

# *Juvenile Justice in Spain*

Past and Present

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Although the juvenile justice system in Spain emerged at the beginning of the 20th century, in accordance with the general movement at that moment in the Western world, the distinctive circumstance of the Franco dictatorship (1939 to 1975) meant that Spain maintained a tutelary approach while things were changing in the rest of the Western world. Spain presently has a criminal responsibility law for juveniles, Organic Law 5/2000 of January 12, which came into effect January 13, 2001 at a moment when criminal justice policy in general and juvenile justice policy in particular were in crisis. Although the law initially was conceived as a progressive law, the end result, after some criminal justice policy decisions, was the minimizing of some of the fundamental principles of law. Spain, in this sense, has embraced a much more repressive approach, paralleling new trends elsewhere in the Western world.

**Keywords:** *juvenile justice system; juvenile offenders; judges; legislation; youth court*

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**J**uvenile justice in Spain has evolved differently from its equivalents in other European countries. The idiosyncrasy of the Spanish system and the special political situation that dominated Spain during a large part of the 20th century have produced in this field, as in many others, a peculiar evolution. At present, Spain has a criminal responsibility law for juveniles, Organic Law 5/2000 of January 12 (OL 5/2000), which came into effect January 13, 2001. At last, Spain has legislation for juveniles comparable to other Western legislations, one that is in agreement with European and international recommendations regarding this subject.<sup>1</sup>

*Journal of Contemporary Criminal Justice*, Vol. xx No. x, Month 200x 1-24  
DOI: 10.1177/1043986203258804  
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Sentencing is the final step of a long process that starts with the arrival of an alleged delinquent in the juvenile court. The kind of sentence a court or a judge passes depends not only on the written laws but also the use that the applier of the law makes of the legal norms; this is especially true in the field of juvenile justice, given its objective of individualized response. This dualism between the written law and its application has marked the history of juvenile justice in Spain.

In this paper, we try to explain how the juvenile justice system has evolved in Spain, especially during the past 25 years, to be able to understand the way in which it functions in the present.

### THE PAST

One could divide the history of the past century in Spain into two different parts separated by the Constitution in 1978. Although this date does not represent a turning point for juvenile justice in Spain, it does explain why and how things started to change.

#### *First Period (1912 to 1978)*

The first knowledge we have of a special court to deal with children in Spain is provided by the Royal Decree of October 28, 1912 allowing the Ministry of Justice to present to Parliament a project to regulate these courts. However, this law was not presented until August 2, 1918, and the first juvenile court (Tribunal de Menores) opened on May 8, 1920 in Bilbao.

According to the general movement that was occurring elsewhere in Western Europe at this moment, a new judicial system to judge and correct juvenile delinquents emerged with a tutelary philosophy under a positivistic influence that considered juvenile delinquents to be unhealthy and dangerous children in need of correction and education (Binder, Geis, & Bruce, 1997; Junger-Tas, 1994; Walgrave & Mehlbye, 1998; Weijers, 1999). Therefore, the concern of this court was not only children who commit crimes but also children who were in poverty, were neglected or abused, or were unruly or committed status offences; later on the court's concern expanded to include those children who behaved in an idle or dissolute manner (prostitute minors and layabouts or slackers).

In the beginning, these courts were responsible for all children younger than age 15 with no lower age limit, but the higher limit was changed in 1925 to include 15-year-old juveniles; that is, the age of adult criminal responsibility was established at age 16, and it remained so until the present OL 5/2000.

One of the more relevant characteristics of the juvenile justice system in the early 20th century, and one of the more celebrated when introduced, was

that it was separate from the formal system, the adult criminal law (Doek, 1994). But this point eventually was to become a disadvantage: The system offered no procedural guarantees, the members of the court were not professionals but “do-gooders,” the sessions were not open, there were no procedural rules to follow, the presence of a defense lawyer was forbidden, and so on.

In 1948, a legal reform of the juvenile justice system was undertaken, but it did not change anything. The Tutelary Juvenile Court Law (Tribunal Tutelar de Menores) was the result of the convergence of the bequest of correctional positivism and the most authoritarian paternalism of the age in which it was written (Tamarit Sumalla, 2001). The judges of these courts, the “good pater familias,” were allowed to act not only on the basis of the alleged breaking of penal rules but also whenever they thought the person younger than 16 years of age (whether a prostitute, an idler, a layabout, or a slacker) was in need of reform because of his or her “dangerousness.” This indefinite concept is far from the principles of the criminal law, which guarantees the rights of the young accused. There was felt to be no need to investigate the facts thoroughly, and the child was not able to defend himself or herself. This system had the same characteristics as tutelary systems existing in other countries at that moment (Klein, 1994; Walgrave & Mehlbye, 1998; Trépanier, 1999).

The measures the judge could apply to the delinquent were classified into soft or isolated measures (cautioning and short custody) on one hand and hard or long lasting measures (custody and probation) on the other. These measures, even the deprivation of freedom, were imposed without any consideration for the seriousness of the facts and with no time limits other than such time as the “delinquent” reached adult age or was considered “corrected.”

During this period, juridical activity was characterized by the stable relationship between the number of cases that reached the court and the number of cases that were sentenced, as shown in Figure 1.<sup>2</sup> The gradual increase is a reflection of the demographic growth during the 1960s and 1970s.<sup>3</sup> In Figure 2, the interventionist functioning of the juvenile courts can be seen; the mean intervention percentage was more than 80% during the whole period and thus the nonintervention options remained at approximately 20%.

