

## CONVICTION RECORDS IN SPAIN: OBSTACLES TO REINTEGRATION OF OFFENDERS?<sup>1</sup>

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### Abstract

*This paper argues that conviction records pose a serious obstacle for the reintegration of offenders, especially in the labor market. It argues that this reintegration will be different in countries where publicity of conviction records is freely available, where employers are required to carry out regular checks before hiring their employees, and where conviction records never get expunged. The first part of the paper presents the regulation of conviction records in Spain, regarding these three matters. The paper then moves on to offer some reflections on how the erasure of spent conviction records could be strengthened and how this might aid the desistance process.*

**Keywords:** Publicity of Criminal records - Culture of Control - Reintegration.

### 1. Presentation of the conviction records in Spain

In Spain there is scant academic discussion or public information about criminal records (Grosso, 1983; Bueno Arus, 2006). We can speak of criminal records in two ways: police records and conviction records. Although police records are also relevant for the reintegration of the offender<sup>2</sup>, there is to my knowledge no academic research dealing with this specific question. However, a little more is known about conviction records which are the focus of this paper.

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2 For example in order to work in the police sector it is not only required to have no conviction records but also no police records. Art. 10.2.e, f y h Ley 23/1992, de 30 de julio, de Seguridad Privada y RD 2364/1999, de 9 de diciembre

In this paper I'll address three issues: a) Publicity of conviction records: that is how accessible are they; b) Employment and conviction records: when are records checks required in order to allow access to some jobs; c) 'Expunging' policies in Spain: how and when does a conviction record come to be sealed?

The National Conviction Register, NCR (*'Registro Central de Penados'*) is unique for all Spain. It contains convictions for crimes and, since the last piece of related regulation<sup>3</sup>, also for misdemeanors (*falta*)<sup>4</sup>. It does not keep a record of administrative infractions<sup>5</sup>.

At the sentencing stage of a criminal case judges send the terms of the sentence electronically to the NCR (art.252 LECrim)<sup>6</sup>. Information about the defendant's prior criminal convictions is used by judges primarily for two purposes: 1) in gauging recidivism as a legally aggravating circumstance<sup>7</sup>; 2) in determining that the existence of a prior criminal record removes the possibility of receiving a suspended sentence<sup>8</sup>.

Besides the legal implications of having a prior conviction, the criminological assumption is that the conviction record poses an obstacle to reintegration (e.g. access to jobs, loss of parental rights, disenfranchisement)<sup>9</sup>. The conviction record reinforces a felonious identity and makes it difficult to adopt a new identity, that of a 'law abiding citizen' (Uggen, Manza & Behrens, 2004).

A conviction record's impact upon an offender's life after they have served their sentence is potentially increased by three factors: a) **Publicity** of conviction records; b) employers **Access** to conviction records; c) **Time** elapsed before their record is sealed or expunged.

## 2. Publicity of conviction records

In Spain, the general principle is that the NCR is not a public register<sup>10</sup> and, as we will see, very few public agencies and no private agencies at all have access to it. This has been confirmed by the Spanish Constitutional Court (STC July 22, 1999, No. 144).

Since the first laws regulating the Register, it has been stated that the NCR is for mainly judicial purposes and is not open to private interests (namely employers)<sup>11</sup>. In general,

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<sup>3</sup> Real Decreto 95/2009 of February 6<sup>th</sup>. Although there was some juridical discussion judges did not send to the NCR sentences about misdemeanors. This will change presumably from 2010 onwards.

See Disp. Ad. 2, LO 5/2010 of June 22, which reforms the Spanish Penal Code.

<sup>4</sup> *Faltas* are criminal offences (art.13.3 Penal Code) which can not receive a direct sentence of prison (art.33.4 Penal Code).

<sup>5</sup> Administrative infractions are a broad legal category that comprises of acts that are not as serious as to be labeled as a criminal offence. It can be a traffic administrative infraction, or a public order administrative offence like consuming soft drugs in public spaces.

<sup>6</sup> Ley Enjuiciamiento Criminal LECrim (Penal Procedural Law)

<sup>7</sup> Penal Code art.22.8 and 66.5. As a rule if the person has committed a previous similar crime, the judge has to increase the sentence.

<sup>8</sup> I thank Professor Jose Cid for having called my attention upon this important aspect.

<sup>9</sup> I speak of 'criminological assumption' because one could argue that a conviction record does not play a major role in the population of ex-offenders since there are many grounds of social exclusion already.

