

Punitive Attitudes in Latin America

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Published online: 13 February 2009
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Abstract The purpose of this paper is to describe, initially, the population's perception regarding some aspects related to the phenomenon of crime, the criminal system and the punitive response the State should supply (the population's disapproving attitudes), bearing in mind the role of the mass media, since the latter perhaps represents the most important link providing feedback between social demand and the activity of the State with regard to subjective perceptions of criminality and the construction of a State with greater punitive reaction. A second part will analyze the scope of the expansive tendencies in criminal matters in Latin America and particularly in Argentina. With this aim, after outlining the phenomenon — from several theoretical perspectives — and summarising its characteristics in Latin America, we shall specify its distinctive features in our midst, as a way of sounding the main problems entailed in this legislative inflation — decidedly influenced by the multiplying effect of the mass media. This diagnosis is necessary in order to intuit possible strategies for criminal policy.

Keywords Criminal expansion · Criminal reforms · Fear of crime · Punitive attitudes · Punitivism

Introduction

Concern about the increase in crime and violence in Latin America is not different from the same concern in the rest of the western world, but in Latin America it has become especially meaningful, since it can seriously affect the quality of its young democratic

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institutions. Home security was for whole decades used as a pretext by military dictatorships to set up the totalitarian regimes that left a deep political smear in the region and a certain authoritarian vocation or culture in the population. On the other hand, although it is said that there has been a sustained increase in crime rates, it is also clear that the feeling of insecurity in the region has grown out of all proportion without there being a direct relation to the objective conditions of violence and crime¹. This phenomenon, the increase in the “culture of fear”, together with how the State should respond to the phenomenon of criminality, have been the central axes of the political agenda of the different countries in Latin America over the last years and its debate was not just based on a serious study of the phenomenon, it also fed on all sorts of speculations and isolated violent events that gained notoriety². The mass media have also increased their intervention in the topic in recent years influencing, as a result, the formation of opinion and the construction of a reality for the common citizen, and also conditioning political power by imposing a discourse of the need for a “legitimated” punitive increase through a message that embodies the popular feeling.

In this sense, what must be taken into account is that virtually the only source of information the common citizen has about criminal phenomena (magnitude, seriousness, reaction, control, etc.) is that which the mass media present. This is why, although it is true that the manipulation of public opinion by the media depends on existing attitudes in the public, in the so-called pre-communicative situation (Baratta 1993: 202), in generating insecurity, the power of the mass media should not be minimized, nor that of the effects of globalization: an isolated violent act taking place anywhere affects even the most peaceful village, however distant it may be from the centres concentrating violence. This leads to the existence of a direct relationship between reports on delinquency in the mass media and the social perception of security, as well as between these reports and the response of public power.

Independently of this and of how questionable these statements may be, what is true is that many empirical studies have shown how low the level of efficiency and how deep the legitimacy crisis are of the current criminal system and the repercussion these symptoms have on the population. This situation becomes clear if one peruses the results of studies of victimization by delving into the real image of crime and assessing the operation of the criminal systems. These studies also reveal that in Latin America, as compared to Western Europe, there is widespread mistrust of, and a critical attitude towards the criminal system, and at the same time a highly punitive attitude in the face of crime, which can be verified not only in opinions regarding the need for a tough punitive response, with a preference among the population for penalties including serving prison sentences, but also in the need to modify criminal laws by normatively raising penalties.

In the following section we shall basically be analyzing two aspects related to the resurgence of punitivism in Latin America and Argentina: 1) the perception the population has regarding some aspects related to the phenomenon of crime, the criminal system and the punitive response the State should give (sanctioning attitudes from the population), and 2) the legislative reception in Latin America and the phenomenon of “criminal expansion” as a response from the State to the social demand for a more serious punitive response. For both points we shall bear in mind the role of the mass media, since perhaps it represents the most important link that provides feedback between social demands and State activity

¹ Research carried out on this matter explains this phenomenon by agreeing that the feeling of insecurity is not necessarily linked to high levels of crime, but that it may well be a phenomenon linked to other fears present in societies originating from uncertainty of a labour, interpersonal, economic, etc. nature. (cfr. Kury 1999).

² In Argentina, for example, a series of extortive kidnappings caused a variety of proposals of firm-handed criminal policies and criminal reforms which were functional to these policies.

regarding subjective perceptions on criminality and the construction of a State with greater punitive reaction.

Results of Some Measurements on Confidence in the Criminal System, Feeling of Insecurity and Punitive Ideas

Following new systems designed to measure, describe and understand criminality in a region, some Latin American countries during the 90s joined in to conduct some international surveys on victimization. The purpose of these surveys was, among others, to get a clearer idea of the extent of criminality in the region, as well as ascertaining crime reporting activity, measuring the feeling of insecurity and self-protective behaviour, and to research opinions regarding the different actions and punitive policies aimed at controlling criminality on behalf of the competent agencies.

