Crime and criminal justice in Latin America

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ABSTRACT

After a presentation of indicators that allow assessing the degree of democratization of the criminal justice system in the context of democratization process in Latin America, this article points out the discrepancy existing in that domain, in the several instances that make up the justice system, from criminal legislation to the prison system. Examining the specific situation of Brazil and Argentina, problems in the functioning of institutions responsible by crime as well as the increase in crime control are pointed out as factors that cause a growing loss of legitimacy for the system, which is unable to justify its high degree of selectivity and authoritarianism. Some efforts under way to approach that phenomenon are listed. Finally, a few alternatives for institutional improvement are presented, among which the action of social scientists by producing research and analyses, as a crucial instrument to enlarge institutional ability to deal with current social conflict on democratic bases.

Key words: Criminal justice; Democracy; Crime; Social control; Criminal policy.

1. The Redemocratization Process and the Criminal System

For Latin America, the 1980s represented the transition from authoritarian political systems to democratically elected governments, with deep implications for the system of criminal justice. This work is intended to establish parameters to verify the effectiveness of the process of redemocratization, considering the administration of criminal justice as one of the most relevant sectors to characterize a political system as democratic.[1]

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[1] In the same vein, PRILLAMAN, William (2000). According to the author, *"a democratic regime with a persistently weak judicial system will also have trouble building popular support for the rule of law. James Holston and Teresa P. R. Caldeira have noted that the basic concept of citizenship so central to a democracy at a minimum entails a sense of fairness, legality, access, and universality. In a country in which significant portions of the population view the legal system as inaccessible and unreliable, individuals may experience what Guillermo O'Donnell has referred to as "incomplete citizenship" or "low-intensity citizenship", an arrangement in which basic freedoms and liberties are perpetually insecure or even trampled, and popular commitment to the regime is half-hearted, at best. At issue ultimately is the quality and depth of the regime. As Alberto Binder has bluntly stated, "If the people do not trust the administration of justice, the democratization process cannot be profound."*
"Despite the obvious need for a strong judiciary in Latin America, our understanding of what constitutes a healthy judicial system is hampered by three factors: an absence of literature examining the

In face of the difficulties to define democracy, especially when measuring a regime's democratic development, José María Rico adopts the criterion of real democracy ("*democracy in actual regimes*") as opposed to democracy as an ideal, according to the distinction formulated by Robert Dahl. The former is characterized by the typical institutions of "*liberal democracies*", such as: rule of Law, pluralism in politics and ideas, freedom of expression and association, universal suffrage, delegation of power to freely elected officials, separation of powers and the existence of a constitutional and legal framework to govern the action of public servants and mechanisms of control between state power (RICO, 1997, p. 37).

In the same vein, Guillermo O'DONNELL sustains that

country X is a political democracy or poliarchy: it holds regularly programmed competitive elections; individuals can freely create or take part in organizations, including political parties; there is freedom of expression, including a reasonably free press and so on. Country X, however, is harmed by vast poverty and deep inequality. Authors who agree with a strictly political, basically Shumpeterian definition would argue that while X's socioeconomic characteristics might be regrettable, that country certainly belongs to the domain of democracies. That is a vision of democracy as a political regime, regardless of the characteristics of the State and society. Other authors, in turn, see democracy as a systemic attribute, which depends upon the existence of a significant degree of socioeconomic equality, and/or a general social and political organization oriented to the realization of such equality. Those authors would dismiss country X as "not truly" democratic, or a "window dressing" democracy.

Contemporary literature produced plenty of definitions of democracy. If the options were limited to the two I have just sketched, I would choose the former. The definition that combines democracy with a substantial degree of justice or social equality is not useful in terms of analysis. Besides, it is dangerous, since it tends to condemn any existing democracy and therefore it favors authoritarianism – in Latin America, we learned that by our own efforts in the 1960s and 1970s (O'DONNELL, 2000, p. 338).

However, that same author recognizes that, if in country X there is a widespread condition of extreme poverty (which affects many more capacities than those based only on economic resources), its citizens are actually deprived of the possibility to exercise their autonomy, except perhaps in spheres directly related to their survival:

If deprivation of capacities resulting from extreme poverty means that many people face huge difficulties to exercise their autonomy in several spheres of their lives, there seems to be something wrong, both in moral and empirical terms, with the proposition that democracy has nothing to do with those socially determined obstacles. In fact, saying that it has nothing to do is too strong: the authors that accept a regime-based definition often warn that if those miseries are not faced somehow, democracy, even in a strict definition, is in danger. That is a practical argument, subject to empirical tests that actually show that poorer and/or more unequal societies are less likely to have lasting poliarchies (O'DONNELL, 2000, p. 340-341).

Nowadays, the indicator most often used to measure the level of a democracy is the protection of human rights, among them human freedom (the physical integrity of individuals, the rule of Law, freedom of expression, political participation, and equality of opportunity) and political rights and civil liberties. Some of those rights are closely related to the administration of justice, such as equality before the Law, access to an impartial and independent judiciary power, protection against arbitrary arrests and torture, mechanisms of control against corruption.

