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León, Francisco Javier

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Spanish legislation against Trafficking in human beings: Punitive excess and poor victims assistance

Francisco Javier De León fcojavier.leon@uclm.es

University of Castilla-La Mancha

Ciudad Real, Spain

Abstract:

The article seeks to provide a perspective of human trafficking as one of the fastest growing criminal activities of the last few years in the area of organised crime and one that affects human beings' most basic rights. In the main, the response to the problem has been its criminal prosecution, but without tackling the issues of need that underlie this conduct and which the traffickers take advantage of to abuse, assail and exploit the people they traffic. In this context, the evolution of Spanish legislation in terms of the criminalisation of this problem has made it one of the most repressive, although there is no clear evidence of its effectiveness. This punishment, which covers a wide range of criminal conducts, has not however been accompanied by any policies to support and integrate the victims of trafficking, which has led to a large number of victims being subjected to slavery who, in the majority of cases, fall under the control of the trafficking networks again.

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Introduction

Spain is currently one of the countries that receives the highest number of trafficked persons, mainly as their final destination, but also as a stage in their transit to third countries. The trafficking focusses on women for purposes of sexual exploitation, especially prostitution, up to the point where 90% of prostitutes are foreigners and most of them are controlled by organised trafficking networks **[1]**.

Despite the fact that it has been growing steadily since the beginning of the 1990s and involves a large number of women living in conditions of slavery, this phenomenon has not been given the attention it deserves by the authorities, particularly in the area of social support and victim protection, which is covered almost exclusively by NGOs. The main response from the government has been the criminal prosecution of trafficking activities with a harshness that exceeds the European reference framework but which, nevertheless, has not achieved any significant reduction in this abject trading that has become one of the preferred activities of international organised crime. In this context, victims' assistance and protection has continuously been unattended and remains as the most important .

But these practices are not new. The magnitude of the problem had already provoked an international response, endorsed, among other countries, by Spain, as far back as the end of the nineteenth century.

The first symptoms of the reaction against human trafficking appeared with the *Movement for the Suppression of Trafficking of Women*, which began in England in 1869. Its first action was a campaign against state regulation of prostitution, considering this the root of the problem, and which resulted in the repeal of the Contagious Diseases Act, as the main exponent of the aforementioned policy.

In 1885, the British Criminal Law Amendment Act made it an offence to procure youths under twenty-one years of age for immoral acts in England or abroad. It is not surprising therefore that the first International Congress on the White Slave Traffic was held in London on 21 June 1899 [2].

This experience marked the beginning of the twentieth century, which saw the creation of associative movements in several countries in the fight against the white slave trade, culminating in the International Conference of Paris in 1902. The result was the draft project for an international agreement in which different countries agreed to reform their legislation to include punishment for actions by third parties for the prostitution of minors, even when the intermediary had obtained the consent of the minors, and in the case of adults when there had been fraud, deception or violence.

As a result of this conference, the 1904 "International Agreement for the Suppression of White Slave Traffic" came into effect, signed by around 20 countries (including, Belgium, Denmark, France, Germany, Great Britain, Italy, the Netherlands, Norway, Sweden, Portugal, Russia, Switzerland and Spain, which ratified it on 8 January 1905).

One of the main purposes of this agreement was to promote the exchange of information regarding the procedures and ways in which trafficking in women and children was carried out. For the signatory governments it meant a commitment to surveillance in stations and ports in order to discover the persons who were trafficking in women or children for prostitution. At the same time, the agreement imposed the obligation to research the repatriation of foreigners and possible claims on foreigners by third countries.

In 1910 another conference was held in order to ratify the 1902 agreements by the countries that had not yet done so.

In the 3rd International Congress on the White Slave Traffic held in Paris on 1 October 1906, important agreements were reached, including the following points:

- creation of a communications network between the different national committees responsible for monitoring the procedures initiated in this area, centralising all the information;

- the need to create local committees with information offices in border and maritime towns and cities;

- surveillance in stations and seaports to detain traffickers and youths in their company, as well as those found seeking work at the points of arrival where they have no family member or contacts;

- surveillance in cafeterias, theatres and similar establishments and repatriation of prostitutes living in countries that were not their own.

From this moment on, prevention of this phenomenon would become one of the decisive factors in the fight against white slave traffic, which paradoxically offered no specific instruments in terms of punishment.

The next step was the preparatory conference for the 4th International Congress on White Slave Traffic held in Vienna in October 1910 in which one of the main conclusions was the need to eradicate trafficking through the exchange of information about the victims. The negotiations between the victim and the trafficker were considered a key element on which to act, as the traffic was the result of promises, deception and threats on the part of the trafficker. Therefore, preventive education of women should become an important aspect in the overall fight against this phenomenon.

This led to the German conference, held in Düsseldorf in April 1907, which dealt with measures to capture traffickers but, above all, it focussed on the criteria to be applied to prevent deception. Nevertheless, the modesty of the victims and the necessary prophylaxis of the measures to be taken in order to avoid giving innocent young people details of such gruesome issues, led the International Congress held in Rome in 1908 to create an educational and scientific instruction programme for young people of both sexes, with special emphasis on the dangers to which they are exposed.

The next step, at international level, was the creation of the "International Convention for the Suppression of White Slave Traffic", signed in Paris in 1910 by thirteen countries (Austria-Hungary, Belgium, Brazil, Denmark, France, Germany, Great Britain, Italy, the Netherlands, Portugal, Russia, Sweden and Spain)[1]. This convention proposed punishment for conduct such as the procurement, enticement or "leading away" of women of any age with the intention of subjecting them to prostitution whenever deception or violence were used and, in any event when the women were under the age of twenty, even if they had given their consent. This could be considered the first international agreement that introduced, among the measures taken, instructions of a criminal nature.

With the onset of the First World War, this trend was interrupted for a few years, until the creation of the League of Nations which, among many other commitments, undertook to promote compliance of the international agreements on these issues. This led to another international conference in Geneva in 1921[2], which was attended by thirty-four countries and resulted in the enactment of the "International Convention for the Suppression of Traffic in Women and Children" in 1922, which extended its protection to all races of both sexes and raised the age of consent for sexual relations to twenty-one.

It also created "The Advisory Committee on the Traffic in Women and Children", made up of official representatives of the different governments and their advisors. In its capacity as advisory committee on the treatment of women[3], it was responsible for studying specific problems related to trafficking, such as the protection of women hired

[1] Amended by the Protocol signed at Lake Success, New York, on 4 May 1949.

[2] *International Convention for the Suppression of the Traffic in Women and Children*, concluded at Geneva on 30 September 1921 and amended by the Protocol signed at Lake Success, New York, on 12 November 1947. Giving a very brief summary of the guidelines agreed in Geneva, it could be said that the set of measures planned had a dual nature: some were repressive, derived from the obligation of the countries taking part to adopt any measure necessary to discover and punish those who traffic in children, or attempt to traffic or carry out preparatory actions related to trafficking in women and children; and secondly, preventive measures, such as surveillance of employment agencies and offices with a view to protecting women who seek work in other countries, the creation of legislative and administrative measures in the area of emigration and immigration that make it possible to provide support to women and children at the time of their departure, during transit and upon arrival.

[3] This committee was made up of ten representatives of ten countries appointed by the League of Nations Council, together with five advisors from five non-governmental organisations principally dedicated to the fight against this kind of trafficking: International Catholic Association for the Protection of Girls, Jewish Association for the Protection of Girls, and the Federation of the "Amigas de la Joven" Societies, together with the international office in London for the suppression of white slave traffic, and the major international women's associations.

for the theatre abroad, emigrant protection, attributing these practices to female police officers and even the creation of an exclusively female corps, and the conservation or suppression of brothels, these being basically the ultimate reason behind trafficking as they were the destination of trafficked women.

In turn, this committee created a body of experts to which it entrusted the difficult task of establishing the characteristics of human trafficking at that time, as a result of which a report was drawn up in 1927[4] that was to reveal the true magnitude of the problem, which affected hundreds of women and children, as well as the conditions under which slave trafficking in women and children was being carried out in certain countries in the Americas, Europe and the Middle East.

As the years passed, the study of such conducts was extended to include Asia and the Far East, for which the League of Nations appointed another group of experts, whose report published in 1932[5] confirmed to a large extent the conclusions of the first report, indicating the existence of brothels as the most important factor in the international trafficking of women destined for the East.

Following the drafting of this report, in 1933 the League of Nations enacted the International Convention for the Suppression of Traffic in Women of Full Age[6], which declared that it was a punishable offence to attract, incite or lead a women or girl of full age, even with their consent, to a life of corruption in other countries, considering punishable the attempted offence or even, within legal limits, any preparatory action.

A short time afterwards in 1937, with the aim of agreeing a joint action, the League of Nations prepared a draft agreement[7] designed to abolish brothels and prosecute and punish people who ran brothels or exploited the prostitution of others. This draft convention should have been signed at the international conference in 1940 but this was not possible due to the start of the Second World War.

Under the Geneva Conventions all people not actively participating in the hostilities had to be treated humanely[8], without any distinction, not even by reason of gender (Sect. 3), offering all civilians protection against sexual violence, forced prostitution, sexual abuse and rape.