With regard to crime reporting activity in Latin America, it can be seen that in general, together with the high dark criminality figure, there is a tendency to consider that the criminal system, represented in particular by the police, would have done nothing in response to the report of the crime. This reveals a great distrust in the criminal system on behalf of public opinion and it can be said that Latin American police in general, as part of the criminal system, are mostly considered violent, corrupt and not particularly efficient. This is reflected in the surveys that research this aspect. Thus, as an example and according to what Alvazzi del Frate reports (1998: 88), if we take the results of the survey on victimization conducted in different parts of the world in 1996, a high percentage in Latin America answered that they had not reported the crime because the police would have done nothing. By simply taking the crime of burglary as a reference we see that the difference with Western Europe is very great since, while in Latin America only 47.2% of victims reported a crime, in Western Europe 79.8% did so. With regard to the reasons given for not reporting the crime, in Latin America 42.1% said that the police would have done nothing, whereas in Western Europe only 2.4% chose this response. Different was the result for the response “the police could do nothing”, which does not contain a criticism of the police, but rather an objective assessment of the actual possibility of them being able to do anything. In this case, there is a greater similarity between the percentages in Latin America (21.1%) and in Western Europe (16.7%) (Alvazzi del Frate 1998: 98). On the other hand, a clear relation can be observed between these values and those obtained from the questions referring to the people’s satisfaction with the police in controlling crime. Indeed, here it can be observed that in Latin America, besides the low confidence in the police actually doing anything, opinion regarding police work is the lowest of all the regions, since 69.7% answered that the police did not do a good job and only 20.6% said they did do a good job. By contrast, these values in Western Europe are more favourable to police work, since 50.3% answered that the police did a good job and 31.4% said they did not (Alvazzi del Frate 1998: 108).

If we focus on Argentina, we see that the National Criminal Policy Office (DNPC in Spanish)³, in a later survey conducted in the city of Buenos Aires in 2000, reports that after verifying a very high percentage of unreported crimes (72.5%), the conviction that the police would have done nothing figured at 30.3% as the reason why victims decided not to

³ All the information quoted as obtained from the DNPC, a branch of the National Ministry of Justice, Security and Human Rights, was gleaned from its website, but is currently unavailable as a result of a ministerial regulation.

report the crimes⁴. A later measurement in the city of Buenos Aires in the 2004–2005 period shows that 44% of victims that did report the crime were satisfied with the work of the police, whereas in Western European countries the average favourable opinion was over 65% (Van Dijk 2007: 115).

Latin American Police forces and different State agencies were severely involved in the illegal repression and large acts of corruption of the violent military regimes during past decades, which contributed to their loss of prestige and credibility after the advent of democracy. Hence the population's lack of trust in the police force and the fact that in some countries the average citizen sees little difference between the police and a band of criminals. On this matter, the process of democratization in Latin America led to important transformations in the procedural systems with the aim of making the criminal system more efficient and respectful of human rights (Maier et al. 2000). However, even though these reforms restricted police authority, a large part of these forces, apart from being responsible for preventive tasks, continue to have the power to repress crime. The truth is that the authoritarian past, weaknesses in terms of professionalism and training, added to socio-economic (low salaries) and organizational (militarized structures) factors have prevented police forces from undertaking the transformation needed to combat crime effectively, to integrate the community with an attitude devoted to service, and therefore to earn the population's trust (Ruiz Vásquez 2004; Klinksberg 2008: 9). Besides, the judiciary is also responsible for the inefficiency of the criminal system since, in the case of Argentina for example, the chances of being condemned in 1990 was calculated at 2.9% and dropped to 2.3% in 1997 (DNPC 1999).

This situation, associated to delay in the judiciary⁵, means the penalty's deterrent force becomes questionable, making it a mere ineffective theoretical presupposition for the prevention of crime. This chart, besides indicating the great inefficiency of the criminal persecution system, may explain the relationship described in the previous paragraphs: in the face of an inefficient criminal persecution system, which provides no answers to victims and society at large, the victim's distrust in the system and a lack of interest in reporting crime are a logical outcome.

With regard to the feeling of insecurity, fear of crime or victimization risk awareness⁶, the region of Latin America follows the same fate as the rest of the world: the different measurements show that, independently of the ups and downs of crime indices, the feeling of insecurity is a growing problem. Thus, in a measurement taken in 1996–1997, it can be seen that the feeling of insecurity in Latin America shows considerably higher values than in Western Europe. Indeed, when asked how safe they felt in a dark street at night, 48.3% of the population in Latin America said they felt unsafe, whereas in Western Europe only 29.2% of the population felt that way in the same circumstance. If we focus on some countries in Latin America, we see that the population expressing some degree of fear in this situation is headed by Brazil with 69.6%, followed by Bolivia with 59.6%, Colombia with 42.5%, Paraguay with 40.6%, Costa Rica with 36.3% and Argentina with 35% (Alvazzi del Frate 1998: 117). In a later measurement corresponding to the period 2001–2005, a significantly higher percentage of the population in the city of Buenos Aires, 66% of them, said they were afraid of walking in a dark street (Van Dijk 2007: 131).

⁴ Another 5.7% needs to be added for those who indicated that the judiciary would have done nothing.

⁵ In Argentina, more than 55% of trials last between 6 months and 2 years and 20% last longer than 3 years.

⁶ Due to lack of space we shall not refer to the methodological problems of measuring fear of crime or its value. For a thorough analysis, see the valuable work of Kury (1999: 211 ff.) or Vozmediano et al. (2008).

Returning to the measurements taken in 1996–1997, avoiding some places when darkness falls follows the same trend, since in Latin America 59.2% of the population said they avoided some places when they went out at night, whereas the percentage in Western Europe was 36.3%. Results for Latin American countries show that 72.9% of Brazilians said they avoided certain areas upon going out at night, in Bolivia 71.2% did, in Colombia 65.4%, in Argentina 48.6%, in Costa Rica 47.8% and in Paraguay 45.6% (Alvazzi del Frate 1998: 118 ff.).

