

# *On the Regulation of Aliens and Immigration in Spain in 2006*

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## **I. INTRODUCTION**

The purpose of this article is to familiarise non-expert readers with the general features of Spanish policies regarding aliens and immigration as from the entry into force of the Spanish Constitution of 1978, and to provide an overview of the legal framework and the published sources of law relating to this subject. It is important to set forth the scope and confines of this paper in advance, as otherwise we might overwhelm the reader by offering a list of the endless provisions that have emerged from the different concurrent legal sources (domestic, autonomous regions, the European Union and international) or a description of Spain's many erratic and often contradictory policies since becoming a democracy. The existence on this subject of disparate contradictory policies formulated by right- and left-leaning governments are not the exception but rather the rule.

Starting in 1984 (when the first law on asylum and refugee status was enacted), in Spain everything relating directly or indirectly to immigration and the rights granted to non-nationals has moved along at an accelerated pace to 2006, following the

most recent “regularisation/normalisation process” that took place in 2005 and with the continued massive arrival in the Canary Islands of “cayucos” (traditional wooden boats) from Africa.

Spain has achieved of “Guinness record” of sorts in the enactment of organic laws (the law of highest rank in the land) on aliens, with the passage of four laws on this subject in a three-year period (2000–2003), in addition to a large number of implementing provisions.

The stark reality is that over the past fifteen years the entry of aliens into Spain, particularly of immigrants, has mushroomed. This phenomenon has brought about some changes in the receiving society, owing to heterogeneity of the immigrant population, its multiracial nature and religious diversity, and the different social value scales now present in Spain. These circumstances have made it necessary to repeatedly change policies aimed at regulating and managing the entry and accommodation of immigrants into Spain and as a gateway into Europe. These policies have, unfortunately, been unsatisfactory to date, as thousands of people continue to arrive daily in Spain by land, sea and air, seeking a “better life.” The result of this avalanche is the oft-encountered, albeit strange and peculiar “status” of many individuals described several years ago by the author of this paper<sup>1</sup> as “irregular immigrants with official deportation orders, who are registered residents and living legally in Spain.”

Owing to its limited length, this paper will not deal with the system of sanctions applicable to aliens, nor with the “privileged, special or unfavourable status” in Spain into which an alien can be categorised in application of internal, community or conventional legislation. In the first place we are referring to the system for asylum-seekers, refugees, stateless and displaced persons with unfavourable status. Second, we refer to the status derived from the Kingdom of Spain’s historical and treaty relations with former colonies, particularly in Latin American.<sup>2</sup> Lastly, we also will not discuss the status of aliens who are EU nationals, as they enjoy an especially privileged status in terms of comparative law as citizens of the European Union.

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<sup>1</sup> E. Sagarra Trias, “Un nuevo status de extranjero en España: El Inmigrante, irregular, empadronado, residente trabajando y con orden de expulsión”. “New Alien Status in Spain: The Irregular Immigrant with Official Deportation Orders, Who is a Registered Resident and Lives Legally in Spain”. *Revista de Derecho Migratorio y Extranjería* (Journal of Migratory and Alien Law), no. 1 Editorial Lex Nova, Valladolid, November 2002, pp. 89–97.

<sup>2</sup> On this subject we recommend a very good paper by María A. Álvarez Rodríguez on regulation of acquisition, attribution, retention, loss and recovery of Spanish citizenship, “*La nacionalidad española. Análisis de la normativa vigente*”, (Spanish Citizenship, Analysis of Current Regulations) Ministry of Labour and Social Affairs 2nd Edition, Madrid 2003.

## II. ON BEING AN ALIEN OR AN IMMIGRANT IN SPAIN AND IN EUROPE

Just as in comparative law, in Spain the meaning of the term “alien” is evident and obvious: an alien is anyone who is not a national of the state in which he is at the moment. One is an alien regardless of having one or several nationalities (*positive nationality conflict*), or no nationality (*stateless person, or negative nationality conflict*). In any case, no one is an alien in the abstract, but rather vis-à-vis a specific state or a specific nationality.

In 2006 any discussion of the immigration law and policy in force in Spain is quite difficult and, sometimes, at great risk. It is a “magmatic” reality subject to daily changes, and, owing to this vivacity, must be approached, to take a phrase from the media, by “transmitting the facts live and as they unfold.” It is a thorny issue where, more than with any other, the political, sociological, humanitarian and economic factors involved in shaping the overall worldwide phenomenon of “political and legal globalisation” all come into play.

As regards the treatment of aliens in any First World receiving country, be it in Europe, North America, Australia or any of the privileged areas in the developing world characterised by having a political system based on democracy and the rule of law, we find a contradiction, difficult to solve situations based on three premises:

First: The domestic and international law of any democratic system defines and seeks to ensure fundamental individual rights and public freedoms for individuals and peoples or groups of people. These are the political and legal assets of the system as such and are made up of constitutional provisions and international treaties, bilateral and particularly multilateral under the auspices of the United Nations; the Council of Europe or the European Union. These organizations define these rights and freedoms and advocate that they be applied everywhere. This is what makes up the “*corpus juris*” that we call “International Human Rights Law.”

Second: Policies on immigration and migratory flows are at the margins of legality in regard to individual rights and freedoms. This is true not only as regards their design (laws, regulations, decrees and orders) but especially as regards their effective application (resolutions, decisions, administrative decisions, limitations, restrictions and coercive measures). Here we can state that the authorities, the administration or the State security forces violate the laws in force on many occasions. Some non-nationals are not given the same treatment, coverage or real protection of the essential rights and freedoms set forth in democratic constitutions, such as the presumption of innocence, the prohibition of illegal detention; *habeas corpus*, the right to a defence, the principle of legal protection, as that provided in the legal system for “all.”

Third: The indispensable needs of the labour and job market in a “welfare state” make it very difficult to combine the need for this foreign labour with a rational immigration policy. This contradiction is also found in the consumer goods production, and the need to enlarge foreign markets and to increase the number of

potential consumers of the goods and services produced by the former metropolis and immigrant-receiving societies. These goods and services are, in turn, difficult to export to third-world countries without effective guarantees and means of payment for first-world producers and purchases are principally financed through foreign currency remittances sent by immigrants to their countries of origin. In some of these countries this is currently the major or the sole source of wealth.

