HUMAN RIGHTS AND CRIMINAL DOGMATIC

Luis Fernando Niño[1]

Abstract
The advances aimed at the rationalization and humanization of the penal system decline when a period of symbolic criminal law occurs, such as that experienced in Argentina so far in the 21st century, which resulted in fifteen reforms of the substantive penal system in just over three years; and culminated in a criminal law's expansion main role, between 2015 and 2019, in line with the neoliberal policy of the government at that time. Contrary to the constitutional reform carried out in Argentina in 1994, which incorporated the main Human Rights Treaties as the supreme law of the Nation, the penal system, fully considered, today appears to be more inhuman and more repressive than before.

Keywords
Symbolic criminal law. Criminal justice system. Criminal Dogmatic.

Summary
1.Introduction. 2. Critical approach of the phenomenon of expansion of criminal law. 3. Reform of criminal and procedural legislations. 4. Final considerations

1. Introduction

Progress towards the rationalization and humanization of the criminal justice system declines when there is a period of excessive symbolic penalize, such as the one experienced in Argentina so far in the 21st century, which resulted in fifteen reforms of the substantive criminal law in just over three years; and culminated in a punitive

[1] Full Professor. Buenos Aires University – AR.

hyperbole, between 2015 and 2019, in line with the neoliberal policy of the government of the time.

Because of this, obviously, incarceration rates increased, tripling in the last twenty-five years, according to the report of the National Directorate of Criminal Policy, which collects data up to 2021.

Four factors led to this undesirable phenomenon. Firstly, the effective application of the prison sentence, despite the low level of harm caused by the crime committed; secondly, the repeal of a large part of the progressive regime of sentencing, which results in the full term of imprisonment; thirdly, the application of extremely high sentences, of up to fifty years of imprisonment; and finally, the conversion of life imprisonment, previously eligible for parole after a certain period of imprisonment, into sentences without the material possibility of release[2] .

In short: contrary to the constitutional reform carried out in Argentina in 1994, which incorporated the main Human Rights Treaties as the supreme law of the Nation, the penal system, taken as a whole, is today more inhuman and repressive than ever before.

The undesirable phenomenon of prisoners without conviction has been succeeded by that of convicts without trial, due to the proliferation of *plea bargaining* imported from the United States, improperly called "abbreviated trial", whose unconstitutionality I have declared, as a judge, on countless occasions, And to the

[2] GUAL; SANZ 2023,111-136.

overcrowded prisons is added today, and as a direct consequence, a growing number of people housed in police stations, especially in the Province of Buenos Aires and in the Autonomous City, without access to basic health and hygiene rights.

Such a dramatic picture led organizations such as the "Comisión Provincial por la Memoria", made up of personalities from different areas, among them Nobel Peace Prize winner Adolfo Pérez Esquivel, to maintain that *"(t)he prison system of the Argentine Republic constitutes, to this day, the main area of application of torture and systematic violation of human rights in our country*", a state of affairs that "*was shaped by the orientation, sustained for more than two decades, of a policy of security and criminal prosecution based on selective imprisonment: the capture of the poor sectors that are part of the weakest chains of* crime"[3] .

Argentina is not an isolated case. It is undeniable that we have witnessed, on a planetary scale, since the last decades of the 20th century, a disproportionate growth of the prison population. And, based on the crude statistics, it is a truism to speak of *prison overcrowding* and *hyper-incarceration*, as warned by the São Paulo magistrate and professor Marcelo Semer, in his recent doctoral thesis, "*Sentenciando Tráfico: o Papel dos Juízes no Grande Encarceramento*", when describing this trend in Brazil and in the world[4] .

Therefore, it is valid -first of all- to investigate the causes of this hypertrophy of the penal system in the most diverse latitudes, and

[3] Available at: https://www.comisionporlamemoria.org/datosabiertos/carceles
[4] SEMER 2019, 19.

then to try to discern whether it is possible -and to what extent- to contribute from the penal dogmatic to alleviate the violence emerging from this situation.