Also with regard to the likelihood of being the victim of a burglary at home in Latin America, 52.9% of the population believe it is likely or very likely, whereas in Western Europe this figure is only 32.7%. Focusing on some Latin American countries, we see that 57.9% of Costa Ricans consider it likely or very likely, 43.5% do so in Brazil, 51.8% in Argentina, 65.8% in Bolivia, 55.4% in Paraguay and 51.8% in Colombia (Alvazzi del Frate 1998: 121 ff.).

However, it should be pointed out that although the rate of crimes recorded in Argentina between the years 1990 and 1999 increased by 75%, according to information from the DNPC, between the years 1999 and 2004 it settled, with a recorded increase of only 16.6%. Together with this attestable increase in recorded crimes, the mass media also adopted the topic of insecurity as the central theme of its reports and the population is exposed daily to a high number of reports on victims of crime, thus seriously affecting the subjective perception of safety. If the image of crime is analyzed in the Argentine press it can be seen that in 1991 some 4.96% of its space was given over to crime-related news and that in the following years this figure rose to 18.2% in 1997 and would remain at that level through 1998 and 1999 (Ciafardini 1999:146). What can also be observed is that crimes against persons and against freedom occupy 51.3% of these new items (Ciafardini 1999:146). This also shows that together with the increase in crime there has been a growing influence of the media in the construction of the image regarding the phenomenon of criminality in recent years in Argentina and, although there is no study that has continued to analyze the phenomenon over the following years, there can be little doubt that the trend continues.

Independently of the official figures on crime reporting, if we take as a reference that two out of three Argentines interviewed in 2005 were not victims of a crime and that 66% of the population do not feel safe, evidently there is no direct relation between the objective experience of victimization and the subjective feeling of insecurity. This shows that the perception of insecurity is not only constructed on the basis of objective data and lived experiences but also on the influence of stories in the mass media and subjective data resulting from social interaction, among other factors. Significant here is what Sarlo (2005: 65) points out when making reference to the phenomenon of the perception the population have regarding the level of security in the city of Buenos Aires, bringing to mind the paradox experienced during the years of the last military dictatorship, during which juridical insecurity was at a high with a relatively low rate of urban crime. Added to which, while the dictatorship murdered tens of thousands, cities were disciplined by an authoritarian State and for those who were not in the eye of the repressive storm, which in most cases meant torture or death, Buenos Aires was a city considered safe by its adult inhabitants. However, it was darkly resentful to youth groups which were permanently harassed, not by delinquents or by the results of their own disputes, but by the police. Which leads to the conclusion that, for different reasons, the city of the democratic transition, that of the last almost 20 years, is perceived as less safe than the city controlled by a terrorist State.

With regard to the punitive attitude or idea of punishment in Latin America⁷, a measurement taken in 1996–97 reveals a society with more repressive ideas than that of

⁷ Methodological observations regarding these measurements can be consulted in Kury (2000: 216 ff.).

Western Europe, since the results show a greater predisposition for prison sentences in Latin America than in Western Europe, with a lower predisposition in Latin America for soft responses to crime such as fines or community service (Alvazzi del Frate 1998: 111 ff.). Indeed, 49% of those surveyed in six Latin American countries who were not crime victims favoured prison sentences, while the idea of a penalty of this nature rises to 49.7% for those who were victims of some crime and to 53.2% among those who were victims of burglary. On the other hand, in Western Europe these values are 30.1% for those who have never been victimized as well as those who have been, and the figure rises to 36.5% for those who have been burgled. It is also possible to see that there is greater disposition among the population to consider alternative responses to crime in Western Europe than in Latin America, with important differences. For the category No victim, 7.6% of the Latin American population favoured a fine and 28.8% community service, whereas 14% of Western Europeans favoured fines and 39.4% community service. For the category Victim, 7.8% of the Latin American population favoured a fine and 31.3% community service, whereas 12.1% of Western Europeans favoured fines and 42.5% community service. Lastly, for the category Victim of burglary, 7.5% of the Latin American population favoured a fine and 25.8% community service, whereas 10.7% of Western Europeans favoured fines and 38% community service (Alvazzi del Frate 1998: 116). One measurement taken in the year 2004/05 in some Latin American cities allows us to observe that 54% of the population interviewed in Buenos Aires (Argentina) and 56% in Lima (Peru) were of the opinion that prison sentences should be applied to recidivist burglars (Van Dijk 2007: 278).

On the other hand, although it does not constitute a measuring technique, an emblematic criminal act in Buenos Aires generated a petition in which profound criminal reforms were proposed to combat insecurity.

This was the so-called “Blumberg Petition”, which was presented in the National Congress requesting profound criminal reforms following a list of seven points to combat insecurity, and the broad support it received (5,125,000 signatures) also reflects one way of expressing an opinion on which punitive policy is desired and on the population’s mood⁸.

