

CHALLENGE

-The Changing Landscape of European Liberty and Security-
Project no. CITI-CT-2004-506255

Work-package 9: University of Barcelona Group
(*Observatori del Sistema Penal I els Drets Humans-OSPDH*)

(State of the Art)
(July, 2005)

FIRST REMARKS

From this very beginning, it should be clarified what orientation has been followed by our Team's research in order to undertake here a description of the State of the Art, related to items which have been chosen up to now to be developed along the CHALLENGE implementation plan.

Taking under consideration that The **state of the art** is the highest level of development, as of a device, technique, or scientific field, achieved at a particular time, but considering also that our concerns are of course linked to the central issues of the WP 9, then our decision was to put here down a description about how we have carried out our tasks, as a Group, up to end of the first 12 months of Challenge Project, and what influences have had on it the main theoretical approaches in the field of Political Science, Human Rights, Philosophy and Sociology of Law, and Cultural Studies.

In order to remind the central issues which must in general be developed within the WP 9, we should get back to our Scientific Report and particularly to the Objectives presented in that Report (on last 10th. June). We stated there, as follows:

- **Objectives**

Main objective of this workpackage will be to analyse the impact that exceptional policies have upon liberties and security of European citizens. Goal of this project is to underpin that European States are breaking citizen liberties and security when using emergency policies. This phenomenon has dramatically increased since the 11th of September 2001. After this date, we have seen a drastic hardening of the legislation against irregular immigrants, and also that related to international and domestic terrorism, which enable us to foresee an unification of both phenomena. Irregular immigrants and terrorists constitute the new "enemies" of world order. The introduction of the "enemy" paradigm justifies the transformation of the liberal criminal law model and also the rule of law.

By trying to go deep in these Objectives, we have established three different branches of research, one of each entrusted to one or two researchers of our group, but also in active participation to others (individual researchers or groups, depending of each branch).

As we mentioned already (see e-mail to CEPS, from last 27th. June), our tasks are organized around the following branches, briefly summarized as follows:

- 1- This branch is related to an analysis about reforms and counter-reforms which have being undertaken within the Spanish State on criminal, procedural-criminal law, penitentiary, police and jurisdictional areas over the last decade (1995-2005);
- 2- After the creation of a consortium composed by several departments of law of Spanish universities, as well as non-governmental organizations and other associations, we have developed an analysis about how tortures and degradating or ill-treatments inside prisons and other Spanish centers of detention are highly applied on inmates; and
- 3- The last branch of our research activity is related to verify if immigrants are considered by the public opinion as criminals or terrorists. If this is true, then we are trying to consider how this situation have been influenced by the effects of September-11 and the tragedy in Madrid on March-11 2003.

Regarding branch number 1, it must be added that this research line is oriented toward the verification of two different hypothesis, both substantially linked, as the followings:

- 1.1) the existence of a new legal punitive framework within the Spanish State, which have provoked several regressive steps to the detriment of human rights and civil liberties in general; and,
- 1.2) how those people either under freedom deprivation or suspected to be connected to terrorist acts, as also social areas like immigrants and all sorts of marginalized, have being suffering a negative or criminal political influence.

These two hypothesis, after the developments of our researches, can be categorized as being part of those former two (1 & 2) branches.

Other remark which must be here underlined is that related to the period coincidence between these two branches (years 1995-2005).

Now, in order to present each research branch separately, it must be said that each one has received a particular heading and its presentation here is followed by its own list of respective bibliography .

The branch number 1, has being entitled as:

PUNITIVE POPULISM

From some years ago western countries have being witnessed to a governance strategy, which has being exacerbated in recent times. This strategy although not original seems to be unavoidable for political classes. We mention to the larger application of Penal System to regulate social conflicts (consequently, also the political ones) than ever has happened after Second World War.

Vertiginous are nowadays most of social events with big consequences and, for this reason, it becomes incomprehensible and of a very difficult assimilation to understand why Penal System, in particular situations, can be the preferably (sometimes, the only one) way to undertake this regulation . This speed is also useful to draw a veil of necessary legitimation over decisions which are generally adopted in relation to conflicts. We know now much more about claims for more security (this understood in a narrow way , i. e. in terms of policing space, behaviours, costumes, etc. through private or public institutions). These claims are becoming governance tools, electoral promises, and this is **punitive populism**. Without any doubt, the latter is really happening in a global scale and, in this sense, the last past years represent a paradigmatic era. On theses basis, it seems very important to try to face up some main questions like, what is really happening on the penal field? How we have attended at a Criminal Justice system transformation from a liberal-garantist to an incapacitation or a neutralization one? Or, how and why a model of “maximum criminal law” has being built also in Spain, on despite of a humanitarian and a rehabilitation one?. All these questions can be answered if it would be undertaken a broad analysis of reforms and counter-reforms which have being carried out on criminal and procedural-criminal law, as also on penitentiary, police and jurisdictional areas over the last decade (1995-2005).

