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Elisa García-España
University of Malaga, Spain
elisa@uma.es
ORCID ID: https://orcid.org/0000–0002–3224–6932

Criminal Prosecution and Punishment of Migrants in Spain: A Border Criminology Perspective[1]

Abstract: The exceptional use of criminal law to achieve migration policy objectives has been a reality in Spain since the first Aliens Law was passed in 1985. Since then, academia has warned about the discriminatory and exclusionary effects of this confluence. This paper critically analyses a series of exceptional Spanish criminal and migration policy measures aimed at criminalising certain population movements. The aim is to show the mechanisms used by criminal justice in Spain to manage human mobility from the perspective of border criminology. Among other things, I will analyse (1) 'hot returns' and (2) racial profiling in police stops, both as police reactions. I will also study (3) the expulsion of convicted foreigners and (4) criminal records as a migration control strategy and, finally, the deprivation of liberty for migration control purposes, such as (5) detention centres for migrants and (6) prison release strategies. The aim is to show that Spanish penal policy, taken in a broad sense as all eminently criminal measures and those where criminal law and immigration law converge, has as its main objective to socially render harmless (innocuousation) foreign suspects, convicts and ex-convicts in Spain with different and exceptional measures that push them to the margins of society.
Keywords: border criminology, expulsion, migrants, prison, social exclusion

Introduction

The reaction of countries of destination to migration is currently characterised by the branding of migrants as dangerous,[2] the inclusion of migration policies within

1 Project on Young Foreigners Held in Prisons in Andalusia (P20–00381-R). Financed with funds from the Junta de Andalucía in the competitive call Retos 2021–2023.

2 K.F. Aas, Crimmigrant Bodies and Bona Fide Travelers: Surveillance, Citizenship, and Global Governance, 'Theoretical Criminology' 2011, vol. 15, no. 3, pp. 331–346.

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a security context and the use of coercive means for its repression.[3] Hence the importance for criminology to pay attention to the different mechanisms and public institutions that are responsible for the control of immigration.[4] From the outset, the EU has had as a priority the maximum control of its external borders against the threat of terrorism and irregular immigration, unifying national migration policies based on the tenets of the Maastricht Treaty and the Schengen Convention. Since then, the EU has been creating a body of legislation that is still evolving, harmonising sanctions against certain behaviours related to illegal immigration and against the entry, circulation and stay of illegal migrants.[5]

As a result, Member States have been arming themselves with diverse strategies to control their external borders, as well as using different dynamics to prevent the movement and stay of migrants in an irregular situation within their borders.[6] Thus, public policy on immigration seems to be full of mechanisms for the protection of external borders (rejection at borders and returns) and internal controls (police stops of ethnically profiled individuals, deprivation of liberty at administrative detention centres, administrative expulsions and deportations as a penal substitute).[7] Other elements of public policies of interest, such as those aimed at the integration of the migrant population, have not received as much attention.

In political speeches, the media and the public at large, it is common to refer to migrants as one of two extremes: regular or irregular. This duality allows the discourse to be divided into regular migrants – the good ones – and irregular foreigners – the bad and dangerous ones – which serves as an excuse to justify reactionary, discriminatory, exceptional, and exclusionary public policies.[8]

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3 B.J. Muller, Unsafe at Any Speed? Borders, Mobility and Safe Citizenship, 'Citizenship Studies' 2010, vol. 14, pp. 75–88; P.E. Villegas, Moments of Humiliation, Intimidation, and Implied 'Illegality': Encounters with Immigration Officials at the Border and the Performance of Sovereignty, 'Journal of Ethnic and Migration Studies' 2015, vol. 41, pp. 2357–2375.

4 M. Bosworth, Border Criminology and the Changing Nature of Penal Power, (in:) A. Liebling, S. Maruna, & L. McAra (eds.), The Oxford Handbook of Criminology, Oxford 2017, pp. 373–390.

5 C. Villacampa, Normativa europea y regulación del tráfico de personas en el Código penal español, (in:)

L.R. Ruiz Rodríguez & M.J. Rodríguez Mesa, Inmigración y sistema penal, Valencia 2006, pp. 69–108.