In Resolution 43 (IV) of 29 March 1947, the UN Economic and Social Council commissioned the Secretary General to reinitiate the study of the project for the convention, introducing all the modifications necessary to update it. The result was the "Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others", approved by the General Assembly in its resolution 317 (IV) of December 2 1949[9], which in one way or another, grouped together all the previous

[4] Report of the Special Body of experts on Traffic in Women and Children (Geneve, 1927).

[5] Commission of Enquiry into Traffic in Women and Children in the East, Report to the Council (Geneva, 1932), 96.

[6] The *International Convention for the Suppression of the Traffic in Women of Full Age* concluded in Geneva on 11 October 1933 and was amended the Protocol signed at Lake Success, New York, on 12 November 1947.

[7] Draft Convention of 1937 for Suppressing the Exploitation of the Prostitution of Others. U.N. ESCOR, U.M. Doc E/574 (1947).

[8] Similarly, the year before, Article 3 of the Universal Declaration of Human Rights (1948) established that everyone has the right to life, liberty and security of person. Article 4 prohibits slavery and the slave trade in all their forms, and Article 5 recognises that everyone has a right not to be subjected to torture or to cruel, inhuman or degrading treatment. According to Article 5, no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Therefore, any form of violence that represents a threat to life, liberty and security of person or which may be interpreted as torture or cruel, inhuman or degrading treatment infringes the principles of this Declaration.

[9] *Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others* - approved by the General Assembly in its resolution 317 (IV) of December 2 1949, opened for signature at Lake Success, New York, on 21 March 1950. At the same time, the 1949 Geneva Convention relating to the protection of

regulations[10], using as a basis the clearly abolitionist policy on which, according to the studies carried out, the entire programme for the fight against the traffic in persons and the exploitation of the prostitution of others should be founded.

Despite being ratified by more than seventy countries[11], including Spain, which signed the instrument of accession in June 1962[12], and even though it had been a key element in dealing with the problem, over the past few years this convention has lost a great deal of its legitimacy as it has failed to adapt to the current situation. [13]The European Parliament therefore issued a call to the Commission and Member States in a Resolution issued on 18 January 1996, for action to be taken at international level to produce a UN convention to replace the obsolete and ineffective Convention on Traffic, indicating that any new Convention should by oriented towards conducts of coercion and deception[14]. What was being demanded was a definition by Member States of both the concept of "traffic of persons" (from its consideration as a "violation of human rights") and of "sexual tourism", as well as determining which conducts should be considered as criminal offences and another series of aspects that affect extraterritorial authority, co-operation and information exchange, etc. Even though traffic and exploitation often go hand in hand, they are not necessarily synonymous and, in many aspects, they require separation actions.

In this evolution the interest and participation of Spain can be clearly seen throughout the whole process of creating the current regulatory system to deal with the trafficking of persons. However, it was at the beginning of the 1990s when the Spanish government started to become increasingly concerned about the problem of human trafficking. This interest focussed specifically on adopting measures defined by international organisations designed to eradicate human trafficking, by signing international instruments and their application, particularly in the area of sanctions. The intervention of criminal law in human trafficking was not orientated towards the protection of the victim but the protection of immigration flows.

The European Council's Framework Decision of 19 July 2002 on combating trafficking of human beings (2002/629/JAI), the decision of 28 November of the same year on the strengthening of the criminal law framework to prevent the facilitation of unauthorised entry, transit and residence (2002/946/JAI) and Directive 2002/90 of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, have therefore created the basic lines for dealing with the problem, as well as to

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civilians in times of war, and the additional Protocols of 1977 (United Nations, Treaty Series, vol. 75, no. 973) established that women would be especially protected against any kind of attack on their honour and, in particular, against rape, forced prostitution and all attacks on their modesty.

[10] Specifically, the International Agreement of 18 May 1904 for the Suppression of White Slave Traffic, the International Convention of 4 May 1910 for the Suppression of White Slave Traffic, the International Convention of 30 September 1921 for the Suppression of Traffic in Women and Children, and the International Convention of 11 October 1933 for the Suppression of the Traffic in Women of Full Age.

[11] Nevertheless, on 3 May 1958 the European Council had to issue its "Recommandation 161 (3 mai 1958) de l'Assemblée consultative demandant une *ratification rapide de la Convention internationale du 2 décembre 1949 pour la répression et l'abolition de la traite des êtres humains et de l'exploitation de la prostitution"*, given the small number of countries that had signed up at the time.

[12] Published in the Spanish Official Gazette (*Boletín Oficial del Estado, BOE*) no. 230, 25 September 1962.

[13] The European Parliament *Resolution on Trafficking in Human Beings* (a4-0326/95) adopted on 18 January 1996 (OJEC 32/88, 5.2.1996), supplemented by ACP-EU *Resolution on the Specific Role of Women in Development Co-operation and* Assembly *Trafficking in Women*, adopted in Windhoek (Namibia) (ref: ACP-EU 1674/96/fin).

[14] In this resolution, human trafficking was described as "the illegal act that directly or indirectly favours the entry or permanence of a citizen from a third country, for the purpose of their exploitation, using deception or any other kind of constriction or abuse of a situation of vulnerability or of administrative illegality".

harmonise the different responses to these phenomenon. However, they failed to reduce or slow down its incidence.

These decisions resulted in the materialisation in our legal system of the lines of action established by the UN Protocols on the traffic of human beings and against illegal trafficking of migrants by land, sea or air, within the implementation framework of the Convention against Transnational Organised Crime. A direct result of its transposition into the Spanish criminal law system was the amendment of Article 318 bis, introduced by Spanish Organic Law 4/2000 through Spanish Organic Law 11/2003, which regulates offences against the rights of foreign citizens.

Specifically, Spain's representative signed the *UN Protocol to Prevent, Suppress and Punish Trafficking in Persons Supplementing the UN Convention of 12 December 2000 Against Transnational Organised Crime* on 13 December 2000, through the ratification instrument published in the Spanish Official Gazette (*Boletín Oficial del Estado, BOE*) on 10 December 2003.

Spain did not signed the *Council of Europe Convention on Action against Trafficking in Human Beings of May 2005*[15] until 9 July 2008[16] although the objectives established in the Convention constitute the focal point for the latest reforms in Spanish Law, particularly within the areas of criminal procedure and social policy.

Current regulations: Criminal punishment as the only means of intervention[17]

The Spanish Organic Law 11/2003 completed the transposition of Framework Decisions mentioned and Directive 2002/90 into Spanish law, modifying Article 318 bis of the Spanish Criminal Code on human trafficking. The 2003 reform was the last of a series of amendments summarized hereunder [3]:

a) The old Spanish Criminal Code (in force until 1995) regulated two different offences concerning human trafficking: trafficking in workers and cooperation in illegal immigration (Article 499 bis 3º) as well as human trafficking for the purpose of prostitution (Article 442 bis a). Regarding trafficking in women, in its section dedicated to "crimes against honesty", the old Criminal Code provided for crimes of cooperation in prostitution activities and the recruitment of women for prostitution, may it be either inside or outside the Spanish territory (Article 452 bis a, which sanctioned such offences with a punishment of 4 to 6 years and a fine). The facilitation, promotion or

[15] The *Council of Europe Convention* has been signed by 43 European countries and ratified by 26 (including Austria, 12 October 2008, Belgium, 4 April 2009, Denmark, 5 September 2006, France, 1 January 2008, Norway, 17 January 2008, Poland, 17 November 2008, Portugal, 27 February 2008, Turkey, 27 May 2009, United Kingdom, 17 December 2008). Greece, Germany, Ireland, Italy, Netherlands, Sweden and Switzerland has signed but not ratified the Convention.

[16] The *Council of Europe Convention* has recently been ratified on 2 April 2009 (Instrumento de Ratificación del Convenio del Consejo de Europa sobre la lucha contra la trata de seres humanos (Convenio nº 197 del Consejo de Europa), hecho en Varsovia el 16 de mayo de 2006, Boletín Oficial del Estado, núm. 219 de jueves de 10 de septiembre de 2009, Sección I, 76.453 and seq).

[17] It is the author's opinion that the Spanish legislation in trafficking in human beings is overly punitive as it clearly exceeds the European framework and the existing international instruments regarding human trafficking. The punitive disproportion of the Spanish Criminal Code is due to the inner intentions of the legislator who pretends to control administrative or supra-individual interests (immigration and economical flows) and does not aim at protecting the fundamental rights of the victims. It is high time to highlight the wrong understanding of this multidimensional phenomenon and thus this overview about the evolution of Spanish legislation and the current situation pretends to point out those legal elements which make the Spanish rule forgets its principle goal: the protection and assistance to the victims.

recruitment of women under 18 years were considered criminal activities in any case (according to Article 452 bis b, which provided a prison term of 2 to 6 years and a fine).

b) The new Criminal Code of 1995 kept, among "crimes against workers", the offence of trafficking for illegal labor (Articles 312, 313.1 and 2) and included, as an additional offence, the employment of aliens without a work permit (Article 312.2), punishable with a prison term of 6 months to 3 years and a fine. On the other hand, the new code reduced the scope of the offences related to prostitution to those consisting in the cooperation and facilitation of underage prostitution (Article 187.1), punishable with a prison term of 1 to 4 years and a fine. Regarding adults, these conducts were only considered criminal in cases of forced prostitution, by means of coercion, deception or abuse of authority or of a position of need or vulnerability, cases punishable by a prison term of 2 to 4 years and a fine. If the victim of forced prostitution was underage, the prison term ranged from 4 to 8 years. Proxenetism, understood as the cooperation or facilitation of non-forced prostitution, was decriminalized.