Brief presentation of Spanish legal reforms and counter-reforms

After a closer examination of the huge number of legal and regulation reforms introduced over the last decade, it would probably be said that also the Spanish State is embedded of this securitising strategy which surrounds most of the western societies, on spite of a complete respect to guaranties and civil liberties introduced by the Spanish Constitution from 1978 and the later development of its categories and principles through a complex law systems (the so called “organic laws”). But, besides what can be said from a juridical point of view, it must be also considered other types of decisions –like political, jurisdictional and economical ones- which will be analyzed in future developments.

Nevertheless, let's see a bit more, trying simply to schematize here the areas and quality of those legal reforms and counter-reforms which have affected the philosophical and legal foundations of the Rule of Law within Spain. Because, if we would be able to go later in a deeper review on the last more recent events, then it could be also said that of course Spain has adopted the securitising strategy already pointed out. The mark that these reforms have left over the Spanish punitive field reveals the how and the why other penal political models have been imported in Spain. Some of these models are clearly alien to the Spanish cultural and democratic tradition, born after the Constitution from 1978. But, of course most of these models belongs to the exceptionalism and emergency culture, as also to some particular approaches of criminological actuarialism, like politics of "zero tolerance", for instance. Then, the following is the scheme of the already mentioned reforms and counter-reforms.

- On Penal Legislation.

The first change is related to the reforms introduced to the Penal Code (known as the "Democracy Code", which has been in force from nine years ago). With the goal to "physically eliminate from the streets those more serious offenders" (as it was announced by the former Home Office secretary, Mr. Mariano Rajoy¹), it were introduced drastic punishment aggravations, particularly in multi-recidivism cases, as an imitation of the American law of "three strikes and you are out", and notwithstanding several unconstitutional reclaims.

- At the criminal- procedural and penitentiary-procedural law level.

- greater facilities in order to provide custody measures by judges and magistrates;
- on the basis to achieve a "quicker" administration of justice (following certain practices from other countries, like "plea bargain") it has been introduced reforms which oblige the accused to accept guilty on exchange of punitive benefits, through judicial "transactions";

¹ Cfr. LA VANGUARDIA, July 5th 2001.

- (covertly) introduction of the category of “reformed” offender who could benefit himself of punishment reductions, which assume to be the same regulation like in Italy, linked to the known as “emergency culture” and Italian penal exceptionality of last decades.

- At the penitentiary-jurisdictional level

- One counter-reform at this level, means a strong distrust to the judicial principle related to the judges independence, which has being diminished through the creation of Central Penitentiary Court of Surveillance, at the “Audiencia Nacional” in Madrid. Because the presence of this new kind of court, it would prejudice the immediacy, orally and weekly visiting to inmates principles, which were introduced through organic penitentiary regulations (in 1979)

- At strictly punishment rules level

- Increase of punishment maximum, from / 30 to 40 years of freedom deprivation

- With reference to university studies of prison inmates

- Increasing difficulties for prison inmates to follow up university studies, as a clear demonstration of a legislation and its enforcement linked to a certain political emergency.

- The enforcement of freedom deprivation measures

- higher increase of restrictions to allow inmates benefits, like go on leave of prison, vacations, etc.;
- introduction of the exigency for previous payment regarding civil responsibilities, if the penitentiary classification of third grade and conditional liberty (probation) is applied. This limitation could presume a serious discrimination risk, because economical reasons (if the inmate is not able to the payment) and it could

means a reintroduction of the already eliminated “punishment for debts”;

- higher difficulties to obtain a half-freedom regime by a prison inmate (third level of penitentiary classification) , when he is obliged to observe a so called “security period” because he was to five years of freedom deprivation sentenced; in this way the new developments of Spanish penitentiary practices are quite similar to certain American trends on punishment, like “mandatory penalties”;
- introduction of differentiated prison regimes (exceptional and ordinary) if inmates are linked or not to political organizations;
- hardening conditions of prison leave for terminal ill inmates.

- Judicial interpretation and enforcement of some rules on terrorism, like for instance:

- retroactive abolishment of punishment redemptions, because labour prison inmates, to those who have being sentenced for terrorism crimes, although these redemptions could have being confirmed by a court decision .

