

THE PUNITIVE TURN IN SPAIN.
IS THE WELFARE STATE ABLE TO RESIST IT?*

*El giro punitivo en España.
¿Lo resistirá el Estado del bienestar?*

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Resumen

En los últimos años hay una tendencia en España a llevar a cabo reformas penales muy a menudo, como también sucede en otros países. En los 20 años de vigencia del Código penal español se han realizado más de 30 reformas, es decir, con más de una reforma penal al año. La mayoría han incrementado el rigor punitivo extendiendo los tipos penales, subiendo las penas y haciendo el sistema penitenciario menos flexible, en especial con algunos delitos. Todo ello ha llevado a unas tasas de población penitenciaria muy elevadas, aunque en España no hay cifras de delincuencia altas. Esta investigación pone de manifiesto que muchas de las prácticas del sistema penal indican que el modelo de la seguridad ciudadana se está consolidando en el sistema penal español. Sin embargo, este proceso tiene una diferente intensidad en cada fase del sistema, siendo más fuerte en la fase legislativa y más débil en el ámbito penitenciario. Una de las principales conclusiones es que el instrumento que se ha diseñado es ideal para medir el grado de penetración del modelo a través del sistema.

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Palabras clave

Modelo penal de la seguridad ciudadana; reformas penales; Código penal español; Estado de bienestar; punitivismo.

Abstract

In recent years there is a tendency to carry out penal reforms in Spain very often, as it also happens in other countries. During its twenty years of existence, the Spanish penal code has already been modified more than 30 times, on an average of more than one penal reform by year. Most of them have increased punitiveness by widening the categories of crimes, raising the penalties, and making the penitentiary system less flexible, especially for some criminal offences, all leading to a very high prison population. The investigation has shown that there are many processes and practices indicating that the law and order model is consolidating itself in the Spanish penal system, leading to a punitive turn. Nevertheless this process has a different intensity at each phase, being stronger at the legislative stage and softer in the penitentiary enforcement phase. One of the main conclusions is, therefore, that the designed instrument is ideal for measuring the degree of penetration of the model throughout the system.

Keywords

Law and order model; penal reforms; Spanish penal Code; Welfare State; punitiveness.

SUMARIO: I. INTRODUCCIÓN. II. HIPÓTESIS, OBJETIVOS Y METODOLOGÍA. III. RESULTADOS. IV. CONCLUSIONES. V. PROPOSICIONES.

I. INTRODUCCIÓN

The Spanish penal system comes from a codification tradition based on the classical liberal criminal law and the principle of legality, and it is usually classified as a procedural justice system. This implies that both conducts considered illegal and the punishments to be imposed are previously set out in the law, including all facts to be taken into account when sentencing. Law also contains provisions on how imposed penalties are enforced, and under which conditions this enforcement can be suspended or a penalty can be replaced, as well as cases in which parole can be granted. Spanish judges are bound by some rules that limit the room for discretion in the imposition of sanctions, and their subsequent enforcement.

After a thorough review of the literature, and the rules and practices developed at the Spanish penal system, one can observe that the traditional penal model does not seem to be capable of containing the new forms of crime and therefore a new model based on the idea of law and order is displacing the procedural justice system in Spain.

According to the latest available data (11th edition of the World Prison Population List, 2016), Spain ranks third in prison population in the European Union comparative, just below UK and Portugal. This is a very striking fact because Spain does not have high crime rates, and therefore there are not many persons entering prison. The explanation is double. On the one hand, there has been an abusive use of imprisonment legal provisions in the criminal Code, with very long penalties for crimes against property and related to drugs, which are the most represented in prison (between 80% and 60% of all). It is remarkable that in its twenty years of existence, the Spanish penal code has already been modified 30 times (on an average of more than one penal reform by year). Most of them have increased punitiveness by widening the categories of crimes, raising the penalties, and making the penitentiary system less flexible, especially for some criminal offences. All these factors have contributed to that very high prison population. On the other hand, the analysis of the enforcement of the penalties imposed show that few paroles are granted, so more than 60% of inmates end up serving the whole sentence in prison. As a result, Spain has also one of the longest average prison stay in Europe (Annual Penal Statistics of the Council of Europe, SPACE I, 2012).

