THE PUNITIVE MEANINGS OF IMMIGRATION CONTROL WITHIN THE REALM OF CRIMINAL COURTS' DECISION-MAKING: AN IN-DEPTH QUALITATIVE CASE-STUDY OF THE SPANISH CRIMMIGRATION REGIME

DE PUNITIEVE DOELEINDEN VAN IMMIGRATIECONTROLE BINNEN DE STRAFRECHTELIJKE BESLUITVORMINGSPROCESSEN: EEN DIEPGAANDE KWALITATIEVE CASESTUDY VAN HET SPAANSE CRIMMIGRATION REGIME

(met een samenvatting in het Nederlands)

Proefschrift

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door

Byron Ernesto Villagómez Moncayo

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te *Quito, Ecuador*

Promotoren: Prof.dr. J. Vervaele
Prof.dr. C. Hentschel

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Declaration

I declare that the research embodied in the thesis is my own work and has not previously been submitted for a degree at any other universities.

I declare that I have not used commercial doctoral advisory services or any sources or aids other than those listed in the thesis.

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Abstract

The contemporary convergence between immigration control and criminal justice, commonly referred to as crimmigration, entails a substantial reconfiguration of immigration control decision-making processes. One of the most significant features of this conversion is the increasing intervention of the criminal judiciary in matters related to immigration control. For instance, deportation can be in many cases a consequence of a criminal conviction for a considerable number of crimes, and bail or sentencing decisions can be influenced by the migratory status and the deportation likelihood of a defendant. Although empirical research upon the convergence between immigration and criminal law has rapidly grown in the last decade, there is still a gap in the literature regarding the judicial decision-making processes and determinants of immigration control within the realm of criminal courts. The present research purports to contribute to the scholarly research on such aspects by conducting an in-depth qualitative case-study analysis of a specific court setting. For that purpose, this dissertation focuses on Spain given that its legal migration regime shares many of the substantial aspects of the phenomenon described by the crimmigration concept. Despite irregular migration is not a criminal offence in that country, immigration detention is authorised by criminal judges and there is a series of expulsion (deportation) pathways available within criminal proceedings. Additionally, Spain is a relevant research location in this regard due to its crucial role at controlling the Southern border of the so-called 'fortress Europe'. Drawing on 78 in-depth semi-structured interviews with judges, prosecutors, clerks, court personnel, defence attorneys and other legal professionals, as well as focused observation conducted for a period of eight months, this thesis seeks to ascertain the punitive meanings attributed by criminal court actors to immigration control. To do so, this research relies on organisational, social-psychological, and cultural frameworks for explaining judicial decision-making by criminal courts, focusing on immigration detention and expulsion throughout the criminal proceeding, which are in general administrative procedures under judicial supervision by criminal courts. Whilst assuming that the convergence between immigration control and criminal justice is a contemporary mechanism for the social construction of the 'criminal immigrant', the main findings of this study are structured in two parts. The first delves into the idiosyncratic features of immigration detention decision-making, and the second into the determinants and meanings ascribed by court actors to so called pre-trial, sentencing and post-sentence expulsion. This analysis evidences that immigration detention decision-making is substantially determined by the convergence of bureaucratically patterned decisional mechanics and the intrinsic criminal justice cultural identity of criminal courts.

This embodies Kafkaesque dynamics characterised by automation, thoughtlessness and dehumanisation in decision-making. Furthermore, this research reveals that expulsion is a court's culturally constructed punishment, defined more by the meanings produced and attributed to it by court actors than by its formal legal categorisation. Specifically, this thesis contends that expulsion is assessed by court actors in terms of its suitability for attaining such traditional purposes of punishment as incapacitation, deterrence and retribution. Therefore, this research concludes that immigration detention and expulsion are substantially traversed by the constitutive cultural identity of criminal courts, which in turn determines their key procedural traits and decisional outcomes.

Zusammenfassung (German)

Die gegenwärtige Annäherung zwischen Migrationskontrolle und Strafrecht, die auf allgemein als *Crimmigration* bezeichnet wird, führt zu einer substanziellen Umgestaltung des Entscheidungsfindungsprozesses der Migrationskontrolle. Ein besonders bedeutsames Merkmal dieser Annäherung ist die steigende Einflussnahme von Strafgerichten auf die Migrationsrechtsverfolgung; wobei solche Gerichte wesentliche Fragen über Migrationskontrolle beantworten müssen. Beispielweise kann Abschiebung in einem Prozess die Folge einer Verurteilung wegen krimineller Handlungen sein, gleichzeitig kann das Strafmaß durch den Migrationsstatus und die Rückführungswahrscheinlichkeit des Angeklagten beeinflusst werden. Obwohl die Anzahl empirischer Forschung zu *Crimmigration* während des letzten Jahrzehnts schnell gestiegen ist, bleibt eine Lücke in der spezialisierten Literatur bezüglich der Entscheidungsprozesse vor Gericht und der bestimmenden Faktoren von Migrationskontrolle im Bereich der Strafgerichtsbarkeit. Die vorliegende Forschungsarbeit trägt durch eine tiefgehende qualitative Fallstudie Analyse eines spezifischen juridischen Settings zu diesen genannten Aspekten der wissenschaftlichen Forschung bei. Zu diesem Zweck fokussiert sich diese Dissertation auf Spanien, da das spanische-juridische Migrationsregime teilt viele der wesentlichen Aspekte des Phänomens, das mit dem *Crimmigration* Konzept beschrieben wird. Zwar irreguläre Migration nicht strafbar ist, wird Einwanderungshaft durch die Strafgerichte autorisiert, weshalb eine Reihe an Möglichkeiten für eine Abschiebung den Strafprozessen inhärent sind. Spanien besitzt auch deshalb eine hohe Relevanz als Fallstudie für das vorliegende Forschungsfeld aufgrund der entscheidenden Rolle, es bei der Kontrolle der südlichen Grenze der so genannten ‚*Fortress Europe*' (Festung Europa) einnimmt. Basierend auf 78 ausführlichen, semi-strukturierten Interviews mit Richtern, Staatsanwälten, Gerichtsbeamten, Rechtsanwälten, und anderweitigem Rechtspersonal, sowie aufmerksamen Beobachtungen während eines achtmonatigen Zeitraumes, macht es sich die vorliegende Thesis zur Aufgabe die der Migrationskontrolle, seitens der Strafgerichtsbarkeitsakteure, attribuierte strafende Bedeutung festzustellen. Dafür bedient sich der hier vorliegende Forschungsansatz Erkenntnissen aus organisationstheoretischen, sozial-psychologischen und kulturwissenschaftlichen Perspektiven, um die juridische Entscheidungsfindung der Strafgerichte zu interpretieren. Ein besonderer Fokus wird hierbei auf die Praktiken der Abschiebung und Abschiebehaft gelegt, die generell als administrative Prozeduren der Gerichte unter richterlicher Anordnung gesehen werden. Der Annahme folgenden, dass durch die Überschneidung zwischen Kontrolle von Einwanderung und Strafprozessrecht als ein kontemporärer Mechanismus für die soziale

Konstruktion des ‚*criminal immigrant*' (Der kriminelle/verbrecherische Einwanderer) geschieht, können die Ergebnisse dieser Forschung in zwei Teile gegliedert betrachtet werden. Der erste Teil vertieft die idiosynkratrischen Besonderheiten der migrationshaft-bezogenen Entscheidungsfindung, und der zweite Teil handelt von den durch Strafgerichtsakteure beigemessenen Einflussfaktoren und Bedeutungen bezüglich vor-Verhandlung, Verurteilung und nach Urteil durchgeführten Abschiebungen. Diese Forschung macht deutlich, dass die Willensbildung im Falle der Einwanderungshaftgrundsätzlich durch die Konvergenz von bürokratisch geprägten Entscheidungsmechanismen, und die den Strafprozessen intrinsische Kulturalidentität von Verfassungsgerichten, determiniert wird. Dies verkörpert kafkaeske Dynamiken einer automatisierten, gedankenlosen und entmenschlichenden Willensbildung des Strafprozesses. Weiterhin zeigt die vorliegende Forschung, dass die Abschiebung eine kulturell-konstruierte Sanktion ist, die mehr durch die ihr von Strafgerichtsakteuren gegebene Bedeutung als durch formale legislative Inhalte abgegrenzt wird.

Insbesondere argumentiert die vorliegende Dissertation, dass die Gerichtsakteure die Abschiebung im Rahmen einer Angemessenheit für traditionelle Bestrafungs-, Entmündigungs-, Abschreckungs- und Vergeltungszwecke einschätzen. Letztendlich schlussfolgert diese Forschung, dass Einwanderung, Verhaftung, und Abschiebung im Wesentlichen von der konstituierenden Kulturalidentität des Strafgerichtes geprägt sind, was wiederum deren Schlüsselverfahrenscharakteristiken und Entscheidungsergebnisse bestimmt.

Samenvatting (Dutch)

De hedendaagse convergentie tussen controle op immigratie en strafrechtelijke handhaving, veelal crimmigration genoemd, leidt tot een aanzienlijke herconfiguratie van de besluitvormingsprocessen op het terrein van immigratie-controle. Eén van de meest belangrijke kenmerken van deze herconfiguratie is het toenemend aantal strafrechtelijke beslissingen op het terrein van de immigratie. Die strafrechtelijke beslissingen zijn ook steeds meer onlosmakelijk verbonden met immigratiecontrole. De rol van de strafrechtsjustitie kan bestaan uit het opleggen van een uitwijzing als gevolg van een strafrechtelijke veroordeling voor een commuun delict. Borgtochten en gerechtelijke beslissingen kunnen ook beïnvloed worden door de migratiestatus en de kans op deportatie van een verweerder. Ook bij niet vervolging voor commune delicten kan de strafrechtsjustitie, zoals in Spanje, een rol spelen, namelijk als justitieel controleorgaan op de administratieve uitwijzingen voor onregelmatige immigratie, zelfs als dit geen strafbaar feit is.

Alhoewel het aantal empirische onderzoeken over crimmigration in het laatste decennium snel gestegen is, bestaat er nog een leemte in de literatuur wat betreft die strafrechtelijke besluitvormingsprocessen en de doorslaggevende factoren die bij die controle op immigratie een rol spelen. Dit onderzoek beoogt bij te dragen aan het wetenschappelijke onderzoek naar die factoren door een diepgaande kwalitatieve casestudy van een specifieke gerechtelijke instantie uit te voeren. Hiervoor is gekozen voor Spanje, omdat het wettelijke regime beantwoordt aan veel van de wezenlijke aspecten van het crimmigration concept: de administratieve hechtenis voor irreguliere immigratie wordt door de strafrechters beslist en er bestaat een set aan procedures voor uitwijzing (deportatie), die inherent zijn aan de strafprocedure. Bovendien is Spanje in dit opzicht een geschikte onderzoeksplaats door zijn essentiële rol in de controle van de zuidelijke grens van de zogenoemde “Fort Europa”. Aan de hand van 78 diepgaande halfgestructureerde gesprekken met rechters, openbare aanklagers, griffiers, personeelsleden van de gerechten, advocaten en andere juridische beroepsbeoefenaren, en ook gerichte observatie gedurende acht maanden, heeft dit doctoraal onderzoek tot doel om de bestraffingsdoeleinden die door de actoren van de strafgerechten toegeschreven worden aan de controle op immigratie te identificeren. Daarvoor steunt dit onderzoek op organisatorische, sociopsychologische en culturele frames om de gerechtelijke besluitvorming binnen die strafrechtsjustitie te analyseren. Op basis van de aanname dat de convergentie tussen controle op immigratie en het strafrechtssysteem een mechanisme

is dat heden ten dagen bijdraagt aan de sociale constructie van de ‘criminele immigrant’, zijn de belangrijkste bevindingen van deze studie in twee delen gestructureerd. Het eerste deel bevat een diepte-analyse van de idiosyncratische kenmerken van de besluitvorming inzake immigratie hechtenis, en het tweede verdiept zich in de doorslaggevende factoren en de tendensen van de gerechtelijke actoren inzake de uitwijzing die plaats vinden vóór de rechtszaak, op het moment van het vonnis of na het vonnis. Deze analyse laat zien dat de besluitvorming inzake administratieve immigratie-hechtenis in essentie bepaald wordt door de convergentie van besluitvormingsmechanismen van de strafrechtelijke rechtbanken, en dit zowel vanuit een organisatorisch- bureaucratisch patroon, als vanuit de hun culturele identiteit als strafrechtelijke autoriteit. Dit belichaamt de kafkaëske dynamiek, gekenmerkt door de automatisering, ondoordachtheid en dehumanisering in de besluitvorming. Bovendien brengt dit onderzoek aan het licht dat de uitwijzing een cultureel vastgetimmerd strafrechtelijk middel is van de rechtbanken en dat het inzetten ervan door de gerechtelijke actoren meer bepaald wordt door de zingeving en doelstelling die ze eraan toebedelen en door hun beslissing activeren, dan door de formele wettelijke kwalificatie ervan. In het bijzonder stelt deze thesis dat de uitwijzing door de gerechtelijke actoren ingezet wordt in verhouding met haar geschiktheid om traditionele bestraffingsdoeleinden te bereiken, zoals beroepsverbod, afschrikking en vergelding. Daarvoor komt het onderzoek tot de conclusie dat administratieve immigratie-hechtenis en uitwijzing sterk beïnvloed worden door de constitutieve culturele identiteit van de strafrechtelijke gerechten, die op hun beurt de belangrijkste karakteristieken van de procedure en de uitkomst van die beslissingen bepalen.

List of Abbreviations

BEDEX	Brigade of Expulsions of Foreign Offenders
CIE	Immigration detention centre
CJEU	Court of Justice of the European Union
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EEC	European Economic Community
EU	European Union
FRONTEX	European Border and Coast Guard Agency
NGO	Non-governmental organization
PP	Conservative party of Spain
PSOE	Socialist party of Spain
SEA	Single European Act
SIVE	Integrated System of Exterior Surveillance
TCN	Third-country nationals
TEU	Treaty on European Union
UNHCR	United Nations High Commissioner for Refugees
US	United States of America

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Chapter 1: Introduction

1.1. Background

In February 2012 the Spanish Minister of the Interior announced publicly that the solution to the problem of recidivism was to put native lawbreakers in prison and deport immigrant offenders out of Spain (ABC, 2012). In this way, whereas prison would be an appropriate method for incapacitating native offenders, deportation would be reserved for 'dangerous' expatriates. However, problems arise due to the Spanish legislation which states that expulsion is in general not a form of punishment but an administrative measure, whilst irregular immigration is not a criminal but an administrative infringement. Although in some circumstances imprisonment can be substituted for the expulsion of the offender, even in that case expulsion is not officially considered a punishment.[1] This means that associating deportees with criminality and using deportation as a form of punishment would result in a dual substantial and procedural criminalisation process: that of labelling the individual as criminal and that of assigning deportation a penal character.

Such substantial and procedural criminalising processes entail an intersection between criminal and immigration law. The configuration and operation of this legal conjunction, as well as the dilemmas, complexities and concerns raised by it, have in recent times been mainly explained in terms of what is referred to as *crimmigration* (e.g. Barker, 2013; Bosworth, 2008, Bosworth & Guild, 2008, Bowling, 2013; Franko Aas, 2013; Fekete & Webber, 2010; Kaufman, 2013; Majcher, 2013; Schuster, 2005; Sklansky, 2012; Stumpf, 2006, 2011, 2013). The concept of crimmigration was originally coined by Stumpf (2006) in regards to the US legal regime but has come to be widely used across different contexts. Indeed, in Europe the notion of crimmigration has been used to describe or explain the migration regimes of such countries as Germany (Walburg, 2016), Italy (Fabini, 2017), the Netherlands (Woude et al., 2014), Norway (Ugelvik & Damsa, 2018), Portugal (Guia, 2012), Spain (Brandariz, 2016a; Brandariz & Fernández, 2017), the United Kingdom (Pakes & Holt, 2017), among others (Parkin, 2013), as well as in regards to the EU legal regime (Franko Aas, 2011; Woude & Berlo, 2015).

The notion of crimmigration provides a suitable conceptual framework for describing and identifying the aforementioned intersection between criminal and immigration law. In general, crimmigration can be defined as a socio-legal phenomenon, traceable at both sides of the North-Atlantic, compromising of a complex combination of

[1] The Constitutional Court (STC 242/1994) has ruled that this type of expulsion is not a punishment.

criminal law and immigration control components. Criminal law enforcement mechanisms, such as policing, prosecution and sentencing, appear to be increasingly used to facilitate immigration control, particularly detention and deportation. Furthermore, in a considerable number of cases the prosecution of a person with an irregular migratory status seems to be deeply influenced by immigration control purposes. Specifically, crimmigration has taken place on three fronts: "*(1) the substance of immigration law and criminal law increasingly overlaps; (2) immigration enforcement has come to resemble criminal law enforcement; and (3) the procedural aspects of prosecuting immigration violations have taken on many of the earmarks of criminal procedure*" (Stumpf, 2006: 14).

Despite its widespread dissemination within the scholarly research and debate of the contemporary migration policies in the Western world, the concept of crimmigration has been subjected to some substantial criticism. Kaufman (2013: 174), for instance, has argued that "*the concept of crimmigration tends to encourage an overemphasis on the process of criminalization*", which in her view, "*is only one of several emergent patterns in migration legislation and policy*". In other words, the crimmigration perspective may seem to take the link between crime and migration for granted, whereas "*in many ways contemporary migration control practices depend less on a connection between immigration and crime than on the particularly non-criminal nature of foreignness*" (Kaufman, 2013: 175). Likewise, Melossi (2015: 39) considers that the concept of crimmigration, even if formulated with critical intentions, may ultimately reinforce the idea of a necessary connection between crime and migration. For that reason, he prefers in this regard such concepts as 'legal violence' or the traditional 'criminalisation'. Apart from these criticisms, I might add that the scientific relevance of the crimmigration perspective has more to do with its descriptive than with its explanatory power. As illustrated by Weber and McCulloch (2018), the concept of crimmigration is largely accented towards the *how* of border control rather than towards the *why* or *when*, which in turn are more clearly and specifically tackled by other theoretical frameworks.

For these reasons, in this thesis I use the notion of crimmigration critically and in conjunction with other more substantial conceptual frameworks. In this vein, it is first necessary to highlight the analytical value of the crimmigration perspective in general, as well as its pertinence and relevance for the present research. As the same Kaufman (2013) acknowledges, the crimmigration framework has contributed to propel academic enquiry into the nature of contemporary punishment practices, capturing how the language and machinery of criminal justice is transposed onto discussions of migration. In this sense, the crimmigration formulation is pertinent and valuable to make sense of the implementation

mechanisms, dynamics and complexities that the interconnection between immigration control and criminal justice involve. Undoubtedly, such convergence between diverse fields of law parts from regulatory designs, but it is at the enforcement level where the specific principles, apparatuses and aims of each of them have to be reconciled in order to come to a decision in each case. Moreover, the concept of crimmigration highlights the instrumental use of the legal categories (Aliverti, 2012; Sklansky, 2012; Stumpf, 2006; 2011), by which whether criminal or immigration law enforcement is used depends on the circumstances of the case in regards to the pathway that best serves the pursued objective. As explained by Sklansky (2012), in some cases the enforcement tools of criminal and immigration law work in unison, so that defendants are targeted or pushed back and forth between both systems; conversely, in other situations, criminal prosecutions can be used to achieve immigration control objectives.

Following on from this, crimmigration is conceptualised as a penal field, understood in Bourdieu's terms (1987) as a "*social space in which various people, groups, organizations, and institutions, with different capital, habitus, and social skills, engage in strategic actions and struggle for domination, exercising penal power over unauthorized immigrants and imposing exclusive measures on immigration*" (Jiang & Erez, 2017: 4). While agreeing with Kaufman (2013) that this may encompass an (over)emphasis on criminalisation, if the analysis is precisely centred around criminalisation processes it becomes not only convenient but even necessary to rely on such a framework. Nonetheless, given the aforementioned limitations of the crimmigration concept, in this thesis it is adopted in the way proposed by Weber and McCulloch (2018), that is in conjunction with other explanatory theoretical standpoints -such as the concepts of *governing through migration control* (Bosworth & Guild, 2008) and *enemy penology* (Krasmann, 2007)-; and understanding it essentially as a "*portal through which we are encouraged to contemplate the ways in which shifts in criminal penology might be linked to contemporary border control*" (Weber & McCulloch, 2018: 12).

In light of these considerations, crimmigration is conceptualised in this thesis as a constituent mechanism of a broader process of criminalisation of immigration. In this way, while the accent is given to the implementation subtleties and complexities prompted by the convergence between immigration and criminal law, the ultimate significance, substantivity and impact of the broader structural dynamics of migration policy formulation and operation are permanently highlighted. In other words, the present research renders crimmigration a pertinent and useful descriptive concept to disentangle and make sense of the implementation intricacies of the social process of criminalisation of

immigration. Considering Melossi's critique (2015), the notion of crimmigration is not used in this dissertation as a substitute for the concept of criminalisation of immigration, but as an analytical device to describe and unravel a specific aspect of the latter. This conceptual determination is justified because the criminalisation of immigration is a complex and broad social process composed of, and determined by, a series of multiple, diverse and sometimes even contradictory factors. In sum, conceptualising crimmigration in this way provides adequate theoretical and methodological precision and depth, whilst ascertaining that both migration policy formulation and implementation and the criminalisation of immigration are complex and multifaceted phenomena.

The analysis of the Spanish migratory regime through the lens of crimmigration is also warranted and has already been done by several legal scholars and criminologists (e.g. Brandariz, 2016a; Brandariz & Fernández, 2017; Larrauri, 2016). Whilst irregular immigration is not a statutory offence in Spain, the convergence between immigration control and criminal justice has been studied for decades (e.g. Asúa Batarrita, 2002; García-España, 2001; Monclús, 2008; Navarro, 2006; Rodríguez-Yagüe, 2012), being evident in a series of legal measures. For instance, immigration detention is authorised by a criminal judge upon request of the police and administrative migration authorities. Besides, having a criminal record is considered a reason for expulsion, with the system also largely subordinating criminal proceedings in favour of immigration control. Under specific circumstances, Spanish legislation allows for the early termination of criminal proceedings whenever an immigrant defendant has been subject to an administrative expulsion proceeding. Moreover, in some cases a custodial penalty for an immigrant offender in case of ordinary criminal liability, can in sentence or afterwards be substituted for expulsion, which in practice means that immigrants often leave prison to face the threat of expulsion from Spain. In this regard, it should be remembered that crimmigration is not limited to formally criminalising irregular migration but can also be the result of a combination of administrative procedures and judicial control by criminal justice authorities.

In practice, while this does not mean that criminal court actors have assumed formal prerogatives in the field of immigration law enforcement or border control, it does involve the exercise of discretionary powers in matters that can have significant effects on immigration control. It should be noted that although these measures have been in force for decades, it seems that in recent years there has been an increasing focus on the expulsion of 'criminal aliens' coupled with a preference for cost-effective immigration control operations (Brandariz, 2016a; Brandariz & Fernández, 2017; Fernández & Brandariz, 2016). The origins of this focalisation can be traced back to 2009, when the government

established a police agency in charge of expelling 'persistent immigrant offenders' and set forth the category of 'qualified expulsions' in regards to foreign offenders with 'numerous criminal and/or judicial records'. It is telling, as will become evident, that the proportion of these so-called 'qualified expulsions' has steadily increased within the last decade. This ostensible policy orientation towards the prioritised expulsion of criminally involved immigrants could have further tightened the conjunction between immigration and criminal law, as part of a wider and compounded process of criminalisation of immigration. Whilst this (re)configuration of the Spanish migration regime can be traceable at the policy and regulation levels, it remains an open question what role the criminal courts are playing, and how their actors are signifying and resolving this in practice.

These criminalising processes are necessarily shaped by the intervention of the judiciary as part of the criminal justice system. Both immigration detention and the expulsions agreed or acquiesced throughout a criminal proceeding require judicial decisions made by judges within the criminal justice system, at the request of the police. In principle, the overseeing of a criminal court as a judicial body is intended to guarantee the defendant's rights and procedural safeguards. However, the decisional intervention of a criminal judge in such cases can also be seen as a screening device, which can either block or speed up the detention and deportation of an immigrant allegedly involved in criminal behaviours or convicted for it. It is thus worth questioning, what the determinant factors of the judicial decision-making processes of immigration detention and expulsion throughout the criminal proceeding are. This research aims to analyse in-depth the decision-making processes of the criminal courts in regards to the immigration detention and expulsion of offenders within Spain. These processes are key aspects of the convergence between immigration control and criminal justice at both regulation and enforcement levels. While the regulation implications of such phenomenon are noteworthy and are therefore also tackled, the main focus of this thesis is on implementation.

The scientific relevance of such a study rests on its contribution towards the improvement of understanding and fully comprehending the regulatory and enforcement mechanisms of the conjunction between immigration and criminal law, as part of the social process of criminalisation of immigration. In this sense, the Spanish migratory regime is of particular significance because Spain is not only a 'border state' within the EU, but it is also a country with a very intricate 'crimmigration regime', in which criminal justice authorities are required to exercise discretion when making decisions with significant implications for immigration control. As I will develop throughout this thesis, such exercise of discretion by criminal justice authorities means that there is a certain leeway to

interpret the law (Albonetti, 1991; Aliverti, 2012; Silveira, 2017). Law is in this sense viewed as a contested field of action, understood in terms of what Bourdieu (1987) defines as the juridical field, so that the ultimate meaning of the law in action is determined in the confrontation between judicial actors. Furthermore, the organisational arrangements and dynamics of the court routines (Dixon, 1995; Hagan, 1977; Haynes et al., 2010; Eisenstein & Jacob, 1977; Eisenstein et al., 1988; Nardulli et al., 1988) may lead to the configuration of patterned responses based on causal attributions (Albonetti, 1991; Steffensmeier et al., 1998; Steffensmeier & Demuth, 2001). This also presupposes the existence of an idiosyncratic court cultural realm (Garland, 1991; Hogarth, 1971; Sudnow, 1965), entailing the production of meanings by court actors and their unceasing ascription towards decision-making processes and outcomes.

The methodological and theoretical approach to examining such judicial decision-making processes relies on organisational and cultural perspectives and social-psychological theories (Carroll, 1978; Fontaine & Emily, 1978). This framework assumes that law application and enforcement, and more specifically judicial and sentencing decision-making, are not merely formal or mechanical operations by which abstract norms are applied to concrete cases. Rather, criminalisation, as seen through the lens of these approaches, is a process of social construction (Chambliss, 1975; Quinney, 1970; 1973). Such a process is a conflicting symbolic interaction between hegemonic enforcers and marginalised/targeted social groups (Becker, 1963; Turk, 1969). This results in an inevitable gap between regulation and enforcement, by which legal norms are selectively rather than objectively applied. In this sense, the social construction of the 'criminal alien' could be the result of some sort of circular social process (Melossi, 2003). Specifically, restrictive, though selectively implemented migratory policies, essential for the function of a profit-oriented economy and precarious labour market, push immigrants to marginalisation; in such conditions, immigrants are more likely to exhibit deviant behaviours, which are in turn the most visibly incriminating acts targeted by law-enforcers.

Assuming such a conceptual basis towards understanding judicial decision-making within criminalising social processes entails using qualitative methodologies. In general, analysing and making sense of a social phenomenon through the meanings generated by the social actors that shape it, requires methods that tackle their understandings and perceptions of the social world (Berg, 2001; Stake, 2005). Moreover, considering that human interactions are a fundamental source of data, dialogue and intersubjectivity between the researcher and the research subjects become essential (Burawoy, 1998). I have therefore conducted seventy-eight in-depth semi-structured interviews with judges,

prosecutors, court staff and defence attorneys; and engaged in focused observation of court hearings and court office routines for a period of eight months in the courthouse of one of the biggest metropolitan cities on the Southern coast of Andalusia, Malaga. As explained in the methodology chapter, this research location seemed appropriate both in terms of the intensity and traceability of the studied phenomenon, as well as in regards to the representativeness of the Spanish and European context. I also considered that the most appropriate way to achieve a thorough and complete understanding of this aforementioned socio-legal phenomenon is through a case-study approach (Hammersley, 1992; Orum et al., 1991; Van Wynsberghe & Khan, 2007).

The present research exhibits the findings of a case-study based upon a specific judicial setting, intended to unravel the intricacies, dynamics and determinants in regards to the criminalisation of immigration through the convergence of immigration control and criminal justice. While the study of crimmigration, from diverse perspectives and conceptual frameworks, has rapidly grown in the last decade (Bosworh, 2017; Bowling, 2013; Parkin, 2013; Woude et al, 2017), there is still a gap in the literature regarding the role of the criminal judiciary and the judicial decision-making processes. Some quantitative studies have been done, especially in the context of the US, which have included variables intended to measure the differential sentencing outcomes of non-citizens compared to citizens (Johnson et al., 2008; Johnson & Betsinger, 2009; Light, 2010; Light et al., 2014; Spohn, 2005; Ulmer et al., 2010; Wolfe et al., 2011; Wu and DeLone, 2012). Although these studies are enlightening in showing the apparent discrimination towards the punishment of foreigners, they are limited in scope and thoroughness due to the nature of the data and the methodological approach used. Specifically, such quantitative studies cannot adequately uncover the motivations and decisional determinants of judges and court actors, nor capture the cultural peculiarities and complexities of immigration control in regards to routine decision-making within the criminal courts.

There are a few noteworthy qualitative and mixed-methods studies on judicial decision-making (Campesi, 2007; Fabini, 2017; Light, 2017), which have more specifically addressed the application and enforcement dynamics of the aspects denoted by the crimmigration concept. Although such studies highlight the selective criminalising processes of foreigners and irregular immigrants and the concomitant social construction of the ‘criminal alien’, they do not specifically or thoroughly address the incorporation of immigration control aspects regarding decision-making dynamics of the criminal courts. Campesi’s study (2007), for instance, examines the accounts of Italian penal actors during

their daily work dealing with immigrant's criminality. However, the analysis is focused on crime control decision-making and not upon immigration law enforcement.

In the context of the US, Light (2017) has found that the eventual deportation of a defendant may lead a criminal judge not to impose a non-custodial sanction, as well as not to consider mitigating circumstances. However, this aspect is solely discussed in a few sentences, as part of an analysis of social ties, and does not involve a specific in-depth study of immigration control within judicial decision-making. On the other hand, Fabini's study (2017), is more specifically focused on immigration law enforcement in Italy (Bologna). Although she discusses the judicial decision-making process of immigration detention from a crimmigration perspective, in which she highlights judicial inclination to focus upon the criminal history of the detainees, she does not delve further into the determinants, motivations or dynamics of such processes.

In Spain, a few empirical qualitative studies regarding pre-trial expulsion (Contreras et al., 2015), sentencing expulsion (Martín-Escribano, 2015) and immigration detention (Orgaz, 2014) have been conducted. These studies will be discussed in greater depth in subsequent chapters. However, it can be mentioned at this point that these studies have focused exclusively on certain decisional aspects, rather than methodologically delving into the phenomenon as a whole. Moreover, such studies have not adopted an organisational and cultural approach, as proposed in this thesis, for understanding the meanings, functioning, dynamics, routines and decisional patterns of the criminal courts.

The present study seeks to expand and contribute to the scholarly research of the criminalisation of immigration and judicial decision-making by unveiling the determinants of criminal court decision-making in immigration control. For that purpose, I intend to decipher the decisional meanings produced and attributed by their constitutive actors (judges, prosecutors, court personnel, attorneys) in regards to immigration detention and expulsion throughout the criminal proceeding. Understanding such processes is essential for accurately defining the implementation characteristics of the current convergence between immigration control and criminal law. It is also crucial for advancing the theoretical foundations of judicial and sentencing decision-making in light of the incorporation of immigration law enforcement within the criminal justice realm. Ultimately, this study may also have implications for policymaking, by shedding light upon the challenges, complexities and possible inadequacies emerging from the exercise of prerogatives with significant effects on immigration control by criminal court actors.

1.2. Research questions and objectives

The aim of this thesis is to explore and develop a greater understanding of how criminal court actors interpret immigration control within their workplace routines and habitual decision-making processes. This research consists of a case-study centred upon a court location, entailing an in-depth immersion into the organisational and decisional cultural realm of the research subjects and settings. In doing so, this study seeks to identify the decisional motivations of immigration detention and expulsion throughout the criminal proceeding, which are considered key aspects of the convergence between immigration control and criminal law. Likewise, I intend to disentangle the routine, mechanics and patterned processes that operationalize decision-making in such cases.

The convergence between immigration control and criminal justice must be understood within the context of the criminalisation of immigration as a social construct. As explained above, crimmigration is therefore seen as a means of explaining the instrumental mechanisms currently used to operationalize such processes. Consequently, the first question posed within the subsequent research is the following:

1. How does the social construction of the 'criminal immigrant' through the intertwining of immigration control and criminal justice function within Spanish judicial practice?

Consistent with this focalisation upon the role of the criminal court regarding the social construction of the 'criminal immigrant', it is logical to focus on the decisional meanings produced by criminal court actors in their working routines and culture. Moreover, this line of inquiry coheres with the conceptual framework described in the previous section; thus, the present research also pursues to answer the following question:

2. What are the meanings attributed by court actors towards immigration control within the cultural realm of criminal court decision-making practices and routines?

Answering these questions requires unravelling and identifying the decisional determinants of such processes. In consequence, this study purports to answer this question:

3. What are the decision-making determinants, conditions and mechanics associated with immigration law implementation within the cultural realm of criminal justice decision-making?

This research also strives to determine whether policy purposes in regards to immigration control have displaced those of criminal law, or whether both realms have converged and therefore attained different objectives in similar ways. Often, the primary intentions of criminal law enforcement officers are to prosecute offenders, whilst the objectives of immigration control involve the implementation of detention and expulsion. Consequently, this thesis also seeks to answer the following question:

4. To what extent do immigration control objectives in regards to detaining and/or expelling an irregular immigrant are preferred over criminal justice objectives towards prosecuting and punishing criminals, within the Spanish judicial practice and decisional culture?

Together, these questions will allow me to address and disentangle the aforementioned aspects of the convergence between immigration control and criminal justice, as part of the social process of criminalisation of immigration in Spain, at both its regulatory and enforcement levels in regards to the realm of criminal court decision-making.

1.3. Terminological clarifications

Some terminological clarifications and definitions are essential to clearly understand the orientation, scope and content of this thesis. First of all, it is necessary to make it clear that the main focus of this research is on irregular immigration. Nonetheless, there are some circumstances within Spanish legislation in which immigration control can be exercised on both regular and irregular immigrants, as well as enforced upon foreigners in general regardless of their migratory status. For this reason, in this thesis I will explicitly use the term ‘irregular immigrants’ when referring to measures only applicable to such category of people, or to emphasise a particular aspect in relation to such social group. I must also mention that this research is focused on the processing of adult defendants only.

Additionally, I use the term ‘foreigner’ in a broad sense, to refer to any individual who is not a Spanish citizen, including those from other EU Member States. Thus, when I state ‘foreigners’, ‘foreign residents’ or ‘migrants’ it means that the analysis or reference is applicable to foreigners regardless of their migratory status. Likewise, any specific reference to ‘regular immigrants’ is therefore only applicable to that category. Conversely, the term ‘irregular immigrant’ refers to someone lacking EU citizenship. EU rules usually refer to non-EU citizens as ‘third country nationals’ (TCNs). This thesis adopts the legal definition of Art. 3.1 of Directive 2008/115/EC on common standards and procedures within Member States for returning illegally staying third-country nationals, which states

that third country national, "*means any person who is not a citizen of the Union within the meaning of Article 17(1) of the Treaty and who is not a person enjoying the Community right of free movement, as defined in Article 2(5) of the Schengen Borders Code*".

The terms 'irregular immigrant(s)/immigration' have been preferred over other more pejorative labels, such as 'illegal immigrant/immigration'. In general, it is accepted from an academic and human rights perspective that the former labels are terminologically correct and free of negative political and social connotations of such expressions as 'illegal/clandestine/alien' (Kostas, 2017; Paspalanova, 2008). In other words,

> "*By intentionally using words such as 'illegal' or 'clandestine' to refer to people, political attention in Europe has shifted from unbiased observation, description, and subsequent management of undocumented migration, to a strongly biased redefinition of a major part of international migration. This redefinition depicts immigrants as a threat to the European Union and as criminals, not because of their nature per se but because of the mechanisms introduced to protect Europe against them*" (Paspalanova, 2008: 84).

Consequently, in this dissertation I use the term 'irregular (im)migration' as broadly defined in the glossary of the International Organization for Migration (2011): "*Movement that takes place outside the regulatory norms of the sending, transit and receiving countries*". Accordingly, an 'irregular immigrant' is someone who embarks on such kind of movement. Nevertheless, such stereotypical labels have also been purposefully chosen to highlight the marginalising and neglectful conditions created or acquiesced by the migration laws to selectively discriminate certain categories of people from others.

To conclude, it is also necessary to clarify the terms associated with the enforcement of immigration law. In this introductory chapter I have intentionally used the term 'deportation' to refer to the involuntary or coercive barring of a person from a given national territory. However, in the continental European context other terms are much more common and accepted, such as 'removal', 'return' or 'departure'. Nonetheless, within the Spanish legislation the expression used to describe the coercive removal of a foreign resident in compliance with an order taken as part of a previous proceeding is 'expulsion'. For this reason, I will use this term in most cases throughout this thesis, whilst continuing to use 'deportation' and 'removal' as generic terms for all measures entailing the coercive removal or involuntary[2] departure of a foreigner from a national territory. Whenever other specific expressions are used (e.g. 'devolutions', 'pushbacks' or 'rejections'), it will be explained in each case. Finally, the detention of a foreigner to ensure their expulsion is within Spanish legislation known as 'internment', although such an expression is not straightforward and may be misleading, given its traditional warlike

[2] The term 'involuntary departure' is understood in a broad sense as meaning that the primary reason for departing is not the will of the person involved but the need to comply with a State order or regulation.

connotations (e.g. ‘internment camps’). Hence, the more precise and already widely-used standardised term of ‘immigration detention’ will be employed in this thesis.

1.4. Chapter outline

To answer the purported research questions and attain the aspired analytical objectives, this thesis is organised as follows. Chapter two traces contemporary immigration trends within Spain and examines the socioeconomic and political contexts and determinants that have shaped the development of the Spanish immigration policy in the last three decades. The purpose of this chapter is to contextualise the peculiar configuration of the Spanish migration regime, particularly the ostensible convergence between immigration control and criminal justice, as well as to illustrate the relevance of this site for conducting the proposed research. This will ultimately contribute to the establishment of the discussion surrounding the issues of policy implementation and immigration law enforcement.

In the third chapter the main theoretical underpinnings of this research are developed, in which five themes are discussed. First, the wide-ranging structural process regarding the social construction of deviant behaviour is defined, followed by the more explicit constitutive elements of the social construction of the ‘criminal immigrant’ within late modern societies. Thereafter, such aspects are situated within the Spanish context, highlighting its specificities and paradoxes. Following on from this, the theoretical analysis concentrates on the convergence between immigration control and criminal justice, focusing upon the Spanish case. Finally, the most relevant previous studies in the field are examined and discussed to accentuate their main features and conclusions.

Chapter four describes the methodological approach adopted for the following research. This study is methodologically guided by a symbolic interactionist framework and a cultural understanding towards criminal court decision-making processes. Therefore, this research relies on two complementary and mutually validating qualitative research methods: in-depth semi-structured interviews with judicial actors (judges, prosecutors, clerks, judicial personnel, defence attorneys and other professionals) and focused observation conducted at a courthouse for a period of eight months.

The next two chapters contain an analysis of the findings and results of this research. In chapter five the decision-making process and practical meanings of immigration detention are analysed and discussed. The results highlight bureaucratic tendencies of such decisional processes and the criminal justice idiosyncrasy attributed towards immigration detention proceedings. This means exposing the determinants and

characteristics of the involvement of the criminal court in regards to immigration detention decision-making. Ultimately, these processes are discussed in terms of their implications concerning the social construction of the ‘criminal alien’ and the intrinsic convergence between immigration law enforcement and crime control mechanisms.

Chapter six deals with the diverse expulsion pathways that occur within criminal proceedings. This analysis is focusing upon the decision-making determinants and processes of such immigration control aspects incorporated into the criminal justice realm. Particular attention is paid to the meanings attributed to expulsion by criminal court actors. Specifically, the in-practice punitive connotations assigned to expulsion are examined, leading to the analysis of whether such a measure is assessed by judges and prosecutors in terms of its incapacitating, deterrent and retributive purposes. Finally, the last chapter is intended to summarise the main findings, specify the scientific contributions of the present study and identify new possible lines of inquiry and pathways for future research.

Chapter 2: The intricate contexts of Spain's immigration policy

2.1. Introduction

In this chapter I examine the evolution, and highlight the key determinants, of the contemporary Spain's immigration policy. Specifically, I seek to answer the following questions: how has Spain's immigration policy evolved within the last three decades? What have been the main characteristics of immigration to Spain in that period? What have been the influence of contextual social, political and economic factors on the regulation and implementation of the Spanish immigration policy? What has been the influence of the EU framework upon the regulation and implementation of such policies? To answer these questions, I analyse the pertinent literature on the subject, evaluate legal and policy documents and dissect descriptive statistics. The main purpose of this analysis is to demarcate the context within which the ostensive conjunction between immigration and criminal law has taken place in Spain, as part of the conceivably complex and substantial social process of criminalisation of immigration in that country.

2.2. Spain's immigration landscape within the last thirty years

Post-war immigration in Europe can be divided into three phases (Cachón, 2002). The first began in the 1950s and was characterised by an influx of emigration from southern to northern and central Europe. Between 1955 and 1974, around four million Italians, two million Spaniards, one million Portuguese, one million Yugoslavians and one million Greeks migrated to north and central Europe (Cachón, 2002). The second phase took place between the 1970s-1980s, during which immigrants from Turkey and Maghreb increasingly arrived and settled, so that by 1987 there were around two million immigrants from each country in Europe (Cachón, 2002). During the third phrase, which started in the late 1980s, southern European states turned into immigration receiving countries. Greece, Italy, Portugal and Spain became immigration destinations due to restrictions imposed by northern countries, their own economic development, and the geographical, economic and historical links between the emigration nations and admitting countries (Cachón, 2002).

Since the mid-1980s, immigration became a 'social fact' in Spain (Cachón, 2003), with new and specific ethnic and phenotypic (Arabic, Black, Asian) characteristics emerging. For instance, while in 1983 60% of foreign residents were from EU countries, 16% from Latin-America and only 2.8% from Africa (2% Moroccan), in 1993 the percentage of immigrants from Africa had risen to 18% (14% Moroccan), Latin-Americans made up 19% of the population, and EU nationals 44% (Cachón, 1995). This new aspect of

immigration led to the emergence of a diverse social image of 'the other', which until then had been traditionally attributed to the gypsies among the Spanish (Cachón, 1995). Since then immigration in such a post-industrial era led to the bifurcation of the labour market, resulting in the creation of a secondary sector of low paid jobs. The unstable conditions and few opportunities for progression meant that the majority of secondary sector jobs were undertaken by immigrants (Cachón, 2003).

Immigration in Spain has also gone through various phases, with at least three being distinguishable. The first, characterised by a moderately increasing growth, can be situated between the time before Spain entered the EEC until the late 1990s. The second period can be traced back to the late 1990s until the mid-2000s, in which Spain experienced the largest immigration flow of its recent history. The third period corresponds to the last decade, in which immigration has declined, although a large foreign community have already settled. Since the 1970s and until the late 1990s, immigration in Spain grew steadily though moderately. Between 1970 and 1995, the number of foreign residents multiplied by three and between 1972 and 1992, their percentage within the total population rose from 1.1% to 2.2% (Colectivo Ioé, 2008a: 33). Furthermore, while in 1981 there were approximately 233,000 foreigners in Spain, by 1997 this had risen to around 637,000 (Colectivo Ioé, 2005). By 1999, immigrants constituted approximately 1.9% of the total population, which situated Spain still as one of the European nations with the lowest immigration rates (Reher et al., 2011).

The demographic composition of these migration flows was relatively homogenous since the majority of incoming migrants were descendants of former Spanish emigrants who had left the country in the previous decades (Colectivo Ioé, 2008a). Besides, starting in the mid-1970s, a significant number of Spaniards residing in other European countries returned to Spain due to the economic crisis (Reher et al., 2011). The presence of African immigrants, especially Moroccans, also increased during this period. However, whereas at the beginning of the 1990s the dominant social image of the immigrant was that of a young Moroccan male, most foreign residents were European (Izquierdo, 2009). Moreover, in 1991, Latin-Americans made up 19% of the foreign population and the African immigrants constituting 17% (Izquierdo, 2009), whilst eight years later 42% of foreign residents came from within the EU, 21% from Africa and 18% from Latin-America (Reher et al., 2011).

The second period was characterised by a demographic transformation due to the mass arrival of immigrants. While Spain had historically been an emigration country, this migratory phenomenon had largely accelerated Spain's status as a prominent centre for

immigration. Between 1995 and 2007, the number of foreign citizens multiplied by seven (Colectivo Ioé, 2008a), so that in 2005 Spain was in absolute terms the third most largely receiving country of immigrants in the world since 1990 (behind the US and Germany) and the first in relative terms (Arango, 2010; Colectivo Ioé, 2008a). During this time, Spain was the largest recipient of immigrants in the EU (Reher et al., 2011), whilst between 2001 and 2008, the incidence of immigration in the Spanish demographic growth (from forty-one to forty-six million people) was around 85% (Colectivo Ioé, 2008b).

In 2009, the number of foreign residents in Spain reached six and a half million, 14% of the population, which was the result of a growth of around five million people (Reher et al., 2011). This trend was especially salient between 2001 and 2004, though in absolute terms the most numerous arrivals were in 2007 (Reher et al., 2011). This happened within a time of economic expansion, increased employment opportunities, low birth rates and population aging (Colectivo Ioé, 2005). After this period, the immigration landscape was much more complex and varied, with large communities of immigrants from Latin-America, Eastern Europe, and Africa (Izquierdo, 2009). By 2003, 31% of foreign residents were from EU countries, 35% from Latin-America, and 18% from Africa (Reher et al., 2011). In 2003 one in every five foreign residents were Moroccan and one in ten Ecuadorian, while Colombians and British accounted each for 6.5% of the population (Izquierdo, 2004). In 2008, 40% of foreign residents were from EU countries (16% from Romania and Bulgaria), while 58% (3.1 million) were from nations such as Morocco, Ecuador, Bolivia and Argentina (Colectivo Ioé, 2008b). In 2009, foreign residents from EU countries took the lead once more with 36%, which has been explained by the increasing presence of nationals from newly integrated Eastern Europe states, while Latin-Americans represented 32% and Africans 16% of the population (Reher et al., 2011).

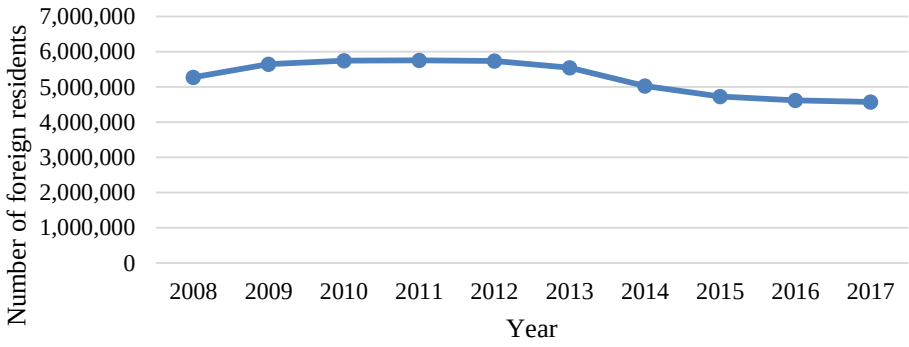
A closer look at the countries of origin confirms the magnitude of these trends (Reher et al., 2011). In 1998, most foreign residents were from Morocco (16%), followed by nationals from EU countries, especially from France (12%), Germany (10%), and the UK (7%). By 2003, the numbers had changed significantly, with Moroccans still being the largest group (13%), but now followed by the Ecuadorians (12%), who were not even representative in 1998, and then by the Colombians, from less than 2% in 1998 to 8% in 2003. In this short period, the number of Romanians also increased significantly, from less than 1% in 1998 to 4% in 2003. By 2009, the momentous growth of the Romanian population was evident through their leading position, shared with Morocco, in the number of foreign residents in Spain (12%). Ecuadorians then came in third place (7%), followed

by the British (6%). Overall, the upsurge of immigration in this period was mostly due to the intensive arrival of Latin-Americans (Martínez & Golías, 2005).

2.2.1. The current immigration landscapes

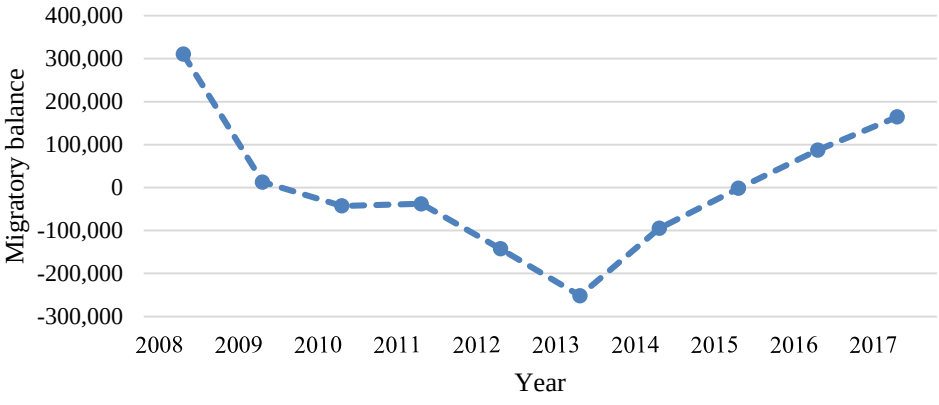
In 2008 a declining shift commenced, which made it apparent that the prodigious decade of immigration had come to an end (Arango, 2010). Between 1999 and 2002, immigration increased interannually at an average rate of 31%. Although it never grew again in that proportion, the sharpest decline began in 2008, when the immigrant population grew by only 6%, the lowest since 1998 (Reher et al., 2011: 26). As of 2017, there were around 4.5 million foreign residents in Spain, which represented 9% of the population (INE, 2018). Figure 1 traces the number of foreign residents in Spain between 2008 and 2017 and figure 2 depicts the flow of immigration and the annual migratory balance.

Figure 1. Trend of foreign residents in Spain (2008-2017)



Source: (INE, 2018)

Figure 2. Migratory balance in Spain (2008-2017)

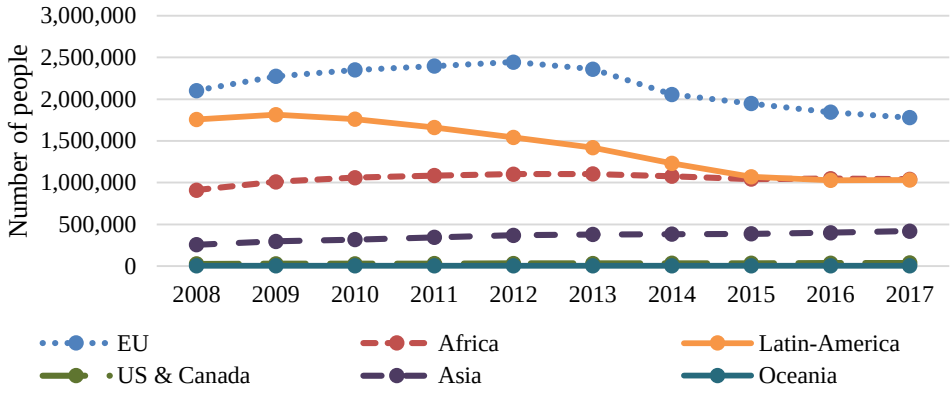


Source: (INE, 2018)

It is apparent that until 2011 the gross number of foreign residents continued to increase, but from there it steadily declined. Regarding the migratory balance, until 2009 the trend was still slightly positive, meaning that more people were continuing to go to Spain rather

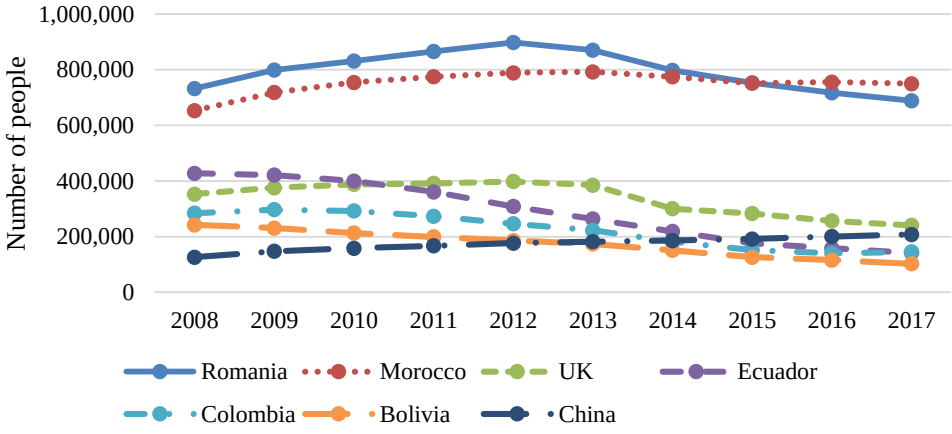
than leaving. However, since then the migratory balance has been negative and particularly acute between 2012 and 2013, although in the last two years the balance has again been positive and increasing. Figures 3 and 4 show the current composition of the foreign population in regards to the most representative zones of origin.

Figure 3. Composition of foreign resident trends, by regions of origin (2008-2017)



Source: (INE, 2018)

Figure 4. Trend of foreign residents, by most representative nationalities (2008-2017)



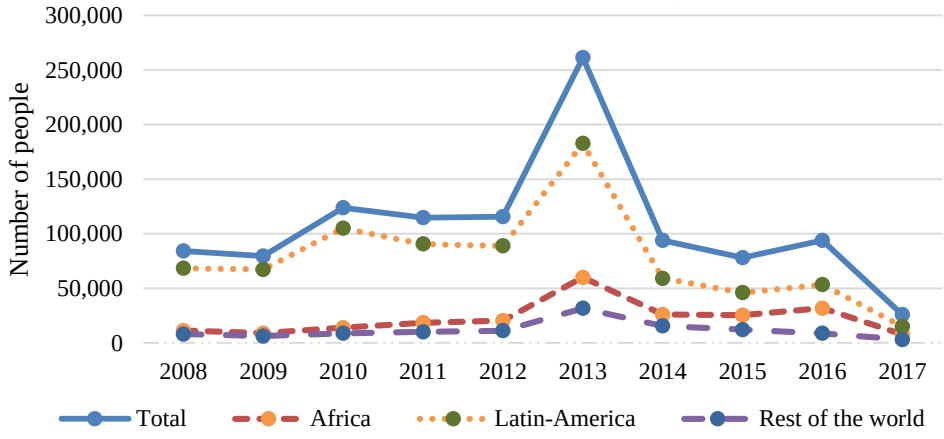
Source: (INE, 2018)

Nowadays, the great majority of foreigners in Spain are from EU countries. In 2017, there were around 1.8 million people holding EU citizenship (3.8% of the total population), with the most prominent group being from Romania at around 700,000 (1.5%), followed by the British with 241,000 (0.05%); however, in both cases a declining trend has been ostensible since 2013. The next numerically representative region is Africa, with around one million people (2%), with Morocco taking the lead with around 750,000 (1.6%), followed by Algeria and Senegal with more than 60,000 people each. In this case, a clear trend is not evident, with rather small variations and a slight increase in the last year.

Regarding Latin-Americans, as of 2017 there were approximately one million Latin-American immigrants (2% of the total population) residing in Spain. In this case, much of those emigrating from that region originated from Colombia, with around 145,000 residents, followed by Ecuador with 142,000 and Bolivia with 103,000. Nonetheless, a declining trend has been particularly evident in the case of the Ecuadorians, who have gone from constituting 8% of the foreign population in 2008, to just 3% in 2016. Finally, a moderately increasing trend has been apparent regarding the numbers of Asian immigrants given that as of 2017 there were approximately 419,000 Asians living in Spain, with China taking the lead with 208,000, followed by Pakistan with 80,000.

Another aspect to be considered are naturalisation rates, which are depicted in Figure 5 in terms of the trends that occurred between 2008 and 2017 (Ministerio de Trabajo e Inmigración, 2018a).[3] In 2016, 93,700 foreigners obtained Spanish nationality, which was an important increase compared with the previous year, and similar to that of 2014. However, 2013 was noteworthy, since more than 260,000 people obtained Spanish citizenship. Between 2008 and 2017, nationals from Ecuador (221,800), Colombia (163,500) and Morocco (173,800) were the largest groups to obtain more naturalisations. Therefore, the decrease of Ecuadorian residents among the foreign population in Spain could largely be due to their high rates of naturalisations.

Figure 5. Trend of naturalizations in Spain (2008-2017)



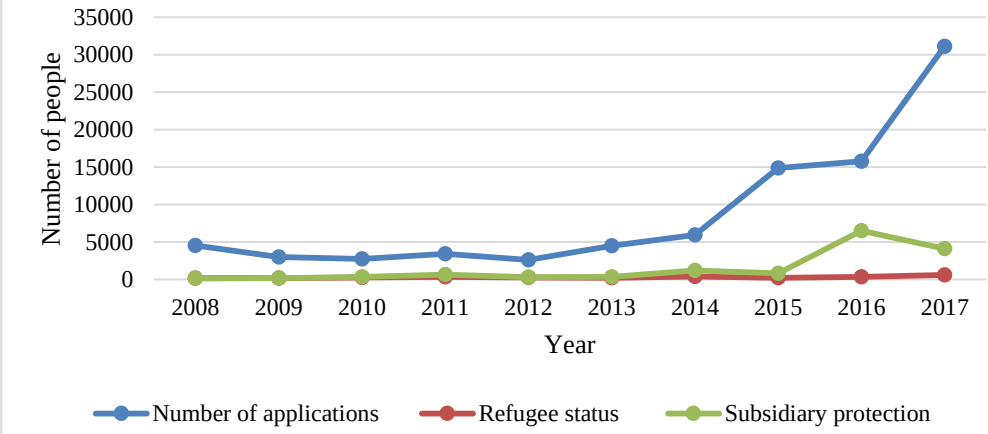
Source: (Ministerio de Trabajo e Inmigración, 2018a)

Lastly, although the statistical impact of refugees upon immigration has been minor in Spain, a brief reference to asylum seekers seems necessary. Figure 6 portrays the application trends for international protection and conceding decisions (2008-2017). Within this period, Spain received a total of 88,483 applications, permitting 2,900 people

[3] It has been noted by the source (Ministerio de Trabajo e Inmigración, 2018) that the number of naturalisations in 2017 was unusually low due to 'administrative reasons'.

to obtain asylum and subsidiary protection to 14,458 others. Until 2014, the trend remained constant, with a slight increase later in the year; however, between 2015 and 2017 applications skyrocketed, exceeding 30,000 in the last year. In 2017, most international protection seekers were from Venezuela (10,350), Syria (4,225) and Colombia (2,460). In comparison with the most notable EU states, Spain is still one of the countries with the fewest applicants. In 2017, while Spain received 31,120 applications, Germany received 222,560, Italy 128,850, France 98,635, the UK 33,780, and Sweden 26,325 (CEAR, 2018).

Figure 6. Trend of international protection applications and outcomes in Spain (2008-2017)



Source: (CEAR, 2018)

While the trend regarding those who have been granted asylum has barely changed over the years, that of subsidiary protection escalated in 2016, when this status was provided to 6,500 people, although it slightly decreased in 2017 (4,080). In comparison to the most largely representative EU countries, the rate of concessions in Spain has significantly increased in the last years, becoming similar to other noteworthy EU countries. For example, in 2017 Spain warranted international protection in 65% of cases, in comparison to France (70%), the UK (69%), Sweden (66%), Italy (60%) and Germany (50%). (CEAR, 2018). This was not the case in the previous years; for example, in 2013 Spain granted international protection only in 22% of cases, increasing to 44% in 2014 and then decreasing in 2015 to 32% (CEAR, 2018).

2.2.2. Irregular immigration

Calculating the number of irregular immigrants is problematic because attaining precise and reliable data has proved difficult. In Spain, the conventional way to do so has been to compare the number of municipal registrations with that of the granted residence permits. The former is not dependent on the latter and both are managed by different administrative offices, which brings the balance closer to a valid estimation. Besides, municipal

registration has proved attractive for irregular immigrants, given that it has been not only a way to demonstrate social roots, but also a requirement to access health services. Although this method has some limitations due to the variability in the registration proceedings across jurisdictions, as well as the lack of control over deregistration, it is comparatively the most reliable method (González-Enríquez, 2009a).[4] Using this technique, Izquierdo (2004) estimated that in 1998 there were approximately 27,000 irregular immigrants compared with around 610,000 with a regular status. From 2000, the number of irregular immigrants increased substantially. In that year, it was estimated that there were 123,000 compared with 800,000 regular residents and in 2003, the figures grew even more, with the number of irregular being the same as that of regular immigrants (1.3 million).

A group of specialised researchers (Colectivo Ioé, 2008b), have also made estimations of irregular immigration to Spain in the same way for the subsequent years. They concluded that while in 2003 the estimated proportion of irregular immigrants among the foreign population was 50.3%, in 2004 it decreased to 45.7% (1.38 million). In the following years, this trend became even more pronounced and in 2008 the proportion of irregular immigrants was only 23.8% (1.24 million). The authors attributed this shift to the 2005 regularisation programme, as well as some policy changes in the access to working permits. However, they have warned that a more accurate estimation requires dissecting those figures by taking out the number of registered EU citizens who have not obtained a residence permit. With that deduction, they estimated that in 2008 there were only 690,000 irregular immigrants within Spain (13% of the foreign population).

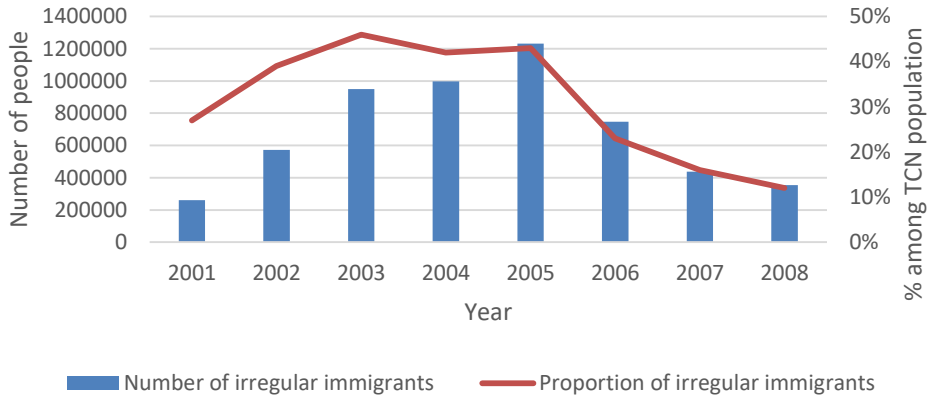
Within the framework of an EU-funded project (Clandestino) intended to unravel the magnitude of irregular immigrants across the EU, González-Enríquez (2009a) has estimated the number of irregular immigrants residing in Spain between 2001 and 2008. She used the method outlined above with some additional corrections that included not only subtracting EU-citizens from the calculation, but also TCNs with student permits and with expired permits awaiting renewal.[5] Figure 7 portrays the author's estimates of the trend of irregular immigrants between 2001 and 2008.[6]

[4] Cebolla and González (2008: 61) have also estimated the number of irregular immigrants using data from the regularisation processes conducted between 2000 and 2005. They compared the number of TCN municipal registrations with that of the applications for regularization. Across the different regularization programmes the approximate rates were these: 65% in 2000, 53% in 2001, and 60% in 2005.

[5] According to Spanish legislation, first-time permits should be renewed at the end of the initial year and then after two years. Once the renewal request has been submitted, the petitioner is allowed to remain in Spain and the administration has three months to decide, after which the permit is automatically renewed. Thus, although in these circumstances immigrants appear in the statistics as irregular, in practice they are not.

[6] Cebolla and González (2008) also followed a similar methodology estimating the proportion of expired permits undergoing renewal by discrediting a quarter of first year renewals, and 1/8 of second and third year

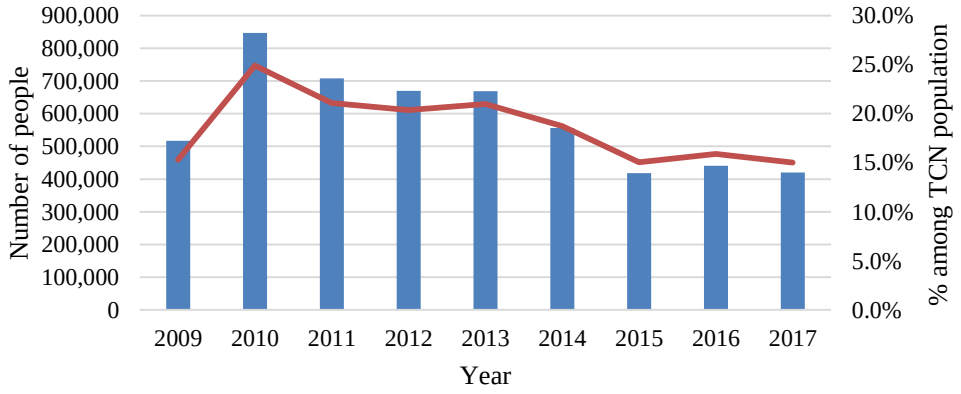
Figure 7. Trend and proportion of irregular immigrants in Spain (2001-2008)



Source: (González-Enríquez, 2009a)

Until 2005 there was an increase in the proportion of irregular immigrants in Spain, followed by a steep decline from that moment onwards. In 2005 irregular immigrants were 43% of the foreign population, which amounts to a total of over 1.2 million people. The decline of the next years is explained both by the massive regularisation programme of 2005 and by the 'automatic regularisation' of Romanians and Bulgarians as a consequence of the joining of both countries to the EU in 2007. Hence, as of 2008, it was estimated that only around 354,000 TCNs (12%) were irregular immigrants.

Figure 8. Trend and proportion of irregular immigrants in Spain (2009-2017)



Source: (INE, 2018; Ministerio de Trabajo e Inmigración, 2018b)

Using the same method, I have estimated the number of irregular immigrants between 2009 and 2016, presenting the findings in Figure 8. This should be taken only as a referential estimation given the limitations of the assumptions on which it is based. It appears that since 2011 there has been a decrease in the proportion of irregular immigrants.

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renewals. Their estimations are almost the same, except for the findings from 2007 (16% vs. 6%), perhaps because they did not exclude Romanians and Bulgarians who had just become EU citizens.

While in 2010 it is estimated that there were around 850,000 irregular immigrants residing in Spain (25% of the TCN population), in 2017 this descended to 420,000 (15%).

2.2.3. Irregular entry gateways

The immigration boom of the 2000s was largely driven by Latin-Americans, mostly Ecuadorians and Colombians. In general, they entered Spain through regular gateways, such as international airports, taking advantage of the non-requirement of visas until the early 2000s (Aparicio & Giménez, 2003; Cebolla & González, 2008; López-Sala, 2009). In fact, according to an official national survey of immigrants conducted in 2007 (Reher et al., 2008), around 98% of Latin-Americans claimed to have arrived in Spain by plane. Once in Spanish territory they managed to get a job and settle, though usually remaining in irregularity until regularisation was feasible (García et al., 2009; González-Enríquez, 2009b). In this regard, it has been argued (Martínez & Golías, 2005; Izquierdo et al., 2003) that during that period, Spanish policymakers displayed a preference towards Latin-American immigrants in comparison to those coming from Africa.

Eastern Europeans, especially Romanians and Bulgarians, also had a prominent role during the booming immigration period. Although they had already begun to emigrate to Spain before this period, immigration from Romania and Bulgaria was seemingly triggered by the withdrawal of visas carried out between 2001 and 2002 (Viruela, 2008). Although this permission did not allow them to work or remain in Spanish territory for more than three months, they still managed to stay and work given the widespread demand for cheap labour that characterised this period, with their preferred means of entry being by land (Reher et al., 2008). In 2007, both Bulgaria and Romania became part of the EU, so that citizens of these countries ceased to be considered TCNs.[7]

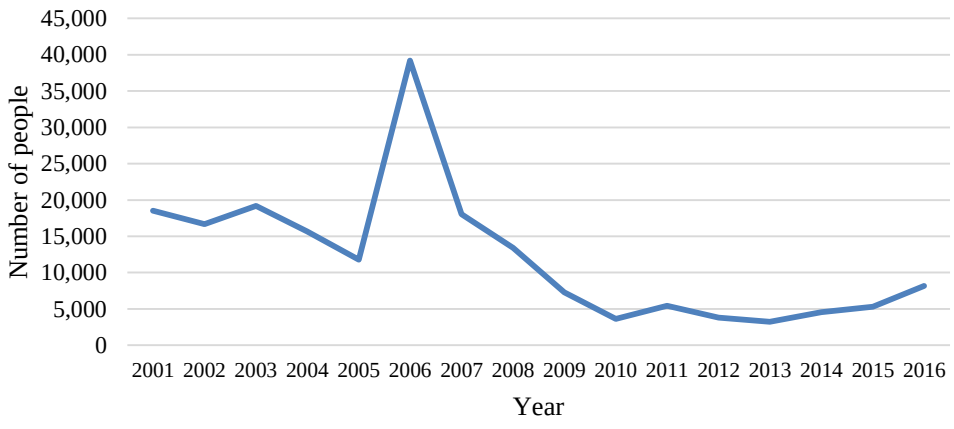
Although immigration from Africa has been noteworthy since the late 1980s, the decay of the Latin-American and Eastern-Europe migration has once again placed it in the front line. Immigration from Africa was not numerically significant in the past decades yet continued to capture the attentions of the media and policymakers (Benamar & Vallejo, 2007; González-Enríquez, 2009b; Vélez, 2008). The publicised 2006 ‘crisis of the cayucos’ and the jumps over the fences of Ceuta and Melilla in 2005, which fostered a notion of an uncontrolled immigration from Africa, further intensified the policy focus on sub-Saharan immigration (Acosta & Del Valle, 2006; Godenau, 2014; Pinyol, 2007).

[7] However, in 2006 Spain imposed restrictions on the access to the labour market for Romanians and Bulgarians, which lasted until 2009. This restriction was reinstated in 2012 and finished in 2014.

The pertinence of these sub-Saharan migration routes makes it necessary to take a closer look. Given its proximity and historical links, the Maghreb, particularly Morocco, can be considered the first points of reference when it comes to examining immigration from Africa to Spain and Europe. Morocco has a complex history of migration to Europe and during the time of large-scale labour emigration between the 1960s and 1970s Spain was almost exclusively a transit country (Carling, 2007; López, 1993). However, this changed during the 1980s and Spain became a desired country of residence for many Moroccans. Moreover, in the last decades Morocco has become more widely recognised as a transit country and lately even a receptor of immigration, given the relentless flow of sub-Saharan immigrants and the increasing tightening of EU border controls (Carling, 2007). In this sense, immigration through the North-African routes have become more and more diverse, with a myriad of Sub-Saharan emigration countries and an increasing presence of immigrants from Asia and the middle-East (Carling, 2007; CEAR, 2016).

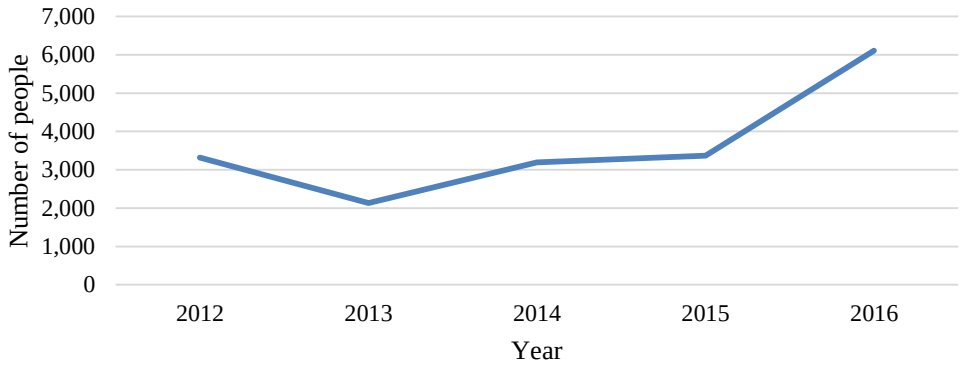
There are four focal points of entry for the African immigration to Spain: the maritime routes of the Strait of Gibraltar, the Alboran Sea, the Canary Islands and the terrestrial routes of Ceuta and Melilla. The Strait of Gibraltar is a strip of sea no more than fourteen kilometres wide. Before Spain entered the EU, adhered to the Schengen acquis and imposed visas on North-Africans, access through this entryway was commonplace for people crossing from Morocco (Benamar & Vallejo, 2007; Carling, 2007). However, the securitisation of this area since the 1990s pushed immigrants to try different routes on either side of the Strait itself, both towards the Atlantic and the Alboran Sea (Carling, 2007). Though, it is the latter which has acquired more relevance, with boats leaving Morocco and arriving at the coasts of Grenada and Almeria. Although border securitisation has also been increasingly extended to this area, crossings are still frequent today.

Figure 9. Trend of irregular entry apprehensions- Peninsula (2001-2016)



Source: (Ministerio del Interior, 2017)

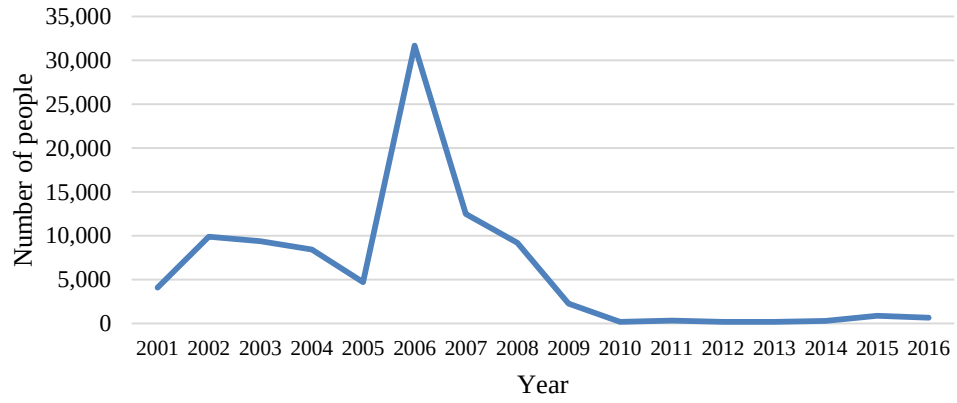
Figure 10. Trend of irregular entry apprehensions-Andalusia (2012-2016)



Source: (ABC, 2016; ABC, 2017)

Figure 9 shows the trend of immigrants apprehended on the coasts of the Spanish Peninsula between 2001 and 2016,[8] whilst figure 10 depicts the trend for the Andalusian shores between 2012 and 2016.[9] It is apparent that after the exponential upsurge of 2006, which happened after years of numbers ranging between 10,000 and 20,000, a steady decline emerged until 2010. From there, the trend has been almost flat, never rising above 10,000 and displaying a slight increasing tendency in the last three years. Most of these arrivals have taken place on the Andalusian coasts.