With respect to the kinds of sentencing measures adopted by the juvenile judges during this period, cautioning was the more popular. The trend shown in Figure 3 for this measure seems to follow the trend of the cases sentenced. Figure 3 shows the enormous gap between cautioning and all other kinds of sentencing measures, showing a slight tendency to deinstitutionalize with custody decreasing progressively. Nevertheless, probation shows a critical downward moment, especially during the 1970s, which may be due to the inconsistency of its regulation. According to its regulation, probation during

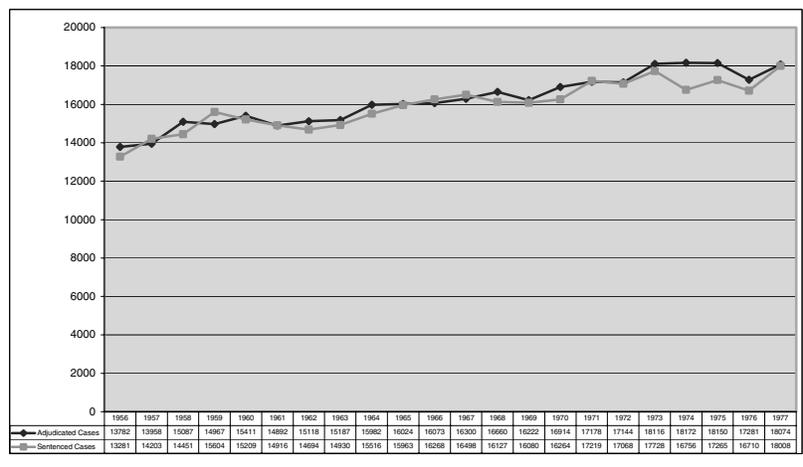


Figure 1: First Period (1956 to 1977): Number of Cases That Went Through the Juvenile Court

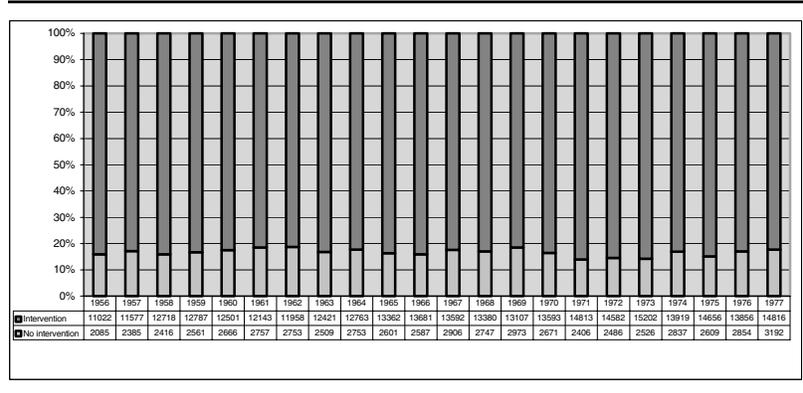


Figure 2: First Period (1956 to 1977): Functioning of the Juvenile Courts

this period was not what currently is considered to be probation: the only task of the probation officer was to control the child’s behavior and to inform the judge of it; no other kind of intervention was possible. As a counterpoint to the probation crisis, judges employed short custody as a last resort.

However, as mentioned above, the criteria related to the sentencing measures adopted by the judge and the young person’s behavior were in agreement with a tutelary system; that is, custody was used for females showing

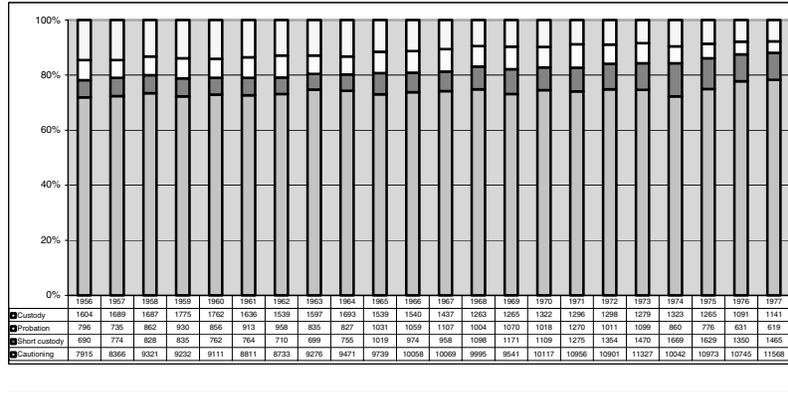


Figure 3: First Period (1956 to 1977): Sentencing

“irregular behavior,” whereas other more serious behavior could be sentenced with cautioning (Cea d’Ancona, 1992; Giménez-Salinas Colomer, 1981).

Reforms of the law in 1970 and 1976 did not produce essential modifications. The culture of stagnation during this phase of the dictatorship meant that juvenile justice in the 1970s continued to be a bad copy of the protection system established in many countries around Spain at the beginning of the century. Those changes carried out by the juvenile justice system in neighboring countries had not been taken into account in the Spanish system (Giménez-Salinas Colomer & González Zorrilla, 1988).

*Second Period (1978 to 2001)*

With the enactment of the 1978 Constitution, there began a period of debate and reflection about the role of the state regarding delinquent children. But this debate, held among professionals, did not have an effect at the legislative level. The juvenile justice situation continued without any change until 1985. On July 1, 1985 an organic law created the juvenile courts (Tribunales de Menores) within the rest of the judicial system and urged the government to present within one year a project of a new juvenile law, but this project was never presented to the Cortes (the Spanish Parliament). These juvenile courts did not work fully until 1988 when a group of “expert judges” initiated their functions in most of them.

Nevertheless, in 1987 a law came into effect (Law 21/87) that split the reform and protection functions into two separate institutions. Until this date,

the juvenile court had ruled on both aspects of juvenile cases. At this moment, a new body, the family court, was created. This civil court was in charge of protecting juveniles at risk and taking care of their needs. The regional social services were to take care of children's well being with the functions of guardianship, adoption, fostering, and so on. This was one of the most awaited responses for the intervention in juvenile cases, and this law was the first step toward normalizing the Spanish regulation relating to young persons and making it similar to those existing in other neighboring countries (Gatti & Verde, 1998; Mehlbye & Sommer, 1998; Weitekamp, Kerner, & Herberger, 1998).<sup>4</sup>

In view of the passivity of the legislators, some juvenile court judges presented the question about the compatibility of the 1948 law and the new Constitution to the Constitutional Court. On February 14, 1991 the Constitutional Court declared some articles of the old law unconstitutional (STC 36/1991). From this very moment on, theoretically, the judges and the juvenile courts did not have a law allowing them to continue with their functions. But faced with this legal vacuum, juvenile court judges continued with their task using the Constitution and Constitutional Court and Supreme Court jurisprudence until June 5, 1992 when the Organic Law 4/1992 (OL 4/1992) was published.