Spain and Europe are becoming a lands of immigrants, similar to the United States but on a different scale. The magnitude can, however, be considered proportionally similar if we take into account all the countries belonging to the Schengen space in Europe.<sup>3</sup>

The proclamation, protection and guarantee of personal rights and freedoms, and access by aliens to status as “normal holders of rights and citizenship” is one of the constant and as yet unresolved dilemmas and challenges of both Spanish and European societies: governments, administrations and public and private institutions, along with citizens and aliens themselves.

### **III. SOME OBVIOUS FACTS AND CONSIDERATIONS REGARDING IMMIGRATION AND ALIENS IN SPAIN IN 2006 THAT NEED TO BE TAKEN INTO ACCOUNT IN ORDER TO UNDERSTAND THE CURRENT SITUATION OR REALITY OF THE NEW SPANISH SOCIETY**

#### **A. The Status of Non-Nationals as Persons in a Parliamentary Democracy**

Under Spanish law, just like in most other legal systems, an alien is defined in the negative. An alien is anyone who is not a national or does not possess the nationality of the country in which he/she is at the time.<sup>4</sup> Nonetheless, having set forth this legal-political definition, an alien still has legal status as a person – with inherent dignity – and all the rights and obligations pertinent to such status, as protected, evidently, by internal and international norms that guarantee his/her intrinsic human rights. It is advisable, before going further, to know who is a national and who is not.<sup>5</sup>

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<sup>3</sup> Kingdom of Spain's Accession Agreement to the Schengen Convention of 14 June 1985, on the gradual abolition of checks at the common borders, signed in Schengen on 19 June 1990 (BOE 5 April 1994).

<sup>4</sup> The current Organic Law on Rights and Freedoms (referred to hereinafter as LODYLE) 8/2000. Art. 1.1. states, “For the purposes of the application of this law, aliens are considered to be persons who do not have Spanish citizenship.”

<sup>5</sup> The Spanish Civil Code sets forth rules in Articles 17–27 on the acquisition, loss and recovery of Spanish citizenship. In 2002 the Law modifying the Civil Code was published in the State Gazette of Spain on 9 October 2002, amending certain articles [see

Therefore, when any Law establishes a general statute of rights using words such as “ALL” or, prevents exclusion using “NO ONE,” and even when it states the indefinite “are granted or are recognised,” the grammatical sense of the term makes it clear that the Law does not discriminate or distinguish and that in such cases the category of “alien” is not a differentiating factor.

If this interpretation is not as clear and simple as all this, we must ask our legislators to amend the Constitution, because when it uses terms such as “All, No One, or No Person” there is no room for unfortunate misinterpretation. If we are going to change something important, let us do it straight on, starting with the Constitution and then working our way down the other declarative rules and regulations on fundamental freedoms, taking this regression on board if we are able. This would be a serious responsibility to be borne by the Spanish society as a whole.<sup>6</sup>

## **B. Prime Interest by the Western World’s Economic and Political Systems in the Corret Accomodation of Immigrants**

The non-nationals that we generically refer to as “aliens”, become immigrants when they either decide to remain to work in the foreign country to which they have travelled or when the purpose of their trip is precisely to work or reside permanently in that country.

If only out of pure selfishness on the part of the capitalist system of production, immigrants need to be dispensed treatment in the country of residence that is similar and equivalent to that of national workers. Such treatment not only grows out of the society’s political, ethical, moral or religious convictions, but results from the pure and simple profitability of the work performed by alien workers.

It may seem an extraordinarily materialistic line of reasoning, but in a free market system it is not possible to have a nationals working side-by-side with other workers living in fear, uprooted, isolated and not integrated. Such a situation is very costly to the system in work-related risk prevention and on-the-job accidents, and in terms of absenteeism, loss of working hours, and even the wasted work-related training that companies or the State itself invests in foreign workers.

All human beings have cultural, sentimental, health, sexual, social and physiological needs that they legitimately must meet. Fear on the face of immigrants in

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commentary on the Aliens Webpage [reicaz@extranjeria.info](mailto:reicaz@extranjeria.info) and commentary by E. Sagarra Trias on the recent modification in the *Revista de Extranjeria* (Review of Alien Law) No. 12 by *Lex Nova* and that of the same author in the *Revista Jurídica de Catalunya* (Legal Review of Catalonia), No. 2 of 2003].

<sup>6</sup> Currently, due to regulation on obtaining citizenship, a large number of immigrants become Spanish nationals every year, by choice or by residence. The Ministry of Justice Resolution of 16 May 2006 (B.O.E. 2 June 2006) publishes that for the second half of 2005 a total of 20,494 persons became Spanish citizens by derivative citizenship acquisition.

our country's cities and towns does not help at all to make their work as effective as the host society desires.

### **C. New Technologies and the Information Society as a Draw Factor in the Migratory Phenomenon of the 21st Century**

Technological advances, globalisation and the Information Society inexorably promote massive immigration, both legal and illegal, or irregular. As those who have travelled to North or Sub-Saharan Africa know, in any hut in the remotest spot in the savannah, the desert or the jungle there may not be running water or electricity, but you will find a dish antenna, a television set and people familiar with the names of the European footballers and who know more about Barça's Ronaldinho and Eto'o than many of us do.

On a daily basis they view a promised land called Europe, where refrigerators are full, supermarkets are clean and orderly with what looks to be an overabundance of food, and surplus food is burned to keep up prices, in line with market laws they do not understand. Through TV they learn about how the Common Agricultural Policy of the European Union is used to subsidise unproductive crops that compete with theirs, and how tariffs are raised against their products and raw materials, preventing competitive trade and development.

Seeing the wastefulness of the neighbouring Europe just spurs inhabitants of other continents, especially any parents who consider themselves responsible, to send their children to this promised land, knowing that not all get there, but those who do – by whatever means or in whatever state (as stowaways, in the freight or the wheel assembly of a lorry, or in a rickety wooden boat) – will have expectation of a better life and a better future than he/she could ever dream of in his/her own country. Also, those who do get to Europe and are living there can serve as links for other family members to enter that paradise legally, under “family reunification.”