Figure 11. Trend of irregular entry apprehensions-Canary Islands (2001-2016)



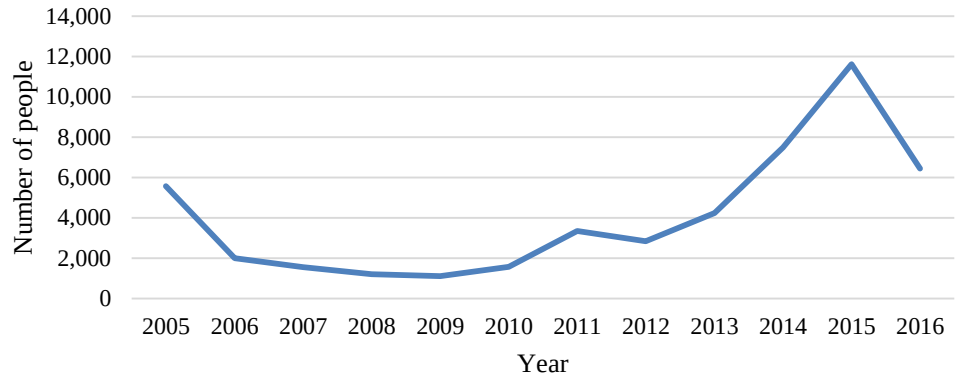
Source: (Ministerio del Interior, 2017)

The additional relevant maritime entryway is through the Canary Islands. Most immigrants who take this route usually make costly and grievous journeys by foot, in the hopes to finally cross the sea from the coasts of Guinea Conakry, Mauritania, Senegal, Gambia, and near the border between Morocco and Western Sahara (Carling, 2007; Vélez, 2008). This route emerged in the late 1990s and rose in popularity in 2001 before reaching its peak in

[8] These data are the latest official statistics available.
[9] Available official information taken from press releases.

2006, in which the prominence of the passageway began to decline due to the increasing focus upon border control (López-Sala, 2014). Figure 11 portrays the trend of apprehensions conducted by the Spanish authorities in this area between 2001 and 2016. It is evident that the trend is similar to that found on the Peninsula, confirming that after the huge peak in 2006 there was a marked decline until 2010 and since then the trend has remained almost flat with a very slight numerical increase in the last two years.

Figure 12. Trend of irregular entry apprehensions-Ceuta & Melilla (2005-2016)



Source: (Ministerio del Interior, 2017)

Finally, the other striking and highly publicised crossing point is the border between Morocco and the Spanish enclaves of Ceuta and Melilla (González-Enríquez, 2009a). Since 2008, this route has become the main point of access for irregular immigrants into Spanish territory and although the number of immigrants using the route remains comparatively low, in the last years it has been experiencing a noteworthy intensification (López-Sala, 2014). As explained below, the dynamics of these borders may be considered tempestuous, not only due to their geographical location, but also in regards to the enforcement measures implemented since the 1990s. Figure 12 shows the trend of apprehensions conducted between 2005 and 2016 upon immigrants entering these cities. Between 2012 and 2015 there was a rise in the number of apprehensions, largely pushed by a noteworthy increase in the number of Syrians from a total of 3,072 (52.8%) in 2014 to 7,164 (78.1%) in 2015 (Ministerio del Interior, 2016). However, in 2016 a sharp decline in the number of apprehensions at the borders of Ceuta and Melilla has been evident.

In the last three decades, immigration in Spain has become an outstanding social phenomenon. Spain became a recognisably popular country for immigration in a matter of a few years, mostly determined by the large influx of Latin-Americans, Moroccans and Romanians. Nowadays there is a significant community of TCNs residing in Spain, who can be subject to immigration controls. While the volume of immigration has reduced in

the last decade, today and in the foreseen future, immigration from Africa, and especially from the Sub-Sahara, will remain and even rise, which will prove critical for border and immigration control. In this sense, as will be seen in the next sections, immigration policy in Spain is significantly determined by a focus on the securitisation of the southern border.

2.3. The lenient side of Spain's immigration policy: the need for migrant labour

The current Spanish immigration policies have been influenced by two key determinants: the country's need for migrant labour and the integration into the EU. This section will focus upon the former aspect, while the next will address the latter. In general, the socioeconomic conditions of Spain have led to contradictory policy fluctuations within the immigration field, which has been coupled with a comparatively tolerant public opinion[10] (Ayerdi & Díaz, 2008; Cea, 2015; Kessler & Freeman, 2005). The Spanish economy has been highly dependent on the cheap labour provided by immigrants. For this reason, it is argued that policies regarding irregular immigration have involved "*the same calculated ambiguity which has affected the underground economy, which is the origin of between 20 % and 25 % of Spanish GDP, and is much more common in sectors such as tourism and catering, construction, domestic employment and personal services*" (González Enríquez, 2006: 327). It has thus been argued that Spanish policymakers set a system of tolerated irregularity (Izquierdo, 2012), by which immigrant workers were pushed to arrive on their own, to then remain with the expectation of an eventual regularisation.

The current Spanish immigration policy can be traced back to the 1985 Aliens Act, but already in 1986, the government conducted the first of the several regularisation programmes implemented until 2005 (Cebolla & González, 2008). Despite the more restrictive regulatory framework set forth in the mid-1980s, up until the early 1990s Spain had been slow-paced at controlling the borders. This was largely due to complex relations with Morocco, which had already been marked by conflicts over fishing rights and the situation of the Western Sahara (López, 1993; Pérés, 1999; Pérez, 2012). Since its implementation, the new Aliens Act affected those relations, especially regarding the status of the Moroccans settling in Ceuta and Melilla, which as result of this law had fallen into

[10] The monthly survey of the Centro de Investigaciones Sociológicas (CIS, 2017), which is the main source of public opinion in Spain, includes a question about the three main problems for the public at the time. According to it, while by the end of 2000 immigration was considered a major problem for around 6% of the population (unemployment 60%, terrorism 65%, and drugs 15%), throughout 2005 it exceeded 30%, and by the end of 2006 almost reached 60% (unemployment 50%, terrorism 30%, housing 20%). During this period, it was consistently among the top three. However, from there it experienced a steady decline, which accelerated from 2009 until it fell below 10% in 2011. Nowadays it is considered a major problem for about only 4% of the population, far below unemployment (approximately 70%), corruption (approximately 40%) and the economy (approximately 25%), which are the three leading concerns.

irregularity. The strained public opinion on both sides of the border led Spain to deploy a more intensive policy of naturalisations in such cities. In this context, immigrants had seemed to become an 'exchange pledge' (López, 1993), constantly used in the negotiations by both countries to advance their respective interests.

The entry of Spain into the Schengen agreement in 1991 prompted a shift towards firmer control of the Strait of Gibraltar and the border with Morocco. Given the situation between the two countries, the imposition of visas and the reinforcement of border controls made it necessary for Spain to put compensatory measures in place (López, 1993). One of the most relevant was the implementation of a second regularisation programme between 1991 and 1992, in which around 109,000 immigrant workers and 5,900 relatives were regularised (51% Moroccans) (Gonzálvez, 2000: 52). In July 1991, Morocco and Spain signed a cooperation treaty, agreeing to boost economic and financial cooperation, promote collaboration within military, agricultural, fishing and infrastructural sectors, as well as to set adequate living and working conditions for their residents in both countries. In addition, Spain granted Ceuta and Melilla an exemption from visa requirements in favour of Moroccans residing within the adjacent provinces of Nador and Tetouan.

During the 1990s and 2000s, despite the inconsistencies in governmental action in regards to immigration control, regulating the influx of foreign workers in accordance with the needs of the Spanish economy appeared to be the leading goal of immigration policy (Sánchez-Alonso, 2011). The policy of annual contingencies set forth in 1993 seemingly responded to this exigency, although it proved inadequate in achieving the desired outcome because it tended to offer fewer employment opportunities than required and focused on very few sectors, which arguably made it one of the major sources of irregular immigration (Sánchez-Alonso, 2011). Furthermore, although the government strengthened border control, it did not implement a consistent internal policy for the enforcement of irregular immigration. In fact, the Spanish authorities were largely lax regarding the supervision of workplaces and their attempts to mediate the illegal recruitment of workers, while the fines for hiring irregular immigrants were relatively low (Sánchez-Alonso, 2011).

The steady growth of irregular immigration led to the implementation of several regularisation programmes. These programmes were strongly criticised at the EU level, but Spain still conducted them in order "t*o bring to the surface the stocks of undocumented foreigners that due to their lack of a recognised legal status were pushed towards the underground economy and did not enjoy the most basic rights*" (Moreno-Fuentes, 2004: 18). Between 1985 and 2005, Spain executed eight regularisation programmes (Cebolla &

González, 2008).[11] While the first two were already mentioned, the third was conducted in 1996, prescribed by a new secondary regulation adopted by the socialist government[12], but ultimately decided by the conservative administration[13], in which between 21,000 and 24,000 irregular immigrants were regularised out of around 25,000 applicants.[14]

The fourth programme took place in 2000, with around 247,000 applications and 178,000 regularisations (Cebolla & González, 2008). Although the elected conservative government promised to tighten immigration control, it completed such regularisation programme and continued to implement others afterwards. In fact, it appeared that the conservative administration never took a clear line of action and was forced to continuously improvise short-term solutions that contradicted its own rhetoric (Colectivo Ioé, 2001). For instance, after the regularisation programme of 2000, the government not only reconsidered the rejected applications,[15] but also implemented a specific regularisation proceeding for Ecuadorians[16] and conducted a new regularisation programme in 2001.[17] These all came into place despite the government having said that the 2000 regularisation was going to be the last so to avoid the so-called 'pulling effect'.

The last programme was implemented in 2005, by the recently elected socialist government.[18] This has been the most extensive programme, since more than 691,000 applications were submitted, 576,506 of which were approved (Cebolla & González, 2008). It was conducted amidst governmental concerns over the growth of the submerged economy, social security and tax evasion, the 'unethical attitude' of employers and the 'marginalising working conditions' of immigrants (Kostova, 2012). Unlike the previous programmes, petitioners were required to prove an existing labour contract and applications were submitted by the employers (Aguilera, 2006). This programme aggravated the criticisms from the opposition, the EU and member states such as Germany, France and the Netherlands, because of the 'pulling effect' it supposedly produced and its impact on the EU intra-border migration (Kostova, 2012; Izquierdo, 2012).

[11] Although Cebolla and González (2008) differentiate between the regularisation of workers and their families in 1991, I consider both here part of the same process.
[12] The PSOE was in office from 1982 through 1996 and then from 2004 through 2011. In 2018, after the impeachment of the conservative Prime Minister, the PSOE took office once again.
[13] The PP was in office from 1996 through 2004, and then from 2011 through 2018.
[14] There is some discrepancy between the actual numbers. For instance, Kostova (2012) maintains that 24,691 people were regularised, while Cebolla and González (2008) say that only 21,294 were regularised.
[15] Of the rejected applications, around 61,000 were accepted (Cebolla & González, 2008: 61).
[16] This programme was intended for Ecuadorians to return to Ecuador and be granted Spanish permits there. Of the approximately 24,000 participants, only around 5,000 returned for that purpose (Colectivo Ioé, 2001).
[17] Of about 351,000 applications, around 239,000 were accepted (Cebolla & González, 2008: 61).
[18] In this case, approximately 691,000 undocumented immigrants submitted applications, of which around 576,000 were successful (Cebolla & González, 2008: 61).

Apart from these policy measures that responded to the circumstances of the Spanish economy, another key aspect of the relatively more liberal tone of immigration policy in Spain has been the role of the courts. By 1987, the Constitutional Court repealed and qualified many of the toughest provisions of the 1985 Aliens Act. Thereafter, during the 1990s, both the Constitutional Court and the Supreme Court played a noteworthy role at softening immigration policies (Aja, 2006).[19] Both Courts also came to remarkable judgements concerning expulsion in criminal proceedings.[20] However, more relevant in this discussion, and especially regarding expulsion proceedings, is the jurisprudence developed by the Supreme Court during the 2000s, as immigration skyrocketed and the restrictive legal reforms were implemented.

The most significant jurisprudence refers to the fine/expulsion regime (Batuecas, 2009; Castilla, 2016; González, 2015). As explained below, the 2000 and 2003 reforms of the Aliens Act intended to emphasise expulsion as the preeminent sanction for unlawful stay. Nonetheless, since 2005[21] the Supreme Court deliberated over the idea that a penalty charge would suffice as the primary sanction in replace of expulsion and that in circumstances in which expulsion is being considered, specific justification based on substantial unfavourable evidence in regards to the defendant and their circumstances is required.[22] Due to this, the administration was not allowed to impose expulsion as a primary response to unlawful stay and had to consider proportionality criteria when deciding such cases. However, as will be explained below, the validity of this regime seems now to be incompatible with the EU legislation.

This constraining framework of administrative power was mostly reinforced by the Constitutional Court in a block of rulings dictated in 2007.[23] Through this, the Court resolved a series of constitutional complaints against the first reform (LO 8/2000) of the

[19] For example, Aja (2006) refers to sentences STC 94/1993, STC 116/1993 and STC 242/1994, by which the Constitutional Court ruled that arbitrary expulsion breached the constitutional right to freedom of movement, making a wide interpretation for the protection of fundamental rights to immigrants. The Supreme Court in turn developed a doctrine that allowed immigrants to remain in Spain while their regularisation was processed and the extension of unemployment benefits to immigrants.

[20] To illustrate, in sentence ST 236/2007, the Constitutional Court dismissed the argument that expulsion based on criminal records breached the principles of double jeopardy and rehabilitation.

[21] Starting with sentence STS 7749/2005 (09/12/2005) and thereafter consistently reproduced in numerous sentences, such as STS 8214/2005 (14/12/2005), STS 1709/2006 (24/01/2006), STS 8566/2007 (20/12/2007), STS 6065/2007 (28/09/2007), STS 6172/2008 (28/11/2008).

[22] Among others, the jurisprudence considers unfavourable evidence to be: a lack of valid documentation as a form of identification, how and for what period the defendant has entered Spanish territory, arrests or prosecution, using a false nationality in order to obtain residency or having been refused entry into the Schengen area (González, 2015).

[23] SSTC 236/2007 (07/11/2007), 259/2007 (19/12/2007), 260/2007 (20/12/2007), 261/2007 (20/12/2007), 262/2007 (20/12/2007), 263/2007 (20/12/2007), 264/2007 (20/12/2007) and 265/2007 (20/12/2007).

2000 Aliens Act (LO 4/2000) and qualified many of its provisions.[24] Regarding expulsion proceedings, the Court confirmed the constitutional legitimacy of the questioned norms, but interpreted them in such a way to make it clear that the administration was constrained by the principles of legality and proportionality. Specifically, the Court maintained that although the specific legal provision (Art. 57) admitted an optional application of either a fine or expulsion, the administration was not allowed to freely and automatically order expulsion because it was conditioned by other legal constraints that imposed the need to adjust the sanction to the circumstances of the case. The principle of proportionality was ultimately incorporated into the Aliens Act in 2009 (LO 2/2009).

The immigration cycles in Spain have been correlated with those of the labour market. Specifically, the trends of immigration employment have been similar to that of immigration, which means that the offer of jobs suitable for immigrant labour has been a necessary condition of the 2000s immigration expansion (Reher et al., 2011). Between 1999 and 2007, the number of employed people increased by five million, 2.3 million of which were immigrants (Colectivo Ioé, 2008a). The Spanish labour market is considered suitable for the kinds of jobs usually undertaken by immigrant workers, with abundant niches for those more resigned to experience cut wages, frequent periods of unemployment, sectorial changes and geographical displacement (Izquierdo, 2004).

The decline of immigration in the last years can also be largely explained by decreasing employment opportunities, with the first impacts of the crisis having enormous effects upon unemployment rates. Between 2008 and 2012, the total loss of employment exceeded three million, which meant that in these years all the jobs created in the previous five vanished (Cachón, 2012: 74). Between 2007 and 2009, unemployment rates among immigrants escalated and by the end of 2009 exceeded rates based upon native residence by more than 10% (28.3% vs. 16.7%) (Reher et al., 2011: 27-28). Then, between 2008 and 2012, while employment among natives decreased by 13.7%, in the case of immigrant workers it had decreased by 30.4% (Cachón, 2012: 74). Due to their fewer vested rights and lack of citizenship, immigrants have had a greater risk of becoming unemployed and falling into poverty (Izquierdo, 2009). Furthermore, immigrants have become more vulnerable because they are overrepresented in the most affected labour areas (building sector, domestic service, agriculture, hotel industry and retail trade), which are also those with the most detrimental working conditions (Cachón, 2012).

[24] They referred to the rights of unionization, strike, education and free access to judicial services.

In sum, the enforcement of immigration policies in Spain has been related to its social, political and economic circumstances. The relationship between employment rates and immigration control has been highly correlated. The so-called system of tolerated irregularity (Izquierdo, 2012) has been principle aspect within the Spanish immigration policy. However, this is a feature that corresponds more with enforcement rather than to regulation. In fact, the Spanish regulatory framework of immigration has been increasingly tougher since the 1980s, whilst enforcement has been selective, being extremely rigorous in regards to the supervision of the Southern border, but largely lax at the internal and airport control. The following section will delve into the specific characteristics and evolution of the Spanish immigration policy within the EU/Schengen framework.

2.4. The tough side of Spain's immigration policy: the need to curb immigration within the restrictive framework of the EU

As an EU member state, Spain is required to implement binding communitarian policies.[25] Immigration control is a crucial aspect of EU objectives and is now considered a priority (Geddes, 2000; Geddes & Scholten, 2016). The consolidation of the so-called 'fortress Europe' (Geddes, 2000) entails the real and symbolic toughening of immigration control, and border states are called to play a significant role, with Spain being of strategical relevance given its geographical proximity to Africa. To better understand such a role, it is necessary to examine the main characteristics and parallelisms of the EU and Spain's immigration policies throughout their most recent historical development.

A true communitarian policy on immigration did not begin to be developed until the mid-1980s. The SEA (1986) and the Schengen agreement (1985) were the starting points of a rather reticent beginning (Geddes, 2000). The creation of a single market and the advancement of free movement within the EEC had unavoidable implications for immigration and asylum policymaking. However, member states were still reluctant to implement immigration policies based upon supranationalism and preferred to consolidate an intergovernmental approach. As explained by Geddes (2000: 67), this period was characterised by member state preferences towards intergovernmental cooperation and a tendency to loosen domestic and judicial constraints on immigration control, coupled with a resistance to an immigration integration that could impose undesirable constraints.

The emergence of the current Spanish immigration policy started in 1985 with the Aliens Act (LO 7/1985), which was prompted by the imminent entry into the EEC (Cornelius, 1994; Sánchez-Alonso, 2011; Zapata-Barrero & De Witte, 2007). It should be

[25] TEU, art. 4.3, 2012 O.J. C 326/15.

remembered that since the end of the 1970s, central and northern European states were immersed in a cycle of restriction regarding immigration. Consequently, this law was arguably passed to assure EEC nations that Spain would not become an easy gateway for 'unwanted immigrants' (Aja, 2006). As explained by Moreno-Fuentes (2004: 12), "*the strong emphasis in border control issues responded explicitly to that responsibility, while it left unresolved the real needs arising from the presence of a still small but growing number of immigrants from less developed countries living and working in Spain*… [which] *placed Spain in the role of gatekeeper of the EEC's southern border*".

This law was set to implement a rigid control of the migration flows (Aja, 2006) by conditioning the entry and long-term stay in Spain to the attainment of a visa (Art. 12) and a work offer or contract (Art. 17). Also, it established a strict regime for the enforcement of irregular immigrants and their expulsion. For instance, it set forth immigration detention for up to forty days (Art. 26) and established an expedited expulsion procedure of just 48 hours (Art. 30), for cases of unlawful stay (Art. 26.1.a). In addition, this law included cases of expulsion due to having a criminal record of prison of more than one year (Art. 26.1.d). Finally, it also introduced measures to advance the expulsion of prosecuted foreigners, regardless of their residence status, either before or after trial (Art. 21.2).

On 25 June 1991, Spain became part of the Schengen agreement, and from there it assumed an increasingly stricter position in respect to border control. The Schengen agreement emerged as an ad-hoc cooperation mechanism, characterised by a securitization tone regarding immigration, an arguable democratic deficit and the absence of scope for judicial scrutiny (Geddes, 2000: 82). This configuration relied on the nature of the agreement itself, since the removal of internal border control necessarily entailed a reinforcement of the external borders. In particular, "*the removal of internal frontiers between participating states meant the introduction of 'compensating' immigration and asylum policies, including harmonisation of visa policies and conditions for entry, and improved co-operation and harmonisation of asylum laws*" (Geddes, 2000: 81).

Spain became part of the Schengen acquis voluntarily, before its incorporation into the EU legal regime. Despite not having participated in the formulation of the agreement, Spain showed high commitment to its principles and was eventually among the countries that opted for its integration into the EU framework (Fauser, 2007). The adherence to the Schengen scheme prompted important modifications regarding the Spanish immigration policy, which became even more restrictive (Fauser, 2007). One of the most noteworthy aspects was the imposition of entry visas on citizens from North African nations in 1991,

which "*was again clearly related to immigration policies designed at the European level, for the closure of the external borders appeared as a precondition for the incorporation of Spain into the Schengen agreement*" (Moreno-Fuentes, 2004: 14). Later, Spain gradually began to impose visas on citizens from many Latin-American countries.[26]

The restriction imposed on North Africans led to an increase in the number of irregular entries (Alscher, 2005),[27] pushing immigrants from that area, especially from Morocco, to use risky means to reach the coasts of Algeciras or Tarifa. In response to the sustained increase in sub-Saharan immigration since the mid-1990s, control of the land and sea borders with Morocco was substantially strengthened (Alscher, 2005; Andersson, 2011; Colectivo Ioé, 2001). The building of border fences in Ceuta and Melilla, the implementation of highly technological and quasi-military surveillance in the Strait of Gibraltar and the externalization of border control, supported with increasing EU funding and collaboration, are clear manifestations of this phenomenon.

Starting in 1993, the eight-kilometre border between Ceuta and Morocco began to be securitized, first with the instalment of a barbed wire and subsequently with the construction and reinforcement of a fence (Alscher, 2005). Over the years, this fence has been extended up to six meters and equipped with motion detectors, video-and infrared-cameras and control towers. In Melilla, the construction of a fence twelve kilometres in length started in 1996 and was then reinforced in 1998 in a similar way to that of Ceuta.[28] As explained by Moreno-Fuentes (2004: 15-16), "*the responsibility of exercising a strict control directly derived from the compromise acquired by Spain with respect to its European partners*", which is confirmed by "*the numerous requests for the EU to co-finance the policing efforts, demand that was positively responded*". Thereafter, amidst recurring attempts to jump them,[29] these fences have been further fortified with blades.

The securitization of the Strait of Gibraltar and the Alboran Sea is another key feature of this restrictive approach towards border control. The core operational framework

[26] Specifically, Spain imposed visas on citizens from Cuba (1999), Peru (1999), Dominican Republic (1999), Colombia (2001), Ecuador (2003) and Bolivia (2007). Nowadays, as part of the commercial agreement reached between the EU, Colombia and Peru, entry visas for nationals from those countries have been withdrawn. The same is expected in the short term for Ecuadorian citizens.

[27] The first peak of apprehensions at the Strait of Gibraltar occurred in 1992, with 2,000 apprehended immigrants. Given that the control of the strait was still low at that time, it was estimated that around 8,000 migrants could enter successfully that year (Alscher, 2005: 15).

[28] According to Alscher (2005), in Ceuta this project cost 48 million euros, with the EU financing 75% of it, whereas in Melilla it cost only 12 million euros due to the more favourable topographic conditions.

[29] Attempts to cross the fences are still frequent today. The most striking events were the massive jumps of 2005, in which on different occasions hundreds of immigrants attempted to cross the fences at once. Although the fences are today much more intensively monitored and secured, not so long ago, in July 2018, more than 600 immigrants jumped and crossed the fence of Ceuta (Eldiario.es, 2018).

of this strategy stems from a project launched in 1999, called SIVE.[30] It consists of extensive technological deployment, with stationary and mobile sensor stations equipped with video- and infrared-cameras, whose main objective is the surveillance of the Spanish borders of Andalusia, the Canary Islands, Ceuta and Melilla (Alscher, 2005). This system facilitates the detection of suspicious boats at relatively long distances (25-30km) and targets, identifies and follows them through a complex set of video cameras (Alscher, 2005; Andersson, 2011). This system is managed by the police and the Civil Guard but has also been operationalised by large multinational corporations. As explained by Andersson (2011), this endeavour seems to be lucrative[31] not only for EU security agencies such as Frontex[32], but also for private enterprises and high officials.

The externalisation of border control has been another salient aspect of the communitarian approach to immigration, with Spain playing a major role in this regard (Casas et al., 2011). As explained by Andersson (2011: 1), it is possible to speak of "*an emerging virtual frontier extending from the Mediterranean to Senegal, controlled from Warsaw, Madrid and Las Palmas in a network involving sophisticated systems of communication and surveillance*". This approach entails the direct or indirect cooperation with sending or transit countries engaged in asymmetrical relations of power and based on the conditioning of development aids and commercial or economic benefits (Naranjo, 2014; Zapata-Barrero, 2013; Zapata-Barrero & Zaragoza, 2008).[33]

Spain has been a spearhead of the EU, developing two broad strategies (Zapata-Barrero & Zaragoza, 2008), such as making Morocco a barrier to migration flows and curtailing immigration through collaboration with sending countries. Spain has strengthened ties with Morocco by increasing police cooperation, signing a readmission agreement in 1992 and interceding economically and diplomatically with the EU. In this sense, the Spanish southern border has virtually displaced the Maghreb, with Morocco playing a crucial role to the point of having become a sort of filter to the native emigration, as well as the sub-Saharan transit immigration (Pérez, 2012). In addition, Spain has

[30] Translated from Spanish as, Integrated System of Exterior Surveillance.
[31] For instance, until 2003, the cumulative investments for the SIVE in the Strait of Gibraltar were 143.43 million euros; and another 7.9 million euros for the SIVE on the Canary Islands (Alscher, 2005). Also, in 2011, the government awarded a 2.9 million euros contract to Indra for the implementation of SIVE on the coasts of Tarragona (Infodefensa, 2011).
[32] Since October 2016, it has been officially named the "*European Border and Coast Guard Agency*".
[33] This strategy entails the installation of custodial centres for asylum seekers, readmission arrangements, police cooperation, exchange of immigration quotas and the transfer of immigration control responsibilities.

focused on collaborating with other African countries, mainly those along the Atlantic coast, through the signing of development and cooperation agreements.[34]

During the 1990s, member states remained reluctant towards establishing a supranational immigration policy and continued favouring intergovernmental cooperation. Moreover, during this period until the early 2000s, they made use of the communitarian framework, promoting restrictive policies on immigration while circumventing domestic opposition and constraints (Geddes, 2000; Geddes & Scholten, 2016; Schain, 2009). The treaty of Maastricht (1992) formalised, but not supranationalised cooperation upon immigration policies, by incorporating it into the third pillar of the newly created communitarian structure (Geddes, 2000). The communitarian immigration acquis remained at the level of the lowest common denominator and almost only in terms of security policy (Colectivo Ioé, 2001). Nevertheless, through the formal creation of an EU citizenship, Maastricht reinforced the exclusion of TCNs by establishing a hierarchical distinction between EU and non-EU citizens (Geddes, 2000; Colectivo Ioé, 2001).

The treaty of Amsterdam (1997) led to noticeable changes in regards to communitarian immigration policy, as it shifted from the third to the first pillar. For instance, the treaty created an 'area of freedom, security and justice', which covered free movement, immigration and asylum, and incorporated the Schengen acquis into the EU regime. From this point, immigration policy gradually became a key issue for EU supranational policy-making and a series of legislative and institutional arrangements were advanced (Geddes & Scholten, 2016). One of the milestones of the immigration policy framework of this time were the conclusions of the Tampere summit (October 1999), in which member states agreed a five-year plan to set objectives and create a common asylum and migration policy (Geddes & Scholten, 2016; Hampshire, 2016). The conclusions emphasized favourability towards 'legal', while proscribing 'illegal immigration'.[35]

In this context, Spain is particularly noteworthy given that the Tampere programme seemed to have had a substantial impact on the Spanish regulation of irregular immigration. Initially, in January 2000, a progressive Parliamentary majority approved a new Aliens Act (LO 4/2000). In general, this law proved fairly liberal, consolidating a block of rights for immigrants and promoting a change of focus towards a more integrative

[34] In this regard, Spain has signed treaties or advanced negotiations with Cape Verde, Ethiopia, Gambia, Guinea Conakry, Mali, Mauritania, Niger and Senegal.

[35] For instance, according to conclusion 3, extending freedom to those who "*justifiably seek access to our (EU) territory*," requires "*the Union to develop common policies on asylum and immigration, while taking into account the need for a consistent control of external borders to stop illegal immigration and to combat those who organise it and commit related international crimes*"; also, conclusion 23 states that the "*European Council is determined to tackle at its source illegal immigration*" (EU Council, 1999).

approach (Aja, 2006). According to this, unlawful stay and working without permit was no longer sanctioned with expulsion (Art. 53), but with a fine (Art. 51). Hence, immigration detention was no longer applicable to these cases (Art.58) and the use of criminal records as justifications for expulsion was eliminated. However, less than a year later, the newly elected conservative government used its Parliamentary majority to substantially modify this new law in line with the increasingly restrictive EU policy framework.

Amidst growing public concern and even moral panics regarding immigration,[36] the PP attained a landslide victory in the elections of March 2000, using such an issue as one of the main focal points of its campaign. Following this, a regressive reform of the 2000 Aliens Act was proposed, which was to a large extent supported by the restrictive EU framework (Fauser, 2007). This reform (LO 8/2000) emphasised diverse categories of citizens with dissimilar rights, institutionalising different levels of exclusion (Colectivo Ioé, 2001). Its more critical aspect was the reinforcement of the sanctioning regime and the enhancement of expulsion mechanisms (Aja, 2006). Indeed, expulsion was reintroduced as an ordinary sanction for both unlawful stay and unauthorized work (Art. 57) and expulsion based on criminal records was reinstated (Art. 57.2). It is telling that the introduction of this measure was justified on the grounds of increasing the capacity of the State to enforce irregular immigration so to bring it in line with the legislation of EU Member States, while complying with the conclusions of the Tampere summit.

The growing communitarian focus upon common strategies within immigration policy was deepened in the following years, influenced by the renewed emphasis on the fight against 'terrorism' prompted by the September 11 attacks. First in 2001, the Laeken conclusions pointed to the need to "*adopt, on the basis on the Tampere conclusions and as soon as possible, a common policy on asylum and immigration*" (European Council, 2001). It was stated that such a policy had to imply the integration of the policy on migratory flows into the EU foreign policy, which also entailed finalising readmission agreements with 'relevant countries' on the basis of a 'new list of priorities' and a 'clear action plan'. Besides, a better management of the EU external border control was promoted in order to fight against terrorism, 'illegal immigration networks' and the traffic in human beings.

[36] As explained by Moreno-Fuentes (2000: 19), "*although in absolute terms immigrants represented less than 1% of the total Spanish population in 1999, the novelty of their presence, their high concentrations in certain regions… the attention immigration issues received in the media because of the role played by Spain as Southern border of the EU, together with the activities of some uncoordinated but locally powerful xenophobic entrepreneurs, contributed to the salience of the issue of immigration in the Spanish public opinion*". Also, between 1999-2000, several racist incidents were reported in El Ejido (Almería), Tarrasa (Barcelona), and Figueres (Gerona) (González-Enríquez, 2006; Moreno-Fuentes, 2004).

Following the Laeken meeting, a new EU council summit was held in Seville in 2002 (European Council, 2002a) under the EU Presidency of Spain. The conclusions of this summit further developed many of the restrictive aspects of the Tampere programme, also reflected in the Spanish initiative for a directive on the communication of passenger data by carriers (Fauser, 2007).[37] The conclusions also gave priority to the regulation of migration flows and the restrain of 'illegal immigration'. It was commanded that the EU institutions prioritise measures against irregular immigration, such as the annual review of the list of TCNs countries of origin, the introduction of a common identification system for visa data, speeding up readmission agreements and the adoption of a repatriation plan.

An EU supranational policy on the expulsion of irregular immigrants also began to take form around this time (Acosta, 2009a).[38] The increasingly intense activity of the EU regarding immigration control paved the way for the keystone of the communitarian regulation in this matter, the 'Returns Directive' (2008/115/EC). Its first direct antecedent was the 'Green Paper on a Community Return Policy' (European Commission, 2002), intended to sketch a community return policy as a necessity in the process of developing a comprehensive EU asylum and immigration policy. It also launched a broad discussion among EU institutions, member states and civil society organisations.

Following several meetings and consultations, in November 2002 the Council adopted a 'Return Action Programme' (European Council, 2002b), acknowledging that the adoption of an efficient comprehensive return policy was one of the greatest challenges of the EU. This plan established the fundamentals for an enhanced co-operation between member states, common minimum standards for the repatriation of 'illegal residents' and intensified co-operation between third countries. Ensuing this, in 2004 the Council adopted the Hague Programme (European Council, 2004), which prioritised the combat against 'illegal immigration'. It expressly stated that "*migrants who do not or no longer have the right to stay legally in the EU must return on a voluntary or, if necessary, compulsory basis*", and called for the "*establishment of an effective removal and repatriation policy based on common standards for persons to be returned in a humane manner and with full respect for their human rights and dignity*".

[37] This regulation was directly incorporated into the Spanish legislation in 2003 (LO 14/2003) and then eventually converted into communitarian law in 2004 through directive 2004/82/EC, on the obligation of carriers to communicate passenger data.

[38] In 2001, the EU Council adopted directive 2001/40, on mutual recognition of decisions on the expulsion of TCNs. Then, the Council Decision 2004/191 set out the criteria and practical arrangements for the compensation of the financial imbalances resulting from the application of that directive. The Council also approved directive 2003/110, on measures on assistance between authorities of member state airports of transit, regarding the removal of immigrants by air. Then in 2004, the Council adopted decision 2004/573 on the organisation of joint flights for removals of TCNs from the territory of two or more-member states.

The Returns Directive (2008/115/EC) was adopted under the co-decision framework devised by the Treaty of Amsterdam. Negotiations were arduous, given the disagreements among member states on the most 'liberal aspects' of the drafts (Acosta, 2009a; Baldaccini, 2009; Friedrich, 2009). Many states complained that the proposals were protecting rather than returning 'illegals', accentuating the various references to human rights along the text. Conversely, the EU Parliament considered that the human rights and procedural safeguards were not strict enough, being concerned about a weakening of standards regarding detention and re-entry bans. However, things sped-up in 2008 as the Parliament approved the directive in June and the Council adopted it in December.

The Returns Directive was criticised by human rights organisations and many international governments, being labelled as 'the shameful directive' (Acosta, 2009b; Arango 2010; Baldaccini, 2009; Peers, 2008; Raffaeli, 2011; UNHCR, 2008). It was argued that the directive was flawed from a human rights perspective, as well as in respect to the basic principles of EU immigration and asylum law (Peers, 2008). Furthermore, Latin-American governments unanimously condemned it for its repressiveness (Acosta, 2009b). It was also contended that the directive's main failure was that it failed to address the prevailing situation in Europe, whereby irregular immigrants have been tacitly tolerated because they were needed in the labour market yet were left vulnerable to exploitation and denied access to health care (Baldaccini, 2009). However, although the directive could have allegedly weakened human rights and procedural safeguards, it apparently did not worsen the existing situation within most member states (Arango, 2010).

Regarding this matter, Spain legitimated, if not pushed, the introduction of stricter regulations (Moya, 2009; Reig, 2015; Solanes, 2010). Spain transposed the directive through a 2009 reform (LO 2/2009)[39] of the Aliens Act.[40] This reform emphasised the

[39] The transposition of the directive to the Spanish legislation led to the introduction of a voluntary return provision. The regular sanction for unlawful stay in Spain has been penalty charges, with expulsion being subsidiary. However, the Spanish administration continued imposing fines as the primary sanction, coupled with the obligation of departing within a certain period. However, in 2014 an administrative court of the Basque Country submitted a request for a preliminary ruling to the CJEU, inquiring whether the directive precludes legislation pursuant to which the illegal stay of a foreigner may be punishable with a penalty charge, which cannot be imposed concurrently with expulsion. The CJEU (C-38/14) concluded that such a regulation does not meet the requirements of the directive because it does not permit a mechanism by which to impose either a fine or removal, in the understanding that both measures are mutually exclusive. It has been argued (Rodríguez-Candela & Lancha, 2015; Castilla, 2016) that this ruling entailed an erroneous interpretation of the Spanish legislation because imposing a fine does not preclude the voluntary return of an irregular immigrant, with the possibility of enforcing expulsion in case of non-compliance. Ultimately, the issue at stake is that a voluntary return does not result in an entry ban, while expulsion does.

[40] This reform also transposed the missing aspects of the following directives adopted since 2000: 2003/110/CE on assistance in cases of transit for the purposes of removal by air; 2003/109/CE on the status of third-country nationals who are long-term residents; 2004/81/CE on the residence permit issued to TCNs who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities; 2004/82/CE on the obligation of carriers to

combat against irregular immigration, by expanding the list of sanctioned infractions to include sham marriages, the indirect promotion of irregular immigration and the use of forged documents for registration. It also raised fines, increased the period for entry ban and included having criminal records as a basis for expedited expulsion. However, the most controversial change was the increase of the immigration detention period from forty to sixty days.[41] Overall, with the emergence of the economic crisis in the late 2000s and the contraction of the labour market, immigrant workers were no longer in demand. This seemingly led Spain to take on a restrictive shift in immigration control, characterised by greater alignment with restrictive EU policies (Hazán, 2014). Although Spain had not followed the prohibitive course of many of its European neighbours, from 2008 onwards signs of a greater alliance with such tendencies have been evident (Arango, 2010).

In this context, Spain adopted the Africa Plan in 2006, which was a policy instrument designed in response to the conflicting past and prompted by the 'crisis of the cayucos'. It prioritised an ostensible market-oriented approach in favour of the interests of Spain's companies in Africa, as well as strengthening the control of immigration flows across the EU southern border (Bidagurren & Aurre, 2008). Moreover, it reinforced the focus on the militarisation of the African routes and aimed at conditioning development aid towards migration control (Romero, 2008). The plan also highlighted and sought after a further involvement of the EU, while promoting a net of bilateral migratory and readmission agreements with listed countries. In 2009, Spain adopted a second Africa Plan, which again emphasised the link between conditional development aid and migration control, as well as the externalisation of border control (Azkona, 2014; Romero, 2011).

At the EU level, the Treaty of Lisbon (2009) inaugurated a new phase in which immigration policy became fully supranationalised (Arcarazo & Geddes, 2013; Geddes & Scholten, 2016). This meant that "*the European Parliament* [became] *co-decision maker with the Council and the CJEU* [could exercise] *full jurisdiction over free movement, immigration and asylum*" (Geddes & Scholten, 2016: 149). However, policies implemented within this framework seem to be mainly reactive, guided by securitization criteria and emphasizing exclusion as a reflection of state preference for the control of the process and institutional domination (González-Vega, 2015; Schain, 2009). Spain has played a prominent role in this regard, standing as the guard of the southernmost EU

communicate passenger data; 2004/114/CE on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service; 2005/71/CE on a specific procedure for admitting third-country nationals for the purposes of scientific research; 2009/50/CE on the conditions of entry and residence of TCNs for the purposes of highly qualified employment; and 2009/52/CE providing for minimum standards on sanctions and measures against employers of illegally staying TCNs.

[41] The directive allows for a detention of up to six months, extraordinarily extendable to eighteen months.

border. Indeed, it has been one of the most active in conducting border control checks and making use of the EU funds and arrangements to facilitate deportation.

Spain has become the country which oversees the most border rejections than any other EU states. According to Eurostat (2016), between 2008 and 2015, at the border Spain rejected approximately 2,148,000 non-EU citizens, which totalled 69% among EU-28 member states.[42] Available data for 2014 (Eurostat, 2016) show that most EU-28 rejections are by far imposed upon Moroccans.[43] Also, between 2008 and 2015, Spain was the third country that imposed most deportation orders. In that period, Spain ordered approximately 507,000 non-EU citizens to leave the country, 12.2% of the total, below Greece (19%), France (16%) and slightly above the UK (11.8%). Furthermore, Spain is the third country in which most of these orders are coercively enforced by the state, with more than 80%.

Spain has also been one of the most active at organising deportation flights. Between 2010 and 2014, Spain was by far the leader in organising joint flights.[44] According to official data (Defensor del Pueblo, 2012-2017), between 2011 and 2016 Spain organised thirty-nine joint flights in coordination with Frontex and participated in another sixty arranged by other states, expelling approximately 1,800 people in this way. Moreover, between 2012 and 2016, Spain itself conducted sixty-nine deportation flights, expelling around 2,800 people. In managerial terms, deportation flights are costly because apart from the freight costs, each deportee must be escorted by two police officers.[45] For this reason, these operations tend to be guided by pragmatic criteria, by targeting specific national groups whilst bearing in mind the distance of the deportation country.

Spain has also become one of the member states that have received more money from EU border funds (European Commission, 2014a). Between 2007 and 2012, Spain received approximately 220 million euros, which represented 43% of the total national expenditure for border control tasks such as border management, visa policy and IT systems (Ministerio del Interior, 2012). Between 2007 and 2010, Spain has spent most of this EU funding (93%) in border management tasks.[46] For year 2013, Spain received

[42] For example, Poland came second with 207,440 rejections, which was 7% of the total.
[43] In 2014, among the EU-28 member states, approximately 165,000 Moroccans were rejected at the border, followed by Ukrainians with less than 25,000.
[44] Data delivered through a Parliamentary request and reproduced by the media (Cadena SER, 2015; Europapress, 2015), show that Spain organised thirty-one joint flights between 2010-2014, followed by Italy with eighteen. In the same period, other countries facing relatively high immigration pressures such as Greece, the UK or France have organized only four, six, and two joint flights, respectively.
[45] It is estimated that on average a deportation flight with forty-eight deportees, costs approximately 265,000 euros, although those sent to Latin American can cost up to half a million euros (Cadena SER, 2015).
[46] This consists of the support for the establishment of a management strategy for "*checking on persons and surveillance of the external borders*" and the implementation of a European surveillance system for the external borders and for the patrol networks at the southern maritime border (Ministerio del Interior, 2012).

around 62 million euros from borders funds, an increase of around 13.7 million euros compared to the previous year. A new EU border control funding program has been approved for the period 2014-2020, with a total budget of 3.8 billion euros (European Commission, 2015). The allocation for Spain under this new fund is approximately 195 million euros, which is again the largest among the participating member states and represents 17% of the specific state funding allocation.

Since the PP took office in 2011, the shift towards austerity and lessening of the welfare state has also had a significant impact on Spain's immigration policy. Indeed, access of TCNs to health services and social benefits has been substantially limited, with a legal reform in 2012 depriving irregular immigrants from unrestricted access to the public health system[47] (Lema, 2014). Besides, non-EU immigrants have been the most affected by the crisis, with such government policies aggravating the situation (Arango, 2010; Bruquetas et al., 2012; Gil-Alonso & Vidal-Coso, 2015; Vázquez et al., 2014). The austerity orientation in public policy has impinged upon immigration law enforcement with a managerial rationale, guided by cost-effectiveness (Brandariz, 2016a; Fernández & Brandariz, 2016). Thus, operations which favour success in relation to deportation rates are preferred, using the swiftest and most cost-effective available strategies. On top of this tightening trend, in 2015 the government reformed (LO 4/2015) the Aliens Act to make it legal the pushbacks carried out along the borders of Ceuta and Melilla, by which border control agents reject and return immigrants attempting to enter Spanish territory to Morocco. This practice has been questioned in terms of its humanitarian implications (Martínez-Escamilla et al., 2014)[48]. Ultimately, as discussed in the following chapters, there has been an increasing focus upon the expulsion of criminalised immigrants.

2.5. Summary

This chapter has provided an overview of the context within which Spain has developed its immigration policy and has traced its contemporary evolution. Such a discussion has been framed within EU immigration policy development. Since Spain became part of the EU, the Spanish immigration policy has been determined by an inexorable dialectic between the need to comply with communitarian commitments and the responses towards labour

[47] They are allowed to access public health only in cases of emergency, pregnancy or underage persons. The recently appointed (2018) PSOE administration has passed a regulation (RD-l 7/2018; BOE-A-2018-10752) that has repealed to a large extent the regressive provisions implemented by the previous PP administration.

[48] The ECtHR has recently ruled (3 October 2017) in a case involving a Malian and an Ivorian national (case N.D. & N.T. v. Spain), that the immediate return to Morocco of sub-Saharan migrants who were attempting to enter Spanish territory in Melilla amounted to a collective expulsion of foreign nationals, in breach of the ECHR. This implies that the automatic or immediate return (pushbacks) of immigrants crossing the fenced borders of Ceuta and Melilla could now be considered legally incompatible with the ECHR.

market requirements driven by the unstable cycles of its largely exposed economy. In this context, Spain has assumed the role of guarding the southernmost border of the EU, while at the same time implementing contradictory internal policies. These dynamics have shaped the different pieces of legislation and policy instruments developed in the last thirty years. In the last decade, however, Spain has more visibly adhered to the hegemonic EU trend in migration control, by embracing a more restrictive tone and a cost-effective orientation. These intricate circumstances and dynamics configure a heterogenous, multifaceted and somewhat ambiguous migration policy scenery, in which diverse policymaking purposes collide not only between themselves but also with the unrestrainable societal conditions. Besides, such policies are in practice necessarily mediated and implemented through mechanisms and processes in which divergent objectives and interests could be at play. Consequently, the conceivable convergence between immigration and criminal law in Spain must be situated within this general framework and interpreted as a noteworthy though not necessarily all-encompassing part of it. The next chapter will focus specifically on this aspect, analysing the substantial social process of criminalisation of immigration in Spain, and emphasising the intertwining between immigration control and criminal justice as an essential component of it.

Chapter 3: The social construction of the 'criminal immigrant' through the intertwining between immigration control and criminal law

3.1. Introduction

The previous chapter has provided the essential for understanding the Spanish immigration policy. This chapter will in turn focus on one of the key features of such policy: the convergence between immigration control and criminal law and its essential role in the social construction of the 'criminal immigrant'. Therefore, in this chapter I will conduct a review of the pertinent literature regarding such aspects. In doing so, I will first consider, from a critical criminological perspective, the most relevant conceptual developments on the social construction of deviancy and the 'criminal immigrant'. This analysis will then lead to the review of the literature that focuses upon the intertwining between immigration control and criminal justice and how its peculiar configuration is functional to the social construction of the 'criminal immigrant'. Thereafter, I will situate this phenomenon within the Spanish context and then I will examine relevant literature on previous similar studies.

3.2. The policy mechanisms of the social construction of the 'deviant being'

The social construction of the 'criminal immigrant' is a conspicuous manifestation of the social construction of the 'deviant being'. It is then necessary to discuss and identify the substantial elements of this social process and how they operate in contemporary societies. Such a discussion takes on a critical perspective of the state social control, since it assumes that the figure of the 'criminal immigrant' is substantially a social construction. From a purely constructivist perspective, crime has no ontological reality and, as such, is not the object but the product of criminal policy (Hulsman, 1986). Power is thus not seen just in negative terms, but in its ability to produce subjects, domains of objects and effects/rituals of truth (Foucault, 1995). However, a radical constructivist perspective may be too impractical for explaining the social construction of the 'deviant being', and it seems more useful to understand it as a process of action and reaction (Matthews, 2010).

In his seminal book (1963), Becker developed the conceptual basis for the study of social reaction. Becker's theoretical perspective is based on *symbolic interactionism*, defining deviance not as a quality that lies in the behaviour itself, but in the interaction between the person who commits the act and those who respond to it. Deviance is consequently a social construction but understood as the consequence of the application by others of rules to a person labelled as offender. Specifically, "*social groups create*

deviance by making the rules whose infraction constitutes deviance, and by applying those rules to particular people and labelling them as outsiders" (Becker, 1963: 9).

The gap between regulation and enforcement is essential in Becker's theory. In his conception, deviance is a function of social reaction and the degree to which that reaction is effectively exercised varies greatly. This means that not every infraction is enforced by law, depending in part on the person who commits the act, since "*rules tend to be applied more to some persons than others*" (Becker, 1963: 12). This bias within law enforcement is in Becker's view explained by the asymmetric power relations of society, in which groups whose social position gives them "*weapons and power*", are in turn "*best able to enforce their rules*". Becker maintains that the imposition and enforcement of rules by some people over others is the result of contested and conflicting socio-political processes.

Critical criminological perspectives are consistent with these standpoints. Chambliss (1975), for instance, argued that criminal law is a set of rules laid down by the state in the interests of the ruling class, so that criminal behaviour is essentially the expression of class conflicts resulting from the inherently exploitative nature of capitalistic economic relations. Enforcement is thus a key element of this process because many acts committed by the lower classes, and whose control is in the interest of the ruling class, are as likely to be as frequent among the upper classes as the lower classes. Hence, it is crucial for the ruling class to control the discretion of law enforcement agencies.

Similarly, Quinney (1973) interprets criminal law as the coercive instrument of the state, used by the ruling class to maintain the existing social and economic order. In *The Social Reality of Crime* (1970), Quinney argues that the enforcement of criminal laws varies according to the extent to which the behaviours of disenfranchised people conflict with the interests of those in power, so that criminal justice activity increases when the interests of the dominant class are more highly threatened. Communities also vary in their expectations of law enforcement and its application is influenced by the visibility of offenses and by the public norms regarding reporting possible violations. Accordingly, as explained by minority threat perspectives (Blumer, 1958), as minority presence increases, dominant groups share a growing sense of apprehension in regards to the threat that subordinate groups could potentially pose. Large increases in minority groups over a relatively brief period could lead to social and economic conflict with dominant groups, as well as the intensification of social control to maintain the status quo (Blalock, 1967).

Within this socially conflicting framework, Turk's (1969) theory seems relevant to understanding how processes of criminalisation operate. Turk stresses the gap between

regulation and enforcement, arguing that not all persons known to have violated laws are actually punished, since there is always some degree of incongruence between norms as declared and norms as enforced. Turk adheres to the conceptual framework of the criminology of conflict and maintains that criminality is a social condition attributed by an authoritative figure that has the power to define and impose it. In this regard, he highlights the conflict between dominant decision-making and subordinate categories.

Turk's theory (1969) is traversed by a cultural understanding of the assimilation and compliance of social norms, with deviation being considered a consequence of such dynamics. In his conceptual framework for describing the criminalisation process, Turk speaks about the conditions in which norm resistance is more likely to occur, explaining it in terms of the degree of congruence between cultural and social norms, that is the correspondence between the axiological or normative and the behavioural or enforcement levels. Nonetheless, the conflict that prompts criminalisation are intergroup, that is the conflict between the norms of the subordinated and dominant groups, given that each of them, at least in theory, adhere to an antagonistic set of cultural and social norms.

Although Turk's theory has been criticised on the grounds of its excessive complexity (e.g. Baratta, 2004; Greenleaf & Lanza-Kaduce, 1995), its conceptualisation of the factors that explain norm resistance are useful in understanding the selectiveness of law enforcement. Specifically, Turk's concept of sophistication is relevant to explain the social and cultural mechanisms that may prompt the criminalisation of certain categories of people. Sophistication is defined as the "*knowledge of patterns in the behaviour of others which is used in attempts to manipulate them*" (Turk, 1969: 58-59). Individuals with higher degrees of sophistication can better assess the strengths and weaknesses of their position relative to authorities and be more prepared to avoid conflict with the ruling group. In terms of law enforcement, this means that individuals who attain lower degrees of sophistication are more likely to be targeted by the criminal justice system.

Given that sophistication implies knowledge of the cultural and social norms of the dominant group and their enforcement patterns, as well as the ability to use it for personal benefit, marginalised individuals, or groups who are unfamiliar with these values and enforcement patterns, are more likely to be criminalised. This is related to another essential concept of Turk's theory: the *degree of congruence* displayed by authorities between the normative and enforcement domains. This explains that intergroup conflict is more likely when authorities act more congruently with their own norms and the gap between regulation and enforcement is closer. Consequently, the likelihood of conflict is greater

when the degree of sophistication of the subordinated group is lower while the degree of congruence of law enforcement is higher.

These conceptual remarks explain, from a critical perspective, the policy dynamics of the social construction of the 'deviant being'. The main inference is that criminalisation processes involve a conflicting power relation between a hegemonic category, represented by policymakers and law enforcers, and a subordinated category of enforced and targeted individuals. Moreover, they highlight the complexity and relevance of policy implementation, by emphasising the selective character of secondary criminalisation processes. These conceptual underpinnings are essential for understanding the current processes of the social construction of the 'criminal immigrant' and therefore pertinent for the present research. The 'criminal immigrant' has once again become the prototypical 'deviant being', and as such, the preferential target of law enforcement in late modern societies. The next section is precisely intended to specify this conceptual elaboration.

3.3. The criminalisation of immigration in late modernity

3.3.1. The social construction of the 'criminal immigrant' in Europe

Early critical criminology pioneers Rusche and Kirchheimer (1984 [1939]) asserted that every production system tends to discover punitive methods which correspond to its productive relationships. This premise remains valid to explain how the current and hegemonic social, political and economic dynamics within Europe and the EU in general, and Spain in particular, determine the way in which punishments, *sensu lato*, are established, implemented and enforced upon immigrants. The following analysis will be a contextual and present-day specification of the mechanisms discussed in the previous section, which is in turn necessary to establish a point of reference to understand the dynamics of policy implementation on a judicial level.

Bauman's liquid modernity (2000) characterises this époque, in contrast with the precedent solid modernity, with uncertainty, existential insecurity, anxiety, individualism and loneliness, especially among the labour class. These circumstances are correlated with the development of so-called labour flexibility, which has led to the deterioration of working conditions, whilst it impinges upon working life with uncertainty. In this era of globalised capitalism, Bauman conceptually opposes the unrestrained mobility of capitals, alongside the selective restriction of people and labour mobility. In this context, societies find themselves urged to identify easy scapegoats and governments, apparently impotent to strike at the roots of these social struggles, attempt to draw such 'disoriented individuals'

into something reminiscent of a 'national community', through presenting immigrants as the most tangible embodiment of 'otherness' (Bauman, 2000: 109).

Relying upon these Bauman's (2000) conceptual insights, Young (2007) has developed concepts such as ontological insecurity and social bulimia. Young argues that liquid modernity leads to both social and individual disembeddedness, with the normative borders blurring, shifting, overlapping or detaching, and individuals feeling disembedded from surrounding culture and institutions. One of the most critical consequences of this phenomenon is ontological insecurity, which is the precariousness of being, with the traditional bases of identity, such as work, family and community having become insubstantial, shaky and uncertain. Ontological insecurity, Young argues, leads to the search for boundaries between social groups, both in terms of the 'othering' of deviants and conventional notions of multiculturalism and ethnic distinctions.

Against this background, Young (2007) develops the notion of social bulimia, arguing that social exclusion in late modernity should not be described in binary terms, but through a more complex framework that entails a paradoxical process of simultaneous inclusion and exclusion. In a social context characterised by blurred borders and hybridised cultures, a bulimic society involves massive cultural inclusion with systematic structural exclusion. While late modern societies commend the liberal mantra of liberty, equality and fraternity, they systematically practice exclusion in the job market, on the streets and in the day-to-day contacts with the world. The emergence of stringent, yet simultaneously selective, immigration policies is ultimately a consequence of such societal dynamics.

This peculiar configuration of immigration control in the Western world is eloquently described by Campesi (2012) through the concept of the confine. He argues that this policy framework is not a project focused on the broad surveillance of all the flows of peoples and goods on a global level, but on the selective and directed surveillance of a minority of 'undesirable and dangerous' subjects. The confine is thus a complex security device that does not function as an exception in relation to the ordinary practices of the neoliberal state, but as a fundamental instrument of its habitual repertoire of government practices. This device works as a mechanism of exclusion of a minority, labelled as dangerous on the basis of its potential future behaviour.

Campesi (2012) contends that the confine is not located outside of the law, but rather resides in a place of legal saturation, produced by the overlapping of a dense network of regulations that legitimise differential mobility regimes. This requires that the confine works as a *biopolitical device*, capable of legally disqualifying certain categories

of people, 'keeping them' in a legal and spatial dimension of suspended guarantees and limited legality. Consequently, the ultimate purpose of the confine is not to fortify the border and curtail the free movement of people, but to immunise the interior space by filtering and sorting out negative and positive circulations. In this context, European immigration policies display an apparent contradiction in the form of a fictitious power-policy, with governments simultaneously enforcing and undermining legislation (Balibar, 2006). Besides, as explained by Staring (2004), restrictive policies in Europe have actually encouraged human smuggling and an immigration industry. In this sense, racism could ultimately be prompted "*by the fact that the State targets and stigmatises immigrants, but also by the fact that, apparently, it does not want to really close the borders*" (Balibar, 2006: 5), which could be explained as a 'biopolitical management of illegality'.

This conceptualisation is pertinent for this research because it highlights the complex character of immigration control, in the sense that implementation is a contested and intricate process. This means that any exclusion prompted by immigration policy implementation is not absolute and everlasting, but rather selective and dynamic. Along the physical and cultural borders, some are allowed to cross, while others are contained; some are allowed to remain, while others are expelled. This implies that borders are selectively porous, allowing entrance to the temporarily needed workforce, but hampering it to those who seem not to be useful according to market criteria, all amidst a context characterised by the unrestrained flow of speculative capital, technology and information (De Lucas, 2004). However, in many situations it is the same subject who goes back and forth between these apparently opposed sides, for the very reason that borders are porous and fluid.

In these circumstances, a 'suitable enemy' (Christie, 1986), is blamed for the anxieties rooted in the structure of late modernity. This figure is intended to embody otherness, personified by the threatening outcast, the fearsome stranger, the excluded and embittered, devised to demonize the criminal, to excite popular fears and hostilities and to promote support for punishment (Garland, 2001: 137). In the Western world, specifically in Europe, the construction of a suitable enemy seems to be determined by a path from nativism to xenoracism and an institutionalised religious discrimination towards Muslims. This appears to be bolstered by the impetus "*to artificially cohere a sense of nationhood in the face of globalisation, the dismantling of the welfare state and the traditional industrial compact between capital and labour*" (Fekete, 2009: 12).

Tsoukala (2005) has described the social construction of the immigrant as an enemy in the European context, arguing that the perception of migrants as bearers of

multiple social threats is based on rhetoric arguments articulated around three categories. The first category is in regards to socio-economic problems, such as associating immigration with the rise of unemployment, the development of a parallel economy, the welfare state crisis and urban deterioration. The next category is based upon a securitarian rhetoric, in which immigration is associated with many security problems, such as organised crime or terrorism. The final category is centred upon issues of identity, with migrants being portrayed as threatening for the demographic balance and the EU identity.

Immigration in thus linked to concerns about stability, cultural homogeneity, internal security, employment and urban quality of life. Consequently, immigration is constructed, through political, mediatic and police dimensions, as the source or aggravating factor of the main contemporary social problems, with in turn justifies the implementation of measures presented as adequate to handle this projected problem. The configuration of this legal status leads to the denial of the most basic legal principles because immigrants, due to their association with 'otherness' are not entitled to the full safeguards of the rule of law. The main function of the law would therefore be the construction and preservation of alterity, in order to legitimate policies that restrict rights (De Lucas, 2003).

These policy dynamics can be centred within a structural reconfiguration regarding the understanding of crime and crime control, corresponding to the so-called 'criminology of the other', in opposition to the 'criminology of the self' (Garland, 2001). In Garland's perspective, these are the prevalent criminological conceptions within late modernity, to the detriment of the formerly dominant 'welfarist criminology', which portrayed the offender as disadvantaged or poorly socialised requiring treatment provided by the state. While the 'criminology of the self' views offenders as rational consumers, who are no different than their fellow citizens, the 'criminology of the other' considers them to be the dangerous other or outcasts, from which society must defend itself. Hence, there are two kinds of punitive social reactions within late modernity: one for those who in spite of their transgressions are regarded as part of the community and one for those who are seen outsiders. In the first case, extensive criminal and procedural legal safeguards are awarded, whereas in the second case, such guarantees and legal protections are weakened.

In consequence, an increased reliance on criminalisation has become ostensible. The increasing punitiveness and criminalisation of immigrants in the European context, and particularly within the EU, has been most explicitly evidenced through imprisonment data, which show that immigrants are disproportionately imprisoned in comparison to the size of their population. The overrepresentation of immigrants in prisons is evident

throughout European jails, especially in the southern countries, such as Italy, Spain and Greece (Silveira & Rivera, 2007). The following table, elaborated by Melossi (2015: 68), illustrates the comparative proportion of imprisoned foreigners across the EU states.

Table 1. Comparative proportion of imprisoned foreigners across EU states

	Percent of foreigners in prison pop.[1]	Percent of foreigners/foreigners extra-EU in general pop.[2]	Estimate of the rate of overrepresentation[3]
Austria	48.6	11.2/6.7	4.3-7.2
Belgium	44.2	11/3.9	4-11.3
Bulgaria	2	6/4.0	3.3-5
Croatia	5.7	84	7.1
Cyprus	53.8	20/7.4	2.7-7.3
Czech Republic	9.1	4/2.6	2.3-3.5
Denmark	26.8	6.4/4	4.2-6.7
Estonia	39.9	16/14.9	1.9-2.7
Finland	14.5	3.4/2.1	4.3-6.9
France	17.5	5.9/3.8	3-4.6
Germany	27.1	9.1/5.7	3-4.8
Greece	63.2	8.6/7.2	7.3-8.8
Hungary	3.5	2.1/0.8	1.7-4.4
Ireland	14.5	10.6/2.1	1.4-6.9
Italy	34.4	8.1/5.7	4.2-6
Latvia	1.3	16.3/16	0.08
Lithuania	1.2	7/0.6	1.7-2
Luxemburg	72.2	43.8/5.9	1.6-12.2
Malta	40.3	4.9	8.2
Netherlands	24.6	4.2/2	5.9-12.3
Poland	0.7	1/0.6	7-11.7
Portugal	18.3	4.2/3.2	4.4-5.7
Romania	0.6	2/1.6	3-3.7
Slovakia	2	1.3/0.3	1.5-6.7
Slovenia	10.7	4.2/3.9	2.5-2.7
Spain	31.6	12/6.9	2.6-4.6
Sweden	30.5	6.8/3.9	4.5-7.8
UK	12.8[5]	7.6/3.9[6]	1.7-3.3

1. Latest data available from the International Centre for Prison Studies, King's College, University of London, between 2011 and the beginning months of 2014.

2. Percentage of foreigners/foreigners from countries outside the EU-28 in the general population (on 1 January 2012; source EUROSTAT).

3. I divided the number of the first column by both numbers in the second column: the result is the estimate in the third column, somewhere in between the two numbers. This is because we do not have a distinction of the percentages of inmates according to whether they are simply foreigners or foreigners from outside the EU. Most inmates are from countries outside the EU, so the second term of the estimate is probably more precise. There is, however, one important exception to such a rule of thumb, the fact that the situation has changed with the admission of Romania to the EU because the number of Romanians incarcerated in several countries is substantial.

4. Data from Croatia are from 2008 and do not report information on where foreigners are from.

5. Data for England and Wales.

6. Data for the UK.

Source: (Melossi, 2015: 68)

In view of this situation, a 'hypercriminalization of immigration' in Europe has become apparent (De Giorgi, 2010), with many such as Wacquant (1999, 2006) arguing that the disproportionate imprisonment of immigrants in Europe is comparable with the mass incarceration of black people in the US. Wacquant assumes that neither blacks nor immigrants are intrinsically prone to being more involved in crime than others and that their alleged higher overall rate of offending is at best only a contested part of the explanation. Therefore, Wacquant argues that that the overrepresentation of those groups in prisons is mostly explained by the preferential police targeting, their differential processing in the courts and the use of formally neutral criteria (e.g. legal conditions for bail) that systematically disadvantage them in terms of the administration of punishment.

Since the overrepresentation of social or ethnic groups in prison is visible on both sides of the Atlantic and across different nations, Wacquant (1999; 2006) argues that the determinant factors may be rooted in a broader structural phenomenon that goes beyond the cultural specificities of each place. In this sense, he contends (Wacquant, 2006: 84) that there has been an intersection of three determinant forces: the duality of the labour market and the generalisation of precarious employment and un(der)-employment at its lower pole, the gradual dissolution of public assistance for the most vulnerable members of society and the crisis of the ghetto as an instrument of control and confinement over a stigmatized population excluded from the national body and turned supernumerary on both economic and political counts. Moreover, in the context of the EU:

> "[T]*he building of 'fortress Europe' in the age of labour flexibility and generalized social insecurity has… accelerated a twofold movement of ostracization of unwanted Gestarbeiter turned Ausländer, through external removal via expulsion and internal extirpation via expanded incarceration directly aimed at those populations embodying the social and symbolic 'exterior' of the emergent postnational Europe*" (Wacquant, 2006: 85).

The social construction of the 'deviant immigrant' and the consequent criminalisation, seem to be linked with the socioeconomic and political aspects of late modernity, in which globalisation is paramount. For instance, Barbero (2010) highlights that the decline of the Keynesian welfare state and the decay of the traditional social structures (family, unions, community) have deprived people of the juridical, political and social elements that provided security and certainty, with a growing dependence upon consumerism and a new economistic model of criminal justice being presented as antidotes. Indeed, Melossi (2003: 375) has argued that the EU integration process regarding the transfer of sovereignty has presaged concerns in regards to the loss of national identity, coupled with difficulties in acquiring a new 'European' identity and the lack of an actual European system of democracy. Furthermore, these problems developed alongside post-Fordist processes of

globalisation and an intensive restructuring of the economy, which questioned the way of living that emerged from post-Second World War reconstruction.

The securitisation of migration in the EU and its member states could then have developed on the basis of three relating themes (Huysmans, 2000: 758): internal security, cultural security and the crisis of the welfare state. In this context, migration has become a functional meta-issue, referred to as the cause of many problems which connected with other related signifiers (e.g. 'foreigner' or 'asylum seeker'), conveys internal security rationale alongside big political questions of cultural and racial identity, challenges to the welfare state and the legitimacy of the post-war political order (Huysmans, 2000: 762). The construction of the internal market entailed making issues of border control a security question, leading to the construction of a *security continuum*, which is understood as an institutionalised method of policy-making that allows the transfer of security concerns, such as terrorism, drug-trafficking and money-laundering, to the area of migration:

> "*The restrictive migration policy, the construction of a security continuum, and the policy of favouring the free movement of nationals of Member States in the labour market and social policy area at the expense of TCNs are politically significant because they sustain the construction of a scapegoat in a political and socio-economic struggle for the transformation and conservation of the welfare state*" (Huysmans, 2000: 770).

Barker (2012: 114) has identified four approaches to explain this predicament: the globalisation of punitiveness, focusing on how existential insecurity drives demands for harsh and broader punishment; the state of the political economy, emphasising how the structure of the labour market creates criminalised populations; enemy penology, highlighting how racism underpins the criminalisation of foreigners; and state governance, emphasising how state sovereignty is being reaffirmed and citizenship reconfigured by the criminalisation and exclusion of 'the other'. Barker (2012) herself favours the idea that the criminalisation of migrants, specifically through confinement and expulsion, enables EU member states to reassert sovereignty, control borders and regulate group membership. Similarly, Schuster (2005) argues that deportation has become a necessity for governments that need to be seen in control of migration and borders. However, deportation is in practice largely ineffective and its function is thus mostly symbolic, offering governments a source of legitimacy for further extraordinary measures (Bloch & Schuster, 2006).

Similarly, Bosworth and Guild (2008), relying on Garland (2001) and Simon's (2007) perspectives, argue that governments have constructed the risk foreigners may pose through the prism of crime. In this way, "*through criminalising practices that range from increasingly intrusive forms of surveillance all the way to immigration detention, the state effectively penalises and stigmatises foreigners as 'other' in order to sort and admit only*

those considered vetted" (Bosworth & Guild, 2008: 714). These restrictions on mobility delimit profound differences between citizens and non-citizens, from legal rights to a more affective sense of belonging, reshaping and articulating citizenship through the criminalisation of migration, synthetized in the idea of governing through migration control. Bosworth (2008) also highlights the challenges imposed on the state sovereignty by the current conditions of globalisation and neoliberalism. In this sense, foreigners, like criminals, have become a target of state intervention at a time when most governments have lost most of their capacity to secure their borders. This has led to the implementation of security strategies, intended to assert power in a time when states have been deprived of a large part of their sovereignty. Likewise, Barker (2013) argues that EU member states turn to more coercive measures to resolve the tension posed by the structural conditions of democracies, in which ethnic minorities are denied or curtailed access to full rights and protections. Consequently, by casting out non-members, governments simultaneously reassert national belonging and sovereignty yet weaken international protections.

Finally, it is worth considering the concept of surveillance assemblages developed by Franko Aas (2011), which links globalisation and the transformation of the nation state into assemblages of territory, authority and rights (Sassen, 2006). Such transformation has been marked by the weakening or detachment of state sovereignty. Hence, the considerable financial, technical and political investments that governments direct towards the building of walls and fortification of border security function theatrically, as an attempt to present an image of sovereign state power in the face of decline. Therefore, surveillance plays both a reactive and productive role within the EU and becomes a central tool for intensifying the integration and building of supranational structures in the field of justice and home affairs.

The previous remarks focus upon governmental and sovereign aspects of the current processes of criminalisation regarding immigration in the Western world, particularly in Europe. The mentioned literature highlights how the construction of the criminal immigrant is functional for reasserting state power in times of illegitimacy and ontological anxiety, amidst the increasing attenuation of welfare. However, it is also necessary to emphasise the economic dimension regarding the paradoxically significant role of immigrants within the labour markets, in the context of neoliberal globalisation. As stated above, borders are porous and cannot totally restrain the movement of people. It is in consequence necessary to disentangle the policy dynamics behind the social processes of entrance, enrolment in the labour market, assimilation and exclusion of immigrants.

3.3.2. The socioeconomic paradoxes of immigration control in late modernity

The correlation between the ascendancy of neoliberalism as an ideological project and governmental practice and increasing punitiveness, targeting categories of people trapped in the margins of the new economic and moral order, is at the core of Wacquant's (2009) theorisations. Specifically, he contends that the generalised hardening of police, judicial and correctional policies lead to the triple transformation of the state: the amputation of its economic arm, the retraction of its social bosom and the massive expansion of its penal fist (Wacquant, 2009: 4). In this context, the consolidation of a penal state is ostensible:

> "[T]*he 'invisible hand' of the unskilled labour market, strengthened by the shift from welfare to workfare, finds its ideological extension and institutional complement in the 'iron fist' of the penal state, which grows and redeploys in order to stern the disorders generated by the diffusion of social insecurity and by the correlative destabilization of the status hierarchies that formed the traditional framework of the national society… The regulation of the working class through what Pierre Bourdieu calls 'the Left hand' of the state… is supplanted (in the United States) or supplemented (in the European Union) by regulation through its 'Right hand', that of the police, justice, and correctional administration, increasingly active and intrusive in the subaltern zones of social urban space*" (Wacquant, 2009: 6).

Despite the apparent novelty of this occurrence, Melossi (2013a) affirms that this is actually a consequence of a deep-seated cyclical phenomenon. According to Melossi, a new 'canaille' is cyclically reproduced by capitalist development at every new phase, given that in every recessive stage the defeat of the so-called 'old working class' and of the least competitive economic sectors, translates into a progressive moral devaluation of human beings. Indeed, the sensitivity surrounding the question of immigration, the hostility towards aliens, the consolidation of borders and the delimitation of boundaries can be considered cyclic phenomena (Fassin, 2011). Moreover, as Melossi highlights,

> "*Especially in the years before the 'peak', increasing recourse is made to a 'new' kind of working class—youth, women, immigrants—that does not share in the values and general 'ethos' of the old one, thereby creating resentments, conflicts, and, what is most important to entrepreneurs, divisions, within the working class. During times of depression, the number of the unemployed increases, 'crime' becomes more and more associated with the 'newcomers', tolerance disappears, prison work and 'alternative programs' are also shelved, and a generally mean feeling of envy and revanche takes hold in a society increasingly structured around lines of hierarchy, authoritarianism, and exclusion*" (Melossi, 2013a: 275).

It becomes apparent that the division among working classes could be a consequence of a functional market-oriented abnormality that precedes it. As Melossi (2013b: 427) argues, migration laws seem to work in the opposite direction of welfare, forcefully depreciating the value of labour instead of appreciating it. In this sense, migration laws may ultimately be a manoeuvre of authoritarian intervention upon the labour market, contributing to the construction of a secondary or tertiary labour market at the edge of legality, with worker

salaries that are lower than minimum wage. From Melossi's perspective, this is one of the mainstays of the neoliberal project, intended to attack the old working class by inserting a new, inexperienced potential working class. Then, imprisonment becomes once again "*a classic instrument by which the resistance of the new imported working class is broken and new habits of subordination and compliance moulded*" (Melossi, 2013b: 428).

Melossi (2013b) also compares the rationales of the incarceration regimes within the US and EU countries, giving pre-eminence to the socioeconomic facet and providing a reinterpretation of the concept of *less-eligibility*. Rusche and Kirchheimer (1984[1939]) coined the term less-eligibility to explain the principle of deterrence, in which the conditions resulting from punishment should be lower than those of the standards of living of the working class. Relying on this idea, Melossi (2013b: 427) suggests that this principle may work on a transnational level, arguing that immigrant workers may leave their countries to extricate themselves from the constraints of their national less-eligibility. Since the less-eligibility threshold of the host country is ostensibly higher, policymakers regulate the size of the working class through migration laws. Then, while mass expulsions may be considered a mechanism by which the less-eligibility threshold is reconstituted, Melossi emphasises the policy strategy of lowering it for everybody through the compression of the living standards of the working class. This ultimately leads, especially in transitional periods, to the formation of a 'segmented multiplicity of access to the labour market', according to the different categories of citizenship or residence, with each one experiencing its own less-eligibility threshold (Melossi, 2013b: 427).

These ideas have been further elaborated by De Giorgi (2005; 2010). De Giorgi reinterprets the less-eligibility dynamic, arguing that it can explain how "*the most marginalized fractions of the proletarian class will accept any level of exploitation in the capitalist labour market, as this will be in most cases preferable to being punished for refusing to work at the given conditions*" (2010: 150). De Giorgi (2010: 153) contends that the new borders are a functional complement to economic deregulation and to the construction of a flexible system of accumulation. Borders today, he argues, have less to do with the geopolitical delimitation of sovereign prerogatives and more to do with the attempt to control, select and govern specific categories of people. Therefore, borders can be considered flexible and mobile and project their power-effects inside the boundaries of the nation-state in order to shape the unsecure legal status of immigrants and their subordinate position within the flexible economy.

Consequently, the constant threat of turning into irregularity stands as a powerful reminder for immigrants of their subordinate and uncertain position, a threat related not only to an eventual criminal conviction, but also to other factors such as job loss (De Giorgi, 2010: 160). This means that immigration policies may purposively marginalise immigrant populations in the interests of the market economy:

> "[T]*his punitive shift is part of an emerging framework of penal and extra-penal regulation of migrations in which the illegalization and the hyper-criminalization of immigrants work symbiotically toward the reproduction of a vulnerable labour force, suitable for the most exploitative sectors of the post-Fordist economy*" (De Giorgi, 2010: 154).

Amidst the ongoing historical struggle between capital and labour over the control of mobility, De Giorgi (2010: 151) argues that the partial de-bordering of the Western world under the impulse of economic and financial globalisation is complemented by a simultaneous process of re-bordering against global migrations. Fassin (2011) in this regard highlights the contradictory interests that governments come up against, with employers generally favouring the 'cheap and docile workforce' of immigrants and the public showing impatience or xenophobia towards foreigners. One of the most characteristic markers of the embedded uncertainty of capitalist evolution is migrations and their concomitant conditions of 'anomie' or 'alienation' (Melossi, 2003: 372):

> "*These forces, these energies, these people, that the movement of capitalism had so dangerously literally set in motion, are to be harnessed, disciplined, governed, controlled, detained, stopped. (…) In Europe today one could venture to say that, once again, those mechanisms that have created the conditions for migration, both at an international and at a domestic level, have also created, at the same time, the conditions for immigrants' involvement in specific kinds of officially recorded crime and for an 'amplified' fear of it*" (Melossi, 2003: 372, 374).

