

The “Law and Order” Approach in Spanish Criminal Justice Policy

José Luis Díez Ripollés*.

I. The breakdown of Spanish liberal approach to crime.

The recent evolution of the Spanish criminal justice policy¹ has disturbed the majority of criminal law academics and actors in the criminal justice system, and it has given rise to a sense of disapproval and rejection of what is summarily called “punitive populism”².

My thesis is that criminal law experts’ inability to understand what is going on in Spain and many other industrialised western countries is closely related to the analytical perspective in which they are rooted. More precisely, they are deeply committed to a model of criminal intervention which gives priority to the recognition of the constitutional and legal safeguards due to any citizen.

This liberal approach, no matter how appropriate we consider it to balance effective social control with respect for civil liberties, is no longer a useful analytical tool for understanding the recent trends in criminal justice policy.

Let me first summarize the main characteristics of the liberal approach:

First to mention is the widespread recognition of the limited efficacy of its tools, that is to say, rules and penalties, to accomplish its goal of preventing serious deviant behaviour. It is generally assumed that only the coordination of all the institutions implicated in the social control around the same objective makes a real modification of social behaviour possible. In other words, criminal laws alone do not change criminal behaviour.

Secondly, criminal law should focus on the protection of the most important social goods, and only on the most serious attacks against them, provided that no other more effective means are available. This principle of “restricted intervention” undermines efforts to launch ideological or moral campaigns involving criminal law and relying on the deterrent effects of sentencing.

Another characteristic of this approach is the profound mistrust in the capability of the whole criminal justice system to meet the legal requirements of a balanced deployment of power while enforcing the law by public authorities. It explains that the protection of citizens’ rights, including those of an alleged or convicted criminal, deserve similar consideration to the protection of social goods against unlawful attacks.

Finally, it is inherent in this model the assumption of principled limits to the use of criminal sanctions: The humanitarian principle bars the use of certain sanctions, no matter the seriousness of crime, as incompatible with human dignity; among them, death penalty, life imprisonment, torture. The ‘just deserts’ principle makes sure that the seriousness of the penalty

* Professor of Criminal Law. Head of the Andalusian Institute of Criminology. University of Málaga (Spain).

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¹ Cornerstones of this recent legal evolution are the reforms of the Spanish Penal Code which took place through the 7/2003 Organic Act (hereinafter LO, which in Spanish stands for Organic Law) published on the Official Gazette (hereinafter BOE, which in Spanish stands for Official Bulletin of the State) n. 156 1/7/2003, LO. 11/2003 –BOE n. 234 30/9/2003- and 15/2003 –BOE n. 283 26/11/2003-. A number of other legal reforms, before and after these remarkable reforms, followed the same pattern.

² See, among many others, Cancio Meliá. “Derecho penal del enemigo”. 2003. Thomson/Cívitas; Díez Ripollés. “El nuevo modelo penal de la seguridad ciudadana”. Revista electrónica de ciencia penal y criminología”. 2004. <http://criminet.ugr.es/recpc> ; Muñoz Conde. “El nuevo derecho penal autoritario”, in Losano/Muñoz Conde. “El derecho ante la globalización y el terrorismo”. 2004. v. Humboldt Stiftung-Tirant lo blanch; Zúñiga Rodríguez. “Viejas y nuevas tendencias políticocriminales en las legislaciones penales”, in Berdugo Gómez de la Torre/Sanz Mulas. “Derecho penal de la democracia vs. seguridad pública”. 2005. Comares; Larrauri Pijoan. “Populismo punitivo... y como resistirlo”. 2006. Jueces para la democracia. n. 55.

corresponds with the seriousness of the offence. And the rehabilitation principle demands that a society imposes sanctions which are able to promote social rehabilitation of the criminal³.

Nevertheless, all these features of the liberal approach are now being questioned in broad social, political, even legal circles. Therefore an adequate understanding of what is going on in criminal justice policy should avoid making use of this analytical model.

II. In search of a diagnosis.

Now, I would like to describe a number of social and legal developments taking place in Spain, as an example of what is happening in other western European countries⁴. They will hopefully allow us to identify some key factors which illustrate the actual development occurring in criminal justice policy. For the accomplishment of this analysis I am in debt to Garland, whose reflections about the recent criminal justice policy evolution in the Anglo-Saxon countries have inspired me to a great extent⁵.

The leading role of common criminality.