<sup>10</sup> art.136.4 Penal Code; and art.6 Real Decreto 95/2009, February 6<sup>th</sup>

however, the legal regulation of Conviction Records has been negligible across different pre-constitutional rules.

## 2.1. Historical regulation

2.1.1. *Real Orden April 3<sup>rd</sup>, 1896* (RO) begins by stating the regulation that created the Conviction Register in 1878 did not specify who could have access to it. According to the preamble this lack of regulation has led to a situation of:

‘providing too much information to everybody, even about people who have served their sentence and therefore have *the right not to be subject to publicity about it*. (...). The Register was not created as a public office, open to all kinds of publicity. It was created to serve a legal goal: to prove the existence of a previous crime and facilitate the imposition of an aggravating circumstance (my underlining). ‘

This RO then goes on to provide detailed regulation. In summary it draws a curious distinction that has endured for a long time: if the requested person had a conviction record then the NCR would deny access to all private people and would deny issuing this information (unless the person had consented). If the person did not have a conviction record then the NCR would issue a Conviction Record Certificate, CRC (*‘Certificado de antecedentes penales’*)<sup>12</sup> to anybody that made a request. As Grosso (1983) states, the irony is that if somebody could not get the information, he assumed (rightly!) that the person had a conviction record.

2.1.2. *Real Orden December 1<sup>st</sup>, 1910*. This order sought to simplify the previous regulation, but crucially it maintained the previous distinction. Art. 4 states:

‘Certifications can be requested by a different person than the recorded subject; but if there are conviction records these will only be given with his consent. ‘

This is probably the reason why Grosso (1983:) stated that the NCR possessed until 1983 a *public* character, for if an employer were denied access to the information he could safely assume that the recorded subject had a conviction record. This situation was remedied with the reform of 1983.

### 2.1.3. *Reform of the Penal Code in 1983.*

The Penal Code stated that once convictions had expired, there would be no further certificates issued. This implied, *contrario senso*, that certificates of conviction records could be issued if the convictions had not expired (Art. 118 Penal Code).

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<sup>11</sup> The alternative of having access to criminal convictions by inspecting court records is not possible. Court records are not accessible to every citizen but just through a public agency called CENDOJ which publishes the judgments of the Appeal and Supreme Court once it has been rendered anonymous without names. Only Constitutional Court decisions are published with names. See Jacobs & Larrauri (2011). For a view of UK see Thomas/Thompson (2010)

<sup>12</sup> This is an official document issued by the Ministry of Justice stating that you do or do not have a conviction record.

The Preamble of the 1983 reform clearly states for the first time that the NCR is not public. A Conviction Record Certificate should be issued only for Judges and in ‘other cases established by the law’<sup>13</sup> (Art. 118 Penal Code).

Notably, this reform to publicize the NCR occurred shortly after Franco’s death and was likely a reaction to the extensive use of the criminal record of that era of Spain’s history.

## **2.2. Present regulation**

### *2.2.1. New Penal Code (1995).*

The New Criminal code of democracy, as it is often called, confirmed that the NCR is not a public register. Art.136.4 states:

‘The registration of conviction records in the different sections of the National Conviction Registry *will not be public*. During their validity *certificates will be issued only in the cases foreseen by Law*. Certifications requested by the Judges or Courts will be issued, independently of whether they have been cancelled or not but clearly expressing this circumstance, if applicable.’

### *2.2.2. Real Decreto 95/2009 of February 6<sup>th</sup>.*

This last regulation introduced some minor changes<sup>14</sup> but upheld the basic principle that the NCR is only accessible to judges, public prosecutors and the judicial police<sup>15</sup> (Art 5). Other cases where direct access can be granted include: Guardia Civil for gun permits; Police responsible for passport control<sup>16</sup>; and Police responsible for the entry into the country (Art.6). Besides judges, prosecutors and some police agencies, only the recorded subject may request a copy of their personal Conviction Record<sup>17</sup> (art.5).

In sum, according to the law, and to the Constitutional Court (STC July 22<sup>nd</sup>, 1999, n° 46) in Spain conviction records are not freely available to the public. They are generally treated as a private issue. There is no Megan’s Law or ‘notification law’ that requires notifying the community if an offender becomes a local resident. At most, offenders serving the final part of their sentences in the community are required to state where they live (Roldán, 2010), but this information is not made public.

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<sup>13</sup> There was never a law that said who else could have. At least, not until RD 95/2009 February 6<sup>th</sup>) that establishes some regulation.

