Latin American Criminal Law: A Historical Perspective*

Alejandro Agüero

Abstract 1

This essay deals with the history of criminal law in Latin America. The first section examines the colonial period and seeks to outline the common cultural background of the region while the second section analyses the transition period after the collapse of the colonial order. The third section deals with the modernisation process of criminal justice in Latin America that is associated with the enactment of various national criminal codes. The uneven development of procedural systems, the growing influence of police forces in criminal justice and de facto repressive practices are also considered in this section. The essay concludes with some final remarks and a brief overview of the challenges that the ideals of liberal criminal law face throughout the region today.

I. Introduction: Criminal law and History

Most Latin American countries bear the hallmark of the European civil law tradition as a legacy of the colonial period. The usual historical introductions to this brand of criminal law highlight the harshness and cruelties of the inquisitorial procedure developed by the Catholic Church courts and adopted in secular courts by the late Middle Ages. The consolidation of the absolute monarchies usually explains the later development of inquisitorial justice systems.[1] 2

These historical perspectives have been the subject of criticism by recent historiography. On the one hand, such a picture of Absolute States neglects the composite and pluralistic character of pre-contemporary power struc- 3

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1 For example, Francisco Tomás y Valiente, *El derecho penal de la Monarquía Absoluta. Siglos XVI-XVII-XVIII* (Tecnos 1969); Michael R. Weisser, *Crime and punishment in Early Modern Europe* (Harvester Press 1982).

tures. On the other hand, the exaggeration of certain features generates an implicit effect that legitimises to some degree the present, which is understood, when viewed in contrast with the earlier period, as a stage of civilizational advance. To avoid these biases, new approaches have employed the methodological premise of the 'otherness' of the past, an anthropological distancing between the past and the historian that allows the latter to inquire into the local sense and reasons of old legal discourses. In this way, the naive evolutionary narrative is replaced by a more complex reflection on the transformation of criminal justice, a process that is no longer construed as one of improving guarantees but as a response to a new conception of society, law and justice.[2]

4 The first part of this chapter examines the colonial period where the purpose is not to find the roots of Latin America's current legal systems but to understand the role of criminal justice in a very different context. Although new ideals spread throughout the region since the crisis of the colonial period, substantial legal reforms were only undertaken from the end of the nineteenth century onward. This transitional period is analysed in the second part of the chapter. The third part deals with the 'modernisation' of Latin American criminal law, a process associated with the enactment of criminal codes. Nonetheless, it would be naive to reduce the contemporary history of the region's criminal law to the history of codification. A glance at the uneven development of procedural systems, the growing influence of police power and the de facto repressive practices employed in many States must also form part of this history. The essay concludes with some final remarks and a brief reflection on the current context and the challenges facing some classic principles of liberal criminal law.

II. The Colonial Context

1. The Catholic ancien régime

5 As a part of the violence inherent to the Catholic colonisation of Latin America, there was a massive process of cultural transfer. The colonisers imposed their legal culture upon indigenous populations while these peoples eventually learned to use it to claim their rights. Inter-ethnic

2 Alejandro Agüero, 'El uso del pasado en la enseñanza del derecho penal en argentina. La imagen del antiguo régimen como tradición latente' (2017) 18 Revista Electrónica del Instituto de Investigaciones Ambrosio L. Gioja, 169–91.

litigation gave rise to some mixed practices, but the fundamental matrix responded to the patterns of the medieval Roman-canon law tradition. A well-known picture of the ancient regime's criminal justice is associated with the inquisitorial procedure, written and secret proceedings handled by judges free to seek evidence and autonomously control an inquiry where confession and torture were accepted means to acquire proof and the private accusation (*accusatio*) was gradually replaced by the action of judges and prosecutors (*inquisitio*). In this context, criminal law was often taken as an expression of royal power, as a set of positive statutes addressed to magistrates who, acting as a sovereign's *longa manus*, endeavoured to enforce it throughout a realm's territories.