Melossi (2003: 379) argues that the disproportionate involvement and public representation of (irregular) immigrants regarding criminality is a social construct, embedded within the structure of social relationships of a social context, which carries the risk of continuous amplification. This means that the likelihood of participation in given deviant types of behaviour is increased by the structure of opportunities available to certain groups of migrants, which also entails the higher likelihood of police focus being directed towards them. Ultimately, these structures push certain immigrants towards what is officially represented as crime (Melossi, 2003: 385). This configuration of immigrant criminality is branded with the attribution of characteristics that make it notorious. It is thus not so much the criminality itself, which under certain cultural boundaries is socially tolerated, but the perceived culturally differentiated features of the action or condition. In sum, these social processes make the otherness of the stranger and the otherness of the 'deviant being' overlap in the social portrayal of the 'criminal immigrant' (Melossi, 2003: 376).

In this section, the structural determinants of the current immigration policies within the Western world, and specifically in the European context, have been discussed. The focus has been upon the government-sovereign and political economy dimensions, amidst a context characterised by the reconfiguration of capitalism, the consolidation of neoliberal globalisation and the decay of the welfare state. This explains how socioeconomic and political factors influence the configuration and implementation of immigration policies and how the cycles of capitalism have had a profound impact on their shape and orientation at a given moment. During recessive times, immigration policies seem to emphasise exclusion and coercion, aspects that, although they may be present at all times, are likely to be stressed in those periods. Moreover, it is evident that immigration policy implementation is a complex process, in which contextually determined interests intertwine with the need to reassert sovereignty through the reinforcement of coercive mechanisms, in which the tools of criminal law become paramount. As examined below, the literature suggests that Spain is an archetypical case of these phenomena.

3.4. Criminalisation of immigration in Spain: structural determinants

Given the focus of the present study upon the Spanish case, the pertinent literature on the specific circumstances of that country must be examined. It is first important to emphasise that in Spain irregular immigration is not a statutory crime but an administrative infringement. This means that the criminalisation of immigration in Spain is not direct or automatic, but the consequence of a substantial social process. In consequence, it makes sense to conceptualise the social construction of the 'criminal immigrant' in Spain as a process of action and reaction (Becker, 1963; Melossi, 2003; Turk; 1969), understood in the ways described in the preceding sections of this chapter. Additionally, as seen in the previous chapter, the analysis of the regulation and operation of the Spanish migration regime shall necessarily be framed within a political economy perspective, without disregarding other determinant factors emerging from different standpoints.

It must be remembered that the migratory boom of the 2000s coincided with Spain's most expansive period of economic growth, followed by the outbreak of a recessive phase in which immigration has been under crossfire. Hence, it makes sense to examine the literature of both epochs to then disentangle the most crucial factors that explain the shape and orientation of the current Spanish immigration policy and its crucial relationship with criminal law and criminalisation. In this regard, Calavita's studies (1998; 2003; 2005) are an unavoidable starting point. Her research points precisely towards the functional economic role of the marginalisation of immigrants, prompted by the Spanish

immigration policies implemented during the period of economic expansion, between 1985 and 2003. She argues (2003: 400) that the Spanish immigration laws primarily focused upon defining levels of social and economic inclusion and exclusion, which in turn had the consequence of marginalising immigrants and consigning them to the extensive underground economy. In this sense, "*the criminalized and marginalized status of the illegal immigrant constructs him/her as an ideal ('flexible') worker in the current post-Fordist economy*" (Calavita, 2003: 401).

Calavita highlights that Spain has recently become a country with high levels of immigration and that this occurred at a time of substantial post-Fordist restructuring. After considering the aspects surrounding regulation and implementation, she concludes that the Spanish immigration regime has had the peculiarity of illegalising immigrants while at the same time not enforcing immigration laws accordingly. Therefore, Spanish immigration law routinely produced and reproduced illegality, effectively criminalising immigrants though concurrently condoning their presence. Irregular immigrants were thus, in Calavita's perspective (2003: 407), simultaneously criminalised and reluctantly tolerated, although that 'criminalisation' was mostly directed towards their work activity:

> "*The point instead is that the immigrant 'other' is constructed as an outlaw (not vice versa), and it is precisely their particular status as workers (not economic cast-offs) that drives this marginalization. To put it another way, the punishment that illegal immigrants endure for their illegality is that they are denied full economic rights. And, it is this penalty and the economic marginalization it helps constitute that shore up the 'flexibility' immigrants provide the post-Fordist economy*" (Calavita. 2003: 400).

Similarly, Silveira and Rivera (2007) argue that the way in which the Spanish migration regime has marginalised immigrants is a typical example of how the same policymakers who govern the migration regime, produce the factual situations which lead to the implementation of exceptional measures, making the exception the norm (Agamben, 1998). Likewise, in her later and more comprehensive book (2005), Calavita deepens and refines these arguments, by comparing the cases of Spain and Italy. Essentially, she describes the legal construction of immigrant otherness through the reproduction of illegality and the contingent nature of legality, which was mostly due to the fact that in Spain legal residency has been dependent on getting/maintaining a job. Hence, legal and economic marginality were mutually constituted, with immigrant's concentration within the underground economy jeopardising their ability to legalise:

> "*Marginality is not just a characteristic that immigrants bring with them like some third-world passport that gains them admission and ushers them into the economy's worst jobs, nor it is solely constructed through the legal system. Rather, their location in the economy reproduces that Otherness from within, as immigrants' status as an underclass of workers*

> *with substandard wages and working conditions impedes their full membership in the national community*" (Calavita, 2005: 74).

Observing this phenomenon, Moffette (2014) has developed a conceptual framework to explain it. Focusing on the booming period, he notices that while the Spanish authorities fortified the external Southern border, they also left the door open to irregular immigration by being lax at international airports. Moreover, by lacking an effective recruitment strategy and wanting to satisfy the demand for immigrant labour, for years they facilitated the entry of Latin-Americans, knowing that many were entering the country to reside and work irregularly This peculiar regime could be seen as one of *tolerated irregularity* (Izquierdo Escribano, 2012), or as defined by Moffette (2014), a *system of encouraged irregularity*, characterised by a strategy of *governing migration through probation*.

Moffette (2014) explains that this has been a flexible regime that entailed displacing some of the filtering practices performed by borders and immigration selection, across space and time. In practice, its functioning has been operationalised by facilitating entry, followed by a process of policing, regularising 'deserving immigrants' and deporting 'undesirable foreigners'. This contradictory amalgam of practices constituted, in Moffette's view, a regime of migration management based on a long probationary period, during which migrants were scrutinised and policed. In consequence, immigrants were not governed simply through criminalisation strategies, but through a system that simultaneously combined promises of inclusion with threats of exclusion.

Regarding the configuration of the legal regime in the field of immigration control, Silveira (2017) has characterised regulation and implementation detention and expulsion devices as a case of 'legal-arbitrariness'. This is understood as a ductile and dynamic mechanism in the immigration Spanish system, situated halfway between administrative discretion and arbitrariness and composed of two dimensions:

> "*It begins with the process of 'primary' legal-arbitrariness, which… consists of the creation of normative provisions that will regulate the exercise of coercive power before foreigners. They show the intentions and the main objectives of public policies in the face of the phenomenon of irregular immigration and that, currently in the European Union, are no other than those of controlling and minimizing situations of administrative irregularity. In a second moment, there is the secondary legal-arbitrariness, consisting of the set of decisions and administrative and judicial acts that are adopted throughout the application of the procedure and that conclude with the expulsion of the immigrant… The legal-arbitrariness is born from the interaction between these two processes. Its result is an act of expulsion before which the immigrant is de facto with very few possibilities to defend himself and to exercise his rights in order to avoid expulsion*" (Silveira, 2017: 53).

Sánchez-Alonso (2011) has also examined the gap between regulation and enforcement, arguing that immigration policies have created or fostered irregularity, mainly through three mechanisms: the rigid link between work permits and residence permits and the short

duration of the latter; the excessive bureaucratic inefficiency, which caused delays in the concession of permits, as well as difficulties in complying with administrative requirements; and the recurrent policy of extraordinary regularisations, which made irregularity transitory until the next regularisation programme. In addition, governments seemed to be lenient in regards to enforcing immigration laws within the borders of their territory, especially during the economic bonanza. According to Sánchez-Alonso (2011), this contradictory policy framework was based on a clear economic rationale: until before the crisis, the abundance of low-skilled immigrant labour was part of the economic growth model and consequently there was no incentive to control irregular immigration.

In his comprehensive analysis of the consolidation of immigrants as a risk group, Brandariz (2011) shares a similar viewpoint to that of Sánchez-Alonso (2011). He first observes that the expulsion mechanisms have been operating selectively because only a minimal proportion of irregular immigrants are effectively expelled. In Brandariz's perspective, the main reason for explaining this situation has been the lack of will displayed by state agents, since a full enforcement could have restrained or drastically reduced the irregular migratory flows which fulfil diverse social, economic, demographic and financial functions of relevance. Therefore, state agents have been following the rationale of an economic analysis of law, which posits that a policy is enforced until the point in which it produces more benefits than costs.

Accordingly, Brandariz and Fernández (2011) argue that immigration policies in Spain have been oriented towards the management and not the exclusion of immigrants, in such a way to encourage the mass employment of migrant labour in conditions of maximum flexibility and exploitation. In consequence, a system of control that targets irregular immigrants was implemented, with measures such as immigration detention and expulsion aimed at binding immigrants to a scheme of employment that pushed them to take precarious jobs. Immigrants have thus been pushed to the extreme end of the Spanish division of labour, within a labour market segmented along ethnic lines, with middle to high-skilled occupations reserved for native workers. Ultimately, the whole concept of irregular immigration has functioned as an instrument of subordination aimed at subjecting irregular immigrants to highly undesirable labour conditions.

To this it must also be added the cultural dimension. As explained by Barbero (2014), the Spanish immigration regime, apart from complying with the European regulations, has been designed to construct alterity and thus to politically and legally (re)define the 'Spanish being'. Moreover, within this alterity process, the 'Muslim world'

has become the ‘chief enemy’ of Spain, for historically reproduced reasons. Accordingly, immigrants coming from Muslim countries, and people who profess the Islamic faith, are the groups perceived as more distant, less assimilable and more problematic. In the end, this means that the relationship between Spain and the Islamic world may be understood as a sort of ‘internal orientalism’, in which the presence of historical as well as contemporary alterities have become established within society.

The mentioned literature agrees in highlighting the paradoxical character of immigration policies in Spain during the migratory boom. It has ultimately been argued that the simultaneous combination of inclusion/exclusion policy mechanisms and the persistent gap between regulation and implementation were functional for the structural conditions of the Spanish economy and labour market. Although Spanish immigration legislation included stringent mechanisms of exclusion, the needs of the economy and the labour market influenced policymakers and law-enforcers to give priority to a migratory model of selective and inequitable inclusion. Consequently, the coercive exclusion of immigrants was either subordinated to divergent policy purposes or directed towards the segregation of determined categories of people deemed undesirable or unrequired. For these very reasons, however, when the pace of the economy declined, and a period of recession began, the orientation of immigration policies seemed to change amidst a context of socio-political conflict and the resurgence of neoconservative impulses.

The economic decline that started in the last years of the 2000s made immigrant labour dispensable. Therefore, the economic importance of irregular immigration decayed, while a renewed emphasis on enforcement and criminalisation gained ground. For instance, Jarrín (2012) explains that during the economic bonanza Spain opened its doors for immigrants, as a temporal way to fulfil the needs of the labour markets in low-skilled areas. However, due to the ‘great recession’ policymakers no longer treated immigration as a solution and instead began to depict it as problem, especially in the case of irregular immigration. Immigration has predominantly become a scapegoat linked to security, public order and unemployment issues. In this context, the construction of the ‘criminal immigrant’ could have become more consequential than in the previous period.

As in the European context in general, the configuration of the irregular immigrant as a category based on a powerful sense of otherness seems also to fulfil in Spain the function of creating cohesion within a society that finds itself in crisis (Brandariz & Fernández, 2011). The irregular immigrant is then constructed as a risk category, a scapegoat or enemy to be blamed for the troubles of society and to be neutralised through

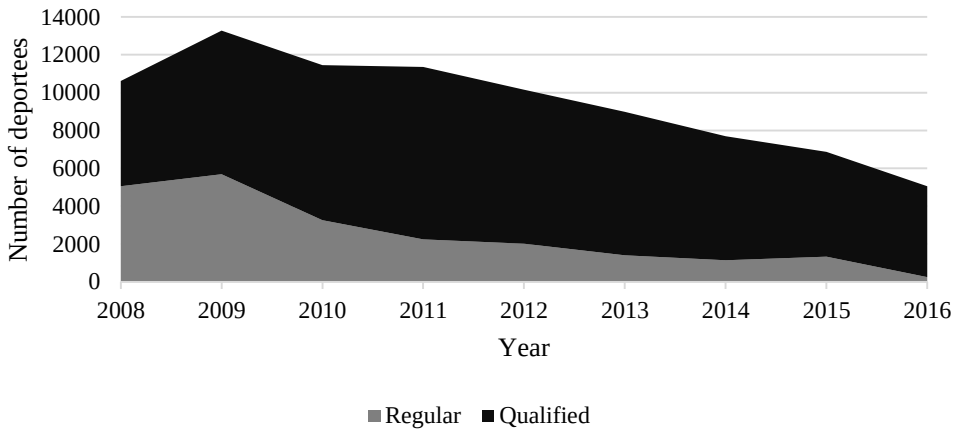
incapacitation (Muñoz Ruiz, 2014). Moreover, the norms that restrict, differentiate or expel, contribute to the consolidation of the immigrant figure as an enemy, making it a catalyst for the fears and social anxieties associated with such stereotypes and as such, the immigrant becomes someone from whom society must be protected through restrictive policies (Fernández, 2010). In this way, governments purport to comply with the social demands for security, showing that 'something is being done'. Ultimately, the construction of the immigrant figure as a delinquent and the exaggeration of the threat posed by immigrants against sovereignty, identity and security, legitimate their exclusion and an increasing state intervention (Fernández, 2010).

In this context, the ineffective detention-deportation coercive mechanisms of immigration control may exist for subtle reasons, since CIEs may not really be intended to eliminate wrongdoings, but to handle and administrate them (Moffette, 2014). For this reason, it is likely that the harsh conditions of CIEs, coupled with the possibility and legal consequences of expulsion, contribute to the governing of immigrants through fear. In addition, this apparatus could be working discursively to mark a distinction between 'desirable' and 'undesirable' foreigners. This is arguably inscribed within a contended European framework of 'biopolitics of expulsions' structured within an outstanding machinery of coercion administered by the state (Silveira, 2012). These phenomena can be explained in terms of a 'policy orientalisation' (Barbero, 2012), understood as a strategy that legitimises the implementation of an exclusionary immigration regime, through the constructed incompatibility of immigrants with 'European values'.

In line with this, it seems that Spain's changing immigration policies have been increasingly marked by a punitive culture that has led to the marginalisation of irregular immigrants, pushing them to illicit ways of subsistence, such as working in the underground economy or becoming involved in criminal activity out of the need for survival. In this sense, with the outbreak of the crisis, a focus on criminalisation has increased, most notably with the consolidation of so-called 'qualified expulsions' (Brandariz, 2016b; Brandariz & Fernández, 2017; López-Sala, 2013), which are those conducted on 'criminal immigrants'. Indeed, this new policy emphasis or reorientation can be traced back to 2008-2009, when the government established a police agency (BEDEX) in charge of expelling 'persistent immigrant offenders'. This agency set forth the category of 'qualified expulsions,' which formally accounts for those conducted on foreign offenders with numerous criminal and/or judicial records, linked to terrorism, organised gangs, gender violence or any other criminal act of notable severity.

Brandariz and Fernández (2017) explicitly state that there has been a policy shift in regards to the Spanish immigration policies, which has consisted of an increasing reliance on security or crime-related tools, most notably at the enforcement level. These authors maintain that the rationale for this change has to do with legitimation purposes, given that it seems more justifiable to expel criminal than non-criminal aliens, as well as a renewed managerial cost-effective policy framework, determined both by the need to rationalise the use of resources and the influence of the hegemonic EU mode of governance. In any case, the empirical evidence blatantly demonstrates the increasing proportion of 'qualified expulsions' over regular expulsions between 2008 and 2016[49], as shown in this figure:

Figure 14. Proportion of types of expulsions (2008-2016)



Source: (Ministerio del Interior, 2017)

An enforcement focus on certain categories of foreigners has become apparent. As reported by Moffette (2014), in 2009 it was revealed that police officers in a district of Madrid were instructed to comply with a weekly quota of thirty-five detentions of foreigners, giving explicit priority to Moroccans because they were easier to deport. Despite the allegations of the Ministry of the Interior that this was not a systematic practice, a spokesman from a police union claimed that it was common, with detentions being used to measure success and make police statistics look better. The use of ethnic profiles by the police has been evidenced by several studies (e.g., Arenas García & García España, 2016; Amnistía Internacional, 2011; ESE, 2010; Ferrocarril Clandestino, 2010; García-Añón et al, 2013; García-España, et al., 2016; Miller, 2015). These papers have highlighted the extent to which police agents stop people of foreign appearance as a method to identify them for immigration control purposes.[50] In this regard, it must also be

[49] These data are the latest official statistics available.

[50] To illustrate, it has been shown that Maghreb and black Latin-Americans are 7.5 and 6.5 times, respectively, more likely to be stopped by the police than natives (Arenas García & García España, 2016).

remembered that immigrants are disproportionately represented within Spanish prisons, apart from those who are detained within CIEs.

The analysis conducted in this section has been a specification of the general concepts developed in the preceding sections, in regards to the process of social construction of the 'criminal immigrant' in Spain. Acknowledging that migration policymaking is shaped by diverse factors at both the regulation and implementation levels, an increasing focus on the figure of the 'criminal immigrant' seems to be developing since the outbreak of the last economic crisis. This has resulted in an intensification of the mechanisms that configure the process of social construction of the 'criminal immigrant'. As explained by Melossi (2003), such process is embedded within the structure of social relationships of a specific context, involving a symbolic interactionist course of action (Becker, 1963) in which policy implementation and law enforcement alter but are also altered by the substantial conditions of society. Besides, as explained in the previous chapter, immigration policymaking in Spain has been characterised by a heterogenous amalgamation of interests and purposes, which in turn has led to inconsistencies, gaps and/or biases in the enforcement of the immigration laws. The substantial social process of criminalisation of immigration in Spain must therefore be situated within this context and understood not in pure legal terms but as the consequence of a complex interplay of macro-and micro-level factors, each of which has its own particular significance. In this sense, the ostensible focus on the figure of the 'criminal immigrant' seems to be one of the key features of the current Spanish migration regime; and the intertwining between immigration control and criminal justice, one of its most conspicuous mechanisms. The following section will unravel the specific 'legal gears' that configure the so called 'Spanish crimmigration regime', as an essential component of the process of social construction of the 'criminal immigrant'.

3.5. The intertwining between immigration control and criminal justice in Spain: A mechanism for the social construction of the 'criminal immigrant'

The convergence between immigration control and criminal justice appears to be one of the key mechanisms for the social construction of the 'criminal immigrant' in Spain. Although policymaking in the field of immigration control is multifaceted and influenced by several factors, the focus on the figure of the 'criminal immigrant' seems to be nowadays one of its most salient characteristics. This presupposes a process of criminalisation of immigration, which in Spain is not the result of an automatic or direct legal adjudication but of a substantial and intricate social process. It must be remembered

that irregular immigration is not a statutory crime in Spain,[51] which means that foreigners who cross the borders without valid documents, or through unauthorised port of entries, or who remain in the territory overstaying their visas or without legal permission, do not commit a criminal but an administrative infringement. In spite of this condition, the Spanish legal system comprises a noteworthy interaction between immigration and criminal law, throughout a series of measures that involve the exercise of decision-making powers by criminal courts in matters related to immigration control.

As conceptualised in the previous section, the criminalisation of immigration in Spain seems to take place through a complex and largely subtle process in which certain categories of marginalised foreigners end up being preferentially targeted by law enforcement. As part of this process, the criminal justice system eventually intervenes through the charging and prosecution of such category of targeted individuals, and it is precisely at this point in which the intersection between immigration and criminal law becomes evident and crucial. However, such a legal conjunction must be understood not as all-encompassing but as a determinant component of the mentioned criminalising process, which means that the legal mechanisms or measures that compose it are not criminalising by themselves but as part of the broader process of social construction of the 'criminal immigrant'. In this sense, I argue that the following measures entail making decisions by criminal court actors regarding matters linked to immigration control: immigration detention and the diverse expulsion mechanisms available within the criminal proceeding. The legal regimes and essential characteristics of these measures will be explained in detail in subsequent chapters, but a brief introductory description is worthy here.

Immigration detention is a noteworthy case of the intertwining between immigration control and criminal justice in Spain: while it is an administrative measure requested and implemented as part of an administrative proceeding, it is authorised by a criminal investigative judge. The acknowledged reason for this is that investigative judges are the only available at any given time and according to the Spanish Constitution, an individual can only be retained by the police without judicial oversight for up to 72 hours. It has also been assumed that such a measure of extended deprivation of liberty requires the intervention of a criminal guarantee judge or so-called judge of liberties. This means that judicial authorities responsible for criminal matters decide whether to enforce such an administrative decision, even in cases where there is no suspicion of a criminal offence at

[51] Nevertheless, the Spanish criminal law does sanction crimes such as human trafficking, human smugglings and the facilitation of irregular immigration.

all.[52] Nonetheless, this does not mean that criminal investigative judges have formal attributions in immigration law enforcement because their functions are limited to judicial supervision and authorization of an administrative procedure. It remains an open question, however, how this is operated and signified in practice by criminal court actors.

Apart from immigration detention, the aforementioned interaction between immigration and criminal law can be found in the diverse expulsion mechanisms available throughout the criminal proceeding. For analytical purposes, I have classified them into four types: administrative pre-trial expulsion, administrative post-sentence expulsion, judicial sentencing expulsion, and judicial post-prison expulsion. Both the administrative pre-trial and post-sentence expulsion are acquiesced by a criminal judge at the request of the administration, which means that their nature and origin are administrative and not judicial. Therefore, in these cases the decision of the criminal judge is not upon the merits of the matter, but upon the convenience of continuing or not with the criminal proceeding or the execution of the punishment. As explained in chapter six, these types of expulsion are applicable only in specific circumstances and under certain conditions.[53] In turn, a judicial sentencing or post-prison expulsion refers to that which is directly decided by sentencing judges at the time of issuing their verdict, or later during the execution phase. This is a measure by which the criminal judge is allowed to substitute, totally or partially, a custodial penalty for the expulsion from Spanish territory, in cases of crimes punished with more than one year of imprisonment. This type of expulsion does not require any previous administrative decision and can be applied to both regular and irregular immigrants.

Another key manifestation of the intertwining between immigration control and criminal law in Spain is the administrative expulsion based on criminal records. Whilst this measure entails a clear connection between a prior criminal justice pronouncement and a subsequent administrative decision, it is ultimately operated and executed discretionally by the administration (Larrauri, 2016). Specifically, the administration initiates an expulsion proceeding on the basis of a previous criminal conviction, which should have been for more than one year of imprisonment and be valid at the time of the expulsion.[54] This means that despite being the result of a criminal justice intervention, it is procedurally

[52] It is possible that an irregular immigrant is also suspected of a crime and, therefore, be brought by the police before the investigative court, not only for requesting an immigration detention, but also for the initiation of a criminal investigation or proceeding.

[53] For instance, this measure is only admissible for crimes or misdemeanours punished within less than six years of imprisonment, and forbidden for cases involving crimes of human trafficking, human smuggling and assistance or help to irregular immigration.

[54] The Spanish immigration law states that an expulsion based on these grounds is admissible only if the criminal record has not been cancelled. The Spanish criminal code establishes the conditions and times for the cancellation of criminal records, which can be requested before the Ministry of Justice.

carried out by the administration. For these reasons and given that the focus of this research is on the criminal judiciary, the legal regime, operation and decision-making process of this measure are not specifically analysed in this thesis.

In summary, from the perspective of the criminal judiciary, there are two broad aspects in which immigration control intertwines with criminal law in Spain: expulsion throughout the ordinary criminal proceeding (at the pre-trial, sentencing and post-prison phases) and immigration detention. Such a singular convergence between administrative and criminal justice mechanisms has been conceptualised in terms of a 'special' or 'administrative criminal law' (Silveira, 2012), or as a 'third speed sanctioning' or 'punitive administrative criminal law' (Monclús-Masó, 2008). These perspectives have evident connections with the concept of the criminal law of the enemy (Cancio, 2003; Cancio & Maraver, 2006; Silveira & Rivera, 2007; Zedner, 2013), whose original formulation is attributed to Jakobs (2003).[55] This concept posits that some individuals are treated as enemies and not as citizens due to their perceived danger, deviant tendencies or their denial of the legitimacy of the legal system. Hence, the corresponding reaction of the legal system, inspired by the purpose of eliminating dangers, is to punish pre-emptively, which entails a flexibilization of criminal justice safeguards. Indeed, specifically focusing on the relationship between the criminal law of the enemy and immigration policies, Zedner (2013) argues that the central precepts of the former correspond to parallel trends found within research regarding the contemporary criminalisation of immigration:

> "*Both seek to punish pre-emptively to prevent harms before they occur; both license the imposition of disproportionate sanctions, indefinite detention, or even exile in the name of security; and both licence departure from the fundamental procedural protections of the criminal law on the grounds that those outside citizenship do not deserve such protection*" (Zedner, 2013: 50).

Despite the relevance and pertinence of these perspectives, the complexity and sometimes even ambivalence of the Spanish migration regime makes it seem disproportionate to speak of a wide-ranging criminal law of the enemy (Brandariz, 2011). Indeed, from the analysis conducted in the previous sections and in the preceding chapter, it could be argued that not all targeted immigrants are subjected to a legal and judicial treatment that completely disregards their constitutional rights and procedural safeguards. Besides, the fact that a judicial authority (criminal judges) supervises the application of the mentioned measures, may actually be considered a way of strengthening the rights of the defendants. Although this premise is questioned in the analysis of the results of this thesis, at least it makes it problematic to use the concept of the criminal law of the enemy categorically. Moreover,

[55] It seems that Jakobs first formulated the idea of a 'criminal law of the enemy' in 1985, in a paper published in the German journal "Zeitschrift für die gesamte Strafrechtswissenschaft", No. 97, p. 753 (Cancio, 2003).

as Barbero (2014) has explained, the existence of a sort of exceptional criminal law in Spain is not a novel phenomenon linked with the regulation of immigration, since for decades it has had a special kind of legislation in regards to terrorism. Consequently, the notion of the 'enemy' in the field of immigration control is adopted in this thesis as explained in the preceding sections of this chapter, that is, in terms of its structural connotations within the broader process of social construction of the 'criminal immigrant'.

Therefore, in regards to the law in action, it seems appropriate to take a more balanced viewpoint when assessing the Spanish immigration regime in terms of its peculiarities and inconsistencies on an enforcement level. This presupposes that the construction of the 'criminal immigrant' does not necessarily entail the purposive implementation of an exceptional (extra)legal regime for irregular immigrants, but more likely the configuration of an enforcement assemblage (Franko Aas, 2013) that selectively incorporates a series of diverse, and sometimes even contradictory, juridical elements to reach certain policy objectives. Additionally, it seems that within the field of immigration control there is actually a legal saturation of a dense body of regulations and norms (Campesi, 2012). Considering that the legal measures described above entail, in one way or another, a mixture of immigration control and criminal law aspects, it seems that the crimmigration perspective could be a useful and pertinent conceptual framework.

3.6. The Spanish case from the crimmigration perspective

In its decisive stages, the intricate process of criminalisation of immigration in Spain appears to be operationalised by the use of certain legal measures, which are characterised by a conjunction between immigration and criminal law. Specifically, such measures as immigration detention and the expulsion mechanisms available within the criminal proceeding entail making decisions by criminal court actors in matters related to immigration control. This peculiar legal configuration by which criminal justice decision-makers are required to become involved in matters belonging to immigration law enforcement can be unravelled through the lens of the crimmigration perspective.

Crimmigration (Stumpf, 2006) designates a socio-legal phenomenon originally recognised in the US but already increasingly studied in the context of Europe and the EU (Parkin, 2013). It is noticeable because its most salient characteristics are relatively easy to find (Bowling, 2013; Fekete & Webber, 2010; Schuster, 2005; Stumpf, 2006), although identifying this phenomenon can also prove ambiguous because these characteristics are difficult to categorise (Kaufman, 2013; Sklansky, 2012). Problems arise in determining whether immigration law is turning into criminal law, or criminal law is adopting an

immigration control character. In addition, it is also difficult to say whether this is a specific occurrence or just another manifestation of a broader phenomenon surrounding securitisation and surveillance (Bosworth, 2008; Bosworth & Guild, 2008).

The crimmigration perspective argues that the boundaries between immigration law and criminal law are blurred (Stumpf, 2006). On the one hand, immigration offences have become what might be called normatively schizophrenic, being at the same time administrative and criminal (Barker, 2013). On the other, immigration enforcement sanctions have become in many cases unavoidable consequences of criminal punishment. One of the key aspects explained by the crimmigration perspective is that immigration control proceedings and sanctions have increasingly taken the shape of criminal law enforcement (Stumpf, 2006). In this regard, detention and deportation may be considered forms of punishment and immigration proceedings may be considered punitive but lacking the characteristic safeguards of criminal law (Majcher, 2013; Stumpf, 2011).

Following on from this, as expulsion has ostensibly become a major objective for policymakers, legislative and policy measures have been directed towards accelerating expulsion proceedings, while progressively eliminating procedural hurdles and judicial reliefs (Stumpf, 2011). Furthermore, automatic or speedy expulsions, which entail reduced or non-existent judicial oversight, seem to be preferred and favoured. Additionally, judicial intervention in regards to immigration control proceedings have been substantially limited, which leads to the reduction of the judicial powers (Legomsky, 2006). Yet, although many immigration control subject-matters have been transferred to administrative officials of the executive (Bowling, 2013), there is still a realm reserved for the judicial system, one which may be preserved for instrumental purposes.

The crimmigration perspective highlights the instrumental use of the legal categories, most notably on the level of law enforcement. Blurring the traditional boundaries of these fields of law may be useful to expedite expulsion and promote immigration control. Whether the criminal justice system or immigration control mechanism is used may depend on the circumstances of each case and the pathway that best serves the sought-after objective (Aliverti, 2012; Sklansky, 2012). It is noted that expulsion is expensive and difficult to achieve for practical reasons, such as the immigrant's unwillingness to cooperate, lack of travel or identity documents, or ignorance regarding their country of origin (Schuster, 2005; Gibney, 2008). However, the symbolical may be as significant as the material effect because it powerfully feeds the social construction of the 'criminal alien' (Aliverti, 2012; Bosworth, 2011; Bosworth & Guild,

2008). Moreover, the potential use of criminal law has the most powerful effect in the representation of foreigners as criminal, dangerous and risky (Aliverti, 2012).

Sklansky (2012) accentuates the connotations associated with crimmigration through the development of a concept known as ad-hoc instrumentalism. Based upon a sceptical view of the legal categories, this standpoint argues that criminal and immigration law have become a set of tools to be conveniently used by enforcement agents, prosecutors and immigration officials, according to the particularities of each case, to expel aliens:

> "*Often the tools will work best in combination, so individuals are shunted back and forth between the criminal justice system and the immigration enforcement… or targeted by both simultaneously: illegal border crossers are placed in immigration detention, then serve time in jail… and then are deported; or individuals suspected of being in the country illegally are arrested for traffic infractions or 'quality of life' misdemeanours, and then transferred to immigration authorities… Immigration tools can be used to bolster criminal prosecution: a 'hold' for immigration detention can be used… to deny bail to a noncitizen charged with a crime. And criminal prosecutions can be used to achieve immigration objectives: by convicting noncitizens of crimes that trigger mandatory deportation, or by insisting… that plea agreements include a waiver of claims that might otherwise block deportation, or simply by substituting… criminal for civil removal proceedings, taking advantage of the threat of lengthy criminal sentences*" (Sklansky, 2012: 202).

Speaking on the European context, Parkin (2013: 17) argues that the increasingly blurred boundaries between criminal and immigration law operate through a two-way process. First, "*criminal law is increasingly intersecting with immigration law and is being invoked to regulate migration matters*"; then, "*administrative regimes are, with increasing prevalence, imposing sanctions akin to punishment but denying the protections of criminal process*". Although these practices may be conceived as primarily administrative, they are often the responsibility of the police, intertwining them with crime-fighting objectives, leading to diverse configurations of the punitive (Franko Aas, 2013). Similarly, Stumpf (2013) argues that 'crimmigration processes' can become punishment when they create a punitive experience for non-citizens, or when they take the place of formal punishment. This happens often with immigration detention and when the purpose of a police arrest is to ultimately direct a non-citizen into a deportation track. Crimmigration thus conveys a wide scope of discretionary powers, which makes the system of immigration and criminal regulations highly unpredictable for immigrants (Aliverti, 2012).

Regarding Spain, Monclús (2008) speaks of a convergence between immigration and criminal law, traceable back to the 1985 Act. This convergence means that in many aspects both laws are enforced by the same agencies of the criminal justice system, as well as by the fact that both are oriented towards the expulsion of foreigners. In this regard, criminal justice agents have become immigration law enforcement agents and it is likely that they could be considering the same criteria and stereotypes that they normally use for

the detection and control of criminality. In addition, immigration law is increasingly using tools of criminal law, such as the deprivation of liberty and the restriction of fundamental rights, yet disregarding the guarantees inherent within criminal law.

Asúa-Batarrita (2002) also speaks of an intersection between criminal law and administrative immigration law, in which the former is subordinated to the purposes of the latter. This is so because the incorporation and preference for expulsion in criminal proceedings leads to the resignation of the state punitive power. Likewise, Rodríguez-Yagüe (2012) maintains that the expulsion mechanisms incorporated into the criminal procedure make criminal law a perfect complement to immigration law, which means that the punitive order plays a mere supportive role for immigration law enforcement. In this sense, Navarro (2006) argues that criminal law may work as the 'armed wing' of immigration policy, although it may actually be a 'silly wing', because in this ambit it seems not to be guided by the rational criteria normally used to justify its intervention.

Brandariz and Fernández (2017) speak of a 'crimmigration turn' in the Spanish immigration policies in the last decade. Highlighting that the interrelation between immigration control and criminal law is not a novelty in Spain, they maintain that the renewed focus on expulsion based on criminal grounds reflects a policy change that can be explained through the lens of crimmigration. This can be found in keystone components of the Spanish immigration regime, such as immigration detention and expulsions in general. Indeed, the severity and effects of measures such as immigration detention or expulsion, which are among the most serious effects in any current legal system, suggest that its nature is materially criminal. However, its formal administrative nature allows the evasion of safeguards established by the criminal law for those accused or convicted of a crime, while at the same time minimising judicial intervention, granting in this way notable room for manoeuvre to the administrative agencies (Brandariz & Fernández, 2017: 119).

The crimmigration perspective is a suitable conceptual framework for describing and disentangling the contemporary connection between criminal and immigration law. Although it can encourage an overemphasis on the process of criminalisation (Kaufman, 2013), as explained in the introductory chapter of this thesis, if taken with caution and acknowledging its limitations, it is actually a quite useful and insightful concept to analyse the law in action within the current processes of criminalisation of immigration in Europe and elsewhere. In this sense, it is necessary to recognise that the crimmigration notion is more valuable in descriptive than in explanatory terms, given that it is more focused on *how* these processes operate rather than on *why* they are working in such a way (Weber and

McCulloch, 2018). For these reasons, in this thesis the concept of crimmigration has been interpreted as a key component of the process of social construction of the 'criminal immigrant', and not as an all-encompassing or self-explanatory analytical construct. In this sense, the notion of crimmigration is used only to make sense of the specific legal mechanisms that comprise a mixture of criminal and immigration law aspects, and not of the whole process of criminalisation of immigration, which has been better explained in substantial terms through the lens of critical criminological perspectives.

Crimmigration is therefore conceptualised as a penal field, which in Bourdieu's terms (1987) could be defined as a "*social space in which various people, groups, organizations, and institutions, with different capital, habitus, and social skills, engage in strategic actions and struggle for domination, exercising penal power over unauthorized immigrants and imposing exclusive measures on immigration*" (Jiang & Erez, 2017: 4). In this way, by linking crimmigration with the conceptual framework designed to explain the social construction of the 'criminal immigrant', it is possible to argue that the purported policy goal at stake could not necessarily be the prompt expulsion of a deportee. In fact, in the Spanish case it appears that other methods are much more efficient and efficacious to attain immigration control purposes. For instance, it seems that the increasingly preferred strategy used by the police for the actual materialisation of an expulsion is without the intervention of the judiciary, or the use of immigration detention, but through so-called 'express expulsions'[56] (Brandariz, 2016b; Brandariz & Fernández, 2017; Fernández & Brandariz, 2016; Martínez Escamilla, 2013; 2016; SJM, 2014a).[57] Hence, while up to some point the convergence between criminal law and immigration control could be functional for immigration law enforcement, it could have more to do with the renewed emphasis on the social construction of the 'criminal immigrant' in that country.

Consequently, the use of criminal justice mechanisms in regards to the enforcement of irregular immigrants may be more clearly related with a broader structural criminalisation phenomenon. As eloquently put by Aliverti,

> "*At the rhetorical level, the re-shaping of immigration law under the banner of crime has the consequence of demonizing migrants. They are often seen as criminals. This is not only because of the borrowing of criminal justice jargon, methods and strategies for*

[56] These expulsions are executed within the first 72 hours during which the police are allowed to retain an individual without judicial oversight and consists of the speedy execution of a formally valid order of expulsion. These expulsions are generally linked with the imminent departure of a deportation flight to a certain destination and in many cases, involve the detention of already identified immigrants who are called to the police station and arrested in their home or frequented areas.

[57] According to a report from SJM (2014), based on a government response to an inquiry formulated by a Spanish congressman in 2013, 6,463 people were expelled from police stations (through 'express expulsions'), while only 4,726 from CIEs.

> *immigration enforcement. It is the potential use of criminal law—the prosecution, conviction and imprisonment—which has the most powerful effect in the representation of foreigners as cheats and abusers. Immigrants who violate immigration statutes are not only represented as criminal, dangerous and risky, but are also strictly speaking—in legal and institutional terms— criminal offenders*" (Aliverti, 2012: 427).

The instrumental use of criminal justice mechanisms may only in part be guided by an efficiency-oriented rationale. In the current context, it seems more convincing to affirm that the convergence between immigration control and criminal law is functional for the social construction of the 'criminal immigrant', in line with the previously explained sociocultural, economic and symbolic conditions and effects that such a construction entail. This is nonetheless a hypothesis to be verified through an in-depth analysis, as proposed within this thesis, of the implementation aspects of the so-called crimmigration law. In this sense, the propositions developed throughout this chapter, from a macro to a micro-level of analysis, lead to the fundamental research questions formulated in the next chapter. However, before turning to that, it is first necessary to briefly examine the extant empirical studies that are theoretically and methodologically relevant for this research.

3.7. Previous similar qualitative-empirical studies

The present research proposes an analysis of the judicial application and enforcement of the mentioned socio-legal crimmigration regime. For that purpose, as will be explained in the next chapter, this study relies on an in-depth qualitative analysis of a specific judicial setting. In this regard, the present research is principally guided by other relevant studies that have previously investigated judicial decision-making processes through qualitative or ethnographic approaches (Barrett, 2012; Bogira, 2005; Eisenstein & Jacob, 1977; Eisenstein et al, 1988; Hogarth, 1971; Kupchic, 2006; Sudnow, 1965). However, it is also necessary to review relevant and similar previous empirical studies, specifically focused on the criminalisation of immigration, to highlight their main points and conclusions.

3.7.1. Previous qualitative studies on 'crimmigration judicial decision-making'

This research entails a conceptual and methodological combination of two substantial aspects: the implementation of crimmigration law and judicial-decision-making by criminal courts. Consequently, the pertinent previous studies must jointly deal with these two subjects, which can be referred to for this purpose as *crimmigration judicial decision-making*. As explained in the introductory chapter, there are three relevant previous studies in regards to this matter (Campesi, 2007; Fabini, 2017; Light, 2017).

Campesi's (2007) analysis of the relationship between immigration and crime in Italy is quite pertinent and enlightening. This is an ethnographic study of a criminal court

setting, intended to explore and analyse the criminalisation of immigration in that country, understanding it as the product of a process of social construction in which the social control agencies have an active role. The fundamental assumption is that there is a high degree of selectivity, with the main target groups being working class young males and ethnic minorities. The author's approach to address such a reality is the following:

> "[T]*o try to identify the practical knowledge… that actors use along the criminalisation process, in order to verify to what extent it enters the penal procedure interacting with the juridical models that should lead judges, prosecutors, and lawyers… identifying the accounts that actors use during their daily work, in particular those typifications by which they identify and deal with immigrants' criminality. These symbolic structures constitute a sort of professional subculture that judges, prosecutors and lawyers share… to evaluate to what extent this practical knowledge corresponds with the social knowledge and the common assumptions about the relationship between immigration and crime… to show how the widespread image of immigrants as importers of disorder and crime could enter the penal procedure, becoming a strong symbolic structure shared by procedural actors that allow to take, and justify, juridical decisions*" (Campesi, 2007: 107).

Campesi (2007) uses a cultural framework in order to understand the decision-making processes of the criminal courts, which is similar to the perspective adopted in this research. Indeed, he explicitly speaks of a 'professional subculture' shared by judges, prosecutors and attorneys and its interaction with the traditional juridical models. For that purpose, the author conducted an ethnographic research of a lower court, which deals with street crimes, in the Italian city of Bologna. The research consisted of observing the daily activities of that court, reading the trial records and carrying out about twenty interviews with procedural actors observed at work. The results have been reported according to specific themes that emerged from the data analysis.

The conclusions of Campesi's study (2007) are consistent with the framework developed in this chapter regarding the criminalisation of immigration. Indeed, he concluded that immigrant criminals are portrayed as a 'new dangerous class', who "*are not charged with a specific crime, but with their general life style that forces them to survive by illegal means*" (109). He found a "*general consensus among procedural actors over the subjects that should be arrested; judges exert their controls guaranteeing an accurate selection*" (111). Besides, preventive detention seemed to be "*explicitly directed to select the social dangerousness, the rabble that is supposed to survive by crime, and remove it as rapidly as possible from sight*" (112). In Campesi's view, this leads to a 'pronounced degeneration' of the penal system, which is part of a public security instrumentality that increases social anxiety over street crimes, normalising the use of exceptional and invasive measures. Ultimately, a judge's "*practical knowledge about normal crimes fills the cognitive gap and the lack of evidence, so that the case could be decided deriving from criminal prognosis, the assessment of subject' dangerousness*" (115).

This approach adopted by Campesi (2007) is conceptually and methodologically enlightening, as it refers to the decisional determinants of criminal courts. However, such study does not deal with immigration law enforcement, but with crime control processes and outcomes, focusing on the police and judicial mechanisms of formal criminalisation. In turn, the main purpose of this thesis is to analyse the decision-making processes of the criminal courts and decisions of immigration control aspects. However, Campesi's study demonstrates that an ethnographic approach towards the study of the environment within the criminal court in relation to criminalising processes and decision-making dynamics and determinants, is not only viable and appropriate, but also highly fruitful and revealing.

Light (2017) conducted a mixed-method study upon the effects of citizenship status on US federal and German sentencing outcomes. The investigation relied on both quantitative and qualitative methods to determine whether non-citizens are more harshly punished than citizens. The rationale behind this hypothesis is that criminal transgressions of those who lack citizenship will be viewed by judges as deserving of harsher penalties. The qualitative study included interviews with eight US federal judges and five German district court judges. The analysis of the interviews revealed a link between being an irregular immigrant and punishment, in the sense that "*many of the judges resented that those who were not members of their society, especially those who entered unlawfully, would compound their status by committing crimes*" (Light, 2017: 59). Moreover, the author found that a foreseeable deportation persuades criminal judges towards imposing custodial over non-custodial penalties upon non-citizens and to not consider mitigating circumstances. Finally, it also seemed that judges used a person's criminal history to attribute meaning to the defendant's behaviour consistent with criminal stereotypes.

Although the qualitative study of Light's paper (2017) is quite illuminating and pertinent, it is not specifically focused upon immigration control decision-making within the realm of the criminal court. The analysis of such study is intended to ascertain the decisional determinants of the criminal convictions of non-citizens (irregular immigrants), compared to citizens and to disentangle what the judges' motivations and justifications for such disparities are. In addition, it is not guided by a specific judicial-decision-making framework, let alone a cultural and organisational understanding of criminal court functioning. Nevertheless, Light's study provides theoretically and methodologically relevant insights that support the approach adopted in this thesis for studying such themes.

Fabini's (2017) study is quite proximal to the central focus of this thesis, given that it analyses, among other aspects, the decisional processes of immigration detention within

the Italian city of Bologna from a crimmigration perspective. It is remarkable that such a measure is, in a somewhat similar way to that of Spain, decided by judges (justices of peace) with jurisdiction over minor criminal and civil offenses at the request of the police, although they are honorary authorities who mostly do administrative tasks. This study is also relevant because it consists of focused observation at public trials on immigration crimes, along with four in depth interviews with deciding judges. The research also includes analysis of case files and interviews with police officers and migrants.

The results of this study reveal some interesting insights regarding the motives of judges. For instance, judges seemed to be guided more by the defendant's criminal background than merely by their status as an irregular immigrant. This means that detention was more likely when the defendant held a criminal record. The analysis revealed that it was harder for judges not to favour the police request than to validate it, complaining that a denying decision meant 'taking responsibility' for that choice. Despite the parallelisms of this study with my research, it ultimately does not delve further into the motivations and dynamics of immigration detention processes. Indeed, it is more focused upon police behaviour than on judicial decision-making, which is reflected in the lack of a specific conceptual framework for explaining such processes. Therefore, the present thesis differs from Fabini's study in terms of its focus and goes beyond that explored within the aforementioned work by explicitly examining the judicial facet of crimmigration law.

3.7.2. Previous qualitative studies on 'crimmigration judicial decision-making' in Spain

Given the focus of this research on the Spanish case, it is also necessary to review the previous relevant studies conducted in such country. To my best knowledge, however, there are only a few empirical studies or ongoing investigations of this type (Contreras et al., 2015; Martín-Escribano, 2015; Orgaz, 2014). There is a range of empirical studies, NGO and media reports and documentaries or audio-visual materials regarding aspects such as the conditions and circumstances of CIEs and their detainees (e.g., CEAR, 2009; Martínez-Escamilla, 2013; 2014; Manzanedo, 2013; Pernía-Ibáñez, et al, 2011; SJM, 2015a), the execution of expulsion orders and deportation flights (Defensor del Pueblo, 2012-2017; Campaña Estatal por el Cierre de los CIE, 2014; Calabozo, Herrreros & Olalla, 2016; SJM, 2015b) and the so-called summary pushbacks and jumping of the fences in Ceuta and Melilla (Caminando Fronteras, 2017; Melgares & Climent, 2016; SJM, 2012; 2013; 2014b; 2015c). However, they are not focused -or just tangentially- on the judicial decision-making process and most significantly, are not specific studies of court settings.

It is essential, first, to refer to an early study (García-España, 2001) regarding the relationship between immigration and crime because it has been the forerunner at explaining the relationship between immigration control and criminal justice in Spain. This study, which is the published version of the author's doctoral thesis, contents a comprehensive theoretical and empirical analysis of immigrant delinquency and criminalisation processes within Spain. The analysis opens with a detailed description of the migratory trends and the evolution of the Spanish immigration policy. Thereafter, it critically discusses the migratory policy through the conceptual lens of racism, discrimination, inequality and minority group prejudice. Moreover, the author reviews the most relevant criminological theories proposed to explain immigrant delinquency.

Against that theoretical background, the study concludes with a thorough empirical analysis, primarily based on official quantitative demographic, police and prison data, complemented with interviews with foreign prisoners. From this analysis the author concluded that the ostensible increase in the arrest of immigrants during the examined period (1990s) had to do with a preferential police focus. Besides, the author made a quite interesting and insightful analysis regarding the relationship between immigration control and criminal justice. She argued that the incongruity between the large number of arrests and the smaller amount of convictions and imprisonment for property crimes was explained by the pre-trial expulsion regime, by which in certain cases a prosecuted irregular immigrant is expelled before being sentenced. This would also explain, in her view, the higher number of convictions for drug crimes, since in such cases a pre-trial expulsion is not admissible. This is quite a significant proposition for this thesis because it emphasises the incidence of such type of expulsion within the decision-making of the criminal courts. This is an aspect that will be considered in the analysis of the results.

Following on from this, Orgaz's (2014) study is markedly relevant in regards to the empirical research surrounding immigration detention. The author relied on the concept of 'bureau-repression' to explain how the activities of the operators of detention and expulsion processes produce 'bureaucratic objects'. Such a study is part of an ongoing doctoral research that examines immigration detention from a historical perspective and through its legitimating discourses. It consists of in-depth interviews with six operators involved in immigration detention and expulsion proceedings: one police officer, one defence attorney, one supervising judge, one investigative judge, one prosecutor and one administrative officer. The results point towards the existence of a 'lattice' of relationships between agents, bodies, processes and administrative sub-products, in which the defendant is displaced, knows little about the proceeding and their right to defence is minimised.

Also, the results regarding roots assessments showed that the interviewees were concerned about the transient nature of immigrants, making it difficult for them to settle, which would in turn justify detention due to the immigrant's lack of roots with Spain. However, it also emerged that there is a significant variation in this assessment task, with some judges being less stringent than others. The analysis of roots must therefore be a significant aspect to be considered within this research.

In regards to criminal expulsions, there is another doctoral study that has analysed the judicial decision-making processes (Martín-Escribano, 2015). This study consists of an empirical analysis of the application of sentencing expulsion within the criminal courts of Barcelona, combining both a quantitative analysis of a non-random sample of 285 judicial records of sentencing expulsions and five semi-structured interviews with two criminal judges, one prosecutor, one immigration state lawyer and one police inspector from the expulsions police agency. The author found that expulsion was mostly requested by the prosecutor and conceded in the majority of cases, demonstrating that the procedure was largely automatic and that the defendant's previous criminal record had apparently no decisional influence. The study also showed that judges seem to assess the immigrant's social and labour roots in only some cases. Additionally, only in 39.7% of the cases was the expulsion successfully executed with the lack of consular identification and travel documents being the main obstacles for the expulsion (71.8%). To the question of whether this circumstance could be assessed at the time of the decision being made, the interviewees agreed that it was not possible for them consider such an allegation because they could not be sure that it would be like that in every case. These conclusions reveal the need to focus upon the procedural practicalities, the decisional determinants, the assessment of the defendant's roots and the ultimate effectiveness of the decision.

Regarding pre-trial expulsion, there is an ongoing research (Contreras et al., 2015) in relation to the judicial decision-making process. This research consists of an analysis of a sample of judicial records from the sentencing and investigative courts of Madrid and Malaga, in which this type of expulsion has been applied. The collection of the data is structured using a personalised sheet in which specific information on previously determined variables is classified and placed. Although it is still in progress, some preliminary results have been presented in a few international academic conferences. These initial findings point towards the existence of formal and juridical inconsistencies in the application of this measure, related to the assurance of the right to defence, compliance with legal deadlines, confusion with sentencing expulsion and carelessness in its implementation. Although these are still tentative conclusions, they reveal that it is

essential to focus upon the procedural intricacies and possible inconsistencies of the pre-trial expulsion decision-making process.

3.8. Summary

This literature review has defined several key conceptual determinations for the present research. First, as part of the broader global and local processes characteristic of late modernity, the design and evolution of the immigration policy in Spain has been largely determined by socioeconomic factors, mostly guided by market-oriented needs and the supply of cheap labour. This means that the analysis of immigration policy regulation and implementation should consider the cycles of the economy and its consequent impact upon the labour market. The main remark in this sense is that in the aftermath of the 'great recession', which broke out in the late 2000s, there appeared a renewed policy emphasis on the social construction of the 'criminal immigrant'. The main implication of this is that the role of the criminal justice system in the implementation of immigration control measures has become paramount and should be adequately situated within the cultural realm of its traditionally determined and exercised competences.

The literature converges in explaining that the criminalisation of immigration in Spain is a somewhat subtle phenomenon, explained through a complex social dynamic of probationary inclusion/exclusion processes. The main conceptual reflection in this regard is that to a large extent the Spanish immigration policy prompt the marginalisation of determined ethnic minority groups, which makes them in turn more likely to be involved in illicit activities, either in the informal sector of the economy, or in survival crimes. From there, as explained by Melossi (2003), the formal mechanisms of criminalisation would operate through police selection and subsequent judicial labelling. Furthermore, this process is operated through the ostensible convergence, at both the regulation and enforcement levels, of criminal and immigration law. In this specific facet, the Spanish legal regime could be considered a case of crimmigration (Stumpf, 2006), most specifically in the form of a contemporary policy shift (Brandariz & Fernández, 2017).

In practice, the convergence between immigration and criminal law in Spain has led to the incorporation of immigration control within the criminal justice decision-making realm. For instance, expulsion has become a measure that can be authorised throughout the whole criminal proceeding, which means that in such cases criminal judges are compelled to assess and balance the specific objectives of criminal policy with those of immigration control. Likewise, the fact that criminal investigative judges supervise immigration detention makes it another key point of such convergence. Although these aspects have

been part of Spanish legislation since 1985, the renewed emphasis upon the social construction of the 'criminal immigrant' in the last decade has increased the critical relevance of these mechanisms, as well as the academic, policy, humanitarian and social focus upon their dysfunctionalities and consequences.

Therefore, from this review it emerges that there is a need to analyse the enforcement aspects of such socio-legal regime, in order to examine the intricacies, practicalities and complexities of judicial decision-making processes within the criminal justice realm. In the last decades, the topic of the convergence between immigration and criminal laws has drawn the attention of an increasing number of scholars, who have been actively working under the crimmigration umbrella. Most studies have either focused upon the legal configuration of this phenomenon, its structural determinants or on its policy, social, and humanitarian consequences, most notably regarding immigration detention, asylum-seekers, refugees and deportees. However, there is still a gap in the literature regarding enforcement on a judicial level, which is one of the most critical aspects of crimmigration. Moreover, within the European context, this is even more consequential in terms of the Spanish case, given that Spain fulfils a central role in the enforcement of immigration law as the EU southernmost 'border state'. Consequently, the present research purports to fill that gap by focusing upon judicial implementation within the criminal justice realm and in the Spanish/European context of crimmigration law.

Chapter 4: Designing a comprehensive qualitative methodological approach for analysing judicial decision-making by criminal courts

4.1. Introduction

In this chapter I intend to explain the methodological approach adopted to answer the research questions. For this purpose, I will first focus upon describing the proposed questions in detail, followed by an elaboration of the epistemological underpinnings that support the intended methodological design. I will then go on to explain how this research is conceptualised as a case-study and expand upon its theoretical and methodological implications. Furthermore, I will develop a theoretical framework for portraying the way in which the research settings and the case-study are understood. Thereafter, I will justify the use of in-depth semi-structured interviews and focused observation as the methods for this research. Finally, I will discuss issues of validity, reliability and triangulation and the ethical concerns that arise from such research.

4.2. Research questions

The complex dynamics of the criminalisation of immigration in Spain have been portrayed in the previous chapter, highlighting the shift regarding immigration policy prompted by the economic crisis. One of the most pivotal aspects of this policy reorientation has been the intertwining between immigration control and criminal justice, guided by a renewed emphasis upon the social construction of the 'criminal immigrant'. Within the Spanish regime, this socio-legal configuration is evidenced by the presence of two broad pieces: immigration detention and expulsion throughout the criminal proceeding. Both entail the incorporation of immigration law features within the realm of criminal justice decision-making. In practice, this means that courts specialised in criminal matters have to decide whether to authorise immigration detention, as well as whether to suspend a criminal proceeding or substitute imprisonment in favour of the expulsion of an irregular immigrant allegedly involved in criminal behaviour or convicted for it.

The crimmigration perspective highlights the relevance of the enforcement aspects, given that its core assumptions are essentially centred upon the ways in which law enforcers make instrumental use of the tools provided by both criminal and immigration law (Aliverti, 2012; Sklansky, 2012; Stumpf, 2006). In this regard, Spain is particularly interesting given its densely-structured merger between immigration control and criminal justice. However, there is still a gap in the literature regarding the judicial decision-making processes of this socio-legal phenomenon. It remains unclear as to how court actors,

including judges, prosecutors, court staff and defence attorneys, make sense of the specific decision-making facets that accompany the aforementioned intertwining. This research is intended to disentangle how such actors make sense of these decisional aspects and from the analysis of their responses, and the observation of their working routines, this investigation hopes to attain an in-depth understanding of the judicial decision-making processes of immigration detention and expulsion throughout the criminal proceeding. For that purpose, the following research questions have been formulated:

1) First and foremost: *How does the social construction of the 'criminal immigrant' through the intertwining of immigration control and criminal justice function within Spanish judicial practice?*

2) Given the emphasis placed upon social construction processes, it makes sense to focus upon the meanings generated through the symbolic interaction of court actors in their routines and decisional culture. Therefore, the second questions proposed is: *What are the meanings attributed by court actors towards immigration control within the cultural realm of criminal court decision-making practices and routines?*

3) In answering these questions, it is also necessary to focus upon the determinants of such processes. Thus, the third questions to be considered is: *What are the decision-making determinants, conditions and mechanics associated with immigration law implementation within the cultural realm of criminal justice decision-making?*

4) This research seeks to determine whether immigration control purposes have displaced those of criminal law. For instance, if we consider cases which involve criminally active irregular immigrants, we notice that while the primary intention of immigration control would be the expulsion, criminal law would instead lean towards goals of prosecution and punishment. Hence, the fourth question proposed is: *To what extent do immigration control objectives in regards to detaining and/or expelling an irregular immigrant are preferred over criminal justice objectives towards prosecuting and punishing criminals, within the Spanish judicial practice and decisional culture?*

To examine and answer these research questions, the following complementary and interdependent qualitative research methods have been used to collect data:

- In-depth semi-structured interviews with judicial actors (judges, prosecutors, clerks, judicial personnel, defence attorneys and other professionals).

- Focused observation conducted at a courthouse for a period of eight months.

4.3. Epistemological underpinnings

The way in which a research is conducted necessarily rests upon certain epistemological foundations. Indeed, the value of a given research method is unclear until seen through the lens of theoretical perspectives, given that each theory demands and produces a specific view based upon the research act (Denzin, 1978). Moreover, "*it is in methodology that theory and method come together in order to create a guide to, and through, research design, from question formulation through analysis and representation*" (Nagy & Leavy, 2006: 21). The epistemological underpinnings of a research are defined through the conceptual framework that determines the ways in which knowledge is acquired (Crotty, 1998). From the research questions proposed it emerges that symbolic interactionism is the most coherent and consistent epistemological framework to guide this research.

As explained in the preceding chapter, the criminalisation of immigration, with the merger between immigration control and criminal law as one of its key mechanisms, is understood as a social construction process; however, not as pure constructivism, but understood in terms of an interaction between the person who commits the act and those who respond to it (Becker, 1963). Consequently, this research presupposes that knowledge emerges, and is created and acquired, through the interaction between individuals such as the researcher, the research subjects and the environment. It assumes that human beings react towards objects on the basis of the meaning that they associate with them, which derive from social interactions and are managed through interpretative processes (Blumer, 1969). Therefore, as a researcher I chose my methods and went to the field assuming that the meaning of objects lies in the actions that people take towards them and that meaning is conferred on objects, people and situations through human interaction (Berg, 2001).

Disentangling the meanings generated and attributed by court actors to immigration detention and expulsion within the decisional realm of the criminal court, requires an in-depth immersion into their interpretative world. This approach relies on an interpretive epistemology, which maintains that social meaning is "*based on the interpretation of interactions and the social meaning that people assign to their interaction*" (Nagy & Leavy, 2006: 14). In other words, interpretivism presupposes that knowledge building is observational and interactional, requiring the development of relationships between the researcher and the research participants. Ultimately, the primary aim of a research conducted from this standpoint is "*to describe what happens, how the people involved see and talk about their own actions and those of others, the contexts in which the action takes place, and what follows from it*" (Hammersley & Atkinson, 2007: 7).

An interpretivist and symbolic interactionist framework are necessary to appropriately establish the methodological background required in order to respond to the proposed research questions. Indeed, ascertaining the decision-making determinants of immigration detention and expulsion within the realm of the criminal courts requires directly approaching the people who implement them in practice. This in turn could facilitate the explanation as to how the preponderance of one or the other fields of law in the decision-making process is operationalised in practice. Furthermore, the interaction with research subjects and their environment is necessary to achieve an in-depth understanding of the concepts, definitions, characteristics, metaphors, symbols and descriptions that they develop as part of their own ways of structuring and giving meaning to their daily routines (Berg, 2001). This way of understanding research embraces the assumption that, in contrast to positivist perspectives, researchers cannot detach themselves from their presuppositions and should ensure that their beliefs and biases are made explicit (Groenewald, 2004; Van Maanen, 1984).

It emerges that the present approach required the use of qualitative methods, which allow the researcher to share in the understandings and perceptions of others, assuming that the reality perceived by subjects is social, cultural, situational and contextual (Berg, 2001; Stake, 2005). Besides, qualitative researchers are interested in generating theory, relying mostly on inductive models (Nagy & Leavy, 2006), although the present research partially relied upon a grounded theory framework (Charmaz, 2006). Specifically, this research held the intrinsic dynamic of grounded theory, assuming the importance of data collection and analysis for the generation or refinement of theoretical insights. However, this required a mixed approach, imbued by a deductive component regarding the construction of codes within the analytical process. This did not constitute a purely deductive approach, but rather a dynamic process in which predefined categories were constantly revisited.

4.4. The need for in-depth dialogue and intersubjectivity

This research is structured as a case-study, which is understood as a methodological approach rather than a research method, defined as a "*transparadigmatic and transdisciplinary heuristic that involves the careful delineation of the phenomena for which evidence is being collected*" (Van Wynsberghe & Khan, 2007: 80). The case-study attempts to arrive at a comprehensive understanding of the situation in question and to develop more general theoretical statements about regularities in the observed phenomena (Fidel, 1984). This means systematically gathering information about a social setting, group or institution to effectively understand how it operates (Berg, 2001; Hammersley,

1992). Moreover, it provides a means of studying human events and actions in their natural surroundings, allowing the observer to render social action as it is understood by the actors themselves, studying the complexity of social meanings and providing a sense of the subject's motives, discernible from their decisions and actions (Orum et al., 1991).

A case-study is also conceptually understood from the epistemological perspective of Burawoy's (1998) extended case method, particularly regarding its emphasis on dialogue and intersubjectivity between the researcher and the research subjects. In this sense, intervention is often favoured given its ability to provide researchers with an in-depth and explicit immersion within the field. Likewise, for the present research the most significant aspect of this approach is the notion of reconstruction. This concept indicates that rather than inferring generality from data, researchers can move from one generality to another, in such a way that a predetermined theory is used in the beginning not to seek confirmations, but rather refutations that allow the broadening of the theory in question. In this regard, the purpose is not to discover grounded theory but to elaborate existing theory.

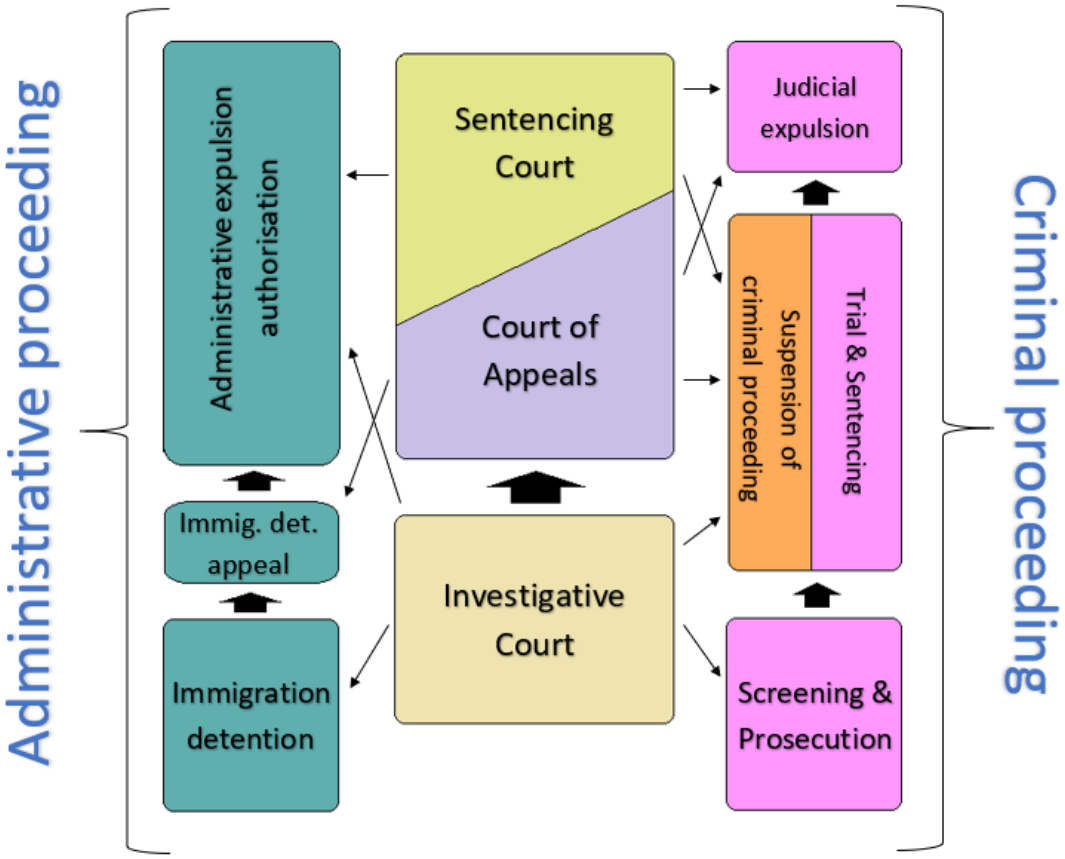
This research is defined as a case-study because it pursued an in-depth analysis of a specific setting through an intense dialogue and intersubjectivity between the researcher and the research subjects. For that reason, I chose a very specific setting to conduct my fieldwork: the courthouse of the city of Malaga. As a judicial bureaucratic body, a case-study is particularly suitable (Sjoberg et al., 1991), since such an approach entails a thorough understanding of how it operates, being useful for researching relationships, behaviours, attitudes, motivations and stressors within organisational settings (Berg, 2001).

Focusing upon a specific judicial organisation was the most appropriate way to achieve an in-depth understanding of how decision-making processes with a specific field are operationalised in practice. In terms of this research, deducing the potential determinants, conditions and mechanics of the incorporation of immigration law aspects within the realm of criminal justice decision-making could be better achieved through a case-study. Additionally, the in-depth immersion enabled by the case-study approach proved effective in allowing me a greater understanding as to what the potential meanings attributed by court actors to immigration detention and expulsion could be, and whether these aspects prevail over criminal prosecution and formal punishment.

Defining the unit of analysis is essential for the delimitation of a case-study (Berg, 2001: 231) and was defined in this study as the criminal section of the courthouse of Malaga. It should first be noted that courthouses in Spain are not formally divided into sections, but into courts according to their subject-matter and procedural function. For

instance, within this specific courthouse there are courts of administrative, civil, labour and of a criminal nature. Besides, courts of a criminal nature are divided into three broad categories according to their procedural function: investigative (14), sentencing (14) and appeal courts (5). Investigative courts are mostly in charge of the screening and prosecuting phases of criminal proceedings, as well as sentencing minor crimes and overseeing immigration detention. Sentencing courts are mostly in charge of the trial and sentencing phases, as well as given the responsibility of supervising the execution of punishments. Finally, appeal courts resolve appeals and make decisions in regards to serious crimes.[58] The following graph illustrates the relevant decision-making aspects of the criminal courts in regards to immigration control:

Figure 13. Immigration control decision-making aspects of the criminal courts



(Illustration by the author)

At first sight, it would have made sense to define the unit of analysis as the criminal court. However, as my fieldwork evolved, I realised that it was more appropriate to define the unit of analysis as the criminal section, by which I am referring to the whole set of criminal courts, including investigative and sentencing courts and Courts of Appeal. This delimitation was based upon several reasons, the first being that although each court

[58] Appeal courts are entitled to judge crimes sanctioned with more than five years of imprisonment, except those subjected to trial by juries (RD 14-09-1882, BOE num. 60 & LO 5/1995, BOE num. 122, 23-05-1995).

consists of a specific organisational unit, they each conduct the same type of work in their respective areas. To illustrate, each of the fourteen investigative courts completes the same tasks and the same can be said in regards to the other courts. It is important to note that this research has been intended to uncover the meanings attributed to the decision-making points in which immigration control and criminal justice intertwine. This means that its prominent focus was not upon the formal juridical prosecution and formulation of verdicts, but upon the substantial and processual gears of the decision-making processes of immigration detention and expulsion. Hence the interest was directed towards how these particular sets of courts implement and make sense of these juridical mechanisms.

The decision to choose the courthouse of the city of Malaga was based upon several theoretical and practical reasons. From a theoretical side, addressing the proposed research questions required choosing a research setting, not only sufficiently representative, but also substantially diverse in terms of caseload subject-matter. For instance, fully ascertaining the decision-making determinants and meanings of immigration detention required analysing the processing of both already residing immigrants and recent arrivals. As will be shown in the results chapters, this is a fundamental distinction for adequately understanding such decision-making processes. Besides, regarding expulsion throughout the criminal proceeding, it was desirable that the selected courts deal with expulsions relatively frequently, as well as noting its different manifestations (pre-trial, sentencing and post-sentence). This allowed me to more adequately determine any patterned decisional mechanics, as well as the intricacies of such processes. Additionally, a busy and large courthouse was preferable to obtain a more complete picture of the analysed social reality in a short period, with the courthouse of the city Malaga fulfilling all these conditions.

Malaga is the sixth biggest city in Spain, and the second in Andalusia, with almost 967,000 people residing in the metropolitan area[59] and 569,000 in the central municipal area (INE, 2017), also being the most densely populated Andalusian province.[60] It is located at the extreme West of the Mediterranean Sea, in the South of the Iberian Peninsula, at about 100 km of the Strait of Gibraltar, and less than 200 km in a straight line facing the North African coasts. It is a popular tourist destination, amongst the most important Spanish maritime ports, and its airport is the fourth most frequented in Spain by number of passengers (Aena, 2016). Malaga is in general considered the 'engine' of the

[59] According to the Spanish Ministry of Development (2016), this area includes the municipalities of Malaga, Mijas, Fuengirola, Torremolinos, Benalmádena, Rincón de la Victoria, Alhaurín de la Torre and Cártama.
[60] These data correspond to the year 2016, during which the fieldwork was conducted.

Andalusian economy.[61] However, Malaga is also full of contrasts, given that on the one hand, it is known for the presence of wealthy entrepreneurs,[62] whilst simultaneously being a strategic location of big illegal businesses.[63] On the other, it has also been one of the most affected by the economic crisis, characterised by detrimental social indicators.[64]

Given that the court caseload in immigration matters is necessarily influenced by the proportion of foreigners in the population, it makes sense to briefly examine such information. There are around 172,300 foreign registered residents in this area, 92,400 of which are non-European (Instituto de Estadística y Cartografía de Andalucía, 2016). Although the British is often considered the most salient community (21,300), there are other nationalities with larger proportions, such as the Moroccan community (29,300), non-Moroccan African community (36,700) and Latin-American community (44,800).[65] Between 1998 and 2010, the foreign population within Malaga multiplied by ten, going from 0.88% to 8.27% (Natera, 2012), concentrating more than a third (35.1%) of the foreign population increment in Andalusia during that period (Junta de Andalucía, 2016: 78).[66] Despite the nationwide stagnation of immigration in the last decade, Malaga has always maintained a positive, though slowly decreasing, migratory balance.[67] Ultimately, it is an important migratory destination, with a structural and permanent presence of foreigners, characterised by their varied and multicultural identities (Calderón, 2011).

[61] Between 2000-2013, despite the impact of the crisis, Malaga was the third provincial economy with the largest growing rate (75%). Malaga's per capita GDP is around 16,384, compared with 16,522 of Andalusia and 22,323 of Spain (Instituto de Estadística y Cartografía de Andalucía, 2016).

[62] The increasing arrival of millionaires prompted by the implementation in 2013 of a special visa for those investing in real states has been particularly notable in Malaga. For instance, it has been reported (Sau, 2017) that until 2017, around 350 wealthy foreigners have acquired a real state in the Malaga area under such regime, which makes it the second most preferred location behind Barcelona.

[63] Media reports have shown how Malaga has become a paramount destination for money laundering and illicit trafficking. For example, it has been reported (Sau, 2016) that Malaga is the second most preferred Spanish province for money laundering, with law enforcement agencies having warned for years about the constant presence of international gangs, as well as big capos spending their time there. Prosecutorial data (Sau, 2014) show that Malaga is a big hot spot of the mafia activities in Europe.

[64] Malaga is considered the fourth provincial capital whose population is at greatest risk of poverty, with a rate of 32.9% (AIS, 2016). Ultimately this means that one in four people from Malaga is at risk of poverty and social exclusion (Sánchez & Ladrón de Guevara, 2016). Malaga's economy has been traditionally dependent on seasonal activities, mainly related to tourism, which in turn has resulted in a labour market characterised by precarious employment, even in times of economic growth (Borrego, 2007).

[65] These statistics refer to registered foreign residents, which means that there could be an additional number of non-registered foreigners residing in this area. However, as already explained in the second chapter, data from the registered foreign community is generally considered reliable and accurate.

[66] Data from 2010 reveal that most of these foreigners were Latin-American, followed by the Maghreb and EU nationals. While in 2003 there were 5,680 Latin-Americans (32.7%), 3,980 Maghreb (22.2%), 3,491 EU 15 (19.5%), 700 EU (3.9%), 1,416 from the rest of Europe (7.9%), 1,434 from the rest of Africa (8%) and 652 (3.6%) Asians living in Malaga, in 2010 they were 16,460 (34.5%), 8,189 (17.2%), 7,116 (14.9%), 4,473 (9.8%), 4,225 (8.9%), 3,969 (8.3%) and 2,396 (5%), respectively (Natera, 2012).

[67] To illustrate, while in 2008, there were 24,150 immigrants who came to Malaga and 8,887 people who departed, in 2013 they were 14,991 and 13,867, respectively (Recio, 2014).

It is also important to highlight the increasing relevance of Malaga as a destination for immigrants arriving in boats. During 2016, the Red Cross reported that 10,389 people arrived in small boats to the Spanish coasts (Cañas, 2017). In the province of Malaga, the arrival of 770 immigrants was reported, 7% of the total (Sánchez, 2017a). As stated in the second chapter, the Spanish Mediterranean route has gained relevance in the last years, and it has been reported that until September 2017, the number of rescued immigrants already exceeded that of 2016, with 11,043 people being saved (Cañas, 2017). In Malaga, already in June of 2017 year, 602 immigrants had been rescued (Sánchez, 2017a) and by October the number already exceeded that of the previous year (1,500) (Sánchez, 2017b). Although the coasts of Malaga are not the most pressured, they still are important destinations, with a constant monthly arrival of boats. This means that investigative courts in the courthouse of Malaga deal with the detention of recently arrived immigrants relatively frequently.

The courthouse caseload reflects the relatively significant proportion of cases of immigration detention and expulsion throughout the criminal proceeding. Regarding the former, it should be noted that in 2016, a total of 12,410 detentions were processed by investigative courts on a national level and 674 (5.4%) in Malaga alone (Consejo General del Poder Judicial, 2017). To provide a better understanding of the proportions, one should note that in the courthouse of Madrid the number of detentions in 2016 was 566 (4.6%). It emerges that investigative courts in Malaga deal with a comparatively large caseload of immigration detentions, larger than the courts of Madrid and just below those of Algeciras (1220) and Almeria (949), which are coastal cities heavily affected by the constant arrival of boats with immigrants. This makes the courthouse of Malaga one of the best suited places to conduct research on immigration detention decision-making.