c) Another general reform took place in the part of the code dedicated to the "offences against sexual freedom" in 1999, on the basis of Article 29 of the Treaty of the European Union and the Joint Action of February 24th 1997 to combat trafficking in human beings and sexual exploitation of children. The *Organic Law* 11/1999 introduced a new subparagraph in Article 188, related to the forced prostitution of adults using violence, deception or abuse in a situation of need, criminalizing the facilitation of the arrival, stay or exit of persons from or into the Spanish territory for the purpose of sexual exploitation. If the victim was under 18 years old or especially vulnerable, the code provided for imprisonment of 4 to 8 years. Regarding adults, these conducts would only be considered offences when it is forced prostitution, using violence, coercion, deception, or abuse in a situation of need or vulnerability of the victim.

d) In 2000, a new law regulating the legal status of aliens, the *Ley Orgánica* 4/2000 of January 11th, introduced in the Spanish Criminal Code (Article 318 bis) a general offence of human trafficking for both trafficking for purposes of labor and sexual exploitation and human smuggling. The introduction of this offence was explicitly inspired by the conclusions of the Tampere European Council in 1999, and also by the two 2001 Protocols of the United Nations Convention against Transnational Organized Crime on trafficking in persons and the smuggling of migrants, respectively. The new regulation was also a result of the Joint Action 98/733/JAI, which defined what was meant by criminal organization and stated that participating in a criminal organization in any of the Member States of the European Union should be considered an aggravating circumstance.

The 2000 reform on the offence of human trafficking makes provision for treating equally both human trafficking (*tráfico de personas*) and smuggling (*inmigración ilegal*). Any activity involving trafficking in persons is punishable by prison terms of 6 months to 3 years and fine. If the trafficking serves profit purposes, or uses violence, coercion, deception or abuse of a situation of need, the prison term provided raises up to a range from 2 to 4 years and a fine. If, when committing the crime, the person's life, health or physical integrity is at risk or the victim is underage, the punishment is increased up to a range from 3 to 4 years and fine. Should these actions be committed by a member of a criminal organization, the penalty provided for the basic offence is a prison term of 3 to 6 years, and of 4 to 8 years for the aggravated

offences and fine. This same act added these illicit associations promoting illegal trafficking in persons stipulated in Article 515 into the list of "illicit associations".

Also in 2000, Spain proceeded to sign the UN Protocol to prevent, suppress and punish trafficking in persons supplementing the UN Convention of 12 December 2000 against transnational organized crime. The ratification instrument was officially published in December 10th, 2003. This same year, the *Ley Orgánica* 11/2003, transposing the Framework Decisions 2002/629, 2000/946 and the Directive 2002/90, reformulated Article 318 bis, analyzed hereafter. However, and despite a certain social pressure, the Spanish government did not yet ratified the Council of Europe Convention until 2009 as it was mentioned above. In late 2007, the Spanish Parliament enacted the *Ley Orgánica* 13/2007 of November 19th, for the extraterritorial prosecution of human trafficking and clandestine immigration; human trafficking and smuggling entered then the limited catalogue of offences that are subject to universal prosecution by the Spanish authorities[18], as we will analyze more closely later in this contribution.

Undoubtedly, the most remarkable element of the Spanish legislation is, as provided by Article 318 bis, that it criminalizes the facilitation of illegal immigration (human smuggling) and human trafficking all together, without any clear distinction concerning the penalties to impose. The criminal law framework is so severe that it provides for both modalities of conduct. Therefore, there is no different legislative framework for smuggling as foreseen in the Framework Decisions 2002/629 and 2000/946.

Article 318 bis 2 provides for an aggravated punishment only for cases of trafficking for purposes of sexual exploitation. Trafficking for purposes of labor exploitation is punished under the basic provision of article 318 bis. Penalties for both modalities might be aggravated in case of aggravating circumstances listed in Article 318 bis 3 (for profit purposes, violence, coercion).

Terminologically, the Spanish Criminal Code does not use the terms contained in the Framework Decisions. Article 318 bis does not mention "human trafficking" or "trafficking in persons" but "illegal trafficking" and "clandestine immigration"[19].

Complementarily, the Criminal Code provides punishment for several conducts related to prostitution, differentiating between adult and underage victims. Concerning prostitution of adults, the entry into force of the Spanish Criminal Code of 1995 implied the abandonment of the abolitionist system inspired by the United Nations Convention of 1950. Instead of that system, sanctions shall apply to those cases where the person is determined to engage in prostitution by means of violence, coercion, deception or abuse of a situation of need or vulnerability of the victim. Nevertheless, and due to the pressure exercised by some feminist collectives that defended that this regulation did not respect the –never denounced- obligations acquired under the United Nations Convention, the 2003 reform provided again for punishment of whoever profits from other person exploitation, even with the victim's consent.

[18] Namely: genocide, terrorism, piracy and airship hijacking, currency counterfeit, prostitution and corruption of minors and disable persons, illegal trafficking on drugs, trafficking in persons or illegal immigration and female genital mutilation. *Vid*. Article 23.4 *Ley Orgánica del Poder Judicial* and the recent amending act *Ley Orgánica 13/2007, de 19 de noviembre, para la persecución extraterritorial del tráfico ilegal o la inmigración clandestina de personas.*

[19] A critical approach to Article 318 bis of the Criminal Code in De León Villalba, F.J. (2003). *Tráfico de personas e inmigración ilegal*. Valencia: Tirant lo Blanch, 244 and seq.

However, there is an academic discussion –but not a supporting case-law yet- on the definition of "exploitation". The most common scholarly interpretations are clearly restrictive, indicating that Article 188 would at most provide punishment for the "sex entrepreneurs", who organizes the provision of sexual services.

Both for adult and underage victims, it is considered an aggravated offence to engage in these activities taking advantage of the condition of public servant.

Clients of prostitution services are not criminally liable. In relation to underage victims, any kind of promotion or cooperation to prostitution is punishable. According to some case -law, this can imply the incrimination of clients, when, because they are paying the victim, they are inducing the latter to engage in prostitution activities. Obviously, the offences related to prostitution do not exclude the concurrence of crimes of sexual aggression or abuses.

The *Ley* 11/1999 amending the Spanish Criminal Code in matters of sexual freedom and integrity responded to the harmonizing requirements of the Joint Action of February 24th, 1997, fully anticipating the elements that only later would be required by Articles 2, 3, 4 and 5 of the Framework Decision of December 22nd, 2003.

Thus, regarding sexual exploitation of minors and the exercise of prostitution, and after the amendments of arts.187 and 188 of the Criminal Code introduced by the *Ley* 11/1999, coercing a child to engage in prostitution, exploitation, profiteering from it or any other conduct facilitating these activities are punishable by prison terms ranking from 4 to 6 years, in addition to any other penalty prescribed for crimes of sexual aggression or abuses against minors. There are also aggravated penalties provided for offences committed taking advantage of the condition of public servant, the consent or forgiveness of the minor being irrelevant (Article 191 CC). The omission by tutors or legal guardians to adopt the necessary measures to avoid the engagement of the minor in such activities is explicitly punishable under the legal code. Disabled people are equally considered.

Articles 186 and 189 contain an extended and specific regulation of activities related to the offering, production, distribution, transmission or exhibition of "child pornography", as well as to its facilitation by any other means, like acquisition or the simple possession of this material. They also provide for aggravated penalties when the victim is under 13 years old, when the case is especially degrading or humiliating or where children or disabled people suffering sexual or physical violence are involved, as well as when it is carried out by members of an organization or association, or by tutors or legal guardians of the victim.

As for activities involving sexual abuse of minors, Articles 180 and 182 of the Spanish Criminal Code criminalize abuse and sexual aggression, including any conduct implying force, coercion, threat or any other form of violence or coercion, as well as the abuse of a situation of trust, authority or influence over the minor or disabled person. Both articles provide for an aggravated penalty justified by the minority of age or vulnerability of the victim.

The penalties provided for these conducts respect the requirements for effectiveness, proportionality and deterrence. The minimum prison term is of 2 to 3 years for abuse of minors not involving penetration (Article 181.4 CP, in relation to

Article 181.2); of 7 to 10 years if there was penetration (182.2 Spanish Criminal Code); of 12 to 4 years, respectively, for sexual aggression, depending on whether there is penetration or not (Article 180 CC). There is a minimum term of 1 to 2 years, respectively, in cases of child prostitution not involving or involving violence, coercion or deception, abuse of a situation of superiority, need or vulnerability. As for child pornography, minimum terms in prison oscillate between 1 and 4 years.

If we take into account that sentencing most of these conducts will require to acknowledge the concurrence of several offences, the final penalty imposed will normally be over 5 years of prison. In any case, the punitive limits for sexual aggression of minors are between 7 and 10 years if there is no penetration, and 13 to 15 years if there is. For sexual abuses without penetration, the maximum term is 3 years and up to 10 years if there is penetration. Penalties provided for prostitution of minors, in the aggravated cases, can increase up to 6 years and 8 years in cases where pornography is involved. Article 192 of the Spanish Criminal Code completes these dispositions providing for an aggravation for those subjects legally or *de facto* in charge of the child or the mentally incapacitated person who engage in such conducts as perpetrator or collaborator. This Article also allows the Judge to impose the especial punishment of incapacitation to exercise the rights of authority of parents, guardianship or tutorship, employment or public office, or certain jobs or professions, up to 6 years.