Nevertheless, it must be remember that the so called *Criminal Code of Democracy* (1995) has generally abolished the category of punishment redemption because labour prison inmates. This means that, from that time, every deprivation of freedom as punishment must be entirely enforced

As it can be seen and although the solid development of Spanish parliamentary democracy, “Law and Order” campaigns, strong supported by both major political parties, have succeed. The new scene for the enforcement of deprivation of freedom as punishment, is therefore AT PRESENT TIME more restrictive. By this way, and on the grounds of all these decisions, prison punishment was slowly reaching the “incapacitation” efficacy, which belongs to

one of the main negative special prevention options produced within the Anglo-American culture of punishment.

As we could see in future developments of this research branch, the “problem of homeland security” has been built through a mere populist way by applying all these reforms to the Spanish penal-legal framework. Citizenship insecurity, terrorist threat, immigration risks are problems which cannot be faced up only from a punishment activity (police, courts and prisons). It needs, of course, a higher complexity of interventions and we will try to show how deep were the social consequences of all these reforms.

Branch number 2:

DEPRIVATION OF FREEDOM AND HUMAN RIGHTS

TORTURE IN SPAIN

1 General Context

As it is well-known, after the end of the Second World War (after the barbarity of the Holocaust, the penal authoritarianism, and the warlike options that led to the extermination of over sixty-million people), the Charter of the United Nations Act, in 1945, established the International Human Rights Law. The Universal Declaration of Human Rights, from 1948; the International Covenant of Civil and Political Rights, from 1966; and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, from 1984 (all of them within the UN), constitute some unquestionable landmarks in the struggle for the prevention, denunciation and eradication of torture. Moreover, in several local-continental spheres, such as the case of the European Council and the European Union, the mentioned regulations had specific rulings and promoted a normative “plateau” which would inspire the subsequent creation and implementation of a similar type of law. Thus, it seemed that the model of the so-called “social constitutionalism” was launched and became consolidated in the field of promoting a real respect for human rights. Nevertheless, and despite these regulations, during the decade of the seventies some important pillars of that legal and political model began to crumble.

On the one hand, the well-known “(fiscal) State crisis” announced, in 1973, firstly in the United States and then in Europe, that the economic cut backs would be applied less and less to Criminal Justice, in general, and to punishment, in particular. The myth of penal rehabilitation began to vanish gradually giving way to punitive rationalities of an incapacitating nature. On the other hand, the emergence of political violence in Europe was fought through a legislation, some instruments of the Penal System (“elite” police, special

Jurisdiction and maximum security prisons), and some measures that were very quickly known as the development of a real “emergency culture and punitive exceptionalism”. In this way, the foundations of the social constitutionalism and the very same International Law of Human Rights began to collapse.

In the last few years, we have witnessed new chapters of this crisis that portray very worrying scenarios for the true respect of human rights. Resorting more and more to military options, adopting antiterrorist legislations that violate fundamental rights and liberties, revealing humiliating and degrading practices, cruel and abusive treatment and torture all over the world, the obstacles set up to prevent the investigation of such practices, and certain kinds of “naturalization” of this regression, constitute just some of the signals that have to be taken into account if we want to keep a model of civilization which could avoid the return to the barbarism that Europe suffered just a little over than half a century ago. Recent solid research projects from very renowned centres and associations devoted to the task of the protection of human rights have revealed the remarkable increase of reports on the cruel and abusive treatment and torture in places where there are people deprived of their freedom (prisons, juvenile correctional centres, centres for foreigners-immigrants, and police centres).

2 The objective of this Report

After the introductory considerations, the present report tries to:

- examine to what extent the standard of human rights is respected among people who are subject to any of the diverse forms of deprivation of freedom;
- deal with, in particular, the problem related to the presence of situations that may be qualified as constituting torture or cruel and abusive treatment. To do this, some statistical data will be indicated. This data comes from recent police investigations, reports made to the police, newspapers, press conferences, academic conferences or workshops, etc. that demonstrate the existence of (and the increase in) the institutional violence which has already been mentioned;
- point out, finally, some recommendations and strategies which will be recommended in order to prevent and fight against the presence of practices that should be eradicated.

3. The “state of art” within the Spanish State

3.1. Introducing the study and its objectives

Within the Spanish State police stations and prisons, torture still keeps on existing, in spite of the large number of denunciations made by international organizations, humanitarian associations, professional institutions, prisoner support groups, as well as the victims themselves and their families... Despite the categorical ban on torture stated by the Spanish Constitution and International Law, and despite the denial of the Government, torture still exists. And its existence is ratified by sentences passed against the Spanish State by the International Court for Human Rights, by the Recommendations expressed by the UN Special Rapporteur on Torture, as well as by the reports from several state and international associations which demand truly effective measures to

prevent the unacceptable violation of human dignity and human rights that torture implies at any time and everywhere (prisons, police stations and in the streets). It is important to highlight, as a result of the work and coordination of social movements, associations, social platforms, and organisation that have been working in this field for many years, the recent creation of the *COORDINADORA PARA LA PREVENCIÓN DE LA TORTURA (CTP)* [*The organisation for the Prevention of Torture*], which has been set up with the aim of joining all the necessary forces to fight against such a terrible situation.