Democratic transition is the process that comprises political liberalization, the increase in political pluralism, tolerance to opposition, and the respect for public liberties of the regime and its

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subject, the lack of an agreed-upon framework for measuring what constitutes a successful judicial reform, and several core assumptions of reformers that, when examined in closer detail and measured against specific case studies, have consistently proven to be inadequate, insufficient, and in some cases counterproductive." (p. 3)

democratization, as well as direct and/or indirect popular participation in decision making. Such process is not linear and can be impaired by remains of the previous regime. In the case of Latin America, in the late 1970s and early 1980s, there were no abrupt changes but rather an exhaustion of the authoritarian regimes. The transition was determined by internal factors whose course was established by dominant elites represented by military authorities – general amnesty – and external ones, where foreign political and cultural influences played a role, especially by the USA.

The elements that make up the system of criminal justice and the principles that sustain it are distinct. The former include the rules that govern the establishment of forbidden conducts and the institutions that promulgate, reform, and cancel them (the Congress, the Presidency, the Ministry of Justice), as well as the agencies in charge of preventive control, investigation, trial, and execution of punishments applicable to the practice of criminalized conducts (the police, courts of justice, the prison system). The principles are those of accessibility of justice, independence of the Judiciary, legality, accountability, humanity, efficiency and moderation. All of them are related to the due process of Law[2]. Therefore, procedural criminal Law as well as constitutional norms constitute, under the Rule of Law, instruments to minimize and control the State's punitive power in order to ascertain citizen's fundamental rights against arbitrariness and abuse in the use of force by the State.

By and large, the main finding about the situation of criminal justice in Latin America within the context of democratic transition is the large gap between the formal and the real situation regarding principles, between what should be and what actually is. As for accessibility, there is disinformation about laws and procedures as well as the means to pursue one's rights. There is also loss of confidence because of the negative image of the Judiciary created by corruption, tardiness, and inefficiency. As for independence, legal decisions are often subject to external pressures (period to exert functions, variable and low pay, death threats, dismissal from positions) and internal (higher instances). Judges' impartiality and equity are targeted by pressures, threats and corruption; suspension of legal guarantees; vague expressions in codes that favor authoritarianism; uncertainty about the precise moment when the process begins; deficiencies of defense systems. As for transparency, deficiencies are found in control of and information about activities as well as inexistence of external control. As O'Donnell reminds,

> there is a longstanding tradition in Latin America of ignoring the law or, when abiding for it, distorting it to favor the powerful or repressing or restraining the weak. When an infamous businessman said in Argentina that "being powerful is having [legal] impunity", he expressed a supposedly widespread feeling that, first, voluntarily following the law is something that just idiots do and second, begin subject to the law does not mean enjoying the rights in vigor, but rather a sure signal of social weakness. That is particularly true and dangerous in conflicts that might trigger the violence of the State or powerful private actors, but an attentive eye can also see it in the obstinate refusal by the powerful to subject themselves to regular administrative procedures, not to speak of the scandalous criminal impunity that they usually enjoy (O'DONNELL, 2000, p. 346).

During the recent process of democratic transition in the Continent, some legislative reforms have taken place in order to value the fundamental principles, to reduce the action of the Armed Forces in domestic politics, to transform the police and to adjust the administration of justice to the needs and realities of each country, thus abolishing and modifying provisions of authoritarian regimes. In some cases, the aim was also modernizing the justice system by professionalizing each sector,

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[2] According to Prillaman, *"a successful judicial reform program includes three critical and interrelated variables: independence, efficiency and access. These variables are not chosen randomly; to varying degrees, each is crucial to ensuring democratic governance, providing the foundation for sustainable, long-term economic development, and building popular respect for the rule of law. The framework developed here argues that the fate of a reform ultimately can be measured by a basket of qualitative and quantitative reform inputs – the number of judges hired, introduction of new case management methods, creation of small claims courts, passing of new laws – but also by whether they produce a certain set of observable outputs: whether courts are able to issue rulings against other powerful branches of government, whether trial delays are increasing or decreasing, and whether the public perceives the judicial system to be more efficient and accessible over time."* (p. 6)

granting stability to judges, prosecutors, and police officers, introducing the judicial career and creating Magistracy Councils and school for training and technical improvement.

It is also noted that in some countries there is a move towards the Anglo-Saxon model, especially that of the United States, by replacing the inquisitive model with the accusatory one in the criminal process, potentiating Public Attorneys by widening the principle of opportunity for criminal action, enforcing legal guarantees, reducing the cases for preventive custody, presence of orality, publicity, and the adversary system during all stages of the process and reduction of time frames.

Efforts are also seen towards demilitarizing the police, its incorporation into civil institutions and its subordination to their control, higher quality in the training of agents; more independence and more effective action by Public Attorneys; creation and improvement of Public Defenders; elimination of special courts for military police officers; depoliticized selection of Supreme Court Judges; introduction of abbreviated and informal procedures; creation of commissions for improvement of justice and protection of human rights.