6 J. Brouwer, M. Woude, J. Leun, Border Policing, Procedural Justice and Belonging: Legitimacy of (Cr)immigration Controls in Border Areas, 'The British Journal of Criminology' 2018, vol. 58, no. 3, pp. 624–643.

7 D. Moffette, La regulación de la inmigración a través de la libertad vigilada: El desplazamiento del trabajo fronterizo y la valoración de la deseabilidad en España, 'Diálogo de Seguridad' 2014, vol. 45, no. 3, pp. 262–278; G. Fabinni, Managing Illegality at the Internal Border: Governing Through 'Differential Inclusion' in Italy, 'European Journal of Criminology' 2017, vol. 14, no. 1, pp. 46–62.

8 K.F. Aas, Crimmigrant…, *op. cit.*; B. Caldwell, The Demonization of Criminal Aliens, http://crimmigration.com/2016/10/25/the-demonization-of-criminal-aliens/ (02.11.22).

The exceptional use of criminal law to achieve the aims of migration policy[9] has been a reality in Spain since the approval of its first Immigration Law in 1985. Since then, warnings have been issued about the discriminatory and exclusionary effects of the intersection between criminal law and migration control. This paper includes an analysis, with a critical approach, of a series of exceptional criminal and migration policy measures which aim to criminalise certain population movements.[10] The aim is to show the mechanisms used by the Spanish criminal justice system to manage human mobility from a border criminology perspective.[11]

1. Police reactions in migration control

The police, as an element of criminal control, play a crucial role in the control of external and internal borders. Regarding the former, the police practice of 'hot returns' in the border perimeter of southern Spain avoids judicial intervention that would allow for the defence and protection of migrants attempting to cross the fence, while at the same time making them visible as socially dangerous. Once inside the borders, people with African or South American features are subject to greater police control and are therefore more susceptible to being absorbed by the criminal justice system.

1.1. Hot returns

Melilla and Ceuta are Spanish cities located on the African continent, specifically off the Costa del Sol, and are the legacy of the Spanish protectorate in Morocco. The two cities are the first land border that can be reached by people who need to apply for asylum because they are fleeing war. The border between these Spanish cities and Morocco, a total of 18 km (8 km in Ceuta and 10 km in Melilla), was delimited in 1971 by small barbed-wire fences. From the 1990s onwards, these fences have been raised and made more complex until they have turned into a triple-fence barrier in order to try to prevent jumps from the Moroccan side of the border.

'Hot returns' (*devoluciones en caliente*) are the actions carried out by the Civil Guard – Spanish border control agents – at the border perimeter of the cities of Ceuta and Melilla, consisting of containing people who try to enter the national territory by circumventing the fences, then handing them over in a coercive manner to the Moroccan auxiliary forces without any type of procedure, identification of the person,

9 J. Stumpf, The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power, 'American University Law Review' 2006, vol. 56, no. 2, pp. 367–419.

10 N.A. Wonders, Sitting on The Fence – Spain's Delicate Balance: Bordering, Multiscalar Challenges, and Crimmigration, 'European Journal of Criminology' 2017, vol. 14, no. 1, pp. 7–26.

11 M. Bosworth, A. Liebling, S. Maruna, Border…, *op. cit.*

granting the interested party a hearing, legal assistance or the possibility of judicial control over such action.[12]

This practice, which was not legal until 2015, is characterised by the absence of individualisation of the person on whom the act falls, due to a lack of minimum guarantees typical of any procedure and to violation of the principle that prohibits public authorities from acting arbitrarily. In addition, fundamental principles of international law – such as international protection (i.e. asylum, among others) and the prohibition of collective deportations – are violated.

The practice of hot returns means that it is impossible to detect whether the person being returned with such immediacy is a victim fleeing from traffickers, a minor in need of protection or a person whose circumstances would qualify for international protection. It is not possible to know who is being deported or under what circumstances, since there is no procedure in place to ensure that they are heard and assisted by a lawyer. Moreover, certain inappropriate actions of the Civil Guard could go unnoticed, as they are not subject to judicial control.

