

LEGISLATIVE IMPACT ASSESSMENT: A CASE STUDY OF SPAIN'S CRIMINAL LAWS¹

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ABSTRACT: This paper addresses the shortcomings of the Spanish legislative process, particularly in criminal matters, in order to make an appropriate laws effects' assessment to ensure their quality, their rationality. The author analyzes with that aim the different tasks currently performed along the phases in the law-making process in Spain and the instruments which public powers have to develop them. So, it reveals the purely formal nature of the work they perform in such phases, including laws assessment, claiming for the empowerment of material aspects of these tasks, especially because of the deficiencies identified at this point in the gestation latest criminal law reforms of 2010 and 2015.

KEYWORDS: science of legislation, jurisprudence, quality legislation, legislative rationality, legislative impact assessment, criminal law.

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I. INTRODUCTION.

The evaluation of norms (or legislative policy) and of their ("*ex ante*" or "*ex post*") consequences is progressively turning into an increasingly well-known and acknowledged field of investigative research within legal scholarship and, over recent times, in juridical-penal scholarship².

We are examining a matter that forms part of the discipline of "Legislative Science", which has the task of *studying the process or activity pursued by the drafting of legal norms*", with the objective of *"improving the quality of laws"*³, facilitating "the guidelines to draft _well designed_" laws⁴, which form part of _rational_ "legislation"⁵.

In fact, without going into additional considerations on the content of these matters, what is clear is that, on the basis of that definition, the evaluation of legislation is related to the objective of achieving rational legislation; legislative rationality, to which Professor ATIENZA RODRÍGUEZ⁶ first referred, as well as Professor DÍEZ RIPOLLES⁷ later on, adapting it to the criminal context.

¹ This paper was translated from Spanish language with funds of the national research project titled "Towards a rational evaluation of the European Criminal Laws" (DER2011-28225, Chief Researcher: Dr. Adán NIETO MARTÍN).

² Simply to note the launch of the "Spanish Group on Criminal Policy and Legislation" (at the initiative of Professors DÍEZ RIPOLLÉS and BECERRA MUÑOZ and the unconditional subsequent support in organizational tasks from Professors NIETO MARTÍN and MUÑOZ DE MORALES ROMERO), within which the present collective work has been prepared. The Group held its foundational session on 21 June 2013, at the headquarters of the *Instituto Andaluz Interuniversitario de Criminología* [Andalusian Inter-University Institute of Criminology] at the University of Malaga, and has continued as a "working group" with a presentation (under the title of "Criminal Law Making Policy") at the "European Society of Criminology" during the recent Conference at Budapest (4 to 7 September 2013), and with the organisation of two multidisciplinary Seminars on Legislative Evaluation in Ciudad Real on 17 December 2013 and 30 June 2014, and recently a scientific meeting in Madrid on 8 June 2016.

³ MENÉNDEZ MENÉNDEZ, A.: "Introducción", in MENÉNDEZ MENÉNDEZ, A./PAU PEDRÓN, A. (DIRS.): *La proliferación legislativa: un desafío para el Estado de Derecho*, Civitas, Madrid, 2004, pp. 20 – 21.

⁴ MONTORO CHINER, M^aJ.: *La evaluación de las normas: racionalidad y eficiencia*, Atelier, 2001, p. 122.

⁵ GALIANA SAURA, Á.: *La Ley: entre la razón y la experimentación*, Tirant lo Blanch, Valencia, 2008, p. 17.

⁶ ATIENZA RODRÍGUEZ, M.: *Contribución a una teoría de la legislación*, Civitas, Madrid, 1997.

Having clarified this starting point, we will set forth an examination in the following pages of the parameters related to the process of drafting legal norms in Spain and the tools that are available to do so. In particular, we shall approach, step by step, the criminal legislative process. In consequence, we shall attempt to detect failings in the processes of drafting criminal legislation and its reform in Spain (on the basis of the examples of the great (pen)ultimate punitive reform of 2010 and the reform that has been underway since 2013, and finally approved in 2015). Fundamentally, and I will say it now, due to a poorly rooted culture of evaluation in general terms and, in particular, due to a weak political will to apply scant (incipient) evaluative instruments that are now available to our legal Order.

II. PRESENTATION AND ANALYSIS OF LEGISLATIVE EVALUATION IN SPAIN.

1. The pre-legislative phase: the predominance of the legislative initiative sponsored by the Government in Spain.

An in-depth examination of legislative process in Spain⁸, for SOTO NAVARRO, allows us to reach an important conclusion (more than well-known in the juridical-public doctrine) on the topic that concerns us here: "the Executive exercises firm control over Parliamentary legislative activity". In fact, it happens that in our legislative system, bills of law (at the initiative of the government) "represent the largest percentage of legislative initiatives and have a far greater likelihood of becoming law than legislative proposals", while, on the contrary, "the power of amendments and the work of the committees represent a weak counterbalance, if above all the Government holds an absolute majority in Parliament"⁹.

1.1. The "should be" of the pre-legislative phase: the expression of consensus on the social interests that are affected.

So, in the opinion of the above quoted SOTO NAVARRO, "the different social interests that it [the Bill] affects" should be prepared in the initial phase of the Bill "as, once this is put before Congress, the possibilities of negotiation with parliamentary groups that are representative of different options are very limited", because the passage of a legislative proposal through Parliament has been converted into a mere procedure that is simply conducted to invest the legislative decisions of Governance with formal legitimacy¹⁰. On the basis of these arguments, therefore, it is said, and quite rightly too, that the objective of this phase should be "the construction of consensus over what is expected from the juridical norm"¹¹.

That phase, the so-called "pre-legislative" phase (also referred to as the "internal legislative procedure" or the "internal procedure for the drafting of legislation"¹²), should begin as soon as "a weak relation between a social or

⁷ DÍEZ RIPOLLÉS, J.L.: *La racionalidad de las leyes penales*, Trotta, Madrid, 2003, a work edited twice in ten years after (2013), adding the subtitle *Práctica y teoría*, as well as three related works with annexes.

⁸ The same happens in Germany, as may be understood from the empirical research conducted by FLOERECHE, P.: *Anatomie der Strafgesetzgebung. Eine vergleichende soziologische Analyse der Normsetzungsprozesse zur Führungsaufsicht und zum Demonstrationsstrafrecht* Forschung, Centaurus, Pfaffenweiler, 1992, pp. 48 – 51, as well as pp. 53 and ff.

⁹ SOTO NAVARRO, S.: *La protección penal de los bienes jurídicos colectivos en la sociedad moderna*, Comares, Granada, 2003, p. 130.

¹⁰ SOTO NAVARRO, S.: *La protección penal...*, ob. cit., p. 130.

¹¹ RODRÍGUEZ, R.: "El proceso de producción legislativa. Un procedimiento de diseño institucional", in *Isonomía: Revista de Teoría y Filosofía del Derecho*, num. 13, 2000, p. 198.

¹² Looking briefly at the theoretical perspective, it has been affirmed that "the iter of internal legislative processes does not follow a lineal process, as its phases take effect and are produced in accordance with political momentum itself; hence neither is the doctrine in agreement when setting the phases of such a process in terms of more or less fixed classifications" (MONTORO CHINER, M^a.J.: *Adecuación al ordenamiento y factibilidad: presupuestos de calidad de las normas*, Centro de Estudios Constitucionales, Madrid, 1989, p. 90). Thus, for example, for KINDERMANN (KINDERMAN, H.: *Rechtstheorie*, Duncker & Humblot, Berlin, 1976 (2nd edition), p. 299), inspired in the model of NOLL (NOLL, P.: *Gesetzgebungslehre*, Rowohlt, Reinbek bei Hamburg, 1973, pp. 72 and ff.), this process would be composed of the following phases: impulse; definition of the problem; plan of the objectives to achieve; plan of the various regulatory alternatives; reduction of alternatives; and "ex-post" monitoring.

As may be seen, an operation pertaining to what we might call the "post-legislative phase" is included here, such as "ex-post" monitoring of the new regulation; but it is not the only model that it contemplates, as HASSEMER, STEINERT and TREIBER (HASSEMER, W./STEINERT, H./TREIBER, H.: "Strafgesetzgebung. Soziale Reaktion auf abweichung und Kriminalisierung durch den Gesetzgeber", in HASSEMER, W./LÜDERSSEN, K. (EDS.): *Sozialwissenschaften im Studium des Rechts. Vol. III: Strafrecht*, Beck, München, 1978, p.

economic reality and its corresponding legal response" manifests itself as a social problem, ending in the "presentation of a Bill or a legislative proposal to the *Spanish Legislative Chambers*"¹³.

In the first part of that process, the "contextualization of the social problem" would begin with a "dysfunctional social situation"¹⁴, which would be considered a "social problem" through the "communicative process of exchange of opinions and impressions", in which the "essential instruments" are the mass communications media¹⁵.

All of that would lead to the launch of a programme of action to respond to such a social problem, in the creation of which "media pressure groups" instead of "expert lobby groups"¹⁶ would intervene. This process, nevertheless, ends in a simple approximation to reality and in the loss of possibilities for reflexive restructuring and sharing of the analyses that should be made available in the process¹⁷, by restricting "the spectrum of social actors intervening in the achievement of [or the attempt to achieve] legislative rationality"¹⁸ that might be expected in the process of drafting criminal law.

Finally, the corresponding "legal response"¹⁹ would be arrived at through the preparation of the pertinent bill or legislative proposal, a stage at which a new social agent would come into play: governmental or partisan bureaucracies²⁰. We see in this phase, as SOTO NAVARRO has pointed out, an unquestionable pre-eminence of government bureaucracy and, therefore, of bills of law²¹.

