible.
Article 348 ORE expressly allows for the possibility of controlling entrances and exits by "identifying and recognising the personnel, vehicles, and material, civilian as well as military."
In 2001, the possible use of private security forces for the protection of some military establishments was tentatively announced. This announcement caused strong public controversy - particularly in the army - and the measure has for the moment been postponed. Thus there are as yet still no civilian guards guarding military facilities.

2. Performance of Guard Duties by Soldiers of Foreign Armed Forces

There is no regulation on the extraterritoriality of the regulations relating to security guards. In principle, unless there is a treaty specifying other rules, the normal regulation is applicable.
The rights and duties of guards who are personnel of foreign militaries located in Spain (in this case, US personnel) are regulated in Articles 17 (2) and 43 of the 1989 Defence Cooperation Agreement between the Kingdom of Spain and United States. In the case of NATO personnel, their rights to exercise guard and sentry duties with respect to their encampments, establishments, or other facilities occupied by virtue of an agreement with the receiving state are regulated in Article 7 (10) of the SOFA (Status of Forces Agreement).

3. The Rules Concerning the Carrying and the Use of Arms and other Military Equipment.

The type of weapon appropriate for the sentry is determined in the "Plan of Security", which is developed by the commander of each base or duty station (Article 361 ORE).
The principle of proportionality must always be applied when weapons are used, by sentries as well as everyone else. In fact, security plans must anticipate "staggered" responses to each foreseeable situation.

VIII. Legal Reforms with respect to Multinational Operations and Structures

1. Pertinent Legislation

No regulations of importance have been enacted on these matters. This very lack becomes significant, however, in light of the fact that an

important legal evolution in the realm of military regulation has been going on for the past few years. However, only a few precepts touch on the phenomenon of the internationalisation of defence, and these rules do not affect any decisive questions: Law 8/1998, Organic Act of the Disciplinary Regulations of the Armed Forces (*Ley Orgánica de Régimen Disciplinario de las Fuerzas Armadas* 8/1998);[191] 17/1999, Act of the Professional Military Regime (*Ley de Régimen del Militar Profesional* 17/1999).[192] Note also that there were only limited references to multi- or international operations in the Acts before 1990 as well.[193] Royal Decree 662/2001, 22 June 2001, Rules of Payments of the Personnel of the Armed Forces, was also approved, and may have some bearing on the question.[194]

2. Probability of Future Reforms

No legislation is foreseen, at least, there is no current parliamentary legal initiative or Government proposal. However, the Directive of National Defence 1/2000 was approved: this is the quadrennial Directive in which the national defence policy is formulated. This directive, specifically in Part III ("basic lines of defence policy"), point six, says that the new defence organisation, structures, and necessities "must be congruent with the actual nature of the conflict and with the concepts of shared security and collective defence that shape allied strategic thought."

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[191] Art. 39 states: "Heads of units or groups temporarily stationed outside the national territory have the power to impose sanctions on personnel under their orders. The precise extent of their power to impose sanctions will be confined to the duration of the mission for which these units or groups were created, and will depend on their organisation according to the rules contained in previous articles."

[192] Art. 165 [Missions Abroad]: "Independently of the provisions of the previous article, the Government has the authority to authorise the incorporation of temporary and voluntary reservists for missions abroad, by exigencies that are derived from the international agreements ratified by Spain, or to collaborate in the maintenance of international peace and security. The participation of reservists in these activities will always be voluntary. The procedure for determining who is to go on such missions will be determined so that voluntary participation can be declared to be of general character for all types of operations, or to be only for those cases that supply seats for a certain operation."

[193] As in, e.g., the Royal Ordinances for the Armed Forces (*ley 85/1978 de 28 de diciembre*). Art. 9 says that "[w]hen Spanish military units act in collaboration on international peace and security missions, they will feel like worthy instruments of the Mother Country, serving high objectives."