However, this practice was legalised by a reform of the Immigration Law in 2015, which set forth a special regime for the cities of Ceuta and Melilla. Thus, the immediate or hot returns of foreigners who enter by circumventing the fences have legal support since then. The tenth additional provision of the Immigration Law, regulating these pushbacks, establishes in section 3 that 'applications for international protection shall be formalised in the places set up for this purpose at border crossings and shall be processed in accordance with the provisions of the regulations on international protection'. This provision was intended to counter the voices that criticise hot returns for not respecting internationally accepted standards on human rights. The curious thing is that the places authorised to request international protection referred to in the precept are located on the Spanish side of the fence. Therefore, in order to apply for international protection, there is no other choice but to try to reach it, the only means being to jump the fence.

Martinez Escamilla considers the decision of the European Court of Human Rights, in its judgment of 13 February 2020 (on the case of N. D. and N. T. v. Spain), to be a step backwards in the protection of human rights at the border. In it, the High Court considered that the two summary expulsions to which the plaintiffs were subjected after jumping the fences separating Melilla and Morocco do not violate the prohibition of collective refoulement, nor the right to an effective remedy enshrined in Art. 13 of the European Convention on Human Rights and Art. 4 of Protocol No. 4. The arguments supporting the practice of hot returns at Spain's southern border

12 M. Martínez-Escamilla, J.M. Sánchez-Tomás, La vulneración de derechos en la frontera sur: De las devoluciones en caliente al rechazo en frontera, 'Revista Crítica Penal y Poder' 2019, no. 18, pp. 1–7.

are open to criticism and leave the people at the border defenceless.[13] Hot returns are an example of how, as regards irregular immigration from sub-Saharan Africa, arbitrary public policies are justified and exceptions to the basic principles of human rights protection are normalised and accepted in Spain.

1.2. Ethnically biased police stops

If hot returns are an example of external border protection, police stops with ethnic biases in Spain are a clear example of border protection within the territory. In Spain's migration policy, the National Police becomes an agent of immigration control. Organic Law 2/1986 on the National Police Force (NPF) establishes that the NPF has exclusive competence throughout the national territory in matters of foreigners, refuge and asylum, extradition, expulsion, emigration and immigration. In the exercise of this task of internal border control, the need to identify foreign offenders arises. Foreigners are often identified as being those who have distinct ethnic traits. This motivates the police to be guided by the ethnic profile of the individual.[14] In Spain, it is common for NPF agents to carry out a migration control measure by requesting people on the street with a foreign appearance to identify themselves. This type of action has been supported by the Constitutional Court (CC) on the Williams ruling (a black Spanish woman). Williams sued a police officer for his racist behaviour because he had stopped her and asked her to identify herself based only on the colour of her skin. The lawsuit was dismissed by the Constitutional Court in judgment 13/2001 of 29 January 2001. The main argument put forward was that the use of the statistical criterion that determines that black people in Spain are more likely to be foreigners is more than reasonable in the field of immigration control. However, years later, the United Nations Committee for Human Rights ruled in favour of Williams, arguing that although it is legitimate to carry out identity checks to control irregular immigration, the mere physical or ethnic features of a person should not be taken as indications of a possible situation of administrative irregularity.

It was not until Law 4/2015 of 30 March 2015, on the protection of citizen's security, that the prohibition of police stops with ethnic profiling was included for the first time in Spain in a regulation with the status of law, expressly included in the last paragraph of Art. 16.1.[15] The lack of official data on this matter makes it impossible to empirically assess both the extent of this practice and the effects of the law. The om-

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13 M. Martínez Escamilla, Las 'devoluciones en caliente' en el asunto N. D. y N. T. contra España (sentencia de la gran sala TEDH de 13 de febrero de 2020), 'Revista Española de Derecho Europeo' 2021, vols. 78–79, pp. 309–338.

14 D. Boza-Martínez, La expulsión de personas extranjeras condenadas penalmente: el nuevo artículo 89 CP, Navarra 2016.

15 E. García-España, L. Arenas García, J. Miller, Identificaciones policiales y discriminación racial en España, Valencia 2016.

budsman urged this legal provision because of repeated complaints he had received about such discriminatory police practices.