Now, we will present an extract that contains those cases of torture and/or ill-treatment that were reported and that took place in 2004, and that were known to the associations that make up the CPT. This sample only embraces the cases from 2004 because the objective of this report is to show the existence of torture at present. Furthermore, the institutional responses to the denunciation of torture are underlined here, and a brief analysis of the sentences passed by the State Courts on the cases of torture and/or ill-treatment is also emphasised.

The objective of this study is clearly defined if we consider the international definition of torture and cruel, humiliating or degrading treatment or punishment reflected in the Convention of 1984:

Torture will be understood as every act through which serious pain or suffering, either mind or physical, is inflicted to a person with the aim of obtaining from him/her, or a third person, some information or a confession, or punishing him/her due to a committed act or when it is suspected that he/she has committed it. As well as intimidating or coercing that person or another ones because of any kind of discrimination, when such a pain is inflicted by a public official or another person exercising its public functions, under its own responsibility or through its consent.

3.2 Radiography of torture in Spain

The report consists of 276 cases in which 755 people have reported being tortured and/or ill-treated. Each case gathers the reports of torture that have occurred during one police operation or during one intervention of prison officers.

In relation to the characteristics of the people who have reported having been tortured and/or ill-treated, it is important to point out that 31% belongs to the trade union movement, 18% to other social movements, 17% are people in prison, while only 5% of the reported tortures or ill-treatments are made by people subject to the antiterrorist legislation, and 6% are immigrants... another 2% are minors and the remaining 21% come from other diverse situations.

With regard to the officers accused, it is important to underline 42% of the reported offences were against the NPF (National Police Force), 23% against the MP (Municipal Police), and 17% against the Prison Officers. The percentages of reported offences against the Ertzaintza (7%) and the Mossos (3%) are remarkable high figures. The Civil Guards (CG), with 5%, ends the list which completes 3% of others.

3.3 Torture and “impunity rites”

The recommendations against torture expressed from social organizations related to human rights defence have been generally ignored by the Spanish authorities. The juridical and public denounce of torture has been often answered through the denouncer's disqualification and criminalization. It is evident that the very same isolation condition (in prisons or another centres) constitutes *per se* a place and rites of impunity, since the victim lacks of enough testimonies to verify the fact of having been illtreated. Moreover, there is also a reversal situation because several times the victim becomes guilty when denounced by the officials. These persons, joined in a group, are able to state diverse testimonies saying that they were the aggressed ones and had to protect themselves using the "necessary physical force", the "repression measures", or other expressions like these.

On the other hand, and with regard to the (few) sentences given to officials due of torture or aggression crimes against freedom deprived people, these sentences are often revoked *de facto* by the political responsible persons, who sometimes give prizes (raises, decorations...) to the sentenced officials².

The problems in the investigations and the referred impunity also reach other spheres, even the jurisdictional field. Let us see some examples:

-With regard to a verdict that sentenced a police officer to a five-year prison period and eight years of professional debarment, the Third Section of the Provincial Tribunal in Alicante asked the Government for a partial Pardon in order to get the punishment of freedom deprivation reduced to just one year and the professional debarment to two years. They considered that *"there is a serious disproportion between the punishment that our Penal Code assigns to the type and the entity of behaviour being judged"*.

-The Hall of Contentious-Administrative Matters, Section 4th, of the Superior Court of Justice of Catalonia revoked the cessation of a doctor in Modelo prison of Barcelona after he had been sentenced to a one-year prison period and to an absolute professional debarred to practice medicine by the High Tribunal, due to a murder crime caused in prison by professional negligence. The sentence ordered the doctor re-entry.

Unfortunately, this cannot be considered as the expression of just a few isolated cases. The most serious aspect of this situation is that most of the denounces of torture and illtreatments established against State Security Forces or Prison Officers have been filed away or superseded in open causes. There are several files which are created after a poor juridical investigation (in case it is performed), making valid the officers versions (i.e.: the accused officers' versions), asserting that the denounced facts did not constitute a crime, or expressing that the officers directly responsible for the aggressions could not be identified. As it has already been pointed out, in those occasions that the