Such reforms, which in many countries do not even occur, have not solved yet the main problems and difficulties for consolidating a criminal system that guarantees fundamental rights. It is a known fact that abuse of power is an endemic phenomenon in Latin America. Tortures and mistreats inflicted by members of the military, police officers, or personnel in prison centers, often supported by businesspeople, still take place and remain unpunished in the countries of the region. Changes were typically limited to the formal domain, besides the permanence of violations to the fundamental principles and obstacles to modernization and democratization of the system.[3] Also according to O'Donnell,

> in most Latin American countries the legal State has limited reach. In several regions – not only those geographically distant from political centers, but also those in the outskirts of large cities – the Bureaucratic State can be present as buildings and officials paid by public budgets, but the legal State is absent: whatever the formally approved legislation is, it is applied in an intermittently and differentiated way, if so. And more importantly, that segmented legislation is subsumed in the informal one enforced by privatized powers that really dominate those places. That leads to complex situations, of which we unfortunately know little but that often entail permanent negotiation of the limits between those formal and informal legalities along social processes where it is (sometimes literally) vital to understand the two kinds of law and the extremely unequal power relations they produce. The resulting dominant informal legal system, punctuated by arbitrary reappearances of the formal system sustains a world of extreme violence, as shown by abundant data both in urban and rural areas. (O'DONNELL, 2000, p. 347)

The main obstacles to democratization have not been removed yet, especially militarism, economic crisis, foreign debt, social consequences from the structural adjustment, permanence of traditional attitudes, partisan bureaucracy, corruption and drug traffic. Those factors increment delinquency and the felling of insecurity.

Programs aimed at modernization and democratization were funded by USAID in the 1980s, by the World Bank and IDB (The Inter-American Development Bank) after 1993 in order to foster economic and productive activities in the region. One of the aims of those programs is to "export" the Anglo-Saxon justice model, often uncritically and without deep analyses. While in the Anglo-Saxon model little importance is given to the criminal process – since in 90% of the cases the charge or the sentence are negotiated – the continental model historically adopted by Latin American countries

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[3] For a broad analysis of the gap between law and social reality in Argentina, see NINO, Carlos S. (1992), *Un País al Margen de la Ley – Estudio de la anomia como componente del subdesarrollo argentino.* About the difficulties to strengthen the rule of Law in Brazil, applying the law in an uniform way, see the anthropological reading if DA MATTA, Roberto (1981), specially chapter IV – *Você Sabe com Quem Está Falando? Um Ensaio sobre a Distinção entre Indivíduo e Pessoa no Brasil* (p. 139-193).

pursues an ideal of justice without negotiation and provides, at least formally, for more guarantees to defendants[4].

There is a trend towards incrementing the gap between the ideal and the real and implementing merely symbolic changes. There has not been reflection about the importance of the several sectors of the criminal system in the various countries and there are not precise indicators that measure the development of democratization and modernization in that field. Anyway, the positive aspect to be underscored is an increasing sensibility to the need to democratize and improve political systems and the administration of justice in the continent.

2. Criminal Control in the Semi-Periphery

Within the framework of the so-called Welfare States established in central capitalist countries in the postwar period, non-punitive mechanisms for inducing conformity, through the incorporation of the population into a highly disciplined system of production and a multifaceted consumption market, as well as a large amount of social institutions for social protection and an inclusive school system, besides a massive media system, guarantee a relatively decreasing concern with penal control. Within an expanding economy, that set of mechanisms reduced the centrality of the formalized system of punishments for the production and conservation of the social order.

Differently from central countries, Brazil and Argentina, located in the semi-periphery of the capitalist system[5], have never had mechanisms able to replace the roles played by the penal system, both in material and in symbolic terms. In those societies, with a fragmented and ineffective school system that restricts higher college education to small social segments, a production system that is unable to guarantee access to income and social security to large segments of the population, a domestic market where only a small part has access to consumer goods, and societies where almost half of the population lives under conditions of extreme poverty, the criminal justice system becomes crucial to maintain the social order, which is unable to maintain itself through ordinary or traditional procedures for consensus building or primary socialization. As Virgolini underscores,

> *the absence of a job and consumption market, the lack of minimal resources to fund general assistance programs and the lack of a regularly comprehensive school system cannot but focus on punitive-like controls, which therefore act in the void produced by the absence or deterioration of the mechanisms of socialization or non-punitive control* (VIRGOLINI, 1992, p.85).

Furthermore, with democratization, the new managers of the State, now elected by popular vote, faced a situation of rising crime rates as a result of factors such as population concentration resulting from migration from rural areas towards large urban metropolises, consolidated in Brazil

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[4] For a World Bank analysis about the judiciary in Latin America and the Caribbean, see Maria DAKOLIAS (1996). For a broader approach on the reform of the Judiciary Branch in the context of State reforms, see Maria Tereza SADEK (1999), P. 293-324.