2. Critical approach of the phenomenon of the expansion of criminal law

The meticulous approach of contemporary sociologists and criminologists to the phenomenon of the expansion of criminal law, which began in the 1970s and has continued up to the present, with its aftermath of prisons full of human beings, has provided various explanations for its occurrence.

New York University professor David Garland has been able to describe, from his work "The Culture of Control"[5] signs such as the decline of the ideal of rehabilitation, the resurgence of criminal retributionism, the emotional and populist tone of Criminal Policy, with the correlative exacerbation of the fear of crime and the centrality of the victim; as well as the commercialization of crime control and the way to manage it efficiently.

Other authors, such as sociologist Christian Laval, professor at the University of Paris X Nanterre and philosopher Pierre Dardot, co-authors of works such as "*The New Reason for the* World"[6] , "*Common*" and "*The Nightmare that Never Ends*" also agree in highlighting the emergence of a rationality aimed at structuring and organizing the actions of rulers and the conduct of the governed in

[5] GARLAND 2001.

[6] LAVAL; DARDOT, 2013; LAVAL; DARDOT, 2015; LAVAL; DARDOT, 2017.

order to promote the prerogatives of capital and the promotion of the market.

For his part, with direct reference to the criminal and criminological field, Antoine Garapon, Secretary General of the "Institut des Hautes Etudes sur la Justice", based in Paris, warns us, in his work "La raison du Petit Etat"[7] , of judicial systems governed by cost control, *performance* indicators, merit-based remuneration for judges, the generalization of real-time processing of criminal cases, the proliferation of plea bargaining as a mechanism for the conclusion of trials - as we have already pointed out here - the generalization of settlement, and the introduction of security retention, as we have already mentioned here, the generalization of real-time processing of criminal cases, the proliferation of *plea bargaining* as a mechanism for the conclusion of trials - as we have already pointed out here -, the generalization of settlement, and the introduction of security detention for prisoners who, at the end of their sentence, present a risk of recidivism due to a serious personality disorder.

Innovations, all of them, that move us away from democratic and liberal Criminal Law, and that abandon the complexity of criminological theories to limit themselves to managing a reality that is no longer attempted to be solved, but is barely controlled, based on diffuse calculations of danger for potential victims.

In such a way, having become a "*risk manager*", the judge is less encouraged to assess the seriousness of the action and the sanction suitable for the reintegration of the accused than to evaluate his

[7] GARAPON 2010.

chances of recidivism, as Garapon himself denounces in another of his lucid works on the topic[8] .

Jonathan Simon, Associate Dean of the Jurisprudence and Social Policy Program at the University of Berkeley Law School, author of the book "*Governing through* Crime"[9] , points -more generically- to the stellar role that the logic of crime has assumed in American society, present in political relations, electoral campaigns and budgetary priorities, legitimizing actors in various institutional spheres and justifying interventions in the most diverse areas. And it places fear as a more effective cause than the crime statistics themselves, a feeling that imprisonment brings with it the illusion of total security for potential victims and neutralization of the potential offender.

This "*government through crime*", far from pursuing the classic aims of intimidating, persuading, or rehabilitating, becomes mere systematic control of risk groups by segregating their members from social life. And, moreover, at the lowest possible cost, as pointed out by another renowned criminologist, the University of Sao Paulo professor Maurício Stegemann Dieter, in his work "*Política Criminal Atuarial – A criminologia no fim da história* "[10] .

It is possible to link Simon's vision with another, poured a quarter of a century earlier by the eminent criminologist Stanley Cohen, who died in 2013. Cohen spoke of "moral *panic*"[11] , to

[8] GARAPON 2008, 215-234.
[9] SIMON 2012.
[10] STEGEMANN DIETER 2023.
[11] COHEN 2017.

characterize the reaction of a group of people - or an entire community - based on the perception - false or exaggerated - of some cultural or group behavior, often of a minority group or subculture, visualized as dangerously deviant and representing a threat to society.