But beyond the actions of the police as immigration control agents, actions are also detected where stereotypes and prejudices, and even institutional racism, interfere.[16] These are cases where the police act with racial biases related to the alleged greater involvement of migrants in administrative and/or criminal offences. Research carried out in Spain, using different methodologies and interest groups, always has the same result: the existence of police actions guided by ethnic bias. Stereotypes and prejudices in this regard are shared socially, so it is not surprising to find such biases in police and legal operators. The evaluation of programmes that have been implemented in several police forces in Spanish municipalities aimed at helping to review police criteria in their street identification actions also demonstrates the lack of effectiveness of this racist criterion in finding irregular migrants.[17]

We can therefore say that with this type of police action, we are witnessing one of the practices of public-space control as a technique of social exclusion referred to by Díez- Ripollés.[18] With this type of control, the city ceases to be a privileged space for social interaction and cooperation to the extent that a group of suspects – such as migrants – is stigmatised because they are not 'standardised'. In other words, we are experiencing a reorganisation of the city through greater control of citizens with distinct features as suspects, due to their appearance or low economic capacity, which leads to an obvious increase in their social exclusion.[19]

2. Exceptional legal consequences for non-EU foreigners

2.1. Expulsion as a substitute for prison sentences of more than one year

The Spanish Criminal Code (SCC) establishes expulsion as almost the only penalty for foreign offenders. Art. 89 SCC provides for the possibility of expulsion replacing, fully or partially, a prison sentence that has been imposed. This article was substantially reformed in 2015; with this reform, expulsion as a penal substitute is no longer applied only to migrants in an irregular situation but to all foreign citizens. However, this provision makes a distinction between EU and non-EU foreigners. For the latter, expulsion as a substitute for imprisonment is the general rule, albeit subject

16 J. Williams, Redefining Institutional Racism, 'Ethnic and Racial Studies' 2010, vol. 8, no. 3, pp. 323–348; M. Tonry, Punishment and Politics: Evidence and Emulation in the Making of English Crime Control Policy, Cullompton 2012; A. Suohami, Institutional Racism and Police Reform: An Empirical Critique, 'Policing and Society' 2014, vol. 24, no. 1, pp. 1–21.

17 E. García-España, L. Arenas García, J. Miller, Identificaciones…, *op. cit*.

18 J.L. Díez-Ripollés, El control de espacios públicos como técnicas de exclusión social. Algunos contrastes regionales, 'Revista Española de Investigación Criminológica' 2014, vol. 12, pp. 1–28.

19 *Ibidem*.

to exceptions such as the fact that the subject has roots in the country or if there are circumstances of general or special prevention. Nevertheless, for foreigners from EU countries, expulsion is an exceptional measure that will only be carried out in cases of serious crimes related to certain legal assets. This shows a clearly discriminatory response, because it reacts differently towards nationals and non-EU foreigners, and this response has nothing to do with differences in the content of the offence. Furthermore, the principle of *non bis in idem*,[20] referring to the prohibition of being punished twice for the same act, continues to be violated, to the extent that the migrant is expected to serve the prison sentence and will then be expelled, as the last part of the sentence.

A reintegration purpose is also not detected in expulsions as a substitute for imprisonment, where it seems that the policies for border control clearly prevail over the constituent principles of criminal law.[21] In any case, expulsion has not been widely used; the number of expulsions actually carried out has barely reached 5–6% of the prison sentences applied to non-EU migrants.[22] Moreover, the benefits of the reform of Art. 89 of the SCC, which establishes the migrant's roots in Spain as an impediment to expulsion, may have reduced both the number of expulsions decreed and those carried out in the criminal sphere. However, although criminal expulsion is little used, it has not lost relevance, as Boza-Martínez argues, to the extent that expulsion continues to be the main response to foreign criminals.[23]

2.2. Criminal record at border control

According to the Spanish Immigration Law, a criminal record is an insurmountable obstacle to the granting of visas and initial residence permits to migrants, which act as a filter to administratively select the entry of citizens from non-EU countries. I share the opinion of Larrauri when he argues that although the requirement of an absence of a criminal record to enter the country or to apply for an initial residence permit is understandable, it is entirely open to criticism that the mere fact of having a criminal record entails an automatic denial of such authorisations, without the se-

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20 M.M. González Gascón, La cuarta reforma del artículo 89 del CP relativo a la expulsión del extranjero condenado a pena de prisión, 'Estudios Penales y Criminológicos' 2016, vol. 36, pp. 131–197.