[5] The concepts of core, semi-periphery and periphery of the capitalist system are used here in the sense used by Boaventura de Sousa Santos. According to the author, *"the more triumphalist the conception of globalization, the lower the visibility of the South or the hierarchies of the world system. (...) Even though we admit that the global economy no longer needs national geopolitical spaces to reproduce itself, the truth is that the foreign debt is still computed and charged at country level, and it is through that debt and the financialization of the economic system that the world's poor countries became, from the 1980s on, net contributors to the wealth of rich countries. (...) It is hard to sustain that the selectivity and the exclusive fragmentation of the "New Economy" destroyed the concept of "South" while, as we have seen before, the disparity of wealth between rich and poor countries had not ceased to increase in the last twenty or thirty years. It is true that the liberalization of markets has unstructured the process of inclusion and exclusion in distinct countries and regions; but what is important is the ratio between inclusion and exclusion in each country or region. It is that ratio that determines whether a country belongs to the South or to the North, to the core, the periphery or the semi-periphery of the world system. The countries where integration into the world economy took place predominantly through exclusion are those of the South and the periphery of the world system."* (SOUSA SANTOS, 2002, p. 51-52).

during the period of military governments that restrained several areas of emerging social conflict through an authoritarian rule (ADORNO, 1994).

For the new governments elected in the region, in all administration spheres (federal, state, and municipal), the problem of public safety became one of the core demands of the so-called "public opinion" often amplified by the action of the media. There is an increasing "sense of insecurity" with growing public perception about the several spheres of crime, from the economy of drug traffic in the shantytowns and violent urban crime until the cores of the political and financial systems, where money laundering and embezzlement take place. A response is insistently demanded from the state and placed in the center of the political debate in electoral times.

With increasing demand for more rigor in fighting and punishing crimes against the financial system, against popular economy, against public finances, Brazil and Argentina had to introduce in their agenda of political-structural reforms, mechanisms for public control over corruption practices and utilization of the state by private interests that existed much before military governments and made the need to modernize relations between the State and civil society the order of the day.

The need to modernize consumption relations – crucial for inclusion in the globalized capitalist system – eventually results in a protective legislation for consumer rights, with the criminalization of conducts of manufacturers and providers of products and services. Acts of discrimination based on ethnicity, gender, or any other nature have also been criminalized in order to guarantee peaceful coexistence in multicultural societies. A higher perception of the dangers related to degradation of the natural environment brought to the agenda the criminalization of environmentally damaging conducts as well as specific structures for enforcing regulations and processing of all those crimes.

In all those areas there has been an increase in the range of facts considered crimes, in a movement of criminalization that seeks to keep up with the speed of the ongoing changes in contemporary societies. Together with internal demands for reduction of risks inherent to social life in a context of rapid change, the criminal system had to respond to the need to repress a new kind of crime that is globally organized as networks for production and traffic of goods without permission to transit in the formal market and that amount at least to two thirds of all volume of capital circulating in the globalized world[6].

As for the police, the debate surrounds its recycling in order to be able act under Democratic Rule of Law to guarantee citizen rights for all the population and not only the elites, also aiming at administrative economy and rationalization of information and prevention efforts needed to face crime at its several levels, with the reduction of selectivity in police activity or its redirecting of more serious crimes in terms of social consequences. Such changes clash with repressive culture that is a result of

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[6] For an analysis of organized crime in the context of globalization, see chapter 3 of volume 3, of the trilogy by CASTELLS, Manuel (1999) The perverse connection: the economy of global crime. According to the author, *the practice of crime is as old as humankind itself. But global crime, the formation of networks among powerful criminal organization and their associates, with shared activities all over the planet, constituted a new phenomenon that deeply affects economy at international and national level, politics, security and ultimately societies as a whole. The Sicilian Cosa Nostra (and their partners La Camorra, Ndragheta, and Sacra Corona Unita), the US mafia, the Colombian cartels, the Mexican cartels, the Nigerian Criminal networks, Japan's Yakuza, the Chinese triads, the constellation formed by Russian mafiyas, Turkey's heroin drug dealers, the Jamaican posses and numerous local and regional criminal groups in all countries of the world united in a global and diversified network that goes beyond borders and establishes links of all sorts. Even though drug traffic is the most important segment of that sector, with ramifications and contacts all over the world, arms traffic also represents a high-value market. Besides, they carry out operations with everything that has added value precisely for being forbidden in a certain institutional context: smuggling of distinct goods and to all places, including radioactive materials, human organs and illegal immigrants; prostitution; games of chance; usury; hijacking, blackmail and extortion, counterfeiting, bank papers, financial papers, credit cards and ID cards; mercenary murderers; traffic of information of confidential access and use, technology or art objects; international trade of stolen goods, or even illegal waste smuggled from one country to another (for instance, US garbage smuggled to China in 1996). Extortion is also practiced at international scale, for instance, by Yakuza with Japanese companies abroad. In the center of the system is money laundering of hundreds of billion (perhaps trillions) of dollars. (...) The conference promoted by the UN in 1994 on Organized Global Crime estimated that the global drug trade has reached 500 billion dollars a year, that is, it was higher than the value of global oil transactions.* (p. 203-206)

the role historically played by the police in countries with such social inequality as Brazil and Argentina.