So, in the light of these successive phases with this point as the objective, and as we have explained at the start of this section on the content of the pre-legislative phase, in which the specific weight of the legislative initiatives sponsored by the Government predominates, we shall now centre on the study of how the preparation of bills of law actually occurs in Spain.

1.2. The "reality" of the pre-legislative phase in Spain.

Having begun, the first thing we see is that the material drafting of all Bills of law corresponds in general to the respective ministries with competence in the matter. In particular, if we are talking about criminal matters, competence corresponds to the Ministry of Justice, in accordance with article 22 of Law 50/1997, of 27 November, of the Government, a norm developed by some Agreements of the Council of Ministers -26 January 1990²² and 22 July 2005, which repeals the former one of 18 October 1991 (on the need for bills of law to adjust to certain formal linguistic and legal requirements).

This regulation is grounded in **article 88 EC 1978**, according to which:

"Bills of law will be approved by the Council of Ministers that will submit them to Congress accompanied by an explanatory statement of the necessary background to deliver an opinion on them".

This constitutional provision that regulatory draft bills of Government are accompanied by "the necessary background to deliver an opinion on them" is a novelty in our constitutional history and in comparative Law (with the sole

13) include in their proposal for the criminal field, in addition to the earlier ones, the planning phases of execution, verification and control of the success of the regulation.

¹³ Díez RIPOLLÉS, J.L.: *La racionalidad...*, ob. cit., pp. 18 – 19.

¹⁴ Díez RIPOLLÉS points out that it should be an acknowledged social failing, which implies the rejection of apparent dysfunctional social situations, that is, situations that are not empirically-socially proven (DÍEZ RIPOLLÉS, J.L.: *La racionalidad...*, ob. cit., p. 21).

¹⁵ Díez RIPOLLÉS, J.L.: *La racionalidad...*, ob. cit., p. 27.

¹⁶ Díez RIPOLLÉS, J.L.: *La racionalidad...*, ob. cit., p. 34.

¹⁷ Díez RIPOLLÉS, J.L.: *La racionalidad...*, ob. cit., pp. 36 and earlier.

¹⁸ Díez RIPOLLÉS, J.L.: *La racionalidad...*, ob. cit., p. 40.

¹⁹ As GALIANA SAURA has point out, "with regard to the decision over regulatory intervention, the legislator has to determine whether a "necessity" or social problem exists or not that should be regulated. A regulatory problem exists when certain social actors perceive stress between an existing situation and when they call on the legislator to resolve that stress" (GALIANA SAURA, Á.: *La Ley...*, ob. cit., pp. 162 – 163, quoting MADER, L.: *L'évaluation législative. Pour une analyse empirique des effets de la législation*, Payot, Lausanne, 1995, pp. 66 – 67).

²⁰ Díez RIPOLLÉS, J.L.: *La racionalidad...*, ob. cit., p. 43.

²¹ SOTO NAVARRO, S.: *La protección penal...*, ob. cit., p. 130. In the same sense, Díez RIPOLLÉS notes that "over two thirds of legislative decisions emanate from bills of law" (DÍEZ RIPOLLÉS, J.L.: *La racionalidad...*, ob. cit., p. 45).

²² Which we shall examine *infra*.

exception, of the Constitution of Greece, of 9 June 1975, article 74 of which states that "all bills and legislative proposals will by obligation be accompanied by an explanatory statement")²³.

In the opinion of SAINZ MORENO, that novelty was introduced "without doubt, with the purpose of breaking the old tradition of submitting bills of law accompanied by a 'statement', in which the Government presented the reasons for the changes proposed in its introduction to the Chamber, without contributing objective data (surveys, reports from experts, statistics, consultations, etc.), which would neither allow them to judge the veracity of the facts nor the feasibility of the reform"²⁴. And, the fact is that some "explanatory statements", considered individually, even though these have had, as is frequently acknowledged, "a high dogmatic value" and have thereafter served to interpret the laws²⁵, "have not contributed or completed the evidence of what is said in them" unfortunately, "in such a way that the Chambers discuss the reforms with very poor knowledge of the reality on which they are acting"²⁶.

In any case, such an obligation to contribute background information established in the constitution was, later on, incorporated in the Rules of Congress (articles 109 and 124) and of the Senate (article 108) as well as in the Rules of the Parliaments of the Autonomous Regions. All these Rules "have been pronounced with a view to exacting an obligation to contribute background not only in relation to bills of law, but also, in relation to legislative proposals"²⁷.

Nevertheless, as SAINZ MORENO criticized, "despite the great influence that the correct application of this precept might have had on parliamentary life and, especially, on the quality of laws, the fact is that a series of factors have, in general, reduced it to a norm without any real, appreciable efficacy". Legal academia together with the jurisprudence of the Constitutional Court has not contributed to improving this situation²⁸. Indeed, in the Judgment of the Constitutional Court (STC) 198/1986, of 26 July, "it appears to follow that absence of background information or its inconsistency is a failing that should be reported by Parliament before approving the bill, without the Constitutional Court "being able to interfere in the assessment of the relevance that an aspect of judgment had for parliamentarians" (FJ 3)"²⁹. Or, more properly, it implies "that the absence of particular background information will only assume importance if the failing had been reported to the Chambers by parliamentarians, during the processing of the law or proposition"³⁰.

The situation is that Law 50/1997, of 27 November, promoted by the Government, covered the constitutional provision of article 88, although additionally establishing the prior preparation of a draft bill by the corresponding Ministry, to present to the Council of Ministers, as stated in arts. 22.2 and 3:

"2. The procedure for the preparation of bills of law to which the preceding section refers will begin in the competent ministry or ministries through the preparation of the corresponding preliminary draft bill of law, which will be accompanied by the statement, the studies or needs assessment and advisability reports on it, a report on the gender implications of the measures that it establishes, as well as an economic report that contains the estimation of the cost that it involves. In any case the draft bills are subject to reports from the General Technical Secretariat".

3. The proposing Department will submit the draft bill to the Council of Ministers for it to decide on the subsequent procedures and, in particular, on the consultations, opinions and reports that it considers advisable, as well as on the terms of their completion, notwithstanding those that are legally binding".

Having completed the procedures that are transcribed above, and as a consequence of article 22.4 of the Law on Government, "the representative of the proposing Department will submit the Draft Bill, once again, to the Council of Ministers for its approval as a Bill of Law and referral to the *Spanish Legislative Chambers* or, if applicable, to the

²³ SAINZ MORENO, F.: "Antecedentes necesarios para pronunciarse sobre un proyecto de ley (Article 88 CE)", in SAINZ MORENO, F./DA SILVA OCHOA, J.C.: *La calidad de las leyes*, Basque Parliament, Vitoria-Gasteiz, 1989, p. 25.

²⁴ SAINZ MORENO, F.: "Antecedentes necesarios...", *ob. cit.*, p. 26.

²⁵ On the value of "explanatory statement", see, for example EZQUIAGA GANUZAS, J.: "Concepto, valor normativo y función interpretativa de las exposiciones de motivos y de los preámbulos", in *Revista Vasca de Administración Pública*, num. 20, 1988, and its accompanying bibliography.

²⁶ SAINZ MORENO, F.: "Antecedentes necesarios...", *ob. cit.*, p. 26.

²⁷ SAINZ MORENO, F.: "Antecedentes necesarios...", *ob. cit.*, pp. 29 – 31.

²⁸ SAINZ MORENO, F.: "Antecedentes necesarios...", *ob. cit.*, p. 27. In fact, "unfortunately, the Constitutional Court has not attached the value to article 88 of the Constitution that it undoubtedly has so that lawmakers may inform themselves sufficiently well of the matter with which they are dealing" (SAINZ MORENO, F.: "Evaluación de las políticas públicas y evaluación legislativa", in PARDO FALCÓN, J./PAU I VALL, F. (COORDS.): *La evaluación de las leyes: XII Jornadas de la Asociación Española de Letrados de Parlamentos*, Tecnos, Madrid, 2006, p. 27).

²⁹ SAINZ MORENO, F.: "Evaluación...", *ob. cit.*, p. 27.

³⁰ SAINZ MORENO, F.: "Antecedentes necesarios...", *ob. cit.*, p. 27.

Senate, accompanied by an Explanatory Statement and a Report and other background information that may be necessary to deliver an opinion on it".

Note that when it speaks about a **Draft Bill of Law**, the Law on Government is referring to the **statement**, the **studies and needs assessment advisability reports**, the **report on gender implications** and the **economic statement** (plus the corresponding report from the General Technical Secretariat for internal use); on the contrary, when it speaks of the **Bill**, it only refers to (the use of capital letters is literal) an **Explanatory Statement**, the **Report** and the other **necessary background information**.

In this way, it is hardly surprising that BECERRA MUÑOZ has qualified this provision as "chaotic", which had supposedly been "conceived to enlighten and to develop the content of the constitutional clause", and from a reading of which "the impression arises that the legislator has decided to include all the reports that may have occurred to him, using in addition any synonym and analogous expression that may have been available", such that it eventually becomes "extremely complicated [...] to distinguish between all these types of documents, referred to in an indistinct and generic way, except in some cases"³¹. In addition, the confusion is increased if we refer to the content of the Instructions for the processing of matters in collegiate bodies of the Government, approved by Agreement of the Council of Ministers of 26 July 1996³².

The author therefore seeks to throw light on the question by classifying all the controversial documents in declaratory (explanatory statement, reports and necessary background information³³) and justificatory statements (studies and reports on the need and advisability of the Draft bill, gender implication studies –in particular gender, which is the sole obligation in our legal Order, although the author would also include the economic statement here–, report from the General Technical Secretariat, subsequent procedures³⁴ and legally binding measures³⁵).