21 J.A. Brandariz García, La globalización en crisis. Gubernamentalidad, control y política de movimiento, Malaga 2009.

J.A. Brandariz García, The Control of Irregular Migrants and the Criminal Law of the Enemy, (in:) M.J. Guia, M. van der Woude, J. van der Leun (eds.), Social Control and Justice: Crimmigration in the Age of Fear, The Hague 2013, pp. 255–266.

22 *Ibidem*.

23 D. Boza-Martínez, Expulsiones. Cifras y su interpretación, 'Revista Crítica Penal y Poder' 2019, no. 18, pp. 309–318.

riousness of the crime or how long it has been since the sentence was passed being taken into account.[24]

A criminal record is also an obstacle to a foreigner staying in Spain when he or she has 'been convicted, inside or outside Spain, for wilful misconduct that in our country constitutes an offence punishable by deprivation of liberty of more than one year'.[25] In this case, not all foreigners who commit crimes in Spain are in the same circumstances as regards the seriousness of their offence, their length of residence and their ties with the community. Foreign nationals who are released from prison after serving their sentence of more than one year and who meet the requirements of this cause for expulsion have at least two profiles:

1. Those where the judge, after assessing the circumstances of the act and the personal circumstances of the perpetrator, especially their roots in the country (Art. 89 SCC), considers that expulsion should not be applied as a substitute for imprisonment and therefore the perpetrator will serve the prison sentence imposed.
2. Those where the judge, after assessing the circumstances of the act and the personal circumstances of the perpetrator, including their roots, considers that the prison sentence should be replaced by the expulsion set forth in Art. 89 SCC, but the execution of such expulsion never takes place, as we saw earlier.

Expulsion after serving the sentence is automatically applied to both profiles of prisoners, with very few exceptions (Art. 57.5 of the Immigration Law), which is contrary to the criteria of the European Court of Human Rights, which establish the need to assess the individual circumstances of the prisoner's roots at the time of the decision in order to determine whether expulsion is a proportionate measure in each specific case.[26] Moreover, such a measure is applied once the foreigner has settled his or her debt with the justice system and is supposed to be in a process of social rehabilitation.[27] The number of expulsions of foreign offenders with criminal records who could be considered threats to public safety has increased, accounting for 70% of the expulsions performed in 2010.[28] As Brandariz García emphasises, criminal expulsions have been highly selective, which works to create the appearance of enforcement while minimising the risks associated with 'dramatically reducing migratory

24 E. Larrauri, Antecedentes penales y expulsión de personas inmigrante, 'InDret, Revista para el Análisis del Derecho' 2016, no. 2, pp. 1–29.

25 Art. 57.2 of the Immigration Law.

26 E. Larrauri, Antecedentes…, *op. cit.*

27 E. García-España, Extranjeros en prisión y reinserción: Un reto del siglo XXI, (in:) A. Cerezo Domínguez & E. García-España, La prisión en España: Una perspectiva criminológica, Granada 2007.

28 J.A. Brandariz García, The Control…, *op. cit.*, pp. 258.

flows which have been performing economic and social functions of extraordinary prominence'.[29]

Notwithstanding the above, a significant number of foreigners who leave prison after having served their time will remain non-removable and, despite having completed their sentence in Spain, cannot be expelled but also cannot regularise their situation because they have a criminal record in force.[30] They have to wait for the cancellation of their criminal record, i.e. 3 years for sentences of 1 to 3 years of imprisonment; 5 years for sentences of 3 to 5 years; and 10 years for sentences of more than 5 years (Art. 136 SCC), so that they can initiate a process of regularisation of their stay in the country.