We may refer to the first part of this period as a phase with a Constitution but without a juvenile offender law. It is a period of uncertainty, which became apparent in judicial practice as can be observed in the data shown in Figure 4.<sup>5</sup>

Unlike the previous period, there appears to be a disjuncture between the number of cases that reached the court and the cases that were sentenced. The legislative reactions (1985, 1987, and 1992) are the consequence of criticism by law administrators reporting the incompatibility of the system with the new democratic culture and asking for a reform. At the same time, every legal reform carries with it a certain optimism on the part of judges, which ceases when expectations are not fulfilled. The situation became critical from 1989 on when the credibility of the system was at its lowest; there now existed an inhibition of the control system, judges did not work as hard as they used to, and the number of cases that reached the court diminished significantly (see years 1989, 1990, and 1991 in Figure 4).<sup>6</sup>

With respect to the courts' functioning, and in spite of the passivity of legislators, judicial practice shows a radical change in 1988 when, as mentioned above, a group of expert judges started to work in the juvenile courts. At this point, as shown in Figure 5, a change in the criteria relating to the functions of intervention and nonintervention appeared. However, this change failed as a consequence of the general crisis that the system was suffering during the years 1989 to 1991. Following the 1991 declaration of unconstitutionality of

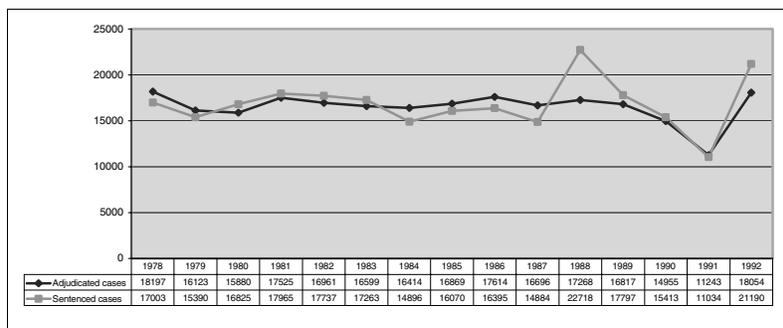


Figure 4: Second Period, First Part (1978 to 1992): Number of Cases That Went Through the Juvenile Court

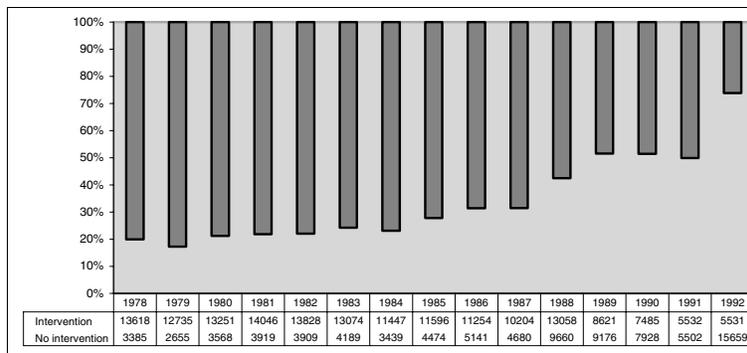


Figure 5: Second Period, First Part (1978 to 1992): Functioning of the Juvenile Courts

the old law of 1948, the judges with their limited resources—the Constitution and Constitutional Court and Supreme Court jurisprudence—tried to apply as best as possible the principles that were presented in international recommendations and laws; the results can be seen clearly in data from 1992 (see Figure 5).

During this period, cautioning continues to be the most employed measure, with a percentage similar to the previous period (see Figure 6 for the gap between this measure and the rest). But the slight tendency toward deinstitutionalization that characterized the first period gave way to a sharp increase between 1978 and 1989 (see Figure 6). Probation continues to be used at the

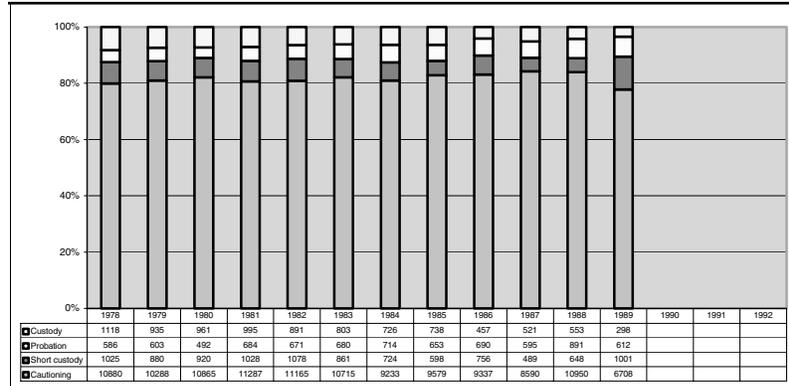


Figure 6: Second Period, First Part (1978 to 1992): Sentencing

same levels as before but appears to grow gradually, whereas patterns of short custody are erratic. Until 1988, as a continuation of the previous period, there is no systematic relationship between the behavior judged and the measures enforced (Cea d' Ancona, 1992; Elejbarrieta, 1984). After 1988, there are no data on the relationship between the crime committed by the juvenile and the kind of measure adopted by the judge, but we may assume that during this period the criminal law criteria weighed most in the judges' decisions, although we cannot know if they were using other criteria for the individualization of the response.