Löic Wacquant, professor and researcher at the University of Berkeley, California, and at the Center for European Sociology in Paris, and author of works such as "*The Prisons of* Misery"[12] , "*Punishing the Poor - The New Management of Misery in the* United States"[13] and "*The Two Faces of a* Ghetto"[14] , The growth of the penal state should be understood as linked to the expansion of neoliberal policies, to the detriment of the so-called "welfare state"; In such a way that the significant reduction of social expenditures corresponds to the vertiginous growth of police and penitentiary costs. He completes his analysis by taking into account other factors, such as the tendency to criminalize minor infractions, the proliferation of technological devices and private security systems, the dissemination of an alarmist discourse and the "*war on crime*" by the mass media, the valorization of the victim and the stigmatization of those who are marginalized from the system, forming a framework prone to legislative and judicial hardening and tending to replace the socializing ideal of the custodial sentence with the more modest aim of managing the overpopulation resulting from this state of affairs.

[12] WACQUANT 2004.
[13] WACQUANT 2010.
[14] WACQUANT 2010.

Wacquant points out, in the preface to his book "*The Prisons of Misery*", that -what he calls- the new liberal criminality is more seductive and more disastrous when it is applied in countries affected by strong inequalities in living conditions and opportunities, and devoid of democratic tradition.

And years later, in the ninth chapter of his work "The Two Faces of a Ghetto", Wacquant refers specifically to Argentina and Brazil, warning (I quote) if "*in any society it is a very bad policy to use the criminal justice system as an instrument to solve social problems, because it does not solve them*", in one that, "in *addition, has a tradition of authoritarian State (linked to the agrarian history, the history of the formation of the working classes in the cities and the period of the military dictatorship), this policy is an invitation to social disaster, an invitation to create a social order in fundamental contradiction with the idea of a democratic society....a dictatorship over the poor to respect another dictatorship, that of the market*"[15] .

3. Reform of the criminal and procedural legislations.

After successive stages of reform of the criminal and procedural legislations of the different countries in Latin America, it can be concluded that the resulting new texts share common features with the questionable political-criminal line investigated and proven by so many social scientists.

And it is reasonable to examine contemporary criminal doctrine in an attempt to establish whether it is possible to identify,

[15] WACQUANT 2004.

in the contributions of some authors, the keys to what later translates into normative expressions of a criminal law prone to the exclusion of marginalized sectors of the economic and social apparatus and - in parallel - to the naturalization of unlawful behavior by subjects operating in the most privileged segments of society as a whole.

In a work with a complicated title but of impeccable expository clarity, "Aporophobia and plutophilia"[16] , that is, "phobia of poor or disadvantaged people and fondness or love for the rich", another esteemed colleague and friend, Professor Emeritus of the University of Cadiz Juan Terradillos Basoco, identifies three ideological currents that provide the basis for a two-faced Criminal Policy, tolerant of illicit acts, Juan Terradillos Basoco, professor emeritus of the University of Cadiz, rightly identifies three ideological currents that provide the basis for a two-faced Criminal Policy, tolerant of the wrongdoings of the powerful and aimed at reinforcing the situation of social exclusion of the most dispossessed. These are functionalism, managerialism and criminal punitivism[17].

Regarding the first of these currents, I have had the opportunity to express my opinion in a work co-authored with Chilean jurist and magistrate Jean-Pierre Matus Acuña, in which, from the very title, we warned about the risks of cultural vassalage in Latin American criminal doctrine[18] .

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[16] TERRADILLOS BASOCO 2020.
[17] TERRADILLOS BASOCO 2020. 59 *et seq.*
[18] NIÑO; MATUS ACUÑA 2016.