The judicial system is the target of constant proposition of change, which take place in a fragmented way, through laws that are often made according to the demands of public opinion, amplified by the media, without any unity able to guarantee a minimum of legal security and internal coherence (KOERNER, 2000). New crimes are created, new areas of criminalization emerge, new procedures are put forward – all in an attempt to recover lost legitimacy and a minimum of effectiveness in face of a social reality that increasingly escapes the control of institutional mechanisms of penal control.

The prison system, lacking the means to respond to the increasing number of inmates, traditionally degrading and stigmatizing in the whole Continent, does not offer any possibility for re-socialization, being more a meeting place for a whole culture of delinquency whose major authors rarely receive freedom deprivation sentences (VELHO & ALVITO, 1996, p. 290/304).

3. Problems for the Administration of Criminal Justice in Brazil and Argentina

In the case of Brazil, the return to democracy came with an unprecedented increase in crime. According to Kant de Lima, Misse, and Miranda,

> *most studies tend to locate a change in the pattern of urban crime between the mid- and late 1970s, especially in Rio de Janeiro, São Paulo, and Belo Horizonte: a widespread increase in theft and robberies to households, vehicles, and pedestrians, a higher degree of social organization of crime, increase in violence in criminal actions, strong increase in homicide rates as well as other violent crimes, and the emergence of bands of robbers attacking banks and other financial institutions. Such change in pattern would consolidate and expand in the 1980s, with the generalization of drug traffic, especially cocaine, and the replacement of conventional weapons with others, technologically sophisticated with high destruction power.* (KANT DE LIMA, MISSE E MIRANDA, 2000, p. 49)

The analysis of the evolution of homicide rates in Brazil between 1979 and 1997 confirms the assertion about the increment in the number of violent crimes in the period[7]:

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[7] For a broad study on the evolution of crime rates in Brazil, based on data available, especially in the city of São Paulo, see CALDEIRA, Teresa (2000).

Table I

Year	Total	Variation
1979	11194	
1980	13910	24.26%
1981	15213	9.37%
1982	15550	2.22%
1983	17408	11.95%
1984	19767	13.55%
1985	19747	- 0.10%
1986	20481	3.72%
1987	23087	12.72%
1988	23357	1.17%
1989	28757	23.12%
1990	31989	11.24%
1991	30750	- 3.87%
1992	28435	- 7.53%
1993	30610	7.65%
1994	32603	6.51%
1995	37129	13.88%
1996	38894	4.75%
1997	40507	4.15%

Source: Brazil's Ministry of Health/FNS/Cenepi/System of

Information on Mortality (SIM) and IBGE.

Recognizing the complexity of the phenomenon, Angelina Peralva proposes four bases of analysis: authoritarian continuity, disorganization of institutions, poverty, and social change.[8] (PERALVA, 2000, p. 74).

Authoritarian continuity represents the way the power was transferred from the military to civilians. In 1979, with the end of AI-5 (The 1968 law that strengthened repression in Brazil), the federal government resisted to transmit powers over public safety to state governments. While the civil police was controlled by local governments, the military police, since Decree 667 of June 2, 1969, was directly under the authority of the Ministry of the Army, which in practice represented a militarist legacy in the practices of repression to crimes by that institution that lacked the skills to act under redemocratization and the need to respect civil and political rights. Besides,

> in the turn of the 1980s, the sensationalism of the media on urban violence seems to have offered an alternative issue to armed revolution against a weakened military regime, whose police system was about to become an orphan of the dictatorship. The subject of crime was a

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[8] In the same vein, Teresa CALDEIRA (2000): *"To explain the increase in violence, we have to understand the sociocultural context where the population support the use of violence as a form of punishment and repression to crime, body conceptions that legitimate violent interventions, the status of individual rights, distrust in the judicial system and its ability to mediate conflicts, the violent pattern of police performance, and reactions to the consolidation of the democratic system"* (p. 134).

perfect justification to explain the resistance to any inclination to reform that system. (PERALVA, 2000, P. 77)

The lack of organization of institutions in charge of public order at the time of return to democracy was due to the continuity between the old authoritarian regime and the fledging democratic regime in terms of public safety, in a context of a long and difficult transition. While the military created at first legal obstacles that prevented a police reform, they were no longer able to really control it. The police gradually became more autonomous from their controlling authorities. Not only there was an increase in violations to the rights of the person, but also crime practices with direct involvement of police officers were diversified.

Even though a direct relationship cannot be established between poverty and violence, there is no doubt that the geography of violent deaths shows a concentration in poor outskirts rather than in rich neighborhoods. Remembering Paulo Sérgio Pinheiro's lesson that there is de facto interdependence between political, civil, and socioeconomic rights, Angelina Peralva underscores that the issue of social inequality cannot be dissociated from explanations for crime (PERALVA, 2000, p. 82).