However, one of the main *lacunae* of the Spanish legislation is the non-existence of a systematic catalog of the rights and duties of the victim, besides the lack of transposition of Framework Decision of March 15th, 2001. Though, many of its provisions can be considered already included in the procedural legislation, the current situation is insufficient and the víctim and his families do not rely on sufficient support on the part of the state organs.

In this sense, the Law of Criminal Procedure (*Ley de Enjuiciamiento Criminal*, hereafter LECr) enables victims to file criminal charges in all these cases. In the Spanish procedural system, the prosecutor is not the only party entitled to bring criminal charges. On the other hand, there are many provisions specifically aimed at protecting victims of domestic violence (Article 544 bis, 544 ter) and measures to protect witnesses who are under 18 years old (arts. 455, 448, 707 713, LECr).

The diverse procedural provisions of the LECr extend the victim's rights. This appears clearly in the proceedings for "accelerated trials" provided for certain kinds of offences (Article 795 ss. LECr), introduced by *Ley* 38/2002 and *Ley Orgánica* 8/2002. In this particular case, we can say that the victim holds an autonomous relevance in the criminal procedure.

As a complement of this law, the *Ley Orgánica 19*/1994 for the protection of witnesses and experts in criminal proceedings and the *Ley Orgánica* 1/1996 of free legal assistance complete the legal Framework on the matter.

The contents of the Directive of 2004 are basically the same as that of Article 59 of the *Ley Orgánica* 4/2000[20] that regulates the rights and liberties of foreigners in

[20] On the interpretation of Article 59 in the context of the protection of the victim, vid. García Arán, M. (2006). Introducción. In M. García Arán, *Trata de personas y explotación sexual* (pp. 296 et seq). Granada: Edt. Comares.

Spain and their integration, and especially with the *Real Decreto* 2393/2004, the norm that explicitly transposes the Directive [21][4]. The aforementioned Article establishes the non-administrative liability and non-deportability of those aliens in illegal situation who were victims, witnesses or affected by illegal trafficking for purposes of labor or sexual exploitation, when they accepted to report the misconduct and collaborate in the investigation, providing essential details or participating as a witness, if necessary, during the proceedings.

This law also enables the alien who cooperated to return to his country of origin or to obtain the work and residence permit. Such permit may be revoked, should the holder stop collaborating with the police or judicial authorities[22]. This opportunity of collaborating is also available for those aliens who are subject to a final or pending order of deportation. If this order is enforced, it is possible to authorize the return to Spain during the time necessary to take part in the proceedings.

The Spanish legislation also provides for the possibility to issue temporary permits of residence for humanitarian reasons[23]. This is applicable to aliens who were victims of offences against the rights of workers, of domestic violence or any other offence involving the aggravating circumstance of racist motivation[24]. Strangely enough, it does not apply to victims of sexual exploitation.

Criminally punishable conduct

In overall terms human trafficking includes several types of conduct: transfer or introduction of persons in third countries with a view to their labour exploitation; recruitment of women to work as prostitutes and in other sexual exploitation activities, to carry out domestic activities and even for the purposes of marriage, normally illegally; and, finally, trafficking in children for the purposes of satisfying the sexual inclinations of a significant sector of the population in many countries or the desire for parenthood of many families, as well as for organ trafficking and, in a subsidiary manner, for them to bear the hardships inherent in certain jobs in certain sectors[25].

These practices constitute one of the most express forms of violation of a person's basic fundamental rights, which is why in most cases they are criminally prosecuted in Spain. Notwithstanding this and taking as a reference point the treatment of illegal immigration (smuggling) in Articles 1 and 2, Directive 2002/90 of 28 of November and the concept of human trafficking contained in Article 1, Decision 2002/629 [5], one can say that the Spanish Criminal Code (CC) differentiates between

[21] See De León Villalba, F.J. (2003). *Tráfico de personas e inmigración ilegal*. Valencia: Tirant lo Blanch, 397 and seq.

[22] Article 117 *Real Decreto* 2393/2004.
[23] Article 54.4 *Real Decreto* 2393/2004.
[24] Article 22.4 Criminal Code.
[25] It is not consider as a criminally punishable conduct when the alien tries to enter or to stay illegally in the Spanish territory. This conduct is only relevant in terms of administrative liability which can determine illegal aliens' deportation. However, Germany (*Gesetz über den Aufenthal, die Erwerbstätigkeit und lie Integration von Ausländern im Bundesgebiet*), Belgium (*Loi de 15 décembre 1980 sur l'acceès au territoire, le séjour, l'établissemente et l'éloignement des étrangeres*), France (*Ordonnance nº 2004-1248 du 24 novembre 2004 relative á la partie legislative du code de l'entrée et du séjour des ñetrangeres et du droit d'asile*, modified through the *Loi nº 2006-911 du 24 juliet 2006 relative à l'immigration et à l'integration*), Portugal (*Decreto-Lei nº 244/98, de 8 de agosto, regulamenta a entrada, permanência, saída e afastamento de estrangeiros do territorio nacional*, modified in 2001, 2003 and 2006), and Switzerland (*Loi fedérale sur les étrangeres du 16 décembre 2005*) provide for prison and fine when the alien enters or stays illegally in their territories.

these only in terms of concept[26]. On the other hand the aforementioned Article 318 bis, far from making any differentiation through its legal-penal treatment, applies the same punitive treatment to both, without taking into consideration the evaluation differences encompassed in each of the terms in terms of the effects on the criminally relevant legal rights. In fact, the conduct of illegal immigration is punished under Article 54.1.b of Organic Law 4/2000, which regulates the rights and liberties of foreigners in Spain and their social integration.

The punitive treatment could be classified as follows, depending on the affected legal rights:

1. Offences against the rights of foreign citizens (Article 318 bis, CC). Including the following offences:

- human trafficking and illegal immigration;

- human trafficking and illegal immigration, aggravated by its sexual purpose;

- human trafficking and illegal immigration, with or without a sexual purpose, when there is also intention to obtain profit, to use violence, intimidation or deception, or abuse of power or the special vulnerability of the victim, or when the victim is a minor or disabled, or when the life, health or integrity of the person is endangered;

- human trafficking and illegal immigration, with or without a sexual purpose, carried out by an authority, an agent of the authority or a public servant;

- human trafficking and illegal immigration, carried out by a member of an organisation or association, even of a transitory nature, dedicated to carrying out such activities.

2. Offences against the rights of workers (Articles 312 and 313, CC)

- illegal trafficking of labour;

- recruitment of persons or getting them to leave their jobs by offering them deceptive or false employment or working conditions

- clandestine promotion or encouragement of immigration of workers

- conduct that determines or favours emigration to another country by deception or simulated employment.

3. Offence of illegal adoption (Article 221, CC)

- handing over a minor for financial compensation for adoption purposes.

Apart from this criminal classification, trafficking conduct affects a large number of other legal rights, such as the right to life, physical integrity, sexual freedom, freedom of movement, moral integrity, honour, etc., which are included in the

[26] For an analysis of the transposition and implementation as well as the impact of the Framework Decision of 19 July 2002 on trafficking on human beings in twelve selected Member States, see the result of the following team work performed by academics and researchers members of the European Criminal Law Academic Network: De León Villalba, F.J., Maroto Calatayud, M. & Rodríguez Arias, M.A (2009). Spanish legislation on combating trafficking in human beings. In A. Weyembergh, & V. Santamaría, *The evaluation of European Criminal law.* The example of the Framework Decision on combating trafficking in human beings (315-335). Belgium: Institud D'etudes Europeennes, Université de Bruxelles.

classification of offences that are normally applicable together with the aforementioned through the application of the rules of concurrence of regulations or concurrence of offences.

The main penalty for all of the aforementioned conduct is imprisonment (Article 36 and following, CC). In some cases the prison sentence is accompanied by a fine, under the day/quota system (Article 50 and following, CC), as well as disqualification (Article 40 and following, CC).

In relation to additional penalties (Article 54 and following, CC) that accompany almost all the described offences and which may be applied optionally by the judicial body, these are as follows:

- loss of the right to live in certain places or to visit them;
- prohibition to go near the victim or those of his/her family or other persons that the judicial body may determine;
- prohibition to communicate with the victim or with those of his/her family or other persons that the judicial body may determine;
- suspension from employment or public office
- special disqualification to exercise the right to vote

Likewise, the judicial body may dictate, in most of the aforementioned cases, the measures contained in Article 129, CC, regarding legal entities:

- closure of the company, its premises or establishments, either temporarily or definitively;
- judicial winding up of the company, association or foundation;
- suspension of the activities of the company, enterprise, foundation or association;
- prohibition to carry out any future activities, commercial operations or business of the same kind as those involved in committing the offence;
- judicial supervision of the company to safeguard the rights of workers or creditors.

Article 318 bis of the Spanish Criminal Code

Special mention deserves the article 318 bis of the Spanish Criminal Code was reformed by the Ley 11/2003 and, as a result, the main contents of the Framework Decision of July 19th, 2002, were introduced. The norm came into force on October 1st, 2003.