Although partially valid, this image needs to be properly contextualised 6
and complemented by some less-known and less-obvious factors. In general terms, this perspective only makes sense in a context in which religion provided the explanation of the world and the basic grounds for any normative reasoning. This entailed a strong anti-voluntarist conception of the law where, in reality, religion and law made up a single textual field from which normative arguments were derived. The legal doctrine of the time defined crime as a "fact against divine or human laws done to the detriment of a third party".[3] The reference to divine laws opened an inexhaustible source of potential causes of incrimination. Criminal matters relied on religion to such a degree that a Spanish jurist at the beginning of the nineteenth century stated that there was no need for harsh penalties in Spain where "a religion like ours rules and is professed, which provides an infinite number of crimes and makes men docile and obedient to the precepts".[4]

Even when theoretically differentiated, the notions of sin and crime had a 7
similar scope. Ecclesiastic and secular jurisdictions, alongside the penitential forum, worked together to achieve the common goal of maintaining the peace. According to a Castilian theologist, the same action could give rise to different punitive responses: "...since one acts against natural reason, against human and divine laws [...] it is conceivable that the offender must suffer three punishments, to restore those three orders that he has disturbed by his act: thus, he is punished by himself, with remorse: then, by men,

3 G. Fernández de Herrera Villarroel, *Práctica criminal* (first pub. 1672, Viuda de Juan Muñoz 1756), 27.

4 R. L. Dou y Bassols, *Instituciones de Derecho Público de España*, vol. 1 (Benito García 1800) 35.

with different means, and finally, by God".[5] In the same sense, punishments had diverse forms but concurrent goals: restore order and peace, repair the damage caused to victims and the community, correct offenders' behaviour and serve as a deterrence to others. Furthermore, punishing crimes and 'public sins' was regarded as a collective duty to prevent communitarian harms associated with God's displeasure.[6]

8 Within this religious communitarian conception of society and punishment, the inquisitorial procedure was but one institutional device focused on dealing with the most serious crimes. Nonetheless, the same religious grounds imposed on all Christians the duty of pardoning offences, settling disputes through peaceful means, agreements and friendship concords. Magistrates were also expected to proceed with love and mercy, to avoid harsh formal proceedings when possible, while acting as mediators in their communities since, as a celebrated Castilian jurist noted, "the goal of justice is peace".[7] Indeed, much relevant literature of the eighteenth century presents justice and mercy as two intimately linked concepts. Judges were advised that extremely harsh penalties, as provided by some royal statutes, were set only *ad terrorem* and that penalties should always be tempered when there was "just cause" to do so.[8]

9 This may explain why capital punishment, although provided for a wide range of offences in the laws, was rarely used by local courts. However, when it was employed, the gallows or garrotte (the latter reserved for nobles), preceded by public humiliation, were the regular methods. Alongside a desire to show mercy, the rare use of capital punishment is also linked to a change in the paradigm of punishments which saw, from the sixteenth century onwards, death sentences gradually replaced by utilitarian punishments. Penal servitude became a source of resource, providing labour for galleys, arsenals, *presidios* (forced labour in fortified military settlements) and mines throughout the Spanish Empire, although even then, these punishments were generally reserved for serious crimes, whereas whipping, public humiliation and/or banishment were commonly meted

5 Alfonso de Castro, *De Potestatis Legis Penalis* (first pub. 1550, V. & H. Ioan Stelsii, 1568) 21.

6 Alejandro Agüero, *Castigar y perdonar cuando conviene a la república. La justicia penal de Córdoba del Tucumán, siglos XVII y XVIII* (Centro de Estudios Políticos y Constitucionales 2008) 133–45.

7 Ibid. 162

8 L. Santayana Bustillo, *Gobierno político de los pueblos de España, y el corregidor, alcalde y juez en ellos* (Francisco Moreno 1742) 263, 318–19.

out for minor offences. Incarceration was not a legal punishment but a way to prevent the defendant from fleeing. Nonetheless, the time spent in pre-trial detention was usually regarded as a sufficient penalty for minor crimes.[9]

Pardoning and settling disputes without formal proceedings were part 10
of the institutional settings of pre-contemporary criminal justice, a relevant trait often neglected by historical narratives that tend to emphasize only inquisitorial traits. Arguments appealing to the pity or commiseration of the judge, even when linked to some pejorative condition of the defendant (rusticity, ignorance, neophyte condition), often achieved success with punishment being moderated or replaced by a warning. Historians familiar with colonial records have highlighted this lenitive quality of the era's criminal justice as a surprising feature.[10] However, regardless of the colonial context, it has been argued that pardons had a specific function in upholding a hierarchical conception of society and aristocratic rule. From a culturalist point of view, they conformed to the religious-legal logic of punishments which combined love and fear in legitimizing public authorities' decisions.[11]