After some decades waiting for a real transformation of criminal law, so that crimes of the powerful might receive the attention it merits according to the social damages they cause⁶, law enforcement still follows the traditional pattern, focused on common criminals. Accordingly, there is a widespread feeling of resignation among the public, in view of the obstacles that have emerged in the management of the investigation and prosecution of white-collar crime in the same strict way common crime is usually handled.

It seems that the powerful have taken clear advantage of the ubiquitous safeguards of the liberal approach to avoid the responsibility for their crimes. Furthermore, these types of criminal cases, which are often used in a partisan way by political agents, cast doubt on whether they address real criminal issues or simply form part of a political campaign.

More surprising still is the attitude of a good number of academics, whose worries about the fashionable topic of criminal law expansion are focused on the proliferation of white-collar crimes, but instead of paying attention to the continuous toughening of sanctions against common crime. Some even argue against the use of prison penalties for crimes of the powerful, citing arguments about efficiency⁷.

A good Spanish example is the shortening, by up to six months, of the time the prosecutor has available to file charges against any suspect, except for special cases authorised by the attorney-general, a very convenient measure to hinder most of the complex investigations within the

³ See a more detailed description of the essential characteristics of the liberal approach in: Díez Ripollés. "La racionalidad de las leyes penales". 2003. Trotta. pp. 109-164.

⁴ A comprehensive review of the recent criminal law decision-making policy in eleven Western countries can be found in Díez Ripollés-Prieto del Pino-Soto Navarro eds. "La política legislativa penal en Occidente. Una perspectiva comparada". 2005. Tirant.

⁵ See Garland. "The culture of control". 2001. The University of Chicago Press.

⁶ This debate has been closely connected in Europe with the new requirements that the so-called "risk society" poses in favour of a more active involvement of the criminal law in the prevention of crimes of the powerful. These crimes are often related with a massive use of modern technological tools available in the financial and industrial complex and in the computer and telecommunications services. The German author Ulrich Beck first introduced the concept in the sociological literature –see Beck. "Risikogesellschaft. Auf dem Weg in eine andere Moderne" 1986. Suhrkamp-. For the discussion in Spain see, among others, Mendoza Buergo. "El derecho penal en la sociedad del riesgo". 2001. Cívitas; Silva Sánchez. "La expansión del derecho penal". 2001. 2nd edition. Cívitas; Gracia Martín. "Prolegómenos para la lucha por la modernización y expansión del derecho penal y para la crítica del discurso de la resistencia". 2003. Tirant, Díez Ripollés. "De la sociedad del riesgo a la seguridad ciudadana: un debate desenfocado". 2005. Revista electrónica de ciencia penal y criminología. <http://criminet.ugr.es/recpc>

⁷ See Hassemer. "Viejo y nuevo derecho penal", in Hassemer. "Persona, mundo y sociedad". 1999. Tirant pp. 67-72; Silva Sánchez. op. cit. pp. 149-162.

socioeconomic field⁸.

Salience of both concern and fear of crime.

Concern and fear of crime have grown in intensity and have widened into social sectors until now rather detached from these emotions.

In Spain concern and fear about crime are currently located among the fifth and sixth most important problems or worries which affect daily life, although specific media campaigns, focused on crime problems and fuelled by political interests, were able to put both issues second or third in the list from the middle of the year 2001 to the year end 2003⁹.

Generalization of these feelings gives rise to varied consequences: On the one hand, opinion that crime issues are not adequately tackled becomes widespread, which implies that law enforcement institutions are seen as incompetent in confronting the problem. On the other hand, sympathetic attitudes to common criminals disappear; labels such as sexual predator, paedophile, serial killer, incorrigible criminal or relentless delinquent become usual.

As a result, the aim of reducing social anxiety about crime takes the place of effective prevention of crime at the moment of shaping criminal justice decisions¹⁰.

Victims' interests reinforcement.

For a long time the attention paid to victims' demands was a part of the broader requirements of the public interest. It meant that the public interest in preventing social disorders and the damage caused by crime, and not immediate compensation of crime victims, led criminal justice decisions¹¹. In any case, victims' interests were not seen as opposed to the defendants' interests in a due process context.

Currently victims' demands are the cornerstone of the criminal-law making debate, despite whatever social needs may exist. A role inversion has taken place: Victims' interests serve to identify the social needs in the prevention of crime. And a zero-sum game characterises the relationship between victim and criminal: Any benefit for the victim should be a cost for the criminal, and any victim cost means a benefit for the criminal.