Following Kury (2000: 204), we can state that the results presented may be related to the explanation that many international comparative studies give for the differences between countries in their attitude toward punishment. These studies show that the population’s attitude to punishment is related to each country’s criminal practice, indicating that in those countries where capital punishment is applied, a greater percentage of the population is in favour of this form of punishment than in those where it has been abolished. That is to say that the punitive attitude is closely related to the population’s experience of the way crime is reacted to in their country, and this moulds the cultural patterns in the society that feeds its criminal institutions back, in such a way that punishment becomes a practical incarnation of certain symbolic themes, constellations of meaning and specific ways of feeling that generally constitute a culture (Garland 1999: 33, 290). This might explain the more rigorous punitive attitude that Latin American inhabitants hold in comparison with those of Western Europe, since the past violent dictatorships developed less tolerant positions before crime. In this sense a parallel can be established with the comparative results between the population of West Germany and that of the ex German Democratic Republic, where it is also apparent that the former communist block has a more homogenous and a tougher punitive attitude (Kury 2000: 205). But what must also be considered is that the totalitarian policies in Latin America delayed the discussion on new criminal theories which introduce the notions of alternative responses with less punitive content, due to which the population

⁸ The “Blumberg Petition” will be dealt with again later.

is also less familiar with this kind of response, since they are culturally used to the idea that a prison sentence is *the* response to crime.

It is interesting to observe a study done in the city of Buenos Aires in 2006, in which the population was consulted as to which are the most effective policies to reduce insecurity, since totally different results were obtained. They were consulted regarding the level of agreement on the following seven measures: greater police presence, more and better education, combating poverty and unemployment, enforcing laws, applying capital punishment, applying tougher laws and ending police corruption. It is evident here that, far from what those in charge of legislating interpret, those who maintain that the population demand a toughening of the criminal system to reduce the problems of insecurity, only 4.6% of the population surveyed favoured the application of more severe laws and 2.8% favoured the application of the death penalty, occupying the last two places among the alternatives mentioned. On the contrary, in order to reduce the problems of insecurity, measures of a social nature were at the top, since 34.4% of those surveyed agreed that more and better education was necessary and 17.6% said that poverty and unemployment should be combated. The need for greater police presence followed with 16.9%, and 14.6% favoured more law enforcement, while 8.9% said police corruption should be brought to an end (Föhrig 2007: 74 ff.). It can be observed that for both applying the death penalty and toughening penalties, agreement is higher as the socio-economic level lowers, with a difference of 12% between the low and high levels of the population. There is also a slight tendency towards greater adherence to these measures as the age of those surveyed rises. Undoubtedly these results contrast with the analysis of the previous paragraphs on punitive preferences, since when choosing a manner of reacting to crime, the option of prison sentences was the most favoured. However, it must be pointed out that a prison sentence does not necessarily coincide with the idea that it is necessary to make existing penalties even tougher. These differences do no more than reveal methodological problems in the way these measurements are taken, either because of how the questions are formulated, because of current political criminal circumstances, or because of the composition of the target social group, among other factors (Kury 2000: 216 ff.).

We may also see the tendency of the punitive practice in Latin American society if we bear in mind the rates of imprisonment in relation to the crime rate. If we consider the rate of imprisonment, we see this has suffered an important increase. Taking 13 Latin American countries⁹, it is possible to see that in 1992 the rate was on average 100.7 inmates per 100,000 inhabitants and that by 1999 it had increased by about 45.2% to 146.2 inmates. If we take Argentina as an example, in 1992 the rate of inmates was 63 per 100,000 inhabitants, rising progressively to reach a rate of 142 inmates in 2004 (125.4% in 12 years). If we compare this with the official rate of crimes committed, which in 1992 was 1592 crimes per 100,000 inhabitants and in 2004 rose to 3430 (an increase of 115.4% in 12 years), we can see that there is a relatively even growth in both rates (DNPC 2004). If we now relate the rates of inmates with the crime rates which, following Kury (2000: 209), we shall call imprisonment rates (the percentage of inmates per crimes committed every 100,000 inhabitants), we shall see that these are relatively low and that the variation in 12 years is not significant, since by 1992 the rate of imprisonment was approximately 3.96 and by 2004 it was 4.1. Compared to other countries this rate of imprisonment is low since, for example, in 1993 it was 76.4 in China, 27.3 in Russia, 9.7 in the USA and 7.2 in Poland (Kury 2000: 209).

⁹ Argentina, Brazil, Colombia, Costa Rica, Chile, Ecuador, El Salvador, Honduras, Mexico, Nicaragua, Panama, Peru and Uruguay (Source: ILANUD).

According to the punitive ideas of the Argentine population analyzed above, and the criminal reforms that increased punitive rigor, as will be seen in the following part 5 of this paper, it is evident that the inefficiency of the criminal system accounts for the low rates of imprisonment and not a lack of social or political consensus on behalf of the population for the more rigorous use of jails as a means of social control. This inefficiency also accounts for the population's lack of confidence in the criminal system, which we made reference to above.

The table presented necessarily leads us to reflect upon the measures that must be adopted to confront a situation that constitutes a definite threat to the quality of life of the Latin American population. The debate on the different possibilities, their ideological contents and possibilities within a socio-economic context governing the region may be endless. This is why we shall restrict ourselves to analyzing the most visible response adopted by the political authorities: the punitive route through criminal expansion, placing emphasis on adopting urgent direct action measures such as granting the police greater power to act, modifying criminal codes to create new criminal categories or increasing the penalties of existing ones, reducing the guarantees that hinder police work, lowering the age of legal responsibility, to the extent of even proposing, in a public debate, to make parents responsible for the crimes of their children.