In any case, the key with regard to all those documents, and we are totally in agreement with BECERRA MUÑOZ, in reality resides "in the level of requirements of their content and the availability of sufficient means for their preparation"³⁶.

However, to all of this has to be added the approval of Royal Decree 1083/2009, of 3 July, in regulation of the **impact assessment report on legislative initiatives**³⁷, a regulation inspired without doubt by the "Regulatory Impact

³¹ BECERRA MUÑOZ, J.: *La toma de decisiones en Política criminal. Bases para un análisis multidisciplinar*, Tirant lo Blanch, Valencia, 2013, p. 385.

³² BECERRA MUÑOZ, J.: *La toma de decisiones...*, *ob. cit.*, pp. 393 – 394.

³³ In the opinion of the author, "for greater transparency in the decision-making process, the references to 'necessary background' should be removed and exclusive reference should be made to the 'report', a document that would have to comprise:

- an account of the events that motivate the drafting of the bill. It would not be a question of repeating the list of factual background information and points of Law that were set established in the explanatory statement, but to refer to whoever promoted the *initiative* to sponsor the draft bill (a ministerial order, an electoral commitment of the Government, a request from a specific ministry, etc.);
- an explanation of the measures that are instituted since the identification of such a need, which would include the request for reports from public and private bodies, as well as individuals and collectives within and outside the administration, meetings held, research carried out and requested;
- a chronogram of measures in which the measures that are taken over time are listed, since the works on the matter began" (BECERRA MUÑOZ, J.: *La toma de decisiones...*, *ob. cit.*, pp. 394 – 395).

According to the author, "an arrangement such as the one pointed out assists a documentary map in which, including the explanatory statement, all the elements have a particular space and an intrinsic value for the information that they contain. At the same time, we avoid the apathy of the legislator, destined to filling in documents the content of which is superimposed and the vagueness of which in the regulation allow him, moreover, to shirk his responsibility when preparing norms supported by a satisfactorily constructed decision-making process (BECERRA MUÑOZ, J.: *La toma de decisiones...*, *ob. cit.*, pp. 395 – 396).

³⁴ These are the "consultations, opinions and reports" referred to in particular under article 22.3 of the Law of Government, "which could be requested from scientists, experts, public organisms, administrations, consultative bodies of the central and regional Administrations, public and private associations, collectives, professional colleges and, even, the general population through questionnaires, surveys, and referenda. All of these fit perfectly in the aforementioned expression". In particular, the author refers to the convenience of including "studies of Comparative Law" here (BECERRA MUÑOZ, J.: *La toma de decisiones...*, *ob. cit.*, pp. 406 – 407).

³⁵ "With reference to the criminal material, it is a question of reports prepared by constitutional bodies, such as the General Council of Judicial Power and the Council of State" (BECERRA MUÑOZ, J.: *La toma de decisiones...*, *ob. cit.*, p. 409).

³⁶ BECERRA MUÑOZ, J.: *La toma de decisiones...*, *ob. cit.*, p. 386.

³⁷ The norm in question also introduces a change in responsibilities, which is to attribute the competences corresponding to the analysis of the normative impact to the General Directorate of Administrative Organization and Procedures of the Secretary of State for the Public Function of the Ministry of the Presidency, removing those competences from the State Agency of Public Policies and Service Quality. In short, the responsibility of driving and encouraging the completion of impact analyses of the new draft bills is passed on to the General Directorate, and that is without prejudice to the collaboration that may be requested from the Agency in matters concerning the encouragement of quality and the improvement of public services.

Analysis" (RIA)³⁸. Through this regulation, it was intended to follow what was established in the Communication from the Commission to the Council and the European Parliament Better Regulation for Growth and Jobs in the European Union, in which the Commission recommended that all member States establish strategies for better legislation. In particular, national impact assessment systems that would determine the economic, social and environmental consequences of a regulation, as well as the supporting structures adapted to their national circumstances. Although, in reality, what has in fact been done, is not to introduce the requirement for different and additional documents when preparing the Draft Bills and Bills of Law, as we have just seen, that are contained in the Law of Government (except with regard to the sections on "Objectives" and "Alternatives" to which I will subsequently refer). Instead, all that been intended is, on the one hand, to specify and to detail "the content of the memoranda, studies and reports on the need and advisability of the planned regulations, the economic statement and the report on gender implications"³⁹ and, on the other hand, to group all that documentation in a single document, under the title "**Legislative Impact Assessment Report**". To do so, a Methodological Guide was prepared, which outlined the way in which the Report in question should be structured, in accordance with the following index:

- I. INTRODUCTION
- II. ADVISABILITY OF THE PROPOSAL
 - 1) Motivation
 - 2) Objectives
 - 3) Alternatives
- III. CONTENT, LEGAL ANALYSIS AND DESCRIPTION OF THE ADMINISTRATIVE PROCEDURE
 - 1) Content⁴⁰
 - 2) Legal analysis⁴¹
 - 3) Description of the administrative procedure
- IV. IMPACT ASSESSMENT
 - 1) General considerations
 - 2) Preparation of the legislation with regard to the distribution of powers
 - 3) Economic and budgetary impact⁴²
 - 4) Gender impact⁴³
 - 5) Other impacts
- V. THE ABBREVIATED REPORT⁴⁴
- ANNEXES
 - I. Executive summary
 - II. Indicators
 - III. European Union Law
 - IV. Identification of effects on competence
 - V. Simplified method of measuring administrative burden
 - VI. Analysis of personnel costs
 - VII. Budgetary impact on the Autonomous Communities and/or Local Entities

³⁸ That is, "a method used to evaluate the costs and consequences of the promulgation of each law and to evaluate the draft bills of new laws that apply organisms and institutions from all member states of the EU" (KARPEN, U.: "La implantación de la evaluación legislativa en Europa: modelos y tendencias actuales", in PARDO FALCÓN, J./PAU I VALL, F. (COORDS.): *La evaluación...*, *ob. cit.*, p. 57).

³⁹ With the aim of "guaranteeing and approving a draft law, the information needed to estimate the impact of the norm on its recipients and agents is used. To do so, it is essential to justify the need and the advisability of the planned regulation, to assess the different alternatives that exist for the achievement of the ends that are sought and to analyze in detail the legal and economic consequences, especially on competences that will be passed to the agents in question, as well as their impact from a budgetary point of view, their gender implications, and in the constitutional order of the distribution of powers" (Introduction of Royal Decree 1083/2009, 3 of July).

⁴⁰ The drafted text of the relevant Bill of Law is included here.

⁴¹ Which will include the detailed list of the regulations that would be repealed as a consequence of the entry into force of the regulation.

⁴² Which will include the impact on sectors, collectives, and agents affected by the norm, including the effect on competence, as well as the detection and measurement of administrative loads.

⁴³ Where the results that may be followed after the approval of the bill are analysed and assessed from the perspective of equal opportunities and their contribution to the achievement of the objectives of equal opportunities and equal treatment between men and women, on the basis of the baseline indicators, the forecasted results and the impact assessment covered in the Methodological Guide.

⁴⁴ When it is considered that the normative proposal will not have appreciable impacts on any of the fields, so that the presentation of a complete report is not needed, an abbreviated report will be prepared that should include, at least, the following sections: appropriateness of the regulation, list of the norms that are repealed, budgetary impact and gender implications.

Within section II, sub-sections 1 and 2 correspond to the content of the so-called "Explanatory Statement". There is a new item in subsection 3, dedicated to "Alternatives".

With regard to section III, under sub-section 1, the body of the text is usually simply transcribed from the Bill; under 2, reference is made to the legislation that the Bill will affect, and under 3 the "iter" is listed followed by the Bill of Law until it is approved as such, with an indication of the bodies that produced reports on it (although not the full contents of those reports), as well as the Council of State.

It is section IV that appears to propose the largest number of novelties with regard to the form in which Bills of Law are prepared in Spain. However, in reality, as BECERRA MUÑOZ pointed out, the only novelty is the "requirement for the adaption of the norm to the distribution of powers", as the rest of the reports included in that section "continue with the line currently in force", including the legally mandatory report on gender implications, as well as the other of an economic-budgetary nature (what up until now was called the "economic memorandum")⁴⁵.

In short, it may be said that the regulation of the regulatory legislative impact assessment report contributes "greater precision [...] in the description of many associated documents, the requirement of some that were not expressly included before and the compilation of all those in a dossier, creating a single instrument, which will without doubt have a psychological effect, as it is no longer a bundle of loose documents that may be successively incorporated in the parliamentary business"⁴⁶. However, it is also true that doubts arise with regard to its binding nature⁴⁷, all the more so if we take into account the Bills of Law for the reform of the Penal Code that were processed under Royal Decree 1083/2009, although this will be examined a little later on.

1.3. Interim Conclusion.

In conclusion, in seeking to clarify the focus of the question, by explaining why we have gone through all of these normative references up until now within the so-called **pre-legislative** phase, our real interest is to highlight reality. Working practice, demonstrates that the requirements for the documentation listed in the Law of Government as compulsory annexes to a Draft Bill on criminal reform -our essential interest in this work- are compiled by the competent organs in a "formal or superficial" manner⁴⁸. So much so that not even this new norm on normative impact introduced through Royal Decree 1083/2009 has had an effect, as previously advanced, on the most recent criminal reforms, even though it was in force (although this, I repeat, will be corroborated later on).

Thus, it may be said, as affirmed by BECERRA MUÑOZ, that "the key to greater rationality and quality in our legislation is not in the number of documents that by obligation have to be prepared when submitting a Draft Law, but in the political will that exists for its real accomplishment and in the establishment of satisfactory control mechanisms to apply the sanction in the face of incompliance with the regulations"⁴⁹. We shall soon see that this affirmation could not be closer to the truth.