This administrative sanction (expulsion for having a criminal record) and its problems of execution (inexpellability) are examples of what in criminal policy are called 'additional sanctions', i.e., collateral consequences that affect the civil, political and social rights of foreigners, which are not related to the type of crime committed, which are imposed outside criminal law and which entail a great capacity for exclusion. They have a very intense, distressing content, but do not enjoy the system of guarantees from which criminal sanctions benefit. This type of additional sanction usually promotes the social exclusion of socially disadvantaged groups, not because they have been in contact with the criminal justice system, but because they belong to a certain group, as happens with migrants in this case.[31]

One might think that the aims pursued by the public policies based on the expulsion of foreigner ex-offenders are inefficient because they do not meet their objectives, given the difficulties in carrying out expulsions. On the contrary, some authors suggest that this regulation has a perverse objective, which is to maintain a criminalised reserve army, with pending expulsion orders and relegated to working in the underground economy, within the framework of a public policy that clearly criminalises this group.[32]

3. Deprivation of liberty for migration policy purposes

Deprivation of liberty is considered in Western democracies as the most serious criminal sanction imposed by the legal system for the most harmful behaviours to

29 *Ibidem*, p. 261.
30 J. Galparsoro, P. Bárcena, Los antecedentes penales y sus consecuencias en materia de extranjería, asilo y nacionalidad, Bilbao 2014.
31 J.L. Díez-Ripollés, Sanciones adicionales a delincuentes y exdelincuentes. Contrastes entre Estados Unidos de América y países nórdicos europeos, 'InDret, Revista para el Análisis del Derecho' 2014, no. 4, pp. 1–37.
32 K. Calavita, Un 'ejército de reserva de delincuentes'. La criminalización y el castigo económico de los inmigrantes en España, 'Revista Española de Investigación Criminológica' 2004, vol. 2, pp. 1–15.

the most essential legal interests. Deprivation of liberty, in addition to affecting freedom of movement, entails *indirect costs* that have to do with the reduction of social relations and life opportunities, with the trauma of confinement, and with the stigma attached to the deprivation of liberty itself. However, border control policy uses deprivation of liberty for its purposes in an exceptional manner in terms of the circumstances and extent of the deprivation, as shown below.

3.1. Administrative detention centres (ADCs)

If the deprivation of liberty is considered as defined above, it is difficult to understand how it can be used for people forcibly displaced from their countries or seeking a better life. It is also not understood that deprivation of liberty is used as a means of attempting to proceed with an expulsion which, according to official data, is not carried out in most cases. In fact, it is disproportionate to accept the deprivation of a person's freedom as a measure to try to achieve an end that is unlikely to be successful.[33]

More than 30 years ago, the Constitutional Court, in its ruling 115/1987 of 7 July 1987, set conditions for considering that the deprivation of liberty in administrative detention centres (ADCs) was constitutional, despite Art. 25.3 of the Constitution, which establishes that 'the Civil Administration may not impose sanctions which, directly or subsidiarily, imply deprivation of liberty'. The CC argued that we are not facing a sanction but a precautionary measure consisting of the extension of police detention beyond the 72 hours allowed and imposed as conditions for this internment that it be (1) exceptional, (2) in facilities that are not penitentiary in nature, (3) with a prior reasoned court decision, and (4) that the loss of liberty is subject to judicial control. These conditions have not been met, as explained below, and it could therefore be said that their use is unconstitutional.

On the one hand, internment in ADCs has not been exceptional; on the contrary, its use has been quite frequent and ineffective. It is estimated that in the last decade, approximately 40% of the persons deprived of their liberty in a ADC were not ultimately expelled.[34] On the other hand, the conditions under which deprivation of liberty takes place in ADCs do not meet the minimum requirements set out in penitentiary legislation for prisons. The ADCs are guarded by the national police, and it was not until 2014 that their operating regulations and internal regime were approved. This has led to such centres being configured as closed contexts, unseen from the outside world and with questionable living conditions. In these places, many situations of vulnerability and risk have been detected that have escaped judicial control. Unaccompanied minors, victims of trafficking for sexual exploitation

33 E. García-España (ed.), Razones para el cierre de los CIE: Del reformismo a la abolición, Malaga 2017.

34 C. Fernández-Bessa, Los centros de internamiento de extranjeros (CIE). Una introducción desde las Ciencias penales, Madrid 2020.

and applicants for international protection are frequently found in ADCs.[35] This reality is admitted by the state authorities and denounced by civil organisations. They are persons subject to special protection who should not be kept in an ADC, either because it is prohibited by law (minors) or because expulsion is not possible and detention is supposed to be merely instrumental (victims of trafficking, applicants for international protection, victims of gender-based violence, etc.).