According to Teresa Caldeira,

The deep inequality that pervades Brazilian society certainly serves as the backdrop to everyday violence and crime. The association between poverty and crime is always first on people's minds when talking about violence. Besides, all data indicate that violent crime is equally distributed and affects mainly the poor. However, inequality and poverty have always been present in Brazilian society and it is hard to argue that they alone explain the recent increase in violent crime. In fact, if inequality is an important factor to explain that, it is not because poverty is directly correlated to crime, but rather because it reproduces victimization and criminalization of the poor, the disrespect for their rights and their lack of access to justice. Similarly, if police performance is an important factor to explain the high violence rates, that is not so much related to the number of police officers and their equipment as it is to their behavior standards, which seem to have become increasingly illegal and violent in recent years. The police, more than guaranteeing rights and fighting violence, are in fact contributing for the erosion of citizens' rights and the growth in violence. (CALDEIRA, 2000, p. 134)

Finally, when debating the impact of cultural modernization of Brazilian society[9], where mass individualism has widely replaced hierarchic relations and poverty has lost the positive cultural content it used to have, Peralva sees a new urban conflict that, in turn, contributed to a feeling of fear and social risk, thus fostering the dynamics of violence. (PERALVA, 2000, p. 84). According to the author, in the case of Brazil

it is mainly the absence of regulation devices proper for a new kind of emerging society that explains the importance of more massive and spectacular violence phenomena, whether they are those related to social disorganization in São Paulo's poor outskirts – which engender conflictive sociability turned into strong death indicators because of the high number of firearms circulating – or those related, as it is the case in Rio de Janeiro, to militarized drug traffic that is object of equally militarized repression by the police (PERALVA, 2000, P. 85)

According to Sérgio Adorno, there remains a violent crisis in the criminal justice system (State's inability to enforce laws and guarantee the population's safety): violent crime grows at fast rates that are far beyond the ability to respond by agencies in charge of repressive control of public order; there is a growing collective feeling of impunity (crime increases, becomes more violent, and ends up not being punished); there have also been other consequences: increase in the selectivity of

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[9] For an analysis of processes of change in the social and institutional structure of Brazilian society – the sequels of inflation, the impact of privatization, the role of consumption and consumers, the new collective identities, the judicialization of the social process in the last decade, see Bernardo SORJ (2000).

cases to be investigated, resulting in more authoritarianism and corruption; excess of formality, contributing to strengthen judicial and process tardiness; high number of cases closed for being impossible to investigate (ADORNO, 2000, p. 140). Sérgio Adorno points out the strong sense of fear and insecurity in face of violence and crime, the weight of social authoritarianism and the legacy of the dictatorship in the agencies in charge of controlling crime, the deficit in the functioning of the criminal justice in all its instances, the polarization of opinions in favor and against human rights as elements that have made the social scenario where issues of public security and criminal justice are dealt with extremely complex.

The highest success obtained in recent years was that of placing human rights in the agenda of Brazilian politics, but the National Program for Human Rights did not get to reduce or mitigate the population's collective sense of fear and insecurity and did not have any major effect in containing crime. The challenge is to evaluate whether that new conception can effectively contribute to reduce violence and crime and increase the degree of respect for human rights in the country.

A recurrent criticism regards the fact that the program does not approach economic and social rights, and human rights movements doubt the possibility of really advancing if economic and social problems are not solved.

A real challenge to the problem of violence and crime involves deep changes in the system of criminal justice: it is necessary to conceive justice as an effective instrument for public mediation of conflicts between private interests as well as between them and the state. However, as Adorno reminds us,

> *the reform of the justice system is a complex political process that requires lots of political skill and, above all, high doses of negotiations, since there are corporate interests involved that have to be cracked and blocked. Given the nature of the justice system and the constitutional distribution of competencies among states and the Federation, any reform project should necessarily go through state government and local political leaders. With few exceptions, more conservative interests prevail in those areas regarding control over the social order, repressive contention of crime, and dealing with public security issues. Even when they tolerate to speak of human rights, they are often suspicious of liberal solutions and the investment on distributive policies. On the contrary, they stress retributive policies that sustain more punitive rigor, if possible by concentrating on freedom deprivation penalties, besides more freedom for action to police agencies in "fighting" crime. Given that such social forces sustain the political representations at federal spheres, specially in the House of Representatives and the Senate, it is not likely that a reform of the criminal system that is compatible with a human rights policy acquires political ballast among distinct social segments to the degree that is break away from the current institutional, corporate and political constraints* (ADORNO, 2000, p. 149).

In Argentina, crime rates clearly show a situation of fast deterioration of quality of life in the country in the last fifteen years. According to a study conducted by Eugenio Burzaco,

> *in this period, the rate of intentional homicides has doubled, going from nearly four to eight crimes per hundred residents. Crimes against property have tripled – a situation that worsened in the last five years, when criminal reports increased about 70% in the city of Buenos Aires and virtually 100% in the province of Buenos Aires. Another significant index in recent years is the acts of violence seen at the moment of crimes: in such circumstances, in 1995, 42 civilians and 1 police officer died in the city of Buenos Aires, a number that increased in 1999 to 71 civilians and 10 police officers. In the same period, the province saw an increase in criminal mortality, from 123 civilians and 28 police officers to 202 and 66 in 1999. In the same course of degrading events, crime in general has also increased notably, whether we look at official statistics or the rise in the number of crime reports or what the victimization surveys say.* (BURZACO, 2001, p. 7)

As in the case of Brazil, there are several tentative explanations for such intrinsically complex and multi-causal phenomenon. First among them is the crisis of public safety institutions – the police, the criminal justice and the prison system[10]. Here, there are problems related to flaws in the functioning and organizational design that hinder the expeditiousness and effectiveness of those institutions, lack of budget and technology resources in face of increasing crime rates, and a gap between public safety institutions and civil society.