2. Brief critical note on the legislative phase in Spain.

Following the earlier phase, the "**legislative**" phase (or, in other terminology, "the external legislative process") commences, that "would begin with the reception in the *Spanish Legislative Chambers* of the legal proposal, and would end with the approval and publication of the law"⁵⁰, following the constitutional procedure established for the approval of laws. At this point of the legislative "iter", Díez RIPOLLÉS pointed to an absence of reinforcement or strengthening of the procedure that the Draft Law has to follow in the Parliamentary Committee phase, as in the opinion of this author, "the period of work of the Committee and its report constitute the decisive procedural moment of all the legislative phase, in which, as a consequence, efforts should be centred on adding the components of rationality". As a result, he considered that it should "look deeper into the furtherance of full legislative competence in certain criminal laws or the development of criminal law", setting aside "a good number of decisions for the committees, such as the formulation of especially complex criminal definitions, the configuration of the most technical aspects of the system of responsibility

⁴⁵ BECERRA MUÑOZ, J.: *La toma de decisiones...*, ob. cit., p. 416.

⁴⁶ BECERRA MUÑOZ, J.: *La toma de decisiones...*, ob. cit., p. 417.

⁴⁷ BECERRA MUÑOZ, J.: *La toma de decisiones...*, ob. cit., p. 417.

⁴⁸ Díez RIPOLLÉS, J.L.: *La racionalidad...*, ob. cit., p. 64.

⁴⁹ BECERRA MUÑOZ, J.: *La toma de decisiones...*, ob. cit., p. 418.

⁵⁰ Díez RIPOLLÉS, J.L.: *La racionalidad...*, ob. cit., p. 19.

and a good part of the system for the enforcement of penalties"⁵¹. This proposal for the distribution of the tasks so as to draft criminal norms certainly follows a very logical reasoning with which I totally agree.

3. The post-legislative phase in Spain.

3.1. What should it comprise?

Finally, the process concludes with the "**post-legislative**" phase, which "begins with the publication of the law and finishes, closing the circle, with scrutiny by society in general, and by relevant groups within it, to establish whether the law has an acceptable relation with the social and the economic realities that it is meant to regulate"⁵². This phase would comprise "the set of evaluation activities of the various effects of the legal decision following its entry into force, and would last up until the point at which its adaptation to the social and economic realities that it seeks to regulate is questioned in a socially credible way". At that time, a new pre-legislative phase begins"⁵³. But are these activities done in our legal order?

3.2. What it really comprises and what instruments are available to it?

From an external and quite an optimist focus, KARPEN affirmed that "the evaluation of law in Spain is profoundly influenced by the Latin tradition and the culture and legal experiences of German speaking countries. However, the country follows the way in which draft laws and legislation is presented in England and the USA with great interest"⁵⁴.

This author describes the Spanish system of legislative evaluation, underlining that "there is no central parliamentary office of the Committee such as the one that exists in the British Parliament, and the bureaucracies of the Ministries prepare the draft bills, which the cabinet finally approves and sends on to the Spanish parliament"⁵⁵. In particular, "the Spanish Minister of Justice is, in the end, the Minister of legislation (and has always been so), because of the fact that the Minister is in charge of drafting and modifying the principal legal codes that exist"⁵⁶.

This author from Germany, in addition, makes the point that the Technical Legislative Guidelines on the form and the structure of draft bills, prior to 1991, and amended by those approved in the Agreement of the Council of Ministers, of 22 July 2005, "solely cover the formal and conceptual aspects of legislation". But they also refer to the start of the 90s, when the Spanish Government, "with the support of Catalan legislators [sic], approved a questionnaire that was practically a checklist inspired by the German 'Blaue Prüffragen' (1986)"⁵⁷, containing, as FERNÁNDEZ CARNICERO said, "criteria relating to patterns of necessity, which fundamentally seek to avoid purposeless legislation", and that act as a complement to those Technical Legislative Guidelines⁵⁸.

We are referring to "**the Questionnaire on Evaluation that should accompany draft legislation for submission to the Council of Ministers**" (approved through two Agreements of the Council of Ministers of 297 December, 1989, and

⁵¹ That is, without "taking away from the Plenary Committee the establishment of the catalogue of offenses and their corresponding penalties, the definition of the basic system of responsibility or the system of crimes" (DÍEZ RIPOLLÉS, J.L.: *La racionalidad...*, ob. cit., p. 55).

⁵² DÍEZ RIPOLLÉS, J.L.: *La racionalidad...*, ob. cit., p. 19.

⁵³ DÍEZ RIPOLLÉS, J.L.: *La racionalidad...*, ob. cit., p. 58.

⁵⁴ KARPEN, U.: "La implantación...", ob. cit., p. 71.

⁵⁵ KARPEN, U.: "La implantación...", ob. cit., p. 71. It has also to be taken into account that "in the institutional field, there are procedures which, in some way, refer back to Parliament certain information on the degree of efficacy of the decisions that are taken. Without any attempt at drawing up an exhaustive list, the following may be pointed out: the submission of accounts to Parliament on the degree of formal compliance of budgetary laws by the bodies (a type of Court of Auditors), specifically foreseen for that purpose; reports to Parliament by the Parliamentary committees (a type of Ombudsman), in which the problems that some members of the public reported in relation to regulatory incompliance or administrative barriers were analysed; the parliamentarians (basically from opposition groups), who channelled, through questions and participation in Parliamentary debates, those aspects that, in their opinion, represented a lack of accommodation between the legislative programme of the Government and that which really took place; as well as the requests submitted to the Chambers that arose from collective initiatives or from individual members of the public" (GALIANA SAURA, Á.: *La Ley...*, ob. cit., p. 288).

⁵⁶ KARPEN, U.: "La implantación...", ob. cit., p. 72.

⁵⁷ KARPEN, U.: "La implantación...", ob. cit., pp. 71 – 72.

⁵⁸ FERNÁNDEZ CARNICERO, C.J.: "La evaluación legislativa en España: posibilidades de articulación y límites constitucionales o estatutarios", in PARDO FALCÓN, J./PAU I VALL, F. (COORDS.): *La evaluación...*, ob. cit., p. 163.

of 26 January 1990)⁵⁹ which, more than an instrument of evaluation in the post-legislative phase, is designed as an "ex ante" evaluation tool, in the pre-legislative phase. In any case, the content of the Agreement of the Council of Ministers of 26 January 1990, under the aforementioned title, was as follows:

"Within the scope of what is known as 'Legislative Technique', various European countries have prepared and applied questionnaires or sets of questions aimed at monitoring the need and the formal and material qualities of the legislative proposals. In this regard, it is worth highlighting that the Federal Republic of Germany is the country that has developed this technique (Checklisten or Prüffragen) to the greatest extent, both at a Federal level and in the various Länder; a technique that is also used in countries like Switzerland, Austria and Italy and that, with other modalities, is likewise applied in the United Kingdom and in the United States of America.

The work of designing an evaluative questionnaire on the legislative proposals that are submitted to the Council of Ministers responds to an increasing awareness to seek out, to analyze and to study systems for the verification and the evaluation of legislative norms, if possible before they enter into force, so as to introduce a technique in our country that brings benefits to the quality and efficacy of legislative production.

With this objective in mind, a questionnaire has been designed, above all, in accordance with its application to legislative bills, as these constitute a more appropriate field of reference. With this end in sight, the set of questions that appear as an annex are designed for the evaluation of proposed statutory instruments with legislative status and those regulatory provisions that are proposed and issued in the development of legislative texts.

In the initial phase, this limitation on draft bills of law and proposed Regulatory orders in the development of the Laws would appear advisable. These are the norms that have the greatest importance in our legal order and, in that framework, they are the ones that require the greatest internal coherence, in order to ensure the highest respect for the constitutional system of sources.

In view of all the above points, the following agreement is submitted to the Council of Ministers

First

Draft Bills of Law and proposals for Regulations that have to be delivered pursuant to regulations with the status of Law will be submitted for consideration to the Council of Ministers, accompanied by the corresponding 'Questionnaire on the evaluation of legislative proposals that are submitted to the Council of Ministers'. This questionnaire should be filled in by the Department or Departmental authors responsible for the proposal.

Second

If the draft Bill of Law or proposal for a Royal Decree were to share the same character, a single questionnaire should be prepared, which would also have to be jointly prepared by the Departments responsible for its proposal.

ANNEX EVALUATION QUESTIONNAIRE ON LEGISLATIVE PROPOSALS SUBMITTED TO THE COUNCIL OF MINISTERS

1. Necessity.

1.1 Does the proposal respond to a legal requirement such as:

- a.- A constitutional and / or legislative mandate?
- b.- The need to develop Community law? Your approval is subject to a specific term?
- c.- The absence of specific regulations?
- d.- The advisability of amending an earlier provision?
- e.- A regulatory vacuum arising from the repeal of another regulation by the courts?

1.2.- Are there provisions in the Government Programme on the matter?

1.3.- What basic aims does the draft bill seek to achieve?

2. Legal and institutional implications.

2.1.- With regard to the European Communities:

- a.- Does the proposal affect another from the EC?
- b.- Has notification of the draft bill previously been sent to the Commission of the European Communities, when required by Community law?
- c.- What was the outcome of the consultation?

2.2.- In relation to the Autonomous Communities

- a.- Which areas of competence form the basis of the competence of the state?
- b.- Is a jurisdictional conflict foreseeable?

2.3.- In relation to the organs of the State Administration

- a.- Will the draft bill attribute new powers to the Council of Ministers?