It is therefore possible to say that ADCs are just another cog in the wheel of European migration policy to fight against irregular immigration that is used according to the need to control a population perceived as dangerous,[36] either for their deportation from the country or for their social exclusion if they cannot be deported.[37]

3.2. Prison release strategies

The border control policies not only condition the penal response when the offender is a migrant, but also influence the response in the penitentiary environment.[38] Prison intervention with non-EU foreign prisoners must deal with two different scenarios.[39] The first scenario has to do with the reintegration into Spain of all those foreigners with a regularised administrative situation or with sufficient roots in the country. In this case, the prison administration takes two types of actions: on the one hand, those aimed at proving the administrative situation prior to admission and keeping it updated based on objective data; and on the other, trying to regularise the situation of those inmates who meet the objective conditions required by the legislation in force.

The second scenario is to return to their country of origin all those foreigners who have been sentenced to expulsion as an alternative to imprisonment, or when it is considered that serving their sentence or parole in their country of origin is appropriate for their rehabilitation (Art. 197 of the Prison Regulations). It is convenient to speed up the procedures in these cases, where resocialisation involves trying to avoid the desocialisation that a longer than necessary time in prison may cause in the subject, and to reinforce their roots with their country of origin. Unfortunately,

35 J.M. Sánchez Tomás, Situaciones de especial vulnerabilidad en los CIE: menores, víctimas de trata y protección internacional, 'Razones para el cierre de los CIE: Del reformismo a la abolición', IAIC 2017, pp. 33–38.

36 A. Aliverti, Patrolling the 'Thin Blue Line' in a World in Motion: An Exploration of the Crime-Migration Nexus in UK Policing, 'Theorical Criminology' 2020, vol. 24, no. 1, pp. 8–27.

37 K.F. Aas, M. Bosworth (eds.), The Borders of Punishment: Migration, Citizenship, and Social Exclusion, Oxford 2013.

38 F. Pakes, K. Holt, Crimmigration and the Prison: Comparing Trends in Prison Policy and Practice in England and Wales and Norway, 'European Journal of Criminology' 2017, vol. 14, no. 1, pp. 63–77.

39 J. Nistal Burón, Los fines de la política criminal y su vinculación con la política de extranjería en la reforma proyectada del Código penal: su incidencia en el ámbito penitenciario, 'Diario La Ley' 2013, no. 8144.

in the case of foreign prisoners, the length of time they spend in prison, conditioned by the execution of the expulsion order, does not seem to be a judicial or penitentiary decision, but rather depends, quite often, on the real possibilities of the police to materialise it. On the other hand, if we look at the data of penitentiary institutions, the number of expulsions that are carried out annually is low. Only 15% of all releases of foreign prisoners are explained by an expulsion.[40] Despite these low numbers, the symbolic role of expulsion and the uncertainty about how it is carried out conditions the treatment and prison regime of these persons. Moreover, the majority of those who are released from prison in Spain after completing their sentence – their final discharge – fully serve the prison sentence in second degree (an ordinary regime) without benefiting from exit permits, third degree (an open regime) or parole. This makes the time spent in prison more burdensome for foreigners than for nationals.

However, most foreigners are released from prison in Spain on provisional release, parole or unconditional release (around 75% of all foreign inmates). These data point to the existence of a considerable number of foreign nationals who cannot be expelled, which brings us to a third scenario.[41] These are the cases where foreigners do not meet the objective requirements to be regularised in Spain, cannot be expelled for legal or material reasons,[42] or who do not want to be transferred to their country of origin to serve their sentence or parole (Art. 197 of the Prison Regulations). Art. 89.8 of the SCC establishes that in cases where the agreed expulsion cannot be carried out, the originally imposed sentence or the remaining time must be served, or even suspended if the requirements for this are met. Thus, the CC's doctrine applies in this regard, establishing that if the expulsion cannot be carried out, the remainder of the sentence and its possible suspension will be considered under the same conditions as for convicted persons who are legally resident nationals and foreigners.[43] This is also included in Instruction 3/2019 of Penitentiary Authorities on the 'Comprehensive Intervention Programme with Foreign Inmates', which includes the need to intervene with foreigners who cannot be expelled as 'in the case of any national inmate, for the purpose of preparing their eventual reintegration into Spanish territory'.