A 1998 Gallup Institute poll conducted with Argentinean judges found that in their opinion the five main causes that would lead to the lack of credibility of the country's judicial institutions would be judges themselves (dishonest acts, excessive media exposure); the media (excessive publicizing of corruption acts), justice's dependence on political power (lack of independence of judges); slow conflict solving (excess of workload, wrong procedures, lack of infrastructure, lack of personnel, scarce information) and the form of selecting judges (low transparency and uprightness). According to Burzaco, *"somehow such correct self-perception from inside the system is transferred to citizens and defines Argentinean society as the most suspicious one regarding its own judicial system within a group of 18 Latin American countries."*(BURZACO, 2001, p. 62)

In Argentina's criminal justice, the proportion of sentences in relation to the total of people charged with a crime decreased from 9% in 1991 to 5% in 1997, leading to a situation where two thirds of inmates in the country are in prison without a definite sentence, placing the country in one of the worst positions in all Latin America (BURZACO, 2001, p. 63).

The bad functioning of the Argentinean criminal system starts with the lack of human, technical, and material resources for police investigation, together with the absence of investigation of certain crimes because of the political nomination of judges that respond to the influence of their political patrons or lack proper training to face the complexity of a criminal investigation. Not responding to "common" crime adds to the inability to solve white-collar crimes. According to Burzaco,

such crimes, which deeply affect our institutions and most of which entail a major economic cost for society, remain virtually unpunished in our legal system, even though the Penal Code provides for and establishes clear penalties for perpetrators. (...) Definitely, the scarce response by the criminal system to citizens, reflected in the extremely low number of sentences issued; an organizational design that is followed by a distorted incentive framework; certain trend to punish some crimes but not others; and the existence of legal instruments that deprive the system of transparency are all elements that contribute to reduce justice's dissuasive power and cause disbelief in society, which ends up not seeking solutions for its problems in the proper institutions. (BURZACO, 2001, P. 69)

Another level of analysis is related to the impact of socioeconomic changes on crime rates, especially, in the Argentinean case, the recession and economic crisis that marked the last decade as a whole and worsened in recent times. The relationship between unemployment, especially among youth, and crime rates has been seen as fostering crime, especially when it is complemented with other risk factors such as the increase in social inequality, growing urbanization, increasing youth in relation to the whole population, as well as the catalyzing effect of drug traffic on the crime rate.

Between 1990 and 2000, the crime rate per 100,000 residents varied from 1,722 to 3,051 – a 77% increment. The highest increase was seen between 1998 and 1999, with a rise of 349 crimes per 100,000 residents. Crimes against property increased 64%, while crimes against the person increased 126% (MINISTÉRIO DE JUSTICIA, SEGURIDAD Y DERECHOS HUMANOS, 2002).

The comparison between crimes registered by the police and condemnatory sentences dictated by the criminal justice allows us to see what happened in the two extremes of Argentina's criminal justice system in 2000. In order to understand the meaning of that comparison, it should be considered that most condemnatory sentences pronounced within a year do not refer to facts occurred in that year, and there is a series of mechanism for deviation of alleged crimes registered by the police from undergoing criminal legal procedures, within the work of police investigation, of Public Attorneys, or

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[10] For a broader analysis of the crisis of the State in Argentina in the 1990s and its historical background, see Ricardo SIDICARO (2001).

even due to the imputability of the perpetrator. Comparing the range of alleged crimes registered in Argentina in 2000 with the number of condemnatory sentences, we see that the latter represent 1.63% of the total of facts. Such negative indicator of the effectiveness of the criminal system is visible along the whole historical series of the 1990s.

According to studies on victimization conducted in the cities of Buenos Aires, Rosário, Córdoba, Mendoza, and the Greater Buenos Aires Area in 2000, only 28.2% of victims of any crime reported the fact to the police, compared to 33.8% in 1999. Breaking down the sample according to type of crime, we see that 10.7% of respondents said to have suffered some sort of robbery with the use of violence, from which 35.8% reported the fact to the police. That is one of the crimes with the highest report rate, together with car theft, whose report rate is around 90% due to the need to prove the fact before insurance companies, and house robberies, reported by 38.6% of victims in 2000 and by 39.5% in 1999. Simple theft, in turn, has a low report rate, with 22.5% in 2000 and 24.9% in 1999.

According to the results of the study on victimization conducted in 200 by Argentina's Ministry of Justice, Security and Human Rights (*Ministério de Justicia, Seguridad y Derechos Humanos,* 2002), 9.3% of respondents were victims of theft of an object from a vehicle, 6.2% of personal theft, 5.1%, of theft of robbery in a house, and 3.4% of car theft or robbery. Those data demonstrate the relative value of police records, since they exclude almost half of actual robberies as well as most thefts. The comparison also shows that, while the number of police records of crimes against property has increased in the city of Buenos Aires, victimization studies indicate a reduction of such crimes along the last year.