### **D. In Spain and the European Union Fundamental Individual Rights and Individual Public Freedoms are Rules of Public Order**

The rules that proclaim and protect the rights and freedoms of persons (nationals, stateless persons, and aliens) in Europe are European Union rules of public order, to which the legal systems of the member States of the European Union must abide because they are the structural principles on which the democratic system is based.

Spain is obligated doubly; first by belonging to the European Union, a European organization with supra-national aspects that is based on values such as freedom, security, equality and justice;<sup>7</sup> and secondly because, among other conventions to

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<sup>7</sup> Constitution for Europe, Articles I–2 approved by the Council of Heads of State of the

which it belongs, Spain is an integral, active party to the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in 1950 in Rome,<sup>8</sup> under the auspices of the Council of Europe.

Any limitation or restriction of human rights should be permitted solely in the overall interest of European society, and always under the perspective of the compass that guides a political system based on democracy, the separation of powers and the Rule of Law.

To this we are obligated, since these rights and fundamental freedoms are essential features of our democratic system, as set forth by the Spanish Constitutional Court:

“Fundamental rights are not merely constitutional rules that establish subjective public rights but rather essential features of the democratic system; effective protection and concrete enforcement of the fundamental right transcends individual cases and takes on objective dimension.” (Constitution Court Decision, Plenary 16 December 1991)

#### **E. Principles and Values as the Foundations of a Legal System**

A political system based on the Rule of Law is an organised set of legal principles and norms.

- Principles: express fundamental and structural social, ethical and moral values that inspire certain parts of the legal system or its entirety, as examined at a specific time in history. Example: freedom, democracy, life, property, family.
- Norms: the imperative mandate of conduct or prohibition of conduct by its subjects, citizens, public administrations, and political representatives.

A political-legal system is shown to be consistent through the proper interplay of its values-principles and its specific rules-laws. Neither one nor the other are unchangeable over time or space since they can vary gradually and evolve along with the society and the national and international community. Unfortunately, too often such values are becoming more restricted through the issuance of specific rules and alleging, in justification, the general economic or political interest of the State as a whole or the European Union.

The Spanish Constitution of 1978 in its entirety, and the norms of the European Union, (specifically the Treaty establishing a Constitution for Europe) are based on

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European Union in Rome on 29 October 2004: Affirmative vote by referendum of the Spanish people held on 20 February 2005. Pending ratification by a majority of the Member States. France and the Netherlands have voted no.

<sup>8</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, concluded in Rome on 4 November 1950 (Official State Gazette, 10 October 1979).

and anchored in values such as dignity, equality, tolerance, justice and freedom, that are the driving force behind the social harmony of its people.

It is therefore legitimate to ask whether positive norms of lower hierarchical rank that mandate certain behaviour in relations among citizens and between said citizens and the institutions of the State should abide by such values or not. If such consistency is lacking, I feel this would amount to a tremendous disconnect that would be difficult to comprehend and have unforeseeable consequences.

The question is whether the values and principles that guided the drafting of our Constitution of 1978 are still valid today as a foundation, or superstructure, for the complex regulatory and jurisprudence framework regarding aliens, or whether, to the contrary, current values are in flagrant contradiction with alien and immigration policy and with the specific rules applicable to aliens and immigration in Spain.

Both the press and public opinion are taking positions, and while there is comprehension of the immigrant phenomenon under a certain viewpoint of human rights, racist and xenophobic attitudes are also coming to the fore. Sociologists report that we are facing a true crisis in values, and discovering that our parents' and grandparents' basic social values are not the same as ours and are today mostly insufficient or not very useful, and at the very least most of these values do not help us regulate today's complex, global society.

This new scenario is one in which there is a mix of cultures with differing and sometimes not at all compatible values and principles. It is therefore not unusual to note the coexistence in the same society, without knowing the causes, of two contradictory and antagonistic phenomena: tolerance and fanaticism.

#### **IV. SPAIN IS THE EUROPEAN UNION MEMBER STATE IN WHICH THE IMMIGRANT POPULATION HAS INCREASED MOST FROM 1990 TO 2006**

Immigrant flows have been constant and continuous since the end of the Franco dictatorship in 1975. They have, however, intensified, particularly since 1995, when, like now, massive waves of immigrants started flowing into Spain on a many different means of transport. Looking at statistics, dates and magnitudes, we find that in 1995 Spain barely had half a million (500,000) resident aliens. Of these, less than 40%, or 200,000, amounting to less than 2% of the Spanish population, were considered immigrants, and were scattered unevenly throughout the country.

At the beginning of 2006 the legal alien population exceeded 3.8 million, over 8.5% of the total population. The latest official Spanish population census dates from 1 January 2005 and shows a population of 44.11 million, of which 3.73 million were legal aliens (8.5% of the total). Of these aliens almost 70% are now categorised as immigrants. To this we must add the over 700,000 aliens that were "normalised" under the most recent regularisation process, in 2005, and all the "irregular" aliens that were living in Spain but did not meet the requirements to



be able to take advantage of the “regularisation/normalisation” process, in addition to others who have entered Spain both legally and illegally since 2004 and are awaiting a new regularisation process that will convert them from “invisible” into “visible” aliens or, stated in other words, into “citizens with rights and obligations.”

Another recent statistic from the Spanish Ministry of Labour and Social Affairs comes from the latest Spanish Social Security census (30 April 2006) and shows on that date a total of 1,803,323 alien affiliates. To these rightholders we must also add all their family members as direct beneficiaries.

Immigration policy over the past 10 years has, in reality, consisted of not very effective attempts by successive Spanish governments (of whatever political leaning) to establish a system to regulate migratory flows in response to real criteria based on the needs of the national labour market. The most serious contradiction is that which exists in Spain between the job supply and the legal restrictions placed on the entry of skilled foreign workers.

Attempts to resolve this situation have led to the establishment of contradictory, ineffectual and counterproductive policies implemented through setting so-called “immigrant worker quotas.” These annual quotas have done nothing to alleviate the problem or to resolve the needs of those offering jobs. Without evaluating actual results, the job offers published over the past 15 years by the Spanish State to cover normal or hard-to-fill jobs are ridiculously low. There is a large gap between official and real demand. The final result is that actual demand can only be met by resorting to irregular aliens.<sup>9</sup>

Together with the legal entry of immigrants provided for and encouraged by law, two other forms of entry are noted, which I will personally call “atypical.”