⁵⁹ MONTORO CHINER, M^a.J.: *La evaluación de...*, ob. cit., p. 16. According to KARPEN, "the person responsible for preparing these two directives were the Minister of the Presidency" (KARPEN, U.: "La implantación...", ob. cit., p. 72). A situation that led the author to affirm that "the present-day situation is that Spain has two administrative centres responsible for controlling the decentralized system of drafting pre-legislative texts and other general legislation" (KARPEN, U.: "La implantación...", ob. cit., p. 72), referring both to the Ministry of the Presidency and to the Ministry of Justice, which may only be said in relation to the latter since 2014.

- b.- Does it modify the current distribution of powers between the various ministerial departments?
- 2.4.- In relation to the existing law
 - a.- Which legislation is wholly or partly repealed by the proposal ?
 - b.- What mandatory reports are required? Have they all been completed?
 - c.- For the full effectiveness of the proposal, will further regulations be needed to develop its contents?

3. Social and Economic Consequences.

- 3.1 What are the main economic and budgetary implications of the proposal? (Financial Report).
- 3.2 Can the measures in the draft bill be undertaken with the levels of staffing currently available? If not, what measures are planned to address the identified weaknesses?
- 3.3 If the current draft bill is approved, what will its consequences be in terms of their acceptance or rejection by the stakeholders and their representative organizations?"

KARPEN considered that "this checklist has been very useful for Spanish politicians and public sector employees to be more aware of the need to control the flow of new regulations"⁶⁰, although I personally consider that he is, as said before, quite optimistic in his appraisal. Why is this so? Simply because (leaving to one side other legislative areas that we have not examined), I have not found, at least with regard to criminal matters, any trace of the use of this Questionnaire in the reforms carried out in Spain since its approval back in 1989 and 1990.

Of course, what is clear is that, because of its content, the interpretation can be reached, without any problems, that following the approval of Royal Decree 1083/2009, the Report on the analysis of regulatory impact can fulfil the function that this Questionnaire was intended to fulfil very well. In reality, the aforementioned Report sought a review of the current legislation from the Government before it approved a new piece of legislation. Hence, it would have mixed the retrospective and the prospective point of view (and they are in practice mixed), the "ex-post" evaluation of the existing regulation and the "ex-ante" evaluation of the new regulation. These evaluative assessments would be mixed, because one assessment in the post-legislative phase would follow on after another in the pre-legislative phase of the new draft legislation, in the majority of cases, to complete the circle of the lawmaking process.

III. CONCLUSIONS ON THE EVALUATION OF THE EFFECTS OF LEGISLATION IN SPAIN

1. A discredited legislative process in a real evaluation of the consequences of the laws

So, in reality, it may be said that the "institutionalization of an evaluative phase of the legislative decisions" is "limited" (perhaps not so much as even "inexistent")⁶¹ in Spain, and we haven't "sociological analysis on its development in practice"⁶², even though the evaluation is recommended of "the social effects of a new law as well as the aspects relating to its potential application by the courts and tribunals"⁶³. So, without going any further, for example, "the ex- post evaluation of a criminal law would serve to correct failings that should be detected in the initial preparatory phase of a draft law or legislative proposal or during their parliamentary business"⁶⁴.

As SOTO NAVARRO said, "[T]he contribution of criminology, together with other disciplines such as psychology, sociology, the economic analysis of Law, etc." would be fundamental for this type of analysis and monitoring of the efficacy of the laws. Thus, she said, the resulting empirical studies would allow us "to analyse such factors as the degree of knowledge and acceptance of a criminal law; its dissuasive effect; the success and failure indicators of its intended aims; the collateral effects of the new criminal law; the infrastructure and both economic and human resources that are necessary for its correct application, etc."⁶⁵.

In effect, I agree with BARBERET, in that scientific evaluation of the proposed legislation would be of interest in the area of criminal legislation, and in particular with the support of Criminology, for the following reasons⁶⁶:

- In the first place, because the scientific process is rigorous, systematic and objective. In this sense, we may say that, in as much as Criminology forms part of the social Sciences, it aims to follow rigorous evaluation

⁶⁰ KARPEN, U.: "La implantación...", *ob. cit.*, p. 72.

⁶¹ Díez RIPOLLÉS, J.L.: *La racionalidad...*, *ob. cit.*, pp. 58 – 59.

⁶² SOTO NAVARRO, S.: *La protección penal...*, *ob. cit.*, pp. 146 and 148.

⁶³ SOTO NAVARRO, S.: *La protección penal...*, *ob. cit.*, p. 163.

⁶⁴ SOTO NAVARRO, S.: *La protección penal...*, *ob. cit.*, p. 165.

⁶⁵ SOTO NAVARRO, S.: *La protección penal...*, *ob. cit.*, pp. 163 – 164.

⁶⁶ BARBERET, R.: "Evaluación de reformas penales y planes de prevención", in Díez RIPOLLÉS, J.L./CEREZO DOMÍNGUEZ, A.I. (EDS.): *Los problemas de la investigación empírica en criminología: la situación española*, Tirant lo Blanch, Valencia, 2001, p. 108.

policies, in harmony with the scientific objectives, unlike the normal practice at the level of governmental programmes.

- In second place, scientific evaluation serves to ascertain whether what is done is really effective. So, in our case, where criminal legislation complies with the exacting scientific requirements from a criminological point of view, then that will allow us to affirm whether a criminal reform, a crime prevention programme or a victim prevention programme, for instance, really has the results that were intended when it was designed.
- Finally, in third place, scientific evaluation also serves to modify and to improve a programme of intervention. In other words, the criminological-scientific evaluation would serve to introduce improvements in a programme that is already underway (and, as the author pointed out, it is especially important, in these times of austerity that we are living through, to justify public expenditure in a scientific way).

However, it is necessary to possess enough personal, material and methodological resources, in order to conduct a legislative evaluation in the criminal field. And, as DÍEZ RIPOLLÉS took it upon himself to highlight, neither the first, nor the second, nor the third are available in the Spanish Order.

With regard to the first, DÍEZ RIPOLLÉS said that the professionals who should be in charge of analyzing whether laws are effective and whether they achieve their ends, "are disconnected or only slightly connected to the problem of criminal legislative interventions"⁶⁷, principally because of, or owing to "the nonexistence of autonomous disciplines that focus their expert knowledge directly on the manifestations of crime -the scant social and economic recognition of the criminologist is also a paradigmatic example-", or because of "the scarce openings to non-jurist professionals in social institutions that are busy with the drafting and application of Law"⁶⁸. At a complementary level, we may note the nonexistence of services related to crime and criminal legislation that allow well-coordinated and structured interdisciplinary action from professionals with useful contributions to make. Likewise, the nonexistence of "professional action in accordance with external objectives" is regrettable, (for the reasons pointed out elsewhere on what the strategy of the criminal doctrine should be to confront the present-day political-criminal situation⁶⁹). This is "especially significant in the university field, where the choice of expert activities to pursue is substantially governed by the perspectives of progress in the academic career, and not by the social demand that has to be satisfied with the skill that is learnt"⁷⁰.

In second place, as I have mentioned, in agreement with DÍEZ RIPOLLÉS, there is the conspicuous absence of material resources, in so far as "there is little tradition of allocating *budgetary entries* for the evaluation of criminal legislative and non-legislative interventions, and there are neither precedents for a criminal law that incorporates a budgetary entry to conduct its evaluation, nor final budgetary entries in the Ministry of Justice, the General Council of Judicial Power or other similar bodies set aside for that purpose."⁷¹ In addition, in parallel to that shortcoming pointed out earlier, of well coordinated and structured services that permit interdisciplinary action, there is a logical consequence, in so far as "*premises* designed and used for the development of studies on the assessment of legislation" do not exist in Spain, which makes "the accumulation of experience, materials, dedicated databases, etc. with the corresponding optimization of resources" impossible"⁷².

Finally, in third place, we lack what DÍEZ RIPOLLÉS has called, in general, a "*non-programmed experimental substrate* on which to build concrete evaluations"⁷³. As specific points in this shortcoming, the author lists "poor police and judicial statistics on crime"⁷⁴. Nevertheless, there are those who tone down this argument and consider that, at least

⁶⁷ DÍEZ RIPOLLÉS, J.L.: *La racionalidad...*, ob. cit., p. 62.

⁶⁸ DÍEZ RIPOLLÉS, J.L.: *La racionalidad...*, ob. cit., p. 62.

⁶⁹ See RODRÍGUEZ FERRÁNDEZ, S.: "Recensión a Bernardo del Rosal Blasco, "¿Hacia el Derecho penal de la postmodernidad? Una breve reflexión sobre el papel del penalista en la deriva del Derecho penal postmoderno", in *Cuadernos de Política Criminal*, num. 98, 2009, pp. 153 – 162.

⁷⁰ DÍEZ RIPOLLÉS, J.L.: *La racionalidad...*, ob. cit., pp. 62 – 63.

⁷¹ DÍEZ RIPOLLÉS, J.L.: *La racionalidad...*, ob. cit., p. 63.

⁷² DÍEZ RIPOLLÉS, J.L.: *La racionalidad...*, ob. cit., p. 63.

⁷³ DÍEZ RIPOLLÉS, J.L.: *La racionalidad...*, ob. cit., p. 63.

⁷⁴ DÍEZ RIPOLLÉS, J.L.: *La racionalidad...*, ob. cit., p. 63.

with regard to the judicial statistics, we have "much more information than is exploited", the problem really being that "the available statistical information [...] is hardly exploited and rarely used"⁷⁵.

Among other concrete aspects, DÍEZ RIPOLLÉS also points to the nonexistence of quantitative instruments of social research structured in series (as, if such instruments or techniques are applied, it is merely done in an isolated way, such that their contents are not usually comparable and hinder the search for reliable conclusions), and the nonexistence of "indicators that are not strictly criminal but have direct political-criminal applications", and, of course, "*experimental references* on specific legislative decisions", etc.⁷⁶

In short, the absence of some necessary minimum standards in the Spanish legal order to conduct a real legislative evaluation, prior to the implementation of any criminal reform that would find its material and empirical justification in the results obtained from the reform, is flagrant and plain to see. The last two criminal reforms undertaken in Spain demonstrate as much, as I will seek to make clear in the following sub-sections.