General Framework of Criminal “expansionism”

The disproportionate expansionism which the criminal legislation has experienced during the last few years and continues to experience constitutes an archetypal characteristic of our societies. It is no doubt part of a generalized phenomenon from which Latin America in general, and Argentina in particular, have not escaped.

The specialized literature which has attempted to describe this situation, resorts to two concepts which, although it may be methodologically convenient to analyze them separately, do not always appear clinically clean in the legislative reality (Cancio Melia 2000:125). We refer, specifically, to the emergence, on one hand, of a criminal law typical of a risk society, with a high symbolic content and, on the other, of the worsening of punitivism as a response before the insecurity of the citizenship (securitarian criminal policy).

What do we understand by these concepts?

The criminal policy of a risk society may be characterized by five main features (Díez Ripollés, 2006: 202):

Firstly, a marked increase in what is criminally forbidden, through the creation of new criminal categories. This is an increase in social domains of criminal intervention intending to influence new problematic social realities (for example: new technological domains, such as nuclear or genetic activity), or existing social realities whose vulnerability had augmented (for example: the manufacture and distribution of products, socio-economic order and activities classified as organized criminal structures).

Secondly, it is possible to observe a significant transformation of the target of the criminal policy, which concentrates its efforts on persecuting the criminality of the mighty, the only sectors with the capacity to develop such criminal behaviour.

Thirdly, a predominance of criminal intervention in detriment of other forms of control (for example, administrative law) becomes evident, with a clear affectation with regard to the principle of subordination.

Fourthly, a need to adapt the contents of criminal law and criminal procedures to the special difficulties posed by the persecution of this new criminality.

Finally, this process of neo-criminalization is characterized by fulfilling an essentially rhetorical role. That is to say: norms that often do not have an actual incidence on the real tutelage of the juridical subject they allege to protect (simply because they are not applied), but which, however, play a relevant symbolic role in the mind of politicians and electors:

“Among the former, it will give the sensation of having done something; among the latter, the impression of having the problem under control” (Silva Sánchez 1992: 305).

The trend we have just outlined materializes thanks to the introduction in the criminal codes or, more frequently, in special laws, of new criminal categories whose existence is not explained in the attempt to avoid harmful social conduct, but, rather, the mere wish to calm public opinion at a particular moment, making a show of efficacy in the struggle against crime (Ragués I. Vallés, 2003:245).

And what are the characteristics of these new typifications? Basically the following:

- a) an increase in the criminalization of behaviours by means of a proliferation of new juridical subjects of a collective nature;
- b) a predominance of the typical structures of simple activity;
- c) the anticipation of the moment in which the criminal procedure proceeds: numerous unlawful activities formerly only administrative are punished; the punishing of preparatory acts becomes generalized; penalties for criminal association become autonomous; and
- d) significant modifications are made to the system of liability and in criminal and procedural guarantees: a devaluation of the principle of criminal legality is admitted by tolerating less precision in typical behaviours and an abuse of the technique of blank criminal laws; there is a lack of rigour in the interpretation of the guarantee of harmfulness of certain behaviours, as in punishing the possession of certain things, etc.

Jointly with this new symbolic legislation one can also see the toughening of the conventional criminal law, a phenomenon which links with an assumed increase in the urban insecurity and before which the State responds with a resurgence of punitivism (securitarian criminal policies). As Cancio Melia (2000:131) expresses it:

“to steer these ‘expansionist’ phenomena [...] towards these suppositions of promoting merely symbolic criminal norms would not attend to the true scope of the evolution in this sense. Because resorting to criminal law does not only appear as an instrument to produce calm by means of a mere act of passing norms evidently never intended to be applied, but there may also be ‘old style’ criminalization, that is to say, the introduction of new criminal norms with the aim of promoting their effective, fully determined, application, [...] [in other words:] processes that lead to new criminal norms that are applied or the toughening of penalties of existing norms (...)”.

Criminal Expansionism in Latin American Countries

How does this expansive phenomenon manifest itself in our Latin American societies?

Díez Ripollés (2008: 488/521) has made one of the most lucid reconstructions on this matter. Below we shall summarize the main aspects of his research, as a step prior to approaching the phenomenon in Argentina.

As regards the content of recent criminal reforms, three fundamental nuclei can be individualized: a) the incorporation of new objects of protection; b) innovation of

traditional crimes to accommodate them to new or modified social values and c) amendments leading to a securitarian transformation of criminal law.

As a manifestation of the first nucleus, a typification can be observed of:

- a) Criminal categories punishing behaviour that obstructs the free trade of economic agencies in industrial societies. This refers to crimes against intellectual and industrial property, fraud in different economic domains (financial, information technology, insurance companies, etc.), illegal entrepreneurial activities, and bribery and power dealing in international economic transactions.
- b) Crimes tending to protect collective interests affected by the very development of the free market. In the case, for example, of crimes against consumers (with an important activity in countries such as Brazil and Peru), with provisions that tend to repress risks derived from processed products [medicines for example]; the environment and financial or business crimes (with an energetic regulation, through special laws, in Venezuela), where the company structure is used as an area for perpetrating illicit behaviour which is extremely harmful to society (criminality from the corporation) (Cesano 2000: 252/253).
- c) Enlargement of criminal categories to criminally counteract tax evasion (Venezuela and Guatemala).
- d) Forecasting crimes to repress administrative corruption (Costa Rica and Guatemala). The criminal system's lack of efficacy in this task has also led to the production of numerous reforms in crimes against the administration of justice (Mexico). These are modifications oriented towards punishing more severely inappropriate conduct of judicial operators, which perturb the correct investigation of these forms of criminality (administrative corruption).
- e) Finally, the far-reaching phenomenon of the international trafficking of people is giving rise to a generalized approval of legislative reforms aimed at persecuting them (Bolivia, Colombia, Ecuador, et cetera).