As mentioned above, 1992 was the year for a new law of juvenile justice impelled by the judges. But this was not unique to Spain. In Germany, where the legislation did not change between 1953 and 1990, the sentencing practice underwent important transformations by virtue of the process known as internal reform (Rössner, 1999). In Italy, the most recent transformation of the juvenile justice system was the expression of a process of rationalization and modernization advocated by an authoritative group of juvenile magistrates (Gatti & Verde, 1998). In England and Wales, as Muncie (in press) points out, the history of youth justice is also a history of active and passive resistance from pressure groups, the magistracy, the police, and youth justice workers.

The most relevant points of OL 4/1992 were an attempt to find a solution to the legal problems reported by the Constitutional Court. However, it was only a provisional law waiting for the definite new legislation that was not enacted until 8 years later. With this law, a new legality was established in the juvenile courts: The law guaranteed effective legal protection; restricted punishable

actions to those established in the adult criminal law, excluding misbehaviors; stipulated that the duration of punitive measures could not exceed 2 years; and for the first time in Spain, established the youngest age limit of criminal responsibility at age 12, maintaining the oldest limit at age 16 (the age of penal majority at the time).

Other characteristics of the new law were less foreseeable, such as the prominence of the prosecutor who assumes the maintenance of the law and children's rights and who is in charge of the investigation. Since this moment, the prosecutor has been the guarantor of the young person's rights during the whole process, not only of the legal guarantees but also of the application of the principle of the juvenile's best interest in the decision making process—the prosecutor controls the enforcement of the measures.<sup>7</sup> This importance of prosecutors is also found in most of the present juvenile justice systems of other European countries (Gatti & Verde, 1998; Gazeau & Peyre, 1998; Junger-Tass, 1998; Weitekamp et al., 1998).<sup>8</sup>

Furthermore, a new body appears in the juvenile court: that of a technical team (TT) including psychologists, social educators, and social workers. This TT has to prepare a technical report at the request of the prosecutor. The report must be an objective statement about the young person's family, his or her social and educational history, and any previous involvement with private or public agencies the young person has had. The report also describes the young person's physical and mental health and makes a recommendation as to which treatment alternatives should be available in the case. All decisions made by the prosecutor depend on this technical report and the judge's decision can also be greatly influenced by this report.

The regional administrations, which were already in charge of the children under protection, now acquired the competence to enforce the measures adopted by the judges in juvenile court. Social welfare institutions have to deal with young offenders. They are in charge of the intervention. When the judge imposes a measure, the professionals of the social welfare system implement the program (content) of that measure.

The law also introduced some principles that helped to bring the Spanish legislation into line with the EU recommendations and the United Nations Convention on the Rights of the Child (1989), including: minimal intervention, flexibility in the decision-making process, individualization of responses, priority of community intervention, a restorative philosophy for the resolution of conflicts, and the evaluation of the juvenile's best interest when imposing a measure. Muncie (in press) comments that the United Nations Convention on the Rights of the Child (1989) developed under what was established in the minimum rules, was able to reach a consensus in some aspects that are common to most European countries.

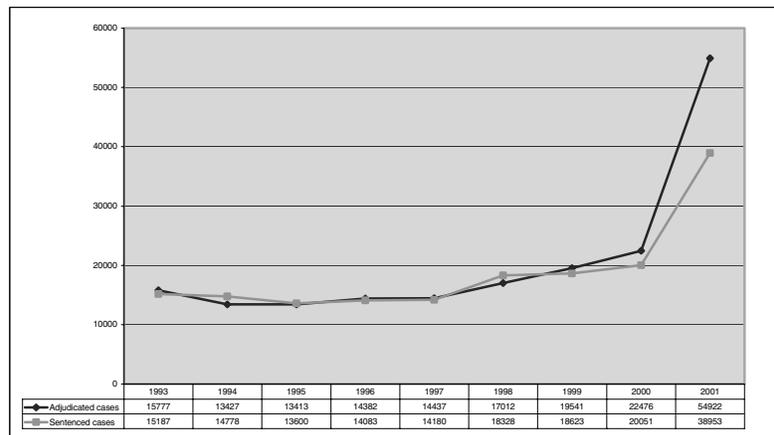


Figure 7: Second Period, Second Part (1993 to 2001): Number of Cases That Went Through the Juvenile Courts

The law was the turning point in the change from a protection system to a system based on a framework of responsibility (Walgrave & Mehlbye, 1998). We consider this law to have been the dress rehearsal for the 2000 law. But the law received fierce criticism from many sectors in society because it did not accomplish the sweeping reform of the system that was expected. Nevertheless, the law allowed a framework where the courts could act in a flexible way, and it initiated a period of stability in the juvenile justice system (see data for 1993 to 2000 in Figure 7) (Ayora Mascarell, 1997).<sup>9</sup> Rössner (1999) points out that in Germany, the flexibility of the norm between 1953 and 1990 allowed a reasonable practice.

In line with the principle of minimal intervention, OL 4/1992 gave the prosecutor the ability to dismiss the case when the offence was a default, a nonviolent one, or in response to the circumstances of the young person. The prosecutor also had the opportunity to dismiss the proceedings through the alternative of starting a victim-offender mediation process when the young person promised to repair the damage or injury caused to the victim.