² Just as an example, and as a sample of some present incidents, it is important to comment that: 1) on April 2005, the Mayor of the Valencian Village of Benifaió appointed as the local Police Chief an officer who had been sentenced due to lesions and aggressions against a person; 2) the Chief of the Spanish Government has appointed as the Tenerife Provincial Police Chief an officer who had been sentenced due to the fact of having tortured Joseba Arregui in Madrid, who died due to the suffered torture. 3) the Mayor's Office of Vigo (Pontevedra) demanded the pardon of four municipal policemen convicted due to arrest and aggress a Senegalese citizen in an illegal way; 4) The penitentiary Administration of the Catalanian Government has filed away an investigation begun in 2004 on the -publicly recognised-aggressions suffered by 26 inmates at Quatre Camins prison in April of the mentioned year, after some incidents where the sub-Director of this prison was seriously hurt. The authorities did not find any guilty people.

aggressors could be identified by the aggressed people, either because of being the direct aggressors or having known the aggressions, the Tribunals mostly absolve the officials saying once and once that the denouncer's lesions were the consequence of the use of *"the minimum force needed to subject him/her"* or that they were caused when the officers *"were fulfilling their obligations"*. Sometimes the aggressions and their illegality are acknowledged, but it cannot be determined which of the several sentenced officials was the author of each inmate's lesion. As a consequence of this, a lot of times the denouncer finishes as being accused of stating a "false denounce". So, a penal process against him/her is begun. In this process, he/she becomes from the *victim* into a *guilty person*.

But what is specially serious and has to be quoted: these attitudes supporting the "rites of impunity" that have been referred, directly contravene the obligations assumed by the States-Part of the Convention against Torture at the United Nations in 1984.

3.4 A graphical sample on the discussed matter

Following, there are a series of charts that may illustrate what is being expressed. Despite all the facts being mentioned, especially the difficulties to investigate the situations full of impunity, and thanks to the continuous dedication of associations and lawyers working on this problem, it may be said that,

BETWEEN 2001 AND 2004 THERE WERE 227 SENTENCES ON TORTURE AND/OR MALTREATMENT

Penal Trial	Contentious-Administrative	Others	TOTAL
161	62	5	227

NOTE: *the 161 penal processes (years 2001-2004) presented here fulfil some of the following requisites: a) they sentence members from the State Security Forces or penitentiary Officials due to torture, lesions and/or that kind of aggressions that imply cruel, inhuman or humiliating treatment, b) state the absolution of officers that had already been sentenced in the Court of the first instance, c) state the absolution of officials who had been accused by the Prosecutor Ministry due to some of the crimes or infringements previously mentioned.*

4. Death in prisons

In order to get this Report finished, there are still two pieces of information left:

During the last decade (1990-2000), 973 people died (what implies a ratio of 1 person dead every period of 3-4 days) in Catalonia (the only nationality in the Spanish State presenting competencies and its own Penitentiary Administration). This information was revealed by the very same Catalanian Parliament.

During the last year of 2002, a total of 237 inmates died in Spanish prisons. This implies a dead prisoner each 37-hour period. This situation, which

was denounced by the Coordination Committee for Torture Prevention, has been recently admitted by the General Director of Penitentiary Institutions of the Ministry of the Interior, Mercedes Gallizo, when attending a parliamentary appearance, even though she estimated a lower number of deaths than the real one.

5. Recommendations and Strategies

Because of all the facts that have been mentioned here, the Coordination Committee for Torture Prevention has pointed out that *“the data presented here is just a part of the whole reality... we already know it. In spite of this or, it would be better to say, because of it, with this work we want to open a path for future and more complete studies which may understand the reality of torture in the Spanish State. Because this knowledge is important to help people create the necessary tools that in the close future allow to prevent, and at the precise moment, completely eradicate this practices, still very frequent at present”* (Madrid, May, 2005).

One of the campaigns and strategies proposed by the different (social, professional, and academic) sectors engaged in human rights defence, consists on the demand of the immediate ratification and starting of the Facultative Protocol (FP) of the Convention against Torture and other Cruel, Inhuman and Humiliating Treatments. This Protocol was approved by the UN General Council on December 18th 2002³, and then signed by the Spanish Government⁴. This FP establishes a mechanism that may result very effective to prevent tortures and maltreatment when being under custody, because it allows to practice some control, visits and inspections of police stations, detention centres, minor centres and other places of direct custody in the State, by national organizations independent from the Public Power. Because of this reason, we believe that its “effective” functioning is very important, as well as its future incorporation to the **Committees of visit and control** that may emerge from the beginning of the Protocol execution.

These Committees will be able to hold (reserved and without witnesses) interviews with any kind of person who has been deprived from his/her freedom, as well as with another people (officials from medical and security staffs, or relatives of the arrested persons). The Committees will count on free access to every kind of record related to any person being under the State custody; they will be able to examine the disciplinary rules and the punishment regime at the detention centres... They will also inspect the detention centres in a regular way and have access to every dependence (even bedrooms, dining-rooms, kitchens, isolation cells, bathrooms, gymnasiums, and nurseries...). Such a mechanism must be composed of people and institutions that should have the independence, engagement and legitimacy required by this UN tool.