One Spanish case, among others, involves the various important reforms in juvenile justice which have come into force due to the strong pressure exerted by victims groups. They involve an enhancement of closed measures (detention) for juveniles, and the reintroduction of opportunity for victims to file and maintain charges as part of the overall procedure¹².

⁸ See L. 50/1981 art. 5.2 paragraph four –BOE n. 11, 13/1/1982-, amended by L.14/2003 –BOE n. 126, 27/5/2003-. Most recently the in-office socialist government modified the provision in order to make possible for the prosecutor to file charges against drug-trafficking, corruption and organized up to twelve months since the start of the investigation, not to mention special duly authorized cases. See L. 24/2007 –BOE n. 243, 10/10/2007-.

⁹ See CIS. "Barómetros mensuales". 2001-2003, 2007. www.cis.es/cis/opencm/ES/2_barometros/

¹⁰ A resolute option for including the prevention of both concern and fear of crime as autonomous objectives of the EU crime prevention policy can be found in Comisión de las Comunidades europeas. "Comunicación de la Comisión al Consejo y al Parlamento europeo sobre prevención de la delincuencia en la Unión europea". COM (2004). 165 final pp. 5-6.

¹¹ This way of thinking has occasionally led to the statement of the "victim neutralization principle" –*Prinzip der Neutralisierung des Opfers*- by liberal authors such as Hassemer. "Einführung in die Grundlagen des Strafrechts". 1981. pp. 67-71.

¹² In this sense, decisive reforms of the original LO. 5/2000 –BOE n. 11, 13/1/2000-, which rules juvenile justice, may be considered the LO. 7/2000 –BOE. n. 307, 23/12/2000-, which was passed before the original LO. 5/2000 came into force, LO. 15/2003 –BOE. n. 283, 26/11/2003, and LO. 8/2006 –BOE. 290, 5/12/2006. The last one implies the amendment of nearly half of its dispositions. An accurate analysis of the Spanish juvenile justice reorientation towards a "law and order" approach can be found in García Pérez. "La introducción del modelo de seguridad ciudadana en la justicia de menores", in Pantoja García ed. "La ley de responsabilidad penal del menor: situación actual". 2006. Cuadernos de derecho judicial; same author. "Prólogo" in "Legislación penal del menor". 2007. pp.11-19.

Populism and politicization.

There is no doubt that experts are discredited: Scholars' theoretical reflections on crime, which were once considered incomprehensible, are now seen by influential social agents as not even worthy of comprehension. The judiciary is perceived as a collective whose decisions often contradict common sense. Prison and probation officers are seen as promoting prisoners' welfare primarily to make their own jobs easier.

Only police experts retain credibility: A recent Spanish survey about the most valued social institutions showed that the three police forces –guardia civil, policía nacional and policía local– were placed by public opinion in the first, third and fifth place, respectively, of a total of fifteen Spanish institutions. The judiciary was placed in the fifteenth and last place¹³.

By contrast, daily mainstream representations of popular experiences and perceptions of crime serve as definitive criteria in confronting the crime phenomenon. Carriers of the necessary knowledge are media, victims' pressure groups and, once and for all, the populace.

Of course, politicians have quickly discovered this change in social mood, and have taken advantage of its voting power: They promote legal reforms immediately connected with popular demands, and devote a lot of effort to make sure that criminal expertise does not interfere in this profitable liaison between politics and populace¹⁴.

This discrediting of expertise is reflected in recent legal decisions: New 2003 Spanish legal reforms pursue to restrict judiciary sentencing discretion, or to prevent prison officers from the use of discretionary rules concerning open prison regime or conditional release¹⁵.

A reassessment of punishment.

To put it plainly, vengeful feelings among both victims and society are considered important.

It brings to the fore two new perspectives about criminals: First of all, rehabilitation is seen by the population as an undeserved favour made to the criminals. And that is so, despite the fact experts now agree that rehabilitation efforts can bring significant benefits. Only programs for drug-addiction, and rehabilitation programs which do not involve a shortening of the prison period, are widely accepted by public opinion.

Added to that, explanations of crime based on socio-structural causes are substituted by rational-choice understandings of criminal behaviour.