Based on statistical monitoring of crime rates and also of issues related to the situation of the prison system, the reform of the criminal system, alternative means for conflict resolution, among others, Argentina's Federal Government presented in 1999 a National Plan for Crime Prevention, including actions under the competence of the national government and other of state governments, which will be able to count on advice and coordination by the Ministry of Justice.

The Plan was structured in three parts, each of which corresponds to the three levels of crime prevention, namely: primary prevention, involving a national communication and awareness-raising campaign through the media and schools; secondary prevention, involving actions of community management of public safety; and tertiary prevention, through improvement and rationalization of the system for investigation, processing, and extrajudicial conflict resolution, as well as improving the system of response to crime.

More recent legal reforms include changes in the system of processing criminal acts, creation of alternative conflict solving systems for children and adolescents, witness and crime victim protection, and creation and expansion of alternatives penalties.

4. Conclusion

The analysis of reforms on criminal justice systems in Brazil and Argentina in the last decade points out the fact that, in practice, the aim of increasing the system's effectiveness has not been reached yet; on the contrary, the gap between the formal situation and reality was enlarged as well as the merely symbolic use of material and procedural criminal Law.

One of the most evident trends is the hypertrophy or inflation in criminal rules, which invades realms of social life that were not regulated by criminal sanctions. The criminal remedy is used by political power instances as a response to nearly all sorts of social conflicts and problems, becoming the symbolic answer offered by the State to society's demands for safety and punishment, which are expressed by the media, with no direct relationship with verifying its instrumental effectiveness as a means for preventing crime. Criminal Law becomes a public resort for the management of conducts used contingently, rather than a subsidiary instrument for protection of legal assets or interests.

The inclusion of some new areas into the so-called formal criminal control has not been compensated by the reduction of repressive rigor in areas traditionally subjected to conventional criminal control. The process of legislative inflation on criminal matters has served to strengthen the system's distortions and selectivity. We witness the creation the so-called crimes of abstract danger, where it suffices to demonstrate the practice of an action described by legislators as dangerous, rather than the occurrence of real damage; the trend of retrocession in the incidence of allowed risk, with progressive restriction of spheres for risky action and the victim starts playing a prominent role, in

practice leading to situations where criminal law is restrictively interpreted regarding excluding or mitigating circumstances, at the same time as more flexibility is given to criminal types, thus allowing the permanent extension of their reach.

The aforementioned legislative changes indicate the search for alternatives to the functioning of the criminal system in Brazil and Argentina, in an attempt to increase its legitimacy, responding to the waves of dissatisfaction with its effective action. However, when Criminal Law is used excessively (violating the principle of minimum intervention), disproportionably (violating the principle of proportionality), inhumanly (violating the principle of humanity), unequal (violating the principle of equity), or appealing to objective responsibility (violating the principle of accountability), it becomes arbitrary. The claim to meet the needs of justice causes a legislative burst and as conflicts of multiple characters emerge, criminal Law becomes a first resort, relegating it to a eminently symbolic function, i. e., a way to calm down public opinion.

The causes of hypertrophy in Criminal Law pointed out here include: the emergence of new legal assets seen as socially relevant for gaining criminal guardianship; the institutionalization of safety by incrementing the possibility that social contacts result in damaging consequences; the "social feeling of insecurity", a subjective dimension of the new societal configuration; passing from a situation where the State was powerful against weak delinquents to an interpretation of that State as the defender of society against the delinquency of the powerful; the discredit of other instances of control parallel to the criminal system; the change in the opinion of a large part of left-wing criminologists, who have become new "atypical managers of moral"; "managerialism", that is, the view of the penal system as a mechanism to effectively manage some problems, disconnected from the values that were at the basis of classic Criminal Law, that start to be seen more as obstacles, as problems in themselves that oppose efficient management of security issues (SILVA SÁNCHEZ, 2002).

In such context, two issues can be seen as guiding the criticism to contemporary trends of expansion of criminal Law, from the point of view of consolidating democratic principles and preserving fundamental rights in the functioning of institutions in charge of controlling crime: first, it would be necessary to increase the level of transparency of the system, in the sense of guaranteeing a consistent information basis regarding legal process and decisions, which might serve as solid guidance to examine and propose changes towards its improvement.

One the other hand, in a time when we live with the discourse on emergency on a daily basis, which proposes the suppression of guaranties and the symbolic use of criminal justice for the supposed reduction of violence, it is necessary to keep the reference that, within the criminal realm, the need for reforms must be firmly supported on establishing, consolidating, and expanding procedural aspects that might contribute to increase democracy, that is, orality and publicity of procedural process acts, respect for individual guarantees, judicial independence, restriction to the use of preventive custody and evidence obtained by means that attempt against individual rights, the creation of mechanisms for control of judicial activity, and the guarantee of double jurisdiction.

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