It is evident that this requirement is supported by the deep concern provoked by the data revealed in this Report which refers to 755 people who last 2004 denounced having been tortured or maltreated, besides the figures of death in penitentiary institutions that have been also revealed.

³ The entire text of this Protocol may be found at <http://www.apr.ch/un/opcat/OPCAT%20Spanish.pdf>

⁴ Last April 13th, 2005, in the UN building in New York. To see the list of countries signing, and, if so, ratifying this Protocol, visit http://www.apr.ch/un/opcat/opcat_status.shtml

The European project "CHALLENGE" may be an effective vehicle of international spreading of this reality that we have to contribute to make visible if we attempt that Europe does not lose its cultural identity that is engaged in the defence of human rights and public liberties.

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Branch number 3:

The reforms of the Immigration law (1985-2005) and the equality of rights

The first Spanish immigration law was published in 1985, year when Spain entered to the European Community, with Socialist Party (PSOE) in government. It was the Organic Law 7/1985, from July 1st, on Rights and Liberties of Foreigners in Spain, denominated commonly "law of *extranjería*", as some authors prefer to see it: law of *extranjería* and not of immigration, because it is totally unaware to the migratory phenomenon (Monclús, 2005: 384), more interested in the aspects of police and control of foreigners than in the integration of immigrants.

Although it could seem contradictory, the function of this kind of laws, is not to contribute to the social integration of the foreigners, as its name would indicate, but indeed the opposite, this means: the social construction of the illegality, as it is referred by Calavita (Calavita, 2005: 11, 28, 46, 165). This irregular situation created by the law reduces immigrants to a situation of precariousness, which forces them to accept works in very adverse conditions, on exclusive interest of their employers (Calavita, 2005: 42); simultaneously, the irregular condition marks them with an stigma that will contribute to their criminalization (Calavita, 2005: 32, 125). The experience in Spain proves sufficiently that the Moroccan immigrants arrived at the country before the LO7/1985, were able to integrate into the Spanish social fabric far better that immigrants who arrived later on (Calavita: 2005: 27).

Organic Law from July 1st

The Organic Law 7/1985 established the legal separation between immigrants with permission to reside in the Country and immigrants in an irregular situation, the rights of the latter were curtailed dramatically by the law. The doubtful constitutionality of several of its rules, concretely those that limited the exercise of rights of assembly and association, made the Ombudsman to lodge an appeal on the grounds of unconstitutionality, solved by the Constitutional Court in its sentence STC 115/1987 (Aja, 1998; Asensi, 2004: 157).

Therefore, this Organic Law made for the first time distinctions about the different kinds of foreigners, as it formally guaranteed "the rights of foreigners with residence permits", and at the same time removed "several rights of irregular immigrants or 'illegal' ones" (Monclús, 2005: 384). According to Professor of Constitutional Law Jose Asensi (2005: 158), it was the combined action of the Organic Law 7/1985 and the sentences of the Constitutional Court what finally established the differences between "regular" and "irregular" immigrants. Indeed, in STC 107 of 1984, the Constitutional Court admitted the existence of three types of rights guaranteed to the foreign population: (1) the common ones belonging to all the people by exigency of the respect to dignity of the person enshrined in art. 10,1 of the Spanish Constitution; (2) the right of suffrage, reserved to the Spanish citizens, unless they are admitted in Treaties based on reciprocity; and (3) the rest of rights and liberties which depend on whether they are affected or not by International treaties or by the law. It is inferred from that sentence that most of the rights of foreigners are of legal configuration (Aja 1998). Nevertheless, that difference in the recognition of the rights between foreigners and Spaniards admitted by the Constitutional Court in its sentence 107/1984, according to professor Pastora García (García, 2004: 16-17) prevents us to speak of "discrimination", since the legally protected interest is the right to not being discriminated, and this one, according to this author, has to be understood "as a right to not be treated pejoratively in

comparison with the treatment which according to law belongs to that person” (García 2004: 58).

In another way, it is not possible to speak of discrimination when refusing a right to a person who is not entitled to it. But the matter did not finish there, since another Sentence from the Constitutional Court , STC 115/1987, added two more groups of constitutional rights which were applied differently to foreigners and Spaniards: (1) Rights that correspond indifferently to Spaniards and foreigners because they emanate from the dignity of person principle; (2) others rights not linked with that principle (association, assembly, etc.) but which are also indistinctly applied to both groups; (3) rights that can be modulated by the law provided that the Constitution mandates are respected (STC 115/87, FJ 3º); (4) rights to which the foreigners are excluded by the Spanish Constitution in its art. 23; and (5) rights not linked to the dignity principle and which are refused to foreigners in illegal situation because the Constitution says nothing about them (Asensi, 2044: 158).