2. For example, the case of criminal reform instituted by Organic Law 5/2010, of 22 June.

This recent criminal reform, the twenty-seventh since the Criminal Code was approved in 1995, was introduced in a Bill of January 2007, which was set aside before the general elections of 2008, and redrafted in November of that same year as a preliminary draft law, only to emerge as a new Bill in December 2009. It is worth highlighting that, between one Draft Bill and another, as SERRANO GÓMEZ⁷⁷ has demonstrated (in relation to those of 2007 and 2009), there are innumerable changes to which, in turn, innumerable amendments are added in legislative proceedings; a process which impacted (or otherwise) on the final text of Organic Law 5/2010, of 22 June.

That said, we shall now focus on examining the content of the documentation that was added to that criminal reform⁷⁸ when the Bill of Law was referred to the Government of the Spanish lower chamber (and published in the Official Gazette of 27 November 2009).

The first thing we find is that the criminal reform of 2010 was not infused with that same spirit, despite the great opportunity in the European initiative (which inspired the approval of Royal Decree 1083/2009, of 3 July, in regulation of the report on the analysis of regulatory impact) to establish national impact assessment systems, which would help determine the economic, social, and environmental consequences of legislation, as well as the creation of a global strategy to evaluate crime and criminal justice.

And that was in spite of the aforementioned Royal Decree that was in force, although it is also true that the Methodological Guide, promoted by the aforementioned Decree, had been approved by the Council of Ministers on 11 December 2009 (in other words, some two weeks after the referral of the Bill to the Spanish parliament). Even though the latter might constitute a justifiable excuse, it is also true that the Bill of Law on Sustainable Economy, prepared at that same time, made clear at the start of its text, that its preliminary Draft Bill had been prepared prior to the Royal Decree of July 2009, despite which the Bill in question was finally approved in the form of an Impact Assessment Report on legislative initiatives. Precisely for that reason, it is my opinion that the validity of that norm in some way imposed a will to comply with it, the absence of which shone out in the case of the Draft Organic Law on the reform of the Penal Code.

⁷⁵ DE BENITO, J.L./PASTOR PRIETO, S.: "La estadística como instrumento de la Política Judicial", in DÍEZ RIPOLLÉS, J.L./CEREZO DOMÍNGUEZ, A.I. (Eds.): *Los problemas...*, *ob. cit.*, pp. 57 – 58. These authors point out that "[a]t times, what is contributed by the competent departments is a cascade of information, without the slightest systematization, or analysis, in the face of which, the surprised user can do little more than ignore it. In conclusion, the available information must be used and optimized, exploiting the possibilities of the information systems that are already available to us and providing only useful results that have been analyzed, in a clear, ordered way" (DE BENITO, J.L./PASTOR PRIETO, S.: "La estadística...", *ob. cit.*, p. 58). Despite the optimistic attitudes of these authors, it has to be recognized that the data included in the judicial statistics "only represent a fraction of the phenomenon the totality of which is unknown", as "[w]hat is accounted for only represents an invariably biased sample of the universe of criminal incidents, and the seriousness of the bias is proportional to the differential access of certain groups to the courts" (RUBIO, M.: "La evaluación de las leyes: lecciones de la Criminología", in *Revista de Economía Institucional*, vol. 10, num. 19, 2008, p. 141).

⁷⁶ DÍEZ RIPOLLÉS, J.L.: *La racionalidad...*, *ob. cit.*, p. 63.

⁷⁷ SERRANO GÓMEZ, A.: "Legislación líquida. Una nota sobre el Proyecto de Ley de 2009 de Reforma del Código penal", in *Revista Electrónica de Ciencia Penal y Criminología*, num. 12, 2010, pp. 3 – 6.

⁷⁸ That documentation was obtained through the Documentation Department of the Congress of Deputies [Spanish Lower Chamber].

As things are, the documentation that was submitted to Congress along with the Draft Organic Law (with its Explanatory Statement and the articles of its text) was the "Explanatory Statement", and (to describe them in the same way as under their respective headings), the "Economic Memorandum" and the "Memorandum on Gender Implications"⁷⁹.

2.1. Explanatory Statement

This document, with an extension of eleven pages, contained two basic sections: the first, dedicated to a summary on the "purpose of the reform" and, the second, dedicated to some brief "comments" on each of the novelties that would form part of the text in Books I and II of the Criminal Code.

So, reference was made in that Report to "experience of the application of the Code [that...] has been revealing evidence of some shortcomings or deficiencies that are necessary to correct". From the references subsequently made in the Report, in its explanatory notes, it appears that the Government made a particular reference, on that point, to the criminal definition of real estate harassment, with which it "sought to protect the right of enjoyment and use of the home by home-owners and renters against the efforts directed at obliging either one or the other to abandon the home, so as to achieve, in the majority of cases, speculative objectives", to which it added that "different legal statements had been highlighting the difficulties that in relation to the repression of these behaviours arose from the absence, up until now, of a specific criminal regulation of such occurrences", **but without a summary of what their particular content might have been.**

Likewise, the actions of the Government could be placed in the same category, which undertook the restructuring of the offences of human trafficking and clandestine immigration with "shortcomings and irregular applications of the Penal Code". Hence, it was decided in the proposed reform, to separate "the criminal regulation of these two criminological realities", under the argument that "unified criminal treatment of the crimes of human trafficking and clandestine immigration contained under article 318 bis was in any event, unsatisfactory, in view of the great differences that exist between both criminal conducts". Nevertheless, **no study at all was appended to justify that**, which is not to say that I consider it false. I am simply remarking on its lack of any proper and opportune justification of the affirmation.

In the first place, the Government announced that it had covered reforms "in areas such as the falsification of certificates, to which has to be added in all of its modalities, the falsification of identity documents that has been converted into an intolerably widespread practice", but once again, **not even one document in support of such a categorical affirmation could be found in all of the documentation** appended by the Government to the draft Bill.

In addition, reference was made to the reform that sought to "resolve the inevitable problems of interpretation that have been raised by the doctrine and jurisprudence and which is a task that corresponds to the legislator". Perhaps here, once again through the references of the Government in the second section of the Report, it is specifically referring to the following modifications:

- In the first place, with regard to the measure on the deportation of foreigners, the Government explained its decision as, "moving away from the current automatism in its application, because the courts, mindful of the concurrent circumstances, can assess the advisability of ordering it [deportation], which has repeatedly been highlighted by the Supreme Court"; although the origin of the jurisprudence was at least identified, which was intended to justify the modification, in my opinion, **those "repeatedly" delivered opinions should have been summarised as explanatory material for the reform of this measure;**
- In second place, it was pointed out in the Report (and the corresponding paragraphs are reproduced here) that "in setting the penalty to impose on the basic offence of fraud, the Courts have to have a sufficient margin of discretion to take into consideration aspects of the fact such as the economic upheaval caused to the prejudiced party, previous relations between the prejudiced party and the offending party, the means employed by the latter, the place where the instruments of exchange would supposedly have eventually taken place, and as

⁷⁹ Together with the opinions and reports of, first of all the General Council of Judicial Power (one-hundred and fifty-six pages), with the Audit Committee in second place (two-hundred and forty-eight pages) and, finally, the only mandatory report, from the Council of State (two-hundred and nineteen pages), which had to report on the presence of modifications in the Bill related to the transposition of community Law.

many other circumstances that may have to do with the case. All of these may or may not involve aggravating circumstances, which the courts may only determine in each particular case. The system of specific qualifying or aggravating circumstances of the fraud has been posing problems of interpretation in practice. It gives rise to the superimposition of dual legal evaluations of the same elements, something which is particularly evident when it applies to the use of a cheque, IOU, open letter of exchange or fictitious business exchange –which, in addition, can get caught up and confused with some form of falsified documentation- that is, in turn, the means and the material presence of the deception, and not something that is added to the fraudulent stratagem, for which reason its separate evaluation is unnecessary". Although those "interpretative problems in working practice" relating to fraud were very correctly explained from the technical point of view, **a summary of the jurisprudential (and even doctrinal) decisions and opinions where they may have been identified, was lacking.**

- Finally, in the field of drug trafficking, the Government had included in the text presented to Parliament for its approval "the provision contained in the Non-Jurisdictional Plenary Agreement of the 2nd Chamber of the Supreme Court, of 25 October 2005, in relation to the possibility of reducing the punishment with respect to those circumstance of minor importance and provided there is no concurrency with the circumstances referred to in articles 369, 369 bis and 370 and following". Here indeed, unlike in earlier cases, we might perhaps find ourselves with sufficient justification for this modification in matters of drug trafficking, as the problem is very clearly identified and a very clear and specific guideline from the Supreme Court is incorporated to solve it.