<sup>14</sup> This new regulation has been passed also in response to pressure from victim groups regarding sexual offences. For example it creates a specific Register for Domestic Violence crimes. And this Register can be accessible also to specific governmental agencies that work with this problem. So it does create more registers and grants more access. But it is still not accessible to employers or private citizens.

<sup>15</sup> Only judicial police acting under the order of a judge for investigative purposes (in the other cases the police will just consult their own data bases which contain not convictions but other information).

<sup>16</sup> In the cases of guns and passport it requires the consent of the person who has to agree that the police will check directly their conviction record (Disposicion Adicional segunda. RD 95/2009, February 6<sup>th</sup>). If he does not agree he will presumably not get the passport or the gun license.

<sup>17</sup> Until 2009 he had to give an appropriate reason for requesting his own criminal record information; his access was not a right (Gutierrez, 2010).

Spanish penal scholars defend the practice of keeping criminal convictions out of the public domain<sup>18</sup>. Publicity is considered an additional punishment that, if pursued, should be established in the law and imposed only by a judge (legality principle). Concerns have also arisen as to how such a vast and practicably endless publication, encompassing all types of offences, may impinge upon the proportionality principle of punishment<sup>19</sup>. And finally, the fear persists that such exposure threatens the possibility of rehabilitation, making it virtually impossible to find occupation. One could conclude, based on the legal regulation of the conviction record's public profile, that in Spain these records have little impact upon the social reintegration of offenders due in part to their limited dissemination.

### 3. A SHORT DETOUR: The Culture of Control and publicity of criminal records

Garland's analysis (2001) of a new '*culture of control*' has been widely discussed regarding how it reflects upon a European legal cultural or if Europe has instead resisted the punitive turn in social attitudes towards offenders (Snacken, 2010). The issue of publicizing conviction records can be considered a case-study in how European and American sensibilities differ.

\* In Continental Europe punishment should not *name and shame* (Whitman, 2003). We can see this in the balance between free speech and privacy, in the restrictions upon publishing judgments with real names in the media or on official websites, and with the restricted dissemination of conviction records (Jacobs & Larrauri, 2011). In the European Union, a criminal conviction is considered a 'private issue' or at least '*sensitive data*' (according to the new laws of personal data protection)<sup>20</sup>.

\* This may reflect the belief that a convicted criminal should *retain all his rights* including privacy<sup>21</sup>. They are not and should not be treated as second class citizens. And any further deprivation added to his sentence should be clearly imposed by the judge.

\* Social protection is to be achieved not by publicizing conviction records but by penalties such as disqualification from a given job (von Hirsch & Wasik, 1997); a disqualification imposed by the judge only if the profession in question is related to the offence. This reflects the idea that the *proper role of legal professions* -judges/police- is to protect the public. The risk of 'vigilantism' by making criminal records public is

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<sup>18</sup> Grosso, 1983; Rebollo, 2001; Gomez Navajas, 2002; del Carpio, 2005; Arenas, 2006; Bueno Arús, 2006; Silguero, 2008; and Rallo, 2009 all hold a firm position against any publicity of criminal records. Bustos (2002) argues that providing access to individual conviction records is not against the Spanish Constitution. However, he ultimately opposes public access because he thinks that it would lead ex-offenders to hide even more and therefore avoid police control.

<sup>19</sup> Xanthaki (2008: 91) points out to the existence of a campaign in Europe defending public access to conviction records [www.forsarah.com](http://www.forsarah.com) but emphatically states: 'However, knowledge of the public would be against proportionality: the restriction of the ex-offender's rights and the danger he will be in, should the public be informed of his previous crime, cannot be said to be proportionate to the prevention of the crime that would be achieved in this instance'.

<sup>20</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995, on the protection of individuals with regard to processing of personal data and on the free movement of such data. Art.8.

<sup>21</sup> But of course privacy has a different meaning in USA. See Whitman (2004) and for the specific case of conviction records Jacobs & Larrauri (2011)

emphasized (Grijpink, 2006).

\* *Fear of crime* and the ‘salience of crime as a political issue’ (Zimring & Johnson, 2006) probably are not as pervasive in Europe<sup>22</sup>, perhaps explaining why the pressure for publicity and the requirement of checking conviction records imposed upon employers is so rare still in Spain.