II. HYPOTHESIS, OBJECTIVES AND METHODOLOGY

A measuring instrument has been developed in order to confirm the hypothesis that the model of law and order is consolidating itself in Spain. This instrument consists of ten features and has been used to identify examples of them in the rules and practices developed at each phase of the Spanish criminal justice system. The analysis has focused specifically on public discourse about delinquency, criminal policy decisions, legislative processes, police routines, judicial dynamics, and prison system practices.

These are the 10 features of the model:

1. The control of the poor through the criminal justice system, leading to an exclusion approach.
2. The growing sense of insecurity, coming from different sources of risk as corruption, unemployment, low investment on public health and education, etc., but targeted by public policies focusing on risk related to crime.
3. The role of the victims as pressure groups, especially through the rhetoric of rebalancing, where rights and guarantees for the offender are conceived as a damage to the victim.
4. The politisation of the criminal justice system through the so called “punitive populism”.
5. The rise of prison, leading to a system where punishment is a way of incapacitation and retribution.
6. Crime as a matter of choice and responsibility, through the “liberal veil” theory, where the offender is conceived as a rational human being who freely decides to commit crimes: it is easier to intervene on the subject (controlling him) than on the socio-economic context (presumed static).
7. Citizens accepting or no longer questioning some of the most punitive policies.
8. The privatisation of the management of crime.
9. The loss of state sovereignty through supranational obligations.
10. And the explanations about the system through criminological and dogmatic punitive speeches.

III. RESULTS

These are the most striking results of the research:

1. An exclusion approach. The control of the poor through the criminal justice system.

The comparison between the regulation of many of the crimes usually committed by people belonging to low or marginal social classes, and those with a higher social or economic status has shown significant differences in the penalties imposed and the extent of criminal types, which do not always correspond to the gravity of the conduct, and are especially severe with blue-collar crime.

I have paid particular attention to last reform of Penal Code in 2015, concluding that the differences have increased, generally by providing greater punitive control on common crime and not modifying or doing it downward for white-collar crime.

The most represented crimes in the Spanish criminal justice system, not only regarding the number of arrests but also on the basis of imprisonment convictions and prison serving, are offences against property, especially thefts and burglaries. Crimes of drug trafficking are not among the most committed, but surprisingly are among the most represented in prison. This is mainly because the penal code provides imprisonment penalty for most of the crimes, with especially high penalties for drug trafficking.

As there is a disproportion between criminal types represented in prison, the high prison population is also a way to control the poor.

There is also evidence of the use of ethnic or racial profiling by the police, an excessive imposition of pretrial detention and its greater impact on foreigners, and not enough mechanisms for a gradual incorporation to life in freedom: a slight decrease in recent years of granting of the grade three regime (less severe enforcement degree), a slight increase of the percentage of persons classified in grade one (most severe degree), a very low amount of paroles granted (although going upwards in recent years), and a very high mortality rate.

2. The growing sense of insecurity.

Although year after year the Spanish Centre for Sociological Research (CIS) show that the main issues of concern for the citizens are corruption, unemployment, low investments in public health and education and political parties, criminal policies usually focus on the insecurity related to crime.

The analysis of all reforms of the Penal Code, shows that most laws repeatedly refer to concepts related to insecurity (social alarm, citizen safety, confidence, etc.).

Some of the alternative uses of public spaces and most of uncivil behaviors are also conceived as sources of risk of crime, so the penal intervention extends to conducts that are not necessarily criminal.

3. The role of the victims as pressure groups. The rhetoric of rebalancing, where the guarantees and rights for the offender are conceived as an injury to the victim.