As a consequence, recent Spanish penal reforms have involved a very significant toughening of prison penalty provisions:

Since 2003, for the first time in our legal system, prison sentences can effectively keep a person up to 40 years in prison¹⁶. A period of time never reached before, not even during the Franco dictatorship -notwithstanding the then-existing death penalty provision, rarely applied from the

¹³ See the survey carried out by Instituto Opina at the end of 2003 on behalf of newspaper El País, in *Diario El País*, 6/12/2003.

¹⁴ Specially remarkable were the succession of parliamentarian irregularities that prevented the scrutiny of the House of the Representatives in some questionable but popular legal reforms. This was done by submitting those provisions, as last minute amendments, to laws concerning other issues in the second reading chamber, the Senate. That was the case of the introduction of two new paragraphs in the Penal Code, punishing the organization of referenda by autonomous governments about issues related with territorial self-determination of some Spanish regions. See González Cussac. "La contrarreforma penal de 2003. Nueva y vieja política criminal". 2003. *Revista jurídica galega*. pp. 19-21, 32.

¹⁵ See LLOO. 11/2003 –BOE n. 234, 30/9/2003– and 15/2003 –BOE n. 283, 26/11/2003–. About the increasing deprivation of the judiciary and prison officers' discretionary powers in Spanish criminal law, see Maqueda Abreu. "Crítica a la reforma penal anunciada". 2003. *Jueces para la democracia* n. 47. p. 49.

¹⁶ See provisions of arts. 76 –concurrency of crimes– and 78 –"truth in sentencing"– of the Spanish Penal Code, introduced by LO. 7/2003 –BOE n. 156, 1/7/2003–. The original version of 1995 Spanish Penal Code established a maximum of 30 years imprisonment, eligible in any case for good time reductions.

Sixties.

Also the accessibility of open prison regimes, temporary leave or conditional release on parole has become much more difficult¹⁷.

Intermediate sanctions, such as community service, day-fines, and treatment on parole have lost ground to prison¹⁸, while, at the same time, short-time prison penalties, from 3 to 6 months, have been re-established¹⁹.

Last but not least, varied public administrations, from municipal to regional and national levels, though not empowered to criminal law enforcement, overtly pledge to file suits directly against certain types of criminal behaviour, such as domestic violence, sexual assaults...notwithstanding the absence of victim consent²⁰. And, as if that were not enough, some regional governments additionally are intending to make public lists of domestic or sexual criminals²¹.

Absence of mistrust in law enforcement agencies.

I have already pointed out that one of the main goals of a liberal approach is to take into account the public's deeply rooted mistrust in the fair deployment of power by law enforcement agencies.

But such social attitude is rapidly changing, in a manner that has few precedents in modern democratic societies: The public is prepared to give up some legal guarantees for protection of individual rights against abuses from the State, if it is promised a more effective crime prevention and prosecution. In other words, law abiding citizens do not feel concerned about the abuses public authorities can commit while enforcing the law.

This attitudinal change makes legal reforms possible which only a few years ago were unthinkable: Pervasive video surveillance in public spaces, simplified adoption of personal and material precautionary measures, lengthening of preventive detention and lessening of its requirements, fast track criminal procedures...²².

III. Positioning and strategies.

It cannot be denied that these social and legal phenomena, among others, are favouring the consolidation of a "law and order" approach within our countries.

If we want to confront this new approach to criminality, we should first ask ourselves about the *mistakes* that the liberal approach may have made in recent times. In my opinion, the key failure

¹⁷ See, specially, provisions of arts. 36, 78 and 90-93 of the Spanish Penal Code, modified by LO. 7/2003 –BOE n. 156, 1/7/2003-.

¹⁸ An analysis of the implementation of the different types of penalties in the Spanish sentencing system shows an ever increasing role of imprisonment since the 1995 Spanish Penal Code was passed. See Díez Ripollés. "La política criminal en la encrucijada". 2007. B de F. pp. 41-52. Useful references also in Cid Moliné., "The Penitentiary System in Spain". Punishment and Society. n.7 2005.

¹⁹ See art. 36 of Spanish Penal Code, according to the reform introduced by LO 15/2003 -BOE n. 283, 26/11/2003-. Original version of 1995 Spanish penal Code banned any prison penalty of less than six months.

²⁰ See art. 16 of L.5/2001, Prevention of Domestic Violence and Protection of Battered Women Act, which has been enacted by Castilla-La Mancha autonomous government. See also art. 16 ter of L. 22/2002 –amended by L. 12/2003-, passed by the Navarran autonomous government.