\* The information of conviction records that North Americans would probably justify as required for public or ‘social protection’ is pejoratively considered ‘*curiosity*’. No academic, legal expert or judge in Continental Europe, to my knowledge, defends the need to make public for example the identity of persons serving their sentence in prison. To require this would probably be labeled as curiosity or revenge and it is still considered poor taste.

\* A *democratic penal law* is understood in different ways (Lacey, 2008). Emphasis is placed upon the role that legal professionals should play so as to protect legal safeguards concerning the offender and to oppose public petitions. This can also be seen in the significant influence legal experts have over EU drafts, which tend to be careful to protect rights and not to concede to public pressure<sup>23</sup>.

\* *Rehabilitation* remains a normative goal defended by legal scholars and politicians. For example the Spanish Constitution recognizes in art.25: ‘Punishments that consist in the deprivation of freedom should be oriented towards rehabilitation and social integration’. The dissemination of conviction records would prove an obstacle to reintegration. People would then be discriminated against on the basis of their criminal record, a goal that Spanish penitentiary law specifically seeks to avoid (art.73.2 LGP).

\* *Control of judicial power*. Values such as transparency of judicial activity and control of judicial power are hardly, if ever, discussed in the context of publicizing judgments and conviction records. They are values but these try to be accomplished by a public trial, and a public judgment<sup>24</sup>.

\* *Free Speech*. Free Speech is balanced with privacy. Journalists try to report the cases in the newspapers just with initials, except in very famous cases. But free speech is normally not used as an argument to defend the publication of lists of convicted offenders in the press or in the web<sup>25</sup>.

#### **4. Employment and conviction records**

In section two I discussed how conviction records would be a bigger obstacle for reintegration if they were more widely disseminated. The second factor I will now consider is whether conviction records are required in Spain to gain access to employment.

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<sup>22</sup> It is of course difficult to measure fear of crime in Europe. For an attempt see The Burden of Crime in the EU (2005) [www.europeansafetyobservatory.eu/euics\\_rp.htm](http://www.europeansafetyobservatory.eu/euics_rp.htm). Concerning Spain crime appears only as a 5<sup>th</sup> concern as shown in the Eurobarometer 64 (European Commission 2005). See more generally Cid & Larrauri (2009)

<sup>23</sup> I thank Matti Joutsen for this information.

<sup>24</sup> A Public trial and a Public judgment is probably regulated differently in the different countries of the European Union. So it would be interesting to study how these countries manage to keep their conviction records private.

<sup>25</sup> For a more extended argument see Jacobs & Larrauri (2011)

In what scenarios are conviction records asked for in Spain? *Orden 6 de marzo 1937* states the requirement of no conviction record when applying for positions within the Administration<sup>26</sup>, the Police or the Army<sup>27</sup>. Positions in public administration (*funcionarios públicos*) include, for example, judges, professors in public universities, teachers in public schools, and doctors in public hospitals. However, for the most part, conviction records are only required for judges<sup>28</sup>. Regarding applicants to the Police and the Army, a list with the names of the applicants is submitted to the NCR<sup>29</sup> to see if any has a conviction record.

Aside from this old regulation there is no general law; instead there are very few specific regulations<sup>30</sup> from within the private sector requiring the presentation of a conviction record certificate when applying for employment. It is difficult to assess how many jobs require a conviction record certificate<sup>31</sup>. According to Grosso (1983:163) it was almost impossible during the dictatorship (1939-1977) to apply for a job without a clean CRC<sup>32</sup>. It is difficult to state how accurate this description is since the author offers no data, only a very critical assessment of the legislation prior to the 1983 penal reform. I too have not been able to obtain any data. In an interview with the sub-director of the NCR<sup>33</sup> I was told that in 2009 there were two million petitions to the NCR, but no statistics are kept<sup>34</sup> so we cannot ascertain how many of these petitions have been made by citizens applying for a job or for other reasons (in the main, to acquire residence permit, working permit, nationality, or gun license<sup>35</sup>).

It is important to emphasize that employers do not have direct access to the National Conviction Register. The only way they can know if the applicant has a Conviction Record is to ask him to provide a CRC<sup>36</sup>. Spanish authors are critical of this practice as it indirectly puts pressure on the person applying for the job (Bueno Arus, 2006). But as a

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<sup>26</sup> In Spain approximately 3,1 million people work in the Administration. (i.e. public administration jobs).

<sup>27</sup> This includes private police, and private security.

<sup>28</sup> Art. 303 Ley Orgánica Poder Judicial. These Conviction records do not last forever. Once they are canceled (see section 5 in this paper ) they can apply again for the profession.