There are numerous examples of penal reforms that have been carried out due to the mobilization of the victims, especially when it comes to: sexual crimes and murders committed against minors (e.g. Mari Luz Cortés and the reform of 2010: LO 5/2010, or Marta del Castillo and the reform of 2015: LO 1/2015), terrorism (after huge demonstrations organised by associations of victims, and meetings with members of the Government), violent juvenile crimes (e.g. Sandra Palo and the reforms of 2003 and 2006: LO 15/2003 and 8/2006), and gender violence (following the pressure of feminist groups on the drafting of various laws, including LO 5/2010)

4. The politization of the criminal justice system. Punitive populism.

The new penal model assumes that public opinion is alarmed and unwilling to understand rational approaches to crime, so it will be likely to accept measures aimed at calming the fear of crime, through extensive control policies and penal tools to manage uncivil behavior.

Recent empirical research about framing and agenda-setting show that populist criminal policies are based on rather emotional than rational arguments, and their proposals often disregard or neglect what citizens really need and claim. As the purpose is to obtain electoral gains, decisions often focus on the short-term view, where the media plays a key role. In short, politicians use public opinion as a criterion to measure the level of attention on a particular issue, thus justifying punitive measures or inaction in certain areas.

It is therefore necessary to refer specially to pressure groups influencing the criminal legislative decision-making in Spain. That includes victims, judiciaries, practitioners and legal experts, think tanks linked to political parties, associations positioning themselves as representatives of public morals, stakeholders looking for business opportunities, and even other States acting as lobbies and imposing their criminal policy approach through mandatory international conventions.

5. The rise of prison, leading to a system where punishment is a form of incapacitation and retribution.

Despite the fact that Spain does not have high crime rates, and the number of persons entering prison is not high, there is an elevated prison population (in the European comparative analysis). Both law in books and law in action explain this situation, as seen before. The abusive use of imprisonment provisions in the Penal Code and the low amount of paroles granted, have led Spain to have one of the longest average prison stay in Europe.

Regarding life conditions in prison and other detention facilities (police stations, internment centers for migrants, juvenile detention centers, etc.) there has been an increase in suicides in recent years, and some external institutions (e.g., Amnesty International, or the Ombudsman) have reported excessive disciplinary proceedings; inadequate medical and psychiatric care, poor infrastructure, etc.

6. Crime as a matter of choice and responsibility. The offender as a rational human being who freely decides to commit crimes.

Last reforms have limited the room for discretion for judges, including mandatory aggravating circumstances in property and sexual offenses, making the penitentiary system less flexible, etc. The result is that socioeconomic circumstances leading a person to commit a crime can not always be taken into account when sentencing. As a matter of fact, reforms carried out in 2003 and 2015 have reduced judicial discretion, incorporating very strict requirements for granting parole and other benefits to the convicted person. The use of non-custodial measures as an alternative to the prison sentences has virtually disappeared (except for the expulsion of foreigners), and parole is now a form of suspension of enforcement rather than a stage of serving prison sentences. Thus, after 2015 reform, when there is a violation of parole conditions, the convicted person must return to prison to serve the full time remaining, without discounting the time spent outside, as has always been the case until 2015.

7. Citizens accept or no longer question some of the most punitive measures.

Some examples of reforms that have not produced much concern about the potential excesses of the system are: the new regulation of confiscation and collection of DNA samples; some reforms in the field of terrorism and sexual offenses, the expansion of video surveillance (which has not proven effectiveness in preventing crime), the extension of competences of private security guards, etc.

There are also some proposals that have not yet been approved, but do not seem to cause suspicion or discontent: post-prison custody, the extended imposition of psychiatric or educational detention, the possibility of judging minors on adult courts, or the lowering of the age of criminal responsibility to 12 years.

8. The privatization of the management of crime.

There seem to be a lack of confidence in the ability of the system to address the problem of crime, and therefore a transfer to society of responsibility in controlling disorder and delinquency.

As a result, new regulation of private security guards has led to a withdrawal of public security agents in some areas. There have been a privatization of various services in Spanish prisons, as external security, workshops and treatment programs, among others. In juvenile justice this has led to an inadequate inspection system, a negative impact on children's rights, and a shift of responsibility for rehabilitation of juveniles to the community.