It should be highlighted that Malaga does not have an immigration detention centre (CIE), which instead can be found in locations such as Algeciras, Murcia, Valencia, Barcelona or Madrid. However, Malaga did have a CIE which was closed in 2012 due to its detrimental and even inhumane conditions. This was allegedly due in part to the noteworthy efforts of a strongly organised platform of NGOs and civil society organisations. Indeed, Malaga has an extensive and well-organised network of NGOs and pro-bono legal service organisations specifically intended to support and provide advice to immigrants. These factors contribute to the relevance and significance of this specific location in regards to research based upon immigration detention.

In relation to criminal expulsions, its caseload content and size also seemed to make the courthouse of Malaga a fruitful place for research on this topic (Fiscalía

Provincial de Málaga, 2017). In 2016 there were 1,428 pre-trial and 2,889 post-trial expulsion cases. In Malaga specifically, there were 360 pre-trial expulsion cases and 97 post-trial cases. To provide a better sense of the proportions described, in Madrid during that year there were 120 pre-trial cases and 438 post-trial, expulsion cases. Comparatively, this means that the courthouse of Malaga deals with a large caseload of such cases, given that it is just 18% smaller than that of the biggest Spanish city, with a particular emphasis upon pre-trial expulsions, which compromise 25% of the national caseload. For this reason, the courthouse of Malaga seemed to be a well-suited place to conduct research on these types of expulsions. Furthermore, it has a specialised prosecutorial office in immigration matters, with three prosecutors specifically dedicated to these cases.

There were also practical reasons for choosing this location, related to viability and access. In deciding where to conduct this research, I first evaluated the likelihood of being able to conduct this study within a reasonably short time, specifically in terms of the facilities available and ease of access. In fact, during the first semester 2015, I conducted an external pre-screening and made contacts with specialised academics from three potential research locations (Barcelona, Malaga and Madrid). Finally, in September of that year I visited the aforementioned places to carry out an initial observation. In the end, due to a contact provided by one of my supervisors, I got in touch with the Andalusian Interuniversity Institute of Criminology, at the University of Malaga, which has been conducting research upon the relationship between immigration and criminal justice for decades. Apart from the scientific relevance of the case, the enthusiasm displayed by the institute's researchers persuaded me to choose this location as the centre for my study. I spent eight months between January and August in 2016 within the institute as a visiting scholar. This ultimately proved to be a fruitful decision, given that the support provided by their researchers was important in regards to the access into the research field.

Overall, the criminal section of the courthouse of Malaga was an appropriate research location to investigate and answer the proposed research questions. Although the mentioned practical reasons were determinant, the conceptual motivations were also persuading. For instance, the courthouse of Malaga is a large and complex organisational setting, which concentrates in one single place all the forms of judicial bodies that are involved in the social construction of the 'criminal immigrant' through the intertwining of immigration control and criminal justice. This in turn made it also suitable for ascertaining the decision-making determinants of immigration detention and expulsion throughout the criminal proceeding. The relatively large size of the court caseload regarding such aspects proved to be another solid reason for the suitability of this location. Moreover, the fact that

there is a plurality of court offices of different categories within the criminal section was useful in regards to tracing decisional patterns, contrasts and intricacies. This ultimately facilitated the disentangling of the meanings attributed by judicial actors to immigration detention and expulsion within the realm of criminal justice decision-making practices.

Finally, it is necessary to address the representativeness of the selected location in relation to the Spanish and EU contexts. The present research has been methodologically defined as a case-study of the Spanish 'crimmigration regime'. While this is an explicit recognition that the analysis is referred to a specific case, it also means that it could be demonstrative of the general Spanish regime. In this regard, it must first be highlighted that the Spanish immigration policies are nation-wide, defined by the central government in accordance with the EU law, and enforced primarily by national police agencies. Besides, both criminal and immigration laws are adopted and applied at the national level. Likewise, in its role of implementer of such norms and policies, the judiciary has a standardised national structure, organisation and operation, and is administratively ruled by a central institutional board. All this means that the analysis of the functioning of a judicial body in terms of the law in action must necessarily be situated within the broader national legal and policy framework. In other words, this thesis is not an analysis of how local norms and policies are being applied, but a case-study of how a nation-wide regime is being implemented by the courts. In addition, such an analysis must be situated within the EU context because, as explained in the second chapter, immigration policymaking in Spain is significantly determined by the EU legal and policy framework.

Whilst the issues of validity and generalisability of this research are addressed below,[68] it is pertinent at this point to briefly discuss the extent to which the courthouse of Malaga could be representative of the Spanish judiciary. The structure, organisation, distribution and functioning of the courts in Malaga correspond to a nation-wide standardised model which has become known as the 'City of Justice'. Court settings in the Western world in general, and in Europe in particular, are designed and operated according to this standard. Additionally, judicial personnel in Spain is classified and allocated in the same way across the nation and undergo the same training according to their categorisation within a formal organisational scale. In terms of subject-matter specialisation, the Spanish courts are entitled to treat the same matters regardless of their location. To illustrate, the investigative courts of Barcelona or Madrid have the same competences as the courts of Malaga, and their judges and personnel are in principle capable of working in any of them. For these reasons, the courthouse of Malaga resembles in its structure and operation most

[68] In section 4.8 of this chapter.

of the Spanish and European courts, especially those located in the biggest cities. Nonetheless, as explained in the next section, courts are also unique places with its own idiosyncratic features and dynamics, all of which compose particular court cultures.

4.5. Researching courts from a cultural perspective

This research consists of an in-depth analysis of the criminal section of a courthouse. It is therefore necessary to briefly explain how court settings are understood, in order to clarify what the conceptual bases of the proposed methods are. Criminal courts are understood as a sort of community embedded in particular contexts (Dixon, 1995; Eisenstein & Jacob, 1977; Eisenstein et al., 1988; Myers & Talarico, 1987). Such communities are integrated with participants coming from interrelated agencies, such as judges, prosecutors, attorneys, court personnel and others who participate in the judicial decision-making process. They establish working relationships and interrelate with one another, leading to the emergence of idiosyncratic symbols, jargon and patterned responses. They also share conflictive and/or consensual beliefs regarding law enforcement, punishment and justice, and giving patterned meanings to their work (Hogarth, 1971). Interdependence and workplace are considered constitutive elements and their confluence in the uplift of the workgroup leads to the emergence of a culture (Eisenstein et al., 1988; 1978; Hogarth, 1971).

The idea of a judicial culture is central to the present research. Indeed, this is intrinsically connected with the determination of the meanings attributed by court actors to immigration detention and expulsion within the realm of the criminal court. Moreover, this is in turn intimately related with the decision-making determinants of such aspects. As explained by Garland (1991:219), such culture is understood as an *immediate framework of meaning* within which the diverse practices, routines and procedures which make up the penal realm are undertaken. In other words, it is defined as,

> "[T]*he loose amalgam of penological theory, stored-up experience, institutional wisdom, and professional common sense which frames the actions of penal agents and which lends meaning to what they do. It is a local, institutional culture-a specific form of life-which has its own terms, categories, and symbols and which forms the immediate meaningful context in which penal practices exist*" (Garland, 1991: 219).

Culture is also defined by the more practical aspects of the working routine of court offices, which can be arranged into five recurrent themes (Eisenstein et al., 1988: 28): community self-awareness, common beliefs of trust and cooperation regarding interpersonal relations, shared attitudes regarding how cases are processed, verbal and non-verbal language and a sense of tradition. In sum, courts develop routines, relationships and informal and subtle rules, which contribute to reduce uncertainty and foster organisational

arrangements in the interest of case disposition (Blumberg, 1967; Wood, 1956; Steffensmeier et al., 1998). Finally, the primary bearers of this culture are the operatives of the penal system, those who transform cultural conceptions into penal actions.

This perspective is not fully unrelated to the Weberian (Weber & Kalberg, 2005) conception of modern Western bureaucracies, understood as formally and rationally oriented decision-making entities. At least in terms of their functional framework, courts are rational, consensual and hierarchically organised structures, in which decisions are based upon abstract rules enacted following formalised mechanisms. Indeed, within the modern judicial bureaucracies, decisions and actions should necessarily be discursively and representatively formal and rational (Lanza-Kaduce, 1982). Nonetheless, this is not incompatible with the idea of the courts as bargaining arenas, in which facts and law definitions are to a significant extent disputed and negotiated (Blumberg, 1967; Hogarth, 1971; Sudnow, 1965). Furthermore, formal legal measures cannot overcome substantial societal and political conditions of contemporary societies, which are characterised more by bargaining rather than by the rigid application of formal rules (Savelsberg, 1992).

It emerges that the decision-making process of immigration detention and expulsion within the realm of the criminal courts are not necessarily driven solely by formal legal considerations. To the contrary, law can be seen as a contested field, influenced by other substantive aspects that compose and affect the cultural dynamics of a specific court. In addition to this, as explained by Krasmann (2012: 384) from a Foucauldian perspective, law must be analysed in relational terms, given that "*it is only conceivable as a practice, presenting itself in the forms and in the moment of its materialisation*". Besides, understood as a juridical field (Bourdieu, 1987), law in action can indeed be conceptualised as a site of competition for the monopoly of the right to determine the law, a social space organised around the conversion of direct conflict into juridically regulated debate between professionals who work with the written and unwritten rules of the legal game. In consequence, "*the practical meaning of the law is really only determined in the confrontation between different bodies (e.g. judges, lawyers, solicitors) moved by divergent specific interests*" (Bourdieu, 1987: 821). The routine configuration of the juridical field may prompt a legal habitus:

> "*Shaped through legal studies and the practice of the legal profession on the basis of a kind of common familial experience, the prevalent dispositions of the legal habitus operate like categories of perception and judgment that structure the perception and judgment of ordinary conflicts, and orient the work which converts them into juridical confrontations*" (Bourdieu, 1987: 833).

This means that the legal practice can be moulded by tradition, education and the daily experience of legal custom and professional usage, operating as complex structures of behaviour. The development of patterned responses and the significance of case disposition within the realm of judicial decision-making, involves decisional processes, which require the development of simplifying strategies and techniques. These strategies may rely to some extent on causal attributions, based on stereotypes linked to case or individual features that are tangible, or more easily identified and symbolized (Albonetti, 1991; Carroll, 1978; Fontaine & Emily, 1978). Thus, the relative decisional discretion exercised by judges in their working routines may be influenced by such considerations. This implies that in practice the criminalisation process (secondary criminalisation) could be the consequence of negotiation and organisational arrangements (Sudnow, 1965).

Regarding the present research, I approached the field with this background in mind. Therefore, I did not consider decision-making as a formal and lineal course, but as a process significantly influenced by the idiosyncratic cultural dynamics of each court setting. This meant giving pre-eminence to cultural, occupational, organisational and practical factors than to legally predefined determinants. For example, rather than approaching the field with the fixed idea that judges predominantly make decisions on the basis of what the penal code establishes, I preferred to focus on the influence of the aspects that compose the legal culture of a specific court, its organisational ends and concerns, the dynamics of action and reaction of its members and the configuration and effect of predominant decisional patterns. This required identifying, understanding and classifying the salient aspects of the legal culture of the studied courts, to then determine how they could influence decision-making. This appeared to be the most coherent way to ascertain the meanings generated and attributed by judicial actors to immigration detention and expulsion and from there identifying their main decisional determinants, and ultimately how they interpret the intertwining between immigration control and criminal justice.

4.6. Access and practicalities

The criminal section of the courthouse of Malaga is contained in a large, modern and luminous, seven-storey building of 70,000 square meters, inaugurated in November 2007. As mentioned above, the structure and appearance of this site is a nationwide model replicated in many big Spanish cities, which concentrates the majority of the courts and judicial bodies of a municipality within one unique place. The building is equipped with elevators and escalators that permit easy access to every floor and the entrance is controlled by Civil Guard officers and monitored with metal detectors and bag checks.

Access to the building is public and does not require previous identification, with opening hours being between 8am and 2pm. During the first six months of fieldwork I regularly visited the courthouse and never encountered any problems in regards to accessing the building within opening hours and was able to stay longer when needed.

Hearing courtrooms are in the basement, separated from court offices. Access to these hearings is public, although I had to request permission from the judge and my presence was made known to the other participants. However, I was not always allowed to remain in the room in-between hearings, with some judges explicitly asking me to leave, though others permitted my attendance. This is relevant because during these moments, judges maintain informal conversations with prosecutors and attorneys discuss details of the case. Most court offices are in the upper five floors and a few of them are located in the basement; however, the organisation and appearances of both those located on the top floors and those within the basements are alike, with modular frosted-glass panels separating them from the outside. Access to these offices was in general unproblematic for me; the first two times I was accompanied by a researcher from the Institute and thereafter I developed my own strategy. My approach was to enter and introduce myself in a confident manner, and ask the nearest official for the court clerk, who is in practice the manager of the court office. I always introduced myself as a law student seeking help with a number of questions. In most cases I was unproblematically brought before the court clerk, with whom I defined in each case the opportunity of conducting interviews.

Regarding the investigative courts there are some details that should be mentioned. The main working feature of these courts is that they are intended to be available at any time, functioning as day-courts, which means that they work in shifts, involving a permanent availability of two days. The first day corresponds to arrest matters, which refer to cases in which a suspect has been arrested and is put at the disposal of the judicial authority. In the second day, investigative courts oversee any incident subjected to judicial review, such as complaints of domestic violence, plaintiffs in general and immigration detention. On day-court days, the court is assembled in a special underground room, in which previous identification is required and access is granted to attorneys, defendants, family and law students, subject to metal detector screenings and bag checks. I always identified myself as a student and so I never encountered any problems entering this space.

4.7. Research methods

To appropriately answer the proposed research questions, it was necessary to choose adequate research methods, which also had to be consistent with the proposed conceptual

framework and the intrinsic conditions of the case-study. In line with a cultural criminological approach, this research primarily embraced a criminological verstehen (Ferrell, 1997), which pushes the researcher to immerse themselves within a culture. Furthermore, research methods and data collection were oriented and traversed by an *ethnographic sensibility* (Ferrell, Hayward & Young, 2008; Ferrell, 2009), which "*orients the criminologist to the ongoing, symbolic construction of meaning, and to the shared emotional environments in which such meaning is made-all while promoting a research sensitivity of openness, attentiveness, and epistemic humility*" (Ferrell, 2009: 16).

4.7.1. In-depth semi-structured interviews

This thesis relied on in-depth semi-structured interviews with seventy-eight professionals active in the criminal justice field (see Appendix with List of Respondents). In line with the proposed epistemological perspective, interviewing was understood not in terms of the exchange of asking questions and receiving answers, but as a collaborative effort leading to contextually bound and mutually created accounts (Denzin & Lincoln, 2005: 696). In consequence, the focus of interviews was to engage with the *hows* and *whats* of people's lives. Given that an ethnographic sensibility impinged the process of data collection and analysis, interviewing sought to locate the cultural influences upon of a person's life, going beyond the immediate concerns of the research questions (Forsey, 2010: 568). In sum, interviews were viewed as social events in which I became an observer and an engaged listener (Hammersley & Atkinson, 2007: 120; Forsey, 2010: 568).

The appropriate type of interview for the present research was the semi-structured interview. It entailed the use of a certain set of questions or special topics to guide the conversation, while allowing freedom to digress and probing beyond the answers and predetermined questions (Berg, 2001:70; Nagy & Leavy, 2006). The semi-structured interview was suitable for this research because it is based on a predefined theoretical framework that explains the interactive process of the social construction of the 'criminal immigrant' through the intertwining of immigration control and criminal law. This involved the use of already predefined questions to guide the interview but allowing room for exploration and theoretical development since its focus was on a field with scant previous research. Ultimately, it was the most appropriate approach for answering the research questions. Indeed, ascertaining the decisional determinants of immigration detention and expulsion in the criminal sphere required allowing research subjects to express themselves in their own words, explaining their own ways of understanding and

interpreting their work. This was even more critical regarding the meanings attributed to such aspects, given that they had to have enough freedom to define and explain them.

Furthermore, the questioning conducted for this research consisted of loosely structured and in-depth interviews. Such an approach assumes that the process of interviewing is a meaning-making endeavour, embarked upon as a partnership between the interviewer and the respondent (Nagy & Leavy, 2006: 119). In conducting my interviews, I attempted in every case to go beyond quick, superficial and cliché responses. This required not only demonstrating trustworthiness, but also exhibiting understanding. The idea was not to excessively focus upon legal formalities and avoid the repetition of legal speeches, unsubstantial waffle and dismissive statements. Nonetheless, reaching such depth within the dialogue required, on many occasions, the initial use of some banal legal clichés. It is quite common amongst legal practitioners to do so and consequently, I had to be at the same time cautious and self-determined to use this in my favour and in most cases, I was ultimately able to reach the depth I originally intended to achieve.

Interviewing requires a sense of reflexivity, by which the researcher recognises and understands how their background and assumptions intervene in the research process (Nagy & Leavy, 2006). Throughout my fieldwork I was always conscious of the influence of my background on the process of interviewing. The primary facet that always came to mind was the fact that I was doing research on immigration whilst being a foreigner from South America myself. However, in general, I was not primarily regarded as such by the respondents, but rather as a student, despite some sporadic references to my geographical origin. Besides, my ethnic appearance was largely similar to that of my interviewees. Thus, this circumstance was mostly something I had to assimilate within my inner self, especially when the answers involved paternalistic, prejudiced or xenophobic views towards immigrants. Yet, such few discriminatory remarks were mostly referred to other nationalities, such as the Moroccans or Romanians, with my respondents showing little concern in expressing such opinions. In this sense, I always attempted to maintain a neutral and non-judgemental stance as to not hinder the progress of the interview.

While my masculine gender was not noticeably influential, it is likely that my young appearance helped me to gain more sympathy from respondents, facilitating access and building rapport with the respondents. Court office work is routine and sometimes even tedious, so the presence of a new face may be refreshing. Language concerns are another aspect to be highlighted. Although both my interviewees and I spoke Spanish, Andalusians have a characteristic dialect, which may even be considered peculiar within

the Spanish context. Nevertheless, given that most of my respondents were used to speaking in a more formal and neutral way, the use of local jargon was limited and as my work fieldwork evolved, I quickly got used to the most common local expressions.

The most significant aspect to be highlighted is the fact that to a large extent I felt as though I was an insider. My academic and professional background centres upon law and I have previously worked within a court office in my home country for over three years. This means that I already possessed an in-depth understanding of the judicial bureaucratic dynamics and work philosophy. The legal culture, or juridical habitus, of the courthouse of Malaga was surprisingly very similar to that of the court offices within my home country. By this I refer to the largely informal and friendly relationships between court workers and the somewhat more formal relationship between court workers and judges, court clerks, prosecutors and defence attorneys. There was also a pervading mutual understanding regarding the tedious nature of bureaucratic routines within the judicial field and the court office environment appears to be deeply influenced by collective relationships and the management styles of court clerks and judges. This made it very easy for me to quickly understand the internal dynamics of the research settings, facilitating access, contact and trust-building with respondents. This also meant that there was a risk of 'going native', which required on my part permanent reflection upon my role as a researcher, constantly reminding myself of my commitment to the research.

The semi-structured interview requires the development of a schedule or interview guide (Berg, 2001: 75; Nagy & Leavy, 2006: 126). For this research, I developed a guiding schedule, which was structured first by topical themes, then by focal matters and finally with specific essential questions. The guide also included a set of identifying and demographic questions, which were always formulated at the beginning of the interview. The schedule began with mild, non-threatening questions and then continued on to more complex and sensitive ones. Probes and extra-questions were not pre-determined and instead developed during the interview and through the fieldwork process. The specific guiding questions included in the schedule are listed in Appendix 1. Given the semi-structured nature of the interviews, it should be highlighted that this schedule was developed only for guiding purposes and does not mean that the interviews strictly followed such structure. To the contrary, they were largely conversational and filled with probes. The schedule was revised by my supervisors, before being pretested with the first interviewee, who was a court clerk willing to be questioned and provide feedback.

In regards to identifying and selecting respondents, a snowball sampling technique was used (Berg, 2001: 33). Snowballing entails a sort of purposive sampling strategy, which is suitable when the intention is to reach informants who possess the best knowledge concerning the research topic (Creswell, 2009: 178). Consequently, the selection of respondents for this research was determined by those who had some specialised knowledge regarding the setting, were available and willing to inform (Nagy & Leavy, 2006: 71). It should be remembered that the research population was relatively hard to reach given their elitist occupational positions; therefore, non-probability sampling was the most suitable strategy in this sense (Berg, 2001).

The snowballing plan for this research started by contacting and establishing trust with the first court clerk I interviewed. This first contact was established with the introductory help of an institute's researcher. In that occasion, I had the chance to develop my first impressions of the court office and maintain an informal conversation with the clerk. This allowed me to conduct my first interview with her the following day, which led her to help me to interview a judge and another officer from the same court. Then, I used these initial contacts to extend my research to other sentencing courts. Respondents were selected until the fieldwork reached the saturation point in which sampling more data would not lead to more information related to my research questions. I also pursued theoretical saturation, intended to produce as many categories and properties of categories as possible, thus facilitating the emergence of relations between categories (Hammersley & Atkinson, 2007: 33). In regards to accessing Courts of Appeal, one sentencing judge, with whom I had built rapport, helped me to contact a judge from the Court of Appeal who was a friend of his, before continuing with my own snowballing strategy.

Accessing investigative courts, however, was more challenging. I first attempted to use a contact from the sentencing courts, but this did not work as expected. After considering a few other plans, one day I decided to select an investigative court at random and try to access it. By coincidence, my choice was ultimately fruitful because the judge and the clerk there were helpful, open and sympathetic. This access point allowed me to develop a new snowballing plan for these courts with great success. Importantly, this contact also allowed me to access the prosecution office to interview immigration prosecutors. As in the case of the sentencing courts, I collected data until saturation was reached. Given that the role of court personnel within investigative and appeal courts is not as substantial as in sentencing courts, I focused my interviews on judges and clerks.

Interviewing defence attorneys proved to be easier. To identify them, I first contacted the director of the immigration section of Malaga's bar association. She gave me a list with the names and contact details of lawyers specifically listed on the immigration voluntary defence service. This is a group of defence attorneys specialising in immigration matters, who work shifts during day-court and whenever they are solicited. I contacted many of them and interviewed those who were available. In addition to this, I also interviewed four more attorneys who did not belong to this specialised group but had also defended immigration cases. I identified and contacted them within immigration hearings and interviewed as many lawyers as possible until the point of saturation was reached.

To complement my data, I conducted supportive interviews with administrative judges and one immigration police commissioner. I also interviewed a few court personnel from the investigative courts of Algeciras, given that there is a CIE there. The interviews lasted between 30 to 137 minutes, with an average of 47 minutes, consisting of face-to-face meetings conducted in the work places of the interviewees, with the exception of two interviews with court personnel from Algeciras which were carried out over the phone. Almost all interviews were tape-recorded and transcribed, though active note taking was used in all cases. At the start of the interview participants were comprehensively informed about the purpose and general contents of the interview, as well as the fact that their identities would remain anonymous and uncompromised. Consequently, informed consent was obtained from all respondents in each interview. The following table contains an overview of the total number of interviewees, while Appendix 2 offers a detailed summary.

Table 2. Overview of the total number of interviews

Who?	Investigative Courts	Sentencing Courts	Court of Appeal	Administrative Courts	Algeciras courts	Total
Judges	4	4	5	5	-	**18**
Clerks	10	9	2	1	-	**22**
Personnel	2	13	-	1	4	**20**
Total	**16**	**26**	**7**	**7**	**4**	**60**

Who?	Total
Prosecutors*	5
Lawyers	12
Police comm.**	1
Total	**18**

*Three prosecutors specialised in immigration matters
**Commissioner of the specialised immigration police

4.7.2. Focused observation

The second method for this research was focused observation of settings and relevant events. In contrast to the traditional participant observation, as an observer I did not become active part of the community under analysis. Instead, my role was of a third-party

spectator of the actions and developments of the research subjects. Despite its intrinsic limitations, this way of observing was the most suitable and convenient for this research. On the one hand, given the formalised structure and organisation of the judicial offices, becoming an active participant would have required completing official membership procedures, which would have been burdensome and lengthy. Besides, adopting such a role would have unnecessarily constrained my flexibility as a researcher because I would have been bounded by the rigid professional rules of the legal profession and required to carry out tasks that would have interfered with my role as a researcher. Ultimately, as my fieldwork evolved, I did not find it necessary to adopt a more active role.

Nonetheless, focused observation can also appropriately incarnate the spirit of ethnography, denoting in-depth immersion in the lives of participants, thus allowing the researcher to witness the process by which meaning is formed (Ferrell, Hayward & Young, 2008: 177). By adopting an ethnographic approach, focused observation also requires the researcher to at least indirectly participate in the routines of the subjects concerned, watching what happens, listening to what is said and asking questions through informal conversations, gathering any data that are available in order to shed light upon the issues in question (Hammersley & Atkinson, 2007: 3). In practice, it involves taking field notes in an unstructured, or semi-structured, way on the behaviour and activities of individuals at the research site (Creswell, 2009: 181).

As a focused observer I intended to immerse myself in the everyday life of court offices and court hearings. I made my presence as a researcher known, while establishing a series of relationships with the subjects in their role of both respondents and informants. As a focused observed I adopted a selective approach (Angrosino, 2005), first concentrating upon the cultural and organisational dynamics and then upon the aspects denoted by the research questions. Furthermore, data collection was relatively unstructured, in the sense that the categories used for interpreting people's responses were not constructed through the use of rigid guidelines (Hammersley & Atkinson, 2007: 3). For my observations I used small notebooks and always included the date and a title indicating the main activity to be observed on the first page. Besides this there was no specific format in terms of the observations, apart from the intensive, focused and selective note-taking on the relevant aspects of my research. Ultimately, my observational work was less concerned with recording the frequency and distribution of events and more concerned with linking interaction patterns with symbols and meanings (Denzin, 1978: 183).

Sampling definitions were also necessary in terms of where and when to observe, who to talk to, what to ask and what to record, and how to do so (Hammersley & Atkinson, 2007: 34). In terms of my focused observation I selected two major settings in which to conduct my investigations: court offices and courtrooms. Regarding the first site, my work consisted of observing and paying attention to the most relevant details of the court office's cultural and organisational components. For instance, the organisational aspect entailed recording information based upon the physical appearance and structure of the office, as well as the environmental conditions and aesthetic appearance of the area in question. Regarding the cultural aspect, observation entailed focusing upon working relationships, the hierarchical distribution of labour and locations, patterned behavioural and attitudinal responses, internal mechanics and work rationale and any other idiosyncratic aspect emerging from the routine tasks of court workers. These observational procedures were conducted in the offices of sentencing, investigative, appeal, and administrative courts.

The second setting in which I conducted focused observation was in hearings courtrooms. These are the places in which hearings occur, which means that my observations there were centred upon the procedural and decisional dynamics of trials and hearings in general. There are two kinds of courtrooms: those for regular courts and those for investigative day-court shifts. In the former, I was mostly interested in sentencing court trials and immigration hearings from administrative courts.[69] In day-court hearings, my focus was directed towards immigration detention. In general, attending these hearings involved maintaining informal conversations with judges, prosecutors and court personnel, whilst in the case of immigration hearings, several conversations with the specialised government attorney were possible. The following table contains an overview of the number of hearings attended, while Appendix 3 offers a detailed summary.

Table 3. Summary of hearings

Court setting	Events
Sentencing court	24
Administrative court	30
Investigative day court	7
Total	**61**

4.8. Validity, reliability and triangulation

Concerns about validity and reliability are common within the social sciences and even more so within qualitative research. In general, validity refers to the accuracy of the

[69] Investigative courts also conduct ordinary trials for minor crimes in these settings, but they had no relevance for the crucial aspects of my research and for that reason I attended just a few of them.

findings achieved through using certain procedures, while reliability has to do with the consistency of the adopted approach across different researchers and projects (Creswell, 2009: 190). In other words, validity is concerned with what is actually being measured, while reliability points to the stability of observations over time (Denzin, 1978: 123).

Triangulation is an extensively acknowledged and practiced way of ensuring validity (Creswell, 2009). Specifically, "*gaining multiple views of the phenomenon strengthens the power of our claims to understand i*t" (Charmaz, 2004: 983). I have used triangulation as the main mechanism to achieve validity within my research. Triangulation for this research has been understood as data-source triangulation and thus defined as "*the comparison of data relating to the same phenomenon but deriving from different phases of the fieldwork, different points in the temporal cycles occurring in the setting, or the accounts of different participants differentially located in the setting*" (Hammersley & Atkinson, 2007: 183). Triangulation has been implemented in two complementary ways. To begin with, it was attained through the comparison of responses from different subjects. The design of this research has been intended to obtain perspectives from symbolically and occupationally differentiated actors within a given legal habitus, providing a contrast between the accounts of different participants coming from diverse and even opposing backgrounds. Following this, triangulation was also achieved by using in-depth interviews and focused observation, which provided comparative data relating to similar phenomena but stemming from different sources, fieldwork phases and cycles.

The methods used in this thesis and the ways in which they were deployed ensured its internal and external validity. Addressing the research questions required direct interaction with research subjects and settings, therefore in-depth interviewing and focused observation seemed to be the most appropriate methods for ascertaining what the determinants of immigration detention and expulsion are, as well as the meanings attributed to them by court actors. Although the interviews were semi-structured, the guiding schedule ensured that the interviewing process was oriented towards addressing the relevant aspects of the intertwining between immigration control and criminal law specified in the research questions. It should nonetheless be noted that perhaps some interviews were not carried out in enough depth as I initially purported and that some respondents could have also attempted to give tailor-made answers, precluding to some extent appropriate responses to the questions. However, this happened in a few cases and in most of them I was able to redirect the dialogue in the pursued direction. Ultimately, internal validity has been achieved through data triangulation, comprehensive and prolonged immersion in the field, data saturation and thorough reflexivity.

Generalization is used in a limited way within qualitative research because its primary intent is not to generalise findings to individuals, sites, or places outside of those being studied, but to offer a singular description, as well as to uncover the themes developed in the context of a specific site. (Creswell, 2009: 193). Hence, the present case-study research is in principle not generalisable to other settings and actors, since it assumes that its findings are context-specific and a result of an in-depth analysis of the specific cultural dynamics of the decision-making processes of immigration detention and expulsion within a certain criminal section. However, as a researcher I have explained in detail the characteristics, contexts, organisation and functioning of the research setting and to identify the occupations and roles of the subjects. In this way, I have specified the main features of the type of court setting to which the results of my research may be extended.

As explained before, the courthouse of Malaga can be considered a representative case of the Spanish judiciary in terms of appearance, structure, organisation and functioning. However, it has also been emphasised that the content and size of the caseload is specific of each court, not to mention their idiosyncratic cultural features. For these reasons, although the decision-making processes can be similar in many respects, it is possible that they vary in intensity, frequency and scale. Moreover, the particular geographical and demographic characteristics of Malaga must be taken into consideration when assessing the generalisability of this research to other locations. In sum, while the analysis proposed in this thesis assumes that decision-making is influenced by an interplay between such aspects as the contexts, organisation and functioning of a given court, in relation to the occupations and roles of the involved subjects, the courthouse of Malaga shares the main characteristics of the Spanish judiciary as a whole, which makes it reasonably representative of the nation-wide judicial system.

Reliability is understood in terms of the ability to repeat findings. However, this is problematic within qualitative research because such studies usually claim to be unique, context-specific and driven by the specific relationships established between the researcher and the research subjects and settings. It is also argued that within qualitative research the quality of insight can be more important than reliability and that giving excessive priority to reliability can limit invention and diminish perceptiveness (Kane, 2004: 317). I have nonetheless attempted to assure the reliability of the present research through clearly specifying the methodological steps taken in regards to accessing the field, sampling both the respondents and the observation settings, conducting interviews, and reporting the results. Additionally, the use of data triangulation ensures reliability, whilst the case-study approach provided a clear advantage in this sense, by facilitating the collection of data in

regards to complementary and overlapping measures of the same phenomenon (Orum, et al., 1991). Finally, in line with Gay and Airasian's (2003) checklist, I have described my relationship with the group and setting, documented the construction of my research instruments, justified the sampling approach and identified the specific data sources.

4.9. Data Analysis

Given the nature of the methods used, as well as the epistemological foundations of the study, the appropriate approach towards data-analysis has been ethnographic content analysis. In general, this is an approach that situates textual analysis within the 'communication of meaning', necessitating a profound involvement with the text, thus enabling the researcher to develop a descriptive account of the text in all its complexities (Ferrell, Hayward & Young, 2008: 139). It consists of a systematic, analytic and reflexive movement between concept development, sampling, data collection, data coding, data analysis and interpretation with categories and concepts which initially guided the study, whilst simultaneously allowing other concepts to emerge throughout' (Altheide, 1987: 68).

Content analysis is the preferred means of analysing qualitative data. The process of content analysis involves condensing and making interviews and field notes systematically comparable through the development and application of an objective coding scheme (Berg, 2001: 238). The appropriateness of content analysis is evident given that data are transcribed into texts, which in turn requires further decoding and examination. In this research, data collection and analysis has been guided by an iterative process of successive analysis and the development of theoretical categories (Charmaz, 2008: 156). Moreover, they have been oriented by an adaptive framework, flexible and systematic enough to include both deductive and inductive dynamics (Layder, 1998). Specifically, the process of data analysis and coding involves the organisation and preparation of data for analysis (Berg, 2001: 240; Creswell, 2009: 187-190). I have therefore converted my collected data, such as interview and field notes, into their text form, using a software programme (F4) to do so in regards to interviews.

Thereafter, I transferred and analysed the data using QDA-Miner software. This process involved thoroughly reading through all the transcripts to immerse myself in the text. I then conducted the coding process, in which codes were analytically developed and affixed to sets of notes. This involved a dynamic deductive-inductive process, in which theory guided the structural topics and data determined their specificities. Then, codes were transformed into themes, identifying patterns, relationships and disparities. Finally, the refined materials were examined in order to isolate meaningful patterns and processes

and then considered in light of previous theoretical groundwork to develop renewed concepts (Berg, 2001: 240). Becoming immersed in such large volume of text was challenging and time-consuming, but it was essential to clearly identify and achieve an in-depth understanding of the relevant aspects delineated by the research questions. For instance, while some of my respondents were precise and concrete, others tended to bypass the matter; while some interviewees were detailed and profuse in their responses, others were rather concise or brief, giving important insights in a few words. In consequence, codes were assigned to both large bunches of text and to words, phrases or sentences.

In many cases different codes were applied to the same pieces of text, since they included aspects that corresponded to a range of research questions. For example, a response from a judge regarding their personal assessment of an immigrant's roots could be referred both to the procedural and substantial connotations of crimmigration, as well as the meanings attributed to it. In addition to this, some codes were developed and assigned in a supportive way, just to identify themes that could eventually inform an area of analysis, though not being necessarily essential for addressing the research questions. For instance, some codes referred to the specific experience of the interviewee in regards to criminal law, or the reasons that motivated them to work as a court servant. Furthermore, during the coding process I consistently took notes in a diary to highlight significant aspects, keep track of my progress or to refer to pertinent literature.

The data have been collected in the Spanish language, which requires some additional reflections. First, in terms of the coding process I decided to develop all codes in English largely because the majority of my theoretical background is in that language. Additionally, since my thesis had to be written in English, it seemed more efficient to start using such categories as early as possible. Another aspect to be highlighted is regarding the reporting of the results. Although translating entails imposing upon the data an additional layer of interpretation, I did not want to be excessively constrained by this concern to remain faithful to my data. The decision to include in-text quotations, despite being translated, was based upon the premise that this would be a more reliable and meaningful means of letting my collected data speak for themselves rather than putting them into my own words to try and make it more digestible for readers. However, when translating, I attempted to meticulously balance the ideal goal of being as faithful as possible, with the need to make things clear and understandable. For these translations I consistently made use of online standard dictionaries, dictionaries of synonyms and antonyms and a vocabulary thesaurus, especially in regards to words without direct translation.

4.10. Ethical issues

The programme that I was part of throughout this research, the Doctorate in Cultural and Global Criminology (DCGC), is a joint degree in which candidates are required to choose two universities among the four members of the consortium: Universiteit Utrecht and Universität Hamburg were the institutions selected for supervising my research. Although they did not require previous approval from an ethical commission, in conducting my research I followed the ethical regulations set forth by these institutions. Also, I was required to discuss ethical aspects of my research in the meetings with my supervisors, who were fully informed of my proceedings and gave their approval at all times.

Ethical concerns regarding qualitative research centre upon informed consent, right to privacy, protection from harm (Denzin & Lincoln, 2005: 715) and assurance that subjects are voluntarily involved in the research (Berg, 2001: 53). Regarding interviews, these concerns have been unproblematically managed given that all participants were interviewed only with their explicit consent and fully informed at the beginning of each interview of the purposes and implications of my research. Moreover, in every occasion I assured them that their identities were not going to be revealed or made known in any way, thus ensuring confidentiality. Also, during fieldwork, I only kept basic personal identification data in a paper journal and never transferred them to electronic devices. For the subsequent phases of my research, I have only identified my research subjects and settings by the type of court in which they worked and a randomly assigned number.

Within focused observation open participation is not always attainable. In my observation of court offices and the day-court, I could not be certain that all people were fully aware of my presence as a researcher. It is possible that some of the court workers or public who noticed me, with whom I had no interaction, could have thought that I was not a student or researcher, but an attorney's assistant, an ordinary person or even a defendant. Anyhow, aside from practical issues, it would have been unnecessarily disruptive to ask consent of every individual I encountered within my fieldwork. Nonetheless, I always informed participants about my research and obtained consent whenever I had to interact with them in a more active or continuous fashion. Regarding my observation of court hearings, my presence as a researcher was made known either by the judge or their assistant. Consequently, my role as a researcher was clear the majority of the time.

Chapter 5: Criminalising immigration detention: Law doorkeeper's routine amidst bureaucratic justice

5.1. Introduction

Immigration detention is a noteworthy feature of the intersection between immigration control and criminal justice in Spain. It is requested when an expulsion order is not executable within 72 hours or during a pending proceeding to ensure the execution of an eventual expulsion order.[70] While formally it is an administrative measure to guarantee the enforcement of an administrative expulsion order, it is authorised by a criminal judge upon request of the police and with the acquiescence of an on-duty prosecutor.[71] However, the primary jurisdiction of such a criminal judge, as well as the court that they belong to, is to investigate any criminal case and to decide about minor offences.[72]

These circumstances raise a series of questions regarding the decision-making dynamics of immigration detention: to what extent are individuals subjected to immigration detention criminalised? What are the decisional determinants and procedural dynamics of immigration detention within the cultural realm of the criminal courts? What are the meanings attributed to immigration detention by criminal court actors? In this chapter I purport to answer these questions by presenting and discussing the results of the focused observation and the interviews conducted with judges, prosecutors, court personnel and defence attorneys regarding immigration detention decision-making practices. For that purpose, I will first describe in detail the immigration detention regime, focusing upon its peculiar legal configuration and the constitutional conditions necessary for its application. Thereafter, I will develop the analysis of the results, focusing on the decision-making aspects emerging from the particularities of the case-study.

5.2. Immigration detention legal regime

Immigration detention was first introduced within Spanish legislation with the Aliens Act of 1985[73] and its configuration as a combination of administrative and criminal traits has been evident since the beginning. In Spain, irregular immigration in all its forms has since then always been an administrative fault and not a criminal offence. However, committing an ordinary offence has also been considered, under some circumstances, sufficient

[70] One last, although rare case, is when a sentencing judge considers it necessary to order it to ensure the execution of a judicial expulsion.
[71] Art. 62.6, LO 4/2000.
[72] The jurisdiction to investigate comprises any case regardless of its seriousness or complexity. Once the investigative phase concludes with an order to initiate the trial, the case is submitted to either a sentencing or an appeal court depending on the severity of the crime.
[73] BOE-A-1985-12767, No. 158: 03-07-1985. LO 7/1985 (01-07-1985).

grounds for initiating an administrative expulsion proceeding. Indeed, the administrative irregularities that justify imposing such a measure have always overlapped in many aspects with some possible criminal offences. Nevertheless, the most remarkable connection of immigration detention with criminal law has been the type of authority that authorises it: criminal judges in charge of investigating crimes and judging minor offences.

Those judges and the courts that they preside over, which in English can be called 'investigative judges' and 'investigative courts',[74] are competent to authorise immigration detention. This means that these courts whose main responsibility it is to investigate crimes and initiate criminal proceedings also authorise immigration detention. For this reason, it is possible that a foreigner suspected of an ordinary offence be processed by the same court for both a criminal offence and an immigration detention request. However, this may not always be the case because a foreigner can be taken before an investigative court solely for an immigration detention proceeding without being suspected of an offence.

This peculiar legal configuration by which a criminal judge is entitled to authorise a measure of restrictive, but formally administrative, character was originally intended to protect those concerned. In fact, the 1985 Act explicitly stated in its preamble that it "*introduces the need for judicial intervention in the revision of certain resolutions that entail… deprivation of liberty, precisely as a guarantee of it*". Likewise, the Spanish Constitution prohibits administrative authorities from imposing measures that may deprive an individual of their liberty.[75] This means that only judges are entitled to do so and in the Spanish judicial structure investigative courts are the only ones accessible at any time. For this reason, since the time the 1985 Act was passed, investigative courts have jurisdiction to authorise immigration detention and criminal Courts of Appeal have the prerogative to decide the appeals proposed against immigration detention decisions.

Despite this statutory judicial intervention in regards to the authorisation of immigration detention, its practical nature has been questioned since the beginning. In fact, just after the enactment of the 1985 Act the Spanish Ombudsman repealed it before the Constitutional Court. Its main argument was based upon the aforementioned constitutional prohibition, contending that the 'endorsing intervention' of the judiciary would not deprive the expulsion proceeding from its administrative nature. It was also argued that such a procedure would not entail a truly adversarial setting because the defendant was left out of

[74] In Spanish, they are called 'jueces de instrucción,' as well as 'juzgados de instrucción'.
[75] Art. 25.3 of the Spanish Constitution establishes that: "*The Civil Administration may not impose sanctions that, directly or subsidiary, entail deprivation of liberty*".

the proceedings. The Ombudsman therefore concluded that the judicial authorisation could not be used as a mere justification for a restrictive administrative measure.

The Constitutional Court ruled on 7 June 1987,[76] confirming the constitutionality of immigration detention, but conditioning it to the verification of certain requirements. The Court first affirmed that such a deprivation of liberty is a judicial decision, without prejudice to the administrative character of the expulsion proceeding. This meant, in the Court's opinion, that the same jurisprudential doctrine developed for pre-trial detention was applicable to this case. In consequence, the decision to impose immigration detention had to be guided by the principle of exceptionality, meaning that it had to be regarded as a measure of last resort, applicable only when it was strictly necessary for fulfilling its specific objectives and in relation to the circumstances of the case. Ultimately, the investigative judge, as the 'natural guardian of individual freedom', was in charge of verifying the reasons for the detention. The court concluded that this measure had to be adopted through a 'reasoned decision' guaranteeing the rights to defence and to appeal.

From this it is possible to assert that the involvement of a criminal judge in the authorisation of immigration detention could actually be considered a means of ensuring and strengthening the defendant's rights. Indeed, the fact that it is a judge and not the police or the administration that authorises such a restrictive measure can make the Spanish regime appear as one of the most protective amongst the EU member states. In fact, according to a report from the European Commission (2014b), Spain has been identified, with five other countries, as a case of best practice regarding the involvement of different authorities in the assessment and decision stages of immigration detention. Moreover, this same report places Spain among the only seven EU member states[77] in which immigration detention is decided by a judicial authority, while in most others[78] it is decided by administrative officers.

However, this apparent protective character of the Spanish regime may not necessarily be so in practice given the criminal specialisation and nature of the decisional judges and courts. Likewise, in many of the countries in which an administrative authority resolves it, an appeal can be launched before an administrative judge, while in Spain it is before a criminal Court of Appeal. It follows that immigration detention defendants could be subjected to the same treatment received by criminal suspects, which raises a critical

[76] STC 115/1987 (07-06-1987).
[77] Germany, Estonia, Lithuania, Poland, Portugal, Spain and Sweden.
[78] Austria, Belgium, Bulgaria, Czech Republic, Croatia, Cyprus, Finland, France, Greece, Hungary, Ireland, Latvia, Luxembourg, Malta, Netherlands, Norway, Slovakia, Slovenia, United Kingdom.

question: To what extent are individuals subjected to immigration detention proceedings *de facto* criminalised? This is one of the key inquiries that this research purports to answer.

The current legal regime of immigration detention was laid down in a reform enacted in 2009 by the socialist government.[79] The grounds of immigration detention are based upon the following:[80] staying illegally within the Spanish territory; working without authorisation and not having a valid residence permit; participating in serious activities against the public order; participating in activities against the national security or that could harm Spain's relations with other countries; inducing, promoting, favouring or facilitating irregular immigration for profit and having been criminally convicted, in Spain or overseas, of a wilful misconduct sanctioned with imprisonment of more than one year, unless the criminal record has been cancelled. This means that the overlapping between administrative and criminal infractions persists and the link is even more evident now that the expulsion based on criminal records has been explicitly incorporated.

It should nonetheless be remembered that expulsion is an administrative proceeding, which means that any decision regarding its merits, with the sole exception of immigration detention, can be judicially appealed before an administrative judge.[81] Hence, while in this subject there is no formal relationship between the criminal and administrative courts, it is possible that an administrative court could decide an expulsion proceeding in which a detention was previously authorised by an investigative court. In addition, if an administrative judge revokes an expulsion order or invalidates an expulsion proceeding, immigration detention shall be immediately reversed.

Immigration detention is also applicable to the so-called 'devolutions'.[82] A 'devolution' is a legal category that refers to the cases in which a foreigner is found at the border attempting to enter or re-enter Spanish territory irregularly and is returned to their country of origin, or the country from which they attempted to cross the border.[83] The difference with an expulsion is that a 'devolution' is not considered a formal sanction and consequently does not require a complete administrative proceeding but a simple and expedited legal paperwork.[84] Besides, in some cases it can be executed immediately, for example, in the so-called pushbacks mentioned within the second chapter.[85] Furthermore,

[79] BOE-A-2009-19949, No. 299: 12-12-2009. LO 2/2009 (11-12-2009).
[80] Arts 54.1 a) and b); 53.1 a), d) and f); and 57.2, LO 4/2000.
[81] Art. 21, LO 4/2000.
[82] Art. 58.6, LO 4/2000.
[83] Art. 28, LO 4/2000.
[84] Art. 58.3, LO 4/2000.
[85] Additional Disposition Tenth, LO 4/2000.

since this defines more of a legal figure than a factual situation, it is possible that someone could be detained in a CIE inside Spanish territory and still be treated as a 'devolution'.

Immigration detention is optional and not obligatory[86] and can be ordered in either already concluded or still pending administrative proceedings.[87] Any request for immigration detention has to be previously reviewed by a prosecutor, which is a procedural requirement and does not mean that immigration detention has any criminal implication by itself.[88] Importantly, the current regulation explicitly requires that the judge consider the principle of proportionality, as well as the circumstances of the case, such as the risk of abscondence due to the lack of a known domicile or proper identification documents, the foreigner's actions to hinder or avoid expulsion, and the existence of previous administrative sanctions, criminal or judicial records, or pending administrative sanctioning proceedings. A critical aspect is the maximum period of detention, since it should be remembered that in 2009 it was increased from forty to sixty days.

It is necessary to mention a procedural peculiarity of immigration detention: it can only be ordered in the so-called 'preferential proceeding' and not in the 'ordinary proceeding'. These are the two types of expulsion proceedings within the Aliens Act, with the preferential proceeding being for six specific cases, five of which overlap with the grounds to order detention.[89] However, in cases regarding the irregular stay of immigrants, this proceeding is admissible when there is a risk of abscondence or if the person in question avoids or hinders the expulsion, and in situations in which they pose a threat to public order, public security or national security.[90] Features of preferential proceedings include swift processing times, the immediate execution of expulsion orders and the prohibition of voluntary return.[91] Conversely, ordinary proceedings grant defendants between seven to thirty days for their voluntary departure.[92] Given these conditions, in cases of mere irregular stay, the administration retains significant room for discretion in order to determine the appropriate proceeding (the 'preferential' or the 'ordinary').

[86] Art. 62.1, LO 4/2000.
[87] Art. 61.1 e), LO 4/2000.
[88] Art. 62.1, LO 4/2000.
[89] As mentioned above, they are: staying illegally within the Spanish territory; working without authorisation and not having a valid residence permit; participating in serious activities against the public order; participating in activities against the national security or that could harm Spain's relations with other countries; inducing, promoting, favouring or facilitating irregular immigration for profit and having been criminally convicted, in Spain or overseas, of a wilful misconduct sanctioned with imprisonment of more than one year, unless the criminal record has been cancelled. The remaining non-overlapping case corresponds to the failure to comply with the measures imposed for reasons of public safety, of periodic presentation or restraining orders, in accordance with the provision of the law.
[90] Art. 63.1, LO 4/2000.
[91] Art. 63, LO 4/2000.
[92] Art. 63bis, LO 4/2000.

5.3. Implementation requirements and dysfunctionalities

Given the restrictive character of immigration detention, the jurisprudence and the doctrine have developed a set of conditions (López Benítez, 2014; Martínez, 2009; Martínez et al., 2009; Martínez, 2013; Rosell, 2015; Sánchez Tomás, 2015; Tomé García, 2015). Immigration detention is a last-resort measure to be imposed only when strictly necessary to ensure the effectiveness of an expulsion proceeding. Consequently, other less restrictive cautionary measures, such as the periodic presentation before a competent authority or the mandatory residence in a determined place, should be preferred. Furthermore, the regulation explicitly requires that the judge be guided by the principle of proportionality. This means that the deprivation of the freedom of movement that such a measure entails is justified only when essential for ensuring an actual or eventual expulsion order.

As stated by the Constitutional Court (STC 115/1987), immigration detention is a cautionary measure, and as such, the decision to impose it shall be guided by same the requirements of a pre-trial detention, which means that it must comply with two principles. The first principle of *fumus bonni iuris*, concerns the appearance of right or the likelihood of success on the merit of the case, meaning that detention shall only be imposed when it is apparent that the administrative proceeding will conclude with the expulsion of the foreigner. Hence, the investigative judge is entitled to conduct a basic control of the apparent legality of the administrative proceeding and a general assessment of the probability of an expulsion decision and/or its feasibility. According to settled case law (Tomé García, 2015),[93] the judge must verify whether the measure has been requested as part of an appropriately handled administrative proceeding in compliance with basic formal requirements. This task is intended only for evident inconsistencies because determining the ultimate appropriateness of the proceeding is down to an administrative judge. Moreover, the investigative judge must also confirm that the legal grounds for the detention of the defendant are clearly stated in the administrative proceeding.

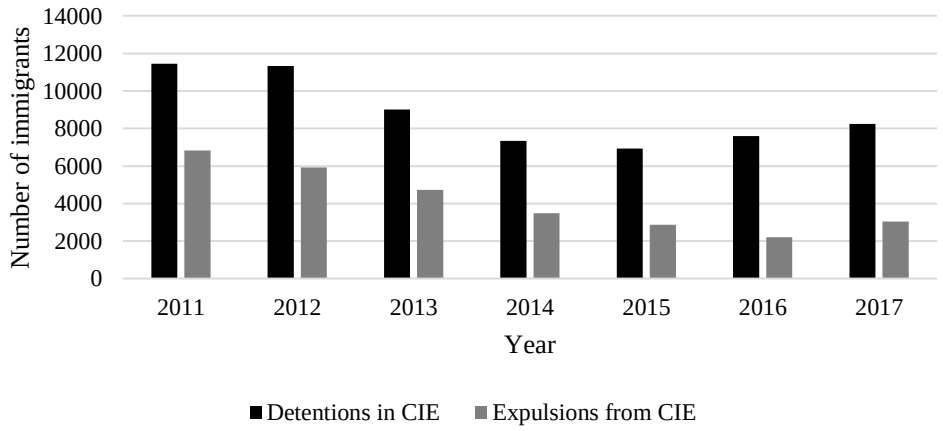
The second principle refers to the so-called *periculum in mora*, meaning that the judge should justify the decision to detain a subject on the basis that it is necessary for the effective execution of an expulsion order. In consequence, in order for the judge to authorise this measure, the subject must pose an immediate threat towards concluding the administrative proceeding or executing the expulsion order, which could be exploited by

[93] The author explicitly cites these rulings: AAP Las Palmas 45/2004, 2 February 2004 (JUR 2004/102357); AAP Las Palmas 46/2004, 3 February 2004 (JUR 2004/102586); AAP Barcelona, 29 March 2004 (JUR 2004/21787); AAP Barcelona 489/2007, 17 August 2007 (JUR 2009/465353); AAP Barcelona 717/2009, 30 November 2009 (JUR 2010/866559); and, AAP Burgos 39/2010, 13 January 2010 (JUR 2010/102025).

the foreigner to put themselves at a distance from the authorities. This risk is usually linked to the immigrant's lack of roots with Spain. In jurisprudential terms, the detention should fulfil a legitimate purpose, coupled with its proportionality to reach the objectives, all of which must be explicitly stated in the authorising judicial decision. It becomes necessary for the investigative judge to assess, at least *prima facie*, the foreigner's roots with Spain. Additionally, this analysis must include a conscious consideration of the defendant's risk of abscondence due to lack of domicile or identification documentation, their actions to hinder or avoid the expulsion, the existence of a sentence or previous administrative sanctions or a pending criminal or administrative sanctioning proceeding.

Consequently, the intervention of the investigative judge should not be regarded as a formal act, but a substantial control of the detention admissibility and feasibility (Martínez, 2013). However, there is evidence that this is not entirely the case. The annual reports of the Spanish Ombudsman show that since 2011[94] an increasingly smaller fraction of detainees in CIEs are effectively expelled from Spanish territory. Indeed, the following figure and table demonstrate that since 2014, the average proportion of expelled detainees has been less than a half of the population, with substantial variation across CIEs:

Figure 15. Rate of expulsions from CIEs (2011-2017)



Source: (Defensor del Pueblo, 2012-2018)

Table 4. Proportion of Expelled Detainees by CIE (2011-2016)[95]

	2011*	2012**	2013	2014	2015	2016
Algeciras	49.8%	36.7%	39.6%	32.2%	20.5%	15.0%
Barcelona	55.1%	50.2%	47.0%	44.1%	27.8%	21.4%
Las Palmas	59.6%	11.8%	26.4%	5.2%	2.8%	0.6%

[94] This information began to be reported since that year.

[95] Although the last reported data corresponded to 2017, they were not disaggregated by number of detainees per CIE, which made it unfeasible to calculate the proportion of expelled detainees by CIE. The data, however, did include the number of expelled detainees by CIE: Algeciras 665, Barcelona 589, Las Palmas 27, Madrid 829, Murcia 604, Tenerife 14 and Valencia 313. It should also be noted that in 2017 the Spanish government detained 576 immigrants from Morocco and Algeria in the prison of Archidona, Malaga, which raised serious criticism from NGO's, the Spanish Ombudsman and legislators, among others.

Madrid	70.9%	59.2%	59.4%	62.3%	70.5%	46.1%
Murcia	59.7%	62.2%	66.5%	73.1%	93.9%	58.0%
Tenerife	49.6%	20.0%	87.9%	27.5%	88.9%	12.1%
Valencia	65.6%	80.1%	63.6%	44.6%	55.1%	59.1%
Total	59.6%	52.3%	52.5%	47.5%	41.4%	29.0%

*The CIE of Fuerteventura was closed in 2011 due to the absence of detainees; in 2011 the proportion of expelled detainees from this CIE was 39.5%

**The CIE of Malaga was closed in 2012 due to its detrimental conditions; the proportion of expelled detainees from this CIE was 60.5% in 2011 and 67.4% in 2012.

Source: (Defensor del Pueblo, 2012-2017)

It appears that most of the foreigners detained within CIEs are not expelled. This means that they could have been unnecessarily detained because their expulsion was not, or was not foreseeably, feasible. It should be noted that most of these detainees correspond to the aforementioned 'devolution' proceedings, which means that they have not had the chance to settle. It should be noted that the predicament evidenced through these data has been explicitly acknowledged by the authorities. For instance, in a circular issued by the National Police Office and the Ministry of the Interior in 2014, establishing guidelines for the appropriate request of immigration detention, it is explicitly recognised that,

> "*Being an objective and verified fact the limited capacity of all detention centres,* ***as well as the considerable number of detention requests that are being made regarding foreigners whose situation does not always make it advisable to adopt such precautionary measure****, the combination of both extremes requires specifying a series of circumstances that occur in those affected by this measure, which have to be valued and taken into account by the instructors of the different repatriation files, so that the requests for detention directed to the Judicial Authority really reflect the personal, social and family situation of the foreign citizen, as well as the viability of the repatriation measure*" (Dirección General de la Policía, 2014; emphasis added).

From this text it can therefore be pinpointed that the police are explicitly acknowledging that in a 'considerable number' of cases immigration detention has been inappropriately requested. Moreover, it is implicit from its content that in such cases the police have not sufficiently evaluated the defendant's ties with Spain (personal, social and family), or the feasibility of the expulsion order. All of these are aspects that, according to the mentioned jurisprudence, must be considered by the authorities before requesting and ordering an immigration detention. However, what is more striking is that judges have been accepting these seemingly inadequate requests, given that we associate such judicial figures with being impartial, independent and protective. This raises questions about the extent to which the judiciary is consciously overseeing or mechanically endorsing the work of the police. The results of my research discussed below address this question.

The aforementioned circular establishes the specific criteria intended to direct the work of the police when requesting an immigration detention. In particular, it is instructed that the police consider the defendant's personal circumstances in terms of whether they

have a known domicile, family, children or dependents, as well as considering any social ties they may have, whether they hold a valid passport, their risk of abscondence, whether they may pose a threat to the public or national security and any other humanitarian reasons. It is also mandated that the police assess the feasibility of the expulsion order, by analysing aspects such as whether the foreigner has a passport or travel documentation, comes from a country in which Spain has a consular or diplomatic office, will be documented by the consular authorities of their country and whether the maximum period of detention is likely to be exceeded even if their country of origin provides the necessary travel documentation. It is also instructed that the police check with the UNHCR, before requesting the detention, in order to ensure that the conditions of the country to which the foreigner could be expelled will not compromise the principle of non-refoulement. Finally, these guidelines emphasise that there are other cautionary measures, such as the periodic presentation or document retention, which can also be imposed to guarantee expulsion.

The prosecution office has issued a set of binding guidelines (3/2001; 2/2006; 7/2015) to be followed by prosecutors when deciding whether to acquiesce with a detention request made by the police. They emphasise that immigration detention is a measure of last resort, conditioned by the principles of proportionality and *favor libertatis* and only applicable if it is deemed necessary to ensure the effective execution of an expulsion. The prosecutor is labelled as *patronus libertatis*, which means that they are required to guarantee the defendant's rights and procedural safeguards. Besides, prosecutors are instructed to act with the 'greatest caution' and carry out a 'decided control of the compliance with the legal requirements' of the detention. This includes opposing those requests in which it has been verified that the execution of the expulsion will not be feasible. Finally, prosecutors shall also consider the aforementioned principles of *fumus boni iuris* and *periculum in mora*.

Taken together, the enforcement of immigration detention seems to be marked by considerable inherent inconsistencies. The police themselves are aware of such discrepancies, as the quoted statement shows. However, it is investigative courts that ultimately authorise immigration detention. Therefore, it is worth asking: what can we learn about the courts and their decision-making processes regarding immigration detention? Examining the practice of these judicial decision-making processes can shed light upon this problem. It thus makes sense to analyse in depth the work of investigative courts and focus upon their decisional intricacies and patterns, as well as on the corresponding meanings developed by court actors. The following sections are intended to

report the results from the focused observation and interviews conducted as part of the present case-study research, regarding immigration detention.

5.4. Judicial decision-making and the relentless doorkeeper's routine

> "*Outside the Law there stands a doorkeeper. A man from the country comes to this doorkeeper and asks to be allowed into the Law, but the doorkeeper says he cannot let the man into the Law just now. The man thinks this over and then asks whether that means he might be allowed to enter the Law later. 'That is possible,' the doorkeeper says, 'but not now.' Since the door to the Law is open as always and the doorkeeper steps to one side, the man bends down to see inside. When the doorkeeper notices that, he laughs and says, 'If you are so tempted, why don't you try to go in, even though I have forbidden it? But remember, I am powerful. And I am only the lowest doorkeeper. Outside each room you will pass through there is a doorkeeper, each one more powerful than the last. The sight of just the third is too much even for me.' The man from the country did not expect such difficulties; the Law is supposed to be available to everyone and at all times, he thinks, but when he takes a closer look at the doorkeeper in his fur coat, with his large pointed nose, his long, thin, black Tartar moustache, he decides he had better wait until he is given permission to enter. The doorkeeper gives him a stool and lets him sit down at the side of the door. He sits there for days and years. He makes many attempts to be let in, and wearies the doorkeeper with his requests. Quite often the doorkeeper gives him a brief interrogation, asking him questions about the place he comes from and many other things, but they are dispassionate questions, such as important people ask, and at the end he always says he cannot let him in yet. The man, who has equipped himself well for his journey, uses everything, no matter how valuable, to bribe the doorkeeper, who accepts everything, but says, as he does so, 'I am only accepting this so you will not think there is something you have omitted to do.' Over the many years the man observes the doorkeeper almost uninterruptedly. He forgets the other doorkeepers and comes to see the first one as the only obstacle to his entry into the Law. He curses his misfortune, out loud in the first years, later, as he grows old, he just mutters to himself. He grows childish, and since, as a result of his years of studying the doorkeeper, he has come to recognize even the fleas in his fur collar, he asks the fleas to help him and persuade the doorkeeper to change his mind. Finally his vision grows weak, and he does not know whether it really is becoming dark around him or whether his eyes are deceiving him. But now, in the dark, he can distinguish a radiance which streams, inextinguishable, from the entrance to the Law. Now he does not have much longer to live. Before he dies, all the things he has experienced during the whole time merge in his mind into a question he has not yet put to the doorkeeper. He beckons him over, since he can no longer raise his stiffening body. The doorkeeper has to bend down low, for the difference in height has changed considerably, to the man's disadvantage. 'What is it you want to know now?' the doorkeeper asks. 'You are insatiable.' 'Everyone seeks the Law,' the man says, 'so how is it that in all these years no one apart from me has asked to be let in?' The doorkeeper realizes that the man is nearing his end, and so, in order to be audible to his fading hearing, he bellows at him, 'No one else could be granted entry here, because this entrance was intended for you alone. I shall now go and shut it"* (Kafka, "Before the Law", 2009: 153-155).

As explained above, immigration detention must be endowed with specific procedural guarantees for it to be considered legitimate. This means that at least for some defendants the law acts as a safeguard to protect them from administrative arbitrariness: law is consequently a 'radiance which streams, inextinguishable'. However, to reach it, a defendant has to go through a door, which is guarded by a doorkeeper who must first authorise their access. This doorkeeper is intimidating and powerful, although they are just the first of many more. We must thus consider what the ultimate duties of this doorkeeper

are. Undoubtedly, they have a function and are there, just like the door, for a specific defendant. Hence, is it their duty to deceive the defendant into the elusive possibility of entering through the door? However, the law is supposed to be available to everyone at all time, therefore we may question whether the doorkeeper is also deceiving themselves.

This quoted Kafka parable was first published before the author's death but has become best known as part of his posthumous, 'The Trial'. However, in the novel it acquires a more evocative connotation regarding what constitutes the bureaucratic labyrinths of justice. In Weber's typology (1946), modern bureaucracies are hierarchical and formal structures intended to rationalise State decision-making processes. However, they also run the risk of dehumanising those in question, promoting efficiency but inhibiting thoughtfulness. The Spanish judiciary is formally structured as a bureaucracy in the Weberian sense. However, the pursued rationalisation of criminal justice decision-making could be to some extent a mirage, considering the substantial societal and political conditions of contemporary societies (Savelsberg, 1992). Moreover, as discussed in the literature review, the criminal justice system can simply reproduce the substantive social conflicts and asymmetrical relations of power (Becker, 1963; Turk, 1969). Nonetheless, it may also work as a field of dispute (Bourdieu, 1987), between the instrumental impulses of the hegemonic powers (Becker, 1963; Chambliss, 1975; Quinney, 1970; 1973), or as an autopoietic system indirectly affected by 'external irritations' (Luhmann (2004 [1993]).

Beyond these considerations, we return to the question: what is the role of law doorkeepers? While the police are at the frontline, investigative judges, assisted by court personnel, prosecutors and attorneys are also eminent doorkeepers because they operationalise judicial oversight and are there to determine whether the 'radiance' of the law is or is not reachable. Nonetheless, the doorkeeper is central within the bureaucratic framework, within which the access to law is preceded by the need to comply with certain formalities and prerequisites. In addition, there emerges the question of time. In Kafka's parable, time seems to pass only for the countryman: while he becomes old and finally dies, the doorkeeper remains unharmed and timeless. Time seems to work in a similar fashion for those subject to immigration detention. Constrained by the imminence of their detention and eventual deportation, they are compelled to persuade their doorkeeper to rule in their favour, while complying with pre-established formal and bureaucratic procedures in order to pass through the gateway and embrace the 'radiance of the law'.

There is, nonetheless, another critical dimension of the role of these doorkeepers: their criminal law identity. As already explained, the peculiarity of immigration detention

is that it is an administrative measure ordered by a criminal judge. This raises questions regarding the extent to which defendants subjected to this proceeding could be criminalised either *de jure*, *de facto* or *procedurally* (Bosworth & Guild, 2008; De Giorgi, 2006; Gibney, 2008; Stumpf, 2013). To answer this question, it is necessary to understand the decision-making and cultural realm of the criminal courts. This is an essential task because the main conceptual underpinnings of this thesis are that criminalisation, either primarily or secondarily, goes beyond the formal categorisation of individuals with such a label. This research stems from the idea that criminalisation could be intricate and sometimes even subtle, referring to the substantial circumstances experienced by defendants as part of their involvement with the criminal justice system and its particular culture.

Consistent with the crimmigration framework (Aliverti, 2012; Sklansky, 2012; Stumpf, 2006; 2011), and with contemporary judicial decision-making perspectives (Steffensmeier et al., 1998; Steffensmeier & Demuth, 2001), criminal justice decision-making is understood not as a merely formal operation of applying abstract rules to concrete cases, but as an activity characterised by negotiation, a significant use of discretion and the development of a penal culture composed of idiosyncratic features (Albonetti, 1991; Carroll, 1978; Fontaine & Emily, 1978; Hogarth, 1971; Sudnow, 1965). The main point in this sense is that law doorkeepers are not automatons who obey previously and externally planned instructions, but conscious beings who influence and are influenced by the cultural realm within which they work and who give meaning to their own actions and decisions (Ferrell, Hayward & Young, 2008). The culture of criminal courts is understood as the "*loose amalgam of penological theory, stored-up experience, institutional wisdom, and professional common sense which frames the actions of penal agents and which lends meaning to what they do*" (Garland, 1991: 219).

Based upon an organisational approach (March & Simon, 1958; Thompson, 1967) and a social psychological orientation (Carroll & Payne, 1976; Fontaine & Emily, 1978), Albonetti (1991) formulated a causal attributions perspective to explain judicial discretion. Such a standpoint is founded upon the idea that judges are required to make rational decisions in a domain of responsibility characterised by uncertainty. This uncertainty, which is mainly associated with judicial inability to accurately predict future criminal behaviour, is conceptually established upon the idea that for a decision to be fully rational it must be made with knowledge of all possible alternatives, given that complete knowledge eliminates uncertainty in decision-making. Since this is rarely the case, decision makers attempt to reduce uncertainty by relying upon a rationality that is the product of habit and social structure. Specifically:

> "*These limits to decision-making rationality are overcome through organisational arrangements such as established operating procedures, a division of labour, a hierarchy of authority, formal channels of communication, professional training, and, finally, indoctrination. These structures absorb uncertainty resulting in a 'bounded rationality'… Decision makers seek to achieve a measure of rationality by developing 'patterned responses' that serve to avoid, or at least, reduce uncertainty in obtaining a desired outcome… problem solving is based on a limited search for 'satisficing' rather than optimising solutions*" (Albonetti, 1991: 249).

Consequently, judges would attempt to manage uncertainty in decision-making by developing 'patterned responses', which are in turn the product of attribution processes based upon personal stereotypes and outcomes from earlier processing stages (Albonetti, 1991). These responses and its causal processes may also be significantly determined by the cultural realm within which criminal courts work. In this regard, the bureaucratic dimension of criminal justice decision-making must be considered.

As explained by Chambliss and Seidman (1971), criminal court decision-making may be largely motivated by the aspiration to maximise institutional benefits, while minimising organisational concerns. Indeed, "*the demands for efficient and orderly performance of the court take priority and create a propensity on the part of the courts to dispose of cases in ways that ensure the continued smooth functioning of the system*" (Chambliss & Seidman, 1971: 468). Likewise, Myers and Talarico (1987) have described the conditioning effect of bureaucratisation on criminal justice decision-making, by which court officials tend to develop strategies to minimise organisational costs and maximise organisational and professional gain. Similar conclusions have been reached in other well-known studies using organisational/contextual frameworks (Dixon, 1995; Hagan, 1977; Haynes et al., 2010; Eisenstein & Jacob, 1977; Eisenstein et al., 1988; Nardulli et al. 1988).

Dixon's (1995) organisational context standpoint is useful to understand the impact of the cultural aspects of the organisation of the criminal court upon decision-making. According to this perspective, judicial decision-making theories can be classified into three categories: substantive-political, formal-legal and organisational-maintenance. The substantive-political posit in general that judicial decision-making is influenced by broader substantial social, economic and political factors. This would fit with Chambliss (1975), Quinney (1970; 1973) and Turk's (1969) viewpoints discussed in the literature review chapter. Theories stemming from the second category would in turn argue that bureaucratic judicial decision-making works as a technical rational machine, in which formal rules govern decisions through their application to specific cases. This would correspond to non-conflictive Weberian standpoints. The third category of theories would instead give prominence to organisational factors, in which efficient case disposition becomes the

operational goal that maintains a stable and orderly system. This would correspond to the perspectives described in the previous paragraphs.

Dixon (1995) considers that, taken alone, none of these standpoints are satisfactory enough to explain judicial decision-making, especially if inter-court variation is introduced into the analysis. Consequently, neither the formal-legal, nor the political and organisational rationalities operating within judicial decision-making should be ignored. The impact of these factors upon decision-making is therefore interdependent and conditional. In this sense, however, there is still an emphasis upon the organisational-maintenance aspect, as it is the focus of the present research. Furthermore, in regards to the criminal court decision-making processes within immigration detention, the analysis of the interviews and focused observation, in accordance with the conceptual orientation that guided the fieldwork will allow us to consider the most significant aspects emerging from the organisational culture of courts, in interaction with so-called formal-legal and substantive-political factors.

Coming back to Kafka, the role of immigration detention doorkeepers should thus be understood in terms of their association with a specific criminal court organisation, whose distinctive cultural features characterise the court's bureaucratic decisional functioning. Moreover, it must be remembered that in essence they are criminal law doorkeepers and in immigration detention cases, they are also immigration law doorkeepers. The results presented below will reflect the main themes emerging from the data through the lens of these theoretical remarks. In this regard, the next sections will analyse the key components of the specific cultural and organisational dynamics of criminal court immigration detention decision-making mechanisms. This analysis will then allow the disentangling of the substantial intricacies and determinants of such decision-making devices and the meanings attributed by criminal court actors to immigration detention. Ultimately, this analysis will address the question of the role of criminal courts as immigration detention doorkeepers.

5.5. Uncommitted and tangential decision-making

In Kafka's novel, when Josef K is arrested by the police and requests information about the reasons for his prosecution, the officers reply that they do not know anything about the merits of the matter and that they are just complying with a legal mandate; the officer in charge responded: "*These gentlemen here and myself are of minor importance as far as your case is concerned, indeed, we know almost nothing about it… I cannot inform you*

that you have been charged with anything or, rather, I do not know whether you have been or not. You have been arrested, that is a fact, and that is all I know." (Kafka, 2009: 12-13).

Specialisation and compartmentalisation are essential aspects of modern bureaucracies. Officers in charge of a certain issue, no matter how related it could be with other matters, are entitled to obtain the relevant information and decide upon that specific aspect. This is particularly marked in the legal field, in which professional and institutional specialisation predominates, and even more so within the judicial hierarchical division of labour, in which the distribution of matters according to broader legal categories has become one of its primary features. Courts are divided according to their speciality into criminal, civil, or administrative categories. Naturally, judicial employees tend to specialise in fields that are largely driven by their job-related experience.

Regarding immigration detention, the first most common response from investigative court actors was that their intervention is limited or tangential. This is not surprising, given that it is a measure that formally belongs to immigration law, which makes it a largely extraneous matter within the decisional realm of criminal courts. Interviewees from these courts were explicit at explaining that their only task is to authorise such a measure and that they have nothing to do with the administrative proceeding and its merits. They contended that these are subject-matters to be decided by administrative courts, arguing in many cases that these courts should ideally be the ones in charge of authorising immigration detention. The following statement from an investigative court clerk summarises the topical kind of response in this regard:

> "*So, since he has not committed any crime, what they do* [the legislator] *is that they invented immigration detention. Therefore, they deprive him of freedom, but without having committed any crime and they detain him in… an immigration detention centre… and then, as he is deprived of liberty, that has to have a judicial control. Well,* ***in reality, that would have to be controlled by the administrative judges, because we only see crimes*** *… A foreigner who has entered the territory illegally, what he has done is that he has entered without complying with administrative regulations. What happens is that as he is deprived of freedom, the law… attributed that competence to the investigative courts; but it could have, in fact, it should have been attributed it to the administrative courts…* ***It is so that any matter related to immigration control is handled by the administrative jurisdiction, we only control the immigration detention*** (Investigative court clerk 10; emphasis added)".

There are significant aspects emerging from this response that should be noted, for example there is an acknowledgment that the legal role of investigative courts within immigration detention is to exercise judicial control. The respondent seems to be conscious of the fact that the deprivation of liberty is a serious measure that requires judicial oversight. However, he goes on to explicitly state that the regular duty of investigative courts is to deal with criminal offenders and crimes and that immigration detention should

actually be handled by administrative courts. In this regard, the interviewee contends that people subjected to immigration detention are, at least in principle, not criminals, which makes it problematic that they are subjected to a criminal court.

The main idea is that investigative courts are neither entitled nor interested in considering the merits of an expulsion proceeding and limit their responsibilities to solely authorising immigration detention. Investigative judges also shared this criterion, emphasising that their intervention is limited and that they are not entitled to assess the appropriateness of the administrative proceeding or the expulsion decision. The following response from an investigative judge reflects the most common answer in this regard:

> "*All I have to check is that this man (the defendant), either has an expulsion order… or that an expulsion proceeding… has been initiated. I don't even have to assess whether that expulsion proceeding is good or not. That is. Administratively I don't control that. The only thing I do, is, being it a precautionary measure, to ensure that this man can be located to be expelled. Because, whether there is a problem in the administrative proceeding, if you actually had a residence permit, or you have appealed or whatever, that corresponds to an administrative court, which is the one that handles that proceeding. I don't, I only detain you, if the circumstances that I mentioned before concur. If that resolution of expulsion is legal or not, has been appealed or not, that is a problem that the lawyer will have to raise before the corresponding body, which is the administrative court*" (Investigative judge 3).

It is again evident from this response that for investigative court actors their role in immigration detention is narrow. As explicitly acknowledged by this judge, they are supposedly not entitled to assess the merits of the expulsion proceeding, despite it being the primary basis of an immigration detention. As explained above, judges in these cases are required to render a *prima facie* assessment of the legality of the expulsion proceeding, which in practical terms means that they should act as though they were judges deciding a pre-trial detention. Nevertheless, it emerges that in practice they are reluctant to do so because they consider it to be beyond their responsibility.

Judges from the criminal Courts of Appeal[96] also considered that this is an administrative matter in which their role is very limited. These remarks from one judge of such courts are rather illustrative:

> "*We only decide the detention… we don't get involved… we assume that there is an administrative file that has been initiated by a competent authority, that the procedures have been followed, that there has been a declaration, that the prosecutor has requested the detention… Well, that they have been complied, that there is an appearance that the administrative action is legitimate… that there are no obvious procedural irregularities. We don't get into depths… One thing is the expulsion and another thing is the detention*" (Court of Appeal judge 3).