The reception of new currents of classical delinquency is noteworthy in several domains:

- a) crimes against sexual freedom (Brazil, Colombia, Chile, Peru and Venezuela); b) protection of vulnerable sectors: minors, the elderly, the sick and the handicapped (Brazil, Colombia, Costa Rica); c) protection in the face of domestic violence (Colombia and Mexico); d) criminal categories that attempt to prevent social discrimination of certain communities for ethnic, racial, nationality and religious reasons (Guatemala) and f) finally those legislative reforms reacting against modern attacks on personal integrity, such as the traffic of organs (Colombia and Peru) or genetic manipulation (Brazil, Bolivia, Colombia and Peru), can also be included in this trend.

Under the name of securitarian transformation of criminal law, Díez Ripollés (2008: 494) includes a reforming trend which is characterized by:

“on one hand, [by] reinforcing criminal control over the more traditional social groups and criminal behaviours and, on another, identifying certain more or less organized groups as the object of preferential persecution. This current also has a very significant influence on the ongoing modification of the penalty system (...)”.

- a) There is, indeed, a closely-knit set of behaviours that fit into in the categories of classical delinquency, whose penalties have been increased. This can be seen, for example, in the cases of crimes against life and personal integrity (for instance, in Costa Rica, injuries which were formerly considered breaches of law and order have now become criminal offences); individual freedom (typified by the category of forced

disappearance of people [Colombia] or of toughening penalties regarding kidnapping and extortion [Costa Rica, Ecuador, Peru and Venezuela]) and individual patrimony (either by turning offences into crimes [Costa Rica and Peru]; intensifying penalties for shoplifting [Chile]; extending the punishment for preparatory acts for a robbery [Uruguay]; punishing the dismantling and sale of stolen cars [Brazil, Colombia, Venezuela] or intensifying sanctions in cattle rustling [Uruguay, Chile]).

- b) The second source that feeds this transformation is identified with so-called organized crime. This category is made up of heterogeneous criminal forms, among which the following stand out: drug smuggling, terrorism, illegal trafficking of people and even capital laundering. In the opinion of Díez Ripollés (2008: 497), the regulatory norms of this phenomenon do not escape the rules created in European countries:

“it is still also true for Spanish America that the punishment of behaviours are presumed well ahead of the injury of the juridical subject, the diffusion of the distinction between authorship and participation or between consummation and tentativeness, the huge increase in penalties, and an extended reduction in criminal and procedural guarantees”.

One evolution in that direction is shown by the legislations of Mexico, Venezuela, and Guatemala. In procedural aspects, the modifications are characterized by:

A strong tendency to the implementation of the accusatory system (Guatemala, Costa Rica, Chile, Ecuador, Colombia); a model that highlights the following among its central features: surmounting the investigative stage (typical of mixed procedural systems) by means of a preparatory criminal investigation at the hands of the prosecuting public ministry; the presence of a guarantee judge; effectiveness of the principle of opportunity and the instrumentation of abbreviated processes, which facilitate a negotiated form of justice.

A systematic pruning of the guarantees of the defendant; which manifests itself, for example, through the extension of protective custody, the restriction of provisional freedom (Chile, Colombia, Mexico, Peru, Uruguay) or the direct suspension of certain procedural guarantees for a certain category of crimes (e.g. organized or white collar crimes [Peru]).

Latin America (as with Africa [Stern 1999: 20]) had not remained beyond what was happening in Europe, especially during the 70s of the 20th century, in order to provide for alternative penalties (for common criminality), with the aim of limiting the use of prison confinement (Cesano 2003:868). Unfortunately, at the start of this century, the hope of this happening has been totally eclipsed.

“This setback may be exemplified by decisions such as that taken in Mexico in 1999, which conditions the application of community work, treatment in freedom and semi-freedom to effectively collaborating with justice, having then limited preparatory freedom; by the Colombian reforms of 2002, 2004 and 2006 which eliminated criminal substitutions regarding certain crimes, among them those committed against minors, and which restrict probation; by those in Chile, which in 2003 reduce the cases in which non jailable substitutive penalties can be accessed, eliminates all penitentiary benefits in qualified life sentences and restricts the chances of a suspension of the prison sentence, [etc.]” (Díez Ripollés 2008: 502).

However, with this trend — and like other manifestations that classify within this expansive conception as regards the legal consequences of crime — we must specify three aspects in particular:

Firstly, a general orientation towards raising the maximum limits of prison sentences (Mexico, Colombia, Guatemala).

Secondly, a generalized restriction regarding penitentiary rights or benefits, such as, for example, an advance in the degrees of progressiveness (and of the institutions for gaining flexibility which result from them) or probation, based on aprioristic criteria on the nature of the crime of the criminal (Venezuela) (Díez Ripollés 2008: 504).