Finally, the Government or rather the Ministry of Justice also pointed out that the aim of the reform was "to respond to the social pressure for an individualized treatment of criminals responsible for sexual crimes and terrorism". With regard to this, the explanatory section of the Report says that "our criminal order foresees no mechanism to approach the assumptions of endangerment consistent with a criminal sentence in the case of offenders with criminological profiles resistant to the effects of rehabilitation, as usually happens in the case of crimes against freedom and sexual or terrorist indemnity. Therefore, the present law introduces a new safety measure called supervised parole". Nevertheless, **references to empirical studies were missing throughout the documentation attached to the Draft bill**, which certainly exist **on the specific percentage of rehabilitated offenders that may be documented in this category of offence through specific treatment**, so that it might be decided in a reasoned way if those sorts of criminals presented or present such resistant profiles that would justify such a reform. **Without it, it might appear that, in reality, the Government was basing its reform on perceptions that had not been empirically tested.**

In addition, there was an additional point in the Report on sex offenders, which refers to the proposal to reform article 36 for effective compliance with the sentences imposed on them, in accordance with what is requested by the non- legislative Proposal approved by the Congress of Deputies on 3 June 2008", which, we recall, was formulated at the end of the **"Mari Luz" case**. Thus precisely for that reason it is not unlikely that we will find ourselves at this point awaiting a new reform in the "media spotlight", such as the proposal that I think could be considered on this point to criminalize the offence of piracy. The fact is that, despite the certainty of the assurances in the Report that the above offence of piracy was defined in the reform "covering the premises of the Convention of Montego Bay of 10th December 1982 on the Law of the Sea and the Convention on maritime navigation signed in Rome on 10 March 1988", it is no less certain that the **"Alakrana case"** (still hot on the media agenda in the months leading up to the referral of the Bill to Congress) was of greater importance in driving that proposal than the two international Conventions approved over twenty years ago.

2.2. Economic Report.

We said earlier that we called one of the documents appended to the Bill of an Organic Law on one of the most recent modification of the Criminal Code, an Economic Memorandum, because those two words appeared in its heading, without an argument in its text that could justify such a name. In fact, this document could under no circumstances be considered an "economic memorandum", nor much less so "an economic and budgetary report" (in the new nomenclature employed by the Methodological Guidelines of the Impact Assessment Report on legislative initiatives). According to the aforementioned Methodological Guide, any Draft Law for submission to the Spanish Parliament should include the following matters:

- general economic impact: in such a way that "together with the consequences of a general nature, the effects on agents and groups directly affected by the proposal should especially be taken into account"; **no reference of this kind was included**;
- analysis of the administrative loads: understanding them to be "all those tasks of an administrative nature that should lead firms and the general public to comply with the obligations arising from the regulation". Thus, it says that "the administrative loads that the regulation introduces and/or that have been suppressed or reduced with regard to the earlier regulation" should be indicated. "The administrative loads that may have been maintained or introduced will be justified in relation to the objectives of the norm and will be quantified wherever possible". In addition, it is pointed out that Annex V of the Guide (pp. 68 – 79) "covers the measurement method approved for Spain and that will be applied to identify the loads and to determine the aforementioned economic assessment". Given what has been explained, **it is very difficult to understand how a legislative proposal, such as the one in 2010, which set up a new system to introduce the so-called criminal liability of legal persons⁸⁰, and that has in fact obliged firms to contract and to pay for the preparation of compliance plans, failed to contemplate the most minimum level of analysis or estimation with regard to the administrative loads that it was clearly imposing.** Neither does the reform currently under consideration, which will be analysed below, maintain in the text of art. 31 bis the consideration of compliance programmes as an attenuating circumstance;
- budgetary impact, which "measures the effect that the legislative proposal might foreseeably have on public income and expenditure, both financial and non-financial" (on the General Budgets of the State, of the Autonomous Communities and Local Bodies), and which should adhere to the following steps, among others:
 - Quantification and identification of income and expenditure: "the costs arising from the legislative proposal will be quantified, identifying the budgetary headings that may be affected, in view of the current classification in the General Budgetary Law, as specified in the Annual Law on General Budgets of the State. It will allow us to identify the bodies that are affected, the economic nature of the income and expenditure and the objective that is pursued, among other points".
 - It is also considered that "in case the application of the proposed legislation has no budgetary impact, it will be indicated and must be suitably justified as such in the Report". **This provision left it plain to see that the mention, in the Economic Report of the Penal Code reform bill, to the fact that the "incorporation of new offences," did not imply "any economic impact", was insufficient in every way, as no justification on that point was included.**
 - In addition, it was indicated that "in case the application of the proposed legislation should have a budgetary impact and it is considered that the cost may be covered by the available credit, without any need for budgetary modification, words to that effect will be noted in the Report, identifying the budgetary entries that are affected and specifying the respective monetary valuation. The maximum amount that it could represent will at least be specified"; when reference appeared in the Economic Report on the Penal Code Bill to the introduction of "supervised parole" that would permit "from the economic point of view, exploitation of the technological advances, as well as other means already available to the Administration", **perhaps the necessary identification of the affected budgetary entries or, in any case, as indicated in the Guidelines, a monetary assessment should have been estimated.**

⁸⁰ Most of the Spanish Criminal Law researchers have been critics with that new system. About that, view PÉREZ ARIAS, J.: *Sistema de atribución de responsabilidad penal a las personas jurídicas*, Dykinson, Madrid, 2014.

- Finally, the provision is also included that "when the budgetary impact may not be quantified, the reasons that prevent it will be noted as well the reasons for which, in spite of anything else, the budgetary impact may be absorbed without any need for budgetary modifications".

In short, and this is especially reprehensible, it should finally be affirmed, as was done in the Memorandum, that the application of the Bill "would not require the Justice Administration to assume additional obligations for expenditure" and that it "will neither impose an increase in expenditure, nor a reduction in income, resulting, from an economic point of view, in neutral consequences for public resources" (!!!), **without advancing the slightest calculation or, where applicable, without giving a reasoned justification as to why it could not be done** (how to secure the provision set out above in the last place), **meant that this "economic" Report lacked the most minimal or elemental rigour.**

2.3. Report on gender implications

The completion of the Memorandum (or "Report", as this document was titled when submitted to the *Spanish Legislative Chambers*) on gender implications, also with a length of two pages, but some four paragraphs shorter, was ticked off the list, once again superficially, by the Government⁸¹. In fact, one need do no more than go over the corresponding section of the Methodological Guidelines for the preparation of the Impact Assessment Report on legislative initiatives (pp. 30 – 33, even lengthier than the document that we are discussing here) to realize that the Report submitted on gender implications was completely inadequate.

3. A new example: the Draft Bill submitted to the *Spanish Legislative Chambers* in September 2013 and finally approved as Organic Law 1/2015, of 30 March

On 24 September 2013 (published in the State Gazette of 4 October 2013) a new Draft Bill was submitted from the Government to the Parliament for the reform of the Penal Code (on the basis of a preliminary legislative proposal prepared in 2012). Despite that text having languished for some months, with continuous extensions to the weekly deadline for the presentation of amendments to the Justice Committee of the Congress of Deputies (or Spanish Lower Chamber), at the end of November 2014, this phase was drawn to a close, and the parliamentary business resumed, with the initial drafting of the corresponding final Report from the legislative Committee. The final text was approved and published on March 30, 2015.

The fact is that, with regard to what interests us here, the empirical foundation of this draft bill, when it had been presented for approval to the *Spanish Legislative Chambers*, had once again proved to be inexistent, in view of the documentation that the Government annexed to the legislative text⁸², due to lax compliance with Royal Decree

⁸¹ This was the full text:

"In accordance with the second paragraph of section 2 of article 22 of Law 50/1997, of 27 November, from the Government, introduced by Law 30/2003, of 13 October, Bills of Law should be submitted with a report on the gender implications of the measures that they establish.

In this respect, it is necessary to highlight that the reform of the penal Code, at present at the committee stage, reinforces the criminal protection of women and girls. This circumstance is evident through the numerous measures that are now pointed out as follows. Although it is true that the passive subject of offences against sexual orientation and gender identity can be a man as much as a women, it is undoubtable that women are affected to a greater extent by these sorts of conduct. Therefore, the amplification of penalties and the definition of new behaviours that threaten sexual orientation and gender identity, action on which is pursued by this reform, impacts directly on greater protection of women in the Penal Code. This situation is repeated with the specific criminal definition of the crime of human trafficking.

It is also necessary to underline the special criminal protection afforded to women and children on the basis of the modifications introduced to offences that are committed during armed conflict, such as those who commit offences against the sexual orientation of a protected person through acts of rape, sexual slavery, forced or involuntary prostitution, forced pregnancy, forced sterilization or any other form of sexual aggression, as well as those that recruit or enlist children of under 18 years in age or use them to participate directly in those conflicts.

It should also be highlighted that the criminalization of the behaviour of clients involved in the prostitution of children will lead to greater protection of girls and young women under the age of consent, given that the percentage of the population that is sexually exploited in networks is far greater among the female than it is among the male population.

In conclusion, the proposed legislation has a positive impact, given that it will contribute to greater protection of women and girls".

⁸² The aforementioned documentation may be obtained through the "Documentation Department" of the Congress of Deputies or Spanish Lower Chamber.

1083/2009 (at least not overlooked this time, as in 2010) when preparing the documentation in question. In fact, this is what I have been able to confirm after consulting the memorandum, prepared, at least this time, by following the guidelines of the Methodological Guide of the report on legislative impact, although, as expected, in an excessively superficial or shallow manner.

In concrete, comparing the documentation prepared by the Government⁸³ that was attached to the Penal Reform Bill of 2010, and that attached to the new Bill at the end of 2013, there is a significant difference in quantitative terms. Whereas in 2010 (as we have seen earlier on) the Explanatory Statement, the Economic Report, and the Report on gender implications hardly amounted to fifteen pages in length all told, the Impact Assessment Report of the reform launched in 2013 had a length of ninety-nine pages. Nevertheless, it should be taken into account that forty-two of them were dedicated to presenting the main objections raised by the General Council of Judicial Power, the Audit Committee, and the Council of State in their respective reports and opinions.