In the other hand, the STC 115/1987 cancelled some of the limitations in the exercise of fundamental rights within the Organic Law 7/1985; concretely, the sentence annulled several limitations related to the rights of assembly (the Law required the previous authorization) and of association (which could be suspended by the Government); it also cancelled the prohibition which prevented the judges to suspend administrative decisions related to immigration, since, according to the Sentence of the Constitutional Court (and contrary to what said the Organic Law) that belongs to the jurisdiction of judges (Aja 1998).

With respect to the preventive detention of foreigners, previous to their expulsion, the sentence accepted the detention for a maximum of 40 days, although noticing that it was to the judge, and not to the police, to whom competed the decision according to the merits of each case (Aja 1998).

These expositions were later revised by the high court, specially where it deals with the rights inherent to the dignity of the person. The Sentence of Constitutional Court 94/1993 granted the protection to a Philippine citizen illegally expelled (she had the receipt of renovation of her work and residence permit) since, contrary to the consideration of the Fiscal Ministry, in respect to whether art. 19 of the Constitution (right to free circulation) applies only to

Spanish citizens, the sentence of the Constitutional Court recognized that right also to the foreigners who reside legally in the country, because—said the sentence— "it is not enough argument the non-existence of constitutional declaration on freedom of circulation to the foreign people" to refuse that right, as was exposed before in SCC 107/1984 (respect to the application of art. 14).⁵ This doctrine changes the previous one radically, since it does not interpret literally the Spanish Constitution (art. 19 speaks of Spaniards only) and when recognizing the entitlement to foreigners of some rights apparently reserved only to the Spaniards.⁶

In the other hand, the same sentence argue that the art. 10.2 of the Spanish Constitution says that "The principles relating to the fundamental rights and liberties recognized by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements thereon ratified by Spain". Among the latter, according to that Sentence, there is the International Pact about Civil and Politic Rights of 1966, which in its article n. 12 recognises the right to free circulation to all foreigners who are legally inside the territory, and in its n. 13 gives guarantees in front of arbitrary.

This change in doctrine (the no literal interpretation of the SC) was consolidated with the SCT 242/1994, where the Constitutional Court gave protection to a foreigner who had been expelled without being granted his right of defence (Aja 1998). That sentence confirmed that that citizen had right to protection by judges and courts, guaranteed by the art. 24 of the SC, in order to prevent the defencelessness. (Asensi 2004: 159).

All those sentences from the Constitutional Court made evident the obsolescence of the Organic Law 7/1985. In that sense, both immigration laws of the year 2000 were a progress respect to the 1985 one (Asensi 2004: 161). The Organic Law 4/2000, from January 11th, allowed the opening up of a process of regularization towards the social integration of immigrants, according to the specific title of the law, although it is necessary to remember the remark on that by Calavita.

5 (STC 94/1993, Juridical Grounds 2°).

6 On Juridical Grounds, after the SCC 94/119 says: "It is clear that the foreigner can be entitled to fundamental rights and reside and circulate freely according to Constitution in its art. 19".

That law, according to Monclús, “had a clearer willingness towards social integration than the old law and was inspired on the criterion of the maximum levelling of rights between nationals and foreigners ” (Monclús, 2005: 385). It was approved by the Parliament with the addition of all the votes of the opposition parties. The political party which then was in Government (Popular Party, PP) won the next elections (March, 2000) and got the absolute majority at the Parliament. Immediately after that announced the reform of the immigration law.⁷

Organic Law 4/2000 from January 11th

Taking into account the several sentences from the Constitutional Court, already commented here, the legislator tried to give the maximum levelling of rights to Spanish citizens and foreigners in articles 3.1 and 3.2 of the OL 4/2000 and declared that the pacts and agreements signed by the Spanish Government would be respected:⁸

While the law of 1985 linked the entitlement of certain rights to the condition of regularity (Monclús 2005: 385-386), with the law 4/2000 it was enough for the foreigners to be registered at the town council to enjoy that rights, although we have to consider that is not easy to achieve that condition (Calavita, 2005: 103 y ss). That Organic Law allowed in its art. 20.3 to get a temporary residence when proved “a continuous stay of 2 years in the Spanish territory, being registered in a town council in the moment of applying for, and having enough economic means for the subsistence”.⁹

Nevertheless, as already mentioned, when the Popular Party (PP) won the absolute majority after the general elections of just that year, it was undertaken the reform of the law, which was the Organic Law 8/2000, from December 22nd, on rights and liberties of foreigners in Spain and their social integration. That law turned back to the confusion of linking rights to politic policies (Asensi 2004: 161)

7 “El PP anuncia que el nuevo Gobierno cambiará “inmediatamente” la ley de Extranjería”, El País, 14/3/2000

8 LO 4/2000 art. 3.1. Our emphasis. See that this rule does not require to the foreigner any condition about the summoned State.