²¹ This is the case of Castilla-La Mancha autonomous government. See references in Silva Sánchez. "La expansión del derecho penal. Aspectos de la política criminal en las sociedades posindustriales". 2nd edition. 2001. p. 147. Legal objections derived from LO. 15/1999 –BOE n. 298, 14/12/1999-, on Personal Data Protection, later on restricted the initiative to an annual and public report presented to the autonomous parliament, where all the sentences concerning domestic violence are included unabridged. See art. 11 and Additional Provision of the above mentioned L.5/2001 of Castilla-La Mancha autonomous government.

²² See, respectively, LO. 4/1997 –BOE n. 186, 5/8/1997- on video surveillance, L. 27/2003 –BOE n. 183, 1/8/2003- and LO. 1/2004 –BOE n. 313, 29/12/2004- on measures against gender violence, LO. 13/2003 –BOE n. 257, 27/10/2003- and 15/2003 –BOE n. 283, 26/11/2003- on preventive detention, LO. 8/2002 –BOE n. 258, 28/10/2002- on fast track criminal procedures.

of the liberal approach has been its resistance to rethink some principles, despite new emerging and unavoidable social needs.

In this sense, we can identify three relevant themes:

First of all, we should highlight its disregard for any empirical data that might shed some light on the current reality of criminality, criminals and social control. It is so, because the liberal approach sees itself as firmly established on principles, and it does not feel obliged to question those principles in accordance with the changes society undergoes. But social facts and attitudes are ever-changing, and, ultimately, ignorance about what is really happening in society is costly. A good Spanish example is the case of the enhanced social concern about domestic violence and the populist reforms it has entailed²³.

Secondly, the liberal approach has persistently defended a minimal use of criminal law –principle of restricted intervention-, which has promoted the idea that other types of social intervention should be tried and exhausted before turning to criminal law-making and its implementation. This way of thinking, no matter how relevant this principle certainly is for the configuration of a rational criminal justice policy, has been repeatedly used to systematically disqualify any attempt to expand criminal law to address new problems and conflicts. Nonetheless some legal reforms, previously discarded by academia, have demonstrated a significant impact in reducing emergent types of criminality. This is the case, in Spain, of the ETA sponsored public disorders, also so-called "street terrorism", which have been effectively tackled through a stricter and wider punishment of those behaviours²⁴.

Finally, the usual criminal law discourse focuses predominantly on topics concerning the rational and predictable interpretation of the criminal law. As a result, there is a very well built theory of criminal liability at disposal of the judiciary, but the task of criminal law-making has been disparaged, described pejoratively as nothing more than political activity without scientific status. This incomprehensible, if not irresponsible, stand of criminal law theorists has given rise to a criminal law-making process, which is deprived of any theoretical frame and rational constraints. Under these circumstances the legislative body feels free to undertake any legislative initiatives, solely driven by its electoral interests, taking opportunistic advantage of any event which can offer voting power, and with disregard for the logic of the decision. It is surprisingly overlooked by criminal law scholars how a rational interpretation of the law assumes a rational law-making²⁵.

After recognizing our errors and omissions, maybe we should adopt a *resistance position*, waiting for better times. It is true that we are experiencing all over Europe a decline of the welfare state, which makes it difficult to distinguish between conservative and progressive policies. In this context of exacerbated individualism any structural explanations of criminal behaviour cannot make headway in the face of simplistic rational choice explanations. According to this argument, we can do nothing else but wait until the negative consequences of these antisocial policies become evident and they are reversed.

Nevertheless, even if this is a good characterisation of the current Spanish situation, we should not be too optimistic: There is no sign of an influential political force questioning the law and order approach. The socialist party –PSOE- has embraced the propositions of the so-called "left realism" and, together with its British, Dutch and other European counterparts, has abandoned its

²³ See, besides the above mentioned L. 27/2003 and LO. 1/2004, other reforms of the Spanish Penal Code on domestic violence, through LO. 14/1999 –BOE n. 138, 10/6/1999- and LO. 11/2003 –BOE n. 234, 30/9/2003-.

²⁴ See article 577 of the Spanish Penal Code after its reform by LO. 7/2000 –BOE n. 307, 23/12/2000-. See also arts. 9, 10 and 11 in LO. 5/2000 –BOE n.11, 13/1/2000-, Juvenile Delinquency Act, after its reform by LO. 7/2000 –see above- and by LO. 8/2006 –BOE n. 290, 5/12/2006-.