The main amendments made by this law were:

- the introduction of the "purposes of sexual exploitation" as an aggravating element (318 bis 1). It was not autonomously present before, although it was punishable through Article 188.2 (prostitution) creating some sentencing problems due to the concurrence of crimes. This last reform eliminated Article 188.2.

-the increase of the penalties. Before the reform, the basic crime was punishable by a prison term of 6 months to 3 years and a fine. After it, the Criminal Code provides a penalty for the same conduct of 4 to 8 years. The increase of the penalties is also remarkable for the aggravated crimes. In the old version of Article 318 bis the conducts

defined in Article 1.1 of the framework decision were already included as aggravating elements. The penalties were prison terms ranging from 2 to 4 years or fine, and now, according to the new drafting they can reach a term of 8 to 12 years. This is, undoubtedly, the most characteristic aspect of the reform.

-The introduction of criminal liability of legal persons in accordance with the general rules set forth in Article 129 of the Spanish Criminal Code.

Definition of crime

There are several issues to tackle regarding the formal conformity of the Spanish definition of crimes.

In the first place, with regard to the material actions concerned, all conducts described (that is, recruitment, transportation, transfer, harbouring and subsequent reception of a person, including exchange or transfer of control over that person) are covered by Article 318 bis 1 of the Spanish Criminal Code. It provides punishment for all those who, directly or indirectly, promote aid or facilitate the illegal trafficking of persons or illegal immigration from, or in transit to Spain or any other country of the European Union[27].

The "means" referred to in Article 1, § 1, a) to c) of the framework decision (coercion, deceit, abuse of authority, etc.) are present in section 3 of 318 bis of the Spanish Criminal Code as the constituent elements of aggravated smuggling and aggravated trafficking for sexual exploitation These aggravated penalties, depending on the case, will range from 6 to 8 years (for aggravated smuggling) and 7 ½ to 10 years (for aggravated trafficking for the purpose of sexual exploitation). As for Section 4, it provides aggravated punishment for those who commit the crime taking advantage of their condition of public servant. There is no explicit mention in these sections, however, to "payments or benefits given or received to achieve the consent of a person having control over another person" (mean referred to in Article 1, § 1, d) of the framework decision).

The exploitation purposes referred to in Article 1, § 1 of the Framework Decision are fully covered. Article 318 bis 2 specifically criminalizes trafficking for the purposes of sexual exploitation as an aggravated offence. The concept of sexual exploitation includes all methods of submission, servitude or forced provision of sexual services, including prostitution and pornography. As for the conducts of trafficking for the purposes of labor exploitation, Article 318 does not mention them explicitly; they are sanctioned under the basic offence. The judge can take the purpose of exploitation into consideration for the sentencing. Trafficking in Spanish or European workers for the purpose of labor exploitation is punishable under Article 312.1 of the Spanish Criminal Code, which provides notably lower penalties ranging from 2 to 5 years of prison. In both cases, if the alien is forced to accept labor conditions inferior to those legally granted to them, a penalty from 2 to 5 years of prison is also applicable (Art. 312.2 Spanish Criminal Code)[28]. These last would be the cases of exploitation referred

[27] This last reference to "any other country of the European Union" was added as recently as November 2007, together with a similar change in article 313.1 of the Criminal Code.

[28] France, Germany and Portugal have adopted a classical perspective on the conduct of trafficking in human beings so as this offence does not constitute an autonomous crime but in the way it is connected with sexual or labor exploitation. On the contrary, Italy also offers as the Spanish Criminal Code an autonomous conception of human trafficking.

to in the proposal of Franco Fratini for a Council Directive on a common set of rights for third-country workers legally residing in a Member State (COM(2007)0638).

The victim's consent to such situation does not prevent the Judge from taking into consideration the purposes of sexual exploitation in the sentencing (Article 188.1 of the Spanish Criminal Code) or the concurrence of illegal trafficking. We should not forget that, besides personal legal interests, such as health, physical integrity or life, Article 318 protects a "supra-individual" interest as well. When the victim is younger than 18 years, the aggravation of the penalty is imposed even if none of the means described in Article 1.1. of the Framework Decision was used. All conducts of instigation, cooperation and complicity, as well as attempted offences are punishable under the general rules of Articles 28, 29 and 16 of the Spanish Criminal Code.

Penalties provided

Penalties provided under Article 318 bis configure a severe punitive framework, similar to that provided for the more serious offences punishable under the Criminal Code. The penalties for the basic offence stipulated in Article 318 bis (a prison term of 4 to 8 years) are similar to those set forth for grievous bodily injury. Spanish legal scholars are highly critical of such a punitive disproportion.

Is it worth analyzing more closely the penalties set forth in Article 318 bis:

- Article 318 bis 1: conducts of facilitation of illegal trafficking and clandestine immigration: prison terms of 4 to 8 years. Note that the definitional verbs used (to promote, to facilitate) confirm the assumption of a unitary concept of the perpetrator, and allow to punish as direct commission this kind of conducts that for other crimes would constitute participation or complicity and would therefore imply a less severe penalty.

- Article 318 bis 2: when conducts of "trafficking or clandestine immigration" are committed for the purposes of sexual exploitation, the prison terms provided range from 5 to 10 years. Recent case-law of the Supreme Court indicates that if the same person engaged in trafficking activities commits, after that, offences of sexual exploitation, it is possible to apply the especial rules for the concurrence of crimes. However, in these cases the aggravating element of profit purpose provided in Article 318 bis 2 would not be applicable, since it is considered inherent in and subsumed under the offence of forced prostitution[29].

- Article 318 bis 3: The concurrence of any of the aggravating circumstances of Article 318 bis 3, coincident with the means described in Article 1.1 of the FD, results in aggravated cases of the two previous conducts. This implies that, for example, if the victim's life was at risk while committing the offence described in Article 318, the prison term stipulated will be of 6 to 8 years, and of 7.5 to 10 years in the case of Section 2[30].

[29] See judgements of the Supreme Court *STS* 484/2007, May 29th 2007; *STS* 1080/2006, November 2nd 2006; *STS* 1087/2006, November 10th 2006.

[30] Germany, Italy, Portugal and France recognize as an aggravating circumstance if the victim is underage but they do not consider as an aggravating when the victim's life or integrity have been at risk.

Besides the means stipulated in Article 1.1 of the FD, Article 318 bis also considers as an aggravating element the existence of a profit purpose. As a consequence, facilitating illegal immigration for a profit purpose results in a punishment of 6 to 8 years. The "basic crime" therefore seems to be aimed at punishing the cases of trafficking without a profit purpose, that would potentially include cases of cooperation with illegal immigration on solidarity grounds.

- Article 318 bis 4: If the perpetrators are members of an organization, the penalties increase in comparison with those of the previous conducts, and even more so in case they are leaders or persons in charge of such an organization[31]. If this aggravating circumstance is present in the already aggravated offences of the previous sections, the prison terms set forth range from 8 to 12 (for aggravated smuggling) and 10 to 15 (for aggravated trafficking for sexual exploitation). When the perpetrator is a "leader, administrator or person in charge of the organization", the minimum term increases to 10 and 12 ½ years respectively to each aggravated offence. The judge can also decide to increase the prison term up to from 12 to 18 years for the first offence and 15 to 22,5 for the second.

A peculiarity of the Spanish transposition explaining how severe the punishments are is that the means of commission referred to in Article 1.1 of the FD have been transposed as aggravating circumstances added to the basic offence (318.1). This basic offence already includes the penalty stipulated in the FD for the aggravated cases (maximum penalty of no less than eight years imprisonment). The aggravating circumstances referred to in Article 3 FD and the means used are considered equivalent, and only the participation in a criminal organization (Article 3d) is autonomously included as an especially aggravating element.

The penalties are so severe that the 2003 reform introduced the possibility for "the Tribunal taking into account the seriousness of the facts and their circumstances, the conditions of the perpetrator and his objectives" to reduce the penalty. However, this Section only affects "basic crimes", and therefore it does not mitigate the severity of punishment provided for the aggravated cases.

Finally, we have to remark that there is no definition of vulnerable victim in the Spanish transposition. The case-law understands vulnerability in a very broad way: "every person that due to his age, physical, psychological, personal or social conditions is situated in a position of inferiority or weakness to the perpetrator".

Unresolved lacunae

Despite the considerable improvement the implementation of the Framework Decision implied, there are still some unresolved lacunae in the Spanish legislation on illegal immigration. In this regard, these following are worth to mention:

- unity of treatment and lack of conceptual and punitive differentiation between human trafficking (trata de personas) and people smuggling (immigración ilegal)[32].

[31] Germany, Italy, Portugal, France, Belgium and The Netherlands consider as an aggravating circumstance if the perpetrator belongs to a criminal organization.

[32] France, Germany, Italy, Portugal, Belgium, the Netherlands and Switzerland distinguish the two offences in their Criminal Code and in France, Germany, Italy, Portugal, Belgium and Switzerland the definition of *smuggling* is found in the laws on aliens and, in this sense, entering and staying illegally in their territories is provided with prison and fine.

Nevertheless, some Spanish legal scholars consider that it is not convenient to differentiate these two concepts completely. It is a highly controversial issue in the legal academic debate if criminal law should intervene in cases of mere smuggling; this is, when there is only support or aid in crossing the border or staying in the country. For some scholars the State's interest in controlling the migratory flow is not a sufficiently relevant basis to justify criminal law regulation. Therefore, they propose the creation of a new offence against "moral integrity" consisting of trafficking activities understood as "trafficking with people from, in transit or to Spain, abusing their conditions of inferiority or cultural, social or economic vulnerability".