This is the case in other European countries such as Germany (Weitekamp et al., 1998), the Netherlands (Junger-Tass, 1998), and France (Gazeau & Peyre, 1998). As can be seen in Table 1 the dejudicialization measures had a great impact on the system, 62.1% of the cases were dismissed with the mediation process increasing (Rechea Alberola & Fernández Molina, 2000; Rechea Alberola & Fernández Molina, 2001).<sup>10</sup>

**TABLE 1**  
*Functioning and Intervention of the Juvenile Courts (Organic Law 4/1992), in Castilla-La Mancha, During the Period 1996 to 1998*

<i>Percentage</i>	<i>Cumulative</i>	<i>Percentage</i>
Dismissal	48.4	48.4
Extrajudicial mediation	13.7	62.1
Measures		
Custody	4.1	66.2
Probation	6.0	72.2
Community service	3.2	75.4
Caution	13.7	89.1
Other	0.5	89.6
Discharge	3.6	93.2
Decision awaited	6.8	100.0
Total	100	

With respect to the measures that appeared in the 1992 law, these could be divided into two groups, custody and community measures. Custody could occur in several ways: in a closed center, in a half-open center, and in an open center. Depending on the kind of custody, the opportunities for the young person to participate in community activities changed. Other kinds of custody are therapeutic custody, used for young persons with drug or psychiatric problems, and weekend custody. Following Article 17.1 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, Beijing (1985), custody is used as a last recourse of the system and will be imposed only after a careful study of the situation and for as short a time as possible. As can be seen in Table 1, this is a last resort, only used in 4.1% of the cases that enter into the juvenile court.

The rest of the measures—alternatives to custody—intervene with juveniles in the community by using all the available resources there such as the family, the school, and any other institutions or community groups existing in the community (Article 1.3 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, Beijing, 1985). These measures include probation, community service, community therapeutic treatment, living with a trustworthy person, family or educative group, cautioning, and deprivation of the license to drive a motorcycle or motor vehicle. The chance to use these measures has been spread quite unequally across the different regions of Spain, depending on the resources existing in each community. For instance, as can be seen in Table 1, only some of these measures were used in the region of Castilla-La Mancha.

### **THE PRESENT: OL 5/2000**

OL 5/2000 is the first law in Spain to compile all juvenile justice regulations into a single, complete system. To many interested people, this reform arrived too late, but the delay can be understood as a consequence of the Spanish political agenda of the moment; the reform of the penal code arrived in 1995. Nevertheless, the delay may be an index of the importance that juvenile justice has had in Spain: it had always been a peripheral subject matter.

According to OL 5/2000, justice for juveniles is to be administered by a separate system within the general legal system, with its own specific and specialized court. Jurisdiction of the juvenile court is determined by the offender's age and his or her conduct. With respect to that conduct, the system is exclusively a penal responsibility system. The legislators' intention was to make young persons responsible for their criminal acts and at the same time, to protect young and adolescent delinquents against any arbitrariness that may occur throughout the decision-making process. Therefore, juvenile justice is concerned only with those who commit acts that are defined as crimes according to adult criminal law. It does not include children who are in poverty, neglected or abused, or those who are unruly or are in risk of becoming offenders. Those juveniles are the concern of another jurisdiction. This division can also be found in other European countries including Denmark (Mehlbye & Sommer, 1998), Germany (Weitekamp et al., 1998), and Italy (Gatti & Verde, 1998); but other countries have maintained a unique system for protection and reform, among others the Netherlands (Junger-Tass, 1998), Belgium (Walgrave, Berx, Poels, & Vettenburg, 1998), France (Gazeau & Peyre, 1998), and Scotland (Asquith, 1998).

And with respect to age, the law applies to persons younger than age 18 and older than age 14.<sup>11</sup> The minimum and maximum age limits of the previous law were established at 12 and 16, respectively. To change the lower limit was a very polemic decision that the legislators decided to take against the opinion of many juvenile judges and regional social services, but everybody agreed to changing the highest limit because of the so-called Spanish Criminal Law of Democracy that came into effect in 1995 and that established the age of civil majority at 18.<sup>12</sup> Within this age range, the juvenile criminal law established two differentiated groups of young people with regard to the consequences of their responsibility and the measures to be applied to each group; for juveniles aged 14 and 15, measures would not last more than 2 years, whereas for those aged 16 and 17, any measure, even custody, could last for 5 years. The law intends to give more criminal responsibility to the older young people as a kind of transition to avoid the abruptness of becoming fully responsible, before an adult penal court, for crimes committed after their 18th birthday.

This new age range has caused a quantitative increase in the number of young people who come under the juvenile justice system, as can be seen in Figure 7 (2001).<sup>13</sup> It is too early to know if this change also will produce qualitative differences in sentencing.<sup>14</sup> It is surprising that even with a law that aspired to a deep reform of a specific jurisdiction, the Spanish legislature did not use criminological knowledge about the juvenile delinquency reality to work out the reform (Rechea Alberola & Fernández Molina, 2001).

The resources provided by this reform of the juvenile justice system were one of the most polemic points of the new law. Many people think that this reform is condemned to fail because not enough infrastructures were foreseen for the new needs this law created. Nevertheless, at the present time all this is mere speculation because, as mentioned above, there are no data pertaining to how the application of the law is working. This information is crucial to verify if, on the part of the government, the real lack of foresight with respect to the resources had as a result the total or partial failure of the reform.

Another problem with respect to resources is the quasi-federal division of the country, with the existence of 17 autonomous communities with different economic standards. This means that the resources applied to the implementation of the execution of the measures that correspond to each autonomous community may differ from one community to another, thereby creating first-class and second-class juvenile justice systems. But this is not only a problem in Spain: Other countries have also accepted the evidence of their own uneven distribution of resources. Gatti and Verde (1998) point out significant differences between the north and the south of Italy; Rösner (1999) registers this difference in Germany. Muncie (in press) points out the widening of material inequalities within states, thus creating new insecurities and fueling demands from centralized and authoritarian law-and-order strategies.

#### *The Juvenile's Best Interest*

The juvenile's best interest is the premise underlying the juvenile justice system, addressed by OL 5/2000. The United Nations Convention on the Rights of the Child (1989) picks up the fundamental right that in all legal actions concerning those younger than age 18, the "best interest of the child shall be a primary consideration" (Article 3.1). The first time this premise appeared in the Spanish legislation was in regard to the area of child protection (Law 21/87) and later regarding juvenile reform in OL 4/1992.