Art. 191 says: "[Soldiers] assigned to units not under Spanish command, and/or in multinational exercises either in Spain or abroad, will observe with respect to the members of other militaries the same rules of behaviour that apply within the Spanish armed forces."

[194] As already noted, this law contains new regulations for soldiers stationed abroad. According to Art. 16, soldiers stationed abroad will have the same payment conditions as other civil employees, (following Royal Decree 6/1995 of 13 January 1995, regulating the payments regimen of civil employees stationed abroad). Soldiers participating in peace-keeping, humanitarian, or evacuation operations will receive extra compensation fixed depending on the particular conditions of the mission and country. This compensation could equal the amount of the regular salary (Art. 17, Royal Decree 662/2001).

3. Academic Discussion

There is no discussion of these matters, except when specific aspects generate doubts. The legal consultant's office in the Ministry of Defence has raised no legal questions regarding the transferral of command power. That is accomplished through an administrative act specified in the international treaty covering the international action. This act is a formal act for putting one or more specific unit(s) at the disposal of a specific commander. With the exception of Germany (and perhaps of Belgium), no problems have occurred and the issue has not been treated as being very important. The final command authority always remains with the Spanish authorities, while, operatively, the units are under the orders of foreign commanders.

Constitutionally, integration into NATO was accomplished by a procedure (Article 94 of the Constitution) that did not involve a transferral of sovereign authority. Final command authority remains with Spain.

In the present phase of the integration of European defence, it would not really be possible to transfer full command authority to anyone. However, Spanish integration in the EU is done through a channel that presumes the eventual transferral of the power to exercise sovereign authority (Article 93 of the Constitution), and it is possible that a future transferral of command power could be of such a nature as to be irrevocable, but the author considers that possibility to be in the very distant future.

The commander receives an order - usually called an "order to cooperate" - by means of the formal act of transferral. He must then obey this order, unless a Spanish authority issues a contradictory order. The High Command of NATO is also under such an order to cooperate - it is built into the NATO structure by the constitutive international treaty.

Thus far, these questions have generated neither problems nor discussions in the legal office of the Ministry of Defence. The transferral of command is considered to be a formal and administrative action only, and has no legal character, and because they are not generally publicised, it is not easy to be directly aware of any of them. The very non-importance of these questions in Spain is therefore relevant data.

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"Royal Decrees" are approved by the Cabinet, and are subject to the legality principle.

"Royal Ordinances for the Armed Forces" (OR) is the name of one law (85/1978 Act). Under this law approved by Parliament, there are three special "Royal Ordinances": for Army (ORE), Navy, and Air Force. These three particular "Royal Ordinances" do not have the character of law; they are subordinate to the general Royal Ordinances for the Armed Forces and other Acts with the rank and force of law. These three particular "Royal Ordinances" were approved by the Cabinet.

Laws are enumerated chronologically by year of approval (e.g. 6/1985 Organic Act was the sixth such Act approved in 1985).[195]

The most important military and defence regulations are:[196]

General Basic Regulations of the Armed Forces and the National Defence:

"Ley 85/1978, de 28 de diciembre, de Reales Ordenanzas para las Fuerzas Armadas" (85/1978 Act, approving the Royal Ordinances of the Armed Forces)

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[195] It should be noted that Spain has both a "Constitutional Court", which is supreme in constitutional matters, and a Supreme Court, supreme in all matters not constitutional. The rulings of the Constitutional Court have a number and are cited by year (e.g. ruling 24/1995 was the 24th ruling of the year 1995). The rulings of the Supreme Court have no number, and are cited rather with the date and the Chamber (there are some thematic Chambers: 5th is the military chamber, 2nd is the criminal chamber, 3rd is the administrative chamber).

[196] These regulations can all be found easily on the internet. One option is to use the "Constitutional Code" on the best constitutional website in Spain: <http://constitucion.rediris.es> (try keyword "*militar*"). Another possibility is the website of the Ministry of Defence, <http://www.mde.es>, especially <http://www.mde.es/mde/docs/legisla.htm>, (2/6/2002).

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