Finally, in some execution laws, a differentiated disciplinary regime was introduced in accordance with particular author categories (Brazil) (Bitencourt 2008: 342). As regards the analysis of the social agents who have impelled these recent reforms in the region, Díez Ripollés (2008: 507/521) highlights the following:

Firstly, the social attitudes based on the feeling of urban insecurity. Such demands for intervention, as a rule, are not oriented towards modernizing legal reforms, but rather to old-fashioned criminalization processes; either by toughening the criminal scales relative to common crimes (in particular: against life, corporal integrity, sexual freedom, personal freedom and property) or modifying these conventional categories in such a way as to extend them.

In nearly all countries these social attitudes in the face of crime appear moulded by the mass media, which produce a distorted image with regard to both the volume of delinquency and impunity. On the basis of its selective criteria, an enormous protagonism is given over to traditional criminality, to organized crime and to corruption. They also tend to place victims, or those groups linked to them, in the foreground. Attending to this, it seems logical that any reforms proposed or realized under the aegis of this discourse is characterized by subscribing to a securitarian model of criminal intervention:

“that deprives different approaches to delinquency of virtually all visibility, especially those centred on social policies or, even, in non criminal legal approximations. Criminal law is seen as the first resort for intervention” (Díez Ripollés 2008: 509).

Many of the reforms have resulted from the operations of institutionalized pressure groups. The following stand out among them:

- a) Political forces. Thus, in Brazil, there is a certain tradition for using criminal law in a populist key. Nowadays it is sought pre-eminently to approach urban violence and organized crime from a strictly securitarian focus:

“Especially those territorial politically responsible repeat demands of zero tolerance, with the suppression of guarantees, in order to end urban violence; left wing parties, in turn, taking on the security model of the right, wish to confront social injustice and administrative inefficacy with predominantly punitive means” (Díez Ripollés 2008: 511).

- b) Another significantly influential group is made up of international agencies or dominant foreign countries (like the United States of America) upon whose stimulus — if not direct pressure — criminal reforms are ruled. As an example of this situation, we may remember the welcome — in certain countries in the region — given to commitments regarding intellectual or industrial property, even to the detriment of their own socio-economic needs.

Among the non institutionalized pressure groups, the one formed by the victims stands out. This sector, supported by the media and by opportunist political groups, has been the source of numerous reforms marked by their high punitive voltage. For example, in Costa Rica, a popular initiative presented itself, as a result of mobilizations on account of the cases of the kidnapping and murder of the children Katia and Osvlado, to create a record of criminals charged with crimes against children and thus considerably increase the penalties in these cases (Díez Ripollés 2008: 515).

With regard to the origins of these reforms, Díez Ripollés (Díez Ripollés 2008: 516/521) points out:

- a) Prevalence of the origin of the government, especially in those countries with strong presidentialism (a widespread phenomenon in Latin America, with the exception of Costa Rica, where legislative initiatives are the norm) (Díez Ripollés 2008: 518).
- b) Fortunately, one of the mechanisms of direct democracy, as is the popular initiative, has no relevance in the region. Even in Argentina — and as we shall see in the following paragraph — there is a constitutional prohibition in this matter.

Finally, with regard to the process of elaborating reform texts, the salient mark is given by the scant pains taken to ground them empirically.

Criminal Expansionism in the Argentine Republic

From the start of this century, Argentinian criminal policy has been characterized by joining this generalized trend towards criminal expansion. From the year 2000 to the present day, 32 laws have been passed relating to criminal matters and criminal procedure.

In earlier research (Cesano 2004a, b:1600, 2005:187/217) we have analyzed the characteristics of Argentinian criminal expansionism. If we are to outline its distinctive features in the light of what we have presented so far, we could state that the direction of the criminal inflation we have been experiencing in the country, from the start of this century, is in no way different from that described of the rest of the region. Indeed:

As regards the content of the reforms it is possible to state that:

The large majority of the modifications (twenty-seven reforms) relate to securitarian transformations. Within this framework, however, three specific projections may be detected:

Firstly, 15 laws restrict themselves to aggravating penalties of existing crimes (for example: rural crimes, carrying weapons, etc.) or to introducing amendments in the general part of the code, tending to include generic aggravations (e.g. for the hypothesis that a crime has been committed with the participation of minors), increasing the penalty in the joinder of crimes or extending the cases of interruption for when criminal action prescribes. These punitive aggravations refer to an increase in the scales of prison sentences, a sanction that continues to have, in our midst, an almost exclusive influence¹⁰.

We can also place modifications in the matter of criminal execution in this group. Indeed, emergency discourse has also extended into penitentiary legislation (Laws No. 25,892 and 25,948). However, in the case of Argentina, the phenomenon does not classify — as originally occurred in Europe — within the struggle against terrorism but, rather, it appears as a projection in relation to the domain of common criminality, with certain differences to the regime for particular categories of crimes (for instance: murder aggravated by connection with another crime, murder aggravated by robbery, extortive kidnapping and illegal detention followed by death, etc.). Thus these authors are banned from gaining access to institutions typical of progressiveness (transitory release, probation, etc.).

A second group (within the securitarian orientation) is made up of nine laws which introduced new criminal categories in relation to juridical subjects already provided for in the Criminal Code (e.g. new forms of aggravated murder when the active subject or the victim are members of the security forces; dangerous driving; etc.) or which typified behaviours which

¹⁰ An orientation which coincides, as a natural reflection, with the preference (regarding this type of sanction and over other possible responses) which is projected in the surveys we have already analyzed above.

reinforce a protection already established by traditional categories, such as, for example, disassembling and selling parts of stolen cars, a situation comprised in cover-up.