It is worth recalling here the differences that Bonn professor Günther Jakobs postulates between citizens and enemies, between persons and individuals. He himself takes care to point out that it is not a matter of "contrasting two isolated spheres of criminal law, but of describing two poles of a single world"[19] , where a distinction is made between the citizen, even one who, by his conduct, has damaged the validity of the norm, but offers a guarantee that he will conduct himself, broadly speaking, "as a person who acts in fidelity to the legal system"[20] , and that of the mere individual whose expectation of personal behavior is defrauded in a lasting way, making him worthy of "*a legislation....of struggle"* (sic)"[21] . To conclude by stating that "an individual who does not admit to being forced to enter into a state of citizenship cannot participate in the benefits of the concept of personhood"[22] . This statement clearly contradicts the main international human rights documents, starting with Article 2 of the Universal Declaration of the United Nations Organization of 1948, and allows him to maintain that it is appropriate, with respect to such "individuals", to advance the criminal punitivism, in order to "*ensure against future acts, not to punish the acts* committed"[23] , which implies, needless to say, a clear transgression of the principle of legality.

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[19] JAKOBS 2003, 22.
[20] JAKOBS 2003, 26.
[21] JAKOBS 2003, 38 *et seq.*
[22] JAKOBS 2003, 40.
[23] JAKOBS 2003, 40.

Strictly speaking, even a few years before the publication of the opuscule on the Criminal Law of the Enemy, after asking himself about "*what are the minimum conditions that must be fulfilled for someone to be a person*", Jakobs himself responded with an example that clarifies for us who would be the target of his disqualification, in the following terms: *"whoever - without this being imputable to him - has no possibility of acquiring sufficient means of subsistence, will hardly be able to respect as a person the one who defends his opulence, but will start a struggle for* recognition"[24]. Obviously, from this point on, he would have no qualms in targeting that neutralizing measure of future events, aimed at the poor or the indigent, transformed, according to this vision, into dangerous enemies.

At the other pole of the world described by the Bonn emeritus, Jesús-María Silva Sánchez, professor at the Pompeu Fabra University of Barcelona, who was able to theorize on the topic, relativizing the categorical concepts of the German professor[25] , shows himself, more recently, inclined to leniency with respect to a white-collar criminal, specifically, an economic operator who enters into the web of corruption in a structurally flawed context, either by defect of the local law or by custom. I quote: "(i)*n structurally corrupt environments, the open question is whether it is enforceable for an economic agent to refrain from entering the game. The answer* - Silva Sánchez concludes - *should probably be* negative"[26] (end of quote).

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[24] JAKOBS 1996, 40

[25] SILVA SÁNCHEZ 2007.

[26] SILVA SÁNCHEZ 2018, 64.

This condescension is particularly notable for a form of high economic crime, if it is noted that the same Professor of Barcelona, in order to keep petty theft committed in supermarkets and other self-service stores within Criminal Law, that is, as a crime, resorts to "*the introduction of the argument related to the ethical-social dimension of the offense of* theft*, beyond the material damage it produces*".[27]

Of course, both academics protect their theses behind what appears to be a simple and aseptic presentation of what it is. Thus, Jakobs refers that "*it is not about the Criminal Law of a desirable society, but about the Criminal Law of the society that has generated the legal system*", while Silva Sánchez, more directly, explains that *"the mission of Criminal Law is not to change the terms of what is socially adequate, but to protect the status* quo"[28] .

Let us continue, I have already alluded here to managerialism, also indicated by Terradillos Basoco as another ideological basis on which the current situation in contemporary penal systems is based, when referring to the research and developments of Wacquant and Garapon.

In any case, it is appropriate to criticize the prevailing technocratic conception since the rise of neoliberal ideology, an ideology that, in the matter that concerns us, has displaced the policies of rehabilitation and readaptation of convicted persons, beyond the subsistence of such purposes in the Constitutions and laws, based on

[27] SILVA SÁNCHEZ 2005, 338 *et seq.*
[28] SILVA SÁNCHEZ 2005

what the Norwegian jurist Nils Christie rightly called, three decades ago, "the crime control industry"[29] .

A control that began to be exercised over risk groups, with an exacerbation of the main role of police agencies, oriented to satisfy the demands of citizen security, encouraged by the mass media. A control that falls mostly on contraventions and expressions of micro-criminality, and that saturates the judicial courts with those unfortunates that Professor Jakobs has described as individuals devoid of personality.