One should understand this principle as a juvenile's right because everybody knows that juvenile delinquency is something different from adult crime, and the social reaction to it cannot be punitive but rehabilitative and educative (Giménez-Salinas Colomer, 2000). But how can this principle be applied? The legislature does not answer this question directly, but while

motivating the law states how to evaluate it (“with technical and no formal criteria”) and who has to do so (“a team of professionals specialized in other sciences than the legal ones”) (OL 5/2000, Introduction para. 7). That means that the evaluation of the juvenile’s best interest, following Article 27 of OL 5/2000, has to be done at the prosecutor’s request by an interdisciplinary team, the TT, which has to write a report that will determine the actions to be taken during the process.<sup>15</sup>

The primary objective of the TT’s report is to provide the judge and the prosecutor with knowledge about the juvenile’s situation, indicating his or her deficits and resources. To individualize the decision the judicial agents have to take, the report has to indicate an action plan for each young person. This report and its use by these agents during the process show that at least initially, we are dealing now with a specific penal process different from the ordinary or adult one in which the juridical reaction to law-breaking does not follow general deterrence criteria but tries to provide the juvenile with a more appropriate response to his or her needs.

The measure to be chosen has to be guided by the principle of rehabilitation, (i.e., it must be educative). However, any intervention in juvenile criminal cases has to be proportional to the seriousness of the offence that the juvenile has committed (Weijers, 1999; Weitekamp et al., 1998).

#### *How Can the System Achieve the Juvenile’s Best Interest?*

##### Dejudicialization: A Way of Materializing the Juvenile’s Best Interest at the Instruction Period

The juvenile’s best interest goes together with the principle of minimal intervention that was the main objective of the 1992 reform and was broadened in OL 5/2000. Minimal intervention means diverting the young person away from the legal process to avoid the stigmatization that formal social control often produces, that is, to look for informal social controls that in some cases are more efficient and more adequate for juveniles than the criminal law (Walgrave, 1994).<sup>16</sup>

As mentioned above, the report of the TT, the technical expression of the juvenile’s best interest, has to be taken into account when making any decision throughout the process. This report is elaborated during the instruction period, and if the TT considers it is convenient for the young person—always in search of his or her best interest—the team may suggest a socioeducative intervention (Article 27.2) or a reparation activity by the young person for the victim (Article 27.3). The TT may also suggest not continuing with the case, with no intervention at all, when the child has had enough reproach or when

intervention would not be adequate because of the time elapsed since the infraction took place (Article 27.4). But it is the prosecutor who has to decide the dejudicialization of the case.

These possibilities are indicative of the importance that OL 5/2000 attaches to the minimal intervention principle and to those of restorative justice and the educational and rehabilitative criteria above social defense. In fact, the law assumes the restorative philosophy as the way to solve conflicts (Bazemore & Walgrave, 1999).

#### Educative Measures: The Juvenile's Best Interest at the Procedural Period

The educative character of the measures and the tendency towards community intervention established by OL 4/1992 were also adopted and reinforced by OL 5/2000. This law added new community measures to the 1992 measures (attendance to a day center and socioeducative measures) and ruled more carefully some of the already existing measures to make them more effective, as in the case of probation.

Once the prosecutor decides to continue with the case and files a formal charge, the TT's report has to be taken into account not only by the prosecutor and the defense lawyer in their proposals but also by the judge in his or her sentence. The judge is obliged to justify the sentence, that is, to explain why he or she decided to apply a certain measure and the length of time it will last, as a way to control the evaluation he or she had made of the TT's report, the concrete technical expression of the juvenile's best interest. This justification will prevent arbitrariness because although the judge's decision will rest on his discretionary power, the decision criteria have to be formally justified (Fernández Molina, in press).

The task of the juvenile judge is an arduous one. He or she has to evaluate the juvenile's best interest in the most sophisticated and exhaustive way because the evaluation will serve to decide the educative answer to be applied to the young person. The legislature demands that the judge consider the juvenile's best interest as an essential element of his or her decision (Article 7.3)

#### *Limits to the Juvenile's Best Interest*

Although OL 5/2000 declared solemnly that the aim of the measures to be taken in the juvenile's process is educative (i.e., specific deterrence), and although the law committed itself to flexibility in the adoption and enforcement of the measures (Article 7.3), in some cases, other aspects of the situa-

tion have to be taken into consideration; these aspects are age, the kind of crime committed, the seriousness of the crime, and recidivism.

Although the legislature initially was interested in the juvenile's best interest, once OL 5/2000 was published, but before it came into effect, the government presented another law, Organic Law 7/2000 (OL 7/2000) of December 22, modifying the criminal law and the law of criminal responsibility of juveniles with respect to acts of terrorism.<sup>17</sup> But this new law was not limited to acts of terrorism only; rather, terrorism was the pretext for introducing other modifications to OL 5/2000 that the government did not dare to introduce before, given the progressive character with which the law was presented. These modifications aggravated the responses to some kinds of crimes or the crimes committed by young persons that were considered especially uncomfortable (in particular, in cases of recidivists and those responsible for serious crimes), and they did not take into consideration the juvenile's interest. We will discuss this law at a later point.

#### Limits to the Juvenile's Best Interest in the Prosecutor's Action

The prosecutor, in his or her proceedings, may consider the possibilities of dejudicialization but is limited by the seriousness of the crime and the offender's recidivism. In the first case, he or she is only allowed not to press charges when the crime was not a serious one and was committed without violence or intimidation. In the case of recidivism, if the juvenile has committed another crime of the same kind, the prosecutor is forced to press charges.

#### Limits to the Juvenile's Best Interest in the Judge's Action

*Age.* Age is one of the factors to be taken into account by the juvenile judge. As we have already explained, according to the two age ranges established by the law and thus depending on the age of the juvenile, the consequences regarding his or her responsibility and the length of the measures that can be imposed on the juvenile will differ. So, according to age, the length of the measure might vary from 2 years for juveniles aged 14 and 15 to 5 years for those aged 16 and 17.