Finally, another three reforms (with securitarian undertones) were incidental in procedural aspects. In this sense, a strong trend is apparent to receive the category of the repentant; first in the domain of extortive kidnapping and illegal detention (Law No. 25,742) and then with regard to categories of trafficking people (Law No. 26,364). Likewise, through Laws No. 25,764 and 25,765 a program for the protection of witnesses and defendants, and an ongoing reward fund are institutionalized as an integral part of the criminal measures oriented penalizing the crimes of kidnapping and illegal detention.

In only five cases did the modifications answer a need to modernize criminal law, by protecting new juridical subjects (e.g. crimes relating to information technology, trafficking people, etc.)

As for the social agents that have taken part in these reform processes, it should be pointed out that a significant number of these modifications appear to be the result of an institutionalized pressure group: the victims. In March 2004, during the administration of President Nestor Kirchner, Axel Blumberg was kidnapped and subsequently murdered. As a result of this tragic event, his father launched an impressive campaign (known as the “Blumberg Petition”) demanding the government toughen criminal policy¹¹. In fact, Clarín daily, in its March 17, 2005 issue (that is, one year after the murder), made the following assessment:

“Over the last year, Blumberg managed to get approval for a dozen laws to toughen penalties against delinquents”.

This rapid process would certainly never have been feasible without the conjunction of two factors: firstly, high media influence¹² of the Blumberg position and b) irresponsible activism of the parliament which, under pressure from the government, rapidly generated these legislative initiatives.

The haste and carelessness with which action was taken is manifest in the passages of the parliamentary debates that accompanied these reforms. As an example, when the modification to Law No. 24,660 by means of Law No. 25,948 was being debated in the Chamber of Deputies, Deputy Alchourron — knowing that at that very moment a law related to probation was being debated in the Senate — pointed out:

“it doesn’t matter if the laws cross, because after all there will always be a judge to put things in their place. It doesn’t matter that we may be producing laws with technical flaws, especially when we are proceeding hastily. We must recognize that the circumstances have necessarily led us to this situation. It is true that this session is taking place in a hurry, but the important thing is to go ahead [...]”.

Likewise, some of the legislative initiatives described appear as a result of the influence exerted by international agencies. The clearest example of this is that of the abolition of the so-called law of economic subversion and its substitution with the fraudulent form

¹¹ Fortunately, the constitutional reform of 1994 expressly excluded popular initiative in criminal matters (article 39). A rule that Jorge De la Rúa (2008:95) has marked as extremely prudent. On this matter, this author says: “Imagine, in such an impassioned and at times erratic country, that to admit an initiative on particular penalties or particular sanctions would be extremely risky”.

¹² Certainly what happened with the Blumberg phenomenon does no more than confirm the trend we have already marked in the first part of this paper with the aim of increasing the space in the mass media devoted to the issue of the increase in insecurity and crime: in 1991 a daily average of 4.96 news items on crime, an average which increased until it reached a high of 18.2 items per day in 1997.

legislated by Law No. 25,602. Indeed, the oft mentioned abolition was a direct response to the pressure exercised by international credit agencies (the International Monetary Fund) as a demand prior to reaching one of its never-ending renegotiations of Argentina's foreign debt. In fact, the agents of the aforementioned agency acted as a veritable pressure group representing the interests of certain financial sectors (especially the international banking community) who were fearful of the extension of the application (in their respect) of the norms of the law of subversion. Thus the government bureaucracy was worked upon so that it would make the political decision of rendering this law null and void, a decision which the parliament obediently endorsed. On the other hand, and with an undeniable symbolical purpose, Congress, together with the abolition, sanctioned a new criminal category with the purpose of not leaving public opinion with the feeling that the repealed type meant giving consent to a gap of impunity.

The above description shows not only that many of these reforms are no more than placebo legislation (Vandelli 2007:95), but that they also manifest the government's prevalence over the role of the parliament.

Conclusions

The growing index of the feeling of insecurity and a rigorous punitive posture in Latin America appeared as fertile ground for criminal expansion. The thirty two legislative reforms that have taken place in our country as from the year 2000 make it clear that Argentina has not remained aloof from this ecumenical trend of expanding the criminal systems.

As occurs in Europe and Latin America in general, in our midst this anarchical growth has extended over the whole of the structure criminal system is a part of: criminal typification, procedural norms and penalties.

In the explanation of this process, at least three factors appear constant:

- a) on one hand, the influence of the mass media in the increase in the feeling of insecurity;
- b) the relevance reached by the victim, as an emotive factor of highly punitive modifications; and
- c) the political use of securitarian claims.

These factors do not operate in isolation but are, rather, interwoven.

This disproportionate growth — at least in the case of Argentina — does not appear justified from the perspective of crime indices, which have not varied significantly (in the sense of having increased) but which, on the contrary, have proved to be stable between 1999 and 2004, according to what the DNPC informs.

Perhaps the only aspect which singles out the Argentine situation from the even trend visible in Europe is given by the fact that, in our cultural environment (as well as in the rest of Latin America) — a situation that European countries do not reflect with the same intensity — surveys regarding the population's punitive attitudes are characterized by claiming for the strong use of responses where the use of prison sentences reaches a virtually exclusive pre-eminence.

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