9 LO 4/2000 art. 29.3

Organic Law 8/2000 from December 22nd

The OL 8/2000 recognised to foreigners the entitlement of several rights but reserved the exercise of others to legal residents: right of association (art. 7.2) and of the assembly (art. 7.1), as if it had any constitutional sense the distinction between being entitled to a right and the exercise of it. As correctly Asensi says, “that distinction does not have any constitutional and intelligible sense” (Asensi, 2004: 162), apart the possible infringement of international treaties by the new immigration law, according to Chueca (Chueca, 2002: 242 y ss).

In short, the new immigration law 8/2000 made a clear distinction between foreigners with residence permit and those in irregular situation, with the obvious object of shrinking the rights of the latter. But, as observed by Calavita, the social evidence shows that legality and illegality could only be just two different moments in time (Calavita 2005: 101). In the other hand, while in the old Organic Law 4/2000 the sanction of deportation was reserved to cases of serious offences, the Organic Law 8/2000 introduced in its section III (art. 57.1) the simple illegal staying in the country as a fault punished with deportation.

Organic Law 14/2003 from November 20th

But the reforms of the immigration law were not still over. In 2003, November 1st, the Official Gazette published the Organic Law 14/2003, which was a reform of the OL 4/2000 as modified by the OL 8/2000. As is observed by Monclús the reform: (1) optimizes the process of deportation; (2) legitimizes the centres of deportations; (3) allows the police to check the local registers of inhabitants to find illegal immigrants; (4) compels the travel agencies to introduce control policies on travellers; (5) and restricts the rights to regroup the families of immigrants (Monclús, 2005: 390).

That reform had the support of the principal party at the opposition (PSOE, now at the Government) in return of the introduction of 23 amendments¹⁰ that didn't

10 “El Gobierno y el PSOE ultiman la reforma de la Ley de Extranjería” *El País*, 8/9/2003

change substantially the law and neither changed the hostile character of the law to the immigrants. That law made several jurists react against it and let them announce that they would take the law to the Court in the grounds of unconstitutionality, and also several unions as UGT which considered that the law was prejudicial to the immigrants since it made impossible to most of them to regularize their situation.¹¹ In the other side, as already mentioned, the Organic Law 14/2003 introduced the possibility for the police to access to the registers of the town councils in order to localize and deport the irregular immigrants (OL 14/2003 Exposition of Motives, V). That modification had other symbolic meanings (apart of its control meanings), since until that moment, the registers at the town councils served to grant rights to the foreigners,¹² but from then on that information could be use also against them.

Although many town councils, following the recommendations of the left-wing parties,¹³ announced the disobedience to the order to give information about their inhabitants, the law created a deep sense of unease to left politicians because of the support PSOE gave to PP in that matter. That became evident when the leader of the socialist party in Catalonia (and now president of the Catalan autonomy), Pascual Maragall, said that “it is not good that the police pokes its nose on the registers because the registers have confidential information” and was replied by the leader of the excommunist Iniciativa per Catalonia (now parter of the socialists at the Government) reminding him that Maragall, being president of the Catalan Socialist Party (PSC), “is so responsible of that law as the PP is, since the members of the Catalan Parliament of PSC gave their votes last week in support of the reduction of rights of immigrants”.¹⁴

Among the rights that were reduced was that of the education. While the OL 4/2000 grant in its art. 9 the access to education the all the foreigners under 18 years old, the OL 8/2003 linked that right to the regular status, leaving thousands of pupils without the possibility to access at the secondary school,

11 “Los abogados de extranjería llevarán al Constitucional la reforma de la ley”, El País, 19/12/2003

12 LO 4/2000, arts. 12.1 (derecho a la asistencia sanitaria), 13 (ayudas en materias de vivienda), 20.2 (derecho a la asistencia jurídica gratuita).

13 “IC y ERC llaman a los municipios a negar el acceso policial al padrón”, El País, 7/10/2003

14 “El líder del PSC critica ahora que la policía acceda al padrón”, El País, 10/10/2003

even without being able to get the title of Obligatory Secondary School (ESO) even in the case they had had follow the courses with progress.¹⁵

¹⁵ "Miles de alumnos extranjeros no pueden cursar bachillerato por carecer de papeles", El País, 28/7/2004

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