*Circumstances and seriousness of the facts.* The motivation of the law regarding the procedure to be used with the juvenile and how to weigh the juvenile's best interest at the time of giving a response seems to have been forgotten by the legislature when writing the rest of the law. The judge has to take into account the legal qualification of the facts (i.e., the crime committed

and its seriousness) to decide on a sentence. In some cases, this will prevent him or her from taking other measures that from the point of view of the juvenile, could be more beneficial to the offender (Article 39). The content of this article of the law is more in line with a general deterrence and social defense point of view than with the rehabilitative principle that seems to govern the proceedings of juveniles.

*Extreme seriousness.* Even stricter limitations are found in Article 9.5. This article establishes the rules to follow in cases of extreme seriousness, including cases of recidivism. It seems that the legislature is harsher with the group considered to be the hard core of juvenile delinquents (recidivists and those responsible for very serious acts). In these cases, the judge is obliged to put the juvenile into custody in a closed center for from 1 to 5 years without the possibility of modifying the measure during the 1st year (the sentence cannot be revised until the 1st year has elapsed).

One of the problems with this article of the law is establishing what the term *extreme seriousness* means. Initially, the text of OL 5/2000 of January 12 included recidivism and a closed list of those crimes: terrorism, murder or homicide, and sexual assault. But the reform of OL 7/2000 of December 22 maintains recidivism as an aggravating matter and creates an especially harsher regime for the crimes included in the above-mentioned list.

*Length of measures.* The duration of the measures established in OL 5/2000 are considered too long if the aim of the law is oriented to the juvenile's best interest. As Ornosa Fernández (2000) pointed out, if in 2 years rehabilitation has not succeeded, whatever the seriousness of the crime committed or the personal or familiar circumstances of the juvenile, the likelihood of success with this juvenile is minimal; this means that measures longer than 2 years do not have a rehabilitative character but rather a retributive one.

*Modifications introduced by OL 7/2000 of December 22.* As mentioned above, this law is not in agreement with the spirit of OL 5/2000, which tried to look for a balance between society's right to defend itself and the rehabilitative objective (Giménez-Salinas Colomer, 2000), because it aggravated the measures and created some other punitive concepts. Although the law was created to respond to the escalation of the terrorist acts of the Kale Borroca (terrorist vandalism by juveniles in the Basque Country), it was expanded to include crimes (murder, homicide, and sexual assault) committed not only by terrorists but also by any other young person.

Reviewing the changes instituted by this reform, the two most relevant are, first, the creation of a Central Juvenile Court at the National Court (in Madrid) for terrorist acts where all juvenile terrorists will be judged. This means that a

**TABLE 2**

*Exceptions to Organic Law 5/2000 Introduced by Organic Law 7/2000,  
With Respect to Terrorist Acts and Very Serious Crimes*

<i>Age</i>	<i>Murder, Homicide, Sexual Assault, and Terrorist Crimes</i>	<i>Very Serious Terrorist Crimes<sup>a</sup></i>
14 to 15 years old	From 1 to 4 years of custody in a closed center and 3 years of probation (the sentence cannot be modified during the 1st year)	From 1 to 5 years of custody in a closed center and 3 years of probation (the sentence cannot be modified during the 1st year)
16 to 17 years old	From 1 to 8 years of custody in a closed center and 5 years of probation (the sentence cannot be modified during the 1st year)	From 1 to 10 years of custody in a closed center and 5 years of probation (the sentence cannot be modified during the 1st year)

a. With more than 15 years of prison in the penal code of adults.

judge located at a great distance from the home region of the offender will judge the young person and that eventual custody measures will be applied away from the juvenile's home milieu. This option is a far cry from the "juvenile's best interest,"<sup>148</sup> and the fact that he or she will now be labeled as a terrorist renders any rehabilitative intervention difficult (Ornosa Fernández, 2000). The second of the two most relevant changes is the extension of the length of the measures for facts mentioned in this law (see Table 2).

## CONCLUSION

Although the juvenile justice system in Spain emerged at the beginning of the 20th century in accordance with the general movement at that moment in the Western world, the impact of the Franco dictatorship (1939 to 1975) maintained the tutelary approach while things were changing in the rest of the Western world. From a legal point of view, Spain missed the educative reform and did not incorporate the responsibility approach until the 1990s, but from a practical point of view, things started to change in the mid-1980s.

Those who apply the law, the judges that were working in the juvenile courts, started in the mid-1980s to use cautiously the principles of dejudicialization and deinstitutionalization in their decision making. And when a new law came into effect, OL 4/1992, they took advantage of its vagueness to introduce a flexible and educative approach through the principle of the juvenile's best interest.

The present law, OL 5/2000, came into effect at a moment when, in the Western world, criminal justice policy in general and juvenile justice policy

in particular was in crisis. Initially, as mentioned above, the law was a progressive law, as can be seen in its preface in which the principles that motivate it are articulated. The end result, after the parliamentary discussion, introduced some limitations to principles underlying the original law. And after this, some criminal justice policy decisions have minimized some of the fundamental principles of law.

What is the future of the juvenile justice system in Spain? We think that it will depend on how the law translates to practice. The passage of time and the implementation of the law in the juvenile courts will tell us how the juvenile's best interest is interpreted and how the appliers of the law will tip the balance: either toward a punitive response as the last legal limitations do now allow them or toward the juvenile's education, following the initial motives of the law. Nevertheless, from our point of view, the general challenge to the system at present is to establish community interventions, and once this kind of intervention becomes firmly settled in the system, to experiment with other options.

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#### APPENDIX

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Statistics in Spain suffer a variety of problems. One of the most important is that usually they do not exist. In those cases when they do exist, they have to be taken cautiously. The statistics of the juvenile justice system are relatively clear: until 1987 there was only one juvenile court in each province. The reliability of the statistics of the juvenile justice system is good (each case that enters a juvenile court has a number and every sentence another one). Its validity depends on the inclusion criteria that vary with changes in legislation.