- Family reunification is, without a doubt, one of top priorities in any Spanish immigration policy and is a major way for new immigrants to enter countries like Spain particularly, that border on the Third World.<sup>10</sup>

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<sup>9</sup> Dates and quotas are summarised below for the 1993–2006 period. Quotas were contradictory and unrelated to the actual needs of the Spanish job market:

<b>Resolution 4 May 1993</b>	<b>Quota: 20,600</b>
<b>Resolution 21 September 1994</b>	<b>Quota: 20,600</b>
<b>Resolution 9 June 1995</b>	<b>Quota: 17,000</b>
<b>In 1996 no quota was set</b>	
<b>Resolution 31 January 1997</b>	<b>Quota: 15,000 (increased to 24,900)</b>
<b>Resolution 14 March 1998</b>	<b>Quota: 17,000</b>
<b>Resolution 16 January 1999</b>	<b>Quota: 30,000</b>
<b>No quotas were set for 2000 and 2001 (regularisation processes were carried out)</b>	
<b>Resolution 11 January 2002</b>	<b>Quota: 32,079</b>
<b>Resolution for 2003 (19 December 2003)</b>	<b>Quota: 10,575</b>
<b>Resolution para 2004 (22 January 2004)</b>	<b>Quota: 10,908</b>
<b>(special quota established for domestic workers)</b>	
<b>2005 quota extended by the Council of Ministers on 3 January 2005</b>	
<b>Resolution January 2006</b>	<b>Quota: 16,879</b>

<sup>10</sup> A. Álvarez Rodríguez, “La transposición de directivas de la UE sobre Inmigración. Las

- Continued regularisation processes, ordered and promoted by the Government with the blessing of the opposition, are a non-conventional way of converting people left outside the law and the implementing regulations and those whose entry, stay or illegal or irregular labour situation made them into “clandestine” or “invisible” aliens, into regular or legal immigrants. It amounts to a realistic policy of *fais accomplis*.<sup>11</sup>

From 1985 – when the first law was enacted – to date, a number of overlapping and incomplete regularisation processes have been undertaken and have become the true and obvious “draw effect” that has undoubtedly been taken advantage of by mafias and organised human trafficking networks. They are aware of the political panorama and the changing legislation, and promise their “clients” that, sooner or later, if an irregular alien makes it to Spain and can somehow accredit his/her presence there, the government will end up regularising him/her.

## V. CONSEQUENCES OF BAD IMMIGRATION POLICY

All this and the failure of the quota policy, which elicited a massive, uncontrolled entry of irregular immigrants, led to the creation of large pockets of irregular immigrants working in the underground economy. These people were not regularised, but neither were they “invisible” to the eyes of Spanish citizens or the authorities, particularly since their presence has caused a change in the characteristics of the populace and it is today totally normal to see people of many different races, religious and languages in Spain.

Their lack of integration has led to friction – fortunately not frequent or very serious – between the host society and the new entrants, that is gradually moving towards individual and collective positions of racism and xenophobia in communities which large immigrant collectives.

Over the ten year period, immigration policy has focussed on border policy, combating illegal immigration and human trafficking mafias, and attempting to

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directivas de reagrupación familiar y de residentes de Larga duración” (Transposition of EU Directives on Immigration. Directives on Family Reunification and Long-Term Residents) Documentos CIDOB no. 8. Barcelona 2006.

The Court of Justice of the European Communities (Grand Chamber), ruled on 27 June 2006 in Case 540/03 (*European Parliament Council of the European Union*), to abolish the last paragraph of Article 4.1, Art. 4.6 and Article 8 of Directive 2003/86/EC of the Council, of 22 September 2003, on the right to family reunification.

<sup>11</sup> For more detailed information on Regularisation in Spain since 1985 see E. Sagarra Trias, “La legislación sobre extranjería e inmigración: Una lectura – *Los derechos fundamentales y libertades públicas de los extranjeros en España*” (Legislation on Aliens and Immigration: A Reading – Fundamental Rights and Public Freedoms of Aliens in Spain), Universitat de Barcelona, April 2002.

recruit what Javier de Lucas calls “necessary or appropriate immigrants,”<sup>12</sup> requiring the rejection and return of immigrants (through deportation, repatriation, return, and prohibited entry) who do not fall into the category of what some authors call “desired immigrants.”

The ten year period (1996–2004) of legislative instability, insecurity and misinformation on applicable rules, along with contradictory immigration policies, led to the presence of an estimated 1,300,000 irregular immigrants (as confirmed by the appropriate authorities) living in Spain when the Socialist government won its electoral victory in March 2004.

At the end of 2004, when the last Implementing Regulation of the Law on Aliens<sup>13</sup> was published, a very large percentage of the aliens living in Spain at paradoxically fulfilled from one to all eight of the characteristics set forth below, providing them with a somewhat unusual status:

1. *Alien:*

Always a negative definition. An alien is someone who is not a citizen of the country in which he/she is present.

2. *Immigrant-alien:*

*An immigrant is an alien who seeks to work and live temporarily or permanently in the host country. The UN International Convention on the Protection of the Rights of All Migrant Workers and the Members of Their Families that entered into force on 1 July 2003 (still not ratified by Spain) defines this category as “a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.”*

3. *Irregular-immigrant-alien:*

An irregular alien is an immigrant in Spain who lacks the appropriate permits to reside or work on Spanish territory, regardless of the origin of the administrative irregularity, is. It is possible therefore to be an irregular alien through: a) having entered Spain illegally; b) original irregularity, sought by the immigrant himself/herself who initially does not have the appropriate permits; c) the expiration of permits granted previously; d) lack of diligence on the part of the authorities responsible for processing “paperwork” (permit renewals).