- the definition of "perpetrator" is too broad and does not allow differentiating between collaboration and commission.

- the notable severity of penalties is noticeable as well. This is in part due to the fact that, in most cases, the aggravating circumstance of Article 318 bis 5 applies (providing a prison sentence of 8 to 12 years), since the very nature of the trafficking behavior normally requires some kind of organization able to facilitate the crossing of the border. In fact, it is difficult to guess the range of cases to which Article 318 bis 1 is to be applied in practice (basic offence without reference to the organization requirement, with a penalty of 4 to 8 years), beyond really exceptional cases that usually involve humanitarian motivations for cooperating with immigrants.

- identifying the concept of victim with the concept of foreign citizen[33]. In this regard, we should remember that the norm enshrined in Article 318 bis was introduced in the Spanish Criminal Code by the Ley Orgánica 4/2000, and that the Title XV bis which regulates the aforementioned article is entitled "Offences against the rights of foreign citizens". A strict interpretation of the text makes us exclude from the scope of this offence those cases in which the victim is Spanish or national of a member state of the European Union; this position was confirmed by the Supreme Court in its Judgment 625/2007 of July 2nd. In these cases, the applicable article would be Article 312 of the Spanish Criminal Code.

- the possibility to combine the application of the offences foreseen in Article 318 with those resulting from the final damage caused by the behavior and normally referred to individual protected legal interests: these other offences are commonly homicide, injuries, sexual aggression or abuse, etc. Several problems arise from the potential application of different provisions for the same or closely related acts. For example, it is incongruent to sanction more severely the conduct of trafficking with purposes of sexual exploitation (as an aggravated offence) than the concurrence of human trafficking and subsequent prostitution (two different offences that are sentenced under the rules of concurrence of crimes provided for cases in which one of the offences is considered to be instrumental for the commission of the other one: the so-called concurso medial). Such a situation, especially taking into account the importance of the "legal interests" protected, may be solved by accumulating the penalties provided for the two offences (concurso real) instead of applying this other rule of concurrence (concurso medial).

However, the penalties provided are not overly severe (prison terms to 1 to 5 years) and this is why it can be said that the interest being protected is that of the State's, immigration flows.

[33] This identification of the victim as an immigrant can be also found in the majority of the European countries which shows the wrong understanding of the trafficking in human beings as any national can also be trafficked.

- finally, as for the aggravating circumstances provided in Article 318 bis, it is possible to notice the lack of an adequate regulation of the mens rea element of "for-profit purpose" (ánimo de lucro) in terms of proportionality. Its existence equates with the use of violence despite the obviously different implications, and it makes difficult to consider adequately if there is a single applicable aggravating circumstance or several.

About the Criminal liability of legal persons

In the Spanish legal system, legal persons can be punished in three different ways:

- through administrative sanctions, normally fines;
- through the criminal sanctions provided in Article 129 of the Criminal Code[34] [6].
- through the fines stipulated when formal or informal managers commit crime acting on behalf of the company (Article 31 of the Criminal Code)

Thus, regarding illegal trafficking, legal persons can be responsible in two different ways:

- criminally responsible under Section 5 of Article 318 bis providing for the application of the security measures of Article 129 of the Criminal Code, when the trafficking or illegal immigration is achieved by an organization or illicit association dedicated to that kind of activities, even temporarily.
- administratively liable under the Ley 4/2000, January 11th, on the rights and liberties of aliens in Spain and their social integration, that provided for administrative sanctions consisting in fines amounting up to 60.000 €.

Conducts sanctionable under this act related to Framework Decision 2002/946 and Directive 2002/90 are:

- instigation to and assistance for clandestine immigration, when it is carried out for profit purposes or as a part of an organization[35];
-transportation of aliens without checking the validity of their passports, identity or travel documents.
- hiring foreign workers without the previous authorization that is necessary.

Finally, it has to be said that in cases of sexual exploitation the Article of the Spanish Criminal Code that criminalizes activities related to prostitution36 also stipulates the possibility to apply the security measures for legal persons of Article 129 when the offences have been committed by a member or an organization, society or association engaged to such activities.

It is important to notice that the measures for legal persons provided under Article 129 are hardly applied in practice. Administrative sanctions have a much greater

[34] The sanctions for legal persons set forth in Article 129 are: closure of the company, its offices or headquarters, for a period of up to 5 years; judicial winding-up order of the society, association or foundation; stop of the activities of the society, company, foundation or association for a period of up to 5 years; incapacitation to engage in the future in business activities or commercial operation related to those involved in the commission, cover-up or facilitation of the offence; judicial supervision of the company in order to safeguard the rights of workers.
[35] Article 54.1.2 b Criminal Code.
[36] Article 189.

practical relevance. The non application of criminal measures has to do with the deficient regulation provided under Article 129, but also with the traditional relevance of the principle *societas delinquere non potest* in the Spanish law. Criminal responsibility of legal persons in Spain is still rare and exceptional. It is the opposite situation in administrative law.

The project of reform of the Spanish Criminal Code, currently in parliamentary procedure provides a much more detailed regulation for the criminal liability of legal persons.

Jurisdiction and prosecution

As indispensable element in the pursuit of such conducts the Organic Law 3/2003, that regulates the European Arrest warrant gathers, in his art. 9, all the conducts here described as crimes that make them putting possible in execution.

On the other hand, the Organic Law on the Judicial Branch (*Ley Orgánica del Poder Judicial*) establishes the limits of the Spanish jurisdiction in its Article 23, according to the following principles:

- principle of territoriality.
- principle of active personality, that allows the trial of offences committed outside the Spanish territory by Spanish nationals or aliens who obtained the Spanish nationality after having committed the crime, when certain requirements concur (the double incrimination requisite).
- protective principle allowing for the trial of Spanish nationals or aliens who committed crimes affecting interests of the State.
- universal jurisdiction principle regarding, for example, genocide and other international crimes, including offences related to prostitution, corruption of minors or incapacitated persons and, since November 2007, those regarding human trafficking and smuggling.

It is important to notice that criminal actions in the Spanish criminal procedure have a public nature, and, therefore, can be brought by any person, according to Articles 100 and seq. of the Law of Criminal Procedure. It is normally the Prosecutor Office the one who initiates the proceedings after having been informed by the police officers.

Before the reform of late 2007, in accordance with these criteria, all conducts of human trafficking committed in the Spanish territory, as well as those committed outside Spain by Spanish nationals, fell under the Spanish jurisdiction. Consequently, the frequent cases of boats arrested or rescued outside the Spanish territorial sea remained initially outside the scope of the Spanish jurisdiction, unless they were involved in the commission of offences of "prostitution" or "corruption of minors and incapacitated persons"[37].

The Supreme Court, nevertheless, on the grounds of the integration of several international conventions ratified by Spain, especially the Protocol against the Smuggling of Migrants by Land, Sea and Air and the Geneva Convention on the Law of the Sea and others, held a very broad interpretation of the Spanish jurisdiction in these

[37] Article 23.4 LOPJ. See also the introduction to Ley 13/2007.

particular cases. It ultimately justified the intervention of the Spanish Security forces and the reviewing role of the Spanish jurisdictional agencies[38].

In order to definitely clarify this situation and fulfill the provisions of Article 6 of the Framework Decision, the Spanish government initiated a legislative project for the reform of the above-mentioned article 23 of the Organic Law of the Judicial Branch. It would establish the Spanish jurisdictional competence on the cases committed by Spanish nationals or aliens outside Spain that were considered constitutive of offences of human trafficking or human smuggling. This resulted in the enactment of the already mentioned *Ley* 13/2007, for the extraterritorial prosecution of human trafficking and smuggling, a norm that extended the scope of Article 318 bis to all those cases where the immigrants tried to reach not Spain but the territory of any other member State of the European Union.

An obvious problem of this latest reform is precisely that explicit limitation of jurisdiction to those cases somehow related to the territory of EU member states. In a legislative framework supposed to be aimed at protecting the basic rights of the victims before any other consideration or interest (like the control of migratory flows), the exclusion of those cases where the immigrants are led to a non-EU-country (cases where the potential harm to the rights of the migrants is essentially identical), does not seem to be especially coherent.

Traffic and minors' sexual exploitation

Sexual exploitation, as the ultimate aim of trafficking in minors, is regulated both in the Article 318 bis already considered, and in later amendments in Organic Law 1/1966 of 15 January, on the Legal Protection of Minors; Organic Law 11/1999 of 30 April, which modified Title VIII of Book II of the Criminal Code, and Organic Law 11/2003 of 29 September, on specific measures related to citizens' safety, domestic violence and social integration of foreigners, which introduced into our legal system the most important aspects of the 1997 Joint Action in the fight against human trafficking and sexual exploitation of minors and the Framework Decision of 22 December regarding the fight against the sexual exploitation of minors and child pornography.

The mandate to adopt the measures contained in both texts, together with the real situation defined by the increase in such conduct, particularly in terms of the demand for child pornography via the new information technologies, have constituted sufficient reason for Spanish legislators to provide the criminal justice system with instruments to act that emphatically reflect the content of the aforementioned texts. This has been possible, thanks undoubtedly to the notable contribution of the *Council Framework Decision of 19 July 2002 on combating trafficking in human beings*, which partially repealed the *Joint action of 24 February 1997,* completing it in some aspects, and which has also been reflected in our criminal law.