Finally, the policies of "zero tolerance" and "law and order", expanded from North to South, complete -with their criminal punitivist trait- the ideological elements that shelter and sustain the Criminal Policy of our cultural universe, with the balance of scandalous penitentiary overpopulation that we recalled at the beginning and the consequent violation of the most elementary Human Rights.

The time has come, then, to analyze what to do, from the modest position of scholars of Criminal Law, of men and women of doctrine in this field, in the face of an exorbitant criminal system, which fails to comply, in its sinister facticity, with the normative mandates of the highest hierarchy of any of our legal systems. In other words, how to give course to a criminal Dogmatic that neutralizes, to the greatest extent possible, the irrationality in the application of the punitive power of the State.

[29] CHRISTIE 1993.

I would like to make clear to those listening to me a personal position related to this topic. In the first five years of the 1980s, I participated as secretary of the research on "*Penal Systems and Human Rights*", organized by the Inter-American Institute of Human Rights, an important five-year investigation that included trips to various countries in the area, visiting police stations, judicial headquarters and prisons, as well as the preparation of questionnaires to be answered by fellow jurists and criminologists from all over the Ibero-American continent, and at the end of which a "Final Report" was published[30] , in whose drafting I also had the honor of actively collaborating; It is a report that today preserves almost intact the validity of its recommendations. At the end of that transcendental experience, the conviction was strengthened in me that Criminal Law, as a doctrine, does not have the function of legitimizing punitive power but to fight to keep it within the limits imposed by a social and democratic Rule of Law.

It is a matter of capturing all the norms in force, starting with those of the respective National Constitution and all those included in International Human Rights Law, and continuing with all the criminal laws, codified and - where appropriate - complementary ones. Once they have been gathered, to analyze exegetically the totality of such texts, that is to say, to interpret them, with due respect to the rank that each one of those norms occupies in the legal system; to construct more general concepts, which should function as filters of the punitive power, and -in such a way- contribute to the

[30] AAVV 1986.

elaboration of a Theory of Crime and Punishment addressed to judges, magistrates and other operators of the judicial apparatus. The goal is to contribute to a rational, coherent, and predictable application of the positive law in force in each case. In short, the aim is to draw up a political program for the exercise of legal power within the framework of the rule of law. This task also serves to train future operators, who are being prepared in universities. And it can be useful, and it would be desirable that it be so, so that the legislator and his collaborators notice, for example, the existence of contradictions between the letter of a criminal law and a precept of supreme hierarchy -constitutional or conventional- and hasten to move the relevant amendment; or be persuaded of the obscure or abstruse nature of a term included in some legal text and correct it; or rectify statements that, if not corrected, will become a puzzle for doctrine and jurisprudence.

In this sense, it is worth quoting here an admonition, taken from the essay entitled "Common", by two authors already cited, Christian Laval and Pierre Dardot. They state, verbatim, that "*the worst thing one can do is to leave the law in the hands of those whose profession it is to dictate it. The system of rules is always a field where conflicts are at stake and law is, as such, a field of* struggle"[31] .

There are precedents of Latin American jurists who undertook the construction of a criminal legal dogmatic applicable to our legal environment.

In the last half century, a healthy evolution of the theoretical framework of criminal law has been developing in the national

[31] LAVAL; DARDOT 2017.

universities of Argentina and in criminal doctrine in general, driven by figures such as Eugenio Raúl Zaffaroni.

To him we owe the merit of having rescued the realism proper to Hans Welzel's thesis of the logical-objective structures[32] , excluding, in parallel, the three clearly questionable topics of the finalist doctrine of action, namely: firstly, the confusion between Ethics and Law, which led the Bonn Professor to maintain that *"(t)he mission of Criminal Law consists in the protection of elementary values of conscience, of an ethical-social character, and only by inclusion the protection of* particular *legal goods*"[33] ; secondly, the diffuse notion of "*social appropriateness of the* conduct"[34] , replaced by Zaffaroni by adding, in the typicity line, the analysis of conglobation, and finally, the concept of "*culpability of the perpetrator*", used by that distinguished German author when basing the culpability of unconscious guilt[35] .