4. *Registered-irregular immigrant alien:*

Organic Law 4/2000 and Organic Law 8/2000 that reformed it, and applicable legislation on Local Administration, authorised and obligated aliens (both regular and irregular) to register in the municipality where they were living “de facto.” Such registration on the municipal rolls was and is an individual obligation. The possibility of access by the Police to the municipal rolls was

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<sup>12</sup> *Le Monde Diplomatique* (5 January 2000).

<sup>13</sup> Implementing Regulations of the Law on Aliens: Royal Decree No. 2393/2004 of 30 December 2004 (Official State Gazette, 7 January 2005).

modified by Law 11/2003 of 24 October, making the irregular population afraid to register, the reason that many had not registered by the beginning of the 2005 regularisation process.

5. *Resident-registered irregular immigrant alien:*

The term “resident” that we apply here is not used in a legal sense, but rather a *de facto* one. For example, the over 200 Sub-Saharanans who lived for over a year (2000–2001) in Barcelona’s centrally located Plaza de Catalunya were *de facto* residents, and that was undeniable proof of status as a *de facto* resident, as they occupied physical space, albeit not legal, or *political*, space.

6. *Working-resident-registered-irregular-alien-immigrant:*

Everyone has existential needs that must be met, such as eating and trying to survive, and sustenance is obtained either in exchange for a wage (legal or illegal); or out of one’s own funds, living off of public aid, begging or, unfortunately, through street crime or involvement in criminal networks and/or illegal human trafficking. It is evident that this situation promotes trafficking in illegal labour and exploitation.

7. *Working-resident-registered-irregular-alien-immigrant with a deportation order:*

This is an increasingly more common reality in which irregular aliens or aliens who entered illegally, commit an administrative or criminal illegality, and are ordered to be deported after appropriate processing, having possibly been held in an appropriate facility, a non-penal institution, for up to 40 days.

8. *And, last but not least, working-resident-registered-irregular-alien-immigrant with a deportation order – living in Spain legally and at liberty:*

If deportation was not carried out owing to lack of means or because of difficulty in locating the deportee or through lack of Administration coordination, or, lastly, because it was not known to where to deport the alien; the deportee can legally remain in Spain and move freely about Europe, as he/she cannot be held or detained since he/she has not committed any crime. These aliens are in a “stand by” deportation status. The situation is today more pathetic and schizophrenic than ever, as authorities are flying “deportable” from the Canary Islands to Barcelona and Madrid by plane and then leaving them at large to their own fate.

This was the status of many of the aliens who were legally in Spain in January 2005.

## VI. THE LAST “NORMALISATION / REGULARISATION” OF IRREGULAR IMMIGRANTS IN SPAIN DURING THE FIRST HALF OF 2005

In 2004, the government in power, – in this case the Socialist government of Prime Minister Rodríguez Zapatero – in an attempt to regulate the existing chaos, had no alternative but to, once again establish a regularisation process for a period of time for immigrants who were in Spain in irregular status. The measure was

denounced and criticised by the Popular Party in the opposition, which was incomprehensible since the confusion and chaos had arisen during that party's time in charge of the government. This special regularisation process was set forth in the Third Additional Provision of the new Regulation on the Law on Aliens approved by the above mentioned Socialist Government.<sup>14</sup> It entered into force on 7 February 2005, one month after its publication.

The situation was a problem of State, the solution to which involved:

#### **A. Pressing Needs**

- *Amnesty for employers.* Although it might seem contradictory, the principle participants in the regularization were employers, who, by normalising the status of their alien workers could avoid criminal, administrative, tax and labour sanctions.<sup>15</sup>
- *Avoid mass deportations,* that furthermore were absolutely impossible to carry out. Neither the structure of society and the irregular employment of aliens, nor the economy of the country as a whole, could or should realistically bear the expulsion of several hundreds of thousands of aliens, without any international collaboration or help from their countries of origin.
- *Employer inspection and monitoring policy.* After the regularisation process, strict inspection of employer practices and conduct was threatened in order to prevent unlawful behaviour that would distort competitiveness vis-à-vis those employing regular immigrants. Irregular status means low costs and non-competitive pricing.
- *Increase enrolment in the Social Security system.* This is a past and present need of the Social Security system, to have all the aliens in the active population contributing to the Social Security system. Otherwise, the immigrants would be beneficiaries of healthcare, education and social benefits to which they did not contribute. Without participation by immigrants, the Spanish Social Security system would end up in bankruptcy. The sheer self-interest of the State dictated the need to obtain the maximum possible number of participants in the general and special systems of the Social Security program.
- *Need to fill essential jobs reserved up to now exclusively for Spanish nationals.* Although only anecdotal in scope, Spain needs aliens to meet the demand for professional military forces. The recent Law on Soldiers and

<sup>14</sup> Regulation of the Organic Law on Aliens Royal Decree No. 2393/2004 of 30 December 2004 (Published in the Official State Gazette on 7 January 2005).

<sup>15</sup> See on this subject E. Sagarra Trias, "Sujeto legitimado, sujeto interesado y sujeto afectado en el proceso de regularización "normalización" de inmigrantes del 2005" (Legitimized subject, interested party, and affected subject in the 2005 immigrant regularisation "normalisation" process). *Revista de Derecho Migratorio y Extranjería*, Editorial Lex Nova No. 8, Valladolid March 2005.

Seamen of 24 April 2006 provides that aliens seeking to join the professional military forces must have legal resident status.<sup>16</sup>

## **B. Requirements that must be Met by Aliens:**

- *Show proof of being in Spain before 7 August 2004* (6 months before the entry into force of the 2004 Regulation) but not just any type of proof was valid, as was the case in prior regularisation processes.
- *Alien must be registered in the municipal rolls of place of residence*, and accredited by means of a certificate. This was one of the most difficult points, which continues still today to inundating government offices and Judicial review courts all over Spain with administrative appeals. Mid-way through the regularisation period, permission was given for “certificates of omission of census registration” to be issued, causing great commotion in which reality and rule-bending surpassed even the wildest imagination.
- *Have a work contract or an offer of work for an initial one-year period*, signed by an employer, and accredited in a bona fide way by requiring the presence of the employer at government offices, thereby making the employer one of the parties most inconvenienced by having to take the time to wait on long lines at government offices.
- *Not have a criminal record in Spain or over the past five years in their country of origin or of last residence.*

## **C. Results**

The process was carried out with some difficulty, contradictions and shortfalls caused by the Administration, particularly because of the acceptance, as indicated above, of a certificate of registration in the municipal rolls “certificate of omission” (approved in April) that led to a certain degree of legal insecurity for the irregular aliens.