²⁵ See a resolute attitude for devoting efforts to analyse the ongoing criminal law-making process in our societies as well as to the building of a prescriptive theory for criminal law-making, in Díez Ripollés. "La racionalidad de las leyes penales". op. cit.

traditional policy focused on the social roots of criminal behaviour²⁶. On the contrary, it emphasizes the fight against its symptoms, that is to say, the criminality itself.

In any case, the resistance position has two important tasks to fulfil:

It is necessary to react vigorously against appeasement analyses which are trying to legitimate the law and order approach within theoretical thinking. The so-called "criminal law for enemies", which denies the character of a citizen, and consequently the right to legal safeguards and humanitarian penalties, to any criminal who commit certain types of felonies –terrorism, organised crime, violent crimes, recidivist street crime-, is the best example²⁷.

At the same time we should unmask the standard-bearer of the law and order ideology:

First the media, which has discovered the enormous audience potential of crime news, and does not feel embarrassed about exaggerating the real occurrence of criminality and to misguide social perceptions²⁸.

Secondly, the community itself, whose common-sense opinions have been so celebrated that it has come to the conclusion that solely the "man-in-the-street" "tough on crime" perspective is the right way to confront criminality.

And thirdly, professional politicians, who are not public opinion-makers any more, have become instead primarily carriers of a public opinion which has been shaped apart from their influence, in the shifting sands of social fears and commercial interests. Their efforts to be in power prevent them from placing their beliefs in front of their electoral interests.

In search of explanations for this rather sudden transformation of the criminal justice policy paradigm, I would like to suggest that the law and order ideology is only a curtain which veils a range of *social anxieties* of much more significance:

A key anxiety is connected to the *dismantling of the welfare state*: In Spain, recent labour reforms have transformed 30% of all the jobs into precarious employment –with an average duration below 90 days –, public expenditures on health and education are clearly below the mean of EDCO countries, and families need to invest 50% of their income to afford the mortgage of their property dwelling²⁹.

It means that many aspirations, particularly among young people, are being frustrated. Thus, it is unrealistic to demand from those social sectors directly affected by personal instability and lacking in any social support any understanding of criminal behaviour. On the contrary, criminals are seen as unscrupulous citizens, who try to achieve the same goals orderly citizens pursue, but by taking advantage of their disregard for the law.

And the same time, those social sectors which have been favoured by this socioeconomic

²⁶ A good example is the PSOE's 2004 electoral program on criminal justice policy matters, which eventually gave the socialists the victory in that year's general elections: The chapter devoted to Crime and Security goes along 10 pages. After some general considerations, the first part focuses on solidarity and social cohesion initiatives as a means to counteract social exclusion based criminality; accordingly it describes in less than a page six general proposals aimed at improving social inclusion, none of them minimally specified. The second part deals in four and a half pages the implementation of a new model of policing and it is plenty of precise measures and commitments to make it possible. The rest of the program, devoted to penitentiary policy, mentions ten initiatives, four alone of which deal with the implementation of treatment programs or intermediate sanctions. See, Partido socialista obrero español. "La democracia de los ciudadanos y ciudadanas. La España plural. La España constitucional". 2004.

²⁷ This theoretical trend has in Jakobs its main proponent. See Jakobs. "Bürgerstrafrecht and Feindstrafrecht", in Hsu/Yu-Hsiu eds. "Foundations and Limits of Criminal Law and Criminal Procedure". 2003. In a similar, but more nuanced sense, Silva Sanchez. "La expansión del derecho penal. op. cit.

²⁸ An illustrative analysis of the media influence in Spanish social perceptions of crime can be found in Soto Navarro. "La delincuencia en la agenda mediática". Revista española de investigaciones sociológicas. 2005.

²⁹ See the figures included in a series of reports in "Diario El País", published on 25/1/2004, 26/1/2004, 27/1/2004, 30/1/2004, 31/1/2004, 12/2/2004 (Andalucía edition). See a more detailed approach, corroborating the figures, in Navarro. "El subdesarrollo social de España. Causas y consecuencias". 2006. pp. 25-119.

development look at deviant behaviour as an aftermath of an insufficient adaptation of some groups to the new social reality.