<sup>29</sup> I am not totally sure if police forces in the process of new applications send a list or if they can check directly in the NCR. In Catalunya it is the first option.

<sup>30</sup> For example, to be able to practice as a lawyer you have to register in a Bar which requires you to bring your conviction record certificate, or to have a taxi license in some cities, an applicant will be asked to provide a Conviction Record.

<sup>31</sup> Spanish authors criticize the incoherence of asking Conviction Records for some occupations and not for others (Grosso,1983; Bueno Arus, 2006: 98,126)

<sup>32</sup> According to Grosso (1983) not only did employers ask for a conviction record (*certificado de antecedentes penales*) but also for a certificate of good conduct.

<sup>33</sup> Mr. Carlos Uranga (General Director of the National Conviction Register). Personal Communication.

<sup>34</sup> The lack of public data in some areas begins to be a real problem in Spain which severely hinders criminological research. See <http://www.criminologia.net/noticias.html>

<sup>35</sup> The cases in which the law provides that you need a clean conviction record are specified on the Ministry of Justice's website

[http://www2.mjusticia.es/cs/Satellite/es/1200666550200/Tramite\\_C/1215326256568/Detalle.html](http://www2.mjusticia.es/cs/Satellite/es/1200666550200/Tramite_C/1215326256568/Detalle.html)

<sup>36</sup> There is no legal specific obligation of the applicant to declare that she has a conviction record. But the person can ask the Register for negative certificates (Art.17.1 RD 95/2009, February 6<sup>th</sup>). The Register will not provide information to the recorded subject if the conviction is a misdemeanor (art.17.6, RD 95/2009, February 6<sup>th</sup>).

general principle employers cannot ask for such a certificate unless the person applies for a position in which some legal regulation requires it. This general principle is stated on the website of the Ministry of Justice and it derives, presumably, from the fact that convictions are considered to be a private issue. Moreover if an employer refused to hire somebody on the grounds of a previous conviction record it could be challenged in the Courts<sup>37</sup> on the basis of discrimination<sup>38</sup>.

In summary, a conviction record is in principle only required in Spain in order to work in the Police forces or the Administration, but in general a private employer cannot ask for a conviction record. We would need some empirical research in order to see how this legal regulation is implemented. For example, maybe some large enterprises do ask applicants for conviction records certificates (even if not legally allowed<sup>39</sup>).

For now, the only thing I can ascertain is that the area where conviction records probably produce the most significant obstacle for social reintegration will be in the work permit applications of migrants. A conviction record will render both residence and work permits invalid<sup>40</sup>. The gravity of conviction records as obstacles for reintegration is therefore significantly greater for migrant populations.

To conclude this section on the impact of conviction records on access to employment in Spain I would like to express some scattered thoughts. One research study in Spain (Gutierrez & Sintas, 1994) shows employers are not necessarily against employing ex-offenders in some cases (if the offence is limited to crimes against property, if there is no evidence of recidivism, or if the subject is young and possessing specific skills)<sup>41</sup>. Other authors point out how some offenders tend not to apply for a job anticipating that having a conviction record will prove an insurmountable obstacle (Roldán, 2010), so even if conviction records are not public knowledge in Spain, it is difficult for the offender to explain where you have been, for example, the last five years of your life. There might be a difference, and different remedies, if one is really excluded or if one self-excludes.

Additionally, after reading this paper it seems that in Spain Conviction Records do not play a major role for having access to the employment market, because they are not public and so few employers ask the applicant to bring with him a conviction record certificate. Additionally we might assume that some offenders are already socially excluded and confronted with multiple obstacles to overcome to acquire a job. On the other hand, the impact of a Conviction Record may be greater for 'middle class'

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<sup>37</sup> To my knowledge there are no cases in the Spanish Courts (Julia López. Labor Law Professor. Universitat Pompeu Fabra. Personal communication.). This may be due to the fact that employers do not usually request conviction records and/or if they do they can find other reasons for not hiring the person.

<sup>38</sup> Art.17 Estatuto de los Trabajadores (Pilar Fernández. Labor Law Professor. University Valencia, Personal communication); also art. 73.2 Ley Orgánica 1/1979 September 26<sup>th</sup>, General Penitenciaria, states 'Conviction records can never be a basis for social or juridical discrimination')

<sup>39</sup> Although I have *not* found any example of this in all the enterprises I have asked in our amateur research. I thank Lorena Anton for her research assistance. I have been told that big companies do a check only for directors and presumably this check is done by private detectives. How they obtain this information which is not accessible by the NCR is unknown to me.