The result was initially satisfactory, albeit incomplete. Out of a total of 690,679 applications filed, 504,786 were resolved favourably and over 319,000 persons joined the Social Security system, contributing a total of 750 million euros, with a projected 1,500,000 million euros for 2006.

The process set forth in the Regulations on “Normalisation of Aliens”, commenced on 7 February and closed (theoretically) on 7 May 2005. We say “theoretically” because administrative and appeals for judicial review over denials are still being considered.

This is a synopsis of the recent “normalisation” and the tangible results. The renewal of the initially granted permits currently underway, while expected to be

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<sup>16</sup> Law 6/2006 of 24 April on Soldiers and Seamen. Official State Gazette of 25 April 2006, Vol. 98, pp. 15752.

difficult and complex, is benefiting from having more data processing and personnel resources devoted to it so as to avoid the confusion of the previous experience.

What has not been avoided is the increase in the pockets of irregular immigrants, both old and new, who are continuing to arrive by plane, “cayuco” (traditional wooden boat), train or bus, and the numbers of which no one exactly knows, in addition to family members who have entered national territory for reunification.

## **VII. SCHEMATIC SYNOPSIS OF THE STAGES OF SPANISH LEGISLATION REGARDING ALIENS, IMMIGRATION AND ASYLUM**

Beginning with the Spanish Constitution of 1978, the most relevant provisions on this subject are set forth as follows:

### **SPANISH CONSTITUTION of 27 December 1978**

**Articles: 13, 10.2, 24.1, 96.1 and 53:** these are the provisions that deal directly with the rights and freedoms of aliens and their exercise. The treatment given aliens consists of recognising their entitlement to fundamental rights and public freedoms, but their exercise must be as stated by Law or by Treaty. This can be termed “restricted equivalency” of attributed rights.

- **Many other provisions of the Constitution and Organic Laws.** Such provisions recognise fundamental rights, administrative-political rights, and societal rights of aliens in general, or resident aliens.
- **Political Rights.** Aliens may actively vote in municipal elections only pursuant to a law or treaty authorising such a practice, and in reciprocity with the alien’s country of origin. It is noteworthy that the only amendment of the 1978 Constitution to date (2006) was precisely of Article 13.2. The amendment consisted of adding the right of an alien to be elected and to vote in municipal elections. Spain was obligated to do so by signing the Treaty of the European Union (Maastricht), which grants such a right to “citizens of the Union.”

### **FIRST STAGE: 1984/1990**

- **Asylum:** Passage of the Law on Asylum and Refugee Status and its implementing Regulation, Law 5/1984 and Regulation of 1985.<sup>17</sup>
- **Aliens:** Publication of the first Law on Aliens, Organic Law 7/1985 of 1 July on the rights and freedoms of aliens in Spain.<sup>18</sup>

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<sup>17</sup> Law 5/1984 of 26 March (Official State Gazette no. 74 of 27 March), amended by Law 9/1994 of 19 May (Official State Gazette no. 9 of 23 May). Regulation of 1985.

<sup>18</sup> Organic Law 7/1985 of 1 July (Official State Gazette of 3 July 1985, no. 158).

- **Regulation of the Law on Aliens** of 1986.<sup>19</sup>
- **Jurisprudence:** During this period the Constitutional Court established doctrine defining alien rights, particularly in Decision no. 107/1984 of 23 November. Constitutional Court Decision 99/1985 also dealt with this issue and clearly and without discussion stated that aliens have a right to judicial protection since it is an inherent right of “every person.” Constitutional Court Decision no. 115/1987<sup>20</sup> is of capital importance, as it declares certain provisions of Organic Law 7/1985 unconstitutional.

Successive regularisation processes were held during this period of time, the purposes of which were to gain an exact knowledge of the number of aliens residing *de facto* in Spain. The term used to refer to irregular aliens was “illegals.”

## SECOND STAGE: 1990/1996

- **Quotas:** During this stage a special regularisation process was undertaken in 1991 under the Resolution of 7 June 1991.<sup>21</sup> Public debate over the magnitude of the problem was augmented in 1993 by the application of quotas for alien workers and the entry into force of the Schengen Agreements<sup>22</sup> automatically making Spain the southern flank of the European Community.
- **Asylum:** The new Law on Refugee Status, no. 11/1994, of 19 May, amended the previous Law on Asylum of 1994, and in 1995 a new set of regulations was enacted to implement this Law.<sup>23</sup>
- **Aliens: 1996 Regulation:** This stage concluded with the drafting and publication of a new Regulation, no. 155/1996, of 2 February 1996,<sup>24</sup> that did not

<sup>19</sup> Royal Decree 1199/1986 of 26 May approving the Regulations of the Law on Education of 1985 (Official State Gazette, 25 April 1986).

<sup>20</sup> Constitutional Court Decision. Plenary. Appeal. Unconstitutionality no. 880/1985 no. 115/87 of 7 July (Official State Gazette. Supplement 20 July 1987 pp. 15 and successive).

<sup>21</sup> Resolution of 7 June of 1991 by the Office of the Deputy Secretary providing for publication of the Agreement of the Council of Ministers of 7 June 1991 on Regularisation of Alien Workers (Official State Gazette, 8 June 1991). On this subject, refer to SAGARRA TRIAS, E. Directed Seminar with the collaboration of other authors in “La regularización de 1991” (The 1991 Regularisation). Fundación Paulino Torres Doménech. Barcelona 1991. And also, “Otra vez con la regulación de 1991” (Again the 1991 Regulation) by the same Foundation. Barcelona 1992.

<sup>22</sup> Membership Agreement to the Convention to apply the Schengen Agreement of 14 June 1985, among the governments of the States of the European Union, regarding the gradual elimination of common borders, signed in Schengen on 19 June 1990 (Official State Gazette, 5 April 1994).