In his explanation, this judge affirms the idea that the responsibility of deciding and assessing immigration detentions does not lie with the criminal courts and even goes as far

[96] These judges, as explained above, are in charge of deciding the appeals against immigration detention.

as to assume that the majority of detention cases are in fact appropriately handled. Furthermore, they make a distinction between the expulsion and the immigration detention proceedings, considering them to be different things as far as their decision-making role is concerned. However, this differentiation is largely artificial because both proceedings are intimately related, and one is consequence of the other.

Just like the officers in Kafka's novel, criminal court actors allege that they 'know almost nothing' about the merits of the case and that they only know about the detention. This theme may look trivial in relation to other seemingly more critical aspects. However, as will be seen below, it is actually a substantial component of the ostensible bureaucratically patterned processing mechanisms of immigration detention. Additionally, this aspect is comparable with Fabini's (2017) finding that Italian justices of the peace consider that the validation of the decision to detain should not be theirs but that of the police. Ultimately, these findings raise a series of significant questions: why is it that criminal courts do not want to get too involved in this type of proceedings? Would that make them consider each case more individually and less mechanically? Would that require giving more time and being more thoughtful when deciding?

5.6. The detention of asylum seekers and the inability of investigative courts

The lack of involvement discussed within the previous section becomes a lack of expertise regarding asylum law matters. Although criminal court actors seem to acknowledge this circumstance, it was defence attorneys who expressed concern about the issue. Their main worries had to do with the lack of knowledge and sensibility of investigative court personnel in regards to tackling the specificities that characterise immigration law application. Immigration lawyers were worried about the fact that criminal court personnel are not well prepared to adequately understand and resolve petitions or plaints related to asylum and international protection or urgent cautionary measures.

According to the Spanish law, the filing of an asylum request suspends any removal decision or proceeding until it is non-admitted or rejected.[97] Evidently, if the application is accepted, the foreigner cannot be removed from Spain. Asylum plaints are filed before the local immigration administrative office of the Ministry of the Interior. In Spain, there is some controversy over whether asylum seekers can be detained in a CIE. On the one hand, the EU Directive on the standards for the reception of applicants for international protection (2013/33/EU) does authorise member states to detain asylum seekers under

[97] An asylum request can be non-admitted due to the lack of formal requirements or evident inadmissibility. A rejection is in turn a final decision which is issued after fully assessing the request on its substantial merits.

certain circumstances.[98] While according to this regulation in some cases they can be detained as part of a removal proceeding, such a decision requires further judicial motivation than in ordinary cases. For instance, it should be objectively determined that there are reasonable grounds to believe that the asylum application is being used to merely delay or frustrate the enforcement of a removal decision. Recent decisions from the ECHR and CJEU (e.g. *Nabil and others v. Hungary*, 2015; and *J.N. v. Staatssecretaris voor Veiligheid en Justitie*, 2016) imply and corroborate that the detention of asylum seekers requires stronger decisional justification.

Nonetheless, Spanish legislation does not explicitly establish the detention of asylum seekers and only contains references to the rights and conditions of detainees to request asylum and be provided legal advice.[99] However, Art. 22 of the Asylum Act (12/2009) determines that while the proceeding is in progress, asylum seekers shall remain within the 'facilities enabled for that purpose'. This is the provision that causes the most controversy because it does not clearly refer to CIEs. In fact, this Act was enacted in 2009, when CIEs were already in operation for decades. As one of the defence attorneys I interviewed explained to me, if the legislator had wanted to refer to CIEs, he would have just stated it. Notwithstanding the legal validity of the detention of asylum seekers, the foreigner's requests for asylum do require additional effort from investigative judges in regards to the assessment and decision of detentions. However, as it will be seen below, for defence attorneys this does not seem to be the case.

In Spain, there are two legal procedures to consider and resolve asylum applications: the ordinary and the border. In general, the ordinary is for requests presented by a foreigner who has already entered the Spanish territory, while the border is for those

[98] Art. 8.3 of Directive 2013/33/EU establishes that asylum seekers can be detained: "*a) in order to determine or verify his or identity or nationality; b) in order to determine those elements on which the application for international protection is based which could not be obtained in the absence of detention, in particular when there is a risk of absconding of the applicant; c) in order to decide, in the context of a procedure, on the applicant's right to enter the territory; d) when he or she is detained subject to a return procedure under Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, in order to prepare the return and/or carry out the removal process, and the Member State concerned can substantiate on the basis of objective criteria, including that he or she already had the opportunity to access the asylum procedure, that there are reasonable grounds to believe that he or she is making the application for international protection merely in order to delay or frustrate the enforcement of the return decision; e) when protection of national security or public order so requires; f) in accordance with Art. 28 of Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a TCN or a stateless person*".

[99] Art. 19.4 of the Asylum Act (12/2009) establishes that asylum seekers have the right to interview a lawyer in the border posts facilities and immigration detention centres; Art. 25.2 mandates that when the request for international protection has been filed in an *immigration detention centre*, its processing must be treated as if it had been presented at a border post; and Art. 34 orders that the UNHCR shall have access to the applicants, including those who are in border facilities or *immigration detention centres* or penitentiaries.

who attempt to enter it, mostly in an irregular manner. Essentially, the only difference between these procedures is in regards to the legal deadlines:[100] the border proceeding is much swifter and makes any return decision more imminent for the foreigner. The critical aspect to consider here is that the Spanish law treats detainee asylum requests as border. In consequence, investigative judges dealing with recently arrived immigrants are often required to consider aspects of asylum and refugee law, which are principally not their expertise. It is therefore not surprising that most defence attorneys were concerned about the lack of knowledge and sensibility of investigative court personnel in these areas. The following statement from one lawyer summarises their common criteria:

> "*They are judges specialised in criminal law, then of course, when they come to an immigration matter and you raise them on an issue of an asylum seeker in application of the asylum act… they are not experts in immigration law and the immigration regulation.*[101] *When you give them a different topic… some topic a little more special, of a special case, someone who has requested it here, they won't know the requirements of regularisation. That is the immigration regulation, normally, the administrative judges do handle it better, but the investigative judges, no, they don't usually handle the Aliens Act, they apply the penal code then you encounter difficulty. And the same with prosecutors, prosecutors don't* [know] *either, they are criminal experts*" (Defence attorney 2).

In this excerpt, the interviewee shows her concerns about the lack of expertise of investigative judges and prosecutors within immigration law, particularly in regards to asylum matters. Specifically, this defence attorney highlights the knowledge limitations and deficits displayed by judges and prosecutors when a more specific issue about such aspects is raised. Once again, the problematic criminal law idiosyncrasy of these officers is evident when the respondent contends that they know how to apply the penal code, but not the immigration law. This predicament can be further evidenced in the following response of another lawyer, who speaking about the case of a Colombian transgender, also referred to the lack of knowledge of investigative judges in immigration matters:

> "*For them* [investigative courts], *the issue of a principle of non-refoulement, which was applicable here… it is not a subject to be discussed in an investigative court… if there is a minimum doubt about the fact that a person can be the object of torture, ill treatment, degrading treatment in the country from which she comes, or in the country to which she will be re-sent, a whole mechanism set forth by the law, the international treaties, shall be articulated. That is, regardless of what court… or judicial authority that deals with such a matter and has to make a decision… but when you introduce a principle of non-*

[100] In the border procedure, the administration is required to decide on either the admissibility or the merits of the request and notify the decision in only four days since its presentation. This period can exceptionally be extended to ten days at the request of the UNHCR under extraordinary circumstances. This decision can be repealed within two days and then the administration has two more days to resolve it. The consequence of not observing any of these deadlines is that the request will be processed through the ordinary procedure. In turn, in the ordinary procedure the decision on the admissibility of the application shall be notified within one month since its presentation, otherwise it will be considered as admitted. Then, the administration has six months to decide on the merits of the application, otherwise it will be regarded as rejected.

[101] In Spanish, 'Reglamento de extranjería.'

> *refoulement, based on the Geneva Convention, that is, several international treaties, then they are blocked… as if you were speaking to them in Chinese*" (Defence attorney 5).

The themes raised in this statement are significant because they largely refer to a specific and very serious case that blatantly illustrates the point. Specifically, the respondent makes explicit reference to the principle of non-refoulement, which is a keystone of asylum and immigration law. The expulsion of people to countries in which their life or integrity is under risk is forbidden. This means, as explained by this interviewee, that any court involved in deciding the expulsion of a person shall carefully consider the circumstances of any defendant in light of such principle. Although the involvement of a judicial authority is at first sight a sign of strengthened protection, the criminal law nature and specialisation of investigative courts seem to be a reason, if not an excuse, for ignoring that.

Another aspect that deserves to be mentioned has to do with a specific case taken by one of the defence attorneys that I interviewed. Given that the port of Malaga did not have the appropriate facilities to process the formal paperwork of administrative proceedings, the requests for asylum had to be filed in the police station or in the investigative court. From the perspective of the defence, the consequence of this was that the ordinary procedure had to be applied here and not the border procedure because the applicant was already within the territory. In the case in question, the defendant requested asylum at the police station and the agents in charge treated it initially as an application filed within the territory. Afterwards, however, they changed the nature of the proceeding without notice and under protest from UNHCR and many NGOs. When the case was brought before the court the next day, the judge accepted the criterion of the police and ordered the detention of the defendant. Nevertheless, the awareness raised by the claims of the defence attorney ultimately led to the installation of facilities in the port and the rectification of the procedure to be appropriately treated as border. This response from another defence attorney illustrates this point:

> "*Well, now the asylum requests, which are formulated in the border post* [at the port]*, are beginning to be processed. When I say now, I am saying, eh, since the month of June, um, don't know if it's May or June*[102]*, a colleague of mine made a fuss, supported by all of us* [the immigration defence attorneys] *and by UNHCR… so, since then, asylum requests are being processed the immigration defence attorneys* [there]. *Before, if the subject expressed his will to request asylum, in the* [investigative] *court, they said: 'no, that does not correspond here' when it is not like that. I mean, if a person has the will to request asylum, you must process absolutely everything and tell the police to process that request*" (Defence attorney 12).

This reply and the circumstance referred to demonstrate the extent to which a committed defence in immigration law can lead to significant transformations. In this particular case,

[102] The interview was conducted in July.

due to the action of a group of dedicated lawyers, the police had to amend an irregular practice to make it legitimate. Following on from this, in the last part of this answer, the inadequacy problems in regards to the investigative courts are raised once again.

In general, it seems that the judicial nature of investigative courts is paradoxically superseded by their criminal nature. Criminal courts dealing with immigration detention seem to give pre-eminence to their criminal law specialisation and practice than to their role as judicial custodians. It is thus possible to speak at least of a procedural criminalisation of asylum seekers (Bosworth & Guild, 2008; Gibney, 2008; Stumpf, 2013), who due to the lack of expertise within the criminal courts, in many occasions end up unnecessarily, or thoughtlessly, being detained in a CIE. Nonetheless, up to this point in the analysis, the inadequate treatment of asylum requests has seemingly more to do with the investigative court's institutional and professional specialisation in an explicit area than with their cultural and organisational configuration as criminal justice agencies. The following sections will address this aspect and complete the picture.

5.7. The problem with 'express expulsions' and urgent cautionary measures

Investigative courts are the only courts available at all times, which means that they have jurisdiction to resolve urgent requests concerning any subject matter whenever the competent court is unavailable. In immigration law practice, defence attorneys often make use of urgent cautionary measures to prevent an imminent expulsion. As a rule, administrative judges shall decide these requests, but when they are not available, investigative judges replace them.[103] According to law[104], this measure is admitted when the judge agrees with the defendant's petition that there are 'circumstances of special urgency' and blocks an expulsion. The decision must be taken within two days and cannot be repealed. However, within the next three days the judge should conduct a hearing, with the intervention of both parties, to decide upon the maintenance or revocation of the cautionary measure. These procedural mechanics are in theory the same when the measure is requested before an investigative judge, but the case has to be subsequently remitted to an administrative judge once the measure is accepted or denied.

Following on from this, defence attorneys shared the concern that investigative judges very rarely permit these kinds of petitions. Most of them agreed that this is due to the fact that such judges do not really have a good understanding of immigration law and

[103] This competence has been established in the 'Reglamento 1/2005, of the Consejo General del Poder Judicial de España,' with the reform enacted through the 'Acuerdo' of 28 November 2007.
[104] Art. 135, BOE-A-1998-16718, No. 167: 14-07-1998. LO 29/1998 (13-07-2000).

are not sensitive to the pressing circumstances that an imminent expulsion often involves. One common response from defence attorneys was that investigative judges and court personnel are reluctant to admit these requests, with the argument that their resolution corresponds to administrative courts and should be presented the next working day. Nonetheless, some of my interviewees asserted that they had encountered cases in which an investigative court dismissed their request by claiming that there was no urgency, which led to their clients having already been expelled by the time the decision from the administrative court was issued. In fact, one of the most experienced lawyers that I interviewed explained me that he once had a case in which an investigative court dismissed his request on the grounds that they did not consider it urgent; the next day the administrative court also denied the request contending that it no longer had purpose because the defendant had already been expelled.

The request and granting of urgent cautionary measures become critical in terms of the so-called *express expulsions*. The police in these cases attempt to expedite the expulsion of a foreigner by trying as much as possible to avoid any legal obstacle that the defence could propose. In practice, the police seek to avoid any judicial oversight, which becomes more likely if the arrest and expulsion are executed outside the regular working hours. This means that in many of these cases investigative courts could be the only available judicial authority capable of preventing the police from executing an expulsion. Since this seems to be rarely the case, express expulsions have become not only one of the main concerns for defence attorneys, but also for administrative judges.

The immigration chief of police that I interviewed admitted that they do execute this kind of practice and explained to me how they do it. First, he confirmed that these expulsions are linked with the imminent departure of deportation flights. He told me that they receive a notification from the central police office in Madrid informing them that a deportation flight will depart to a given destination in a certain date and that there are available places to be filled. Then, the local police will refer to their own records and trace already identified immigrants from the destination in question with an executable expulsion order and arrest them, which can happen from one day to the next. In this aspect the chief of police did not give explicit details and only said that for that purpose they already have the deportee ‘located’. However, defence attorneys and some of the administrative judges that I interviewed were more explicit, as it is described below.

Although the formal legality of this practice can be questioned, most of the defence attorneys and administrative judges that I interviewed shared the criterion that in purely

legal terms, aside from sporadic arbitrary cases, it is a valid police practice. This is so because this type of expulsion is in general executed against foreigners who have already been given an enforceable expulsion order. Defence attorneys, however, were concerned about the limitations that this practice could impose upon the right to defence due to the swiftness with which the police act upon these cases. Although such an expulsion may be considered legal, it is the way in which the police act that raises concerns among attorneys. For instance, while most of them agreed that the police do their job and attempt to achieve their own objectives, attorneys complained about the practical difficulties and contentious manoeuvres that such a practice often entails. Indeed, one attorney said that at the beginning of his practice he had "*to learn the hard way*" in a case involving a Moroccan deportee. Speaking about this case, he explained me that his client had contacted him about a call from the police station requiring him to go there and that he wanted to be sure whether he should go. My interviewee acknowledged that he was naïve and saw no problem, but that this ultimately resulted in the expulsion of his client the next day.

The administrative judges that I interviewed also referred to this police practice. In general, they agreed that it is formally legal because it is normally supported by a valid expulsion order. However, a couple of them expressed their concerns in regards to the ways in which the police attempt to take advantage of the vulnerable situation of deportees. One of them, quite young and talkative, was very explicit at criticising this practice. Indeed, at the end of an immigration hearing he engaged in a short conversation with the government immigration attorney and told him that he had to go back to his office quickly because he had to resolve an urgent cautionary measure. In that moment, the judge commented in a lower voice that the police "*go fast, very fast*". Days later, during the interview, I brought up this comment and he elaborated on this matter extensively:

> "*That is an administrative practice… which for me is particularly harmful and dangerous, that the police are implementing especially with* [Moroccan] *citizens. I think not for an ethnic or racial issue… But mainly because… of the ease of transportation… the citizens of Morocco, it is becoming more frequent that the police don't request immigration detention… They wait to have an expulsion order, then as they know where the man could be walking, because they already have his address and they have been watching him for days, they already know him physically. They arrest him in the afternoon. The administrative court is closed… They don't request immigration detention. Then, tomorrow 'at 7 in the morning we will get you on a ferry, and we will leave you in Tangier.' And that is what is causing on many occasions for them to be nullifying the possibility of judicial control… a person whom they arrest on the street, we are talking about 8 o'clock in the afternoon, they stop him and they tell him 'tomorrow morning you go to Morocco.' Whilst they notify the arrest to his relatives and the public defender and the defender goes to the police station to assist him, the defender… has to be speedy, writes his case at night, whatever he can in a fleeting situation, in which he is not able to collect documents, almost nothing and introduces it here… Here the presentation of documents starts in theory at 9 in the morning… He introduces it here* [at the courthouse reception]*, although very quickly…*

> *Since they* [the court personnel] *take the case upstairs* [to the court office], *since they deliver it to us and we can decide, is that* [finger snapping sound] ... [he has already been] *expelled… And man, that's not right*" (Administrative judge 2).

This response reveals details that merit attention. First, it is noteworthy that such concerns come from an administrative judge who is in charge of overseeing the work of the administration and the police, and is therefore a direct witness to these happenings. In his explanation, a crucial point to be noted is the ostensible enforcement focus upon Moroccan citizens. It seems that among the many reasons that could explain their disproportionate expulsion from Spain, as evidenced in the second chapter, the geographical proximity and ease of transportation are paramount. Besides, this judge explicitly affirms that the enforcement mechanics of the so-called express expulsions *de facto* nullify judicial control.

Beyond the legal discussion, all this reveals that the administration and the police are in a favourable position to take advantage of the legal mechanisms to advance their own objectives within immigration control. This amplification of police and administrative powers is indeed a characteristic of the crimmigration phenomenon (Aliverti, 2012; Dauvergne, 2013; Legomsky, 2006; Sklansky, 2012; Stumpf, 2006; 2011). In this sense, defendants and defence lawyers are constrained by time and material limitations due to the swiftness with which law enforcers act. Investigative courts seem not to be sufficiently receptive to requests for urgent cautionary measures, thus self-limiting the scope of the judicial control and increasing the vulnerability of deportees, especially Moroccans.

5.8. The difficulties of assessing roots

A significant aspect prompted by the intertwining between immigration control and criminal justice is the judicial assessment of roots.[105] As already explained, investigative judges are required to *prima facie* assess the defendant's ties with Spain when deciding immigration detention. The concept of roots or ties has been developed in the case law of the Supreme Court. As established in a series of rulings,[106] it is possible to speak of the existence of roots when there are family, economic and social interests which, in a specific case, can justify the permanence in Spain, so that an expulsion would cause damages that would be difficult to repair, which would affect the foreigner's personal sphere.

In legal terms, there are considered to be three types of roots: family, economic and social. Consequently, the means of gathering evidence are usually oriented to demonstrating the foreigner's family life, schooling of an underage child, marriage or

[105] The Spanish word to refer to this concept is 'arraigo.'
[106] STS 2000/639, 7 December 1999; STS 2000/1740, 21 December 1999; STS 2000/9374, 24 October 2000; STS 2001/9535, 16 January 2001; STS 2001/1376, 6 March 2001; STS 2001/5091. 14 June 2001; STS 2007/7871, 23 November 2007; STS 2008/40, 9 January 2008.

stable union with a Spaniard or foreign permanent resident, as well as any work certificates or contracts that the subject may hold. The most common piece of evidence presented by the defence is usually a certificate of residence registration, which is used to demonstrate that the foreigner has a known domicile address. The investigative judges that I interviewed acknowledged that they do consider the immigrant's roots in determining whether to order immigration detention. In fact, the concept of looking into a person's roots was a recurring theme whenever I asked about the aspects they consider before making a decision. However, in line with Orgaz's findings (2014), there was considerable variation in the way in which judges interpret and assess such a concept. The following excerpts from an interview with a very open judge are an illustrative starting point:

> "*Before it was not regulated so well, but now it is regulated. Now it tells you that in order to detain a person, what has to exist is a risk of abscondence, that is, we actually detain the person to be able to guarantee that the expulsion order can be executed… So, if there is a risk, in what way can the expulsion order be executed? Having the foreigner been located… to have an address of him, where you know that you are going to find him, to be able to notify him the administrative resolution of expulsion and expel him. Well, I detain when I have no guarantee that the person will be located at home*" (Investigative judge 3).

In this excerpt, this judge explicitly mentions that immigration detention is justified only if there is a risk of abscondence. She then explains that there is no such a risk if the foreigner is located, that is, if they have a known address where it will be possible to find and notify them and execute an eventual administrative expulsion order. In consequence, detention is ordered when there is no guarantee that the person will be located at home. This judge then explained to me the specific criteria that she uses to assess this:

> "*The first thing I look at is: does an expulsion order has already been issued, or an expulsion proceeding initiated and the police have tried to locate him at the address he provided and couldn't do it? For me that is an indication that he will not collaborate and that I will not locate him. Secondly, that they don't have a known domicile address, as they say 'I don't remember the street', or that he is registered or not… because… there were many people who had a work residence permit and as a consequence of the crisis they lost it because they lost their job. But for example, with many of them, it happens a lot with the South Americans, they have been in Spain for ten years, they have their health card, an address, they are registered in that address. So, all that, even if he doesn't have the right to reside in Spain, doesn't justify his detention… the man has been living here for many years and he lives in an address where he receives the bank letters, the social security and everything. It is believable that he will be in his house and that they* [the police] *will be able to locate him*" (Investigative judge 3).

In this second interview passage, the judge explains that she primarily assesses whether the defendant has previously given a false address or hindered the police investigation, which in her opinion would be an indication that the subject should be detained. In the next parts of her remarks, the interviewee is more detailed and reflects upon the critical circumstances experienced by many immigrants as a consequence of the last economic crisis. She explicitly mentions South-Americans as an example of those who have suffered

as a result of the crisis, which may show a greater empathy for them than for other foreigners. The main point in this regard is that in this judge's opinion, being or working irregularly in Spain is not enough reason to justify immigration detention. If the defendant has roots within Spain, related for instance to their time of residence and institutional links, detention would not be necessary. In the last part of her response about this topic, this judge further explains the concept of roots:

> "*I look at that… if he has an address and if that address matches… if he has children in school… minimum requirements that he has given me. And then also the roots they have… because they have a family and have children, even if they aren't married but have had children here in Spain or have not had them in Spain but the children are here and they are in school also because they have roots here in Spain. And then if he has committed a crime… depending on the crime he has committed… if he has committed a crime, there are reasons for fleeing… no one wants to be sentenced and imprisoned. So that is a sign that leads you to try to leave my country, to try not to be located, so you cannot be sentenced*" (Investigative judge 3).

Roots, therefore, appear to be considered in the judicial sense as being related to having children or family ties. This was indeed a topical theme among interviewees. Conversely, it emerges that having a criminal or police record is a substantially negative factor that causes judges to believe that the person will flee. For instance, this same judge gave me the example of a foreigner who had just arrived at the airport with false identification documents and passport, to illustrate that in such cases the risk of abscondence is high, meaning that the detention is necessary. While this interviewee demonstrated a fair understanding of the concept of roots and a conscious and even compassionate perspective, other judges had a different stance. For instance, another investigative judge had a quite antipathetic view upon this matter and her response is particularly revealing, not only because she gave me just a few minutes, but also because it was absolutely impromptu:

> "*What happens is that many insist that 'I am registered', as if the registration meant some document that would allow him to stay in Spain. Today you can, to register, you are not required, nothing. So, they stick to the registration, they stick to marriages that many times are* [sham] *marriages, which are more of convenience, because you ask them, and they don't know where she is, where she lives… It is a problem, that, the CIEs, maybe they don't have the* [adequate] *conditions… But, well, there is a legislation that is there, and perhaps Spain was too permissive, and now it becomes again to not being so much like that. Anyway, there were many periods to regularise, people who didn't take advantage of them either*" (Short conversation with an investigative judge).[107]

Unlike the previous respondent, this judge had a severe position regarding irregular immigrants, implicitly stating that they did not take advantage when they could of the supposed permissiveness of the Spanish legislation. Moreover, it emerges from her answer,

[107] Although this was intended to be a complete interview, a few minutes after it started, the interviewee said that she had to leave due to a last-minute occupation. Nonetheless, I have included this quote due to its significance and the fact that these remarks were the first spontaneous words of this judge after I specifically introduced the topic of immigration detention.

and the spontaneous way in which she replied that she is by principle suspicious of defendants who try to demonstrate roots using marriage certificates. In addition, she considers municipal registrations to be insufficient in terms of evidence, while not making any reference to such aspects as having a known domicile, family or children.

Most of my interviewees, including judges, prosecutors and defence attorneys, agreed that only one of the fourteen investigative judges in the courthouse was really concerned and thoughtful in regards to authorising immigration detention. When I interviewed her, I was not yet aware of this circumstance, but she did tell me that "*as soon as I see an escape route*[108]*, I do not detain*" and that she was "*very inclined not to detain*". It appeared that when assessing roots, she exhibited higher levels of compassion than the other judges and she analysed and resolved these cases more thoughtfully. I observed this first-hand during a detention hearing in which a Colombian was brought before her in court. The police had arrested him for a small physical altercation with a neighbour, but then also realised that his residence permit was expired and initiated an expulsion proceeding. The defendant was brought before the court for both criminal charges and an immigration detention request. Regarding the criminal matter, it was resolved with a plea agreement and penalty charges. In relation to immigration detention, however, the judge decided to deny the request because the defendant had lived in Spain for more than eight years, had a child, a known and registered address and was in a stable relationship with a Spanish citizen. Afterwards the judge even commented that such an expulsion proceeding had some formal irregularities that would eventually invalidate it.

Given the agreement of my interviewees in pointing to this judge as the most thoughtful at deciding immigration detention, it does not seem unlikely that the rest of the judges tended to consider the assessment of roots with lesser concern. Since the concept of roots is ultimately an administrative matter, which would determine the resolution of an expulsion proceeding, it made sense to ask administrative judges what their opinion was regarding the decisions of investigative courts. Administrative judges resolve the judicial appeals against expulsion administrative orders, which mean that in many cases they also have the chance to take a look at detention decisions. As they are not legally entitled to formally assess the merits of immigration detention, such analysis is rather personal.

Their general impression was relatively negative and somewhat condescending, with three of my interviewees being more detailed than the others. Recurring comments referred to the fact that investigative judges have to make decisions under pressing

[108] This is an expression to explain that as soon as she finds a minimal legal justification, she does not detain.

circumstances, which makes them not to 'tune well' when assessing roots. However, there was one judge who had worked as a university professor for many years and had also spent a few years as an investigative judge, who was particularly emphatic and in answering my question about investigative judges' assessment of roots, said the following:

> "*That is a problem of investigative judges, who manage it badly… Because they don't know, I mean, I can tell you in many ways… they don't dominate the administrative technique… They don't know how to appreciate, technically, the circumstances of having roots… this person has circumstances of attachment that… when he will be notified of the sanction, is it easy to locate? … The investigative judge finds no roots. And now it comes to me… And I have to analyse the same roots… Then, I could say, 'well, if the investigative judge said, 'roots, no, so detention', I would have to say, 'no, and I don't suspend'. In most of the occasions… I say, 'roots, yes'… Much sputtering, a lot of writing without substance* [in regards to the decision of investigative judges] *… And this serves for all detentions. This is the same. But hey, okay. This is a general doctrine, but now we have to apply that to the concrete case… Normally they silence the reasons. It is problem of deficit of motivation*" (Administrative judge 1).

This critical perspective is revealing of the inconveniences that the attribution of immigration law matters to investigative judges may produce. It seems that the problem could be related to a lack of motivation in regards to making the decision to detain. Nonetheless, other administrative judges were more condescending towards investigative judges, arguing that their failures have more to do with the pressing circumstances of decision-making within the investigative courts. For example, another administrative judge stated the following:

> "*Investigative courts are criminal… I'm not saying they don't know, but they just know the basics. They are criminal, they are not administrative law specialists… Then of course, how can someone understand, who is not a specialist in a subject, in a matter that requires specialists… Then, in their decisions, investigative courts don't tune well…. I get cases, where I see that they do what they can… This should correspond to the administrative courts, but they have given it to the investigative courts, for the facilities they have, to arrange them, as they are on duty… But they have their specialty and then what happens: remove a corpse, 'I remove a corpse at four in the morning and then at six o'clock I detain a foreigner'… It is a judicial guarantee, but it is not, for me it is not full… It is not a full judicial guarantee, because that… must be controlled and supervised by an administrative judge, who are the ones who can know, the sensitivity they have, what is immigration law… in the decisions of investigative courts it can be appreciated… that they don't dominate certain nuances, that if they had more sensitivity, they would do it in a different way*" (Administrative judge 3).

From this reasoning once again emerges that investigative judges may not be well suited to properly assess the roots of an immigrant and decide detention. Interestingly, this judge explicitly mentions the criminal law identity of investigative courts as a reason for this problem, contending that carrying out criminal justice tasks, such as removing a corpse, has nothing to do with the authorisation of an immigration detention. In this regard, he argues that despite it being a judicial guarantee, it is not the most appropriate.

The two remaining administrative judges emphasised that the roots assessments conducted by administrative and investigative judges take place in dissimilar temporal dimensions: while investigative judges decide in a more pressing and immediate situation, in which defence attorneys are also more constrained in their opportunities to obtain evidence; administrative judges are more likely to be better prepared since defence attorneys have also had more time. The following response summarises this perspective:

> "*Are our criteria usually coincident? Man, in principle they should be… But sometimes they are not. And many times, it is not due to lack of preparation, or lack of interest, or a careless review: it is because of the brevity of the deadlines… You imagine, a foreign citizen, in the dynamics of these cases… The lawyer, practically, only has time to meet his client when he is already… at the disposal of the investigative court… Many times, in the investigative court the… detention is authorised because the foreign citizen doesn't prove his roots in any way. What happens? When he is already in a CIE the resolution is issued, it is appealed, and a cautionary measure is requested, a few days have passed, the foreign citizen has been able to speak with his family and has already compiled documents… And here we are with his request, that although the personal situation of this man is the same as in the investigative court, a lot of evidence is introduced. Then it is possible that here the outcome is different… but not because the colleague of the investigative court hasn't done a thing… What simply happens is that here the requests come with more abundant evidence*" (Administrative judge 2).

This excerpt highlights that it may not be so much the lack of knowledge of investigative judges when deciding immigration detention that raises concerns on the efficacy of such practices, but the idiosyncratic dynamics of the investigative court environment and decision-making processes. In addition, the fast pace that characterises the work of such courts also appears to be a crucial aspect to be emphasised. In the next part of his response, this same judge introduces other significant aspects:

> "*We judge from a different perspective… because we don't assess the roots from the point of view that the expulsion will be easily executable, but if the execution of the expulsion would mean for the foreign citizen an irreparable damage… In which way do these two perspectives coincide? These two coincide in that the person has roots in Spain… It is like looking at a diamond from different sides, it is the same, but from different lenses… Therefore, it is not so much the lack of preparation… but many times, the circumstances in which the request takes place, in one case and in another*" (Administrative judge 2).

Once again emphasising the different circumstances under which both types of judges make their decisions, in this excerpt the interviewed judge mentions that the assessment of roots also differs in terms of perspective. Specifically, while investigative judges are in theory more interested in the risk of abscondence, administrative judges would be in principle more focused upon the possible damage that an expulsion may have on the defendant and their family. Lawyers also agreed that, unlike cases of urgent cautionary measures or asylum requests, investigative courts handle the concept of roots somewhat better, being more concerned about the swiftness witch which these cases are processed.

Although this may lead to a more indulgent view of investigative judges, it actually reinforces the idea that investigative courts would not be the most suitable for dealing with immigration detention. It appears that there is a conjunction of interrelated factors that lead to the dysfunctionalities surrounding the processing of immigration detention by criminal courts. Ultimately, the problem seems to be related to the idiosyncratic dynamics of such court's processing and decision-making mechanics. With this background, it is now possible to fully focus upon the specific organisational and cultural components that configure the bureaucratically patterned decision-making processes of such courts.

5.9. The penal culture of doorkeepers and the bureaucratically patterned decision-making mechanics of immigration detention

The themes discussed in the previous sections lead to a major conclusion: the mechanics of immigration detention decision-making are substantially determined by the idiosyncratic dynamics of the criminal court, particularly in regards to their organisation and functioning. This means that the dysfunctionalities discussed above are also a consequence of this reality. The lack of expertise and commitment within the criminal court, as well as their ostensible thoughtlessness, are determinant components of such decision-making mechanics. It is nonetheless necessary to make sense of these aspects as a whole, and to do that, it is logical to begin with the most critical theme emerging from the previous analysis.

When asked about the specific decision-making process of immigration detention, defence attorneys complained not so much about the lack of knowledge of the investigative judges as of the swiftness and thoughtlessness of the proceedings. They tended to regard them as a bureaucratic machine largely functional for governmental purposes. This could indeed be one the most significant conclusions emerging from the present research. The following response from one of those defence attorneys is revealing in this regard:

> "*Investigative courts have little sensibility… In the quickest way to get rid of the people. But they don't individualise, that is what they should do, what they should do is to individualise, case by case, that it is the right thing to do… There is always a conflict of interests, between the general interest of the state and the private interests. Then, from my experience, it is very frequent that they go in a hurry, to go hastily, to get the proceeding out of the way… And unfortunately, except in very special cases that they* [the defendants] *have children in Spain… you also find ignorance, many times, from judges… and prosecutors*" (Defence attorney 2).

The main theme described in this response is that investigative courts seem not to individualise cases, which means not considering each case and defendant as carefully as their role as judicial custodians would require. The assertion that they just want to "*get rid of the people… in the quickest way*" is especially poignant. This kind of perspective was very common among attorneys. The following response is another reflection of that:

> "*About the investigative courts, my opinion, a disaster, because there is a lack of knowledge, quite large… it is not so much as a bad practice, but many times their own ignorance, for the little time they have to make a decision, that is almost urgent… They take it very lightly, so,* ***it becomes a little like a machinery, you know, a state machinery*** *… A person is taken that has a series of characteristics, and they don't bother too much and we don't have much time… Except for example… if it is a client that… for any reason already has a connection with me, I can have a lot of documentation here in the office… there I have more time to prepare allegations, to prove roots… Because as a rule, it's like a kind of machinery, a routine thing… so, when you get an immigration detention request it's very difficult to overturn it. Many times, also, the clients call me when they are already detained*" (Defence Attorney 5; emphasis added).

It is explicitly stated in this excerpt that investigative courts seem to act as a sort of "*state machinery*" when deciding an immigration detention request. This is once again linked to the deficit of individualisation and a lack of interest in analysing each case more thoughtfully. Moreover, the concern about the lack of time to properly assist defendants during duty days was also common among defence attorneys. They recognised that when they had prior knowledge of the client, they were more capable of convincing judges and prosecutors of considering the case more carefully. They acknowledged that when they had to be on duty as public defenders their chances were considerably lower because of the time pressures and for not being previously aware of the defendant's circumstances. These remarks from another defence attorney are illustrative of these concerns:

> "*It is not that they don't know… it is that the judge must have it very very clear. Besides, this is all very fast, it is complicated because it is very fast… The police call you at 4 o'clock in the afternoon and tell you, 'You come here at 4:30, I have a detainee'. If he is your private client… you have documents in your office or you have the number of his sister, mother, cousin, or aunt. Then you call and tell them… Then you go to the police station with all the documents and you bring the registration certificate, the passport, this and that. If you take all that the police release him and don't request detention… If it is a duty client, you don't know him, then you get there… you don't know anything… You assist him, they let you talk with him for five minutes… If he lives with someone or has relatives, then you call and the relative brings you the documents… But if he lives alone… he can tell you, 'I have a cousin' and you tell him 'but the cousin has these documents?' and he says 'no, my documents are in my house', 'and you have the key to your house?', 'no'… Then in the court you say it, but no matter how much you tell the judge that he has been registered for 10 years, has had a residence card, has a cousin, has a sister, this or that, if you don't show that in papers it is of no use, he is sent to the CIE. Then, you can go to the administrative court with a cautionary measure… but if the man has been taken from the police station to the court and then to the CIE, it is impossible to obtain that documentation*" (Defence attorney 8).

From this line of arguing it appears that apart from the swiftness and mechanistic fashion of these proceedings, there seems to be unequal circumstances regarding the defence of detainees. On the one hand, it is apparent that those who are able to hire a private attorney are more likely to obtain a better defence. However, this has more to do with the fact that these kinds of lawyers tend to spend more time and effort defending such cases than others who take them on duty. Nonetheless, as one of the defence attorneys explained me, it also happens that those who actually have more roots are more likely to spend more money

when hiring a private lawyer. Besides, as another lawyer also told me, only a small fraction of defence attorneys is properly trained in immigration law, leading on many occasions to legal malpractice. In fact, I was also told that, due to the economic crisis many lawyers left their specialties and started to take on any kind of case, often referring them to their specialised colleagues as soon as the matter got complicated.

Many of my interviewees also acknowledged that since Moroccan detainees are at much greater risk of expulsion than others, avoiding their detention is more challenging. The judicial personnel of the investigative courts of Algeciras also confirmed that, unlike the sub-Saharans, the Moroccans are easy to identify and expel, remaining for only a few days as a detainee within the CIE. Defence attorneys in turn recognised that they prefer not to take on cases involving already detained Moroccans because it is usually almost impossible to overturn the detention decision and avoid the expulsion. This response from one defence attorney illustrates these points:

> "*The Moroccans, that is not only for the agreements, but Morocco is four hours by ship and ships leave every day… then it is very easy to expel Moroccans… It's more for a matter of time… As soon as the expulsion order is ready, if the lawyer is not quick and files the appeal with a cautionary measure, the police in 48 hours, bye… You must move very fast to request the cautionary measure… But the issue is of deadlines, that a Moroccan who has already been notified with the expulsion file in 48 hours they expel him. If he doesn't call me in 24 hours, call me the same day they notified him… and to all this, that you obtain the power of attorney… and that you can do it all. Of course, if they detain you, the notary has to go there, to the CIE, to issue the power of attorney, to be able to introduce the lawsuit… there are many administrative judges who don't accept the mandate that is signed in the police station, for the writ of allegations… Then, everything is complicated, very complicated*" (Defence attorney 7).

The fact that Moroccans are easily expelled has been widely recognised by different actors involved in detention and expulsion proceedings, with the main reason appearing to be the geographical proximity of Morocco to Spain, although this could also be just part of the story. The immigration law enforcement focus upon Moroccans is certainly evident within the aforementioned accounts, which also correspond to the stereotypical image of the Moroccan as dangerous and criminally inclined. This in turn feeds the social construction of the 'criminal alien' as a culturally incompatible individual, a scapegoat to be blamed for the social deficits which plague late modernity.

Following on from this, the last issue raised by the previous interviewee has to do with the formality of obtaining a power of attorney to represent the defendant while they are detained. Indeed, one of the most topical concerns from defence attorneys was related to this aspect. It is apparent that administrative courts are reluctant to accept any documentation other than the power of attorney issued by a public notary or a judicial authority. I witnessed first-hand how defence attorneys struggled with the court clerk to

obtain a power of attorney signed by him. In this case, the court clerk refused to do so and the lawyers with whom I spoke with said that it was sheer stubbornness on his part and that he was not taking such allegation seriously. As a couple of defence attorneys explained me, the lack of this judicial power, which can be issued by a court clerk, results in an additional expense for the detainee in question because a public notary would have to be paid to go to the CIE and issue the required document. This illustrates how a largely insignificant formality can further hinder the already precarious situation of many detainees.

The perspective of defence attorneys is critical and points towards the swiftness and thoughtlessness in which decisions are made by the investigative courts in regards to immigration detention. This in turn reflects a predominantly patterned mechanisation of procedural acts and behaviours and highlights the dehumanisation that streamlined bureaucratic arrangements can prompt and reproduce. Focusing now on the side of the criminal courts, it is necessary to remember that investigative court workers tend to be the oldest in the judicial organisation. This is because they receive a salary bonus for working during day-court days, therefore most of them prefer to stay and continue their careers in such courts until retirement. This means that most of them are not only of a mature age but have also spent most of their career within these types of courts, or even in a single court. Hence, the environment of investigative courts tends to be opaquer than others, and the decisional processes are largely marked by entrenched bureaucratic patterns. In this sense, the following response from a rather young investigative court clerk is remarkable because at the time of the interview she had been working there for less than two years and her previous experience had been within civil courts:

> "*The only thing here is that there is a lot of stress… because a lot of paper comes in, because you have to work very fast, you have to give very quick solutions in order to get the papers out… These are issues that need a quick response because you cannot delay in giving those answers, you have to solve them immediately. That is the complexity that I believe affects the investigative court… The questions that are resolved are a little more delicate, issues of prison… Then, you have to have it very well tied and everything very clear and urgent so that you don't miss any type of evidence… But it is true that the issues here are sadder, because unfortunately, here come drug issues, homicides or robberies, then they are a little more at the state of mind level, a little more painful. Of course, it is not a civil matter that is purely economic… What draws attention above all is the swiftness of the things, which you always have to be very attentive, you have to be there to facilitate the swiftness of the things… In civil courts you can study the case, you can have it on the table and think about it, study it, but not here, here you don't have time for that, you have to have things very clear*" (Investigative court clerk 1).

This statement clearly illustrates the working environment and decision-making dynamics of investigative courts, particularly during day-court days. The need to provide quick responses and advance proceedings in a swift manner are essential features of the decision-making mechanics of such courts. Additionally, unlike other courts, time pressures seem to

make it difficult for investigative courts to consider cases more thoughtfully. In this sense, as already mentioned, court personnel, judges and prosecutors tend to be more attentive when defence attorneys are more proactive and insisting, which is more likely in regards to private practice. In general, the need to provide quick responses amidst a permanent flow of cases, makes it necessary not to spend too much time and resources on each of them. This response from another much more experienced court clerk is revealing:

> "*Here, well ... it is a tense environment because things are not like in a labour court or civil court… Here there are very important things, the freedom, because someone has been arrested… They are things, above all, that also pay you a little more… but it's also because of the pain… that if you make a mistake and send someone to prison and it is not, it was not like that, then you play with the freedom of the man… Then they are all, they are all things of life or death. Yes, in the day-court you have to be continuous… They are issues, very important. They pay you more, but you also sweat more*" (Investigative court clerk 8).

This response further elaborates the idea that investigative courts deal with delicate and distressing matters related to the deprivation of freedom. This means that especially during day-court days, investigative court personnel must make quick decisions about very serious and pressing matters. Immigration detention decision-making must be understood in terms of these dynamics. In this regard, there are two broad themes that spontaneously emerged from the interviews and that were topical: the ineffectiveness of immigration detention and the propensity to authorise it. Regarding the former, most of my interviewees, shared the perception that detainees are usually released just a few days after being detained. This means that within investigative courts it has become well-known that immigration detention is essentially ineffective. Nonetheless, this does not seem to be a real concern for court personnel, since they do not consider it a reason to stop issuing detentions, or at least to reflect upon the issue. The following response from a court clerk is revealing:

> "*Then we are informed that the expulsion has been executed or… we are often told that, if in the maximum period that is granted they have not been able to conclude the proceeding… because, sometimes, it is not easy… there are people who say that they are of a nationality, but that country doesn't recognise them as a national. That is to say, there is no choice but to release them. And they remain undocumented in the country, until the police can arrest them again, because in reality that doesn't give them regularity either, that they have not been able to expel you, they don't give you a document that legitimises you to stay*" (Investigative court clerk 3).

From these remarks it is possible to see how court personnel appear to be aware of the general inefficacy of immigration detention. Moreover, this interviewee even expresses her concerns about the situation of irregular immigrants who are neither expelled nor regularised and remain in Spanish territory in what Jarrín (2012) has called a legal limbo:

> "*For those who are in the 'legal limbo' their situation of irregularity has been revealed. Subtracted from the diffuse mass of 'the nobodies', represented by the 'illegals', they have been identified and touched by the Law, and nevertheless, this touch… instead of recognizing them as people, reinforces more than ever their condition of marginals. The*

> *paradox of the Law determines that the irregularity is constituted in a structural, permanent and chronic fact, sentencing them to live in a permanent state of exception*" (Jarrín, 2012: 312).

Judges from Courts of Appeal are also aware of this circumstance. For instance, as one of them told me, there is a paradox in this regard because immigrants who come from more institutionalised countries are more likely to be expelled than those from countries with more precarious institutions. The mentioned practical difficulties to execute an expulsion are further illustrated in the following remarks from an investigative court clerk:

> "*There comes a man from Algeria, the man arrives in a boat that crossed the strait… and he says he is from Algeria and is named in such way. But you go to the embassy, to the consulate… 'this gentleman is not from here, he must be from Tunisia or from Libya, but not Algeria'… Well, to the street and he cannot be expelled and they stay here, selling handbags or committing robberies, everyone does what they can… With Morocco it works relatively well. Now, Algeria doesn't document anyone; the Nigerians are very complicated; of Sierra Leone, very complicated… Because how the police files of those countries work, in the middle of the jungle… Once they get here, it is difficult… accommodation, eating, dressing, if they make a family then they are in school, they get sick, they go to a hospital, it is a cost. In the long term it is a high cost, but… expelling them also imposes a very high cost because… a migrant who has to be taken, perhaps to Côte d'Ivoire… the police have to go in a plane, plane tickets, which are not cheap, and travel, three people there… The detention is ordered before that proceeding is concluded and when the police fail to find out the identity of those people, the police request the immediate release*" (Investigative court clerk 6).

This response not only reflects the practical difficulties that executing an expulsion entails, but also that court personnel may know to which countries expulsion is seemingly unfeasible. Indeed, the reference to such countries was common among my interviewees. As it seems that the ineffectiveness of immigration detention in these cases is mainly due to the lack of consular identification, it could be possible to ascertain in advance, or at least have reasonable doubt, that the expulsion to certain countries will very likely not be feasible. Nonetheless, this does not seem to be a reason for them not to order a detention. The following response from an investigative judge illustrates this point:

> "*What happens is that I find it out later. It is that normally there, the vast majority of the time, what they bring you are people who already have a notified expulsion order and who have not gone voluntarily, or people against whom at that moment an expulsion proceeding is initiated. So, if all the requirements that I have mentioned before are given to you, I detain him… If it is going to be possible to expel, the police communicate it to me… If you cannot expel him, then the police always communicate it, they find out they cannot expel him, so, they tell me and he is released… Of course, at that very moment we don't know, because… when they bring him is when the police begin to make arrangements to check if the country of origin recognises him as such and it will be possible to send him… Then of course I don't know that when the proceeding starts, I find it out later… even if you later know that they probably cannot be expelled, that is not an argument that I can use to not detain them*" (Investigative judge 3).

The last part of this statement is the most remarkable because the interviewee is acknowledging that even if it is probable that the defendant will not be expelled, that is not

a reason for judges not to detain. It appears that the main motivation for them not to consider this circumstance is that they become certain about it only afterwards. Court personnel of the investigative courts of Algeciras also agreed that most detainees, around 95%, are released and not expelled, but that they still have to detain because that is their job and the immigrant must also be identified. This means that within immigration detention proceedings the purpose of detaining and expelling is valued by judges more than an individual's freedom of movement. Paraphrasing the Blackstone's formulation in regards to this matter, it can be assumed that for judges involved in cases such as these it is better that ten non-removable persons be detained than one removable person escape.

Defence attorneys have in turn contended that the foreseeable unfeasibility of an expulsion must be considered by judges and that they should not order a detention whenever it is likely that the expulsion will not be feasible. These remarks from a very experienced lawyer are illustrative:

> "*Most sub-Saharans, in a very high percentage, are released… If the expulsion is not going to be executed, and you know it beforehand, as you really know, because the percentage of non-executions in cases involving the arrival of sub-Saharan migrant boats is around 100%. Then all these deprivations of freedom are meaningless. And that is what I say to the judges, 'look, sir, judge, the police's own instruction says that you should not detain and if there is a doubt, it says that you consult to see if the nationals of these countries can be expelled or not'…* [and they say] *'no, no, no, if they could not expel him, they will release him in four or five days' and I say, 'look, why he has to be four or five days deprived of freedom', 'and where will they be? There at least they give him food and a bed'. That is very little respect for the freedom of a person*" (Defence attorney 12).

This is precisely the argument that judges appear to deem invalid despite its explicit recognition within the prosecutorial and police guidelines. This same respondent also argues that investigative judges are in general more cautious when sending someone to prison than to a CIE, because they do not really know what the conditions of CIEs are like. This would mean that the deprivation of liberty of certain individuals may be considered more serious than that of others, entailing another selective mechanism of biopolitical regulation (Balibar, 2006; Campesi, 2012).

Furthermore, I found that there was variation regarding the periods of detention issued across judges. It emerged that the rationale behind this disparity had to do with the underestimation of the seriousness of this kind of deprivation of liberty. An immigrant can be detained in a CIE for up to sixty days, but it is at the discretion of the judge to decide the actual period of detention or to extend it at the request of the police. When I asked judges and clerks about this aspect, some said that they issue detentions for a period of thirty days, others for forty, a few for sixty days and one said for fifteen days. Explanations for this were quite curious, for instance, the judge known for being more thoughtful said

that she does not like to issue the full period, but thirty days. The judge who prefers to order fifteen days argued that this is "*to force in some way that the police quickly get the documents of the detainee to execute the expulsion*", and that if he ordered sixty days of detention the police "*will relax, but these are people who are effectively suffering the consequence of this. So, if they will be expelled, it is obviously better to be expelled in fifteen days than in sixty*". In contrast, a judge who prefers to order sixty days said this:

> "*My experience is that the police don't want to have anyone for sixty days… the police want to have them detained for the minimum time necessary… there is no special interest in having the foreigners detained… The problem if I give it for forty days is that, if there is a problem in the documents with the country of origin, if there are problems with the flight tickets, the police, before the deadline expires, will request an extension, then I will have to pass it to the prosecutor, then I get it back, it's a mess. If for example I saw that the police take fifty-nine days, even knowing that they cannot expel him, then I would say it is not justified. But my experience is that the police reply you immediately. If they can expel him, they immediately tell me, 'Look, in ten days we will expel him, cease the detention'. And if they cannot expel him, they will let me know. I don't see that they wait until the end of the sixty days. So, for that reason I don't see reasonable to limit the time to the police… To limit the time is to control the police, in this case I don't consider it necessary to control the police*" (Investigative judge 3).

These differences of opinion regarding the need to control the police are noteworthy and reveal the extent to which investigative judges may define the periods of immigration detention in disparate ways. This also demonstrates that judges may either not be fully aware of the issues surrounding the behaviour of the police in this matter or they may not be very conscious of their role as judicial custodians.

In sum, the legal limbo that represents being an irregular immigrant who is neither expelled nor regularised reinforces the social construction of the 'criminal alien'. It perpetuates the marginalisation of immigrants, pushing them towards the outskirts of society in which a life of crime appears inevitable and encounters with law enforcement are probable (Melossi, 2003). This also reflects the extent to which immigration detention may be working not so much as a device for the effective enforcement of expulsion, but as a mechanism of surveillance (Bosworth, 2008; Bosworth & Guild, 2008) and as punitive tool fulfilling functions of general deterrence or biopolitical management (Barone, 2015; Silveira, 2012; Silveira & Rivera, 2009; Stumpf, 2013). What is more concerning, however, is that these consequences are, as evidenced by the present research, a by-product of the bureaucratically patterned decision-making mechanics of criminal courts. They not only seem to prefer detaining an un-removable immigrant than freeing a removable immigrant, but also appear to consider the deprivation of liberty of a foreigner in a CIE less serious than that of ordinary jails. The next section will further develop these remarks.

5.10. The case of just-arrived immigrants

From the previous analysis, and from my own observation, it appeared that there are in practice two types of immigration detention proceedings: one for just-arrived immigrants, usually by sea in small boats (commonly known as 'pateras' in Spanish) and one for those already within Spanish territory. The former will be discussed in this section and the latter in the next. This is a crucial differentiation because the majority of the detainees within CIEs are immigrants who arrive in small boats. Therefore, the noticeable ineffectiveness of immigration detention, according to the data described above, is mostly due to the implausible nature of expelling these detainees. However, what is more relevant is that they embody the typical case of the immigrant who has not committed a crime but is nonetheless required to go through a proceeding with criminal justice characteristics, as well as being subjected to custody within a facility of a 'punitive nature'.

The immigration detention proceeding regarding just-arrived immigrants is mechanic, bureaucratically patterned and dehumanising. During my observation of the day-court, I was able to witness the way in which the investigative courts handle these cases. Immigrants who arrive in Spain are brought to the court and remain in custody in the cells. Since there are usually around fifty people, the court facilities end up being insufficient to accommodate for everyone. These people are identified with numbered bracelets and wear donated clothes delivered to them by the Red Cross on their arrival at the port. Minors should not legally be brought before the court and pregnant woman and injured people await in a hospital until they are authorised to be processed. Defence attorneys are assigned a given number of defendants and are expected to meet with their clients prior to the court hearing, although this is not always the case.

Immigrants are brought into the hearings room in groups according to their assigned defence attorney and stand in line at the entrance of the room guarded by several policemen. Inside the room are the judge, the immigration prosecutor, one or two court workers, the interpreter, the defence attorney and sometimes law students are permitted to be present. Immigrants pass one by one and take seat in between the defence attorney and the interpreter and in front of the judge, the prosecutor and the court staff. Then the judge starts the hearing by explaining the general grounds of the proceeding before asking a set of already structured questions. However, this procedural act is essentially patterned and mechanic, intended simply to comply with the legal formalities. For instance, one of the investigative court clerks I interviewed explained it quite clear:

> "*Imagine if we take a full declaration, one by one… So, the questions are always the same: if he has entered illegally in a small boat in the national territory and if he has a residence or work permit in Spain, if he has relatives in Spain or in the European Union… That is, then already, as the questions are pre-established, the lawyers also say that 'the questions we want to formulate are this, this and that' and then, one by one, they are informed of their rights, with the interpreter, and well, then… each one, to answer them, to those questions, before the judge and his lawyer*" (Investigative court clerk 9).

This explanation depicts the procedural mechanics of investigative courts in deciding the detention of recently arrived immigrants. It confirms that the formulated questions are routine and pre-established and that the whole procedure is largely pre-determined. The most significant aspect, nevertheless, is that this respondent implicitly acknowledges that making a full and thoughtful declaration would hinder the quick processing of the case. Similarly, an investigative judge that I interviewed a few days after he had to deal with a case of immigrants who had arrived on small boats, said the following:

> "*In this case it is different… The procedure is different when he is found in the national territory without documentation, that can justify… certain roots, that can justify that he is working, even if illegally… Those who enter on a small boat, it is clear that they will not comply with anything, because they don't even have papers, they have tried to enter illegally. So, of course, the questions the court asks them are only, in principle there are two: if it is true that they have entered illegally in the boat, which all answered 'yes'; and if they have a work or residence permit, to be in Spain, which they obviously didn't have because they would not have had to enter that way. Someone could say, 'I was here and I went back to my country, I don't know when.' But everyone said that they did not have it. And then the lawyers try to focus the questions they ask on the possible right of asylum that could correspond to them, if they are being persecuted in their country, why they left their country. Some of them said they were homosexuals and that in their country were sentenced to eight years for homosexuality and that's why they were afraid of being persecuted, etc… questions that could have been considered impertinent, because ultimately I'm not going to consider or process the right of asylum, but well, as they were just three or four questions about the same thing, because afterwards they want to process the asylum, they were permitted*" (Investigative judge 1).

This response is particularly interesting because it explicitly establishes that the proceedings for those who arrive on migrant boats are different to that of those who already reside in Spain. In addition, the interviewee confirms that the questions are pre-established and that they are largely formulated as a mere formality given that the answers tend to be the same in most cases. Furthermore, this judge acknowledges that he does not consider asylum plaints to be his responsibility and that he allows attorneys to ask related questions just as some sort of generous concession. The mechanistic process for the detention of recently arrived immigrants is further evidenced in the following reasoning of an investigative court clerk:

> "*In the case of the migrant boats, always… the decision is favourable for the detention because they have no known domicile, nor have roots. And then many times, what happens is that they give you an identification and that identification is not of that person, really. It is very difficult to identify them, and of course, in the face of the difficulty of identification,*

> *the difficulty of having a known address for its location, the usual thing is to be favourable to the detention request and the subsequent expulsion*" (Investigative court clerk 1).

When considering an immigrant's lack of roots and a known domicile, the reasons argued by this court clerk for detaining recently arrived immigrants seem to be reasonable. However, this once again ignores the fact that the purpose of detention is to ensure the execution of an expulsion, which means that if it is likely that the expulsion will not be feasible the detention becomes unjustified. Nonetheless, as explained above, this does not seem to be a valid reason for judges, prosecutors or court personnel.

The main feature of this proceeding is its swiftness, determined by the need to conclude with the interrogation and rapidly continue with the next detainee. Indeed, during one hearing I observed that the judge became irritated with the interpreter because he was not hurrying the immigrant's declaration. This proceeding was so routine that any individualised allegation could generate setbacks. For instance, during one particular hearing, a defence attorney alleged that one of his defendants was minor. This led to the abrupt suspension of the hearing, with the judge asking all of us to leave the room and wait a few minutes outside. It was apparent that the judge, with her assistant, had to change the written template of the decision to include and resolve such allegation. Nonetheless, it was also striking that in an informal dialogue between the lawyers they ironically complained that court workers "*should at least mind their manners*". This phrase alluded to the fact that the decision to detain had already been made in advance for everyone.

It was apparent that court personnel, including judges and prosecutors, were uncomfortable and unhappy at dealing with this kind of proceeding. In fact, during my interviews some of them sometimes said that they had been lucky to avoid dealing with such cases lately. These proceedings are seen as stressful and causing organisational difficulties. The following statement from another court clerk illustrates this point:

> "*It is processed as a kind of chain, in which the police bring one by one, or two by two, for a declaration, and of course you must have an interpreter, we have there a lot of interpreters, a lot of police, a lot of lawyers. So, that creates a lot of problems of management… a lot material and personal resources are needed… The holding cells which are for twenty people, but if you suddenly have to put eighty that generates a problem: feed them, bring support police officers. Besides, they are also people who are not criminals, you cannot mix them with criminals either… So, that is, all this generates some declarations that you have to take in a day, maybe you have eighty declarations. These would be the management problems*" (Investigative court clerk 10).

This statement reflects the extent to which dealing with the arrival of a relatively large number of immigrants is problematic for investigative courts. This explains the increased swiftness and patterned mechanisation with which court personnel attempt to advance the processing of these cases. Moreover, this respondent also reflects on the fact that these

immigrants are not criminals, but that it is difficult not to mix them with those who are arrested for a criminal prosecution. These procedural features, which may fit a bureaucratic decision-making model that prioritises efficiency over thoughtfulness, lead ultimately to the dehumanisation of defendants. The following response from the court clerk that had been in office for just a couple of years at the time of the interview is demonstrative:

> "*I feel this causes us grief, that these people have had to go through this so bad situation and then also bad because they have an uncertain future and finally, also bad, because this is a cost for Spain, a useless cost… it is a formality, but what else can we do? This also represents a personal and material cost for us, for an end that is not met… These things are a bit too automatic*" (Investigative court clerk 1).

Reciting the own words of this court clerk, "*these things are a bit too automatic*". Although the ways in which these proceedings are handled may seem to favour efficiency and cost-effectiveness, it is worth asking: what is the purpose? Immigration detention doorkeepers are supposedly there to manage the entrance to the 'radiance of the law'. If the law states that the purpose of detention is to ensure the execution of an actual or eventual expulsion decision, why is it that so many immigrants are detained but not expelled? Therefore, what is the actual purpose of immigration detention? These are structural and even political questions that go beyond the scope of the present study. However, this research has already proposed some answers about the role and purpose of immigration detention doorkeepers. The following two sections will complete this Kafkaesque picture.

5.11. Regular immigration detentions and criminal justice bureaucratisation

The previous section has analysed the mechanistic fashion of the bureaucratically patterned decision-making process of immigration detention for just-arrived immigrants. I will now focus on the second type of immigration detention proceeding, which can be called *regular detentions*. In general, while the detention of just-arrived immigrants is automatic and thoughtless, in regular detentions it is more clearly tainted by a criminal justice bias and more affected by the criminal law identity of the intervening courts. This is largely so because in most of these cases defendants are brought before the court for both a criminal charge and a detention request. For instance, as explained by one investigative judge, "*Most of them come here arrested for a crime and coupled with that the detention request. That's the usual. Except, the boats*" (Investigative judge 3). This means that there could at least be a procedural juxtaposition of immigration and criminal matters.

In the previous section it was evidenced that just-arrived immigrants are detained as a general rule due to their lack of roots or known domicile. This might suggest that immigrants who already reside within the country may not be detained; however, this is

not the case. In my interviews with judges and clerks, they agreed that detention is authorised in most cases. Their discernment was that in most cases the defendants are not able to prove their ties with Spain. The judicial personnel of the investigative courts of Algeciras also asserted that they use to authorise the detention and one of them even affirmed that they do it in 99.9% of the cases. In this regard, the confidence that judges and court clerks have in police work is striking. This response from one judge is revealing:

> "*Normally, let's see, normally, not in this court, but in almost all, the usual tendency is to detain, but why? If I am a foreigner, I came here, I've been in Malaga for 5 years, I have no roots of any kind, I don't have. I'm not going to stay waiting in an apartment, in a room until the police come to take me out on the plane, no. It's the same for me to go to Barcelona than to go to Madrid, so what I do is get out of the way*" (Investigative judge 1).

It appears that judges may tend to share the presumption that most immigrants brought before them do not have roots and will flee. But this also suggests that judges seem to assume that the police will only request detentions for immigrants who do not have roots. As one court clerk put it, "*when the police bring an immigrant, normally, in 99% of the cases, is because the detention is admissible. They don't request the detention carelessly*" (Investigative court clerk 9). Similarly, another clerk said that there are very few cases in which the requirements for not detaining are accredited. Nonetheless, the crucial aspect that most defendants are also brought before the court with criminal charges must be highlighted. Judges in these cases not only decide upon immigration detention, but also upon the initiation of a criminal proceeding. This leads to new decisional scenarios because the eventual expulsion of a defendant may interfere with the criminal prosecution. Hence, the defendant can either be immediately sentenced through a plea agreement or the proceeding will be suspended, with authorisation of the prosecutor, to favour the expulsion. This aspect will be discussed in the next chapter, but it is necessary to explain here how this affects immigration detention decision-making.

The defendant's legal ambivalent nature, due to the superposition of their deportability and criminal prosecution, poses a complex classificatory challenge for investigative courts. Is it possible for them to discern between these two different characters cohabiting within the same person? Beyond this metaphoric dilemma, in practice, a clear differentiation between the two proceedings is unattainable. From my observation, while both are formally treated as different files, they take place in the same environment and with the same judicial actors, one immediately after the other. Besides, both proceedings are intrinsically connected because the detention is only admissible if the criminal case had already been cleared, in one way or another. Ultimately, what matters most in this regard is that investigative courts are conceptually and practically intended to

deal with criminals. For defence attorneys this is not only evident, but also problematic. The following response from one of the most experienced lawyers is revealing:

> "*Well, I think they have the idea of… I think they have the person in front of them prejudiced. Since they are very used to working with criminals… well, I think that role, they apply it to that person… then I think there is a prejudice there… they usually don't believe what the bad guys tell them, among other things because they have the right to lie* [being ironic]*... and then when a foreigner is put before them, they don't believe him either*" (Defence attorney 12).

These remarks suggest that, since investigative courts are accustomed to dealing with criminal suspects or convicts, many of whom are involved in serious crimes or with large criminal records, they could be prejudiced against immigration detainees. As explained above, courtroom workgroups operate in environments characterised by relative uncertainty. Therefore, they may develop causal attributions based on stereotypes emerging from individual features that are visible or tangible (Albonetti, 1991; Carroll, 1978; Fontaine & Emily, 1978). This seems to be the case in this regard, with the following response from an investigative judge being particularly illustrative:

> "*My experience is as follows: normally the detainee, the police have arrested him first, he has been in the police station, he has been assisted by a lawyer at the police station. If he is a person who has roots in Spain and has papers and is registered, he will always have acquaintances who can go to his house… The one that really has roots, the day that comes to me, the lawyer comes with all the papers…. It is true that it has ever happened to me, because* ***when you have been a long time in this you have some experience when it comes to discerning who is lying to you and who is telling you the truth****… If they don't bring it on the same day, never, as far as I remember, they never gave it to me afterwards*" (Investigative judge 3; emphasis added).

The interviewee explicitly acknowledges that she uses her intuition to ascertain whether someone is lying or telling the truth. Hence, no matter how profuse and documented a case could be, judges may still make use of their intuition in order to come to a decision. On the other hand, this response once again reflects the confidence that criminal judges seem to have in police work, affirming that the requests for detention are proposed only in those cases in which the defendant has no roots.

An important feature of criminal justice dynamics is the close and largely cooperative relationships between their actors. The relationship between investigative courts and the police, in general, must necessarily be close and supportive because they carry out the bulk of judicial tasks together. It is thus not surprising that these courts have a tendency not to excessively inconvenience police officers by dismissing their work too frequently. This also seems to be the case regarding immigration detention. Indeed, these close relationships can be evidenced by the fact that the police in many occasions make requests to investigative courts by fax, coupled with previous or simultaneous telephone

contact. Meanwhile, defence attorneys are required to present formal plaints, be insistent and expect delays. In this regard, the following response from an administrative judge is quite significant because he had also previously worked as an investigative judge:

> "*There is a connection and then there are other things, uh, I have also been an investigative judge. Keep in mind that this is requested by the police… and the police have a relationship with the investigative judges, which sometimes is, especially in the small cities… I mean, a little more or less, that if you tell the police that the detention is not authorised, you know, the police say, 'How come! We have worked for nothing, and this and that!' I mean, there are other things that come into consideration, that I prefer not to say… They have a tendency, they tend to follow the criterion of the administration… they have a tendency*" (Administrative judge 1).

Despite his reluctance to expand upon this matter more explicitly, this judge did suggest that there is complicity between the police and the investigative courts. However, he did explicitly say that such courts tend to follow the criterion of the administration. In consequence, the close cooperative relationships between the police and criminal courts are a prominent feature of the immigration detention decision-making dynamics. This clearly is an idiosyncratic element of the criminal law identity of such courts, which would not be found in other types of courts. Aside from this, the immigration detention decision-making process is also explicitly affected by the consideration of criminal aspects. It seems that those brought before the court with criminal charges/records, are much more likely to be detained. The following response from an investigative judge is demonstrative:

> "*It is assumed that for having committed a crime, there are reasons to flee, that is, no one wants to be sentenced and imprisoned. So that is a sign, that… you will try to leave my country, to try not to be located, so that you cannot be judged, you cannot be sentenced. About that, it is more or less the same criteria that we use to put someone in prison. If you are charged with five years of jail, then the most logical thing is that you don't stay at home waiting for them to come and notify you… So, it is not because you have committed a crime that you will be expelled, but because you have committed a crime it is easier for you to try to prevent us from finding you*" (Investigative judge 3).

This statement confirms that judges cannot dissociate the criminal from the administrative dimension and that the criminal aspect is a determinant of immigration detention decision-making. Specifically, a criminal charge or record can often be considered by a judge to be a negative indicator that makes detention more justifiable. Nonetheless, there is an even more critical implication of this circumstance, which is the potential use of immigration detention as a substitute for pre-trial detention. When a criminal proceeding is suspended in favour of expulsion, the criminal charges are not dismissed, meaning that the defendant is still officially considered a criminal suspect. As will be seen in the next chapter, from the perspective of an investigative judge authorising the expulsion could mean releasing the defendant with impunity. Consequently, authorising their detention in a CIE can be a sort

of compensation. The following response from a defence attorney highlights the extent to which judges may in practice substitute one kind of detention for other:

> "*The judge, when there is a crime, which is a criminal issue, and the administrative issue, which is the expulsion, it has happened to me regarding the criminal matter,* [they order] *provisional freedom, which means that you are in freedom and will be called to declare in a trial, but you are free. But regarding the administrative issue, proposes, that is* [the judge] *authorises the detention… it has happened to me, that they have ordered it. He was an undocumented person, they gave provisional freedom with respect to the criminal matter but authorised the detention*" (Defence attorney 6).

This idea was common amongst defence attorneys, and as one of them said, immigrants with criminal charges are more likely to be detained because they are considered by the courts as "*further evil*". Besides, it seems that in the last years the police have increasingly been using immigration detention for irregular immigrants with criminal charges. This idea was also shared by defence attorneys as the following response will illustrate:

> "*In my experience, in practice, the police request the detention when there is a crime, always. Or when it is for example a person who has been here for a short time, has no relatives, has no roots, perhaps; but, especially when there is a crime… when this person, who has been here a short time, has no roots, has no family, has no documentation, doesn't carry a passport or a document to show. Then, it is not surprising the detention is requested… It has also changed, at first they used to request detention for almost everyone… now normally the police execute expulsions permanently, but request the detention if there is something else, an already enforceable expulsion or the commission of an act*" (Defence attorney 8).

These remarks reinforce the idea that immigrants with a criminal charge are more likely to be detained, although it also seems that they are becoming the preferential target for detention. This raises the question of whether the police could be using crime control to detect irregular immigrants and enforce immigration law. In one case I observed how an immigrant was brought before the court for a criminal charge and became subject to an immigration detention request as part of an expulsion proceeding. In practice, the criminal case was largely insignificant and what mattered most was the expulsion proceeding. However, defence attorneys were not convinced that the police intentionally use crime control as a guise to enforce immigration law. It seems to be more a matter of opportunity, without ruling out that the police, as noted in the literature review chapter, may focus more upon certain groups or carry out ethnic profiling in their regular crime control tasks.

Prosecutors seem also to consider that detention should be directed to those deemed more dangerous or criminal. When I interviewed a prosecutor just after an immigration detention hearing in which he opposed the police request, he said the following:

> "*In my opinion we have to authorise the detention of people who are going to be expelled, if I don't see a particularly harmful individual, I oppose… What cannot happen is that an almost insignificant individual, I mean, harmless, like the person that they brought us this morning, be expelled; with the personal cost that this could have for the person who is*

> *going to be deprived of freedom… and the economic cost that it has for the Spanish State. I think… these resources and this suffering must be reserved for people who are particularly harmful. What you cannot do is to expel, for statistical reasons, the first one you find. And the truth is that we all have that idea quite clear*" (Regular prosecutor 1).

This reasoning clearly illustrates the idea that detention must be reserved for criminals, or "*particularly harmful individuals*". Furthermore, the interviewee recognises that detention is ultimately a "*suffering*" and that it brings about personal and economic costs that must be spent accordingly. The main conclusion from these remarks is that criminal court actors also assess immigration detention in terms of its punitive adequacy. It is a pain that shall be imposed only upon those considered more criminally prone or dangerous. These findings corroborate the policy image that most detainees in CIEs are criminals, although in practice most of them actually are recently arrived immigrants whose expulsion is unfeasible. However, aside from these cases it is apparent that the police tend to request immigration detention mostly for irregular immigrants who also have a criminal charge or criminal records. This is consistent with both arguments of a crimmigration turn (Brandariz & Fernández, 2017) and a managerial turn (Brandariz, 2016a; Fernández & Brandariz, 2016): there is a particular focus on detaining 'criminal immigrants' coupled with a preference for expeditious and cost-effective expulsions (express expulsions, expulsion of Moroccans).

It also appears that investigative courts tend to follow what the police and the administration say, routinely accepting their detention requests. This seems to be the consequence of the idiosyncratic criminal justice cultural dynamics that favour collaborative relationships between involved agencies (Blumberg, 1967; Eisenstein & Jacob, 1977; Eisenstein et al., 1988; Sudnow, 1965), as well as the prevalence of criminal connotations regarding the labelling process of irregular immigrants (Aliverti, 2012; Sklansky, 2012, Stumpf, 2013). This is operationalised through a mechanised and bureaucratically patterned decision-making process, driven by the need to speed up the flow of cases and provide quick solutions amidst a largely pressing environment.

5.12. The useless appeals pathway

The last relevant theme regarding immigration detention concerns the subject of appeals. Against the decision of investigative judges, both parties (the prosecutor and the defendant) have the right to propose a reconsideration plaint before the same judge, or an appeal before the Court of Appeal. These judicial remedies can be proposed separately or jointly, but in the latter case the reform must be resolved in the first instance. In theory, these legal remedies add another layer of judicial oversight, giving a new opportunity for defendants to introduce evidence that was not previously available or to make new

allegations. The defendant therefore has the chance to make the doorkeeper reconsider their original decision and allow entry into *the ways of the law*. Moreover, they also have the chance to access a second doorkeeper, authorised to revoke or modify the decision from the previous one. However, investigative judges rarely change their own opinion and modify their original decision. This was the view of most defence attorneys, who considered that only in very exceptional cases, with persistence and outstanding effort, would investigative judges change their own decision. As one lawyer said:

> "*You can appeal within the criminal sphere… but if you have been detained they will never, it is very difficult, that they will uphold a plaint for reform or appeal… and that* [the appeal] *will not get to the court on time… and the reform, as it has to be resolved by the same judge who has detained… he will not generally change his reasoning. Unless he would tell you, 'If you bring this document to me, you tell me that you can get it to me in two days, I uphold the plaint'… but that is few cases and certain judges because most judges don't give a shit*" (Defence attorney 3).

The idea expressed in these remarks, which was shared by most attorneys, is that investigative judges rarely change their original decision. It was also noted that appeals before the Court of Appeal tend to be decided after the defendant has already been released or expelled. Immigration prosecutors were also aware of these circumstances, with the following considerations from one of them confirming this: "*Reform or appeal: reform, to be resolved by the same judge who has issued the decision, which in general is dismissed because the judge normally doesn't go against his own criteria unless documentation is presented that was not presented on the day-court day*". Consequently, from the perspective of the defence it appears that proposing a reform appeal tends to prove futile.

In regards to appeals before the Court of Appeal, the main problem seems to be the loss of time that the processing of these plaints entails. Defence attorneys shared the concern that investigative courts take too much time to resolve, during which the defendant may have already been expelled. This happened in the case of one defence attorney who explained to me that as he awaited a response from the court in regards to his plaint, they extended the detention period of the defendant in question at the request of the police and even authorised the expulsion of the defendant for a later date. In the end, the court reached a decision and resolved to dismiss his plaint after the immigrant had already been expelled.

A subsequent problem with this situation is that an eventual appeal would no longer make sense, given that the defendant would have already been expelled or released by the time the judge is ready to decide. Indeed, in my interviews with judges from the Court of Appeal, the most common theme was precisely that in most cases, when the appeal finally gets to their desk, the defendant had already been expelled (or released). Indeed, one appeal judge said that in his experience this happens in 90% of the cases. The consequence

of this is that the plaint no longer has an object and a decision on the merits of the case becomes unnecessary. This response from one Court of Appeal judge is illustrative:

> "*The appeal comes, against the authorisation to detain a foreigner, for his expulsion from the national territory, when the decision is repealed, and the appeals comes to you, the foreigner has already been expelled… a letter comes from the police station, that the man is going to be expelled, or sometimes it also says that its expulsion was already materialised, on such day, in the flight of Iberia. And we have to resolve something that is no longer here*" (Court of Appeal judge 5).

As this judge expresses at the end of his remarks, this predicament puts them in the position of resolving a plaint regarding someone who is no longer residing within Spanish territory. Since the appeal no longer has an object, Court of Appeal judges tend to simply confirm the original decision. Nevertheless, at the time of my fieldwork the persistence of this situation had led defence attorneys to change their strategy and directly propose the appeal and not the reform plaint. As one of the most experienced lawyers told me:

> "*Now we are recommending… I did it already in the December patera* [a case of a migrant boat]*, directly appeal… to effectively not give the judges of the Court of Appeal that excuse… that the appeal has lost all its object, therefore they no longer had to resolve. Now the judges must resolve, because as we directly appeal… Then the recommendation that we have, is directly appeal, because the* [investigative] *judges are not going to reform*" (Defence attorney 12).