<sup>40</sup> Art.31.5, Art.50.2 LO 4/2000, de 11 de enero y RD 2393/2004, de 30 de diciembre.

<sup>41</sup> Their answers state that they 'would' employ. We have no research stating they actually did.



offenders, in cases where offenders lead a 'normal' professional life. In sum, we might presume conviction records to have differing impacts upon different groups of offenders. So more research is need about the real impact of conviction records to have access to a job for different group of offenders.

Last, just as a reminder, the impact of a conviction record might extend into other areas such as civic rights. In Spain, since the criminal code of 1995, offenders are not deprived of their right to vote, but they may not be elected to office<sup>42</sup>; or be selected for jury duty<sup>43</sup>.

## **5. Sealing and reintegration rituals**

### *5.1. Access to a sealed CR.*

I use the word 'sealing' to denote the process in Spain in which, after having served sentence, and following a pre-determined period of time, conviction records are 'cancelled'. This is not equivalent to an expunging of the record since CR are not erased<sup>44</sup>: judges will still be aware of the records, but according to the Penal Code (art.19.3) they are disregarded as an aggravating factor (of recidivism) and the judge should not take them into consideration when deciding to grant suspended sentences<sup>45</sup>.

Besides judges and prosecutors, only the individual person and the investigative police can have access to the NCR in Spain. When conviction records are sealed these will be unavailable regarding the recorded subject who will now be in possession of a clean CRC<sup>46</sup>. And finally, presumably they will also be unavailable to the police (who might still nevertheless have their police records).

### *5.2. Requirements to seal a CR*

In order to seal a conviction record the penal code (art.136.2 Penal Code) 47 states that the following requirements must be met: 51, 1) A period of time after having served the sentence must have elapsed (6 months, 2 years, 3 years or 5 years depending on the sentence); 2) no further crime has been committed in the interim; 3) civil compensation has been paid or the person has been declared without money.

A conviction records sealing is considered a right (art.136.1 Penal Code) and can be described as 'automatic': there is no individual assessment and the period of time after having served the sentence without committing another offence depends only on the

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<sup>42</sup> Art. 56.2 Penal Code; and art.6.2 LO 5/1985 de 19 de junio del regimen electoral general.

<sup>43</sup> Art. 9 LO 5/1995 de 22 de mayo, del tribunal del Jurado.

<sup>44</sup> In Spain this process is called 'to cancel a conviction record'. Before they could be erased, according to Real Decreto 2010/1983 de 28 de julio sobre cancelación de antecedentes penales. But the possibility of erasing them has vanished in RD 95/ 2009 february, 6<sup>th</sup> (art.19.3)

<sup>45</sup> However, judges usually grant, when all the legal requirements are met, suspended sentences in 84%. We think that maybe the 16% left is because he is aware of the existence of a previous conviction that legally should not count (see Cid & Larrauri, 2002).

<sup>46</sup> Art.25 RD 95/ 2009 February, 6<sup>th</sup>. An interesting legal discussion is if in this case the obligation to declare a conviction record includes the obligation to declare that you have a sealed conviction record, as for example art.436 LECrim in the case of expert testimony (Silva, 2010).

<sup>47</sup> See also Art.18-25, RD 95/ 2009 February, 6<sup>th</sup> art.18-25

previous offence.

There is an additional comment to be made. The period of time to seal a conviction record is short in Spain if we compare it with other European legislation (see this volume). But we should remember that, even when sealed, conviction records are never erased<sup>48</sup>.

### *5.3. The process to seal a conviction record*

A conviction record may be sealed in two different ways: The recorded subject petitions the Ministry of Justice<sup>49</sup>, or the NCR seals the record itself (art.136.1 Penal Code)<sup>50</sup>.

There are currently no statistics available as to how many petitions to seal conviction records are made each year so we are unable to determine whether sealing occur as a result of applications made by the recorded subject or automatically by the NCR. It would be interesting to know how many people have initiated this process themselves because this would give us an indicator of how burdensome they find the fact of having a conviction record.

When an application is made, the NCR asks the judge to provide a report<sup>51</sup>. The judge sends a report and the Ministry of Justice must respond to the applicant within 3 months. If the register has not answered in that time the person can assume that they have had their record sealed<sup>52</sup>.