<sup>23</sup> Law 5/1984, of 26 March, amended by Law 9/1994, of 19 May, on the regulation of the Right to Asylum and Refugee Status. – Royal Decree 203/1995, of 10 February. Approves the Implementing Regulations of Law 5/1984, of 26 March, which regulates the Right to Asylum and Refugee Status, amended by Law 9/1994 of 19 May (Official State Gazette no. 52 of 2 March).

<sup>24</sup> Regulation of the Organic Law on Aliens, RD 155/1996 of 2 February 1996 (Official State Gazette of 23 February 1996).



amend the 1985 Organic Law. It is unusual for one Organic Law to give rise to two Regulations as differently in orientation as these. This notwithstanding, the 1996 Regulation, like the previous one, approaches immigrants or alien workers from a perspective of temporary stay. The alien's entire stay is based on different types of temporary, limited residency or work permits. The police and employment record of the alien is of more concern than the alien's integration into the social fabric where he/she lives. The new Regulation was established by consensus among the political and social forces and is much more rights-oriented.

- **Arrivals en masse:** The principal feature of this period was the sheer numbers of aliens entering Spain by all means of access with a view towards working and living in Spain. At police immigration check-points, the newcomers referred to themselves as "asylum seekers" when they were really were "economic asylum seekers" claiming refugee status because it was in principle more beneficial owing to its being based on International Human Rights Law and Treaties signed by Spain.

### THIRD STAGE: 1996/2000

- **New PP Government:** Power changed hands from the former PSOE government to the new Popular Party (PP) government.
- **Organic Law 4/2000 of 11 January 2000** on the Rights and Freedoms of Aliens in Spain and their Social Integration.<sup>25</sup> After a lengthy process, agreement was reached among the majority of the Spanish political parties on a new text, but the governing Popular Party voted against it. This was the first and only vote on a Law that the PP government lost during its first legislative period. In the campaign leading up to the subsequent elections, the PP promised to immediately change the Law, and did so. The law was based on consensus and broadened and recognised certain rights such as the right of family members to reunite with the family member residing in Spain, to the contrary of what would be the case in Law 8/2000 which gave the right to the reuniting resident.

### FOURTH STAGE: 2000/2002

- **New Organic Law 8/2000:** *Organic Law 8/2000, of 22 December, that reformed Organic Law 4/2000, of 11 January, on Rights and Freedoms of Aliens in Spain.*<sup>26</sup> The two Organic Laws of 2000 gave rise to Decrees and new processes to regularise irregular, ordinary and special aliens, seeking to

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<sup>25</sup> Official State Gazette of 12 January 2000.

<sup>26</sup> Organic Law 8/2000, of 22 December 2000, to reform Organic Law L 4/2000, of 11 January, sobre Rights and Freedoms of Aliens in Spain and their Social Integration Official State Gazette of 23 December 2000.

protect and legalise aliens in this category through their own volition, owing to changes in legislation, or because of administrative delays and/or neglect in resolving previous residence and/or work permits. These regularisations were carried out during 2000 and 2001.

- **New Regulation on Aliens.**<sup>27</sup> Interestingly, the two Organic Laws passed in 2000 continued to be governed by the most recent Regulation, which dated from 1996, a situation which produced legal insecurity and contradictions that were overcome through court decisions constituting jurisprudence, especially by the Supreme Court and the Territorial Courts. The 2001 Regulation is much more limiting of rights, and the Aznar administration blamed the previous Socialist administration and its Law 4/2000, for exerting a so-called “draw effect” on hundreds of thousands immigrants. Enforcement measures applied at borders were insufficient.

#### **FIFTH STAGE: 2002/2004**

- **Uncertainty and masses:** Policy was relatively unclear especially in the light of the avalanche of new immigrants and the inundation of embassies and consulates with applications for work contracts to perform essential, necessary jobs to fuel the Spanish economic “boom”, which was greater than in the other Member States of the European Union, to which Spain belonged since 1986.
- **Mafias:** One of the main issues of concern to legislators, governing party and opposition alike, was the fight against terrorism and the mafias that traffic in human beings, that are fully aware of the system’s shortcomings and the market’s need for manpower.
- **Terrorism:** During this time period the terrorist attacks occurred in New York and Washington on 11 September 2001, and then there was the war in Afghanistan. International measures to combat terrorism and both direct and indirect terrorism financing affected immigration policies.
- **Citizenship:** The Spanish Civil Code was modified in regard to citizenship by Law 36/2002, promoting the naturalisation of immigrants in Spain, and creating new forms of accession to Spanish and, therefore, European citizenship.
- **New Quotas:** Priority was given to a policy of quotas, that resulted totally insufficient, and provisions were made to implement European policies and directives referring to family reunification.

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<sup>27</sup> Royal Decree 864/2001, of 20 July, that approved the Implementing Regulations of Organic Law 4/2000, amended by Organic Law 8/2000, Organic Law 11/2003 and Organic Law 14/2003 (Official State Gazette no. 174 of 21 July 2001). Special mention is also made of Royal Decree 865/2001 of 20 July, that gives approval for the recognition of Stateless Person status, published the same day.

- **Nullification of Regulation Articles:** The Supreme Court declared null and void certain articles contained in the 1996 Regulation.
- **New Organic Laws of 2003:** New Organic Laws were enacted that modified the Law on Aliens, Law no. 11/2003 of 29 September<sup>28</sup> and Organic Law 14/2003 of 20 November 2003 (Official State Gazette of 21 November 2003) the title of which, in and of itself, reads like a novel.<sup>29</sup> The two Laws amended Organic Law 8/2000. As we indicated, these Laws sought to curb mafia activities and complicity between such domestic organisations and their international counterparts. A number of provisions were established for implementation.<sup>30</sup>

## **SIXTH STAGE: 2004/2006**

This is the stage we are in now. Here we will only set forth the most important milestones, as we lack the historical perspective necessary to be able to analyse effectiveness, and furthermore, this has been broadly discussed and assessed above.