In short, a Theory of Crime with a plausible ius-philosophical basis was thus reworked, according to which the existence of a world with ontic orders -the physical, biological, political, economic, and legal- is recognized, the fundamental logical-real structure in the latter being that which recognizes the human being as an entity with moral autonomy. And the three corrections introduced by the emeritus of Buenos Aires place such theoretical construction in line with the constitutional and conventional mandates. For one thing,

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[32] WELZEL 1962, 39.
[33] WELZEL 1987, 15.
[34] WELZEL 1987, 83 *et seq.*
[35] WELZEL 1987, *211 et seq.*

they place it at the antipodes of neo-Kantianism, which conceives the world as ordered according to values, and which, to the question of what values are, answers that values are not, but that they are worth, giving room -in short- to the imposition, by very different real factors of power, of certain ordering values[36] .

The most current version of this theoretical construction appears in the work "Lineamientos de Derecho Penal", published in 2020[37] .

Perhaps some observers might consider this updating of the stratified theory of crime to be outdated, refined, and revalued, this sort of finalism typical of a marginal legal and criminological realism.

In this regard, I would like to propose that we abandon the tendency to uncritically incorporate into our theoretical baggage everything -apparently- new that appears in the cloisters of the Old Continent. As Zaffaroni himself points out, in a book presented this same month and year in Buenos Aires, (I quote) *"(t)he fashions of imported criminal dogmatics seem to impose on our America the need to dress up in the latest attire taken from our customs, since everything previous is filed away in a store of costumes for* period *balls*"[38] (end of quote).

And it is worth clarifying this point. It is not a matter of settling for a provincial or regionalist vision, but of submitting the various doctrinal trends to a critical analysis and, most especially, reflecting

[36] ZAFFARONI 2023, 32.
[37] ZAFFARONI 2020.
[38] ZAFFARONI 2023.

on their merit in view of their possible application to social realities different from those existing in the countries in which they originate.

The excessive respect for infra-constitutional laws and the fear of judges in our region to assume the diffuse control of constitutionality of such laws may well be because our doctrine is based on classic works of European authors, a continent in which such control of normative hierarchy became generalized only after the last post-war period. The Constitution of the Italian Republic came into force in 1948, and that of the Federal Republic of Germany in 1949.

At the opposite extreme to the tendency of many Latin American jurists, eager to import novelties produced in the Northern Hemisphere, the German professor Kai Ambos, of the University of Göttingen, denounces precisely the "presumptuous provincialism" of German Dogmatics, a defect that he considers necessary to overcome.[39]

Perhaps it is this presumptuous provincialism that leads some authors, as Zaffaroni also points out, "*to underestimate culpability, to the point of leaving the crime as an objective wrong, to deny subjective typicality because they consider it impossible to separate it from the objective, to "normativism" to the point of inventing a malice without a 'psychic element', to totally or partially merge guilt into unlawfulness, to minimize the importance of the result, to obviate offensiveness and, above all, to reduce or omit the treatment of punishment in general works*". [40]

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[39] AMBOS 2016, 4-30.

[40] ZAFFARONI 2023

It is not useless to recall that it was Rudolf von Ihering who, from Private Law, succeeded in separating unlawfulness from culpability[41] , initiating a legal exegesis based on decomposing the elements or dogmas and then integrating them into a system. A distinction that, transferred to German criminal doctrine, was later attacked by Friedrich Schaffstein, of the Kiel School, clearly functional to Nazism, while another well-known member of that School, Georg Dahm, attacked the differentiation between typicality and unlawfulness.

The conception of an action necessarily provided with some purpose was confronted with the naive realism of Liszt and Beling's scheme, with its rudimentary parallelism of innervation and muscular distension when distinguishing between action and omission, but also with neo-Kantianism, which conceived a voluntary action without purpose, under the pretext that law can use its own concepts for its theory. Such a scheme is not "naturalistic" either, in the pejorative sense with which the incorporation of data from reality in a theoretical development of our branch of law is scorned, since elements that will be analyzed in the specific line of culpability are left out of the substantive segment of the action. But what is prevented, by considering the conduct as a voluntary and final human act, is that the disvalue of the unlawfulness is made to fall on a mere causal process.