At the same time, because of the lack of transparency in the Spanish system, it is not clear whether all conviction records actually get sealed when they are legally eligible, nor is it clear how this process of sealing works or how difficult it is to initiate.

### *5.4. Ceremonies of reintegration*

In Spain, not only are there are no rituals (e.g., Maruna, 2011) to signify the offender's successful reintegration back into civil society but worryingly, in all likelihood, the offender may not even be aware that his conviction record has been - or could have been - cancelled. Only if the recorded subject applies may he or she receive a certificate from the Ministry of Justice<sup>53</sup>.

It would definitely be worthwhile considering some small suggestions in this connection: could judges play a bigger role in the conviction record sealing process, urging the NCR

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<sup>48</sup> See Footnote 47.

<sup>49</sup> The petition costs 3,50 Euros in Spain.

<sup>50</sup> Independently if the person asks for a cancelation or the NCR does it automatically the judge will not consider the conviction record if it should have been canceled (which he will know looking at the time of the offence and the sentence or at the National Conviction Register)

<sup>51</sup> Art.19 RD 95/ 2009 February, 6<sup>th</sup>)

<sup>52</sup> This is what the law states. We have no research as how it actually works.

<sup>53</sup> If the register cancels it automatically she does not get a certificate since the NCR does not have any address. Mr. Carlos Uranga. (General Director of the National Conviction Register). Personal Communication.

to seal the records as soon as they realize that the sentence has been served and the agreed time has elapsed? Should victims have a more active involvement, for example concerning the requirement that civil compensation be paid? Would it be useful for the NCR to send a sealing note to every offender?

## 6. Conclusion

The limitations of this research may be so apparent that their highlighting may prove a somewhat redundant exercise. However, a word of warning: on this subject, there are no data, scarce academic studies, and the legal regulation is so fragmented that at times it is a mystery even to actors within the criminal justice system. From this situation we can conclude that, for now, conviction records play only a minor role in Spanish society. This is, of course, liable to change in the future if fear of crime increases and greater public pressure is exerted for access to conviction records, not to mention the growing influence of European legislation regulating the exchange of criminal records within Europe<sup>54</sup>.

The somewhat negligible role conviction records play in Spain is demonstrable by their public inaccessibility, by the fact that the jobs requiring their disclosure are limited to some professions in the Administration and the police force, and because all conviction records are sealed within five years of offenders having served their sentence (and not having committed any further offences). Nevertheless, as I have tried to show, conviction records may play a larger role than we think -- specifically in dealing with immigrants. It is wishful thinking to assume that the majority of the 2 million disclosures made in 2009 have been a result of a dramatic surge in applications only for hunting licenses.

As I have mentioned, sealing a conviction record is important not only for gaining employment, but also for civic participation and family rights. And again, if we look specifically at immigrants the impact of a conviction record also lasts longer since sealing your conviction record is no guarantee of, for example, gaining access to nationality<sup>55</sup>.

Lastly, we are unaware as to exactly how many petitions for the sealing of records are made, and of how many records are currently being sealed year on year. At least for this group of petitioners to have a clean conviction record might be important. The certificate might be the living proof that these records are sealed, and we should not undervalue the symbolic force of this 'piece of paper'. Perhaps in future research we could ask subjects whether another ritual would be of any value or, instead, if silence proves a more discreet and effective practice.

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<sup>54</sup> *Council Framework Decision 2009/315/JHA of 26 February 2009* on the organization and content of the exchange of information extracted from the criminal record between Member States This *Council Framework Decision* should be implemented by April 27, 2012.

<sup>55</sup> STS: Sala de lo Contencioso-Administrativo, Sección 6ª), 12 noviembre 2002.

