III. MAIN ISSUES IN SPANISH CRIMINAL LAW AND PRACTICE RELATED TO TRAFFICKING IN AND SMUGGLING OF HUMAN BEINGS*

1. INTRODUCTION

In this section, an analysis will be made of current Spanish penal legislation and the corresponding case law concerning the trafficking in and smuggling of human beings. As has already been mentioned, the legislation applicable in this area has undergone substantial reform recently through Organic law 11/2003, of September 29 on specific measures concerning the security of citizens, domestic violence and social integration of aliens,22 which modifies article 318 bis of the Criminal Code. This adds some difficulty to the drafting of this paper as no corpus of scientific and case law doctrine has been sufficiently developed concerning the new criminal legislation. Therefore, it is necessary to present a number of preliminary considerations:

– It is essential to make at least a summary study of the historical evolution of legislation in this regard in order to be able properly to understand the latest legislative changes together with the bibliography on the theme (largely based on the legislation previous to Organic Law 11/2003) and the more outstanding case law related to trafficking in and smuggling of human beings.

– The historical background and the characteristics of this matter, which is the subject of a continuous, lively, political debate, led us to guess that another legislative reform may take place in the not too distant future. This will involve reforms to administrative and criminal law, especially if we bear in mind that current criminal legislation is not the result of meditated doctrinal thinking but, as will be seen below, it is the result of unstable criminal policy.

– The practical cases which can be analysed have not yet generated established case law which enables us to know the interpretation of the courts concerning the reformed article 318 bis of the Criminal Code with certainty. This is due to the fact that the slowness of the Spanish Courts when resolving cases of some importance prevents accessing a high number of cases tried under the new legislation, and, due to procedural reasons, the highest Spanish jurisdictional court, the Supreme Court, has hardly had the opportunity to resolve cases related to this matter (even less so with regard to recent legislation), therefore the case law which will be quoted cannot be considered to

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be uniform doctrine, but is a variety of lines of interpretation deriving from the resolutions of many provincial courts.

As we will see below, it should be pointed out that the recent reform of Spanish criminal law was not due mainly to the need to adapt the Spanish law to European Community law, but was, above all, due to strictly internal political reasons which has used the European framework as an excuse and a cover up rather than as a reference and guide. It is true that, as the stated purpose of the Organic Law 11/2003 expressly recognises, the 2003 reform attempted to include some of the initiatives of the Council of the European Union in order to establish a common penal framework with regard to the fight against the trafficking in human beings and the smuggling of persons, particularly in relation to the sentences for criminal conduct; however, the very title of the law which modifies article 318 bis of the Criminal Code shows that the Spanish legislator had other objectives: Organic Law 11/2003 terms itself as “specific measures”, that is to say, it is not systematised, ordered and integrated legislation but rather a series of legal prescriptions which are intended as a penal reaction to a variety of events which give rise to social alarm, and are also intended to extend the protection “against criminal aggression”, and this is explicitly admitted in the stated purpose. Considering that the reform of September 2003 addresses another two themes which are currently giving rise to serious worry in Spanish society and the media: domestic violence and public security, it can be said that, in fact, the intention of the legislator was to try to mitigate the social alarm caused by certain circumstances which give the sensation that criminality is increasing and among these circumstances is illegal immigration. In fact, as the stated purpose of Organic Law 11/2003 clearly indicates, the reform of article 318 bis of the Criminal Code is closely related to the penal response to aliens not legally resident in Spain who commit offences (and the fundamental reaction is to decree expulsion from Spanish territory), which permits the inference that the Spanish legal reform was not oriented by European harmonisation in this area, but was due rather to the interest the Spanish State (or the Government) had in making the Criminal Code the symbol of the fight against delinquency, particularly delinquency associated with illegal immigration.

2. LEGISLATIVE EVOLUTION THROUGHOUT HISTORY

The legislative landmarks we are about to highlight as regards Spanish criminal law concerning the trafficking in human beings and the promotion of the smuggling of persons, previous to the reform of September 2003, are the following:

- The Criminal Code previous to that of 1995 (Criminal Code of 1944-1973);