A second concern is related to the current movement towards a *global society*. This passage is felt as a spontaneous phenomenon, which lacks any intentional control by the social agents, and leads society in unpredictable directions. The personal insecurity generated by this movement to globalization is changing some social attitudes:

In the first place, this includes a withdrawal into community identities, which seem to offer a solid ground in the face of an increasingly unrecognizable society. Spain has become 2006 the second migrant receiver country in the world, only behind the USA. Having a 2006 population of 45 millions, Spain received from 1999 to 2006 4.5 millions immigrants³⁰.

Secondly, adherence to a practice of social exclusion which, by means of stigmatization of alien groups, tries to restore lost confidence among individuals and their friends and family.

The law and order approach allows for the appeasement of these uncertainties: It is well founded on values apparently beyond debate, makes a clear distinction between orderly citizens and criminals, advocates severity against outsiders and aliens, and tends to ignore social inequalities.

In saying all this, something is clear: The social and legal debate on criminal justice policy does not move to and fro between positions favouring either more or less guarantees to be respected while law enforcement. The discussion turns instead on the most effective approach to prevent criminality and the fears it produces

Consequently the alternative to the law and order approach is not the liberal approach but a *welfarist approach*: This approach should be in a position to secure more effective crime prevention through socially-based policies than by means of simple repressive policies³¹.

And it is able to do it:

The law and order approach implies an ingenuous, naïve confrontation with common criminality, focused on the symptoms of a wide range of social problems and unable to look further than a short-term analysis³².

The welfarist approach means an expertise-based confrontation with criminality, conscious of its complexity, focused on the social causes which mostly explain it, and prepared to wait for long enough for social reforms to take place.

Notwithstanding, any criminal justice policy approach should recognise that public order is a value in itself, and no long-term social policy can be achieved in a climate of social disorder and ubiquitous violation of law.

But the effectiveness of the welfarist approach must be proven, or at least be made more credible than the alternative, and in doing this you need more than claims about ideological adherence to this approach: You have to document the negative consequences of the law and order approach and its foreseeable, if not current, failure. Of course, it will be also necessary to test any welfarist proposal from the standpoint of its efficacy and effectiveness.

It means that our usual principled discourse must be complemented by considerations and predictions supported by empirical data. That is the only way criminal policy expertise can recover its lost power to convince.

In any case, principles should keep their privileged position:

³⁰ See references in "Segundo anuario de la comunicación del inmigrante en España". www.etnicomunicacion.com, and "Demografía y población. Cifras de población" Instituto nacional de estadística –INE-, www.ine.es/inebase.

³¹ See in the same direction, Beckett-Sasson. "The Politics of Injustice. Crime and Punishment in America". 2nd edition. 2004. pp. 7-8, 45-72, 189-204.

³² On the confrontation between the volitive and the structural point of view about crime, see Scheingold. "The Politics of Street Crime. Criminal Process and Cultural Obsession". 1991. pp. 4-28.

In one respect, because it is still pending a genuine *modernization* of the contents of criminal law: In our industrialised and global societies a sentencing system mainly interested in the repression of common criminality is no longer sustainable. A real expansion of criminal law into the fields of white-collar criminality and crimes from the powerful classes is objectively required.

Should criminal law be oriented to the protection of basic goods for a peaceful and self-determined coexistence, offences against socio-economic conditions, urban planning and environment, public administration, among others, must be at the forefront of criminal law-making and law enforcement. Only when the scope of criminal law addresses any seriously damaging behaviour will we be able to talk about a neutral criminal law guided by general interests³³.

In a second respect, because a *liberal approach* continues to be essential: First of all it is necessary to make clear that the liberal approach is not a criminal policy program, that is to say, it does not intend to prevent criminality. Its proper role is elsewhere: It is established as a bulwark, a trench, against any possible abuse of public authorities when implementing any criminal policy program. And to secure this vital function inside the criminal justice system we, the experts, should devote all our efforts to convince society that abuses can take place in any public body any time. Unfortunately we have sufficient examples of violation of human or due process rights and the consequences they bring with them. So that it is never worth substituting constitutional rights and safeguards with considerations for alleged efficacy or effectiveness.

³³ Spanish references to claims for the expansion of the contents of criminal law to prevent serious social damages caused by white-collar crime and by the so-called "crimes of the powerful" can be found in Díez Ripollés. "De la sociedad del riesgo a la seguridad ciudadana. Un debate desenfocado". op. cit. pp. 7-8; Gracia Martín. "Prolegómenos para la lucha por la modernización y expansión del derecho penal y para la crítica del discurso de resistencia". 2003. passim.