This new defence strategy assumes that proposing a reform before the investigative courts makes little sense and is ultimately a waste of time. Although some defence attorneys asserted that in some cases they have convinced judges to change their decision, the general consensus was that the direct appeal is more convenient. Court of Appeal judges seemed to give credit to this new strategy and one of them explicitly recommended that defence attorneys present the appeal directly so that it would get to his desk promptly. Beyond this procedural predicament, Courts of Appeal seem to have a tendency to dismiss the appeals and ratify the repealed decision. This has been largely attributed to the conceptual and practical incompatibility between immigration control and criminal justice. For instance, one Court of Appeal judge acknowledged that they confirm the decisions of the investigative judges in 90% to 99% of the cases, justifying this pattern in this way:

> "*We are bounded. For example, the reasons that lawyers argue… the adequacy of the CIE to house inmates… What happens is that these issues are not debatable here. I can analyse if the judge's order is correct based on the file that has been initiated. So, I don't have to go and assess if the CIE meets the requirements or not, that's an administrative matter… I cannot get to know, for example… if the CIE has adequate infrastructure, he should allege that before the administrative court… not to me. They are alleging to me that the detention will not be useful… because the return to certain countries, below the Sahara, they won't be accepted, with what the expulsion will not be executed. All these problems are meta-legal, they are not problems that I can assess, I only assess the legal adequacy of the detention for the return, not if later it will not be executed… The truth is that the reasons that they raised are humanitarian, which have little to do with the function of a criminal judge*" (Court of Appeal judge 1).

The legal purpose of detention is once again ignored in practice, this time by the Court of Appeal. It is widely confirmed that the feasibility of the expulsion is not considered a valid argument to deny a detention request. As this interviewee said, such allegations have little to do with his function as a criminal judge. The truth is that such an analysis would require significant effort on the part of judges and inter-institutional cooperation from court personnel. Criminal courts do not seem predisposed to, or even capable of, spending more time to individualise and be more thoughtful when analysing each case. Bureaucratically patterned and mechanised decision-making processing is an idiosyncratic feature of the criminal court's dynamics and organisational culture, and such a model is inherently incompatible with individualisation or thoughtfulness.

The decisional mechanics of immigration detention are also marked by a judicial *esprit de corps*. As one Court of Appeal judge put it, it is not that they confirm the decisions of the investigative courts routinely, but "*as the work is well done, there is no choice but to confirm it*". However, another judge told me that they are conscious of the problems surrounding the reasoning of investigative judges within their decisions; though they tend to justify these setbacks because such decisions are made under pressing circumstances. It seems that for criminal courts the goal of maximising institutional benefits while minimising organisational concerns (Chambliss & Seidman, 1971) is more important than pointing out someone's error or acknowledging an institutional fault.

5.13. Summary: The penal character of immigration detention

Coming back to the questions posed at the beginning of this chapter, the present analysis has shed light upon aspects such as the criminalisation of immigration detention defendants, its decisional determinants and procedural dynamics, as well as the meanings attributed to such a measure by criminal court actors. In the first place, the inherent inconsistencies of immigration detention decision-making have been evidenced through the numerical data that show that a large proportion of detainees are not expelled. This means that the legal purpose of immigration detention, which is ensuring the effective execution of an actual or eventual expulsion order, is not being accomplished. This predicament has been acknowledged by the police; however, the inefficacy of immigration detention raises questions regarding the role of the judicial authorities. Taking a look at the decision-making practices of investigative courts and criminal Courts of Appeal could help to explicate the circumstances and particularities implied in such questions.

Following Kafka's description, criminal court actors (judges, prosecutors, court personnel and defence attorneys) have been conceptualised as law doorkeepers. Such a

categorisation is based on the idea that they have the power to manage the entrance to the law, which is described as emitting a 'radiance which streams, inextinguishable' from the gateway (Kafka, 2009: 153). Nonetheless, the role of these doorkeepers has been framed within the decision-making organisational and cultural dynamics of criminal courts. It has been hypothesised that court actors attempt to manage the inherent uncertainty of decision-making by developing patterned responses (Albonetti, 1991), which are in turn significantly determined by the cultural realm within which criminal courts operate (Carroll, 1978; Eisenstein & Jacob, 1977; Eisenstein et al., 1988; Fontaine & Emily, 1978; Garland, 1991; Hogarth, 1971; Sudnow, 1965). It has been presupposed that the bureaucratically patterned configuration of criminal court decision-making favours the maximisation of institutional benefits and the minimisation of organisational concerns, with case disposition being the operational goal that maintains a stable and orderly system (Chambliss & Seidman, 1971; Dixon, 1995; Myers & Talarico, 1987).

These conceptual remarks have also been tied to the concerns regarding criminal justice decision-making, which refer to aspects such as the offender's blameworthiness, the protection of the community and practical considerations (Steffensmeier et al., 1998; Steffensmeier & Demuth, 2001). Furthermore, this also entails considering such decision-making processes as intrinsically traversed by substantial sociological and political determinants (Savelsberg, 1991), which means assuming the incidence of societal factors originated in the broader structures of power, as well as from the social, cultural and political conflicts characteristic of contemporary societies (Chambliss, 1975; Quinney, 1970, 1973; Turk's, 1969). Ultimately, this assumes that immigration detention decision-making could be part of the institutional mechanisms required for the social construction of the 'criminal alien' (Becker, 1963; De Giorgi, 2006; Melossi, 2003).

The results of the present research give credit to such conceptual determinations. First, it appears that immigration detention is not only in its regulation, but especially in terms of law in action, a noteworthy case of crimmigration law (Aliverti, 2012; Sklansky, 2012; Stumpf, 2006; 2011). It involves the decisive intervention of criminal law 'doorkeepers to determine the defendant's access to the 'radiance of immigration law'. The analysis of the data reveals that this peculiar legal configuration is characterised by some intrinsic predicaments. The criminal specialisation of the deciding courts makes them give more pre-eminence to their role as criminal law doorkeepers than as judicial custodians. The consequence of this is that they tend to overlook the essence of immigration detention, which is the expulsion proceeding, and limit their work to a tangential intervention that resembles the apathy displayed by Kafka's police officers. This circumstance is even more

critical regarding asylum-seekers, who may end up detained in a CIE and procedurally criminalised (Bosworth & Guild, 2008; De Giorgi, 2006; Gibney, 2008; Stumpf, 2013) largely as a result of the lack of expertise of the courts in these matters.

It appears that the protective nature of the involvement of a judicial authority within immigration detention is in practice counterbalanced by the criminal justice attributes of criminal courts. This is due to two main idiosyncratic features of the organisational and cultural dynamics of immigration detention decision-making: the court's bureaucratically patterned processing mechanics and its criminal law identity. While the first attribute may be applicable to any court organisation, the problem is that criminal courts are specialised in criminal matters, which make them overlook aspects belonging to other fields of law. Therefore, their bureaucratically patterned decision-making mechanics are intensified within immigration detention because court actors do not regard it as part of their intrinsic responsibilities. As one interviewee exemplified, one hour they could be removing a corpse and the next they have to decide a detention. While this specific situation may not be routine, it nonetheless reflects the practical incompatibility between criminal and immigration matters. From this perspective, as most interviewees contended, it would make more sense for the immigration detention be decided by administrative judges.

The decision-making process of immigration detention is thus bureaucratically patterned, automated and irreversible. Although the thoughtlessness and dehumanisation incited by the bureaucratic nature of the judiciary is likely to be permanent, regarding immigration detention it seems to be aggravated by the mentioned circumstances. Based on Arendt's insights, Fiss (1983) has precisely examined and questioned the bureaucratisation of the judiciary, first highlighting that, "*It is here that bureaucracy emerges as a social structure that makes possible, facilitates, and perhaps even causes the thoughtless use of public power*" (1453). It is contended that this is due to the fragmentation and compartmentalisation of tasks, as well as the diffusion of responsibility. Moreover, "*a case involves a fragmentation of human experience… an artificial and necessarily truncated presentation of a specialised concern*", which ultimately "*can insulate the judge from those critical intellectual experiences that should inform his judgment*" (Fiss, 1983: 1454).

The present results also resemble the implementation dynamics explained by the concept of legal-arbitrariness (Silveira, 2017), which explains that the resolutions of the criminal court are part of the secondary process of decisions and judicial acts decreed throughout the procedure which conclude with the expulsion of the immigrant. Although there is a supposedly protective and legally reinforced intervention of the judiciary, it

seems to be ultimately functional for the purposes of the administration. Following Arendt's (1965) portrayal of the banality of evil, investigative court actors may be desensitised by their submission to the bureaucratic machinery in which a thorough individualisation of cases is intrinsically antithetical. In this sense, it is not so much that judges, prosecutors and court workers consciously neglect an immigrant's personal circumstances, as that they are simply another appendage of an already established mechanism programmed to fulfil determined policy objectives. This is especially noticeable in the case of just-arrived immigrants (coming in small boats), in which the intense automation of the proceeding is contrasted with the extensively known infectiveness of detention. However, court actors are not mere alienated automatons, although they are indeed constituent elements of such apparatus.

Lastly, the criminal law identity of the deciding courts is also a determinant factor of immigration detention decision-making, which is reflected in the collaborative relationships between criminal justice agencies (Eisenstein & Jacob, 1977; Eisenstein et al., 1988; Myers & Talarico, 1987; Sudnow, 1965). Criminal courts seem to share a common spirit of cooperation and interdependence among themselves and with the police. Consequently, there is a simultaneous process of mutual reinforcement, with criminal courts complying with immigration police and administrative objectives, while also fulfilling their own purpose of targeting and sanctioning criminal individuals. Apart from the case of just-arrived immigrants, immigration detention is increasingly being used for irregular immigrants who are also charged with a crime or who have a criminal record.

The social construction of the 'criminal alien' in Spain is based upon a policy dynamic in which the definition of deported immigrants is equated with deported criminals. By increasingly focusing upon detaining irregular immigrants charged of a crime or with a criminal record, law enforcers and policy-makers communicate the idea that most detainees and deportees are criminals. The problem is that such detainees may be just criminal suspects and not convicts, which means that equating being an irregular immigrant suspected of a crime with being a criminal is equivocal at best. This research reveals that judges cannot dissociate the criminal from administrative aspects when deciding a detention. It has been evidenced that having a criminal record or charge is a determinant factor of immigration detention and that this is also due to the occupational criminal law dedication of criminal court actors, since they seem to regard such defendants as 'further evil', deserving of the suffering produced by a detention.

Immersed in their own routine, the question persists: what is the role of law doorkeepers within immigration detention? What if the actual purpose of immigration detention is not to ensure the expulsion of irregular immigrants? If its unrecognised policy function is to fulfil purposes of deterrence, surveillance, biopolitical management or even punitive nature, perhaps investigative courts are complying with their real role in this field. The answer would require determining what the actual aim of the law is. Law doorkeepers normally maintain, following the famous Montesquieu's phrase, that they are no more than the mouth of the law. However, in words of Bourdieu (1987), judges do not simply apply the rule, but have a significant freedom of interpretation that allows them to introduce the innovations that are necessary for the integrity and permanence of the system.

Criminal court actors are decisive doorkeepers and are awarded significant room for discretion to mould, even if in a limited way, the contours of the law and its practical meanings. Law could be seen as a contentious field, in which contrasting perspectives confront and define what it actually means in a concrete case. Nonetheless, from the present analysis it could be that criminal courts have already internalised a certain purpose of the law and assumed a specific role as law doorkeepers. Such a role, however, is substantially determined by a cultural decisional realm characterised by two converging factors: bureaucratically patterned processes and a criminal law identity. This ultimately configures the 'criminalisation of immigration detention'.

Chapter 6: The punitive meanings of expulsion throughout the criminal proceeding

6.1. Introduction

The intertwining between immigration control and criminal law in Spain is also remarkably manifested in the various expulsion pathways available within criminal proceedings. An irregular[109] immigrant charged, prosecuted or judged for an offence can be subject to expulsion at the different phases of a criminal proceeding, from pre-trial to parole. This means that in such cases criminal courts are required to make decisions that may have significant implications for immigration control. This raises a series of questions: what are the decisional determinants of an expulsion authorisation within a criminal proceeding? What are the mechanisms of such decision-making process? What are the meanings attributed by criminal court actors to such decisions? This chapter is intended to answer those questions by presenting the results from interviews and focused observation regarding expulsions throughout the criminal proceeding. For that purpose, I will first examine the legal regimes, and thereafter report the results of the research, highlighting the main themes and theoretical underpinnings emerging from the data.

6.2. The legal regimes of expulsion throughout the criminal proceeding

As explained in the third chapter, expulsion throughout the criminal proceeding can take place at three different procedural phases: pre-trial, sentencing and post-sentencing. In terms of its decisional nature, an expulsion can be either administrative or judicial, meaning that criminal courts can either authorise a pre-trial or post-sentence administrative expulsion, or directly order a sentencing or post-sentence judicial expulsion. Given that this circumstance has significant implications for the decision-making processes of criminal courts, it makes sense to describe their legal regimes separately. This will evidence how Spanish policymakers have established several procedural pathways, at different decision-making points, to promote or facilitate the expulsion of immigrants suspected of or convicted for criminal behaviours.

6.2.1 Pre-trial and post-sentence administrative expulsion

Pre-trial and post-sentence administrative expulsion is a peculiarity of the Spanish legal regime. It involves the parallel existence of an administrative expulsion and a criminal proceeding, in which a person is processed for both an immigration infringement and a

[109] As it will be explained below, in some cases this is also applicable to regular immigrants.

criminal offence, respectively.[110] While the criminal jurisdiction is in general pre-eminent, the Spanish legislation favours, under certain circumstances, the expulsion of a prosecuted or convicted irregular immigrant. In practice, this means that the criminal proceeding or the punishment can be suspended to favour an expulsion. This legal preference has been established within Spanish legislation since the 1985 Aliens Act.[111] In its original form, it was an entirely discretional decision from judges in cases sanctioned with 'minor prison' or less, which was equivalent to six years of imprisonment. The 2000 Aliens Act[112] maintained this measure and explicitly specified it for cases sanctioned with less than six years of incarceration. Thereafter, in 2003[113] a new legal reform made it imperative, requiring specific justification only when the judge considered it necessary to not suspend the proceeding. This remains valid until today.[114]

The current regulation in regards to pre-trial expulsion is contained within Art. 57.7 of the Aliens Act. It establishes that when an irregular immigrant is 'under investigation' or 'prosecuted'[115] for an offence or misdemeanour sanctioned with imprisonment of less than six years, or an alternative punishment, and this circumstance is accredited in the parallel expulsion administrative proceeding, the judge 'shall' authorise the expulsion, unless circumstances that justify its denial are accredited.[116] It is necessary that both the prosecutor and the defendant are heard before deciding,[117] and the proceeding should not last more than three days.[118] A reform enacted in 2000,[119] which remains in force until today,[120] exempted certain offences, such as illegal trafficking of labour, the employment of irregular immigrants, crimes against the rights of foreigners and promoting or being part of associations dedicated to human trafficking and 'illegal' or 'clandestine' immigration, from this measure. In these cases, it is mandated that the expulsion shall be executed once the eventual imprisonment punishment is served.[121]

The procedural phase in which this measure can be applied is decisive and has been debated for years. In its original form, the legal provision of the 1985 Aliens Act used a

[110] It should be remembered that in Spain irregular immigration is not a statutory criminal offence, which means that the criminal prosecution of any foreigner is for ordinary crimes.
[111] LO 7/1985 (01-07-1985), BOE-A-1985-12767.
[112] LO 4/2000 (11-01-2000), BOE-A-2000-544.
[113] LO 11/2003 (29-09-2003), BOE-A-2003-18088.
[114] Art. 57.7 a), LO 4/2000.
[115] In Spanish, 'imputado' and 'procesado,' respectively.
[116] Art. 57.7 a), LO 4/2000.
[117] Although the Aliens Act (Art. 57.7 a)) only requires that the prosecutor be heard, its secondary regulation of the Aliens Act (Art. 247, RD 557/2011 (30-04-2011), BOE-A-2011-7703) does require that the defendant be previously heard. In addition, this proceeding should not last more than three days.
[118] Art. 57.7 a), LO 4/2000.
[119] LO 8/2000 (22-12-2000), BOE-A-2000-23660.
[120] Art. 57.7 c), LO 4/2000.
[121] Art. 57.8, LO 4/2000.

word with no direct equivalent translation to English ('encartado'), but that can be understood as a synonym of 'prosecuted'. Initially, the prosecutorial office considered in a couple of early interpretative consultations (Consulta 5/1987; Consulta 2/1990) that this measure was applicable only when the prosecutor had formulated charges in an indictment. This meant that it could not be applied when the foreigner was still under investigation. However, in 1994 the prosecutorial office changed its opinion in a binding instruction (Circular 1/1994) and stated that the pre-trial expulsion authorisation could be issued since the defendant had been put 'under investigation'. The controversy was further complicated by the new provision of the 2000 Aliens Act, which established that this measure was applicable to 'prosecuted' or 'indicted' defendants.[122] In the end, the prosecutorial office issued new guidelines in 2001 and 2006 (Circular 3/2001; Circular 2/2006), reiterating that this measure was applicable since the defendant was 'under investigation'.

Finally, in 2009 a new and definite reform explicitly mandated that pre-trial expulsion could be authorised from the moment in which the foreigner was 'under investigation'.[123] The problem with this is that in such an early stage of a criminal proceeding it is likely that there would still not be enough information to determine the seriousness and nature of the suspected crime (Rodríguez-Candela, 2016). Therefore, clearly ascertaining whether the investigated facts correspond to a certain crime would be dubious. The prosecutorial office, however, has interpreted this differently. It has argued that the prosecutorial indictment, which is dictated at the end of the investigative phase, must necessarily be correlated with the act of formally putting the defendant under investigation (Circular 1/1994). Such a decision formally initiates the criminal proceeding, notwithstanding any preliminary judicial investigation, and this early decision determines the indictment. It has also been argued that once the facts have been specified *prima facie* and preliminarily qualified as crimes, it is possible to determine whether the penological conditions of expulsion are met (Circular 2/2006). Finally, the prosecution office has stated that this measure can only be authorised before the trial has begun (Circular 2/2006), notwithstanding the eventuality of authorising the administrative expulsion of the foreigner after the sentencing phase (Circular 5/2011), as it will be explained below.

Although the expulsion procedure is of an administrative nature, the decision to suspend the criminal proceeding is judicial and requires that judges comply with certain

[122] The problem was that the first category was not extensible to the prosecution of the category of crimes to which this measure was mostly intended, while the other did not exist in the penal code. The reason for this is that the term 'prosecuted' is applicable to the *ordinary proceeding* and not to the *abbreviate proceeding* and the *speedy trial*. The difficulty with this is that the ordinary proceeding is for the most serious crimes while the two other proceedings are for lesser crimes and the pre-trial expulsion is intended for the latter.
[123] Art. 57.7 a), LO 4/2000.

conditions. Specifically, the Constitutional Court of Spain (STC 24/2000) has compared the role of criminal judges in these cases with that of those who decide a *habeas corpus* and concluded that although the full legal oversight of an expulsion corresponds to administrative judges, criminal judges are expected to uphold their obligation in ensuring a defendant's rights. Hence, criminal judges are required to assess, although provisionally, the basis on which the administrative action that precedes their intervention is grounded. This means that the decision to authorise a pre-trial expulsion requires a provisional assessment of the grounds of the expulsion proceeding. The Constitutional Court has also ruled that a person's right to defence shall be guaranteed, asserting that the intervention of the criminal judge shall actually strengthen the defendant's legal safeguards. Nevertheless, it should be remembered that within this kind of proceeding judges are not explicitly required by law to justify their decision when they opt for the administrative expulsion.

It is important to clarify the relationship between immigration detention and pre-trial expulsion. In the previous chapter it was explained that a foreign defendant can be brought before an investigative judge not only for an immigration detention request, but also for a criminal charge. This means that in such a case the investigative judge is required to make decisions regarding both the initiation and advancement of a criminal proceeding, as well as the application of an immigration detention order. Consequently, if the judge decides to continue with the criminal proceeding and the defendant cannot be immediately sentenced through a plea agreement, the immigration detention request shall be dismissed. Conversely, if the judge decides that the criminal proceeding shall not be concluded, immigration detention can be ordered, which is a pre-trial expulsion authorisation. Furthermore, an investigative judge who authorises a pre-trial expulsion can then decide whether to order an immigration detention against the same defendant.

In some circumstances, sentencing judges can also authorise a post-sentence administrative expulsion. The judicial authorisation for the administrative expulsion of a convicted irregular immigrant is the consequence of an interpretation of the provision that regulates pre-trial expulsion[124] (Plasensia, 2017). While such provision does not have any explicit reference to post-sentence expulsion, the prosecution office has maintained that it should be interpreted as authorising the execution of these expulsions. In a circular issued in 2006 (Circular 2/2006), it stated that prosecutors shall adopt the necessary actions to expedite the execution of non-custodial punishments, in such cases in which neither pre-trial nor sentencing expulsion could be legally applied, to facilitate the administrative expulsion of a convict. The alleged reason for this is to prevent non-custodial sentences

[124] Art. 57.7, LO 4/2000.

from becoming an obstacle that hinders the execution of an administrative expulsion. This criterion was ratified in a subsequent circular (Circular 5/2011), in which it is asserted that committing crimes punished with non-custodial sanctions had become a way for convicts with an expulsion order to remain within Spanish territory. Hence, it is instructed that in such cases there should not be obstacles that may delay the execution of an administrative expulsion order, since sentencing expulsion is not applicable to non-custodial penalties.

The legal configuration of post-sentence expulsion is a deliberate expression of the immigration law objective in regards to expelling convicted immigrants. Indeed, there seems to be a connection with the administrative expulsion based upon criminal records (Larrauri, 2016), regulated in the Aliens Act.[125] It has been argued that such type of administrative expulsion should be repealed because the current post-sentence expulsion regime already regulates the expulsion of convicted foreigners (Rodríguez-Candela, 2016). The existence of these overlapping mechanisms[126] ultimately facilitates the expulsion of a previously criminalised foreigner in most cases. Following on from this, the secondary regulation of the Aliens Act also explicitly requires prison authorities to inform the administration three months in advance about the release of convicted foreigners in order to execute their expulsion.[127] It is also instructed that the administration be informed about the criminal records of foreigners punished with more than one year of imprisonment, so that the corresponding administrative expulsion proceeding can be initiated.[128]

It is necessary to emphasise that the prosecutor has a particularly decisive role in these types of expulsion. Within the Spanish legal system, prosecutors are responsible for public prosecution, which means that they are in charge of initiating and advancing criminal proceedings.[129] Therefore, when a prosecutor deems it unnecessary to prosecute or advance a case, it will most likely not be prosecuted. Likewise, when a prosecutor agrees with a pre-trial expulsion, they are showing their unwillingness to prosecute in such criminal case. The same can be said regarding the execution of an already dictated non-custodial sanction. Although the judge is not bounded by the prosecutor's criterion, if they dismiss the expulsion request, such decision will have to be justified,[130] which in principle makes it easier for judges not to oppose the criterion of the prosecutor.

[125] According to Art. 57.2 of the Aliens Act (LO 4/2000), an expulsion proceeding can be initiated when the foreigner had been convicted of an intentional criminal behaviour punished in the Spanish legislation with more than one year of imprisonment, unless her/his criminal records had been cancelled.
[126] This also includes judicial post-sentence expulsion, which will be explained in the next section.
[127] Art. 256.4, RD 557/2011.
[128] Art. 256.5, RD 557/2011.
[129] Arts. 101 and 105, RD 14-09-1988, BOE 260 (17/09/1882).
[130] Art. 57.7 a), LO 4/2000.

To conclude, it is worth reviewing some statistics of pre-trial and post-sentence administrative expulsions in the last years. Table 5 portrays the number of judicial authorisations for administrative expulsion throughout criminal proceedings issued between 2009 and 2016,[131] and the comparative proportion with the number of 'qualified expulsions'. These data come from the prosecution office, although they should be taken cautiously given that it is not totally certain that prosecutors report this information in all cases. Although these data can be compared with the total number of expulsions executed during each of those years, it makes more sense to compare them with the number of 'qualified (criminal) expulsions'. It emerges that between 2009 and 2016, these types of expulsion accounted on average for 34.8% of the total qualified expulsions, which can be considered a relatively significant proportion.

Table 5. Proportion of pre/post-trial v. qualified expulsions (2009-2016)

	2009	**2010**	**2011**	**2012**	**2013**	**2014**	**2015**	**2016**
Pre/post-trial expulsions	1,988	3,249	3,284	2,382	2,573	2,685	2,391	1,468
Qualified expulsions	7,591	8,196	9,114	8,140	7,582	6,557	5,539	4,803
Proportion	26.2%	39.6%	36.0%	29.3%	33.9%	40.9%	43.2%	30.6%

Source: (Fiscalía General del Estado, 2017)

6.2.2. Sentencing and post-sentence judicial expulsion

The substitution of imprisonment for expulsion has been in force since 1985.[132] Nonetheless, the application of this measure became common only after its incorporation into the penal code in 1995.[133] This rule allowed for the expulsion of an irregular immigrant in cases statutorily punished with less than six years of incarceration; however, it was maintained that the decision to substitute imprisonment for expulsion was discretional. In addition, the convict was automatically banned from returning to Spain for a period ranging from three to ten years. Finally, for cases punished with six or more years of prison, expulsion could also be ordered at the discretion of the judge once the defendant had served three-quarters of their sentence within prison.

This regime was then reformed several times. The first reform in 2000, with the new Aliens Act, saw a number of crimes excluded from the application of this type of expulsion: human trafficking or smuggling, facilitation of unauthorised immigration and terrorism. Afterwards, in 2003,[134] a new legal reform made it imperative for judges to substitute imprisonment for expulsion, unless they considered, with sufficient reasons, that

[131] The last available data correspond to 2016, since the report for 2017 has still not been published.
[132] LO 7/1985 (01-07-1985), BOE-A-1985-12767.
[133] LO 10/1995 (23-11-1995), BOE-A-1995-25444.
[134] LO 11/2003 (29-09-2003), BOE-A-2003-18088.

the nature of the crime justified imposing imprisonment. For cases punished with six or more years of imprisonment, substitution also became imperative once the imposed prison term was served. In 2010,[135] a new reform expanded the grounds for exceptionally imposing imprisonment rather than expulsion. For instance, it allowed the judge to support the decision to decree imprisonment rather than expulsion not only upon the nature of the offense, but upon any motivated reason that justified such resolution. The reform also re-established a time range for the re-entry ban, from five to ten years, depending upon the severity of the punishment and the personal circumstances of the convict.

The current regulation of sentencing expulsion, contained in Art. 89 of the Penal Code, is the result of a reform made in 2015.[136] There are three major aspects that merit attention. First, this type of expulsion can now be imposed not only upon irregular immigrants, but upon any foreign resident.[137] Secondly, sentencing expulsion is now applicable to offences sanctioned with more than one year of imprisonment.[138] This is an expansion of the scope of this measure, given that its imperative nature remains inalterable, although it also means that it is inapplicable to minor crimes or misdemeanours. However, when the prescribed punishment exceeds five years of imprisonment, the convict shall serve some time in prison before being expelled.[139]

Lastly, the current provision established a regime of exception, which counterbalances the prevalence of expulsion by reinforcing criminal law objectives. For instance, it allows the judge, in exceptional cases, to make the defendant serve part of the prison term to ensure the defence of the legal order and restore trust in the infringed norm.[140] Nonetheless, the time to be served should not exceed two-thirds of the sentence, and afterwards expulsion is still imperative. Finally, unlike the previous regulation, it is not necessary that the decision to substitute imprisonment for expulsion is issued in the sentence, since it can also be decreed in a subsequent judicial writ.[141] Regarding the re-entry ban, the current regulation allows judges to impose a period of between five to ten years, depending on the length of the substituted sentence and the personal circumstances

[135] LO 5/2010 (22-06-2010), BOE-A-2010-995.
[136] LO 1/2015 (30-03-2015), BOE-A-2015-3439.
[137] Art. 89.1, LO 10/1995. Given that EU citizens are treated with special consideration under communitarian and national law, this disposition only affects so-called TCNs. In general, an EU citizen can only be expelled from Spanish territory if they have become a serious threat to the public order of the public safety, considering the nature, circumstances and seriousness of time, as well as their criminal record and personal circumstances.
[138] Art. 89.1, LO 10/1995.
[139] Art. 89.2, LO 10/1995.
[140] Art. 89.1, LO 10/1995.
[141] Art. 89.3, LO 10/1995.

of the convict.[142] If during that period the foreigner re-enters Spanish territory, they shall serve the previously substituted prison sentence, unless the judge deems it necessary to reduce it considering the defence of the legal order and the restoration of trust in the norm.[143] However, if the expelled foreigner is found crossing the border when attempting to re-enter, they shall be expelled again, and the entry-ban period shall be restarted.

The current regulation has more decidedly incorporated essential aspects of the pertinent Supreme Court jurisprudence. Formerly, the decision to not substitute imprisonment for expulsion could be based upon any reason that justified serving time in prison. Consequently, there were no specific references to human rights standards and this could be interpreted more as an attempt to prioritise criminal law objectives, such as deterrence or retribution, over humanitarian values. The current regulation, conversely, incorporated the criterion of proportionality as a basis for not expelling. Indeed, expulsion shall not be applied if it results in a disproportionate sanction, particularly in regards to the circumstances of the case and whether the defendant has roots within Spain.[144]

Post-sentence judicial expulsion is actually a modality of the sentencing expulsion regime, which means that the same requirements and conditions, in terms of procedural and human rights safeguards, are also applicable to it. It has already been acknowledged that a criminal judge can impose a post-sentence expulsion once the defendant has served two thirds of their prison sentence.[145] Nonetheless, according to the law, and regardless of the judicial decision, the expulsion of the foreign convict remains imperative once they become eligible for parole.[146] In a similar sense, when the crime is sanctioned with more than five years of imprisonment, the judge is required by law to make the defendant serve time in prison before they are expelled.[147] Specifically, the judge shall order that all or part of the prison sentence be served considering again the defence of the legal order and the restoration of the trust in the infringed norm. Thereafter, once the foreign convict becomes eligible for parole release, they shall be expelled in all cases.[148]

Judicial expulsion is peculiar because, unlike the other types of expulsion, it is not decreed by the administration, but by a criminal judge. Hence, it is not necessary that an expulsion proceeding be initiated by the administration for the judge to order it. Since in these specific circumstances criminal judges act as immigration authorities, the highest

[142] Art. 89.5, LO 10/1995.
[143] Art. 89.7, LO 10/1995.
[144] Art. 89.4, LO 10/1995.
[145] Art. 89.1, LO 10/1995.
[146] Art. 89.1, LO 10/1995
[147] Art. 89.2, LO 10/1995
[148] Evidently, except when the expulsion is inadmissible due to the defendant's personal circumstances.

Spanish judicial bodies had extensively ruled on the nature, procedural requirements and relevant conditions of this measure.

First, in 1994 (STC 242/1994), the Constitutional Court of Spain argued that this type of expulsion should not be considered a punishment because it is not a measure imposed in exercising the *ius puniendi* and by itself does not satisfy any criminal or civil liability derived from an illicit conduct. Although the court did not explicitly address the *ne bis in idem* principle, such an argument does preclude any allegation in that regard. Nonetheless, the Court stated that if the expulsion is not accepted by the defendant, it could become a measure that restricts their constitutional rights. The Court also argued that this measure could be legitimately enforced within the framework of the State criminal policy, linked to its immigration policy. Therefore, the Court did not dispute the abstract validity and legitimacy of the measure as approved by the Spanish legislature, but established limitations and conditions to guarantee the defendant's rights. In this sense, the Court highlighted the constitutional applicability of the human rights' international treaties, which mandates that in removal proceedings the defendant shall be awarded the chance to exercise their right to defence and be given the opportunity to propose their reasons. The Court concluded that a previous hearing, in which the judge considers the arguments of both parties and decides assessing the interests of both the State and the defendant, is an unavoidable and fundamental prerequisite for ordering an expulsion.

Thereafter, the Supreme Court of Spain extensively ruled on these aspects, relying heavily upon that constitutional precedent. The Supreme Court started to increasingly rule on these matters only after the first reform of the 2000 Aliens Act. A small reference was made in a 1998 ruling,[149] in which the Court ratified that the decision to expel required a previous hearing. The main criterion developed by the Court in such jurisprudence[150] is that the decision to expel a convicted immigrant should not be made automatically, requiring a careful consideration of their specific circumstances, especially in regards to their roots within Spain. Moreover, the Court has ruled that judges should adequately assess the protection of fundamental rights, which are *prima facie* superior to the public order or a specific criminal policy. In consequence, although expulsion is in principle imperative, the Court made it obligatory for judges to impose it only after a thorough consideration of the circumstances of the defendant on a case-by-case basis.

[149] TS Sala de lo Penal, 330/1998, 03/03/1998.

[150] TS Sala de lo Penal, 17/2002, 21/02/2002; 901/2004, 08/07/2004; 1231-2006, 23/11/2006; 35-2007, 25/01/2007; 108-2007, 13/02/2007; 166-2007, 14/02/2007; 140-2007, 26/02/2007; 682-2007, 18/07/2007; 125-2008, 20/02/2008; 165-2009, 19/02/2009; 498-2009, 30/04/2009.

The prosecution office has also issued instructions about this type of expulsion (Circular 1/1994; Circular 3/2001; Circular 2/2006; Circular 5/2011), although the current reference is the instruction issued in 2015 (Circular 7/2015) in response to the last legal reform. Even though this will be discussed more in detail in the analysis of the results, at this point it is worth highlighting that the prosecution office considers that if certain objective limits are not established, the application of this measure can lead to impunity, affecting the principle of general deterrence. In addition, it acknowledges that a proper delimitation of the subjective scope of this measure is necessary to avoid discriminatory consequences based on the nationality of the defendant. It is mentioned in this regard that those who have social, family or work ties should not be treated in the same way as those who do not. Finally, it is also stated that this measure should not be applied automatically, and that it should not be agreed when the expulsion will be unfeasible.

The Spanish criminal expulsion scheme seems to correspond with the EU legal framework regarding the expulsion of irregular immigrants. Although the so-called *effet utile* of the Returns Directive is to ensure the rapid expulsion of irregular immigrants from the territory of the EU (González-Saquero, 2016; Raffaeili, 2011), the legal regime of the judicial expulsion established in the Spanish penal code would be excluded from the application of the directive according to Art. 2.2(b)[151] (González-Saquero, 2011). The CJEU has ruled (El Dridi C-61/11; Achughbabian C-329/11) that the criminalisation and criminal sanction of irregular immigration and germane infractions shall not hinder the directive purpose of ensuring the rapid expulsion of irregular immigrants. In the Spanish case, however, irregular immigration is not a statutory crime, which means that the judicial expulsion in regards to the penal code is not based on the defendant's irregular migratory status, but on their participation in an ordinary crime.

In a recent preliminary ruling (C-636/16, 7 December 2017), requested by a Spanish administrative court, the CJEU concluded that "*a decision to expel may not be adopted against a third-country national who is a long-term resident for the sole reason that he or she has been sentenced to a term of imprisonment of more than one year in duration*". This conclusion was based on the EU principle that long-term residents should enjoy reinforced protection against expulsion.[152] This means that the expulsion of a long-term resident is not admissible solely on the grounds of a criminal conviction, requiring

[151] According to this provision, "*Member States may decide not to apply this Directive to third-country nationals who… are subject to return as a criminal law sanction or as a consequence of a criminal law sanction, according to national law, or who are the subject of extradition procedures*".

[152] In general, expulsion against long-term residents would be admissible only when they constitute an actual and sufficiently serious threat to public policy or public security.

further justification related to a possible threat to public policy or public security. Given the novelty of this decision, the scholarly debate is just about to begin. However, this judgement shall not invalidate the judicial sentencing/post-sentence expulsion statute because such an expulsion is already forbidden by law when it could be disproportionate in relation to the offender's personal circumstances and roots with Spain.

To conclude, it is worth reviewing numeric data on judicial expulsions. Table 6 presents the number and proportion of judicial expulsions between 2012 and 2016.[153] Although the prosecution office also reports information in this regard, the data from the judicial database is in principle more reliable given that it refers to the actual judicial decisions and not only the prosecutorial requests, which are not necessarily accepted by judges in every case. Despite the theoretical and jurisprudential relevance of this type of expulsion, it is not that common in proportional terms. For instance, between 2012 and 2016, the proportion of judicial expulsions among the total number of convictions was 0.3% and 2% in the case of non-Europeans. Compared with qualified expulsions, they accounted for 26.9%, which are fewer than the proportion of administrative expulsions.

Table 6. Number and proportion of sentencing expulsions (2012-2016)

	2012		2013		2014		2015		2016	
Sentencing expulsions	2190		1928		1906		1448		773	
Total convictions	557,793	0.3%	608,901	0.3%	615,640	0.3%	617,696	0.2%	695,013	0.1%
Foreign convicted	143,405	1.5%	152,468	1.3%	146,705	1.3%	145,226	1.0%	161,292	0.5%
Non-European convicted	94,785	2.3%	100,852	1.9%	95,044	20.0%	92,025	1.6%	99,783	0.8%
Qualified expulsions	8,140	26.9%	7,582	25.4%	6,557	29.1%	5,539	26.1%	4,803	16.1%

Source: (Poder Judicial España, 2018).[154]

6.3. The procedural stratagems of pre-trial and post-trial administrative expulsion

Expulsion is formally an administrative measure which originates from the state immigration policy, intended in principle not to punish, but to manage migration flows. The question arises, however, when the decision to allow an expulsion is taken by criminal courts within a criminal proceeding. Although such courts are not entitled to fully assess the merits of an administrative expulsion proceeding, without their acquiescence the expulsion of a prosecuted irregular immigrant cannot be executed. This means that the criminal jurisdiction could be considered a sort of screening device that can either block or speed-up an expulsion. In practice, this entails to a significant extent the exercise of decisional discretion in immigration matters on the part of criminal justice actors.

[153] These are the years in which complete data were available. Data for 2017 have still not been published.

[154] The number of foreign convicts was calculated by taking the number of people convicted minus the number of Spanish convicts. Likewise, the number of Non-European convicts was estimated by taking the number of people convicted minus the number of European (including EU and non-EU) convicts.

Therefore, it is worth considering what the decision-making determinants of an administrative pre-trial or post-sentence expulsion authorisation could be.

First, as in the case of immigration detention, criminal justice actors share the mindset that this ultimately "*is not their business*". The most common response was that this is an administrative matter and that they have nothing to do with its substance. The following response from one sentencing court clerk is quite illustrative in this regard,

> "*It's not our competence… but I believe that it's still the state that has to see if the guy is really dangerous or not. Not because of the crime. If he is dangerous because he has not settled, or has no family, or has no roots, that is, he has dedicated nothing more than to pillaging. Well then, you ask me and I say 'if not for you, for me less'. Now if you tell me that he's a good guy, I can say, 'Look, you're telling me he's good, and I say that the case is open here, for me, but I'm still saying the same thing, you have to decide, it's yours'. I believe that we have to change that conception, 'do not ask me to tell you, you ask me for the writ, I send the sentence and now you decide, it's not me who has to decide…'"* (Sentencing court clerk 9).

There are two important remarks from this response. First, the interviewee explains how the police and the administration seem to try to force the responsibility of expulsion decision upon the criminal courts. However, he emphasises that determining whether a foreigner deserves to remain within Spanish territory is an administrative matter, beyond their actual criminal involvement. Furthermore, the respondent links such resolution to an assessment of the dangerousness of the individual, which goes beyond their actual criminal involvement and is more related to their belonging to mainstream Spanish society. The significance of expulsion as an incapacitating measure for 'undesirable aliens' is one of the most important aspects revealed in this research and will be discussed in more depth later.

The same interviewee further elaborated on the seemingly opportunistic police use of the judicial authorisation for administrative expulsion, explaining the following:

> "*In the end, who is deciding? … In the end, they're spinning around so that the same agency always decides… If you consider that administratively you're going to expel him, I cannot oppose either because it's not me anymore, it's the administrative judge who has to decide that.' That's why I tell you, it's a bit, let's say, a kind of diabolical procedure, because you ask me one thing, when if you say that this guy is bad, you're the police, you have the guy… let's suppose that here he has a slight offense, but the guy already committed, he has ten criminal records, because he has pissed on the street, because he has broken a shop window. Hey, you don't have to ask me about my crime anymore, that man cannot be on the street. Or that he isn't complying with the norms or with the Spanish coexistence… don't ask me, if you're the one who knows best… If you see that the reason is, and now, if you really believe, that man has roots and such, it's not the criminal* [court] *who has to see it, it's the administrative* [court]*... throw him out, but you*" (Sentencing court clerk 9).

It is noteworthy how the interviewee once again links the suitability of expulsion with the determination of the individual's dangerousness ('bad guy'), connecting it with the involvement in so-called quality-of-life offenses. I will come back to this later. Focusing

again on the previous theme, it seems that it is not only that criminal courts consider expulsion an extraneous matter, but that the police apparently seek to attain judicial legitimacy in the expulsion of immigrants allegedly involved in criminal behaviours. It seems that in practice the police attempt to make the administrative expulsion decision look as if it were a judicial decision. It is not accidental that the police and the Ministry of the Interior have publicly stated that these expulsions are 'judicially ordered'.[155] This criterion is further evidenced in the following explanation from a sentencing court servant:

> "*We don't order that expulsion. If the police ask us for authorisation for the administrative expulsion of such person, we authorise that it can be done, but we don't order it. It would be a serious error to put that we order an expulsion, because it is not a thing that comes from us… they are not really criminal expulsions, we simply authorise, it is said that there is no problem. I don't know if in the statistics the police consider as criminal expulsions those cases in which they have had to ask the court, but really it is not, it is not an expulsion at the judicial level. They are administrative expulsions*" (Sentencing court servant 2).

In her reasoning, the interviewee further emphasises that the job of criminal courts in these cases is only to authorise, and not to decide, an administrative expulsion. Consequently, formally speaking, these are administrative and not judicial expulsions; however, it seems that the police covertly intend to make these expulsions appear as though they were judicial, endowing police action with a judicial façade in order to achieve legitimacy. As defined by Sunshine and Tyler (2003: 514), "*legitimacy is a property of an authority or institution that leads people to feel that that authority or institution is entitled to be deferred to and obeyed*", not simply due to the authority's use of reward and coercion, but to properties which make people feel entitled to act in such a way. Additionally, the exercise of state power within democratic societies, as an expression of relations of dominance and subordination, needs legitimation to be justified (Beetham, 1991).

It has indeed been evidenced that public support for police work is associated with its perceived legitimacy (Levi et al., 2009; Sunshine & Tyler, 2003; Tyler, 2003; 2004). Among the various sources of legitimacy, there are two that are crucial within modern states: procedural justice and the justifiability of rules. Regarding the former, it has been revealed that procedural justice, understood as the state's procedures being fair and consistent with the rule of law (Levi et al., 2009; Tyler, 2003, 2004), exerts a major influence on perceiving police action as legitimate (Tyler, 2003). Regarding the latter, the State's own compliance with the rule of law that justify its exercise of power is ensured to a large extent by the effective independence of the judiciary (Beetham, 1991).

[155] This is for instance explicitly mentioned in a press release from the Ministry of the Interior of 14 September 2016 (Ministerio del Interior, 2016).

From this it appears that one substantial way for the police to achieve legitimacy, and in this manner attain public support, is by relying on a seemingly unbiased authority, attributed with impartiality and fairness, to justify the exercise of its own discretionary power. The independence and neutrality of the judiciary is at least formally speaking a keystone of the Spanish constitutional regime. This means that the police, which may be more easily characterised as the enforcement arm of an unavoidably biased immigration policy, may rely on the judiciary to make such expulsions look as if they were decided and issued by an impartial and disinterested authority. In consequence, it is very likely that in the expulsion of irregular immigrants involved in criminal proceedings the police seek a higher level of legitimacy by obtaining an explicit authorisation from a criminal judge.

Following on from this, it is highly relevant for this discussion that the police and the administration may be using the intervention of criminal courts to operationalise the social construction of the 'criminal immigrant' through so-called 'qualified expulsions'. Such category is not straightforward because it does not solely account for expulsions of immigrants with criminal records, but also with 'judicial records'[156] This use of judicial records may be considered a veneer in which to disguise police records. In fabricating the 'criminal alien', the inclusion of judicial records may give the illusion of appearing more conclusive, given that while a police record may in principle only account for an arrest, a judicial record may appear to refer to a convicted person. In practice, however, this is inconclusive because a pre-trial expulsion can take place at any time since the person has been put under investigation. Consequently, a criminal proceeding can potentially be dismissed at an early stage due to lack of evidence or merits and the person in question may still be expelled on the basis of a judicial record. The following response from an immigration prosecutor as to whether they also review the police records is quite revealing:

> "*Yes, if he has records. I already tell you that, in those cases, in which the proceeding is not yet finished, but he has, is immersed in several proceedings that are being processed; man, in some he may be freed because maybe he has been confused* [with someone else], *but if you have several proceedings. I know that this goes against the principle of presumption of innocence, but, it seems that, with statistics and the whole thing, not in every case you will be confused with someone else*" (Immigration prosecutor 1).

These remarks are significant because the interviewee is acknowledging that at least in some cases an irregular immigrant can be considered criminally involved even though they have not been sentenced or even formally accused. As this same prosecutor acknowledges, this could go against the presumption of innocence. This whole picture gives credit to the

[156] The police define 'qualified expulsions' as those executed against "*criminals with numerous criminal or judicial records, linked to terrorism, organized gangs, gender violence or any other particularly serious criminal act*" (Ministerio del Interior, 2010).

idea that there has been a crimmigration turn (Brandariz & Fernández, 2017) in the Spanish immigration policy, at least during the last ten years. It appears that there has been a constant focus on the expulsion of immigrants allegedly involved in criminal behaviours. However, as the results of my research reveal, such a policy orientation is largely based on a specific way of socially constructing the 'criminal alien' (Aliverti, 2012; Barbero, 2015; Tsoukala, 2005), by means of making a malleable use of the legal-procedural categories of prosecution and judicial records. In this way, the labelling process (Becker, 1963) is completed through the attribution of a criminal label to someone who, in some cases, could have been prosecuted only incidentally, or that could have been pushed to criminality by the exclusionary social mechanisms explained by Melossi (2003).

The processing mechanics of pre-trial and post-sentence administrative expulsion are also of a malleable nature. This is reflected by the fact that the effective enforceability of an administrative expulsion is favoured and even ensured by the internal logistics of the criminal proceeding and the bureaucratic culture of the criminal justice system. Specifically, the linkage of an irregular immigrant to a criminal proceeding seems to allow the police time to arrange their resources to execute an expulsion in a more efficient and effective way. Moreover, this can also be linked with the similar use of pre-trial detention or immigration detention to keep the immigrant locked up to ensure their eventual expulsion. The following response from a sentencing court servant demonstrates this point:

> "*Let's say that when they see that it's a matter of expulsion, they take it to a specific prosecutor and he knows that he has to report as quickly as possible. Because sometimes there is no hurry, but sometimes yes, because if the person is in a CIE waiting for the courts… And there are times that yes, there is a bit of a hurry because there is a maximum of sixty days for a person to be in a CIE… other times not… maybe they tell us, for example, in this case that they asked me about an expulsion, I asked them if it was something urgent or not, if he was in a CIE, and they said no, that he was at liberty, at home, so they have him more or less controlled, but there is no rush to expel him. In cases where the police directly arrest him in a cautionary way, take him to a CIE, and meanwhile they start asking the courts… whether they authorise or not, they have a bit of a limit because he cannot be more sixty days* [detained] *and they have to look for the flight, that is, everything. Then, we cannot say to them on the 59th day, 'ah yes,' because previously they have to look for a flight to that country and have more or less everything done* [for the expulsion]" (Sentencing court servant 2).

This response not only reveals the habitual close communication between the police and criminal courts, but also the extent to which they collaborate to facilitate an expulsion when it is authorised. In this respect, it is crucial as to whether the immigrant is detained in a CIE or not, since it means that the proceedings may need to be speeded up. On the other hand, when a person who is not detained though located by other means -as a potential case of an express expulsion- both the police and the court may be less pressured. There is, however, another significant dimension of these procedural mechanics, which has to do

with the subjugation of the defendant to a state of uncertainty as to whether they will be prosecuted or expelled (Aliverti, 2012). For instance, the bureaucratically patterned case processing of criminal courts makes it possible for the criminal proceeding to be active until the expulsion of the person is effectively authorised and executed. The following response from a sentencing judge points in this direction:

> "*As a general rule, those that usually happen before trial are mostly in speedy trial.*[157] *They are urgent proceedings, in which either the investigative court has ordered an immigration detention… which is something that I don't understand, that they detain someone for expulsion and don't directly authorise the expulsion, but admit a speedy trial so that I later* [judge it] *... That happens sometimes… maybe he is detained in a CIE, but yes, they prepare a proceeding for me, and yet perhaps it is quickly detained as something precautionary, that the administrative authority has requested because perhaps the administrative authority has not yet issued a resolution of expulsion*" (Sentencing judge 4).

It becomes apparent that while the police are working on the expulsion of a defendant, investigative courts advance the screening phase of the proceeding, and if the expulsion is still not executed, the case in sent to the sentencing court for trial. In this way, investigative courts may avoid issuing an early authorisation for expulsion because perhaps the expulsion decision, or its execution, is still not defined, confirmed or scheduled. In this particular case, the interviewee complains about the fact that in many occasions investigative courts authorise an immigration detention, but do not suspend the criminal proceeding and instead submit it to the sentencing courts for the trial phase. Following on from this, other interviewees explained that situations can arise in which an investigative court authorises and expulsion but will still send the proceeding to the sentencing court "*just in case*". Indeed, it is not uncommon that by the time the trial hearing is ready to be held, the defendant has already been expelled.

Another crucial aspect to consider in regards to the procedural mechanics of these pre-trial or post-sentence administrative expulsions is the decisive role of the immigration prosecutor.[158] As already explained, in the courthouse of Malaga there are three prosecutors specialised in immigration matters and most of their work centres upon these types of expulsions. Their decisive role in these cases is largely related to the fact that they

[157] A speedy trial is a type of proceeding to quickly prosecute and sentence the most common crimes. It is applicable to crimes sanctioned with less than five years of imprisonment, or under certain circumstances, to cases punished with up to ten years of imprisonment. In addition, it is necessary that those crimes be either flagrante delicto, or any of the following: domestic violence, robbery or theft of vehicles, traffic offenses, damage of more than €400 to property of others, drug crimes (drug cultivation), and crimes against intellectual and industrial property. Finally, the prosecution of such crimes must be 'presumably simple'.

[158] This is not necessarily the prosecutor that intervenes in immigration detention proceedings. As explained in the previous chapter, immigration detention is requested before an on-duty investigative judge during a day-court day. This means that the prosecutor who participates in such cases is also an on-duty officer, appointed by turn according to a previously arranged schedule. Specialised immigration prosecutors intervene in such capacity in immigration detention proceedings only in cases of just-arrived immigrants (pateras). In all other cases they may participate randomly as on-duty prosecutors according to their turn.

are the only specialised in immigration law within the criminal judiciary. For this reason, they are considered to be particularly knowledgeable in such field of law. The following response from one sentencing court servant is illustrative of this circumstance:

> "*Neither the administration, nor we, have specific training in this matter… if I'm interested in this topic I'm going to deepen, I'm going to study, I'll consult, but that also depends on each one, there is no training that imposes us, or tells us… 'Hey look, we can go to these courses', nothing, it has never been organised, any course, any training… In terms of immigration, there is a prosecutor, alone, in all the administration of justice, the only body that has specialised personnel and the others don't*" (Sentencing court clerk 1).

In this statement, the interviewee highlights the general lack of expertise in regards to immigration matters among court personnel. It is something that depends more on the interest of each person than on a systematic judicial training policy. This in turn heightens the prosecutor's status of expertise, thus endowing their criteria in these matters with incontestable credibility and truthfulness. The subsequent answer from another court servant confirms this standpoint:

> "*It is given to the public prosecutor, a distinct prosecutor, for these issues there is a prosecutor. Normally there are prosecutors, there are many, they inform us depending on the court… there are prosecutors who are more skilled… there are prosecutors who take their job more seriously than others, there are some reports that are very good and others that are regular. But in certain things, such as… issues of foreigners, there are specialised prosecutors. Yes, it is true that they have a lot of knowledge, and they always make some very, very well-done reports, well-founded*" (Sentencing court servant 5).

It is remarkable that the specialised prosecutors within immigration matters are perceived as the ones who are particularly knowledgeable. In this sense, while criminal courts may be more or less skilled and specialised in criminal law, it is only the prosecution office that has specific personnel dedicated to expulsion cases. Nonetheless, the decisiveness of these prosecutors has also to do with the patterned decision-making mechanics of criminal courts regarding expulsion, prompted by the legal regulation that requires specific justification only when it is not authorised. In practice, this could be a peculiar case of the so-called 'hydraulic displacement of discretion' (Engen, 2008; Miethe, 1987), by which discretion is displaced from one decision-making point to another, and more specifically, from judges to prosecutors. In the present case, this is understood in the sense that judges normally follow what prosecutors deem to be appropriate, which means that the latter are in practice the ones who decide. The following remarks from an investigative judge are quite explanatory:

> "*There we always go in unison, always* [with the prosecutor] *… because in this case, I have no reason to say no. I mean, what arguments do I have to say that you don't expel a foreigner… and accuse him here? … What happens is that here the functions are divided a little; really, who is accusing is the prosecutor, who exercises the ius puniendi of the State, who wants a person to be condemned… If the prosecutor has no interest because he prefers* [the defendant] *to be expelled, I cannot continue… if the prosecutor tells me to file* [the case]*, I have to file it. I cannot continue against a person that the prosecutor doesn't*

> *want. So if the prosecutor tells me to expel because he prefers to expel rather than to accuse him, I could not, I have no reasons to continue… But really saying yes to the expulsion, I don't have to motivate anything; that is, the one who accuses tells me that he doesn't want to accuse him, that he wants to expel, so that's it*" (Investigative judge 3).

One may conclude from this reasoning that in these cases judges tend to follow the criterion of the prosecutor. This argument may actually sound valid, given that it is true that within the Spanish system the prosecutor is the one who initiates and advances the criminal prosecution. However, as explained in the first section, in authorising these types of expulsions, judges are required to at least roughly assess the basis of the administrative proceeding. It therefore emerges that the role of the judge is substantially superseded by that of the immigration prosecutor, who ends up being the ultimately decisive figure in authorising a pre-trial or post-trial administrative expulsion. Although judges are legally entitled to have the last word and assess the legal requirements for the suspension of a criminal proceeding to allow an expulsion, a patterned decision-making process has been developed by criminal courts, by which the criterion of the prosecutor is conclusive. The following response from a sentencing court servant demonstrates this:

> "*We report to the prosecutor, we pass it to the prosecutor. And here it is that it depends on each court. The criterion for example in this court, our judge, is that if the prosecutor says yes, go forward, we authorise the expulsion, we put an expulsion order, and what we tell the police to proceed to the expulsion, and that let us know when the expulsion has actually taken place… When it comes favourable, that is to say, the prosecutor tells us that yes, we directly put the writ; we don't even give any account to our judge because we already know her criteria. That* [the prosecutor] *tells us not to the authorisation, there I comment to her (to the judge). But if he says no, the trial goes forward, we don't put an expulsion order or anything, we say that there is no expulsion, we communicate it to the police equally and the trial is not suspended or anything*" (Sentencing court servant 6).

The patterned decision-making mechanics of these types of proceedings are blatantly described in these remarks. For instance, the court personnel already know that in such cases, whenever the criterion of the prosecutor favours the expulsion of an immigrant, the court servant just fill in the decision template and pass it to the judge who will then sign it. It is essentially an automatic process in which there is no substantive analysis from the judge. Consequently, it is quite clear that the specialised immigration prosecutor is the one who determines whether the suspension of the criminal proceeding to allow a pre-trial or post-sentence administrative expulsion is admissible or not. Besides, it is apparent that given the infrequency of these cases in the routine of criminal courts, coupled with their lack of expertise in these matters, decisional discretion has been transferred to prosecutors. Moreover, immigration prosecutors themselves are aware of this circumstance, as the following response from a prosecutor reveals:

> "*I don't know if it's for comfort… the court, which may be for comfort, that it already has the prosecutor's report that says that the expulsion is appropriate, many times… it doesn't*

> *go against that criterion… Basically, because… the colleague who was before me is a person who is very informed about the issue of immigration, and when he reported it, they usually didn't oppose it… That's why I tell you that… sometimes for comfort and sometimes for trust*" (Immigration prosecutor 1).

What is relevant from this statement is that the immigration prosecutor himself acknowledges that judges tend to follow their criterion "*for comfort*". This is largely due to the widely assumed expertise of immigration prosecutors in these matters. Additionally, it seems that this in turn has been largely settled by the intellectual and academic prestige of a former immigration prosecutor, who was the only one specialised in such matters for a long time. Hence, for many years in the courthouse of Malaga it is apparent that a single person had the determinant criterion in the judicial authorisation of expulsion. Nowadays, there are three specialised immigration prosecutors who work in weekly shifts.

From the present analysis, it is ostensible that there are three big themes regarding the patterned organisational and procedural mechanics of pre-trial and post-sentence administration expulsion decision-making. First, there is a police tendency to seek legitimacy through the judicial endorsement of administrative expulsions, which in turn is also functional for the social construction of the 'criminal immigrant' through a surge in the so-called 'qualified expulsions'. In addition, the procedural overlapping between the administrative and criminal proceedings has been found to be largely favourable and functional for the purpose of expelling immigrants allegedly involved in criminal behaviours. It has become apparent that the police make use of the idiosyncratic features of criminal proceedings and criminal justice bureaucratic culture to advance their own objectives, assured by their intimate working relationships with criminal courts. This in turn puts the defendant in an uncertain situation as to whether they will be expelled or prosecuted and as to whether they will have to comply with the punishment ordered in first instance by the judge. Finally, it appeared that in most cases it is not judges, but immigration prosecutors, who in practice decide these cases.

6.4. The punitive character of pre-trial and post-trial administrative expulsion

Pre-trial and post-trial administrative expulsions are not formal methods of punishment and it is very difficult to argue otherwise. It could perhaps be more debatable in the case of post-sentence expulsion, but the fact that it is an entirely administrative decision based on the irregular immigration status of a defendant makes it very problematic to consider it a formal punishment. Nonetheless, the question emerges, what if these measures are assessed by criminal courts as if they were punishments? Bearing in mind what has been said about the decisiveness of the immigration prosecutor, to answer this question it is first necessary

to focus on the general decisional determinants considered by the courts in these cases.

Despite being an authorisation for an administrative expulsion, the fact that it is issued by a criminal court within a criminal proceeding makes it logical that its decision-making determinants are based upon criminal law considerations. This is also reinforced by the fact that it is administrative and not criminal judges who are entitled to fully assess the merits of the expulsion proceeding. Hence, the analysis and assessment of immigration law aspects by criminal courts should be minimal, if not totally absent. The following response from one very knowledgeable sentencing court servant shows the extent to which this seems to be case, as well as what the determinants of such decisions are:

> "*There are times when the defence lawyers send a writ of allegations, opposing the expulsion, alleging issues of roots. Well, I don't know, that he has a son here, this and that. Many times that really is sent to us, but it cannot be taken so much into account here at the criminal level because it is a more administrative issue. That is to say, many times some of them what they do is that they appeal administratively, judicially, but at the administrative court level, they repeal that expulsion. And then it is there where, before an administrative judge, they do have to prove whether or not they have roots; or if, say, if the administration has dictated an incorrect resolution about their situation here. And we, really, sometimes they bring that to our attention, but it's not determinant. Here what the prosecutor, the defence and the judge will consider is rather the type of crime he has, the punishment he has*" (Sentencing court servant 2).

The fact that immigration aspects are not considered by criminal courts when deciding an administrative expulsion authorisation was widely acknowledged by most interviewees. Although they recognised that there have been exceptions in which such allegations have been indirectly considered, those have been only a few, extraordinary cases. Therefore, it seems that the judicial decision to authorise an administrative expulsion is almost always solely based upon an assessment of criminal law considerations. It now makes sense to more specifically analyse how these criminal law aspects are evaluated by criminal courts. The following answer from one sentencing judge is an illustrative overview of this theme:

> "*They* [the police] *arrest a person, in a typical case, maybe a Moroccan, for a robbery, and it turns out that he is irregularly in Spanish territory. He is taken before the investigative judge… to request that the expulsion be authorised… If that foreigner, for example… instead of a theft is a homicide, then the court is going to oppose the expulsion because, it is going to say, 'look, you have killed a person, homicide, you have to comply with the punishment; it is not acceptable that we put you in a plane and you go to your country of origin,' with the trip, in quotes, paid, because he would go unpunished for the crime… The expulsion is authorised based on the severity* [of the crime]*; when the crime is not of a serious enough nature to justify the execution of the sentence in Spain instead of being expelled from the national territory… When the punishment is sufficiently serious, expulsions aren't authorised because logically the State must also guarantee that the punishments are served… Otherwise, it would be very easy, 'I come, I commit crimes a lot, I get involved in scams, this and that, and if they catch me, nothing will happen to me because they will take me to a CIE until they can put me on a plane and take me to my country'… But if the crime is serious enough for the State to consider that the punishment must be served, you will not be authorised to be expelled. You will comply with the*

punishment and… you can then be caught and expelled, and then you will be expelled, but not previously, because otherwise it would go unpunished" (Sentencing judge 2).

This response highlights a series of significant factors regarding the decision-making determinants of this type of expulsion authorisation. First, it explicitly mentions that the key aspect considered when coming to a decision is the severity of the crime. In this regard, the interviewee compares a theft with a homicide to exemplify how in the former the expulsion could be admissible, while not in the latter. Furthermore, the respondent also explicitly links the seriousness of the crime with the severity of the punishment, explaining that a crime sanctioned with a large penalty cannot be subject to an expulsion authorisation. However, the most significant aspect may be considered to be the way in which the interviewee made a punitive assessment of expulsion, considering it appropriate in some cases and a pathway to impunity in others. It is important to remember that in this circumstance the crime could have still not been sentenced and consequently, the culpability of the defendant may not have been officially declared. It ultimately emerges from this response that the meanings of expulsion attributed by criminal courts may be closely related with those of formal punishment.

Given the decisiveness of immigration prosecutors in these cases, it is necessary to consider what the most salient aspects in deciding an expulsion authorisation are. In this sense, it should be remembered that they are at first instance guided by specific guidelines (Circular 2/2006) issued by the prosecution office. Nonetheless, these guidelines are quite general and do not develop in detail specific criteria regarding the admissibility of this expulsion authorisation in difficult cases. Indeed, these guidelines are emphatic in stating that immigration law aspects, such as the immigrant's roots, or the legal adequacy of the administrative proceeding should not be assessed because they are the responsibility of the administrative courts. They explicitly insist that the criminal judge neither expels nor oversees the legality of the expulsion. This statement may to some extent contradict the Supreme Court doctrine that the criminal judge in these cases should conduct a provisional assessment of the grounds of the expulsion proceeding.

Apart from this more explicit instruction, and the reiteration of legal requirements, the guidelines tend to be vague and unspecific. For instance, regarding the assessment of the case factors to be considered by prosecutors, the guidelines only instruct them to analyse whether due to the concurrent circumstances and as a duly substantiated exception it is necessary to continue the criminal proceeding. One experienced immigration prosecutor explained to me that the vagueness of the guidelines in this respect is rather appropriate because each case should be analysed in its specificities, giving prosecutors the

necessary room for decisional discretion. Accordingly, the criteria to assess the admissibility of the expulsion authorisation have been developed by the immigration prosecutors themselves over the years. To ascertain what these criteria could be, I interviewed such experienced prosecutor, who was the only immigration prosecutor to have been involved with these cases for years. He explained to me that the assessment has more to do with the nature of the crime than with punishment and its severity:

> "*It's not the punishment, but the nature of the crime… In a crime of drug trafficking, the expulsion is authorised, depending… because you say, 'Man, what do you bring there? So many kilos of hashish, from Morocco'. Then, if you don't oppose the expulsion, it can result in a call to crime… it can also entail an unequal treatment in relation to Spaniards, or European citizens, who commit the same crime… one is subjected to prison, and the other is even paid the return ticket, and without consequences*" (Immigration prosecutor 3).

This explanation introduces some of the main themes subsequently developed in the rest of the interview: the need to avoid the 'calling effect', the impunity result of an inadequate expulsion, the fact that an expulsion authorisation can in some cases be a benefit rather than a sanction and issues of discrimination regarding Spanish and EU citizens. As said, these aspects are developed throughout the rest of his remarks:

> "*In general, I think that the expulsion authorisation… is thought primarily for petty crimes, for unimportant crimes. The fact that the legislator has put a maximum of six years of prison seems to me an excessively high upper limit, because practically 90% of the crimes in the criminal code are punished with penalties that don't exceed that amount. From the point of view of criminal policy, we must be very careful when authorising this type of expulsion, not only because of the calling effect, but mainly because it breaks with the principles of specific deterrence and general deterrence*" (Immigration prosecutor 3).

In this excerpt, the interviewee introduces an essential concept: the suitability of the expulsion authorisation for petty crimes. This suggests that expulsion could be an even more appropriate solution for certain crimes, particularly in regards to those considered unimportant. Evidently, the administrative expulsion decision has formally been issued because of a breach to the immigration law and not for the specific crime prosecuted in such proceeding. In fact, the guidelines from the prosecutorial office explicitly affirm that the grounds of the administrative expulsion should not be those that led to the criminal prosecution. Nevertheless, the expulsion can actually be regarded and used by the criminal courts as a means of fulfilling punitive purposes, such as specific and general deterrence. The following excerpt from the interview with this prosecutor is revealing:

> "*For example, crimes of violence against women. Then, the nature of the act is greatly valued because they usually are crimes in which to give the victim more protection, what better than to distance the aggressor from the victim? So there, for example, with the expulsion… it can also have beneficial effects from the point of view of the criminal proceeding, because you give greater protection to the extent that he will not be able to get in touch with her*" (Immigration prosecutor 3).

It is outstandingly clear from this example how the expulsion authorisation can have a punitive meaning and be used as a criminal sanction, if not as a form of punishment, to favour the achievement of a criminal law purpose. Moreover, in this example the conscious consideration of the criminal law goal of incapacitation is evident. In the next and final passage of this interview, the assessment of the nature of the crime is further specified:

> "*The nature and the punishment are usually linked to the extent that, depending on the severity of the act, the penalty is greater. But it is also the distance… Drug trafficking from Morocco, it is not the same as drug trafficking from Latin-America. It will always be more complicated to bring it from Latin-America… It is not the same, if we speak of selling drugs, we are talking about people who dedicate themselves to small trading, to sell hashish bars on the street. Well, that doesn't have any significance in relation to the one that has important quantities of hashish. It is not the same those who commit the crime in Spain, who enter Spain committing the crime. You will understand that if a person has been convicted because they have caught him trafficking drugs in the Spanish airports, then giving the authorisation to expulsion to that person is a terrible naivety, because if he has been able to come, won't he be able to return whenever he wants? There are always many conditions that I cannot summarise, in one, you have to analyse the specific case to reach one or another solution*" (Immigration prosecutor 3).

The strong emphasis upon drug offenses is particularly noteworthy. This reveals that within the prosecutorial practice there might be a perceptual tendency to associate foreign offenders with drug crimes. More relevant, however, is the idea that expulsion could be considered counterproductive in many of these cases. The crucial argument behind this reasoning is related to the pursued incapacitating effect of expulsion. Specifically, if it seems likely or foreseeable that the foreign defendant will come back to Spain without major difficulties, expulsion would not attain its purported incapacitating effect. Besides, in the judicial conception it would also curtail the deterrent aim of criminal law, by making it apparent that such crimes are not really punished. Another less experienced immigration prosecutor confirmed these ideas with some minor nuances, once again emphasising the relevance of these assessments in regards to drug trafficking offenses:

> "*What does it mean? That someone, to avoid that, a Brazilian for example, who spreads the word in Brazil, or a Guatemalan spreads the word there, that if you go to Spain and get caught with the drug, the only thing that happens is that they expel you because the punishment doesn't exceed six years… you are promoting a calling effect… You have to go through the dungeon, you have to be prosecuted, and once prosecuted… you can be expelled and that's what is usually done… To avoid that calling effect, in drug crimes, which carry a significant punishment, there we oppose expulsion, even if it doesn't exceed six years… Someone says, 'Oh, they caught me with a pound of cocaine, and the only thing that happened was that they took my coca, they took me to a dungeon, I was in the dungeon for a while, they took me to court, I was some time in the court, they even put me in jail, but then, I asked for the expulsion… and they gave it to me'. We don't do it… It is a general rule that at least here… we have self-imposed ourselves*" (Immigration prosecutor 1).

It is evident from this statement that deterrence is a major determinant within the prosecutorial decision-making rationale and that expulsion would only be admissible if it does not compromise such a purpose. Furthermore, from all the aspects highlighted in

these excerpts, it is apparent that this type of expulsion, despite its administrative nature, has become part of the decision-making culture of criminal courts. By this I am referring to the fact that the criminal courts have given it a punitive meaning. Apart from the overt immigration law enforcement orientation of expulsion, it seems that when it overlaps with a criminal proceeding, a largely latent criminal justice rationale taints it with the colours of criminal law. In other words, expulsion in these circumstances may serve such traditional criminal law purposes as general and specific deterrence and incapacitation.

There is, however, another crucial criminal law dimension that should be discussed: retribution. The analysis of the interviews reveals that for most court actors, expulsion tends to be regarded more as a benefit rather than as a penalty. Therefore, the rationale for keeping someone in prison before the expulsion would be, as many court workers have said, to make him "*pay for what he did*" and that "*it does not come for free*" despite the widely acknowledged perception among court actors that most defendants do not want to be expelled. This means that although expulsion may adequately serve deterrent and incapacitation purposes, in the eyes of criminal court actors it may not be enough to fulfil the retributive aim of punishment. The following response from a sentencing judge further clarifies this aspect:

> "[Expulsion] *is like an alternative, which in certain cases makes the execution* [of the sentence] *operative. There are times, in short-term custodial sentences, in which I don't care when a person is going to reach parole… A person that I have sentenced… to two years and three months of prison,*[159] *I don't care, that the last six months, seven months, or nine months of the sentence, he serves them in prison, or that he returns to his country… I think it is more operative for a person who has already committed a crime of that significance, to return to his country, and we also remove him from here to avoid the commission of new crimes. In other words, I believe that in those cases, execution is operative, in the sense that there come into play here; it would not be the retributive purpose of the penalty, since the retributive purpose of the punishment in those cases I see it more compromised. That you have to have that person removed and you cannot give him the prize of taking away years of prison because you are going to expel him. To those other cases where the retributive goal is not so important, and you may be looking for more deterrent purposes, that with the expulsion you can attain, once you expel someone, you prevent the commission of new criminal acts*" (Sentencing judge 4).

It should first be noted that the ideas expressed in this excerpt refer to expulsion in general, including those of administrative origin, as well as those of judicial nature. Hence, the first part of this extract, regarding the execution of a punishment, is applicable to both post-trial administrative and judicial expulsion. However, what is more relevant is the last part of the excerpt, in which the interviewee explicitly speaks of the aims of punishment and how expulsion may be useful to fulfil deterrent but not retributive purposes. Ultimately, the core

[159] The judge intentionally said this specific imprisonment time because it would not allow suspending the imposed punishment.

idea of this interpretation is that there is a complex interplay between the different objectives of punishment, such as deterrence, incapacitation and retribution. Consequently, in some cases the incapacitating effect of expulsion may be more significant than deterrence or retribution. However, in others, deterrence, and even retribution, could be considered more important, leading to the dismissal of the expulsion request. This rationale was further evidenced in the responses of Court of Appeal judges, given that they have to resolve the most serious crimes.[160] This response from one Court of Appeal judge illustrates how these considerations come into play in their decisions:

> "*The administration has decreed the expulsion of a man and here he is prosecuted. As he has a criminal procedure… the court can say yes, or no, because it may be in its best interest ... that his man be tried and convicted, whatever the circumstances. So, in this type of situation, what the judge does is to authorize or not to authorize, because it depends on the crime. If this man has committed a murder, the expulsion will not be authorized because it is a very big crime. If it's a theft in Carrefour* [a supermarket], *well let's say I don't care… Suppose, perhaps, that there are several accused, and one specifically accused of a smaller thing, well, maybe that gentleman in this proceeding, well, maybe* [it is authorised]*. But here normally* [it is not authorised] *… In the investigative courts, they do see it, or even in sentencing courts… they see crimes of lesser punishment, maybe there it is authorised more frequently… We don't usually grant them, because of the seriousness of the crime… Let's say that punishment… has several functions, among them general deterrence, that punishment serves to let people know that if one commits a crime… something will happen, that he will go to jail. If a man has been caught with 5kg of cocaine, and then we expel him without a trial, well, as soon as he arrives in Colombia, he will say, 'Look at this country, they have caught me with 5kg of cocaine and nothing happened'… it would be laughable, it's not logical*" (Court of Appeal judge 3).

It is possible to see how the interviewee emphasises general deterrence as a goal of punishment, stating that in some relatively serious drug offences, expulsion may cause potential offenders to believe that such cases are not punished. The Court of Appeal judges that I interviewed agreed that they tended not to authorise this type of expulsion because of the severity of the crimes that they judge. In this sense, in some cases it is the seriousness of the offence that requires a proportionate retribution, as in the case of a homicide; and in others it is the nature and circumstances of the crime that make expulsion counterproductive in terms of general and specific deterrence. In sum, pre-trial and post-sentence administrative expulsions have a punitive meaning for criminal courts, in the sense that despite their intrinsic administrative nature, they are assessed in terms of its appropriateness for achieving the functions traditionally attributed to formal punishment.

The parallelism between the objectives of punishment and those of immigration law is precisely one of the keystones of the crimmigration perspective. Indeed, as explained by Stumpf in her seminal paper (2006), both criminal and immigration laws create insiders and outsiders, as well as distinct categories of people such as the innocent versus guilty,

[160] As explained before, court of appeals are in charge of judging and sentencing the most serious crimes.

admitted versus excluded or ultimately, 'legal' versus 'illegal.' In Stumpf's view, both fields of law seem to be affected by a currently predominant retributive ideology instead of the rehabilitative model that was popular decades ago. This tendency, which has evident connections with Garland's portrayal of a contemporary *culture of control* (2001) and Feeley's and Simon's (1992) conceptualisation of the *new penology*, makes objectives such as deterrence, incapacitation and retribution the preferred orientations for both criminal and immigration law. In fact, "*the emphasis on retribution, deterrence, and incapacitation in immigration law is apparent from the expanded use of deportation as a sanction for violating either immigration or criminal laws*" (Stumpf, 2006: 407-408). The results of my research are consistent with these theoretical positions and reveal that the enforcement of immigration law by the criminal courts is affected by such considerations. Ultimately, they reveal that criminal courts seem to assess expulsion in terms of its capability to achieve such objectives, thus assigning it punitive meanings.