- **Terrorist attack on the Atocha Train Station (Madrid)** on 11 March 2004: perpetrated by activists, apparently Islamic fundamentalists pertaining to the same organisation as Al Qaeda. Certain rights were granted to aliens affected by the terrorist attacks.<sup>31</sup>
- **Mr. Rodríguez Zapatero's Socialist Government:** In elections held on 14 March 2004, the Spanish Socialist Workers Party (PSOE) won in counter to all predictions and Mr. Rodríguez Zapatero became the Prime Minister.
- **Immigration is a priority of the Government and in the eyes of the public:** There was interest in immediately dealing with the issue of aliens in conjunction with the political parties and the country's social and economic forces. Pressure was exerted by the European Union to put a stop to irregular immigration and the massive influx of immigrants through Spain.

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<sup>28</sup> Organic Law 11/2003, of 29 September on Specific Measures on Public Security, Domestic Violence and the Social Integration of Aliens (Official State Gazette of 30 September 2003).

<sup>29</sup> Organic Law 14/2003, of 20 November, to Reform Organic Law 4/2000, of 11 January, on Rights and Freedoms of Aliens in Spain and their Social Integration, amended by Organic Law 8/2000, of 22 December; Law 7/1985, of 2 April, **Regulating Local System Bases**; Law d 30/1992, of 26 November, on the Legal System of the Public Administrations and Common Administrative Procedure, and Law 3/1991, of 10 January, on Unfair Competition (Official State Gazette of 21 November 2003).

<sup>30</sup> Circular containing Implementing Instructions for Organic Law 4/2000, on Rights and Freedoms of Aliens in Spain and their Social Integration, after the reform carried out by Organic Law 14/2003, of 20 November, Madrid, 16 December 2003. [www.reicaz.es](http://www.reicaz.es).

<sup>31</sup> Royal Decree 453/2004, of 18 March, on Granting Spanish Citizenship to Victims of the 11 March 2004 Terrorist Attacks.

- **New regulation on aliens:** Implementing Regulations for the Law on Aliens were enacted on 30 December 2004 (Official State Gazette 7.01.05).
- **Normalisation:** Normalisation, or regularisation, process was set to run from 7 February to 7 May 2005. Extensively discussed above.
- **Referendum in Spain on the Constitution for Europe** was held on 20 February 2005, with affirmative result.<sup>32</sup>
- **Lack of control at borders:** There was massive influx of aliens through Ceuta and Melilla, (by boat, “patera”); Mauritania, Senegal (by boat, “cayuco”), or from countries in Eastern Europe (by boat, train, bus), Latin America (by air).

## VIII. CONCLUSIONS

**FIRST:** Spain’s current situation can be described, in the words of Javier de Lucas,<sup>33</sup> as one of “overwhelmed preoccupation.” The policy implemented over the past year is merely one effective step forward that has partially redressed a very dangerous human situation in Spain. Of the nearly 700,000 “invisible” immigrants seeking regularisation, the regularisation process brought over 600,000 people out of irregular status and made them visible, but has left over 750,000 people unregularised because they did not meet the requirements, a number that increases with new arrivals daily.

**SECOND:** The reality of a globalised world and the desperate yearning for the promised land of Europe will make regularisation processes not extraordinary events, but rather normal processes aiming to convert *de facto* population into legal population. The phenomenon of unremitting, massive immigration brings our progressive legal and political system into question, and whether nationals and aliens should have equal individual rights and freedoms.

**THIRD:** Laws exist to serve the needs of the people and knowledge of the law must serve to facilitate compliance thereto. If this is not the case, laws become illegitimate no matter how legal they may be. Laws should take into account the diversity of the people to which they apply and seek ways to integrate immigrants, **so as to prevent very dangerous situations of racism and xenophobia.**

**FOURTH:** As citizens of the First World we do not appreciate what we have or the privileges we enjoy daily. **The citizens of the third world, however, are fully cognizant of what they lack and will never have if they do not move towards**

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<sup>32</sup> Constitutional Court. Statement by the Constitutional Court (DTC 1/2004, of 13 December 2004) on the existence or not of contradiction between the Spanish Constitution and Articles 1–6, II–111 and II–112 of the Treaty by which a Constitution for Europe is established, signed in Rome on 29 October 2004.

<sup>33</sup> *Le Monde Diplomatique* of 01–05–2006.

the sources of wealth, be they in Europe or North America. The naïve belief that law enforcement measures and border controls at seaports and airports to prevent massive entry is the short- or medium-term solution, is unrealistic and reckless, just as is setting up a system of unrealistic quotas that does not meet the society's needs or prevent illegal trafficking in persons by structured international mafia networks.

**FIFTH:** The avalanche of desperate people, a characteristic of the 21st century, can only be dealt with successfully through: a) Collective engagement regarding the magnitude of the situation; b) Policies at the European Union level, since domestic measures are ineffectual; c) Promotion and funding of international cooperation in immigrants' countries of origin; d) Proclaiming austerity in our world on behalf of the Third World – from a standpoint of sheer selfishness – to dissuade them from coming. Fighting irregular immigration and securing our borders is like trying to keep back the sea, and will not keep immigrants from seeking a way to escape their grim reality. They have nothing to lose but their lives in the attempt.

**SIXTH:** The continuous, daily, and almost now normal practice of entering Spain by rudimentary is not an individual enterprise, but rather a collective family investment in the future. We Europeans are concerned about the future too, and start pension and retirement plans to provide for us when we retire, while in many parts of the world, Africa, Asia, Central and South America and Eastern Europe, people are investing and pawning their assets and those of the entire family, to finance passage on a boat or other means of transport. This amounts to their pension funds, their plans for the future. We must realise that in many parts of the world “there is no future” and Europe and the U.S. are the only future possible.

**SEVENTH:** In Europe and the U.S. the political influence of immigrants will increase. Immigrant aliens in Spain cannot now vote in national elections, and only European nationals can vote in municipal elections. However, the government's immigration and alien policy, and political party programs regarding immigrants will taken into account by Spanish voters and may be decisive in general elections. Aliens do not have the right to vote, but policies affecting them will be decisive and influence the results of upcoming national, regional and local elections.

**EIGHTH:** Our European society of the First World must come to grips with a difficult new reality and abandon policies dealing with immigration as a scourge against which to fight. We must seriously initiate a rigorous process in Europe in which immigration, multiculturalism and diversity are considered factors of progress and change as we enter the 21st century.