In relation to the sexual exploitation of minors and, specifically, the activity of prostitution, following the amendments of Articles 187 and 188 of the Criminal Code (CC) introduced by Organic Law 11/1999, the offences of coercing a child to engage in prostitution, exploitation, profiteering from it or any other conduct facilitating these

[38] See Judgment of the Supreme Court STS 582/2007, June 21st.

activities have been duly included, without prejudice to the penalties that correspond to sexual aggression or abuses against minors.

Additionally, aggravated penalties have been established for cases in which such activities are carried out taking advantage of a position of authority, or as an agent of the authority or as a public servant, all of this regardless of whether or not the minor consented and without the exoneration of the offended party or their legal representative foregoing any liability whatsoever. (Article 191 CC). It explicitly includes the failure of tutors or legal guardians to adopt the necessary measures to avoid the engagement of the minor in such activities.

For the purposes of the application of the aforementioned conduct, the Spanish Criminal Code grants the same protection to those declared incompetent or disabled, given their greater degree of vulnerability.

Articles 186 and 189 of the Criminal Code deal extensively and specifically with the conducts of offering, producing, distributing, transmitting or exhibiting child pornography, or of offering or facilitating child pornography by any other means, as well as the acquisition or possession of child pornography, whether for own use or use by others.

There are also provisions for aggravated penalties in cases in which any of these activities are carried out with children under the age of thirteen or when the conducts are particularly degrading or humiliating or when children or disabled persons are the victims of physical or sexual violence or the offenders belong to an organisation or association dedicated to such activities or they are the persons responsible for the minors or disabled persons.

In relation to sexual activities involving minors, Articles 180 and 182 of the Criminal Code deal with sexual abuse or sexual aggression, including any conduct that involves force, coercion, threats or any other form of violence or intimidation, including abuse of a position of trust, authority or power over the minor or disabled person. Both articles introduce a special punitive consideration through increased penalties due to the victim's young age and vulnerability.

Pursuant to Article 16, CC, all the aforementioned conducts may be punished as an attempt to commit the corresponding offence, provided they did not achieve the intended result. Likewise, the regulation of induction as a form of commission of the offence or accomplice thereto in Articles 28 and 29 of the aforementioned text, respectively, establishes penalties in relation to all the indicated offences.

As regards the penalties for these conducts, Spanish law gives sufficiently covers the requirements for effectiveness, proportionality and deterrence. In the case of abuse of minors without penetration, the minimum prison term is two to three years (Art. 181.4, CC) and six years in the case of penetration. (Art. 182.2, CC); in the case of sexual aggression, and depending on whether or not there was penetration, the prison term is twelve to four years, respectively (Art. 180, CC). A minimum sentence of one to two years, respectively, is set for cases of prostitution of a minor, depending on the perception of any violence, coercion or deception, or abuse of a situation of superiority, need or vulnerability. Finally, the minimum prison terms for child pornography range from one to four years.

Taking into account that when judging most of these conducts, the sentence will have to consider the existence of several offences due to the real or intended concurrence of offences, the penalties imposed usually exceed five years. In any case, the punitive limits for sexual aggression of minors are between seven to ten years if there was no penetration, and thirteen to fifteen years if there was. The maximum term for sexual abuse without penetration is three years and up to ten years if there was penetration.

Prostitution of minors can carry penalties of up to six years imprisonment, in aggravated cases, and up to eight years in cases related to pornography.

Article 192 of the Spanish Criminal Code supplements these provisions, considering aggravating circumstances when any individuals legally or de facto in charge of a child or a disabled person engages in such conduct as the perpetrator or accomplice. At the same time, it enables the judge or court to impose a sentence of special disqualification to exercise the rights of paternal authority, guardianship, tutorship, public employment or public office, or to exercise the profession or office for a period of up to 6 years.

Assistance to victims

Assistance to victims of these offences and their families, pursuant to Framework Decision 2001/220/JAI, and the appropriate protection of witnesses that provide information, constitutes another of the essential elements in the prosecution of human trafficking.

But as we already anticipated, except for Section 3 of Article 318 bis of the Spanish Criminal Code, that provides for the aggravated character of those cases where the victim is younger than 18 years of age or incapacitated, there is no concrete normative development of the particularities of minors as victims of human trafficking.

In relation to the provisions of Article 7.3 of the FD, the norms on the protection of victims previously referred to provided for several procedural measures of children's protection.

Concerning the measures of assistance referred to in Article 7.3, social services have to provide the minor victims with adequate treatments and, as far as possible, promote their social integration, as well as the adoption of the set of measures necessary to protect them as participants in criminal proceedings.

As for the fulfillment of this objective as well as for the general promotion of the best practices in treating minors, it is important to remark the strong criticisms received in June 2002 from the Committee on the Rights of the Child. They criticized the role of the Spanish authorities in relation to the situation and rights of children of certain ethnic and social groups, especially in relation to immigrant children alone in irregular situation. The criticism is based on the detection of some cases of police mistreatment, forced deportation to the country of origin, the impossibility to obtain residence permissions and the lack of places in reception centers and children's hospitals.

After these criticisms, the Spanish government proceeded to an intense activity of legislative reform, resulting mainly in the Real Decreto 2393/2004 December 30. This piece of legislation regulated the measures of protection and assistance of minors and the role of the prosecutor in such cases. Under Sections 1, 4 and 5 of Article 92, the interest of the child will prevail and can constitute the grounds to deny the deportation to the country of origin and to concede a residence permit.

However, as for human trafficking for the purposes of sexual exploitation, we must remark the different *lacunae* highlighted by the recent observations reported by the Committee on the Rights of Children with regard to the report submitted by Spain. They are based on the first paragraph of Article 12 of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. In Sections 6, 7, 9, 11, 12 and 33 and following, the report[39] points out the need to review the framework of cooperation in assistance issues between the central administration and the autonomous communities (regional states) of Spain. This framework should help to strengthen the interdisciplinary assistance; to improve the legal representation of children victims as well as the application of the Second National Action Plan on the matter, and to adopt other measures such as the establishment of a central database to keep records of violations and habilitate the evaluation and review of the enforcement of the policies on the subject.

The judicial practice in prosecuting the trafficking of adults has increasingly demonstrated over the last few years the existence of a series of deficiencies that, in turn, have been taken into account by the Executive in order to provide the legal system with the instruments to resolve these deficiencies, by reforming the laws that regulate the legal status of victims and, in general of foreign citizens in Spain, which in turn is translating into greater collaboration from victims in the criminal proceedings against these kinds of crimes.

The participation of the victim is of vital importance in these criminal procedures, as without it the praxis demonstrates that, in most cases, these conducts go unpunished. The importance of the victims' declaration in order to dismantle organised crime networks and achieve successful prosecutions is linked to the difficulty in obtaining valid incriminating testimonies. Criminal organisations therefore use methods designed to silence those who fall into their networks.

On many occasions, victims of illegal trafficking are, at the same time, liable for an administrative infringement that could lead to their repatriation or deportation from the country, as occurs with a foreigner who enters the country illegally, which explains their reluctance to make statements against those who facilitated their entry into the destination or transit country. However, more important than this is the fear generated by the way these networks operate.

For any years, impunity has been the common denominator in a large number of these cases, in both the administrative and criminal systems, and the main cause of this has been the deportation of the victims of the crimes. By the time the judicial proceedings against the heads or members of the organisations commenced, the main incriminating evidence - the women forced into prostitution or workers subject to illegal conditions - had disappeared, since the administrative procedure to deport the illegal

[39] Doc. ONU CRC/C/OPSC/ESP/CO/1 October 17 2007.

foreigners to their country of origin were carried out while the formalities of the criminal proceedings were in progress. In cases in which the women were not deported, the victim had to fend for herself, returning once again, in many cases, to the control of the same or another mafia, as a result of which she changed her original statement or she simply disappeared.

And the truth of the matter is that, although some progress has been made in acknowledging specific victim status, there is still a long way to go, as well as the complete adoption of the measures described in the 2001 Framework Decision and the 2004 Directive, in order to guarantee the goals they set.

In this field, Organic Law 1994 of 23 December on witness protection and experts in criminal cases, and Organic Law 4/2000 of 11 January, which regulates the rights and liberties of foreigners in Spain and their social integration, both include plans for several of the indicated measures, together with the general legislation derived from the Spanish Criminal Procedures Act (*Ley de Enjuiciemiento Civil*).

Therefore, together with the procedural rules that assure due respect for the victim, guaranteeing both personal dignity and their rights and interests in the process, including that of free legal assistance (Art. 2 of Organic Law 1/1996 of 10 January regulating free legal assistance), Article 59 of Organic Law 4/2000 regulates the treatment of illegal foreigners who are victims, injured parties or witnesses of human trafficking, illegal immigration or trafficking of labour or of exploitation in prostitution taking advantage of their situation of need. This law establishes the possibility of exemption from the administrative liability and avoidance of deportation if the party in question reports the perpetrators or accomplices of the trafficking to the competent authorities or co-operates or collaborates with the police authorities responsible for illegal alien matters, providing essential data or testifying, as appropriate, in the corresponding proceedings against the perpetrators.