9. The influence of supranational instruments in the management of crime.

Spain has assumed some supranational commitments that determine legislative processes. After analysing the 30 reforms of the current Penal Code, in order to identify references to supranational commitments, it is noteworthy that 14 of them explicitly refer to conventions and jurisprudence of international courts, whereas 5 mention the legislation and jurisprudence of other countries. Regarding the content of the laws, there are 69 specific references to European or international legislation, 11 to comparative legislation or jurisprudence, and 3 to the European Court of Human Rights.

One can usually distinguish two situations: obligations that must be transposed into national legislation, and those that serve as a pretext for the national legislator to carry out broader reforms than those required by international standards.

Some examples of the very punitive reforms carried out because the supranational instruments so demand can be found at: i) the very broad concept of child pornography (Framework Decision 2004/68/JHA); ii) the regulation of preparatory acts and participation in terrorist offenses (Framework Decision 2008/919/JHA); iii) the protection of the environment that may be violating the principles of legality and ultima ratio of criminal law (Directive 2008/99/EC); iv) the regulation of hate crimes, which could undermine the principle of subsidiarity (Framework Decision 2008/913/JHA), etc.

Other examples of the use of these instruments by the Spanish legislator to carry out reforms that go beyond what is required are the regulations of: i) hate crimes (Framework Decision 2008/913/JHA); ii) confiscation (Directive 2014/42/EU); iii) genetic profile (Council of Europe Convention held in Lanzarote, 2007); iv) terrorism (UN Security Council Resolution 2178/2014); v) age of sexual consent (Council of Europe Convention for the protection of children against exploitation and sexual abuse of 2007), etc.

10. The explanations about the system: criminological and dogmatic punitive speeches.

Although many scholars criticize the law and order model, some of them support the punitive turn, through the actuarial criminology, and some

theoretical constructions based on the concept of risk, such as situational prevention and some adaptations of the broken windows theory, the authoritarian welfarism, etc.

On the other hand, some experts have begun to lose confidence in the real possibilities of the penitentiary system of achieving rehabilitation. Therefore, they are supporting the idea of the reintegration based on the cooperative attitude of the prisoner himself, conceiving rehabilitation not only as a behavior modification but also as the internalization of values, or attributing to the victim a central role in the field of implementing the penalties through the rhetoric of rebalancing (more for the victim has to mean necessarily less for the convicted person).

IV. CONCLUSIONS

The research has shown that there are many processes and practices indicating that the law and order model is consolidating itself in the Spanish penal system, with a different intensity at each phase, being stronger at the legislative stage and softer in the penitentiary enforcement phase. Although there are no alarming crime figures in Spain and experts consider it appropriate to promote a stronger, more inclusive and active welfare state, it seems that this is not the approach that legislator is taking. It rather seems that this could only happen for utilitarian reasons, in a context of economic crisis that makes it unsustainable to maintain such a high prison population.

V. PROPOSALS

To conclude, I want to make some proposals that I think could help to resist this punitive turn. These could be, for instance:

- Improving the measurement of punitive attitudes, as it has been found that many of the formulas used are incorrect. Research about public opinion shows that citizens are less punitive than suggested by ordinary surveys, and it would be more appropriate to use deliberative polls or focus groups.
- Increasing the knowledge about the criminal justice system, as it has been found that the greater the knowledge about the reality of crime and criminal punishment, the less punitive attitude.
- Balancing the impact of mass media and establishing control measures and ethical accountability protocols when information is not contrasted or is presented out of a context.
- Demanding responsibility to populist politicians, by highlighting their erroneous estimations or their inability to carry out their policies.

- Improving the image of the criminal justice system, as those who come into contact with it draw a positive experience.
- Responding the needs of victims to reduce their vindictive demands.
- Evaluating laws to predict the need of reform and the impact of the new ones, incorporating realistic criteria to compensate the symbolic nature of many of the proposals.
- Reducing the use of prison: both in the legislative and the judicial and penitentiary areas: providing this penalty only for the most serious cases and applying as far as possible alternative to custody penalties.
- Designing respectful strategies to manage disorder: promoting the sharing of public spaces and the tolerance within the difference.
- Applying rigorous selection policies and demand of accountability processes for members of security agents and prison staff.

I am not sure if these proposals are realistic or not, but I think most of them are just a question of political will and would not be so difficult to implement.