6.5. The curious case of sentencing expulsion: punitive assessments and the preference for post-sentence expulsion

Sentencing expulsion has been a widely debated topic that has called the attention of legal and socio-legal scholars. The analysis and discussion have considered aspects such as its legal configuration and nature (e.g. Cancio-Meliá & Maraver, 2006; Izquierdo-Escudero, 1997; Martín-Escribano, 2015; Muñoz-Ruiz, 2014; Rodríguez-Candela, 1998; 2016; Torres-Fernández, 2012), procedural implications (e.g. Flores-Mendoza, 2001; Garcia-Esteban, 2015; Guisasola, 2010; Martínez-Pardo, 2012; Recio-Juárez, 2016; Roig-Torres, 2014) and functionality and symbolism within the Spanish expulsion regime (e.g. Brandariz, 2011; García-España, 2016; Navarro-Cardoso, 2006; Rodríguez-Yagüe, 2012). Nevertheless, it seems to be applied infrequently, being ordered by judges in few cases and under exceptional circumstances. While it may be seen as a legal device to set expulsion as the preferred response to 'criminal aliens', in practice criminal justice actors do not seem to be inclined to request or order it in the first place. This response from a sentencing judge illustrates the reasons that seem to motivate this occurrence:

> "*It really is very difficult, although it seems incredible, that the expulsion be ordered by sentence. Why? Because normally the immigrant, when he is irregular in Spanish territory and commits a crime, when he is arrested, the administrative proceeding is initiated… for being irregularly in Spanish territory. Whereupon, if he is expelled, because the country of origin documented him and there is no problem… in the end he will be expelled from the national territory before he comes to trial… And when he has not been expelled, normally before, it is because he is not deportable, because his country of origin doesn't document him… and then the expulsion cannot be materialised. As the expulsion cannot be materialised, it is also not ordered in sentence, as it is unenforceable, it cannot be executed… In cases that come to trial, and that he is irregular and so on, yes, it is*

> *replaced, he is expelled, and that's it. But usually they are the least cases, it is very little. Normally, always, it is more than substituting punishments for expulsion, what is usually done and generally more in the investigative courts than in the sentencing courts, is to authorise the administrative expulsion*" (Sentencing judge 2).

The main theme emerging from these remarks is the numerical and procedural marginality of sentencing expulsion. For instance, this interviewee contends that if someone can be expelled, they will be expelled before the trial. Conversely, if someone has not been expelled before, it is likely that they cannot be expelled at all for some practical reason. The high percentage of unsuccessful sentencing expulsions evidenced in Martin-Escribano's study (2015), seem to corroborate this assertion. However, there appears to be other significant motives that make sentencing expulsion very rare. The following response from another sentencing judge elucidates this point:

> "*Substitution in sentence, are the least cases, very few. What's more, regarding that I got my misgivings. I prefer to do it later, in the execution… it is more comfortable to do it later in the execution. Because there are times that I don't have a clear element that allows me to determine that this person is in a clear irregular situation in Spain… I prefer him later, with a final conviction, in which I'm going to commute that sentence, I'm going to replace it with expulsion. It is preferable to do so. And then I do it in the execution… so that he has more guarantees. It seems to me with more guarantees what we do later in the execution… Also for a simple reason: in normal trials it is possible that between the end of the investigative phase, or the phase in which the investigative court became aware of the irregular situation of this person; until I hold the trial, one year has passed, or two years have passed. In these two years, the situation of this person may have changed. He may have appealed and won in the administrative level, to void the expulsion order. Then, as I don't know the situation, many times, updated at the time I dictate the sentence, of what happens with this person, I prefer not to put it, and postponed it for execution… and I usually offer the same justification, because at the date of the trial, I am not aware of the irregular situation of this person*" (Sentencing judge 4).

It looks that, apart from the practical motivations regarding the enforceability of the expulsion, there are other considerations that come into play regarding the decision-making rationale of judges. It seems that judges prefer to order the substitution not in sentence but in the execution of the punishment, making the defendant first serve time in prison before being expelled. It also appears that judges are more likely to favour a defendant's plaint to not order a sentencing expulsion even if requested by the prosecutor. Referring to this circumstance, one very experienced defence attorney explained to me the following:

> "*Let's see, it is true that this happens in the sentencing court and in the appeal's court… I have had more cases where the prosecutor asked for it and I had to fight for it not to be granted, proving the roots in Spain. There the truth is things haven't gone badly for me, I have not had many cases of expelled defendants… When I have opposed the substitution, I don't remember having had someone expelled who didn't want to be expelled… when I have opposed, I have achieved it, on the basis of the roots… and long before the last reform, because before this roots thing wasn't in the norm, but even so, as there was jurisprudence in that sense, the judges applied it… I don't remember any client expelled with that norm*" (Defence attorney 12).

It emerges that in general, judges seem to be relatively more receptive to the plaints of defendant's in terms of opposing sentencing expulsion. It was also evident from the interviews with judges and prosecutors that despite it being currently applicable to any foreigner regardless of their migratory status, sentencing expulsion is mostly reserved for irregular immigrants. Although the wish to resolve cases with more guarantees and with a more complete knowledge of the defendant's migratory status may be relevant to decide, reasons related to punitive assessments are also very significant. In fact, the decision to make the defendant serve at least a part of a custodial punishment could also be the result of an assessment of the appropriate response that a crime deserves, once again through the lens of incapacitation, retribution and deterrence. There seems to be a discretional decision-making interplay between considerations regarding the seriousness and nature of the crime, the types of available punishments and the length of the imprisonment penalty. Aside from the explanation of one of the sentencing judges quoted above, who said that expulsion is "*like an alternative*" that in certain cases "*makes execution operative*", the following excerpt from an interview with an appeal judge is further explanatory:

> "*As this is regulated, you always have to order the expulsion. But, let's say that… the general rule is this, but in practice, especially for us… as we deal with crimes normally more serious* [it is different] *… Now specifically the other day… there were some men who entered a house, hooded and tied the man who lived there, tied him to a chair, beat him, to take money… with weapons and such. So, we put them… four and a half years. They asked for the expulsion. Of course, if they are expelled… the legal norm that sanctions this type of serious behaviour would be much compromised. Because it is not the same for a man who has stolen in a car, or who has had a fight, has hit another, which is no more than a small injury than very big things, that would not be understood by the people… that this big penalty be substituted for an expulsion. So we said no*" (Court of Appeal judge 3).

In this interview passage, this judge reflects upon the obligatory nature of sentencing expulsion as set forth in the law and how in practice things work differently. In general, it seems that the seriousness of the crime, and the need to enforce the norm, are essential determinants in the judge's decision-making rationale. Once again, for such serious crimes, expulsion seems to be regarded more as a benefit than as a punishment. However, in the following piece of the interview with this judge, other crucial themes emerged:

> "*Now, what the penal code does necessarily say, is that he can serve in these cases, two thirds of the penalty maximum and the rest is replaced by expulsion. Then, there always has to be an expulsion, either as a substitute for the whole sentence, or as a substitute for a part of the sentence… The fact that it is not done in the sentence doesn't prevent anything because… it is also necessary that the affected person be heard, about this possibility, because if he is not heard, his right to make allegations would be violated, and his lawyer, the possibility to appeal… Then let's say that the expulsion, in the area that I work, which is more serious crimes, it is not often that it be given… because here we have more serious crimes, if they were replaced entirely by the expulsion… it is the same we talked before about general deterrence, because it would seem that the legal norm is really not complied*" (Court of Appeal judge 3).

From this statement, it is possible to see how the interviewee discusses the idea of postponing the imminent expulsion of a defendant until after they have served a substantial part of their imprisonment sentence. The point is that judges are aware that defendants will most likely be expelled anyway, but still prefer to make them serve some time in prison in the understanding that an expulsion would not be an appropriate measure for the most serious crimes. Conversely, expulsion may be an adequate response for milder crimes. This last excerpt from the interview with this judge is revealing:

> "*What happens is that… normally a sentenced criminal, if he has been sentenced to a short penalty he doesn't want to be expelled. On the other hand, if he has been sentenced to a very big penalty he wants to be expelled, right? Because if he has been sentenced to six months in prison, then he is taken to Morocco, he doesn't want to. Here he will be six months in jail, which will be much better, well, much better, not, let's understand, that he will be in a decent jail and in six months, or four or five, he will be in the street. While if he is taken to his country he cannot come back here, within the years that he is put, I don't know, five years. Now, if he has been sentenced to five years in prison, he wants to leave, because it means being in jail for five years or four and a half years. So really, when they want* [to be expelled]*, it will not be ordered, and when they don't want it, it will be ordered* [in a bit of laughter]" (Court of Appeal judge 3).

This last ironic phrase epitomises one of the most significant issues regarding sentencing expulsion: its afflictive ambivalence (Asúa-Batarrita, 2002; Cancio-Meliá, 2007; Cancio-Meliá & Maraver, 2006; Tomé-García, 2006; Vieira da Costa, 2010). As described by Asúa-Batarrita (2002), an expulsion does not mean the same thing for those who migrate out of desperation in search of work than for those who have more than enough resources in another country and come to Spain to expand the possibilities of clandestine businesses. To this last part it must also be added those cases in which the person is, for example, a drug smuggler whose socio-economic situation in their country of origin is unfavourable. Therefore, in essence expulsion as a punitive response for a crime displays an ambivalent nature that, in practice, could have different meanings for both law enforcers and deportees depending on the specific circumstances of the case. Bearing in mind this reflection, the following statement from one defence attorney, albeit ironic and perhaps to some extent unreal, corresponds to the earlier account from the aforementioned judge:

> "*It can be at the request of a party, or because the prosecutor proposes it, or in short because the judge decrees it… in general, you have to apply reverse psychology… if you want to be expelled, say 'don't expel me' and they expel you… and if you want to stay, say 'expel me' and the judge says, 'no, I don't expel you, you stay here'… I use reverse psychology, when I want a thing, I ask the contrary so that they reject it… if I don't want to be expelled, I say 'I request that they expel me' and then they tell me, 'I don't expel'… There are people who want to stay in Spain, but others to leave and never again hear of Spain in their life because Spain has done them a lot of damage, they say 'I hate Spain, I want to leave.' So they say, 'no, I don't want to be expelled' then they expel you… they are going to do what they think is going to screw the accused more*" (Defence attorney 3).

Apart from the apparent irony, this response reinforces the idea that expulsion is of an ambivalent nature and that depending on the case it could be understood as a sanction or as a benefit. Judges, thus, would apply it depending on such determination. In the same sense, another sentencing judge gave me a specific example to explain how expulsion should be applied in such a way to prevent it from becoming desirable for the defendant:

> "*Expulsion must not be a prize… Not long ago I had a person that I sentenced… I think it was in 2008 or 2009. It was for a violent robbery, with serious injuries and I put the maximum penalty, I think I gave him five years for the violent robbery with a dangerous weapon and five years for the injuries because he beat the victim tremendously. This person, now in 2015, was about to reach the third degree*[161]*… Of course, it had been a ten-year sentence, so 3/4 parts were going to be right now, at seven and a half years. And Penitentiary Institutions,*[162] *but mainly the prisoner, wanted me to substitute the last two and a half years for his expulsion from the national territory. And I said no, that the crime had been so violent that he deserved serving the rest of the sentence because he had not satisfied the civil responsibility either. So, like a prize, no. Moreover, what is to be avoided is precisely that expulsion be a way to avoid compliance with custodial penalties*" (Sentencing judge 4).

The interviewee here highlights that expulsion should not be applied if it may end up being a benefit rather than a pain for the defendant. In particular, the interviewee links the determination of the appropriate punishment with the seriousness of the offence, explicitly stating that "*the crime had been so violent that he deserved serving the rest of the sentence*". Taking into consideration these sorts of circumstances, the prosecution office addressed this type of expulsion in detail. In the guidelines issued in 2015, it has established two types of exceptions to the general rule of imperative expulsion: a 'relative exception', referring to the need to ensure the defence of the legal order and restore trust in the validity of the infringed norm and an 'absolute exception', referring to the need to comply with the principle of proportionality. The first exception is necessarily linked with a punitive assessment of the crime and its circumstances. To illustrate, the applicability of this type of expulsion must be related with the seriousness of the crime, which is in turn determined according to the severity of the applicable punishment.

The guidelines instruct that in general, expulsion shall be accepted when the imposed penalty is subject to conditional suspension, which is applicable to sentences of limited duration imposed on 'non-dangerous subjects'. The guidelines then refer to crimes sentenced with more than two years of prison, in which case it is recommended that the expulsion be accepted for those behaviours that by their intrinsic gravity or by the way in which they have been executed do not display traits that make it necessary to serve the full prison sentence. Apart from these general remarks, the guidelines also provide more

[161] This means that the prisoner was about to become eligible for parole release.
[162] This is the administrative agency that manages the Spanish prison system

specific criteria for assessing these circumstances. For example, they instruct that expulsion shall not be accepted in such cases in which the offender exerted too much violence; or in cases that involved harassment or cruelty to the victim; or that affected particularly valuable rights, such as the sexual freedom; or relatively serious drug trafficking offenses. Finally, as already explained in the first section, in cases sanctioned with more than five years of imprisonment this type of expulsion is not applicable and the defendant must first serve some time in prison before being expelled.

The second exception has to do with the requirement that expulsion shall not be applied when, in light of the circumstances of the act and the offender, especially in regards to their roots in Spain, it would be disproportionate. The guidelines establish that this requires an assessment of the impact of the expulsion upon the private and family life of the foreigner, and the severity of their crime. This should necessarily entail an analysis of the defendant's roots, as well as of the principle of non-refoulement. The guidelines then provide specific criteria taken from the caselaw of the ECHR, which include such aspects as: the defendant's time of residence in Spain, whether they are a so-called 'second generation' immigrant or one who arrived in Spain as a child or at a young age, their health condition, family ties and links with their country of origin. Finally, this exception also alludes to the circumstances of the crime, which means that its intrinsic severity and the relevance of the affected rights shall also have a significant impact on the decision. It is instructed that when the crime seriously affects the state internal or external security and generates a feeling of insecurity or distress within the population, an expulsion may not be disproportionate even if the defendant demonstrated personal roots within Spain.

Regarding the assessment of roots and other personal circumstances of the defendant, my respondents affirmed that they do consider such aspects when making a decision. In this sense, the following remarks from a sentencing judge are quite illustrative:

> "*Sure, I resolve it… If he has roots in Spain, if he doesn't have them; if he has a family, if he doesn't have a family; if he has a job, if he doesn't have a job; if he has a criminal record. These are the aspects that invite me to decree the expulsion… Although I don't usually decree expulsions… I believe in the judicial sovereignty of the country… that the crimes committed in Spain are repressed in Spain. In the end, expulsion is a benefit, even though the accused doesn't want to be expelled* [in a bit of laughter]. *What it does is to decline, the punitive apparatus of the State declines its function for the benefit of the person who is expelled from the territory… And we value objective criteria, as I am telling you. If he has roots; he either has them or not. He has a house that is rented with family, or that, he doesn't have it. Really if it is someone who has come here, who has been in Spain for two months, who doesn't have any kind of relationship with the country, it is normal that he be expelled*" (Sentencing judge 3).

It appears that judges do consider the concept of roots when deciding an expulsion. However, it is also evident that at least for some of them it could affect the 'judicial

sovereignty' of the nation, entailing a declination of the punitive apparatus. The consideration of roots in these decisions was ratified by the experienced immigration prosecutor that I interviewed, who asserted that unlike the authorisation for the suspension of a criminal proceeding to allow an administrative expulsion, in this case they are required to analyse such aspects, as well as the practical feasibility of the expulsion. Additionally, this excerpt once again highlights the ways in which expulsion is regarded as a benefit, despite the fact that in a subsequent part of his reasoning the judge in question affirmed that criminal records have a lot of weight in his decision, arguing that: "*if the crime has been very serious… a crime of blood, serious injuries, the expulsion is certified… it is preferable not to have that kind of citizen in Spain*". It is again possible to see how expulsion as a punitive sanction is measured according to the circumstances of the crime and the offender, particularly in regards to their perceived level of dangerousness. These remarks lead us to the last significant theme of this research.

6.6. Sentencing decision-making rationale: a utilitarian mixture of administrative and judicial expulsion choices

All the aforementioned discussions lead us to the specific sentencing decision-making rationale developed by criminal courts, particularly judges and prosecutors, regarding the use of expulsion as one available measure within a catalogue of existing punishments. The analysis of the interviews reveals that there is a differential regime regarding expulsion at the sentencing and post-sentence phases, which apart from specific immigration law considerations, seems to depend upon an assessment of both the seriousness of the crime, the type of crime committed and the severity of the applicable punishment. The following response from another sentencing judge illustrates this assertion:

> "*In the execution it is usually at the request of a party… either it is the convict's own representation that asks us to substitute the punishment for expulsion. Or, when they are serving a prison sentence, Penitentiary Institutions tell us if the rest of the sentence, especially when they reach the third degree… is substituted for the expulsion. Or there are times, especially in non-custodial penalties, such as community services… when the administration… tells me that they have requested the expulsion and it has been decreed in another proceeding… if I have a problem that he be expelled. So, then I usually say that I have no problem… I usually say yes, unless it is a custodial penalty of importance… That's why this normally happens with penalties of community services or fines… Because in theory, the administration tells them that this person is in an irregular situation, and given that the general rule is that once he reaches the third degree the rest of the penalty is substituted for the expulsion, we are notified so that we don't have a person there longer in prison… What they are looking for is also… to minimise the cost of having a person in prison*" (Sentencing judge 4).

In this excerpt, the interviewee summarises the three typical cases of post-sentence expulsion, two of which are judicial and the other administrative. Regarding the

administrative case, it seems that there is a tendency to admit it for non-custodial sanctions. When the defendant is sanctioned with a fine or community service, judges seem to be open to neglect the execution of the penalty, file the criminal proceeding and state that they have no inconvenience at accepting the administrative expulsion of the defendant. Given that non-custodial penalties are imposed upon minor crimes, and that in such cases a judicial expulsion is not legally admissible, judges seem to give less weight to deterrence and retribution. In addition, the authorisation for the administrative expulsion of a convict can be given once they have fully served the imposed imprisonment sentence. Although this is merely a bureaucratic confirmation that the defendant has no obligations within the sentencing court, it seems once again to be used by the police to strengthen the legitimacy of their own decisions and reinforce the social construction of the 'criminal alien'.

Regarding judicial expulsion, there are two possibilities. The first is when it is requested by the defendant at any time during the execution of the punishment. As explained above, judges tend not to accept this type of request based on the seriousness of the crime, the severity of the punishment and the need to ensure general deterrence. Finally, the last case is when the expulsion is tacitly requested by Penitentiary Institutions due to their legal duty to notify the police whenever an imprisoned irregular immigrant is about to become eligible for parole. It appears that this is the most common case, in which the judge substitutes the remaining part of the prison sentence, which will anyway be completed in parole, for the expulsion. In summary, for custodial sanctions and depending on the punitive assessment of the crime and the offender culpability and dangerousness, there seems to be an ostensible preference for making the convict first serve some time in prison, usually until they are eligible for parole, before substituting the rest of the penalty for expulsion. For the most serious cases, it seems that judges prefer to make the convict serve the full prison sentence before they authorise the administrative expulsion requested by the police. All of this reveals that expulsion is assessed in punitive terms and selected in relation to its appropriateness to fulfil traditional objectives of punishment.

Nonetheless, all of this also reveals a marked disdain for rehabilitation as a goal of punishment. It is poignant that this topic is scarcely mentioned by judges, prosecutors and court personnel. This reflects the extent to which such a formal purpose of punishment, as explicitly recognised within the Spanish Constitution,[163] is largely irrelevant for criminal courts, at least regarding the prosecution and sentencing of deportable immigrants. This raises a critical question in regards to the fact that if the statutory objective of punishment

[163] Art 25.2 of the Spanish Constitution establishes that the custodial sanctions shall be oriented towards re-education and social integration.

is rehabilitation, expulsion is intrinsically inappropriate in every way to achieve that purpose. Consequently, if for a prisoner the preeminent purpose of imprisonment is to be 'rehabilitated' to 're-join the Spanish society', those who are expelled after serving time in prison are treated in vain. This is aggravated by the fact that those who are expelled are forbidden from returning to Spain for five to ten years, thus accentuating the incapacitating effect of expulsion. For this reason, it has been argued that when not accepted or requested by the defendant, expulsion has a merely retributive function (Rodríguez-Candela, 2016; Vieira da Costa, 2010). Indeed, this type of expulsion has been conceptualised as a manifestation of the criminal law of the enemy, in which irregular immigrants are excluded from the legal system, and as such, categorically denied any chance of individualisation and rehabilitation (Cancio-Meliá & Maraver, 2006; Cancio-Meliá, 2007).

This discussion also revolves around the issue that an expulsion following imprisonment could compromise the *ne bis in idem* principle. As mentioned above, the Constitutional Court ruled (STC 242/1994) that expulsion is not a punishment because it cannot be conceived as a means of exercising the *ius puniendi*, but as a measure legitimately devised from the link between criminal and immigration policies. Furthermore, the same Court has ruled (STC 236/2007; AT 331/1997) that an expulsion following imprisonment does not violate the constitutional principle of rehabilitation because such a principle refers to custodial sanctions. This mandate is addressed to the legislator in criminal matters in order to guide the criminal and penitentiary policy, but does not regard administrative matters and measures within the immigration field. Relatedly, from my research it appeared that, although expulsion could in practice be assessed in terms of its punitive effects, it is not regarded as a formal punishment. For instance, the following response from a sentencing judge summarises these remarks:

> "*One thing is the crime, and another thing is that there is an administrative infraction or not… that is, the criminal code, and the conduct that is criminally punishable; and another thing is the administrative infraction. Being irregularly in Spain is not a crime; it is an administrative infraction… Nobody is judged for being illegal, no, no. Another thing is that being not regularly in Spanish territory, administratively entails a sanction, of a fine or expulsion from the national territory with an entry ban. But they are two totally different things, so there can never be, there would be no accumulation of sanctions because they are two totally independent things*" (Sentencing judge 2).

This criterion, which was common amongst criminal court actors, is that expulsion is not a punishment but an administrative sanction resulting from the unauthorised presence of a foreigner within Spanish territory. Hence, in the view of judges and prosecutors, an expulsion following imprisonment is neither regarded as an accumulation of punishments, nor as a way to punish the same offence. However, as the same results of this research

demonstrate, expulsion in general, and judicial expulsion in particular, are assessed by judges and prosecutors in terms of their adequacy to achieve eminently punitive purposes, assigning them punitive meanings. It is therefore necessary to conclude this chapter by discussing the configuration of expulsion as a form of punishment from the perspective of the practical meanings attributed to such measure by criminal justice actors.

6.7. Summary: Expulsion as punishment through its attributed meanings

The results of my research reveal that expulsion, in its various forms, has been incorporated into the idiosyncratic decision-making rationale of criminal courts. This means that in spite of its formal administrative nature, it seems to be substantially signified in punitive terms by criminal court actors. This signification goes beyond its explicit labelling, given that these actors repeatedly emphasised that it is not a criminal sanction. Indeed, even in regards to sentencing and post-sentence expulsion, they contended that it is not a punishment. Nonetheless, the analysis presented in this chapter demonstrates that expulsion throughout the criminal proceeding is implemented in practice according to its particular appropriateness for attaining criminal law objectives such as incapacitation, deterrence and retribution. In this regard, the conception of punishment is an essential component of the culture and decision-making rationale of the criminal courts. Certainly, as expressed by Garland (1991), penological theory is a constitutive part of the of amalgamation that composes the penal culture, which in turn frames the actions of penal agents and gives meaning to what they do. Accordingly, sentencing is in Garland's words a signifying practice of some importance, in the sense that,

> "*The various sanctions available to the court are not merely a repertoire of techniques for handling offenders, they are also a system of signs which are used to convey specific meanings in terms which are generally understood by the social audience. Each specific sanction has attached to it a recognizable symbolism, so that, in any particular context, imprisonment means one thing, a fine another, probation something else, and so on. Thus whenever a sentence is passed, the sentencer knowingly deploys a conventional device for the expression of meaning, and engages in a symbolic communication of greater or lesser significance*" (Garland, 1991: 256-257).

This process of the production of meaning can be extended to other decision-making points in which judges make punitive determinations about the defendant's attributed actions or behaviours. As evidenced throughout this chapter, expulsion has become one of the various available measures that criminal courts can decree, although it is exclusively applied to a certain category of defendants: irregular immigrants. In consequence, when an expulsion is ordered or authorised, there is an invariable intrinsic meaning related to the ways in which immigrants allegedly involved in criminal behaviours shall be treated. As it has been explained, this forms an essential part of the process of constructing the social image of the

‘criminal alien’ (Becker, 1963; Melossi, 2003; Wacquant, 1999, 2006). Such a radically incapacitating measure as expulsion is only applicable to a predefined category of people.

This is also an expression of the twofold process of production of meaning described by Garland (1991: 249): “*punishment is shaped by broad cultural patterns which have their origins elsewhere, but it also generates its own local meanings, values, and sensibilities which contribute… to the bricolage of the dominating culture*”. Punishment shapes the predominant culture and contributes to the (re)generation of the cultural structures. This cultural function of punishment within the realm of immigration control is present in Bosworth and Guild’s (2008: 714) notion of governing through migration control, by which the controls on migrants “*delimit profound differences between citizens and non-citizens from legal rights to a more affective and qualitative sense of belonging. In so doing, the criminalization of migration reshapes the referents for security*”.

Consequently, the policy configuration of irregular immigration as a threat, and its enforcement, is relentlessly fed by the socially constructed conception of the ‘criminal alien’. Then, this policy is effectively operationalised by the process of criminal labelling, which is completed through the court’s culturally constructed punishment of expulsion. This process comes full circle with the use of judicially constructed expulsions for the confirmation of the ‘immigrant’s criminal character’. Expulsion is then rendered as the appropriate response for the crimes of irregular immigrants. However, it is expulsion as the result of a cumulative process which ultimately defines the criminal character of such a social group: they are expelled; therefore, they must be criminal. This is evident in the composition of the so-called ‘qualified expulsions’, which seem to be boosted with expulsions that are presented as judicially ordered, despite actually being administrative.

The idea of expulsion as a court’s culturally constructed punishment implies that expulsion is defined more by the meanings attributed to it by court actors, than by its formal or official categorisation. In this sense, the results of this research reveal that there is essentially a dilemma regarding the afflictive ambivalence of expulsion (Asúa-Batarrita, 2002; Cancio-Meliá, 2007; Cancio-Meliá & Maraver, 2006). For instance, in each case in which the application of this measure is discussed, judges and prosecutors confront a contentious debate regarding whether expulsion could be a sanction or a benefit for the defendant. However, over the years, court actors have not only developed a set of unwritten rules for discerning such ambivalence, but also a patterned practice for ascertaining whether expulsion is an appropriate response for a given crime or not. Implicit in this is the analysis of the actual punitive character of expulsion in a particular case. This

inquiry is ultimately the reflection of an assessment of the suitability of expulsion for achieving traditional goals of punishment such as deterrence, incapacitation and retribution. Rehabilitation, however, seems to be largely irrelevant. In this regard, judges and prosecutors weight-up the goals of punishment in each case based on the seriousness and nature of the crime, the severity of the stipulated punishment and the personal circumstances of the defendant. Such an analysis leads them to conclude whether deterrence, incapacitation or retribution has more weight than the others in a given case.

In line with the focal concerns perspective for explaining sentencing decision-making (Steffensmeier et al., 1998; Steffensmeier & Demuth, 2001), the application of expulsion is based on an assessment of its appropriateness for ensuring the protection of the community. This is understood as a decisional factor of utilitarian nature, referring to the need to incapacitate the offender or to deter would-be offenders. The present research reveals that the preference for a given measure (or for that matter, a given punishment) in crimes involving an irregular immigrant is not only determined by its conceived severity, but by its effectiveness. Expelling a foreign defendant would be deemed appropriate by court actors only when its incapacitating effect is foreseeably effective. To illustrate, the expulsion of a Moroccan defendant for a relatively significant crime would not be authorised given the geographical proximity and ease of re-entry. In such cases, although the expulsion will anyway be eventually executed, court decision-makers would prefer to prosecute the defendant or punish them with a custodial penalty. This kind of procedural and sentencing formula is directed by the pursuance of retribution and deterrence.

Similarly, the attribution of meaning through the punitive assessment of a given case could also be linked to perceptual determinations as to which of the available crime control measures is more appropriate. As explained by Hawkins (1981):

> "*Crime represents a form of negatively valued behaviour, and criminal punishment represents a means of control. Therefore, the perception of criminal behaviour may involve processes of attribution and prescriptions for punishment. For example, a perceiver may believe that a violent criminal offender is an aggressive person or alternatively that environmental factors precipitated the criminal act. Perceptual differences such as this may in turn lead to conclusions regarding the possibility of the offender's rehabilitation potential, the threat posed to society, and the type of criminal sanction imposed*" (Hawkins, 1981: 208).

The possibility of having at hand, in the repertoire of punitive sanctions or punishments, such a measure as expulsion, may have contributed to reconfiguring and predisposing the decisional mindsets of court actors. As the laws and policies foster the use of expulsion as a preferential measure to respond to immigrant delinquency in general, court actors may perfunctorily perceive it as deserving expulsion as a response, regardless of other relevant

circumstances. Specifically, below the threshold in which retribution and deterrence become more relevant, court decision-makers seem to authorise or decree expulsion irrespective of the perceived nature of the offender or the circumstances of the criminal act. In other words, if expulsion was not available, it is likely that court actors would decide considering other aspects that ordinarily influence their perceptual determinations. Hence, the migratory status of an immigrant defendant prevails over all other relevant aspects.

In the present research it appears that the application of expulsion in a particular case is mostly determined by the severity and nature of the offense. Consequently, it is possible to speak of an interrelation between factors related to the presumed culpability of the defendant and the need to protect the community. Regarding the severity of the crime, the analysis revealed that expulsion is in general not considered retributive enough as the severity of the crime increases. This reflects the extent to which punishment could in practice be understood as a 'pain' that the defendant deserves in response to their fault. In this sense, Durkheim's (1994 [1893]) conceptualisation of punishment as an act of vengeance and expiation remains valid nowadays. In fact, Durkheim rebutted the idea that in his own times society no longer punished to avenge, but to defend itself, arguing that the essence of punishment remained inalterable, and that the necessity for vengeance was only better directed then than in the past. Therefore, while punishment may be intended to achieve other more utilitarian purposes, its retributive essence is indelible.

Retribution as an essential feature of punishment regained momentum and theoretical significance through Von Hirsch's commensurate deserts framework (1985). Von Hirsch criticised the supposed role of punishment as a measure of specific deterrence, especially regarding its purported rehabilitative function. He also questioned the absolute value of general deterrence as an ultimate reason for justifying punishment in general, and the selection of specific penalties in particular. Then, after acknowledging that punishment is indeed a form of suffering for the offender, he argued that in the current state of society the most appropriate basis for punishment should be deserts. Von Hirsch admitted that general deterrence should play a relatively important role, but that in the end it is deserts that should guide punishment. In essence, this means that punishment is imposed because the offender deserves to receive some painful consequence for their criminal behaviour, and that this painful measure should be proportional to the caused harm. This thesis reveals that these considerations are part of the decision-making rationale of the criminal courts.

Philosopher of law Carlos Nino (2003: 173), analytically discussed Kelsen's definition of sanction, concluding that what distinguishes punishment from other legal

sanctions is its afflictive character. Specifically, imposing some suffering on the offender is an essential part of the reason why punishment is applied. In this regard, my research shows that, from the perspective of the meanings attributed to it by criminal justice actors, expulsion does not fully satisfy a retributive purpose. However, my interviewees did share the idea that most defendants did not want to be expelled and a few of them even reflected upon the fact that for some people it could be worse than serving time in prison. Speaking on the US context, Pauw (2000) has precisely analysed the extent to which expulsion could be deemed a form of punishment, contending that the concept of punishment as retribution, deterrence, and backward looking is the most useful in distinguishing punishment from other legal sanctions whose primary purpose is remedial. Specifically, he argues that,

> "*We might say, then, that a remedial measure is a sanction imposed in order to compensate a person, or party who has been injured or in order to protect members of the public from actions that are likely to be harmful. 'Punishment,' on the other hand, is a sanction that is imposed for purposes of retribution or deterrence on account of a prior action that is regarded as improper or offensive. Such a sanction can be imposed without an intention to compensate a victim and without consideration of whether the individual being sanctioned is likely to reoffend or injure society*" (Pauw, 2000: 330).

Based on this, Pauw (2000) concludes that in some cases expulsion can have a punitive nature either because the statutory framework itself is punitive, or because the statutory provision is punitive when applied. In the same sense, Kanstroom (2000) has argued that the expulsion of long-term permanent residents for post-entry criminal conduct seems to be a form of punishment because it serves incapacitating, deterrent and retributive functions. As my research has demonstrated, in the case of Spain, an expulsion authorised or ordered during a criminal proceeding can both be based on a punitive statutory framework or be punitive when applied. Besides, the results of my study point towards the fact that from the perspective of criminal court actors and their penal culture, expulsion does not properly accomplish retributive but mostly deterrent and incapacitating purposes.

Deterrence and incapacitation, as eminent and traditional purposes of punishment, are thus undoubtedly linked with the practical signification of expulsion as a punitive measure. As explained by Roxin (1981: 44), it is widely acknowledged nowadays that the essential mission of criminal law and punishment, apart from rehabilitation, is to fulfil "*unavoidable general prevention exigencies*". The concept of general deterrence is nowadays connatural to criminal law, and was indeed already present in Beccaria's foundational treatise (1872[1764]), where he explicitly contended that,

> "*The end of punishment, therefore, is no other, than to prevent others from committing the like offence. Such punishments, therefore, and such a mode of inflicting them, ought to be chosen, as will make strongest and most lasting impressions on the minds of others, with the least torment to the body of the criminal*" (Beccaria, 1872: 47).

The incapacitating function of punishment, in turn, has generally been treated in theoretical terms as a modality of specific deterrence. As critically explained by Zaffaroni (2003: 64), criminalisation and punishment in this regard are directed towards the criminalised person, not to improve them, but to neutralise the effects of their 'inferiority' at the cost of suffering for the criminal, but as a benefit for the social body. The results of my research point towards a dialectic arrangement of retributive and deterrent purposes when assessing the suitability of expulsion for a certain crime. Nonetheless, the problem with expulsion, from the perspective of human rights and the rule of law, is that it is only intended for a certain category of people: irregular immigrants. Moreover, the incapacitating effect of expulsion is only comparable in the Spanish legislation with the punishment of reviewable life imprisonment, which is applicable to crimes as dreadful as aggravated murder. Finally, the fact that expulsion is not considered a formal punishment further exasperates these circumstances, since in the words of De Giorgi (2006: 133), "*the fact that the detention, expulsion, and deportation of immigrants are not considered as real 'punishments' permits a de facto criminalization which leaves aside the principles of the rule of law*".

The disparagement of rehabilitation as a goal of punishment and the resurgence of incapacitation, deterrence and retribution have become essentially connected within an ongoing phenomenon labelled as the *new penology* (Feeley & Simon, 1992). Punishment in the era of the new penology is not about rehabilitating individuals but about identifying and managing unruly groups (Feeley & Simon, 1992: 455). Consequently, incapacitation has become the keystone method and predominant utilitarian model of punishment within the new penology, as delineated in the following remarks:

> "*Incapacitation promises to reduce the effects of crime in society not by altering either offender or social context, but by rearranging the distribution of offenders in society. If the prison can do nothing else, incapacitation theory holds, it can detain offenders for a time and thus delay their resumption of criminal activity. According to the theory, if such delays are sustained for enough time and for enough offenders, significant aggregate effects in crime can take place although individual destinies are only marginally altered. These aggregate effects can be further intensified, in some accounts, by a strategy of selective incapacitation. This approach proposes a sentencing scheme in which lengths of sentence depend not upon the nature of the criminal offense or upon an assessment of the character of the offender, but upon risk profiles. Its objectives are to identify high-risk offenders and to maintain long-term control over them while investing in shorter terms and less intrusive control over lower risk offenders*" (Feeley & Simon, 1992: 458).

As immigration and criminal law converge, the new penology has also had implications in the current reconfiguration of immigration control. In this regard, Miller (2003) has conceptually linked the increasingly exclusionary character of the US immigration policy between the 1980s and 2000s, with the hegemonic prevalence of the new penology. By tracing the punitive immigration reforms enacted in that period, Miller concludes that:

> "*In demonstrating how these harsh, punitive new reforms reproduce the new penology, I contend that a new hybrid crime/immigration system of social control has formed that reconfigures both the crime and immigration control systems by 'criminalizing' immigration law, and making the criminal law-like immigration law more administrative and less judicially reviewable. Ultimately, this hybrid crime/immigration control system has the potential, when combined with the highly focused political objective of eliminating the threat of terrorism, to dramatically impact the nature of penal supervision and spawn a potent, new system of social control premised upon protecting national security*" (Miller, 2003: 665-666).

These remarks can be extended to the current EU policy trend in immigration control which has been increasingly focused upon the securitisation of the external borders, as well as the swift expulsion of TCNs. In this context, as discussed in chapters two and three, Spain has been embarked on an ambivalent path that is nowadays more clearly oriented towards cost-effective immigration control and a tougher approach towards targeting and expelling criminalised immigrants. This can be concentrated within a structural policy dynamic revolving around the social construction of the 'criminal alien', linked with the construction of a scapegoat to be blamed for the social deficits characteristic of late modernity (Barbero, 2010; Bauman, 2000; Christie, 1986; Fekete, 2009; Tsoukala, 2005; Wacquant, 2006; Young, 2007). The persecution and punishment of 'criminal aliens', within the realm of the new penology, can be understood as a pacification strategy to mollify increasingly anxious and uprooted native constituencies (Ackerman, et al., 2014).

Beyond the legal discussion as to whether expulsion is an administrative or a criminal sanction, it seems that in practice it is assessed in punitive terms. This means that either as an authorisation, or as a direct order, expulsion is signified in terms of its ability to achieve punitive purposes depending on the particularities of the case. In general, in circumstances in which judges and prosecutors consider retribution to be insignificant given the mildness of a crime, expulsion is preferred. Conversely, when the severity and nature of the offense is so that it requires a proportionate retribution, expulsion is excluded. Nevertheless, once the 'appropriate amount of retribution' has been experienced by the defendant, expulsion will be reconsidered. Therefore, it seems that within the penal practice, expulsion serves a latent function, conveying aspects of wider cultural and policy configurations. As Garland explains, "*the representations projected by penal practice are not just threats aimed at criminals: they are also positive symbols which help produce subjectivities, forms of authority, and social relations*" (Garland, 1991: 276). In sum, the essential contribution of the criminal judiciary in the social construction of the 'criminal alien' is manifested in the meanings attributed by their decisive protagonists to the different modalities of expulsion available within criminal proceedings.

Chapter 7: Conclusions

"In a way, they seemed to be arguing as if it had nothing to do with me. Everything was happening without my participation. My fate was being decided without anyone so much asking my opinion. However, on second thoughts, I found I had nothing to say".

(Albert Camus, "The Stranger")

In the protagonist's trial described by Camus in his seminal novel, criminal court actors seem to be deciding the fate of a 'stranger'. Such a 'stranger', however, appears to be for the judge, the prosecutor and even the defence attorney some sort of ghost. His fate and his circumstances are under the scrutiny of a group of professionals working within the rules of the legal game in a juridically constructed dispute (Bourdieu, 1987). Though, none of these professionals are actually having a stake in the conflict, since they are at best representatives of the genuine contenders. Consequently, speaking metaphorically, it would in principle make more sense that the defendant defends their own interest without such intermediaries. Nonetheless, the 'legal contest' has its own rules, its own dynamics, its own paradoxes and its own mysteries. The judicial performance seems to develop according to a predetermined script, in which each actor plays its role. Therefore, the defendant may really have nothing to say because it will likely be fruitless.

Access to the 'radiance of law' -in Kafkaesque terms- is not an easy task for a 'stranger'. Complying with the legal formalities and requirements needed to obtain access may not be enough and they may also have to persuade the law doorkeeper to allow them entry. The legal game is supposedly designed and played to ensure that the law is reachable for anyone. Ultimately, the entry door is there, visible for the defendant, exclusively designed and set only for them. However, it could be that not all that glitters is law. Perhaps it is not an entry but an exit door. Perhaps the doorkeeper is not there to assist the defendant into their journey to the 'radiance of the law', but to a rather obscure and irreversible destiny. Criminal court actors may then not be charming accompanies that help the 'stranger' to arrive at safe harbour. Speaking ironically, the roads to criminalisation and expulsion are for some people wide and open, but the 'stranger' may not be able to see this clearly, which is where doorkeepers may be available to offer a guiding hand or not.

The present research has shed light on the decision-making determinants and processes of immigration control within the realm of the criminal courts. It has focused on the two constitutive components of such crimmigration decisional ambit within the Spanish context: immigration detention and expulsion throughout the criminal proceeding. The analysis has been situated within the structural framework of the social construction of the 'crimmigration immigrant'. This has entailed understanding the current convergence

between immigration control and criminal justice as a contemporary instrument of such a deeply rooted and cyclical social phenomenon. The focus has been upon judicial decision-making by criminal courts from organisational, cultural and social psychological perspectives. Through an in-depth qualitative study of a specific court setting, this thesis has attempted to answer a series of relevant questions regarding these aspects. In this concluding chapter, my intent is to summarise the findings of the present research. For that purpose, I will address each of the research questions, and in doing so, I will explain the specific contributions of this study, its limitations and the pathways for future research.

7.1. The social construction of the 'criminal immigrant' through the intertwining between immigration control and criminal justice

The criminal involvement and labelling of irregular immigrants has been conceptually explained in terms of a complex social construction process. The Spanish case in this regard is particularly interesting. In contrast to other countries, within Spain irregular immigration is not a statutory crime. Consequently, the attribution of a criminal label to an immigrant is not automatic or the sole consequence of a formal legal qualification. In consequence, it is not that irregular immigrants are instantaneously criminalised when they reach Spanish territory or fall into irregularity after entering it. For this reason, the social construction of the 'criminal immigrant' in Spain must not be seen from a radical constructionist perspective, but from one which understands criminalisation as a complex social process of action and reaction between a hegemonic category of policymakers and law enforcers and a subordinated category of enforced and targeted individuals.

Relying on critical criminology perspectives (Becker, 1963; Chambliss, 1975; Quinney, 1970; 1973; Turk, 1969), this study has assumed that the criminal labelling of irregular immigrants is determined by the structure of social relationships within a social context (Melossi, 2003). In Spain, immigration policies have produced and reproduced immigrant marginality by defining levels of social and economic inclusion and exclusion (Calavita, 2003). This is explained in terms of its functionality for an exposed post-Fordist economy largely dependent on a highly precarious workforce. For this reason, irregular immigrants have been simultaneously allowed entry and illegalised, in a paradoxical policy dynamic labelled as a system of tolerated (Izquierdo, 2012) or encouraged irregularity (Moffette, 2014). Although, this has entailed an implicit preference for some immigrants (Latin American) over others (Martínez & Golías, 2005; Izquierdo et al., 2003).

The marginalisation of immigrants, significantly determined by their unstable and/or disadvantageous migratory status, ostensibly pushes them towards illicit behaviours

in the name of subsistence. Immersed in such exclusionary social reality, irregular immigrants may end up not only working in the underground economy, but also may become involved in survival crimes, or quality-of-life offenses. Due to the culturally enhanced notoriousness of their ways of deviancy (Melossi, 2003), coupled with a selective law enforcement focus intended to target the specifically intolerable criminality of 'the other' (Wacquant, 1999; 2006), irregular immigrants end up stranded on the criminalising pathway. Although irregular immigration is not a criminal offence in Spain, these social mechanisms make irregular immigrants a preferential target for law enforcement. This means that whilst in formal legal terms the criminalisation of irregular immigrants is for ordinary crimes, the selective nature of law enforcement, heavily determined by the exclusionary character of immigration policies, configures in practice a linkage between being an irregular immigrant and being a criminal. The corollary of these criminalising processes is the application of measures specifically designed and intended for irregular immigrants: immigration detention and expulsion.

Defined as mechanisms of convergence between immigration control and criminal justice, immigration detention and expulsion are in principle immigration control measures that can nonetheless be authorised or acquiesced by criminal courts during a criminal proceeding brought against an irregular immigrant for an ordinary crime. Although in most circumstances[164] those measures are decided and applied as part of a parallel administrative expulsion proceeding, the role of the criminal judiciary is paramount because criminal courts exercise significant discretion in deciding whether to suspend or not a criminal proceeding to facilitate the administrative expulsion and detention of a defendant. In this sense, before expulsion is authorised or acquiesced, criminal courts are required to assess, depending on the procedural phase of the criminal proceeding, whether the defendant should first be fully prosecuted and formally punished. In light of the previous remarks, I have hypothesised that the incorporation of these key decisional aspects of immigration control within the decision-making realm of criminal courts is an essential feature of the social construction process of the 'criminal immigrant'.

Following on from this, the first research question that I proposed was the following: *How does the social construction of the 'criminal immigrant' through the intertwining of immigration control and criminal justice function within Spanish judicial practice?* The results of my research have been consistent with the provided theoretical

[164] As explained in the introductory chapter and throughout this thesis, there is also a judicial expulsion that is entirely decided and imposed by the criminal judiciary. Besides, as also explained, immigration detention is authorized by criminal courts in all cases, even in those in which an irregular immigrant has not been charged or prosecuted for a criminal offence; this happens mostly in the case of just-arrived immigrants.

underpinnings but have also expanded our understanding of the crimmigration phenomenon at the enforcement level in several ways. Regarding immigration detention, the analysis has demonstrated that the promoted policy linkage between being a detainee and a criminal is substantially supported by the work of the intervening criminal courts. It has been evidenced that aside from just-arrived immigrants, who are not criminally prosecuted, most detainees are taken before investigative courts with both a criminal charge and an immigration detention request. There seems to be in this sense a patterned procedural and collaborative mechanisation of actions between the police and investigative courts, deeply traversed by a bureaucratically organisational structure.

While the police seem to be focusing upon requesting the detention of immigrants allegedly involved in criminal behaviours, criminal courts end up, consciously or unconsciously, legitimising this strategy. To a large extent this is seemingly due to the deeply embedded and culturally entrenched collaborative relationships between the police and investigative courts. Moreover, for criminal courts, it seems that immigration detention must be reserved for particularly 'dangerous individuals'. While this has been explicitly acknowledged by some court actors, this was more evident in the judicial assessment of the case and defendant's circumstances. Specifically, being charged with a crime or having a criminal record is in the opinion of criminal court decision-makers a markedly negative factor that encourages them to order the detention. Their rationale for this decisional tendency was that there was an enhanced risk of abscondence on behalf of the immigrant defendant allegedly involved in a criminal behaviour, due to an increased motivation to remain outside of the reach of the law.

Such way of reasoning is conditioned by the occupational habitus of criminal courts. Since criminal court actors are used to dealing with criminals, it appeared that they have developed prejudiced attributions (Albonetti, 1991) that tendentially narrow their judgement to emphasise the 'evil traits' of defendants. Besides, the bureaucratically patterned processing mechanisms of the criminal courts favour thoughtlessness and streamlined case-disposal in detriment of individualisation and reflexivity. This is especially evident in the processing of just-arrived immigrants. Those coming in small boats are taken before the criminal courts only in regards to their irregular arrival in Spanish territory, and not for any criminal reason. Although the intervention of criminal courts is intended to guarantee the defendant's rights, my research reveals that in practice court actors treat these cases mechanically and contemptuously.

Immigration detention is in general inefficacious given the high rate of detainees who are not expelled. Most of those who are not ultimately expelled are newly arrived immigrants. This means that they are unnecessarily deprived of their freedom of movement because detention is justified only on grounds of ensuring an actual or foreseeable expulsion. My research evidences that criminal court actors are aware of this predicament, but it did not justify a discontinuation of ordering detention in the ways that they did. For them this is an extra-legal issue, or a circumstance that they cannot anticipate at the moment of deciding. Nevertheless, it also appeared that they persist in this decisional dynamic because in their deeply rooted legalistic and bureaucratic conception they see no alternative. As one noteworthily reflexive court clerk resignedly said: "*what else can we do?*" In such cases, detainees are ultimately freed to remain in Spanish territory in a legal limbo (Jarrín, 2012), being both non-deportable and unable to acquire a regular migratory status. Pushed to marginalisation, these immigrants may conceivably enter the criminalising social process (Melossi, 2003).

The role of criminal courts in the social construction of the 'criminal immigrant' is more straightforward when it comes to expulsion throughout the criminal proceeding. The link between being an irregular immigrant and being a criminal is decidedly reinforced by the practical configuration of expulsion as the appropriate response for immigrants allegedly involved in criminal behaviours. By making punitive assessments of expulsion in terms of its suitability for achieving traditional objectives of punishment such as incapacitation, deterrence and retribution, criminal court decision-makers engage in a symbolic communication and expression of meaning (Garland, 1991) in regards to the punitive response to the criminal involvement of irregular immigrants. This cultural process goes beyond legal formalities since being categorised as criminally involved is not necessarily dependent on a final judgement. As explained in many occasions, the so-called 'qualified (criminal) expulsions' include the expulsion of individuals with 'judicial records', which could simply be a way in which to disguise the use of police records.

In sum, this thesis has answered the mentioned research question by describing and explaining the role of criminal courts in the implementation of immigration control within their decisional realm. The social construction of the 'criminal immigrant' in the Spanish judicial practice is substantially shaped by the predetermined interconnection between immigration control and criminal law. Criminal courts in this regard fulfil a determinant role: to complete the labelling process by which being an irregular immigrant is identified with being a criminal. By validating and operationalising expulsion as the most appropriate

legal response for immigrants allegedly involved in criminal behaviours, criminal courts legitimise and sustain the social construction of the 'criminal immigrant' within Spain.

7.2. The decision-making determinants, conditions and mechanisms of immigration control within the realm of criminal courts

Studying how the social construction of the 'criminal immigrant' operates in the Spanish judicial practice made it necessary to analyse the determinants, conditions and mechanics of immigration control decision-making within the realm of criminal courts. Accordingly, the following research question was proposed: *What are the decision-making determinants, conditions and mechanics associated with immigration law implementation within the cultural realm of criminal justice decision-making?* The rationale behind this question was the assumption that criminal courts have had to incorporate within their cultural decisional realm a matter corresponding to other field of law. This was supposed as entailing the development of a peculiar decisional arrangement integrated by both components.

This in turn required analysing the challenges, intricacies and dynamics of such convergence between decisional realms, ultimately reflected in the need to balance the objectives of immigration control with those of criminal justice. Consequently, this thesis also sought to answer the following question: *To what extent do immigration control objectives in regards to detaining and/or expelling an irregular immigrant are preferred over criminal justice objectives towards prosecuting and punishing criminals, within the Spanish judicial practice and decisional culture?* While the incorporation of a series of expulsion pathways available through criminal proceedings may reveal a policy preference for immigration control objectives, in practice this must be reconciled with the crime control orientation and idiosyncrasy of criminal courts and their decisional processes.

This research has presented significant findings. Regarding immigration detention, as already mentioned in the previous section, criminal court decision-makers could not dissociate the criminal from the immigration control dimension. Specifically, crime-control aspects seemed to be determinants of immigration detention decision-making. Although it appeared that the assessment of the defendant's roots with Spain was relevant, it was also evident that most courts assess this aspect in a thoughtless and mechanistic fashion. This seemed to be mostly due to the pressing and bureaucratically streamlined decision-making dynamics of investigative courts. Concomitantly, Courts of Appeal appeared to have a marked tendency to confirm investigative courts decisions, largely determined by a judicial *esprit de corps*, shaped by an implicit aim of preserving the institutional integrity. Finally,

it was evidenced that the processing of just-arrived immigrants is mechanistically patterned, conveying a substantially predefined and scripted decisional dynamic.

The superposition of crime-control and immigration law enforcement features was also evident in the latent use of immigration detention as a proxy for pre-trial detention. As most defendants, excluding just-arrived immigrants, are processed for both an immigration detention request and a criminal charge for an ordinary crime, investigative courts are required to decide upon the suspension of the criminal prosecution to enable their expulsion. While in some minor crimes the defendant can be sentenced by the same investigative court through a plea agreement, in others the criminal judgment remains pending. It appeared that in the latter, investigative courts may suspend the criminal prosecution, or keep it pending for a further resolution by a sentencing court without ordering a pre-trial detention, but nonetheless authorise immigration detention. Hence, although officially not deprived of their freedom of movement for a criminal suspicion, the defendant is still locked up in an administrative jailing facility.

These remarks lead then to the analysis of the different expulsion pathways available within criminal proceedings. The first relevant moment in which such aspects are decided is precisely when investigative courts resolve whether to continue with the criminal prosecution for an ordinary crime or authorise the administrative expulsion. Investigative courts are therefore able to authorise an administrative expulsion, whenever they order the immigration detention of a prosecuted immigrant. However, it seems that investigative courts in many cases prefer not to suspend the criminal proceeding and submit the case to the criminal sentencing courts for trial. This procedural approach appeared to be a way to transfer a decisional responsibility to a higher court, but also proved to be an enforcement strategy used to acquire time and room for manoeuvre.

Specifically, keeping the criminal prosecution pending allows the police to advance the arrangements for the expulsion and verify its practical feasibility, without compromising an eventual criminal judgement. In this way, if the expulsion is ultimately inexecutable, the criminal proceeding continues, the trial hearing is held, and the sentence delivered. Nonetheless, in many cases this also results in failed hearings since the defendant could have already been expelled. The authorisation of an administrative expulsion can also take place after the trial, during the execution of the sentence. This type of expulsion is mostly reserved for defendants sentenced to non-custodial penalties, such as fines or community work. Finally, it can also be authorised in custodial sanctions when the defendant is eligible for parole release. Determining the appropriateness of expulsion in

each circumstance is based on a punitive assessment linked to the determination of its suitability for attaining traditional purposes of punishment.

Regarding the judicial authorisation for administrative expulsion, there is a final remark that must be mentioned: the decisive role of the specialised immigration prosecutor. Whilst this prosecutor also handles regular cases as any of her/his colleagues, they have an additional specific dedication to cases involving expulsion decisions. This research has revealed that in such cases criminal courts tend to mechanically follow the criterion of the prosecutor. The alleged rationale behind this course of action is that in the Spanish legal system the prosecutor is the one in charge of activating and advancing the criminal proceedings, which means that if they are not interested in prosecuting or punishing a crime, there is no reason to go against their opinion. However, it also appeared that for criminal courts, agreeing with the prosecutor helped to facilitate a quick case disposal. Resolving against the criterion of the prosecutor would require from judges an increased effort of argumentation and motivation. Although this is a general requirement when the judge denies an expulsion authorisation, it is less laborious for them to take and reproduce the reasoning and motivations of the prosecutor. A further reason for this decisional tendency was the heightened confidence in the specialised prosecutor to decide in these cases, given their specific expertise in immigration matters.

Focusing on judicial expulsions, which have been classified as those directly ordered by criminal judges in sentence or afterwards, this thesis has revealed some significant findings. In general, it appeared that judges are reluctant to order it in sentence in substitution of an imprisonment sanction. For them, it seems to be preferable to impose it once the convict has served a substantial part of the custodial penalty, normally after becoming eligible for parole release. As described below, this has to do with the assessment of the suitability of expulsion for attaining traditional objectives of punishment. However, it is also explained in terms of its practical residuality: advancing to such a definitive procedural phase may mean that for some reason expulsion is not applicable.

If expulsion has not been authorised before, it should most likely have been because it was not executable or admissible. In this regard, although judicial expulsion is now admissible for both regular and irregular immigrants, criminal judges tend to deem it acceptable only for the latter. Consequently, not being sure of the irregular migratory status of a convict seems to dissuade them from ordering an expulsion. Relatedly, if the irregular migratory status of the defendant had been accredited at a previous stage of the procedure, it is most likely that the expulsion had been authorised in advance. If that was actually the

case, but the criminal proceeding still progressed until the sentencing phase, it should most likely have been because the expulsion could not be executed for some practical reason. Therefore, since my research subjects seemed to be aware of these circumstances, they appeared to prefer not to order seemingly pointless expulsions. Nevertheless, this conclusion must be complemented with the analysis of another substantial dimension of the decisional determinants of the expulsion pathways inherent within criminal proceedings: the punitive meanings attributed to them by criminal court actors.

7.3. The punitive meanings of immigration detention and expulsion throughout the criminal proceeding

The central aim of this thesis has been to ascertain and interpret the meanings produced and attributed by criminal court actors to immigration control, as part of their working routines and occupational culture. The incorporation of key aspects of immigration law enforcement such as immigration detention and expulsion within the decision-making realm of the criminal courts has necessarily enlarged the decisional choices of criminal court actors. This expanded repertoire of techniques for handling criminally involved irregular immigrants is seen as a system of signs conveying specific meanings (Garland, 1991). This entails that each sanction may have attached to it a certain symbolism. Court actors are immersed in cultural processes in which meaning is produced through the administration of punishment and immigration detention and expulsion seem to have become part of these processes.

Defining what punishment is can be a challenging task; however, when it comes to expulsion, it becomes even more unclear and ambiguous. None of the forms of expulsion inherent within criminal proceedings were regarded as formal punishment by any of the court personnel that I interviewed, including policy and law-makers, the Constitutional and Supreme Courts, judges or prosecutors. Likewise, immigration detention is considered an administrative and not a penal measure. The main rationale behind this reasoning is largely legalistic and formalistic: they are not forms of punishment because they belong to another field of law and do not pursue criminal law objectives. Indeed, as explicitly stated by the Spanish Constitutional Court in relation to the expulsion that is judicially ordered, it cannot be categorised as punishment because it is not a means of exercising the *ius puniendi* of the State. If this is applicable to the expulsions that are on its merits decided by judges, all the more regarding the expulsions of administrative character that are merely authorised by them. This thesis, however, reveals a more complex picture.

Expulsion in particular does seem to be used to a large extent in the judicial practice as a means of exercising the *ius puniendi* of the State. The present thesis has revealed that expulsion is assessed by criminal court decision-makers in terms of its adequacy to fulfil traditional objectives of punishment such as incapacitation, deterrence and retribution. My interviewees not only gave very specific examples of how expulsion can be an effective incapacitating measure, but in general expressed the idea that its admissibility and applicability is discerned when considering the seriousness and nature of the crime and the severity of the corresponding statutory punishment. Consequently, my research has shown that it is not so much that one field of law pre-empts the other, but that they are reconciled in practice to concurrently achieve the purposes of both immigration control and criminal law. Furthermore, given that the current policy orientation is predominantly and overtly directed towards the expulsion of criminally involved irregular immigrants, the attribution of punitive meanings to immigration detention and expulsion throughout the criminal proceeding could actually be the most effective way to conform to immigration policy objectives.

In this thesis I have explained and labelled such decisional peculiarity as a form of court's culturally constructed punishments. Although Franko Aas (2013) has suggested that in this field it is more useful to speak of punitive measures rather than punishment, I have found it more accurate and revealing to use the latter. If expulsion is in its practical substance constructed and signified as a punishment, it makes more sense to label it as what it is: a punishment. Expulsion's well-described afflictive ambivalence (Asúa-Batarrita, 2002; Cancio-Meliá, 2007; Cancio-Meliá & Maraver, 2006) is nonetheless not a reason against but in favour of such conclusion. For instance, this research has shown that what criminal courts precisely seem to attempt to do is to prevent expulsion from being a benefit for the defendant. Therefore, in practice their work is specifically directed to manage and differentiate such ambivalence on a case-by-case basis and impose expulsion accordingly. This is ultimately the reason why expulsion becomes punishment through the cultural process of the attribution of meaning carried out by criminal courts.

As evidenced in this dissertation, the criminal courts' cultural construction of punishments within the prosecution and sentencing of irregular immigrants seems to be functional for the current orientation of the Spanish immigration policy. Expulsion is a measure that can predominantly be ordered against irregular immigrants; and expulsion is also a court culturally constructed punishment that can almost exclusively be imposed upon criminally involved irregular immigrants. Criminally involved Spanish citizens cannot be expelled, which means that they can only be punished with sanctions that will

necessarily be served within Spanish territory, and the use of expulsion for authorised foreign residents is limited. Within the current context of a policy and enforcement emphasis on the so-called 'qualified (criminal) expulsions', the criminal court appeared to signify expulsion as an appropriate incapacitating measure for 'undesirable' and/or 'criminal' immigrants. In this way, the process comes full circle: policymakers prompt the use of expulsion as an incapacitating measure for 'criminal immigrants', and criminal courts implement this in the practice.

Finally, the use of expulsion as an incapacitating measure is central within a contemporary context characterised by the discrediting of rehabilitation as a goal of punishment and a renewed praise for retribution, deterrence and incapacitation. While structurally this may correspond to a current trend eloquently described with the concept of the 'criminology of the other' (Garland, 2001), in the administration of punishment this would fit with the underpinnings of the so-called 'new penology' (Feeley & Simon, 1992). This would also explain the fact that, as evidenced in this research, the suitability of expulsion in a given case is balanced by court decision-makers against the need to ensure the retributive and deterrent aims of punishment. Specifically, expulsion tends to be preferred and anticipated when the circumstances of the case and the defendant are estimated as requiring incapacitation. To the contrary, when court decision-makers consider that retribution and/or deterrence have more relative weight in a given case, they prefer to postpone expulsion and impose other types of penalties, normally imprisonment.

To conclude, in answering the proposed research questions, this thesis has shed light upon the decisional processes and determinants of immigration control within the realm of criminal courts. It has revealed how immigration detention and expulsion throughout the criminal proceeding are processed and made sense by criminal court actors. Ultimately, this analysis has ascertained the punitive meanings attributed by court decision-makers to such key aspects of immigration law enforcement. This research has in this way contributed to a better understanding of the current tendencies in the administration of punishment. Moreover, it has evidenced that the judicial implementation of the so-called crimmigration law could have substantially modified the cultural composition of the decisional realm of criminal courts. The criminal prosecution and punishment of irregular immigrants should henceforth not be seen in univocal terms, but as entailing an enforcement hybridisation: proceedings and sanctions can simultaneously be means for attaining both immigration control and criminal law objectives.

7.4. Limitations and challenges for future research

The present research has shed light on the judicial decision-making operation of the convergence between immigration control and criminal justice. Nonetheless, there have been some inevitable limitations that must be discussed. First of all, as explained in the methodology chapter, the generalisability of this study is intrinsically limited and must therefore be handled with care. The conceptual and methodological approach adopted for this thesis has assumed that criminal courts are a sort of community, which develop particular organisational and decisional cultures, establishing largely idiosyncratic functioning and decisional patterns. Additionally, this thesis has understood research settings as unique social worlds, conveying the idea that they are essentially unrepeatable. Finally, it should be noted that this research has been designed as a case-study, which entails stressing the need for depth and immersion over generalisability.

It should nonetheless be highlighted that as in other Western countries, most Spanish courthouses, especially in the big cities, are organisationally designed according to a nationwide model. This condition, coupled with the bureaucratic functioning of the judiciary, makes it likely that at least some significant decisional features might be applicable to every judicial setting. Since I have made sure to achieve internal and external validity by explaining in detail my methodological approach, using data triangulation and describing the main features of the research setting, it could be possible to extend the findings of this study to court locations with similar substantial characteristics. However, it would be much more fruitful to replicate this type of study in other court settings.

Another important limitation of the present research is that it did not include a specific analysis of judicial files. Given the focus on judicial decision-making determinants, it would have been useful and pertinent to examine a sample of case files containing judicial decisions of the key aspects discussed in this research. Nonetheless, conducting such a study would have entailed time and human resources that were not available given the conditions of the doctoral programme within which the present research has been conducted. Furthermore, this study was largely exploratory, given that no previous research of this particular nature has been done on the judicial decision-making of the convergence between immigration control and criminal justice. Consequently, it was intended to acquire a better primary understanding of the court dynamics and its decisional processes. Ascertaining the meanings underlying a certain phenomenon can in general be better achieved through directly interviewing and observing those people who shape and participate in it. This research has revealed that judicial decisions are formally written and

communicated in templates, using patterned formulas, which means that they obscure, or even hide more than they reveal, the real motivations and determinants that precede and justify judicial decisions. It would nonetheless still be very useful and informative, as two of the cited previous studies have done (Contreras et al., 2015; Martín-Escribano, 2015), to collect data from judicial files regarding aspects such as immigration detention and the decision-making points of expulsion throughout the criminal proceeding. That type of case-file data analysis can be used to complement studies like the present one.

In terms of policymaking, the present research has revealed that the attribution of decisions involving immigration control to criminal courts may not be the most advisable, especially regarding immigration detention. In spite of its apparent enhanced protective role, the working dynamics and criminal justice identity of investigative courts make them prone to adopt thoughtless and non-individualised decisions. Although the structural legitimacy of immigration detention is highly questionable, in the current context it is unlikely that it will be abolished any time soon. In this regard, as explicitly asserted by many defence attorneys, administrative judges, and even investigative judges and court personnel, to guarantee more knowledgeable decisions, and better ensure the due process rights of the defendants, the authorisation of immigration detention can be left in the hands of administrative courts. Regarding expulsion throughout the criminal proceeding, the issues are more complex because there is an ostensible policy orientation that favours the expulsion of immigrants allegedly involved in criminal behaviours. In this sense, given the results of this research, it could perhaps make more sense to formally and unequivocally incorporate these mechanisms into the repertoire of punishments, to ensure that all the relevant constitutional safeguards of criminal law are applicable.

Finally, the present thesis has traced further promising pathways for future empirical studies in the field of crimmigration and judicial decision-making research. For instance, prospective research can more specifically focus upon the use of immigration detention as a replacement for pre-trial detention. Although this aspect has been highlighted and discussed in this thesis, its notable relevance makes it worthy of a complete and specific in-depth study. Furthermore, future research can also more specifically focus upon the ostensible demographic disparities of the judicial decision-making processes of immigration detention and expulsion. While this thesis has underscored, for example, that there could be ostensible differences in the processing of Moroccans compared with Latin-Americans, potential studies in the field can address these kinds of issues more explicitly. For instance, it would be pertinent and revealing to

examine whether in these types of proceedings there could be decisional disparities based on ethnic, socioeconomic or gender considerations.

7.5. Final remarks

Criminalisation is a complex process that entails the interaction of a series of social psychological, legal and cultural mechanisms. It is also substantially biased and selective, focusing more on certain individuals and groups than others. As a deeply embedded cultural process, it is traversed by the different and even contradictory facets of the human coexistence. Rational calculation, as well as passionate exhalation, simultaneously juxtaposes in the process of criminalising and punishing those people who are selected to incarnate the evil of the human nature. In many cases it is not enough to simply expel an 'undesirable criminal' from society to protect it from such an 'evil.' Sometimes criminals are considered to deserve a pain in retribution for the damage that they have allegedly caused. Criminalisation and punishment could therefore also be regarded as mechanisms for distinguishing between good and evil. To do that, however, the evil must be defined as something that derived from beings of a different nature. Through criminalisation and punishment, the 'other', the 'stranger', the 'criminal immigrant' is constituted and shaped.

As societies increasingly become more and more disembedded, social anxieties grow, and an urgent need to strengthen a sense of community takes form. By assembling an identifiable enemy who incarnates the evils inherent within a diverse culture, policymakers and law enforcers attempt to recover what has been lost. The 'criminal immigrant' is 'the other' that must both be punished and expelled. Sometimes, both aspects coalesce in a unique instrument: expulsion is appropriate enough for both expelling and punishing. However, in other instances the need to punish is not sufficiently satisfied with an expulsion, and so the 'criminal immigrant' must receive an additional dose of suffering. The responsibility for assessing and determining appropriate responses to the deviant behaviours attributed to 'criminal immigrants' lies in the hands of the criminal courts. Nonetheless, the question proposed in chapter five returns once again: What is and what should be the actual role of law doorkeepers? Is law, in Kafkaesque terms, 'a radiance which streams inextinguishable'? Is it reachable by anyone? What is the purpose of law? Paraphrasing Becker (1967): whose side is the law on? Should the law take sides for something? While some would say that the law must take the side of the weak (Ferrajoli, 1999), crimmigration law appears to do otherwise.

References:

ABC. (2016, December 21). *Andalucía recibe menos pateras pero más inmigrantes*. Retrieved from: http://sevilla.abc.es/andalucia/sevi-andalucia-recibe-menos-pateras-pero-mas-inmigrantes-201612212245_noticia.html.

ABC. (2017, March 24). *Crecen un 62% las pateras en la costa sur con un 135% más de inmigrantes*. Retrieved from: http://www.abc.es/espana/abci-crecen-62-por-ciento-pateras-costa-135-por-ciento-mas-inmigrantes-201703240334_noticia.html.

Ackerman, A. R., Sacks, M., & Furman, R. (2014). The new penology revisited: The Criminalization of immigration as a pacification strategy. *Social Work Publications*, 7: 1-19.

Acosta, D. (2009a). The Good, the Bad and the Ugly in EU Migration Law: Is the European Parliament Becoming Bad and Ugly? (the Adoption of Directive 2008/15: The Returns Directive), *European Journal of Migration and Law 11*(1), 19–39.

Acosta, D. (2009b). Latin American reactions to the adoption of the Returns Directive. *CEPS Liberty and Security in Europe, November 2009.* [Policy Paper]: 1-7.

Acosta, M. & Del Valle, A. (2006). La crisis de los cayucos. La Agencia Europea de Fronteras-FRONTEX y el control marítimo de la inmigración clandestina, *Tiempo de Paz 83*, 19-31.

Aena. (2016). Tráfico de pasajeros, operaciones y carga en los aeropuertos españoles. Datos provisionales. Retrieved from: http://www.aena.es/csee/ccurl/660/807/Estadistic-as2016-.pdf

Agamben, G. (1998). *Homo Sacer. El poder soberano y la nuda vida*, Pre-textos: Valencia.

Aguilera, R. (2006). El acceso de los inmigrantes irregulares al mercado de trabajo: Los procesos de regularización extraordinaria y el arraigo social, *Revista del Ministerio de Trabajo y Asuntos Sociales* 63, 175-195.

AIS. (2016). Población en riesgo de pobreza en España pueblo a pueblo (Datos 2015). Retrieved from: http://www.ais-int.com/la-pobreza-pueblo-pueblo-datos-2015-habits-municipios/

Aja, E. (2006). La evolución de la normativa sobre inmigración, in E. Aja y J. Arango (Eds.). *Veinte años de inmigración en España*, Barcelona: CIDOB: 17-44.

Albonetti, C. A. (1991). An integration of theories to explain judicial discretion. *Social Problems* 38(2): 247-266.

Aliverti A. (2012). Making people criminal: The role of the criminal law in immigration enforcement. *Theoretical Criminology*, 16(4), 417-434.

Alscher, S. (2005). Knocking at the doors of "fortress Europe": Migration and border control in Southern Spain and Eastern Poland, *CCIS working papers, 126*. La Jolla, CA: Center for Comparative Immigration Studies, University of California, San Diego.

Altheide, D. (1987). Ethnographic content analysis. *Qualitative Sociology*, 10(1): 65-77.

Amnistía Internacional. (2011). *Parad el racismo, no a las personas. Perfiles raciales y control de la inmigración en España*. Madrid: Editorial Amnistía Internacional (EDAI).

Andersson, R. (2011). Frontex y la creación de la frontera euroafricana: golpeando la valla ilusoria. *Revista de derecho migratorio y extranjería*, 28, 177-191.

Angrosino, M. V. (2005). Recontextualizing observation: Ethnography, pedagogy, and the prospects for a progressive political agenda. In Denzin, N. K., and Lincoln, Y. S. (Eds.), The Sage handbook of qualitative research (3rd ed., pp. 729–745). Thousand Oaks, CA: Sage.

Aparicio, R. & Giménez, C. (2003). *Migración colombiana en España*, Embajada de Colombia, Organización Internacional para las Migraciones y Money Exchange.

Arango, J. (2010). Después del gran 'boom': La inmigración en la bisagra del cambio, in Aja Fernández, E., Arango Vila-Belda, J., Oliver i Alonso, J. (coord.). *La inmigración en tiempos de crisis*, Barcelona: Edicions Bellaterra, 52-73.

Arango, J., Moya, D. & Oliver, J. (2014). 2013, ¿un año de transición?, in Arango J., Moya, D., & Oliver, J. (Dir.). *Inmigración y emigración: mitos y realidades. Anuario de la Inmigración en España 2013*, Ed. 2014. Barcelona: CIDOB, 12-26.

Arcarazo, D. & Geddes, A. (2013). The development, application and implications of an EU rule of law in the area of migration policy, *JCMS: Journal Of Common Market Studies*, *51*(2), 179-193.

García-España, E., García-Arenas, L. & Miller, J. (2016). *Identificaciones policiales y discriminación racial en España. Evaluación de un programa para su reducción*. Valencia, España: Tirant lo Blanch.

Arenas García, L. & García-España, E. (2016). Identificaciones policiales y discriminación racial en España. Evaluación de un programa para su reducción, *Boletín Criminológico* Artículo 3/2016, abril (n.º 163).

Arendt, H. (1965). *Eichan in Jerusalem. A Report on the Banality of Evil*. Revised and enlarted edition. New York: The Viking Press.

Asúa Batarrita, A. (2002). La expulsión del extranjero como alternativa a la pena: incongruencias de la subordinación del derecho penal a las políticas de control de la inmigración, en Laurenzo Copello, P. (coord.), *Immigración y derecho penal. Bases para un debate*, Tirant lo Blanch, Valencia.

Ayerdi, P. & Díaz, V. (2008). Perfiles sociales de la opinión pública española sobre la inmigración, *Revista Internacional de Sociología 66* (50), 95–128.

Azkona, N. (2014). El II Plan África o cómo continuar con las políticas de externalización de la frontera sur europea y de instrumentalización de la AOD española. *Universidad de Huelva*, 1-27. Retrieved from: http://www.uhu.es/IICIED/pdf/10_5_ii_pla.pdf.

Baldaccini, A. (2009). The EU Directive on Return: Principles and Protests. *Refugee Survey Quarterly*, 28 (4): 114–138.

Balibar, E. (2006). Strangers as enemies: Further reflections on the aporias of transnational citizenship, *Working Paper No. 06/4*, Hamilton: Institute on Globalization and the Human Condition, McMaster University.

Baratta, A. (2004). *Criminología crítica y crítica del derecho penal introducción a la sociología jurídico-penal* (8a. ed. ed.). México D.F. (México): Siglo XXI Editores.

Barbero, I. (2010). Las transformaciones del estado y del derecho ante el control de la inmigración = estatuak eta zuzenbideak immigrazioa kontrolatzeko izan dituzten aldaketak (Cuadernos, 3 = koadernoak ; 3). Bilbao: *Ikuspegi, Inmigrazioaren Euskal Behatokia = Observatorio Vasco de Inmigración*.

Barbero, I. (2012). Orientalising citizenship: The legitimation of immigration regimes in the European Union, *Citizenship Studies*, 16(5-6), 751-768.

Barbero, I. (2014). Historia contemporánea de la alteridad en el derecho de extranjería, *Revista de Estudios Políticos*, 164, 115-150.

Barbero, I. (2015). Scapegoat citizens in times of austerity: The impact of the crisis on the immigrant population in Spain, *Social Identities*, 21(3), 244-256.

Barker, V. (2012). Global mobility and penal order: Criminalizing migration, a view from Europe, *Sociology Compass*, 6(2), 113-121.

Barker, V. (2013). Democracy and deportation: Why membership matters most? In Franko Aas and Mary Bosworth, *The borders of punishment: Migration, citizenship, and social exclusion*, Oxford University Press.

Barrett, C. (2012). *Courting Kids: Inside an Experimental Youth Court*. New York: NYU.

Barone, S. (2015). Los centros de internamiento de extranjeros (CIEs) entre control migratorio y control social: una frontera interna y polimorfa. *Revista de Dialectología y Tradiciones Populares* 70(2): 325-330.

Batuecas, J. M. (2009). *La Expulsión del Extranjero en la Legislación Española*, Alicante: Editorial Club Universitario.

Bauman, Z. (2000). *Liquid modernity*. Cambridge, UK: Polity Press.

Beccaria. C. (1872 [1764]). *An Essay on Crimes and Punishments. By the Marquis Beccaria of Milan. With a Commentary by M. de Voltaire*. A New Edition Corrected. (Albany: W.C. Little & Co., 1872).

Becker, H. (1963). *Outsiders: Studies in the Sociology of Deviance*, New York: Free Press.

Becker, H. (1967). Whose Side Are We On? *Social Problems*, 14(3), 239-247.

Beetham D. (1991). Legitimacy in Political Science and Political Philosophy. In: *The Legitimation of Power. Issues in Political Theory*. Palgrave, London.

Benamar, J. & Vallejo, F. A. (2016). Los flujos migratorios ilegales en el estrecho de Gibraltar, *Barataria. Revista Castellano-Manchega de Ciencias Sociales 8*: 69-86.

Berg, B. L. (2001). *Qualitative research methods for the social sciences (fourth edition)*. Boston: Pearson Education.