As can be seen in Figure A, cases involving juvenile offenders in Spain remained more or less stable during the second half of the 20th century. It should not be imagined that juvenile delinquency (and also adult delinquency) did not grow in Spain at the same rate as in the rest of the Western European countries during this period. During the years 1956 to 1978, largely dominated by the dictatorship, the formal and informal control in Spain was strong. What happened during the period from 1978 to 1992 may have another explanation; the first part of this period saw a transition from a dictatorship regime to a democratic one, although the rate of change was often limited. In the second part of the 1980s, things started to move with the creation of the juvenile courts (1985) and the separation of reform and protection functions (1987) that eliminated some cases from the juvenile courts, which could explain the small decrement of cases coming to these courts, but we think that the explanation provided above may be a better one. Both explanations may have contributed to the results shown in Figure A. The period from 1993 to 2000, when OL 4/92 came into effect, was a period of stabilization of the juvenile justice system; nevertheless, the number of cases was at its lowest and the index shows an increasing trend from 1997 on (the same trend is seen in the adult delinquency statistics). This trend may be explained in

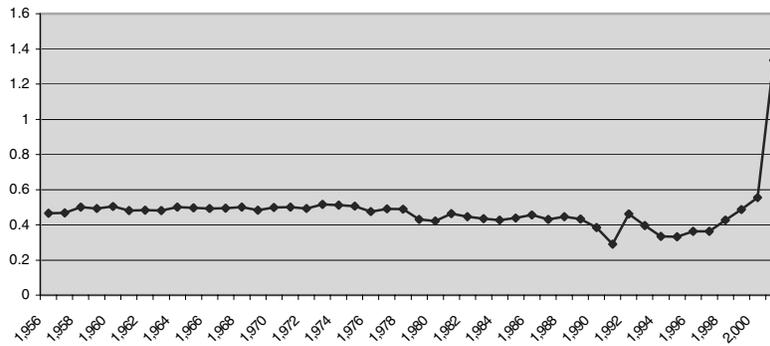


Figure A: Adjudicated Case Rates/100,000 Population in the Juvenile Justice System (1956 to 2001)

many ways: more effective police control, a real increase of delinquency, a change in the method of writing the statistics, and so on. The data of 2001 are a clear reflection of the coming into effect of OL 5/2000: the new age range for juvenile offenders and a transition period where young offenders, those aged 16 and 17, move from the adult to the juvenile court. We will have to wait until the system reaches stability to be able to appreciate the real juvenile delinquency rates.

## NOTES

1. United Nations Standard Minimum Rules for the Administration of Juvenile Justice, Beijing (1985); Council of Europe Recommendations, R20 (1987); United Nations Convention on the Rights of the Child (1989); and the United Nations Standard Minimum Rules for Juveniles Deprived of Their Liberty (1990).

2. The data shown here represent cases of children under reform within the Tutelary Juvenile Court, including misbehaviors. Data from children under protection are not considered.

3. The Spanish population increased from 29 million in 1956, to 37 million in 1978, and to 40 million in 2002. See Figure A in the Appendix for the adjudicated case rates/100,000 population during the period 1956 to 2001. These rates for data shown in Figure 1 have a mean of .49, with a standard deviation of .013 (maximum = .52; minimum = .47).

4. With Organic Law 1/1996 of Protection of Minors, the reform in the field of protection was considered completed.

5. The adjudicated case rates/100,000 population for data shown in Figure 4 have a mean of .42, with a standard deviation of .042 (maximum = .46; minimum = .29). See Figure A in the Appendix.

6. The minimum of the adjudicated case rates/100,000 population in Figure 4 corresponds to 1991. See Figure A in the Appendix.

7. Besides the protection the prosecutor has to give to the juveniles, there are other institutions, aside from the judicial system, that take care of and are interested in the well-being of the juvenile. In the region of Madrid, there is a Defensor del Menor, and the general Spanish ombudsman usually pays great attention to the problems among juveniles. For instance, in 1991, taking into account the critical condition of the juvenile justice system, the ombudsman wrote a report that was presented to the government; and in 2002 he wrote another report on the 1st year of enforcement of Organic Law 5/2000.

8. See Schüler-Springorum (1999) for an explanation of the loosening of power by the judges on behalf of the prosecutors in what he calls a “shift to the left.”

9. The adjudicated case rates/100,000 population for data shown in Figure 7 (1993 to 2000) have a mean of .40, with a standard deviation of .074 (maximum = .56; minimum = .33). See Figure A of the Appendix.

10. These data from the region of Castilla-La Mancha are the only data that were available for the enforcement of the Organic Law 4/1992. Although there can be differences between regions, and in some cases large differences, these data may reflect the general trends in the system.

11. Article 4 of Organic Law 5/2000 allowed young persons between the ages of 18 and 21, under some circumstances, to be judged by the juvenile court to get the benefits of a more lenient system. However, this article was suspended for a period of 2 years by Organic Law 9/2000 of December 22. This period was recently extended to last until 2007.

12. We do not want to enter into the polemic, but in a world where frequently the trend is for younger children to be considered as criminals, the new law has increased the age for criminal responsibility of juveniles. In the Netherlands, young people aged 16 and 17 can be treated as adults (Junger-Tass, 1998), and in the United Kingdom, the 1998 reform considered that a child aged 10 can be responsible (Muncie, in press).

13. The adjudicated case rates/100,000 population for 2001 are 1.52 and reflect the changes of the new system: new age ranges and the transition period.

14. Data are not yet available on the functioning of Organic Law 5/2000. The data from 2001 are distorted by the transition period (the first 6 months once the law came into effect) where, because of the new age range, all the young people aged 16 and 17 that were waiting to be processed by the adult criminal court were sent to the juvenile court.

15. The composition and functioning of the technical team are the same as in Organic Law 4/1992.

16. To defend this in a country where the legality principle is very important gives an idea of the interest the original legislature had with respect to the dejudicialization of juveniles.

17. The government established a *vacatio legis* of one year for the system to prepare itself for change. During this period, a new legislature gave the absolute majority to the government.

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