However, in second place and as we have been warning, in qualitative terms, the dossier under analysis is no more profound, from an empirical point of view, than the dossier analyzed in the preceding sub-section, that was presented in 2010. The Government has complied with the formal aspects of its preparation, but it is as incomplete as before from the point of view of its material content. As much is demonstrated when reading the first pages containing the identifying data and basic information on the Bill: the "Alternative principles considered" were "None", and its "Economic Impact" was or is "Not quantifiable". In fact, in the first part, the scant content of the alternatives that are considered when filling in the obligatory section on the analysis of possible alternatives to the new regulation that they wish to propose, in blatant disregard for compliance with the principle of minimum intervention (specific reference to which is made, as we shall see, as an explanatory argument for the suppression of Book III), is as follows: "In view of the matter relating to the regulation that is modified, there are no alternatives other than the modification of the Penal Code." With regard to its economic impact, it is explained in the corresponding section that "The economic impact of this reform is difficult to quantify and to measure, such that the study will centre on the impact of this reform on the Administration of Justice, the Prison Administration and the specific legal agents affected by the reform", a very similar formula to that used to tiptoe around compliance with an economic estimation (whether difficult to complete or otherwise) which appears as an obligation in Royal Decree 1083/2009.

Contemplating some of these substantive aspects of the reform (we cannot do so in all cases due to limitations on space), I have chosen the one relating to the suppression of Book III of the Penal Code, on the subject of minor offences. It appears to be one of its strong points, in the sense that it presents the appearance of an empirically justified reform, undertaken on the basis of arguments revolving around rationality. And I say "appears" because, no sooner than beginning to look into the specific proposal for reform on this question, do we once again find shortcomings and incoherencies. The Explanatory Statement of the Draft Organic Bill (certainly, quite a lot more exhaustive when explaining the content of the reform than the Impact Assessment Report on legislative initiatives) gives us the arguments used by the Government to propose the suppression of Book III. On the one hand, there is "the notorious disproportion that exists between the legal goods that they protect and the investment in time and resources that are required by their trials". In relation to that, on the other hand, there is "the doubtful necessity that behaviours lacking sufficient seriousness in many cases, should be subjected to a criminal sanction". With regard to the first argument, the Report says that the aim is to "reduce the number of matters of petty importance that at present absorb a great part of the available material and personal means"⁸⁴, in order to achieve a "rationalization in the use of the public service of the Administration of Justice, through the suppression of criminal infringements that constitute petty crimes for their processing through other channels for conflict resolution". However, there is no trace in the reform of a regulation on **criminal mediation, which would be a satisfactory alternative route for the solution of conflicts that arise with present-day petty crime** (not those that are incorporated as minor offences in Book II, of course), so that these offences "can find a response through the system of administrative and civil sanctions". Nevertheless, it is fair to

⁸³ I therefore once again exclude from this consideration the Report from the Council of State (this time with a length of one-hundred and thirty-eight pages), the Report from the General Council of Judicial Power (also with a length of one-hundred and seventy-four pages).

⁸⁴ In the chapter dedicated to economic and budgetary impact, empirical data are presented to give us an idea of the scope of this "overload" involved in the processing of these petty offences: "the suppression of petty crimes is, in itself, a reform from which a positive economic impact will be likely. Recently, the General Council of Judicial Power proposed the decriminalization of petty crimes as one of the paths that should be explored to reduce litigation and thereby to unlock resources tied up in the courts of justice. According to the available statistics, almost 71% of the total number of cases admitted in 2010 in all the jurisdictions were of a criminal nature and, in turn, the Courts of First Instance –which try the majority of petty crimes– had taken cognizance of 3,448,548 of the 6,639,356 cases (almost 52%) that were processed under criminal law in 2010".

recognize that this is neither incorrect nor inappropriate. On the other hand, with regard to the second argument, that relates to the principle of minimum intervention with the desired lightening of the workload of the overburdened Courts of the First Instance, the Report perseveres in that line. It affirms, after explaining the economic and legislative impact that the suppression of Book III would have, that not only "no procedural innovation nor need for new resources is foreseen", but that "a reduction in the present workload" will even be achieved, and they will allow "better exploitation of the available resources". So, it is true that there are petty crimes that are "decriminalized", but only a few that are applied least of all. The majority of the most important infringements are recategorized as minor offences. The aforementioned process implies, of course, that **the instruction of procedures for these infringements will have to continue**, now as minor offences, in the Courts of First Instance⁸⁵. In brief, is it certain that there would be "a reduction in the current workload"?

The finishing touch to the deficient material compliance with Royal decree 083/2009 and hence, to the directives on the acceptable content that the "Impact assessment report on legislative initiatives" should have, is made patently clear at the start of the chapter dedicated to "Impact Assessment" in the following words: "This reform of the Penal Code will have an important impact on Spanish society" (!), accompanied in the following paragraph by an "In consequence, it will be society as a whole that will see the safety of its daily routines improved, from both a legal and a sociological point of view, as it is a reform that is especially directed at preventing crimes perceived as particularly serious that affect coexistence". An affirmation that is finally followed by a "Likewise, the reform brings technical improvements to the code and its efficacy is augmented, which amounts to benefits for legal professionals"... One question after another is raised by this wording: perhaps the Government defines what it understands by efficacy? How is efficacy measured to say what is augmented by the reform? How has it managed to determine which "crimes" are "perceived as particularly serious" by society on an empirical basis? How "important" will the impact of the reform be on Spanish society? Is it true that the only impact will be from the point of view of the safety of its daily routines? What about the impact on the liberty of the general public? Does it exist? Is it difficult to quantify? As much as the impact that affects safety, or even more? And, on the other hand, returning to what has been described above: in what sense are there no alternatives to the modification of the Penal Code in matters that the Bill regulates? What of the Criminal Law dimension of "*ultima ratio*" in relation to the principle of minimum intervention?

4. Conclusions and final remarks.

In short, all these questions without a response, along with the analysis of the preceding pages, brings us to a preliminary and important conclusion. It is that, in spite of the current regulatory framework in Spain for legislative evaluation (for over twenty or thirty years of course), as we said at the start of this work, there is no **deep-seated culture of legislative evaluation in general terms**. Not for nothing has it been accurately affirmed that Spain has traditionally been "resistant to the culture of evaluation" that exists in other countries and that it is a country in which resources are neither set aside nor granted "for the preparation of evaluations of reforms introduced according to criteria of independence and scientific seriousness"⁸⁶.

Of course, it is equally possible to speak about a legislative tradition distanced from evaluative culture in the field of criminal legislation, but also, more recently, of a **weak political will** to apply the incipient evaluative instruments which our Legal Order has at present. With regard to the first point, in effect, in the preparation of all the pre-legislative documents that have been attached to the successive criminal reforms carried out since the Penal Code of 1995 up until today (right now more than thirty), not even one "preliminary study on the identification of problems and the proposal of strategies"⁸⁷ has been carried out (I have already stated that we have found no trace of the Questionnaire since 1989-1990 in the reforms that have been approved up until 2009), nor have the texts been subjected to "a transparent and public procedure of consultation with the scientific community and the professional sectors related to the criminal

⁸⁵ Although the introduction of "criteria for opportunities that allows the Courts and Tribunals, at the request of the Office of the State Prosecutor, to renounce the prosecution of behaviours that, even though they may be offences, are however of minor consequence in relation to which their prosecution is not in the public interest".

⁸⁶ TAMARIT SUMALLA, J.M^a.: "Política criminal con bases empíricas en España", in *Política Criminal*, num. 3, 2007, pp. 3 – 4.

⁸⁷ In reality only one of the multiple criminal reforms pointed to "an evaluation standard" in one of its Additional Provisions: Organic Law 7/2000, of 22 December, in reform of Organic Law 5/2000, of 12 January, on the criminal liability of children. Legislation that TAMARIT SUMALLA rightly brands as a "sarcastic anecdote", as it contains "a surreal mandate to the future legislator to penalize certain crimes with greater vigour, leaving it understood that the results of the evaluation are known beforehand". (TAMARIT SUMALLA, J.M^a.: "Política criminal...", *ob. cit.*, p. 4).

system"⁸⁸, as does happen in other States. With regard to the second point, the weak political will to apply the incipient evaluative instruments now available to the present-day Spanish legal Order, which was set forth as a partial conclusion in the analysis of the so-called pre-legislative phase in Spain, has been upheld in this study: working practicedemonstrates that, in the recent criminal reforms, the demand for documentation that by obligation has to be attached to a Draft Bill of Law is only complied with by the competent organs in a "formal or superficial" way, so that not even the new regulation on legislative assessment introduced by Royal Decree 1083/2009 has had an impact on the past two greatest criminal reforms undertaken. Or, to be more rigorous in the description of the situation, we can speak of **evident and outright noncompliance with these requirements in the 2010 reform**, and of **negligent noncompliance in the reform** submitted for approval to the *Spanish Legislative Chambers* at **the end of 2013**, which has been finally approved in 2015. A strong will is therefore missing on the part of the executive powers (as well as the legislative powers, which does not excuse the attitude of the Government) to evaluate its legislation and their effects on society. This weakness is especially serious in the case of criminal norms; all the more so if we take into account that they impact more severely and more seriously on individual freedom, by restricting it.

As things stand, the search to find ways to inculcate that political will for satisfactory compliance with the existing evaluative instruments has to be the main priority, in order to undertake successive criminal reforms (I am afraid that within no less than a few years we will have more than surpassed the thirty five of so of them since the approval of the original text of the present Code in 1995). One of these ways forward could, without a doubt, be the one embodied in the "Working Group of Criminal Legislative Policy" I belong to, which is making very many different proposals for the strengthening and improvement of evaluative activity in relation to Spanish criminal norms. We hope that at least some of them may be taken on board, sooner rather than later, by those responsible for the administration and the drafting of criminal reforms in Spain.

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⁸⁸ TAMARIT SUMALLA, J.M^a.: "Política criminal...", *ob. cit.*, p. 4.

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