Once they have been exempted from administrative liability, they may be given the choice of returning to their country of origin or staying and residing in Spain (with a temporary permit for between three months and five years, pursuant to Art. 31 of the aforementioned law), as well as authorisation to work and assistance in their social integration. Granting of this documentation may be revoked if the holder, whilst the procedure in which he or she is the victim, injured party or witness is in process, ceases to co-operate or collaborate with the police or judicial authorities (Art. 117, Royal Decree 2393/2004 which deals with the regulation of Organic Law 4/2000 of 11 January on the rights and liberties of foreigners in Spain and their social integration).

In the case of a foreigner for whom a deportation order has been issued and who appears in a criminal procedure as victim, injured party or witness and is considered essential to proceed with the case, the government authority may suspend the deportation or, if it had already been carried out, authorise the return of the foreigner to Spain for the time required to participate in the necessary procedures.

The aforementioned law on witness protection therefore establishes a series of measures designed to protect the identity of witnesses (art. 2), under police protection, and in exceptional cases, to provide new identity documents and the financial means to change the place of residence or work.

Finally, the law includes the granting of residency permits to victims without the need to make it conditional on participation in the procedure. There is therefore the possibility of granting temporary residency permits due to extraordinary circumstances

and, specifically, for the humanitarian reasons set out in Art. 31 of the Organic Law on the rights and liberties of foreigners in Spain and their social integration, which refers to RD 2393/2004 of 30 December. Article 45.4 of this decree establishes a temporary residency permit (one year, renewable, Art. 45.6), for foreign victims of the offences classified in Articles 311 to 314, related to the rights of workers, as well as offences in which there are the aggravating circumstances established in Art. 22.4 (racist or discriminatory motives) or offences of family violence, provided that a sentence has been dictated for these offences. This temporary residency permit includes authorisation to work (Art. 45.7 of the RD). In relation to conducts of trafficking, the victims of labour exploitation would be eligible for this permit, but not victims subject to sexual exploitation. In all cases, it should be noted that a sentence is required, which means that the measure could be implemented too late.

Conclusions: Still a long way to go

The criminalization of trafficking is nowadays an essential for the protection of the fundamental rights of the victims of these offences. An area of freedom, security and justice in which protection of fundamental rights is a central goal cannot overlook such harmful conducts.

In addition to all previously highlighted issues, the system of aggravating elements of the concerned Framework Decision and its transposition in national legal orders has underlined that criminal law intervention must aim at protecting fundamental rights, and not at controlling administrative or supra-individual interests as it occurs with illegal immigration. We cannot deny that, at least symbolically, and at internal level, the Framework Decision has greatly contributed to raising the awareness about human trafficking as a human rights problem [7] affecting seriously personal dignity [8].

However, this approach is not as present as it should be in the European legislation on illegal immigration. Such issue is tackled by the Directive 2000/90 and the Framework Decisions 2002/629 and 2002/946 as a simple problem of borders control, and not the humanitarian and human rights issue that it actually represents. The peculiarities of illegal immigration in Spain, where we witness every year thousands of deaths in the Straits of Gibraltar or the Atlantic Ocean, highlight the existence of cases of illegal immigration as alarming and tragic as those of human trafficking, even if the purposes of exploitation are not present [9].

As for human trafficking, especially for purposes of sexual exploitation [10], European legal orders already presented a remarkable degree of harmonization as a consequence of the United Nations conventions. The Framework Decisions on human trafficking and illegal immigration have facilitated the task of tackling jointly such relevant criminal phenomena that, due to its novelty and the political and sociological peculiarities of every country, could have been regulated from very diverse perspectives.

The Framework Decision of 19 July 2002 on combating trafficking in human beings has become one of the elements of a very complex legislative policy that extends its ramifications over many social aspects, a policy developed in Spain from the 90s onwards, and especially after the entry into force of the Law on the Rights and liberties

of aliens. The Framework Decision has not been perceived as an alien body in the Spanish legislative background, since criminalization was already an important element of it.

Although it is obvious that human rights policy cannot exclusively or mostly depend on criminal law, the Spanish criminal policy of the last years is generally characterized by a very punitive tendency. The increasing severity cannot be only attributed to the transposition of the European legislation. The Spanish legislators frequently explain the growing severity brought with the reforms as a requirement of the European Union or of the international law on the matter. However, analyzing the EU Framework Decisions and Directives, it is easy to notice that Spain has gone far beyond the literal text of those instruments. This is the reason why it is extremely important to create, within the systems of legislative evaluation, a way of controlling not only the transposition "lacks", but also its "excesses". Otherwise, we run the risk of turning European criminal law into a scapegoat for the mistakes of national contemporary criminal policy. After all, neither the penalties nor the deficiencies of the Spanish regulation on the matter are attributable to "the European legislator" but to the national one, especially regarding immigration and illegal residence issues.

It is difficult to indicate if, thanks to the Framework Decision 2002/629 there has been an enhancement of penal and judicial cooperation with the other members of the Union. Besides, the most important part of cooperation is that affecting third countries, countries that often, and especially regarding immigration issues, have poorly effective, if not corrupt, judicial and police systems. In fact, the foreign policy of the Spanish government consists in granting economic aid in exchange for the implementation of due controls on illegal immigration and human trafficking in the country of origin.

From a strictly legal approach, the abandonment of the principle of double incrimination would be acceptable if there is a common approach to the criminalization of the conducts. If understood as the consequence of the principle of legality in international cooperation in criminal law matters, the existence of a common reference, a "euro-crime" [11], would contribute to achieve a degree of legal certainty similar to that granted by the principle of double incrimination. Undoubtedly, harmonization, through Framework Decisions or Directives, increases mutual trust.

Nevertheless, there is still a considerable diversity, especially regarding mere illegal immigration. For example, the Spanish legal system does not provide criminal punishment for it, but only administrative sanctions, differing from the option adopted by other member states. On the other hand, the mere facilitation of the illegal residence or immigration without profit purposes is in many countries considered an administrative violation, while in others, like Spain, it constitutes a crime. Therefore, Spain could issue a European arrest warrant based on such conduct to countries where the same conduct is not considered as a criminal offence.

On the other hand, and despite the remarkable progress, the legislation still has to resolve many problems in order to provide the criminal justice system with suitable response capabilities. The severity of the penalties imposed under the legislation transposed into our legal system has excessively strengthened the general prevention to the detriment of the needs of special prevention. The treatment of the problem should

have been supplemented with measures outside criminal law in order to prevent human trafficking more effectively.

It is therefore essential to create victim profiles and identify the areas of recruitment of victims. In general the recruitment networks operate in defined territorial areas and take their victims to their area of influence, which are also specific. This, together with knowledge of the type of persons that are trafficked could enable the creation of action plans for recruitment points. In particular, such actions could provide these points with information on trafficking networks and how they operate once the person has been introduced into their structure.

Once the traffic has occurred the action model continues to provide little guarantee for the rights of the victim and, above all, for their future. On one hand, no action is taken in relation to the problems that, in most cases of human trafficking, led to the victimisation in the first place (poverty, lack of personal resources, family problems, situation of vulnerability, etc.). On the other hand, the power of the international trafficking networks gives rise to the need to create true victim protection and social integration systems at international level and especially in the case of traffic in women for the purposes of sexual exploitation..

However, the lack of a global vision of the phenomenon and of a suitable social-cultural context has generated a partial and unrealistic perspective, very different to the real core of the problem, the fundamental rights of the person[40]. Specifically, even today there is still a lack of understanding of the problem of sexual slavery due to the existence of a partial approach to the problems involved. Physical abuse, inhuman working conditions, the lack of labour guarantees and other elements that give a biased vision of trafficking are viewed in isolation and which, at the end of the day, generates little appreciation of the victimisation of trafficked women, particularly of those who furthermore, come from foreign and lesser developed countries.

This constitutes a phenomenon that has traditionally been approached through a prostitution perspective, based on a motivational analysis in which the accepted premise is the existence of intrinsic violence and which, in most cases, eludes an objective evaluation of the personal reasons of the woman at the time of making the decision, when it is voluntary, or of her induction into sexual exploitation, when it is forced.

The trafficking in women for their exploitation cannot therefore be observed from a one way perspective, but must be looked at through binocular lenses so that both the financial interests generated and the connotations involved (usually sexual), are clearly understood. Trafficking in women can only be understood in terms of power, both financial and sexual, within a framework in which gender relations have always been conditioned by male supremacy and, only now, can this dual aspect be seen through greater awareness about female sexual slavery as a further exponent of the degree of disenfranchisement in the development and application of the fundamental rights of women.

A system such as the Spanish system, which has a harsh punishment component but little support for victims, and which lacks the resources to promote their social

[40] It is then the author's opinion that the trafficking in human beings should be replaced in the Spanish Criminal Code among those offences against people's dignity. I have always been critical about the punitive excess of Spanish legislation on this phenomenon and defended that new treatment since the first Spanish monograph on human trafficking I wrote back in 2003 as it is the ultimate aim of the legislation in trafficking in human beings, the protection of the fundamental rights of the victim, especially dignity. Following this path, a new Criminal Code is today in parliamentary procedure to be passed (Spanish Congress Gazette, Boletín del Congreso de los Diputados, Ser. A, number 52-1, 27 September 2009) containing the treatment I early supported and ratified today.

integration, and specifically, to promote human rights, is a system destined to perpetuate the problem, allowing thousands of people to be reduced to mere objects that are bought and sold.

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