Bidaguren J. & Aurre, E. (2008). La nueva política exterior y de cooperación de España con el continente africano: el asociacionismo interesado del Plan África, *Revista cIDOB d'Afers internacionals 84*:201-220.

Blalock, H. (1967). *Toward a theory of minority-group relations*. New York: John Wiley and Sons.

Bloch, A. & Schuster, L. (2005). At the extremes of exclusion: Deportation, detention and dispersal. *Ethnic and Racial Studies* 28(3): 491-512.

Blumberg, A. S. (1967). The practice of law as confidence game: Organizational cooptation of a profession. *Law and Society Review, 1*(2), 15.

Blumer, H. (1958). *Race prejudice as a sense of group position*. Pacific Sociological Review, 1, 3–7.

Blumer, H. (1986). *Symbolic interactionism: Perspective and method*. Berkeley: University of California Press.

Bogira, S. (2005). *Courtroom 302: A year behind the scenes in an American Criminal Courthouse*. New York: A. Knopf.

Borrego, F. (2007). Desequilibrios en el Mercado de trabajo. In Aurioles, J., and Parejo, A. (Cords.) *La economía de la provincia de Málaga* (447-466). Colección Economía-Fundación Cajamar.

Bosworth, M. (2008). Border control and the limits of the sovereign state, *Social & Legal Studies*, 17, 2, 199-215.

Bosworth, M. (2011). Deportation, detention and foreign-national prisoners in England and Wales, *Citizenship Studies*, 15, 5, 583-595.

Bosworth, M. (2017). Border criminology and the changing nature of penal power. In A. Liebling, S. Maruna, & L. McAra (Eds.), *The Oxford Handbook of Criminology* (6th ed., pp. 373–390). Oxford UK: Oxford University Press.

Bosworth, M. & Guild, M. (2008). Governing through migration control, *British Journal of Criminology*, 48, 703-719.

Bourdieu, P. (1987). The force of law: toward a sociology of the juridical field. *Hastings Law Journal*, 38(5): 805-54.

Bowling, B. (2013). Epilogue: The borders of punishment: Towards a criminology of mobility, in Franko Aas and Mary Bosworth, *The Borders of Punishment: Migration, Citizenship, and Social Exclusion*: Oxford University Press.

Brandariz, J. A. (2011). *Sistema penal y control de los migrantes: Gramática del migrante como infractor penal*, (Biblioteca comares de ciencia jurídica). Granada: Comares.

Brandariz, J. A. (2016a). Crimmigration Policies and the Great Recession: Analysis of the Spanish Case, in *Immigration detention, risk and human rights: studies on immigration and crime*, Cham: Springer International Publishing: Springer, 185-197.

Brandariz, J. A. (2016b). Immigration detention, risk and human rights: Studies on immigration and crime, in *Crimmigration policies and the Great recession: Analysis of the Spanish case* (pp. 185-197). Cham: Springer International Publishing: Springer.

Brandariz, J. A. & Fernández-Bessa, C. (2011). *The Construction of Migrants as a Risk Category in the Spanish Penal System*, in Palidda, S. (ed.), *Racial Criminalization of Migrants in the 21st Century*, Surrey: Ashgate.

Brandariz, J. A. & Fernández-Bessa, C. (2017). La crimmigración en el contexto español: El creciente protagonismo de lo punitivo en el control migratorio. In López-Sala, A., and Godenau, D. (Coords.). *Estados de Contención, Estados de Detención. El Control de la Inmigración Irregular en España*, Barcelona: Anthropos Editorial.

Bruquetas, M., Mari-Klose, P. & Moreno-Fuentes, F. J. (2012). Inmigración, crisis económica y Estado de Bienestar en España. *Documentación Social, 162*, 209-234.

Burawoy, M. (1998). The extended case study method, *Sociological Theory*, 16 (1):4-33.

Cachón, L. (1995). Marco institucional de la discriminación y tipos de inmigrantes en el mercado de trabajo en España, *Reis, 69*, 105-124.

Cachón, L. (2002). La formación de la 'España inmigrante': Mercado y ciudadanía, *Reis, 97*, 95-126.

Cachón, L. (2003). La inmigración en España los desafíos de la construcción de una nueva sociedad, *Migraciones* 14, 219-304.

Cachón, L. (2012). La inmigración de mañana en la España de la Gran Recesión y después, *Panorama social 16*: 71-83.

Cadena SER. (2015, April 3). España expulsa a más inmigrantes que ningún otro país europeo. *Madrid*. Retrieved from: http://cadenaser.com/ser/2015/04/03/sociedad/-1428012211_939510.html.

Calabozo, R. (Producer), Herreros, J. & Olalla, C. (Directors). (2016). *Express* [Motion Picture]. Spain: CIEs No Madrid.

Calavita, K. (1998). Immigration, law, and marginalization in a global economy: Notes from Spain, *Law & Society Review*, 32(3), 529

Calavita, K. (2003). 'A "reserve army of delinquents": The criminalization and economic punishment of immigrants in Spain', *Punishment & Society*, 5(4): 399–413.

Calavita, K. (2005). *Immigrants at the margins: Law, race, and exclusion in Southern Europe*. Cambridge: Cambridge University Press.

Calderón, F. J. (2011). Evolución de los flujos migratorios en el Área Metropolitana de Málaga. *Dedica. Revista de Educação e Humanidades*, 1: 233-254.

Caminando Fronteras. (2017). *Tras la Frontera*. Retrieved from: https://caminandofronteras.files.wordpress.com/2017/05/ccf-itlf-arte-final-cuerpo.pdf.

Campaña Estatal por el Cierre de los CIE. (2014). *Paremos los Vuelos. Las Deportaciones de Inmigrantes y el boicot a Air Europa*. Cambalache e Inmigración. Retrieved from: http://descargas.localcambalache.org/paremos_los_vuelos.pdf.

Campesi, G. (2007). The control of the «new dangerous classes». *Sortuz Oñati Journal of Emergent Socio-legal Studies*, 1(2): 105-120.

Campesi, G. (2012). Migraciones, seguridad y confines en la teoría social contemporánea, *Crítica Penal y Poder*, 0(3).

Cancio-Meliá, M. (2003). ¿«Derecho penal» del enemigo? In, Jakobs, G. and Cancio Meliá, M. *Derecho penal del enemigo*. Madrid: Thomson Civitas-Cuadernos Civitas, 57-101.

Cancio-Meliá, M., & Maraver-Gómez, M. (2006). El derecho penal español ante la inmigración: un estudio político-criminal, en Bacigalupo, S./Cancio Meliá, M. (coords.), *Derecho Penal y Política Transnacional*, Atelier, Barcelona, 31-121.

Cancio-Meliá, M. (2007). La expulsión de ciudadanos extranjeros sin residencia legal (art.89 CP), in *Revista Electrónica del Instituto Latinoamericano de Estudios en Ciencias Penales y Criminología*. 002-04. www.ilecip.org.

Cañas, J. A. (2017, September 14). *La ruta española de pateras alcanza cifras de 2008*. Retrieved from: https://politica.elpais.com/politica/2017/09/13/actualidad/1505297407-_338569.html.

Carling J. (2007). Unauthorized migration from africa to spain, *International migration 45*(4), 3-37.

Carrera, S. & Guild, E. (2008). The French Presidency's European Pact on Immigration and Asylum: Intergovernmentalism vs Europeanisation? Security vs Rights? *CEPS Policy Briefs 170*, 1-10.

Carroll, J. S. (1978). Causal theories of crime and their effect upon expert parole decisions. *Law and Human Behaviour, 2*(4), 377-388.

Carroll, J. S. & Payne, J. W. (1976). The psychology of the parole decision process: A joint application of attribution theory and information-processing psychology. In J. S. Carroll & J. W. Payne (Eds.), *Cognition and social behavior.* Oxford, England: Lawrence Erlbaum.

Casas M., Cobarrubias S. & Pickles J. (2011). Stretching borders beyond sovereign territories. Mapping EU and Spain's border externalization policies. *Geoplitica(s), 2*(1), 71-90.

Castilla, K. (2016). Migración sine permissum en España: multa, expulsión, y nos bis in ídem. Más allá de los constitucionalmente admisible y acorde con la normativa europea, *Revista de Derecho Migratorio y Extranjería 42*, 87-110.

Cea, M. A. (2015). Los efectos de la crisis económica en la modulación y evolución de la opinión pública española ante la inmigración, *Migraciones 37*, 29-52.

CEAR-Comisión Española de Ayuda al Refugiado. (2009). Situación de los Centros de Internamiento para Extranjeros en España. Retrieved from: http://www.migreurop.org/IMG/pdf/Informe-CEAR-situacion-CIE.pdf.

CEAR-Comisión Española de Ayuda al Refugiado. (2016). *Movimientos migratorios en España y Europa.* Retrieved from: https://www.cear.es/wp-content/uploads/2017/02/-Informe-rutas-migratorias.pdf.

CEAR-Comisión Española de Ayuda al Refugiado. (2018). *Más que cifras. Cifras de asilo en España.* Retrieved from: http://www.masquecifras.org/.

Cebolla, H. & González, A. (2008). *La Inmigración en España (2000-2007). Del control de flujos a la integración de los inmigrantes*, Madrid: CEPC.

Chambliss, W. (1975). *Criminal law in action*, Santa Barbara, Calif.: Hamilton Pub.

Chambliss, W. & Seidman, R. (1971). Law, Order and Power. Reading, Mass.: Addison-Wesle.

Charmaz, K. (2004). Premises, principles, and practices in qualitative research: Revisiting the foundation. *Qualitative Health Research*, 14: 976-993.

Charmaz, K. (2006). *Constructing Grounded Theory: A Practical Guide Through Qualitative Analysis*. Thousand Oaks, CA: Sage.

Charmaz, K. (2008). Grounded theory as an emergent method. In S.N. Hesse-Biber and P. Leavy (Eds). *The handbook of emergent methods* (155-170). New York: Guilford.

Christie, N. (1986) `Suitable enemy', in Herman Bianchi and Rene von Swaaningen (eds.) *Abolitionism: toward a non-repressive approach to crime*. Amsterdam: Free University Press.

CIS-Centro de Investigaciones Sociológicas. (2017). *Barómetro: Tres problemas principales que existen actualmente en España (Multirrespuesta %)*. Retrieved from: http://www.cis.es/cis/export/sites/default/-Archivos/Indicadores/documentos_html/TresProblemas.html.

Colectivo Ioé. (2001). Política migratoria española en el marco europeo. *Studi en emigrazione, 38*(144), 855-868.

Colectivo Ioé (2005). Inmigrantes extranjeros en España ¿Reconfigurando la sociedad? *Panorama Social 1*, 32-47.

Colectivo Ioé. (2008a). *Inmigrantes, nuevos ciudadanos. ¿Hacia una España plural e intercultural?* Madrid: CECA.

Colectivo Ioé. (2008b). Dimensiones de la inmigración en España: impactos y desafíos, *Papeles de Relaciones Ecosociales y Cambio Global 103*, Madrid.

Consejo General del Poder Judicial. (2017). *Estadística Judicial*. Retrieved from: http://www.poderjudicial.es/cgpj/es/Temas/Estadistica-Judicial/.

Contreras Román, M., García-España, E. & Rando Casermeiro, P. (2015, June). *Análisis Criminológico del Principio de Oportunidad Judicial del Art. 57.7 LOEX: Renuncia al Proceso Penal y Primacía de la Expulsión Administrativa*. Paper presented at the II Simposio Investigación Criminológica, Albacete, Spain.

Cornelius, W. (1994). Spain: the uneasy transition from labor exporter to labor importer, in Cornelius, W., Martin, P. & Hollifield, J. (Eds.). *Controlling Immigration: A Global Perspective*. Stanford, CA: Stanford University Press, 331-69.

Creswell, J. W. (2009). *Research design: Qualitative, quantitative, and mixed methods approach*. Los Angeles: Sage.

Crotty, M. (1998). *The foundations of social research*. Allen and Unwin, Sydney.

Dauvergne, C. (2013). The troublesome intersections of refugee law and criminal law, in Franko Aas, K., & Bosworth, M., *The Borders of Punishment*, Oxford University Press.

Defensor del Pueblo. (2012-2018). *Mecanismo Nacional de Prevención de la Tortura. Informe anual 2016. Madrid*. Retrieved from: https://www.defensordelpueblo-.es/informes/resultados-busqueda-informes/?tipo_documento=informe_anual

De Giorgi, A. (2005). *Tolerancia cero: Estrategias y prácticas de la sociedad de control*, 1.ed., Colección ensayo / virus. Barcelona: Virus Editorial.

De Giorgi, A. (2006). *Re-thinking the Political Economy of Punishment: Perspectives on PostFordism and Penal Politics*. Aldershot: Ashgate Publishing.

De Giorgi, A. (2010). Immigration control, post-Fordism, and less eligibility: A materialist critique of the criminalization of immigration across Europe, *Punishment and Society*, 12(2), 147-167.

De Lucas, J. (2003): *Blade Runner. El derecho: Guardián de la diferencia*. Valencia: Tirant lo Blanch.

De Lucas, J. (2004). La inmigración como res política, en J. Chaizo y K. Yamagnane (coords.). *Movimientos de personas e ideas y multiculturalidad*, Vol. II (193-225). Bilbao: Universidad de Deusto.

Del Camino, M. A. (2009). La jurisprudencia del tribunal constitucional en materia de derechos fundamentales de los extranjeros a la luz de la STC 236/2007, *Revista Española de Derecho Constitucional 85*, 353-379.

Denzin, N. K. (1978). *The research act.* New York: McGraw-Hill.

Denzin, N. K. & Lincoln, Y. (2005). *The sage handbook of qualitative research* (3rd ed.). Thousand Oaks: Sage.

Dirección General de la Policía. (2014). Circular 6/2014. Criterios para solicitar el ingreso de ciudadanos extranjeros en los centros de internamiento. Retrieved from: http://www.migrarconderechos.es/legislationMastertable/legislacion/Circular_DGP_CGEF_06_2014.

Dixon, J. (1995). The organizational context of criminal sentencing. *American Journal of Sociology* 100(5): 1157-1198.

Durkheim, E. & Halls, W. (1994). *The division of labour in society*. Houndmills: Macmillan.

Eisenstein, J. & Jacob, H. (1977). *Felony justice: An organizational analysis of criminal courts*. Boston: Little, Brown.

Eisenstein, J., Flemming, R. B. & Nardulli, P. F. (1988). *The contours of justice: Communities and their courts*. Boston: Little, Brown.

Eldiario.es. (2018, July 26). *602 personas entran en Ceuta tras saltar la valla fronteriza*. Retrieved from: https://www.eldiario.es/desalambre/Cerca-personas-entran-Ceuta-saltar_0_796870486.html.

El Mundo. (2016, June 23). *Las muertes superan por primera vez a los nacimientos desde 1941*. Retrieved from: http://www.elmundo.es/sociedad/2016/06/23/576bab80e5fdea-99418b457b.html.

Engen. R. (2008). Have sentencing reforms displaced discretion over sentencing from judges to prosecutors? *The Changing Role of the American Prosecutor* Eds. Worral & Nugent-Borakove.

ESE-Encuesta Social Europea (2010): Justice ESS5 2010. Disponible en: http://www.europeansocialsurvey.or g/data/themes.html?t=justice

Europapress. (2015, February 12) *España expulsó a más de 9.400 inmigrantes en 253 vuelos de deportación.* Retrieved from: http://www.europapress.es/epsocial/igualdad/n-

oticia-espana-expulso-mas-9400-inmigrantes-253-vuelos-internacionales-deportacion-fletados-2010-2014 20150212133025.html.

European Commission. (2002). *Green Paper on a Community Return Policy on Illegal Residents*, COM (2002) 175, 10 April 2002.

European Commission. (2014a). *Report from the commission to the European parliament, the council, the European economic and social committee and the committee of the regions: on the ex-post evaluation of the External Borders Fund for the period 2007-2010*. 23 April 2014. Retrieved from: https://ec.europa.eu/home-affairs/sites/homeaffai-rs/files/e-library/documents/policies/borders-and-visas/schengen/docs/com_2014_235_-f1_report_from_commission_en.pdf.

European Commission. (2014b). *The use of detention and alternatives to detention in the context of immigration policies Synthesis Report for the EMN Focused Study 2014*. Retrieved from: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/emn-studies/emn_study_detention_alternatives_to_detention_synthesis_report_en.pdf.

European Commission. (2015). *Managing migration and financing a safer and more secure Europe: €2.4 billion to support Member States. Press Release*. 10 August 2015. Retrieved from: http://europa.eu/rapid/press-release_IP-15-5483_en.htm.

European Council. (1999). *Tampere European Council, Presidency Conclusions*, 15-16 October 1999.

European Council. (2001). *European Council Meeting in Laeken, Presidency Conclusions*, 14-15 December 2001.

European Council. (2002a). *Seville European Council, Presidency Conclusions*, 21-22 June 2002.

European Council. (2002b). *Return Action Programme*, 28 November 2002.

European Council. (2004). *The Hague Programme: Streghtening Freedom, Security and Justice in the European Union*, 2005/C 53/01, 3 March 2005.

Eurostat. (2016). Statistics on enforcement of immigration legislation. Retrieved from: http://ec.europa.eu/eurostat/statistics-explained/index.php/Statistics_on_enforcement_o-f_immigration_legislation.

Fassin, D. (2011). Policing borders, producing boundaries. The governmentality of immigration in dark times, *Annual Review of Anthropology*, 40, 1, 213-226.

Fauser, M. (2007). Selective Europeanisation. Europe's Impact on Spanish Migration Policy, in Faist T. & Ette A. (eds.). *The Europeanization of National Immigration Policies: Between Autonomy and the European Union*. Migration, minorities and citizenship. London: Palgrave Macmillan, 136-156.

Feeley, M. & Simon, J. (1992). The new penology: Notes on the emerging strategy of corrections and its implications. *Criminology*, 30 (4): 449-474.

Fekete, L. (2009). *A suitable enemy: Racism, migration and islamophobia in Europe*, London: Pluto.

Fekete, L. & Webber, F. (2010). Foreign nationals, enemy penology and the criminal justice system, *Race and Class*, 51, 4, 1-25.

Fernandez-Bessa, C. (2010). *Movilidad bajo sospecha. El conveniente* vínculo entre inmigración y criminalidad en las políticas migratorias de la Unión Europea, *Rev. Inter. Mob. Hum.*, Brasilia, Año XVIII, No. 35, 137-154.

Fernández-Bessa, C. & Brandariz, J. A. (2016). Transformaciones de la penalidad migratoria en el contexto de la crisis económica: El giro gerencial del dispositivo de deportación. *Indret: Revista para el Análisis del Derecho*, 1-25.

Ferrajoli, L. (1999). *Derechos y garantías: La ley del más débil*. Madrid: Editorial Trotta.

Ferrell, J. (1997). Criminological *verstehen*: Inside the immediacy of crime. *Justice Quarterly* 14(1): 3-23.

Ferrell, J. (2009). Kill method: A provocation. *Journal of Theoretical and Philosophical Criminology* 1(1): 1-22.

Ferrell, J., Hayward, K. & Young, J. (2008). *Cultural criminology: An invitation*. Los Angeles: SAGE.

Ferrocarril Clandestino. (2010). *Informe de investigación sobre controles, identificaciones y detenciones*. Madrid.

Fidel, R. (1984). The case study method: a case study. *Library and Information Science Research, An International Journal* 6(3): 273-288.

Fiscalía General del Estado. (2017). Memoria elevada al Gobierno de S. M. presentada al inicio del año judicial por el Fiscal General del Estado, Vol. 1. Retrieved from: https://www.fiscal.es/memorias/memoria2017/FISCALIA_SITE/recursos/pdf/MEMFIS17.pdf

Fiscalía Provincial de Málaga. (2017). Datos estadísticos de la Fiscalía Provincial de Málaga publicados en la Memoria 2017. Retrieved from: https://www.fiscal.es/fiscal/publico/ciudadano/fiscalias_territoriales/andalucia/memoria_y_estadistica/!ut/p/a1/04_Sj9CPykssy0xPLMnMz0vMAfGjzOI9HT0cDT2DDbwsXAwMDBwtXAI9nUJCjA1MTYAKIpEVuPtYuBk4unsGO5l6eBhbBJkQp98AB3A0IKQ_XD8KrxJ3c3QFBu6mxkAFoWbBli5uBgYmJugKsPgBrACPIwtyQyMMMj3TAYSTua8!/dl5/d5/L2dBISEvZ0FBIS9nQSEh/?paginaDestino=2.

Fiss, O. (1983). The bureaucratisation of the judiciary. *The Yale Law Journal*, 92: 1442-1468.

Flores-Mendoza, F. (2001). La expulsión del extranjero en el código penal español. *Anales de la Facultad de Derecho* 18: 311-339.

Fontaine, G. & Emily, C. (1978). Causal attribution and judicial discretion: A look at the verbal behaviour of municipal court judges. *Law and Human Behaviour Law and Human Behaviour*, *2*(4): 323-337.

Forsey, M. G. (2010). Ethnography as Participant Listening. London, SAGE Publications, *Ethnography*, 11 (4), 558-572.

Foucault, M. (1995). *Discipline and punish: The birth of the prison*. New York: Vintage Books.

Franko Aas, K. (2011). 'Crimmigrant' bodies and bona fide travelers: Surveillance, citizenship and global governance, *Theoretical Criminology*, 15(3), 331-346.

Franko Aas, K. (2013). The Ordered and the Bordered Society: Migration Control, Citizenship, and the Northern Penal State, in Franko Aas and Mary Bosworth, *The Borders of Punishment: Migration, Citizenship, and Social Exclusion*: Oxford University Press.

Friedrich, S. (2009). *Returning Illegal Third-Country Nationals residing in the EU: The Return Directive An Issue of EU Concern?* Retrieved from: http://essay.utwente.nl/60230/3/The_Return_Directive.pdf.

García, A., Jiménez, B. & Redondo A. (2009). La inmigración latinoamericana en España en el siglo XXI. *Investigaciones Geográficas 70*(70), 55–70.

García-Añón, J., Bradford, B., García-Sáez, J.A., Gascón-Cuenca, A. & Llorente-Ferreres, A. (2013). *Identificación policial por perfil étnico en España. Informe sobre experiencias y actitudes en relación con las actuaciones policiales.* Tirant lo Blanch.

García-España, E. (2001). *Inmigración y delincuencia en España: Análisis Criminológico*. Tirant lo Blanch.

García-España, E. (2016). La expulsión como sustitutivo de la pena de prisión en el Código Penal de 2015. ¿De la discriminación a la reinserción? *Revista Electrónica de Ciencia Penal y Criminología*, 18-07: 1-31.

Garcia-Esteban, M. (2015). Expulsión de extranjeros en el Código Penal. *Revista Penal*, 35: 45-83.

Garland, D. (1991). *Punishment and modern society: A study in social theory*. Oxford: New York: Clarendon Press Oxford University Press.

Garland, D. (2001). *The culture of control: Crime and social order in contemporary society*. Chicago: University of Chicago Press.

Gay, L. R. & Airasian, P. (2003). *Educational research: Competencies for analysts and application* (7th ed.) Upper Saddle River, NJ: Merrill/Prentice Hall.

Geddes, A. (2000). *Immigration and European integration: Towards fortress Europe?* Manchester [u.a.]: Manchester Univ. Press.

Geddes, A., & Scholten. P. (2016). *The politics of migration & immigration in Europe* (2nd edition.). Los Angeles London New Delhi Singapore Washington DC Melbourne: SAGE.

Gibney, M. J. (2008). Asylum and the Expansion of Deportation in the United Kingdom, *Government and Opposition*, 43, 2, 146-167.

Gil-Alonso F. & Vidal-Coso, E. (2015). Inmigrantes extranjeros en el mercado de trabajo español: ¿más resilientes o más vulnerables al impacto de la crisis? *Migraciones, 37*, 97-123.

Godenau, D. (2014). Irregular maritime immigration in the Canary Islands: externalization and communautarisation in the social construction of borders, *Journal of immigrant & refugee studies 12*(2), 123-142.

González, P. (2015). La regulación de la expulsón administrativa por estancia irregular en España, incompatible con la Directiva "Retorno". (Sentencia del Tribunal de Justicia, asunto C-38/14, Zaizoune), *Civitas. Revista Española de Derecho Europeo 55*, 133-158.

González-Enríquez, C. (2006). The fight against illegal immigration, smuggling and trafficking in human beings in Spain: Ambiguities and rhetoric. *Immigration and Criminal Law in the European Union: The Legal Measures and Social Consequences of Criminal Law in Member States on Trafficking and Smuggling in Human Beings*: p. 325-343.

González-Enríquez, C. (2009a). Undocumented Migration. Counting the Uncountable. Data and Trends across Europe. *Clandestino. Country Report Spain. European Commission*. Retrieved from: http://clandestino.eliamep.gr/wp-content/uploads/2009/1-0/clandestino_report_spain_final_2.pdf.

González-Enríquez, C. (2009b). Spain, the cheap model. irregularity and regularisation as immigration management policies, *European Journal of Migration and Law*, *11*(2), 139-157.

González-Saquero, P. (2011). La Directiva "retorno" y el alcance de la armonización del procedimiento de expulsión de extranjeros. Comentario a la Sentencia del TJUE de 28.4.2011, as. El Dridi C-61/11 PPU. *Revista Española de Derecho del Trabajo*, 152: 1135-1152.

González-Saquero, P. (2016). La regulación de la expulsión administrativa por estancia irregular en España, incompatible con la Directiva "Retorno". (Sentencia del Tribunal de Justicia, asunto C-38/14, Zaizoune). *Revista Española de Derecho Europeo*, 55: 133-158.

González-Vega, J. A. (2015). El control de la inmigración irregular en España: compromisos y desarrollos. *Revista CIDOB D'Afers Internacionals*, *111*, 173-196.

Gozálvez Pérez, V. (2000). La inmigración irregular de africanos en España, balances y perspectivas. Alicante: Biblioteca Virtual Miguel de Cervantes, 47-58.

Greenleaf, R. & Lanza-Kaduce, L. (1995). Sophistication, organization, and authority-subject conflict: Rediscovering and unravelling Turk's theory of norm resistance, *Criminology*, 33(4), 565-586.

Groenewald, T. (2004). A phenomenological research design illustrated. *International Journal of Qualitative Methods*, 3(1): 42-55.

Guia, M. J. (2012). Crimmigration, securitisation and the criminal law of the crimmigrant. In: Guia, MJ, van der Woude, M, van der Leun, J (eds.) *Social Control and Justice: Crimmigration in the Age of Fear*. The Hague: Eleven.

Guisasola, C. (2010). Consideraciones politico-criminales para una reformulación de la expulsión penal de condenados extranjeros sin residencial legal. *Estudios Penales y Criminológicos*, 30: 201-218.

Hagan, J. (1977). Criminal Justice in Rural and Urban Communities: A Study of the Bureaucratization of Justice. *Social Forces* 55:597-612.

Hammersley, M. (1992). *What's wrong with ethnography?: Methodological explorations*. London: Routledge.

Hammersley, M. & Atkinson, P. (2007). *Ethnography: Principles in practice* (3rd ed. ed.). London: Routledge.

Hampshire, J. (2016). European Migration Governance Since the Lisbon Treaty: Introduction to the Special Issue. *Journal of Ethnic and Migration Studies 42*(4), 537–553.

Haynes, S., Ruback, B. & Cusick, G. (2010). Courtroom workgroups and sentencing. *Crime & Delinquency, 56*(1), 126-161.

Hawkins, D. (1981). Causal attribution and punishment for crime. *Deviant Behavior* 1:193-215.

Hazán, M. (2014). The uneasy transition from labor exporter to labor importer and the new emigration challenge., in Hollifield, J. F., Martin, P. L., & Orrenius, P. M. *Controlling immigration: A global perspective* (3rd edition.). Stanford, California: Stanford University Press, 371-394.

Hogarth, J. (1971). *Sentencing as a human process.* Toronto U.P.

Hulsman, L. (1986). Critical criminology and the concept of crime, *Contemporary Crises*, 10(1), 63-80.

Huysmans, J. (2000). The European Union and the securitisation of migration. *Journal of Common Market Studies* 38(5): 751-77.

INE-Instituto Nacional de Estadística. (2014). Proyección de la Población de España 2014-2064. *Notas de Prensa*, retrieved from: http://www.ine.es/prensa/np870.pdf.

INE-Instituto Nacional de Estadística. (2017). *Cifras oficiales de población resultantes de la revisión del Padrón municipal a 1 de enero*. Retrieved from: http://www.ine.es/jaxiT3/Datos.htm?t=2882.

INE-Instituto Nacional de Estadística. (2018). INEbase: Operaciones estadísticas. Retrieved from: http://www.ine.es/inebmenu/indice.htm.

Instituto de Estadística y Cartografía de Andalucía. (2016). Evolución del producto interior bruto a precios de mercado per cápita por provincias. *Anuario Estadístico de Andalucía. Grandes Cifras de la Economía Andaluza, Producción*. Retrieved from: http://www.juntadeandalucia.es/institutodeestadisticaycartografia/iea/resultadosConsulta.jsp?CodOper=64&codConsulta=96415.

Infodefensa. (2011, May 9). *Interior adjudica a Indra el despliegue del SIVE en la costa de Tarragona*. Retrieved from: http://www.infodefensa.com/es/2011/05/09/noticia-interior-adjudica-a-indra-el-despliegue-del-sive-en-la-costa-de-tarragonza.html.

IOM-International Organization for Migration (2011). *Glossary on Migration. International Migration Law Series, No. 25*. Retrieved from https://www.iom.int/key-migration-terms.

Izquierdo-Escudero, F. J. (1997). Naturaleza jurídica de la sustitución prevista en el artículo 89 del Código Penal. Comentario al Auto del Tribunal Constitucional 106/1997, de 17 de abril. *La Ley*, 5.

Izquierdo, A. (2004). La inmigración en España y las consecuencias de una política restrictiva: 2000-2003, *RAE: Revista Asturiana de Economía 30*, 53-83.

Izquierdo, A. (2009). *El modelo de inmigración y los riesgos de exclusión*. Madrid: Cáritas Española.

Izquierdo, A. (2012). La política de regularizaciones masivas y su función en el modelo migratorio español, in Izquierdo Escribano, A. & Cornelius, W. A. *Políticas de Control Migratorio: Estudio comparado de España y EEUU*, Barcelona: Edicions Bellaterra, 45-102.

Izquierdo, A., López de Lera, D. & Martínez, R. (2003). The favorites of the twenty-first century: Latin American immigration in Spain, *Studi Emigrazione 149*, 98-124.

Jakobs, G. (2003). Derecho penal del ciudadano y derecho penal del enemigo. In, Jakobs, G. & Cancio Meliá, M. *Derecho Penal del Enemigo*. Madrid: Thomson Civitas-Cuadernos Civitas, 19-56.

Jarrín-Morán, A. (2012). La construcción de la persona inmigrante en el limbo jurídico: Ni expulsables ni regularizables en España, *Cadernos de Campo, São Paulo*, 21(21), 301-301.

Jiang, J., & Erez, E. (2018). Immigrants as symbolic assailants: Crimmigration and its discontents. *International Criminal Justice Review, 28*(1), 5-24.

Johnson, B. D., Ulmer, J. T. & Kramer, J. (2008). The social context of guidelines circumvention: The case of federal district courts. *Criminology*, 46(3): 737-783.

Johnson, B. D. & Betsinger, S. (2009). Punishing the "model minority": Asian- American criminal sentencing outcomes in federal district courts. *Criminology*, 47(4): 1045-1090.

Junta de Andalucía. (2016). *Informe Económico de Andalucía 2015*. Retrieved from: http://www.juntadeandalucia.es/export/drupaljda/InformeEconomico2015.pdf.

Kane, S. (2004). The Unconventional Methods of Cultural Criminology. *Theoretical Criminology* 8(3):303-321.

Kafka, F. (2009). *The Trial*. A new translation by Mike Mitchell. Oxford World's Classics. Oxford University Press.

Kanstroom, D. (2000). Deportation, social control, and punishment: Some thoughts about why hard laws make bad bases. *Harvard Law Review*, 113: 1890-1935.

Kaufman, E. (2013). Hubs and Spokes: The Transformation of the British Prison, in Franko Aas & Mary Bosworth, *The Borders of Punishment: Migration, Citizenship, and Social Exclusion*: Oxford University Press.

Kessler, A. & Freeman, G. (2005) Public opinion in the EU on immigration from outside the community, *Journal of common market studies 43*(4), 825-850.

Kostas, S. (2017). Irregular vs. illegal immigration: Setting the definitions. An overview of European practice. *Slovenský národopis*, 65(4): 420–426.

Kostova, M. (2006). Una evaluación del último proceso de regularización de trabajadores extranjeros en España (febrero-mayo de 2005). Un año después. *Documento de Trabajo (DT) 15/2006*. Real Instituto Elcano.

Krasmann, S. (2007). The enemy on the border. *Punishment & Society, 9*(3), 301-318.

Krasmann, S. (2012). Law's knowledge: On the susceptibility and resistance of legal practices to security matters. *Theoretical Criminology,* 16(4): 379-394.

Kupchik, A. (2006). *Judging juveniles: Prosecuting adolescents in adult and juvenile courts*. New York: New York University Press.

Lanza-Kaduce, L. (1982). Formality, neutrality, and goal-rationality: The legacy of weber in analyzing legal thought. *Journal of Criminal Law and Criminology, 73*(2), 533-560.

Larrauri, E. (2016). Antecedentes penales y expulsión de personas inmigrantes. *Indret: Revista para el Análisis del Derecho,* 2: 1-29.

Layder, D. (1998). *Sociological Practice: Linking Theory and Social Research.* London: Sage.

Legomsky, S. H. (2006). Deportation and the war on independence, *Cornell Law Review*, 91, 2: 369.

Lema, M. (2014). La reforma sanitaria en España: Especial referencia a la población inmigrante en situación administrativa irregular, *Eunomía Revista en Cultura de la Legalidad, 5*, 95-115.

Levi, M., Sacks, A. & Tyler, T. R. (2009). Conceptualizing legitimacy, measuring legitimating beliefs. *American Behavioral Scientist*, 53(3): 354–375.

Light, M. T. (2010). Has racial/ethnic disparity in punishment decisions changed over time: An wanalysis of U.S. Federal Courts 1992-2004 (Master's thesis, The Pennsylvania State University).

Light, M. T. (2017). Punishing the 'Others': Citizenship and State Social Control in the United States and Germany. *European Journal of Sociology* 58: 33-71.

Light, M. T., Massoglia, M. & King, R. D. (2014). Citizenship and Punishment: The Salience of National Membership in U.S. Criminal Courts. *American Sociological Review* 79: 825-847.

López, B. (1993). *Inmigración magrebí en España. El retorno de los moriscos*, Madrid: Mapfre.

López-Benítez, M. (2014). El nuevo régimen jurídico de los centros de internamiento de extranjeros, *Revista Vasca de Administración Pública,* 99-100: 1905-1935.

López-Sala, A. M. (2009). Immigration control and border management policy in Spain. Report prepared for Institute of Public Affairs, Warsaw, Poland. Retrieved from: http://digital.csic.es/bitstream/10261/64154/1/Poland%20Report%20_Immigration%20control%20_2009.pdf.

López-Sala, A. M. (2013). Managing uncertainty: Immigration policies in Spain during economic recession (2008-2011). *Migraciones Internacionales* 7(2): 40-69.

López-Sala, A. M. (2014). La inmigración irregular en Ceuta y Melilla en 2014: prácticas de control y debate púbico, *Anuario de la Inmigración en España 2014: Flujos cambiantes, atonía institucional*, 170-191.

Luhmann, N. (2004). *Law as a social system*. New York: Oxford University Press.

Majcher, I. (2013). "Crimmigration" in the European Union through the Lens of Immigration Detention, *Global Detention Project Working Paper No. 6*. Retrieved from: http://www.globaldetentionproject.org/fileadmin/publications/Crimmigration_E-U_final.pdf.

Manzanedo, C. (2013). Resoluciones de los juzgados de control de los centros de internamiento de extranjeros (CIE) 2009-2013. *Revista de Derecho Migratorio y Extranjería*, 34: 249-259.

March, J. G. & Simon, H. A. (1958). Organizations. New York: Wiley.

Martín-Escribano, P. (2015). *La Expulsión de Extranjeros del Artículo 89 del Código Penal: Análisis Jurídico Penal y Criminológico* (Doctoral dissertation). Retrieved from TDX Doctoral Theses Database: http://www.tdx.cat/handle/10803/361400.

Martínez, B. & Golías, M. (2005). La Latinoamericanización de la inmigración en España. *Cuadernos GeográFicos 36*(1), 51-64.

Martínez-Escamilla, M. (2009). Para que el derecho no se detenga a las puertas de los CIE. Análisis del régimen jurídico del internamiento de extranjeros, *Anuario de Derecho Penal y Ciencias Penales*, 62(1): 253-281.

Martínez-Escamilla, M., et al. (2009). El internamiento de extranjeros en el proyecto de ley orgánica de reforma de la ley orgánica 4/2000, sobre derechos y libertades de los extranjeros y de su integración social: propuestas y razones para su modificación. *Revista del Instituto Universitario de Investigación en Criminología y Ciencias Penales de la UV*, 2: 215-234.

Martínez-Escamilla, M. (Dir.) (2013). Mujeres en el CIE: Género, Inmigración e Internamiento. I+D+i Iusmigrante. Retrieved from: https://www.ehu.eus/documents/2007376/2226923/Mainstreaming+gender+into+the+policies+and+the+programmes+of+theMUJERES+EN+EL+CIE.+G%C3%89NERO%2C%20INMIGRACI%C3%93N+E+INTERNAMIENTO+institutions.

Martínez Escamilla, M. (Dir.) (2013). Mujeres en el CIE: Género, Inmigración e Internamiento. I+D+i Iusmigrante. Retrieved from: https://www.ehu.eus/documents/2007376/2226923/Mainstreaming+gender+into+the+policies+and+the+programmes+of+theMUJERES+EN+EL+CIE.+G%C3%89NERO%2C%20INMIGRACI%C3%93N+E+INTERNAMIENTO+institutions.

Martínez-Escamilla, M., Sánchez J., Segovia, J., Díez Ripollés, J. L., García, E., Gimbernat, E., González, J., Pérez, E., Pérez, M., Pérez, P., Pérez, E., Revenga, M., Saiz, A., Rey, F., Ríos, J. & Villaverde, I. (2014). "Hot returns": When the state acts outside the law. Legal Report. Retrieved from: http://eprints.ucm.es/27221/1/HOT%20RETURNS.%20WHEN%20DE%20STATE%20ACTS%20OUTSIDE%20THE%20LAW.%20Legal%20report.pdf.

Martínez-Escamilla, M. (2014). Los derechos humanos en los centros de internamiento de extranjeros. Especial consideración al caso de las mujeres. Retrieved from: https://www.fiscal.es/fiscal/PA_WebApp_SGNTJ_NFIS/descarga/Ponencia%20Mart%C3%ADnez%20Escamilla,%20Margarita.pdf?idFile=0bda6e6b-ddda-4c4d-9738-b42a-33ac8f28.

Martínez-Escamilla, M. (Coord.) (2016). Detención, internamiento y expulsión administrativa de personas extranjeras. *I+D+i Iusmigrante*. Retrieved from: http://eprints.sim.ucm.es/34492/1/FINAL.%20DIC%202015%20LIBRO%20CGPJ.pdf.

Martínez-Pardo, J. V. (2012). La expulsión de extranjeros como sustitutiva de las penas privativas de libertad y de las medidas de seguridad. *ReCRIM: Revista de l'Institut Universitari d'Investigació en Criminologia i Ciències Penals de la UV*, 29-51.

Matthews, R. (2009). Beyond 'so what?' criminology, *Theoretical Criminology*, 13(3), 341-362.

Melgares, H. (Producer) & Climent, A. (Director). (2016). *Las Lágimas de África* [Documentary]. Spain: Siete Estudios.

Melossi, D. (2003). `In a peaceful life': Migration and the crime of modernity in Europe/Italy, *Punishment & Society*, 5(4), 371-397.

Melossi, D. (2013a). *En la intersección del Derecho, las migraciones y la economía: comparando los EUA y la UE, InDret*, 3.

Melossi, D. (2013b). People on the move: From the countryside to the factory/Prison, in Franko Aas & Mary Bosworth, *The borders of punishment: Migration, citizenship, and social exclusion*, Oxford University Press.

Melossi, D. (2015). *Crime, Punishment and Migration*. Routledge, London.

Miethe, T. (1987). Charging and Plea Bargaining under Determinate Sentencing. *Journal of Criminal Law and Criminology* 78 (1): 155–76.

Miller, T. A. (2003). Citizenship and Severity: Recent immigration reforms and the new penology. *Geo. Immigr. L. J.*, 17: 611-666.

Miller, J. (2015). *Identificaciones policiales imparciales y eficaces. Lecciones sobre la reforma en cinco servicios policiales españoles*. Informe técnico. Open Society Foundations.

Ministerio de Fomento. (2016). *Las Grandes Áreas Urbanas y sus Municipios (ordenadas por población) 2016*. Retrieved from: https://www.fomento.gob.es/NR/rdonlyres/416C-E7FD-A6B0-431D-881B-D1F07664795E/140256/listado_2016.pdf.

Ministerio de Trabajo e Inmigración. (2018a). *Concesiones de nacionalidad española por residencia*. Retrieved from: http://extranjeros.empleo.gob.es/es/Estadisticas/operaciones/concesiones/index.html.

Ministerio de Trabajo e Inmigración. (2018b). *Extranjeros con certificado de registro o tarjeta de residencia en vigor*. Retrieved from: http://extranjeros.empleo.gob.es/es/estadisticas/operaciones/con-certificado/index.html.

Ministerio del Interior. (2010). *En 2015 llegaron a las costas españolas 5312 inmigrantes irregulares frente a los 4552 que lo hicieron en 2014*. [Press release] Retrieved from: http://www.interior.gob.es/prensa/noticias/-/asset_publisher/GHU8Ap6ztgsg/content/id-/6373518.

Ministerio del Interior. (2012). *Ex-Post Evaluation Report on the results and impacts of actions co-financed by the external borders fund annual programs 2007 to 2010*. 30

November 2012. Deputy Director General, Sub -directorate General for Planning and Infrastructures Management and Material for Security of the Ministry of Interior. Retrieved from: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/financing/fundings/migration-asylum-borders/external-borders-fund/national-actions/docs/ebf_repor-t_en_en.pdf.

Ministerio del Interior. (2016). *Balance 2015 Lucha contra la Inmigratión Irregular*. Retrieved from: http://www.interior.gob.es/documents/10180/3066430/Balance+2015-+-de+la+lucha+contra+la+inmigraci%C3%B3n+irregular.pdf/d67e7d4b-1cb9-4b1d-94a0-9a9ca1028f3d.

Ministerio del Interior. (2017). *Balance 2016 Lucha contra la Inmigratión Irregular*. Retrieved from: http://www.interior.gob.es/documents/10180/5791067/bal_inmigracion_irregular_2016.pdf/8a040aaf-a1b6-4493-9191-cf386fd31dd4.

Moffette, D. (2014). Governing immigration through probation: The displacement of borderwork and the assessment of desirability in Spain. *Security Dialogue*, 45(3): 262-278.

Monclús-Maso, M. (2008). *La gestión penal de la inmigración. El recurso al sistema penal para el control de los flujos migratorios*, Editores del Puerto: Buenos Aires.

Moreno-Fuentes, F. J. (2000). Immigration policies in Spain: Between external constraints and domestic demand for unskilled labour, *Paper presentation at the ECPR Joint Sessions of Workshops*, Copenhagen, 14-19.

Moreno-Fuentes, F. J. (2004). The evolution of immigration policies in Spain between external constraints and domestic demand for unskilled labour, *Estudios/Working Papers, Centro de Estudios Avanzados en Ciencias Sociales*, 211.

Moya, D. (2009). *La reforma de la ley de extranjería. Documento de trabajo*. Real Instituto Elcano. Madrid.

Muñoz-Ruiz, J. (2014). La expulsión penal: nuevas tendencias legislativas, *Revista electrónica de ciencia penal y criminología*, 16.

Myers, M. A. & Talarico S. M. (1987). *The Social Contexts of Criminal Sentencing*. Research in Criminology. New York: Springer-Verlag.

Nagy Hesse-Biber, S. & Leavy, P. (2006). *The Practice of Qualitative Research.* SAGE Publications.

Naranjo, G. (2014). Desterritorialización de fronteras y externalización de políticas migratorias. Flujos migratorios irregulares y control de las fronteras exteriores en la frontera España-Marruecos. *Estudios Políticos, 45*, 13-32.

Nardulli, P., Eisenstein, J. & Flemming, R. (1988). *The Tenor of Justice*. Urbana: University of Illinois Press.

Navarro, F. (2006). "Expulsión penal" de extranjeros: una simbiosis de Derecho Penal "simbólico" y Derecho Penal del "enemigo", *Revista de Derecho Penal y Criminología* 17(2).

Natera, J. J. (2012). Población extranjera en el municipio de Málaga: Evolución de sus niveles de diferenciación residencial y de sus pautas de distribución espacial

(2003/2010). *Scripta Nova. Revista Electrónica de Geografía y Ciencias Sociales*, XVI(413).

Nino, C. (2003). *Introducción al análisis del derecho* (11a. ed. ed., Ariel derecho). Barcelona: Ariel.

Orgaz, C. (2014). Produciendo objetos burocráticos: Fundamentos, prácticas y discursos de los operarios gubernamentales en torno a la expulsión y el internamiento administrativo de extranjeros/as. *III Jornadas Internacionales de Sociología de la Asociación Madrileña de Sociología: Los Desafíos Sociales del Siglo XXI 12 y 13 de noviembre de 2014. Grupo de Trabajo: "problemas sociales"*.

Orum, A., Feagin, J. R. & Sjoberg, G. (1991). Introduction: The nature of the case study. In Feagin, J., Orum, A., & Sjoberg, G. *A case for the case study*. Chapel Hill: University of North Carolina Press.

Pakes, F. & Holt, K. (2017). Crimmigration and the prison: Comparing trends in prison policy and practice in England & wales and Norway. *European Journal of Criminology*, *14*(1), 63-77.

Parkin, J. (2013). The criminalisation of migration in Europe. A State-of-the-Art of the Academic Literature and Research. *CEPS Paper in Liberty and Security in Europe*, 61: 1-27.

Paspalanova, M. (2008). Undocumented vs. Ilegal migrant: Towards terminological coherence. *Migr. Inter*, 4(3): pp.79-90.

Pauw, R. (2000). A new look at deportation as punishment: Why at least some of the Constitution's criminal procedure protections must apply. *Administrative Law Review*, 52: 305-345.

Peers, S. (2008). *Statewatch supplementary analysis: The Returns Directive – the final stages?* Human Rights Centre, University of Essex. Retrieved from: http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.363.5980&rep=rep1&type=pdf

Pérés, H. (1999). "L'Europe commence à Gibraltar. Le dilemme espagnol face à l'immigration", *Pôle Sud*, *11*(1), 8-23.

Pérez, A. (2012). La evolución reciente de las políticas de control migratorio en España, in *Políticas de Control Migratorio: Estudio comparado de España y EEUU*, Barcelona: Edicions Bellaterra, 143-211.

Pernía-Ibáñez, L., Rodríguez-Candela, J. L. & Ruiz-Enciso, G. (2011). *Centros de Internamiento de Extranjeros. Cárceles Encubiertas. Donostia*: Tercera Prensa.

Pinyol, G. (2007). España en la construcción del escenario euroafricano de migraciones, *Revista cIDOB d'Afers internacionals 79/80*, 87-105.

Plasensia, N. (2017). Las autorizaciones para la materialización de expulsiones administrativas del artículo 57.7 LOEX. *Diario La Ley* 9001. Retrieved from: http://diariolaley.laley.es/home/DT0000248032/20170605/Las-autorizaciones-judiciales-para-la-materializacion-de-expulsiones-administrat.

Poder Judicial España. (2018). Base de datos de la estadística judicial. Retrieved from: http://www6.poderjudicial.es/PXWeb/pxweb/es/?rxid=62adb5cc-9df4-4d46-a014-5525c201a971

Público. (2017, April 5). *Rajoy ha sacado 67.337 millones de la hucha de las pensiones desde 2012*. Retrieved from: http://www.publico.es/economia/rajoy-sacado-67337-hucha-pensiones.html.

Quinney, R. (1970). *The social reality of crime*. Boston: Little, Brown.

Quinney, R. (1973). Crime control in capitalist society - critical philosophy of legal order. *Issues in Criminology*, 8(1), 75-99.

Raffaeli, R. (2011). Criminalizing Irregular Immigration and the Returns Directive: An Analysis of the El Dridi Case. *European Journal of Migration and Law* 13(4): 467-489.

Recio, A. (2014, July 1). Málaga suma más inmigrantes que emigrantes durante los años de crisis. *MálagaHoy*. Retrieved from: http://www.malagahoy.es/malaga/Malaga-inmigrantes-emigrantes-anos-crisis_0_821318473.html.

Recio-Juárez, M. (2016). *La expulsión de extranjeros en el proceso penal* (1st ed.). Madrid: Dykinson.

Reher, D., Cortés-González, M., Requena, M., Sánchez, A., Sanz, A. & Stanek, M. (2008). *Informe Encuesta Nacional de Inmigrantes (ENI-2007)*. Madrid: Instituto Nacional de Estadística.

Reher, D., Requena, M. & Sanz, A. (2011). ¿España en la encrucijada?: consideraciones sobre el cambio de ciclo migratorio, *Revista Internacional de Sociología 69*(1), 9–44.

Reig, I. (2015). La directiva de retorno y la tutela judicial efectiva, *Barataria, Revista Castellano-Manchega de Ciencias Sociales 19*, 115-126.

Rodríguez-Candela, J. L. (1998). La expulsión del extranjero en el nuevo Código Penal. *Jueces para la Democracia. Información y debate*, 33.

Rodríguez-Candela, J. L. (2016). *El extranjero ante el derecho sancionador como víctima y victimario* (Doctoral thesis). Retrieved from: https://riuma.uma.es/xmlui/handle/10630/-12221.

Rodríguez-Candela, J. L. & Lancha, M. (2015). *Multa vs. expulsión en el derecho de extranjería español frente a la estancia irregular, antes y después de la directiva de retorno*. Artículo Monográfico. Editorial Jurídica Sepín.

Rodríguez-Yagüe, C. (2012). El modelo político-criminal español frente a la delincuencia de inmigrantes, *Revista Electrónica de Ciencia Penal y Criminología*.

Roig-Torres, M. (2014). La expulsión de los extranjeros en el proyecto de reforma del código penal. Análisis desde la perspectiva del TEDH. Unas notas sobre el derecho británico. *Estudios Penales y Criminológicos*, 34: 423-509.

Romero, E. (2008). El Plan África, la política migratoria española de "nueva generación" y la guerra contra los pobres, in VV.AA. *Frontera Sur. Nuevas políticas de externalización y gestión de la inmigración en Europa*. Barcelona: Virus editorial.

Romero E. (2011). *Quién invade a quién: Del colonialismo al II Plan África*. 1ª ed. Oviedo: Cambalache.

Rosell, M. V. (2015). El juez de instrucción y la autorización del internamiento en CIE. Mención a la autorización de expulsión prevista en el Art. 57.7 LOEx, in Martínez Escamilla, M. (coord.). *Detención, Internamiento y Expulsión Administrativa de Personas Extranjeras*, I+D+i Iusmigrante.

Roxin, C. & Muñoz-Conde, F. (1981). *Culpabilidad y prevención en derecho penal*. Madrid: Reus.

Rusche, O. & Kirchheimer, G. (1984). *Pena y Estructura Social*. Bogotá: Temis.

Sánchez-Alonso, B. (2011). La política migratoria en España: un análisis de largo plazo, *Revista Internacional de Sociología 69(1)*, 243-268.

Sánchez, J. (2017a, June 11). Más de 600 inmigrantes en patera han sido rescatados este año en Málaga. *Ser*. Retrieved from: http://cadenaser.com/emisora/2017/06/11/ser_mal-aga/1497167845_955149.html.

Sánchez, J. (2017b, October 30). Málaga ya dobla la cifra de inmigrantes que llegaron en pateras el año pasado. *Ser*. Retrieved from: http://cadenaser.com/emisora/2017/10/30/ser_malaga/1509368044_512684.html.

Sánchez, J. & Ladrón de Guevara, I. (2016, October 17). Un 43% de la población en Málaga está en riesgo de pobreza y exclusión social. *Ser*. Retrieved from: http://cadenaser.com/emisora/2016/10/17/ser_malaga/1476711897_680511.html.

Sánchez-Tomás, J. M. (2013). Detención, internamiento y expulsión de ciudadanos extranjeros en situación irregular. Marco comunitario e international, in Martínez Escamilla, M. (coord.). *Detención, Internamiento y Expulsión Administrativa de Personas Extranjeras*, I+D+i Iusmigrante.

Sassen, S. (2006). *Territory, Authority, Rights: From Medieval to Global Assemblages. Princeton*, NJ: Princeton University Press.

Sau, J. A. (2014, September 15). La Fiscalía insiste en retratar a Málaga como gran centro de actividad de las mafias. *La Opinión de Málaga*. Retrieved from: http://www.laopiniondemalaga.es/malaga/2014/09/15/fiscalia-insiste-retratar-malaga-gran/707128.html.

Sau, J. A. (2016, April 24). Málaga es la segunda provincia preferencia del país para lavar dinero. *La Opinión de Málaga*. Retrieved from: http://www.laopiniondemalaga.es/malaga/2016/04/24/malaga-segunda-provincia-preferida-pais/844754.html.

Sau, J. A. (2017, May 8). Málaga, segunda provincia que más millonarios atrae. *La Opinión de Málaga*. Retrieved from: http://www.laopiniondemalaga.es/malaga/2017/05/08/mal-aga-segunda-provincia-millonarios-atrae/928765.html.

Savelsberg, J. J. (1992). Law that does not fit society: Sentencing guidelines as a neoclassical reaction to the dilemmas of substantivized law. *American Journal of Sociology, 97*(5).

Schain, M. A. (2009). The State Strikes Back: Immigration Policy in the European Union. *European Journal of International Law, 20*(1), 93-109.

Schuster, L. (2005). A Sledgehammer to Crack a Nut: Deportation, Detention and Dispersal in Europe, *Social Policy & Administration*, 39, 6, 606-621.

Silveira, H. (2012). Biopolítica de estados expulsores, *Politica y Sociedad*, 49(3), 497-517.

Silveira, H. (2017). La legalarbitrariedad como mecanismo jurídico del control de la inmigración irregular. *Revista Crítica Penal y Poder* 12: 34-54.

Silveira, H. & Rivera, I. (2009). La biopolítica contemporánea ante los flujos migratorios y el universo carcelario. Una reflexión sobre el regreso de los «campos» en Europa», en Ignacio Mendiola (ed.), *Rastros y rostros de la biopolítica*, Barcelona: Anthropos, 271-292.

Simon, J. (2007). *Governing through crime: How the war on crime transformed American democracy and created a culture of fear*. Oxford: Oxford University Press.

SJM-Servicio Jesuita a Migrantes. (2012). *Vidas en Tránsito. Experiencias de Migrantes que viven en Marruecos y Argelia*. Retrieved from: http://sjme.org/wp-content/uploads/2017/11/vidas-en-trnsito.pdf.

SJM-Servicio Jesuita a Migrantes. (2013). *Por un Estado de Derecho también en la Frontera Sur*. Retrieved from: http://sjme.org/wp-content/uploads/2017/11/por_estado-_derecho_frontera_sur_sjm.pdf.

SJM-Servicio Jesuita a Migrantes. (2014a). *CIE y Expulsiones Exprés. Informe Anual 2014*. Retrieved from: https://www.cuartopoder.es/wp-content/uploads/2015/04/Informe-2015.pdf.

SJM-Servicio Jesuita a Migrantes. (2014b). *Vidas en la Frontera Sur*. Retrieved from: http://sjme.org/wp-content/uploads/2017/11/201407_vidas-en-la-frontera-sur.pdf.

SJM-Servicio Jesuita a Migrantes. (2015a). *Vulnerables Vulnerabilizados. Informe Anual 2015*. Retrieved from: http://pueblosunidos.org/wp-content/uploads/1608-informecie15-vfe.pdf.

SJM-Servicio Jesuita a Migrantes. (2015b). *Situación actual de los Centros de Internamiento de Extranjeros en España y su adecuación al Marco Legal vigente*. Retrieved from: http://www.icade.comillas.edu/images/Clinica_Juridica_ICADE/Informe_situacion_actual_CIE_junio_15.pdf.

SJM-Servicio Jesuita a Migrantes. (2015c). *Sin Protección en la Frontera. Derechos Humanos en la Frontera Sur: Entre Nador y Melilla*. Retrieved from: http://www.nadiesinfuturo.org/IMG/pdf/sin-proteccion-en-la-frontera.pdf.

Sjoberg, G., Williams, N., Vaughan, T. R. & Sjoberg, A. F. (1991). The case study approach in social research: Basic methodological issues. In Feagin, J., Orum, A., & Sjoberg, G. *A case for the case study*. Chapel Hill: University of North Carolina Press.

Sklansky, D. A. (2012). Crime, immigration, and ad hoc instrumentalism, *New Criminal Law Review*, 15(2), 157-223.

Solanes, A. (2010). Un balance tras 25 años de leyes de extranjería en España, *Revista del Ministerio de Trabajo e Inmigración 90*, 77-102.

Spohn, C. (2005). Sentencing decisions in three U.S. district courts: testing the assumption of uniformity in the federal sentencing process. *Justice Research and Policy*, 7(2): 1-27.

Stake, R. E. (2005). Qualitative case studies. In Denzin, N. K. & Lincoln, Y. S. (Eds.), *The Sage handbook of qualitative research* (3rd ed., pp. 443–466). Thousand Oaks, CA: Sage.

Staring, R. (2004). Facilitating the arrival of illegal immigrants in the Netherlands: Irregular chain migration versus smuggling chains. *Journal of International Migration and Integration/Revue de l'integration et de la migration internationale*, 5(3): 273-294.

Steffensmeier, D., Ulmer, J. & Kramer, J. (1998). The interaction of race, gender, and age in criminal sentencing: The punishment cost of being young, black, and male. *Criminology, 36*(4), 763-798.

Steffensmeier, D. & Demuth, S. (2001). Ethnicity and judges' sentencing decisions: Hispanic-black-white comparisons. *Criminology, 39*(1).

Stumpf, J. P. (2006). The crimmigration crisis: Immigrants, crime, and sovereign power, *American University Law Review*, 56, 367.

Stumpf, J. P. (2011). Doing time: Crimmigration law and the perils of haste, *Ucla Law Review*, 58(6), 1705-1748.

Stumpf, J. (2013). The process is the punishment in crimmigration law, in Franko Aas and Mary Bosworth (eds.), *The Borders of Punishment: Migration, Citizenship, and Social Exclusion. Oxford*: Oxford University Press, 58-75.

Sudnow, D. (1965). Normal crimes: Sociological features of the penal code in a public defender office. *Social Problems, 12*(3), 255-276.

Sunshine, J. & Tyler, T. R. (2003). The role of procedural justice and legitimacy in shaping public support for policing. *Law & Society Review*, 37: 513-548.

Thompson, J. D. (1976). Organizations in Action. New York: McGraw-Hill.

Tomé-García, J. A. (2006). Autorización judicial para la expulsión administrativa del extranjero procesado o inculpado en un proceso penal, en Robles-Garzon, J. A., and Ortells-Ramos, M. *Problemas actuales del proceso iberoamericano*, 2: 719-736.

Tomé-García, J. A. (2015). La autorización del internamiento: principios rectores, in Martínez Escamilla, M. (coord.). *Detención, Internamiento y Expulsión Administrativa de Personas Extranjeras*, I+D+i Iusmigrante.

Torres-Fernández, M. T. (2012). La expulsión de extranjeros en derecho penal. *La Ley*, Madrid.

Tsoukala A. (2005). Looking at immigrants as enemies, in: Bigo D, Guild E, (eds.). *Controlling Frontiers. Free Movement into and within Europe*. Aldershot: Ashgate, 161–192.

Turk, A. (1969). *Criminality and legal order*. Chicago: Rand McNally.

Tyler, T. R. (2003). Procedural Justice, Legitimacy, and the Effective Rule of Law. *Crime and Justice, 30*, 283-357.

Tyler, T. R. (2004). Enhancing police legitimacy. *The Annals of the American Academy of Political and Social Science*, 593: 84-99.

Ugelvik, T., & Damsa, D. (2018). The pains of crimmigration imprisonment: Perspectives from a norwegian all-foreign prison. *The British Journal of Criminology, 58*(5): 1025-1043.

Ulmer, J. T., Eisenstein, J. & Johnson, B. D. (2010). Trial penalties in federal sentencing: Extra-guidelines factors and districts variation. *Justice Quarterly*, 27(4): 560-592.

UNHCR-United Nations High Commissioner for Refugees. (2008). *UNHCR Position on the Proposal for a Directive on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals*. Retrieved from: http://www.unhcr.org/4d948a1f9.pdf.

Van Manen, M. (1984). *Doing phenomenological research and writing: An introduction* (Curriculum praxis. monograph series, no. 7). Edmonton, Alta.: Publication Services for Dept. of Secondary Education, Faculty of Education, University of Alberta.

Van Wynsberghe, R. & Khan, S. (2007). Redefining case study. *International Journal of Qualitative Methods*, 6(2): 80-94.

Vázquez, M. L., Vargas, I. & Aller, M. B. (2014). Reflexiones sobre el impacto de la crisis en la salud y la atención sanitaria de la población inmigrante. Informe SESPAS 2014. *Gaceta Sanitaria: Supplement 1*, *28*, 142-146.

Vélez, F. (2008). Pateras, cayucos y mafias transfronterizas en África. El negocio de las rutas atlánticas hacia las Islas Canarias, *Real Instituto Elcano ARI 14*.

Vieira da Costa, P. L. (2010). La expulsión de los extranjeros "sin papeles". *Revista Jurídica Universidad Autónoma de Madrid*, 21: 149-168.

Viruela, R. (2008). Población rumana y búlgara en España: evolución, distribución geográfica y flujos migratorios, *Cuadernos de Geografía 84*, 169-194.

Von Hirsch, A. (1985). *Past or future crimes: Deservedness and dangerousness in the sentencing of criminals* (Crime, law, and deviance series). New Brunswick: Rutgers University Press.

Wacquant, L. (1999). 'Suitable enemies': Foreigners and immigrants in the prisons of Europe, *Punishment & Society*, 1(2), 215-222.

Wacquant, L. (2006). Penalization, Depoliticization, Racialization: On the Over-Incarceration of Immigrants in the European Union, in S. Armstrong and I. McAra (eds.) *Perspectives on Punishment*. Oxford: Oxford University Press.

Wacquant, L. (2009). *Punishing the Poor: The Neoliberal Government of Social Insecurity, Durham and London*: Duke University Press.

Walburg, Ch. (2016). 'Crimmigration': Die Ausweisung als Mittel der Migrations- und Kriminalitätskontrolle. *Neue Kriminalpolitik*, 28(4): 378-388.

Weber, L. & McCulloch, J. (2018). Penal power and border control: Which thesis? Sovereignty, governmentality, or the pre-emptive state? *Punishment & Society*: 1-19.

Weber. M. (1946). *Essays in Sociology*. Translated, edited and with introduction by H. H. Gerth & C. Wright Mills. New York: Oxford University Press.

Weber, M. & Kalberg, S. (2005). *Max Weber: Readings and commentary on modernity*. Malden, MA: Blackwell Pub.

Wolfe E., Pyrooz, D. C. & Spohn, C. C. (2011). Unravelling the effect of offender citizenship status on federal sentencing outcomes. *Social Science Research*, 40: 349-362.

Wood, A. L. (1956). Informal Relations in the Practice of Criminal Law. *American Journal of Sociology, 62,* 1.

Woude, M. A H. van der, Leun, J. P. Van der, & Nijland, J. (2014). Crimmigration in the netherlands. *Law and Social Inquiry, 39*(3), 560-579.

Wu, J. & DeLone, M. A., (2012). Revisiting the Normal Crime and Liberation Hypotheses: Citizenship Status and Unwarranted Disparity. *Criminal Justice Review*, 37: 214-238.

Young, J. (2007). *The vertigo of late modernity*. Los Angeles: Sage.

Zaffaroni, E., Alagia, A. & Slokar, A. (2003). *Derecho penal : Parte general* (2. ed. ed.). Buenos Aires: Ediar, Sociedad Anómia Editora, Commercial, Industrial y Financiera.

Zapata-Barrero, R. (2013). La dimensión exterior de las políticas migratorias en el área mediterránea: Premisas para un debate normativo. *Revista del Instituto Español de Estudios Estratégicos, 2,* 1-37.

Zapata-Barrero, R. & Witte, N. D. (2007). The Spanish Governance of EU borders: Normative Questions. *Mediterranean Politics*, *12*(1), 85-90.

Zapata-Barrero, R. & Zaragoza-Cristiani, J. (2008). Externalización de las políticas de inmigración en España: ¿Giro de orientación política en la gestión de fronteras y flujos migratorios? *Panorama social*, *8,* 186-195.

Zedner, L. (2013). Is the criminal law only for citizens? A problem at the borders of punishment, in Franko Aas and Mary Bosworth (eds.), *The borders of punishment: Migration, Citizenship, and Social Exclusion*. Oxford University Press: Oxford.

Appendices

Appendix 1: Interview Schedule and leading questions:

Court office personnel

GENERAL AND BIOGRAPHICAL:

- How many years have you worked in the judiciary/in this court office/in others?
- What is your professional and academic background?
- May you briefly summarize your judicial or professional career?
- Do you belong to any judicial organization or labour union?

ORGANIZATION OF THE OFFICE:

- How is the court organized?
- How are the duties and tasks distributed in the office and with which criteria?
- How are the supervision and control tasks managed?
- Which is your administrative/organizational role in the court?

WORK RELATIONSHIPS:

- How are the work relationships in the court?
- How is your relationship with the judge/clerk and other officers?
- How is the work environment of the court office?
- How are the relations with other institutions in the courthouse?

JUDICIAL CULTURE:

- Which are the most notable characteristics of your court office?
- How do you describe your main characteristics as judge/clerk/servant?
- To what extent does the size of the workload and caseload affect case processing and decision making?
- What are the criteria for the management of cases?
- What are the criteria for cases involving foreigners?
- How is the relationship between lawyers/prosecutors with the court staff?
- To what extent the quality of the defence/prosecution influences the fate of the case?
- What is the situation in cases involving foreigners?

PUNITIVE MEANINGS:

- What factors are most important to the decision of a case?
- In practice, what you think are the functions performed by punishment?
- To what extent the function of punishment varies depending on each case?
- What are the reflections that you make/are made when imposing a sentence?
- How all this applies in the case of foreigners?
- How do you think expulsion in general/and in each case: punishment/award?

IMMIGRATION CONTROL ASPECTS:

- How common are cases involving foreigners and/or immigration issues?
- What is your opinion about the incorporation of expulsion/immigration detention in the criminal justice realm?

- What has been the impact of the incorporation of expulsion/immigration detention in the clearance of cases and work of the court?
- Can you explain the general handling of these cases (immigration detention/criminal expulsion)?
- How is pre-trial/post-trial/expulsion – immigration detention processed?
- What are the determinants of pre-trial/post-trial/immigration detention decision-making?
- What reasons influence to accept or deny a request for expulsion/immigration detention?
- What is the role of prosecutors/police officers/attorneys in expulsion/immigration detention cases?
- Do you think that certain foreigners deserve a punishment (prison/fine) and not expulsion, and vice versa? What reasons?
- Is there a model or standard rule for handling such cases?

Prosecutors

GENERAL AND BIOGRAPHICAL

- How many years have you worked as a prosecutor?
- In which areas are and have you been specialised?
- May you briefly summarize your professional career?
- What is your experience in immigration matters?
- How you became and what motivated to become involved in immigration law?
- Do you belong to any professional union or organisation?

WORK RELATIONSHIPS:

- How are the work relationships in the prosecutorial office?
- How is your relationship with courts and their workers?
- How is the work environment of the prosecutorial office?
- How are the relations with other institutions inside the building?

WORK AND PROFESSIONAL PRACTICE:

- What is your role and the role of immigration prosecutors in immigration matters?
- How is the decision-making process of immigration detention?
- What is your role and the role of immigration prosecutors in immigration detention?
- How do you decide in immigration detention matters?
- What are the determinants of your decision-making process in immigration detention?
- What is your role and the role of immigration prosecutors in expulsions?
- How do you decide in expulsion proceedings?
- What are the determinants of your decision-making process in expulsions?

Defence attorneys

GENERAL AND BIOGRAPHICAL:

- How many years have you worked as a defence attorney?
- What are the areas of your practice?

- May you briefly summarize your professional career?
- What is your experience in immigration matters?
- How you became and what motivated to become involved in immigration law?
- Do you belong to any professional union or organisation?

WORK AND PROFESSIONAL PRACTICE

- How often are you in day-court shifts?
- How is the process of immigration detention?
- How are immigration detention decisions made?
- How often do you defend expulsion cases?
- How often do you defend criminal expulsion cases?
- How are the processes of criminal expulsion?
- How are criminal expulsions decisions made?
- What is your opinion of so-called express expulsions?
- Have you attended a day-court of small boat immigrants (pateras)?
- How are "patera's" hearings processed?
- How are "patera's" cases decided?
- How is the relation between administrative and criminal proceedings?
- Which cases are more complex and difficult?
- How do you assess your work?

WORK RELATIONSHIPS:

- How is your relationship with court workers, judges, prosecutors, and the police?
- What is your opinion of criminal/investigative/appellate/administrative courts
- What is your opinion of the prosecutors and the police?
- What is your opinion of other defence attorneys in the field of immigration?

Appendix 2: Summary of all interviewed people

Identification	Duration (minutes)	Gender	Total experience (years)	Date
Sentencing judge 1	30	Female	16	26/02/2016
Sentencing judge 2	36	Male	13	12/04/2016
Sentencing judge 3	30	Male	14	01/04/2016
Sentencing judge 4	50	Male	16	25/04/2016
Investigative judge 1	30	Male	28	19/04/2016
Investigative judge 2	30	Female	23	22/04/2016
Investigative judge 3	36	Female	15	26/05/2016
Investigative judge 4	40	Female	23	12/04/2016
Court of Appeal judge 1	30	Male	30	31/05/2016
Court of Appeal judge 2	78	Male	36	02/06/2016
Court of Appeal judge 3	57	Male	29	13/05/2016
Court of Appeal judge 4	42	Male	30	16/05/2016
Court of Appeal judge 5	25	Male	34	16/05/2016
Administrative judge 1	67	Male	16	22/04/2016
Administrative judge 2	76	Male	16	25/05/2016
Administrative judge 3	83	Male	11	01/05/2016

Administrative judge 4	27	Male	25	26/05/2016
Administrative judge 5	90	Female	11	30/05/2016
Sentencing court clerk 1	47	Female	7	25/02/2016
Sentencing court clerk 2	30	Female	12	15/03/2016
Sentencing court clerk 3	50	Female	25	30/03/2016
Sentencing court clerk 4	60	Female	12	22/03/2016
Sentencing court clerk 5	41	Male	32	12/04/2016
Sentencing court clerk 6	30	Male	12	15/04/2016
Sentencing court clerk 7	70	Female	13	20/04/2016
Sentencing court clerk 8	65	Male	1	12/04/2016
Sentencing court clerk 9	115	Male	35	08/04/2016
Investigative court clerk 1	35	Female	6	28/04/2016
Investigative court clerk 2	30	Female	35	12/04/2016
Investigative court clerk 3	62	Male	30	29/04/2016
Investigative court clerk 4	12	Male	28	06/06/2016
Investigative court clerk 5	18	Male	36	27/04/2016
Investigative court clerk 6	30	Male	33	27/04/2016
Investigative court clerk 7	20	Male	24	11/05/2016
Investigative court clerk 8	50	Male	27	12/05/2016
Investigative court clerk 9	30	Male	31	19/04/2016
Investigative court clerk 10	66	Male	24	22/04/2016
Court of Appeal court clerk 1	30	Female	27	16/05/2016
Court of Appeal court clerk 2	35	Female	26	13/05/2016
Administrative court clerk 1	43	Female		20/04/2016
Sentencing court servant 1	56	Male	5	25/02/2016
Sentencing court servant 2	60	Female	16	15/04/2016
Sentencing court servant 3	37	Female	4	28/03/2016
Sentencing court servant 4	52	Female	5	27/04/2016
Sentencing court servant 5	50	Female	20	01/04/2016
Sentencing court servant 6	42	Female	6	18/03/2016
Sentencing court servant 7	30	Male	4	21/03/2016
Sentencing court servant 8	30	Female	6	15/04/2016
Sentencing court servant 9	27	Female	4	28/03/2016
Sentencing court servant 10	22	Female	4	28/04/2016
Sentencing court servant 11	40	Male	6	08/04/2016
Sentencing court servant 12	57	Female	18	30/03/2016
Sentencing court servant 13	41	Female	4	18/03/2016
Investigative court servant 1	20	various		11/05/2016
Investigative court servant 2	30	Female	26	01/04/2016
Administrative court servant	34	Male	24	20/04/2016
Algeciras court servant 1	30	Male		03/08/2016
Algeciras court servant 2	30	Female	23	29/08/2016
Algeciras court servant 3	30	Female	5	03/08/2016
Algeciras court servant 4	30	Male	26	18/10/2016
Immigration prosecutor 1	70	Male	26	19/04/2016
Immigration prosecutor 2	42	Male	22	28/04/2016
Immigration prosecutor 3	30	Male	29	25/05/2016

Regular prosecutor 1	30	Female	17	10/05/2016
Regular prosecutor 2	32	Male	33	15/04/2016
Police commissioner 1	120	Male	39	07/07/2016
Defence attorney 1	30	Female	24	23/06/2016
Defence attorney 2	30	Male	15	27/06/2016
Defence attorney 3	32	Male	18	27/06/2016
Defence attorney 4	30	Female	21	28/06/2016
Defence attorney 5	48	Female	15	29/06/2016
Defence attorney 6	62	Male	4	04/07/2016
Defence attorney 7	60	Male	21	05/07/2016
Defence attorney 8	68	Female	13	05/07/2016
Defence attorney 9	50	Female	15	06/07/2016
Defence attorney 10	45	Male	6	08/07/2016
Defence attorney 11	60	Female	14	11/07/2016
Defence attorney 12	60	Male	27	13/07/2016

Appendix 3: Summary of attended court hearings

Sentencing Courts			Administrative Courts			Investigative courts	
No.	**Date**		**No.**	**Date**		**No.**	**Date**
1	02/03/2016		1	17/05/2016		1	18/04/2016
2	14/03/2016		2	17/05/2016		2	18/04/2016
3	14/03/2016		3	17/05/2016		3	19/05/2016
4	16/03/2016		4	17/05/2016		4	19/05/2016
5	16/03/2016		5	17/05/2016		5	19/05/2016
6	16/03/2016		6	17/05/2016		6	19/05/2016
7	16/03/2016		7	17/05/2016		7	27/05/2016
8	29/03/2016		8	17/05/2016			
9	29/03/2016		9	17/05/2016			
10	31/03/2016		10	24/05/2016			
11	31/03/2016		11	24/05/2016			
12	31/03/2016		12	24/05/2016			
13	31/03/2016		13	24/05/2016			
14	31/03/2016		14	24/05/2016			
15	31/03/2016		15	24/05/2016			
16	31/03/2016		16	24/05/2016			
17	05/04/2016		17	24/05/2016			
18	05/04/2016		18	24/05/2016			
19	07/04/2016		19	24/05/2016			
20	11/04/2017		20	24/05/2016			
21	11/04/2016		21	24/05/2016			
22	06/04/2016		22	24/05/2016			
23	06/04/2016		23	07/06/2016			
24	06/04/2016		24	07/06/2016			
			25	07/06/2016			
			26	07/06/2016			
			27	07/06/2016			
			28	07/06/2016			
			29	07/06/2016			
			30	07/06/2016			