Abandoning the stratified scheme of crime is risky: merging personal unjustness with culpability brings us closer to the type of

[41] JHERING 2013.

perpetrator; dispensing with the psychic element in malice blurs its limits and leads to the old presumption of such element; resorting to social roles for objective imputation tinges the approach with ethics; and understanding that the citizen has a duty to cooperate with the Law, as postulated by Michael Pawlik[42] , a disciple of Günther Jakobs, comes close to a claim of fidelity that recalls the conceptions of the "Kiel school".

If we add to this the idea that punishment has as its exclusive function the ratification of the validity of the communicatively violated norm, we return to Hegel: punishment implies the affirmation of the right and is justified by itself[43] .

Perhaps, in another model of state, such returns would not be uncomfortable, although they seem to assume that the rule of law is a "*being*" to be protected in its safety, instead of visualizing it as a dynamic and permanent "*must be*". But in those of our continent, where iniquitous social, economic and cultural inequalities are evident, it is not appropriate to abandon oneself to logical games or extreme standardization, but to maintain the filters derived from the stratified theory, in an attempt to contain the punitive power, and to make use of the delimiting principles of that power, today present, as positive law of supreme hierarchy, in the Constitutions of our region and in the Treaties that make up the International Human Rights Law.

Latin American jurists dedicated to criminal doctrine, we retain a power that is not minor, that of discourse, aimed at guiding

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[42] PAWLIK 2016.

[43] HEGEL 2004, 102.

the power of control of judges and other legal operators, both with respect to the legislative material in force and the activity of police forces and other security forces; as well as to provide training to those who are prepared in the university cloisters. In other words, to provide systems of interpretation that incorporate data from reality, to provide maximum effectiveness to those delimiting principles.

It is not possible to ignore a panorama full of prisoners without convictions -and, for some time now, of those sentenced without due trial-, detained -some and others- in conditions of inhumanity and correlative psychophysical deterioration. Nor should we ignore the fact that, in many cases, the control of intramurals is exercised by gangs of prisoners fighting for hegemony, with the precipitation of bloody riots.

In this regard, I would like to point out that, as a judge of the National Chamber of Cassation in Criminal and Correctional Matters of the Federal Capital of Argentina, exercising the diffuse control of constitutionality of laws, I have formed a majority with my colleague Mario Magariños, declaring the unconstitutionality of the institute of recidivism provided in the Argentine Criminal Code, based on numerous conventional and constitutional reasons, including the violation of *ne bis in idem*, but to which I added the following: *"although in an exercise of abstraction we were to leave aside all the provisions of maximum normative hierarchy mentioned above, in the face of an individual who returns to crime, after serving a sentence in one of our prisons, under the sordid global framework that so many national and foreign entities have been highlighting year after year, it is worth questioning, with absolute circumspection, whether it is ethically and legally admissible to automatically award him disdain or*

lack of feelings, (which has been the argument of the judges of the Supreme Court of my country to validate such an institute) *after such existential experience, and to put in those subjective states the pretext of greater punishment for a supposedly greater guilt"*[44] .

4. Final considerations

To serve justice, it is not enough to know the law or to update one's knowledge of foreign doctrine. It requires a civic courage that becomes particularly relevant in societies fragmented by the disparity in the distribution of wealth and opportunities, or by very specific episodes in their history, or by both causes simultaneously.

A courage that allows judges, prosecutors, and defenders to overcome the moral panic that media coverage and intra and extra-systemic pressures create. It should lead them to give prevalence to the principles that delimit punitive power, which have supreme normative hierarchy. And to protect them from incurring in an authentic denialism, when they are in the presence of a massive violation of the rights to life, to physical and moral integrity and to the security of every person, legal goods that the Constitution they swore to defend orders them to recognize and safeguard.

[44] Available at https://www.pensamientopenal.com.ar/fallos/42511-reincidencia-inconstitucionalidad

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