## References

- Arenas, M. (2006) Protección de datos personales y sentencias del Tribunal Constitucional: A propósito de la sentencia del tribunal Constitucional 114/2006. *Revista Española de Protección de Datos*, numero 1: 235-250.
- Bueno Arus, F. (2006) *La Cancelación de Antecedentes penales*. Madrid, Thomson/Civitas.
- Bustos, R. (2002) Sobre la publicación en páginas web de listados de condenados penalmente: los casos de las listas de pedófilos, maltratadores, torturadores y errores médicos. *Revista Vasca de Administración Pública*. Enero-Abril, numero 62.
- Cid, J & Larrauri, E. (2002) *Jueces penales y penas en España. Aplicación de las penas alternativas a la privación de libertad en los juzgados de lo penal*. Tirant lo Blanch, Valencia.
- (2009) Development of crime, social change, mass media, crime policy, sanctioning practice and their impact on prison population rates in Spain. *Sistema Penal & Violência*.  
<http://revistaseletronicas.pucrs.br/ojs/index.php/sistemapenaleviolencia/issue/view/404>
- Del Carpio, V. (2005) Divulgación de antecedentes penales y protección del derecho al honor y a la intimidad. *Aranzadi Civil*, num.1/2005.
- Garland, D (2001): *The Culture of Control*. Oxford, OUP.
- Gomez Navajas, J. (2002) Listas de delincuentes: ¿pena de ‘escarnio público’? en *Estudios penales sobre violencia doméstica*. ESTUDIOS PENALES SOBRE VIOLENCIA DOMÉSTICA 5 (Carlos Aránguez Sánchez & Lorenzo Morillas Cueva, eds.). Granada.
- Grijpink (2006) ‘Criminal Records in the European Union. The Challenge of Large-scale Information Exchange’, *European journal of crime, criminal law and criminal justice*, Vol. 14, pp. 1-19.
- Grosso, M. (1983) *Los Antecedentes penales: Rehabilitación y Control Social*. Barcelona, Bosch.
- Gutierrez, A. (2010) La Protección de datos personales como derecho fundamental del imputado, ¿también en el ámbito del proceso penal?. *La Ley*. Nº 71, Mayo.
- Gutierrez ,J., Sintas, F. (1994) Actitud de los empresarios hacia la integración laboral de personas que están o han estado sometidas a medidas privativas de libertad. *Anuario de psicología jurídica*, Nº 4, pp. 137-160.
- Jacobs, J. (2006) Mass Incarceration and the proliferation of criminal records. 3 *St. Thomas Law Rev.* pags.387-420
- Jacobs, J., Larrauri, E. (2011) (forthcoming) *Are Criminal Convictions a Public Matter?: The USA and Spain*.
- Lacey, N. (2008): *The Prisoners’ Dilemma*. The Hamlyn Lectures. Cambridge, Cambridge University Press.
- Maruna, S (2011). Reentry as a Rite of Passage. *Punishment and Society*, 13(1), 1-27.
- Rallo, A. (2009) La garantía del derecho constitucional a la protección de datos personales en los órganos judiciales. *Nuevas Políticas Públicas: Anuario*

- multidisciplinar para la modernización de las Administraciones Públicas*, Nº. 5, pags. 97-116.
- Rebollo, R. (2001) La publicidad y la publicación de las listas de delincuentes. 52 Cursos de Verano de la Universidad de Cádiz 'Las nuevas tecnologías ante el Derecho Penal'. Unpublished manuscript.
- Roldan , H. (2010) El uso de la libertad condicional y su influencia en el tamaño de la población reclusa en España. *RECPC* 12-04 <http://www.criminologia.net/reic.html>
- Silguero, J. (2008) Régimen de la protección de datos en la publicación de las decisiones judiciales. *Revista española de protección de Datos*, numero 5. Madrid, Thomson/Civitas.
- Silva, J.M. (2010 forthcoming) La verdad en las declaraciones sobre pasadas condenas ¿histórica o normativa?
- Snaken, S. (2010) Resisting Punitiviness in Europe. *Theoretical Criminology*. 14:273
- Thomas, T. and Thomson, D. (2010) 'Making Offenders Visible.' *The Howard Journal*, vol 49:4.
- Uggen, U., Mamza, J., Behrens, A. (2004) 'Less than the average citizen': stigma, role transition and the civic reintegration of convicted felons, in Maruna,S. & Immarigeon,R. (eds) *After Crime and Punishment*. Cullompton, Willan.
- von Hirsh, A., and Wasik, M.(1997) 'Civil Disqualifications Attending Conviction: A suggested conceptual framework.' *Cambridge Law Journal* 56 (3): 599-626.
- Whitman, J.Q. (2003) *Harsh justice*. Oxford, Oxford University Press.
- (2004) The Two Western Cultures of privacy: Dignity versus Liberty. 113 *Yale L.J.* 1151.
- Xanthaki, A. (2008): 'The establishment of a European criminal record: human rights considerations', in Stefanou, C. and Xanthaki, H. (eds) *Towards a European Criminal Record*. Cambridge, Cambridge University Press.
- Zimring, F. and Johnson , D. (2006) 'Public Opinion and the Governance of Punishment in Democratic Political Systems.' *The Annals of the American Academy of Political and Social Science*. 605:265.