40 Prison Service, Secretary General of the State, Ministry of the Interior. https://www.institucionpenitenciaria.es/es/web/home (02.11.22).

41 E. García-España, El arraigo de los presos extranjeros. Más allá de un criterio limitador de la expulsión, 'Revista Migraciones' 2018, no. 44, pp. 119–144.

42 The factual assumptions thanks to which the expulsion, criminal or administrative, cannot be executed have to do with the roots declared in a conviction or subsequently proven (Art. 89 SCC); with the condition of stateless persons, asylum seekers, refugees and internationally protected persons, as long as they maintain such status; those whose life or health is put at risk by the expulsion, either by the personal circumstances of the subject or by the situation of the country; for being undocumented; those who are not recognised or accepted by their country of origin; those whose nationality is not known; and those who rebel and prevent the expulsion from being carried out.

43 ATC no. 132/2006 of 4 April 2006.

This 2019 Instruction may produce a considerable change in interventions with the foreign population that cannot be expelled, since previously, the fact of having a cause for expulsion and therefore being in an irregular situation in the country was sufficient reason to deny exit permits and third-degree regimes granting of parole. In fact, according to the study by Rovira, Larrauri and Alarcón carried out prior to the above-mentioned instruction, only 20% of migrant prisoners obtained an exit permit during their entire sentence, compared to 74% of the total prison population.[44] The explanation for such a low number of exit permits granted to foreigners was to be found in the interpretation that their irregular situation in the country was an impediment. Thus, the objectives of immigration policy hindered the treatment and social rehabilitation purposes of penitentiary policy.

As of the 2019 Instruction, the 'irregular situation' of the non-expellable foreigner can no longer be considered an element of uprooting that serves to deny exit permits or serving in an open environment (third-degree regime), as the Provincial Court of Barcelona warned in Order No. 1275/2015 of 14 August 2015. We must still wait for some time to see whether this change of procedure has really taken place in the prison environment.

Conclusions

As explained at the beginning, the aim of this paper is to show the mechanisms used by the criminal justice system in Spain to manage human mobility, from a border criminology perspective. These mechanisms are many and varied. Among others, police actions consisting of hot returns or ethnically profiled police stops are evidence of arbitrary public policies that are currently normalised and accepted.

The committing of a crime by a migrant seems to be the perfect excuse to banish him or her from the country. Hence, expulsion as a substitute for imprisonment is the main sanction for foreign offenders. In this way, the migrant-criminal label triggers a response of exclusion, as they are regarded as dangerous. This detracts from their dignity and reifies them as a threatening object which the public needs to be protected from. For these reasons their expulsion is 'justified', and sometimes goes as far as to break basic principles of the legal system. On occasion, the label of migrant-criminal is even extended long after they have served their sentence and have taken root in Spain. Citizens with distinct facial features are even haunted by such label, and they are sometimes suspected of having committed crimes they have nothing to do with.

44 M. Rovira, E. Larrauri, P. Alarcón, La concesión de permisos penitenciarios. Una aproximación criminológica a distintas fuentes de variación, 'Revista Electrónica de Ciencia Penal y Criminología' 2018, vol. 20, no. 2, pp. 1–26.

On the other hand, the deprivation of liberty in administrative detention centres is excessive and disproportionate, as discussed above. In any case, the failure to carry out both criminal and administrative expulsions result in the social exclusion of migrants who, after being deprived of their liberty, are not expelled but thrown to the margins of society.

Thus, it is proved that Spanish criminal policy, broadly defined as all penal strategies, as well as those where criminal law and immigration law converge, primarily aims to socially render harmless (innocuousation) foreigners who are suspects, convicts and ex-convicts in Spain with distinct and exceptional measures that push them to the margins of society.

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