2. Jurisdictional pluralism

Although the civil law tradition has long been characterised as a law- 11
centred system (in contrast to common law) more recent legal historiography has emphasised the jurisdictional (justice-centred) trait of political power in the whole European ancient regime. Taken from Roman sources and adapted to the Christian medieval context, the concept of *iurisdictio* referred to all forms of legitimate public power, encompassing both judicial and legislative competencies.[12] To different degrees, all public authorities

9 Ruth Pike, *Penal Servitude in Early Modern Spain* (University of Wisconsin Press 1983); Agüero, *Castigar* (n 6) 235–72.

10 For example, William B. Taylor, *Drinking, Homicide, and Rebellion in Colonial Mexican Villages* (Stanford University Press 1979) 101–102; Charles Cutter, *The legal culture of northern New Spain 1700–1810* (University of New Mexico Press, 1995) 145.

11 Douglas Hay, 'Property, authority and the criminal law', in Douglas Hay and others (eds.) *Albion's fatal tree: crime and society in eighteenth-century England* (Allen Lane 1975) 17–63; Antonio M. Hespanha, *La gracia del derecho. Economía de la cultura en la Edad Moderna* (Centro de Estudios Constitucionales, 1993) 203–73.

12 Pietro Costa, *Iurisdictio. Semantica del potere politico medioevale (1100–1433)* (Giuffrè 1969); Antonio M. Hespanha, *Vísperas del Leviatán. Instituciones y poder político. Portugal, Siglo XVII* (Taurus 1989).

had a measure of it, from the supreme *iurisdictio* enjoyed by High Royal Courts (*Reales Consejos*, *Audiencias*) to lesser degrees of jurisdiction exerted by provincial officers (*gobernadores*, *corregidores*) and local magistrates elected by the cities (*alcaldes ordinarios).* Beyond the various institutional settings, it was assumed that each body politic (territorial corporations, privileged estates) of each community, had its specific share of jurisdiction by way of natural law. This led to a complex structure of multiple overlapping jurisdictions, whose interactions could eventually converge in the highest courts of both divine and human majesties.

12 The different functions and scopes of punishments were consistent with this complex structure of jurisdictions (penitential, ecclesiastical, inquisitorial, secular, military as well as for university students, nobles, Indians, etc.) and with the multiple textual sources to which judges and litigants could have recourse. Moreover, under the hegemony of Catholicism and royal jurisdiction, local customary practices had leeway to make punishments suitable for every context, meaning the legal order was thus flexible and adaptable with both social hierarchies and local interests (the community's welfare) also often being determinants in the courts.[13]

13 Given these traits, a simple description of positive laws would be a biased and insufficient way to know the punitive culture of this era. Having said that, there were positive criminal laws at the time: the medieval *Siete Partidas*, the Compilation of Castilian Law (1567), the Portuguese *Ordenações Filipinas* (1595) and the specific statutes issued for the colonies (like the Spanish *Leyes de Indias* compiled in 1680). Furthermore, innumerable local regulations, general rulings of courts as well as municipal ordinances and customs could be added to this list. However, to the extent that judges were not expected to simply apply the laws but to do justice, attending to religious and natural principles, to the factual details of the case at hand, the kind of people involved and the peculiarity of each jurisdictional context, the administration of justice relied much more on the virtues of the good judge (*iudex perfectus*) than on the textual tenor of the laws.[14]

13 Alejandro Agüero, 'On Justice and home rule tradition in the Spanish colonial order. Criminal justice and self government in Córdoba del Tucumán' (2012) 41 Quaderni Fiorentini 173.

14 Carlos Garriga, 'Sobre el gobierno de la justicia en Indias (siglos XVI-XVII)' (2006) 34 Revista de Historia del Derecho 67.

Jurisdictional pluralism proved to be a functional tool for colonial em- 14
pires.[15] It allowed the settlers to enjoy a high degree of self-government under the minimum control of the king's authorities. In addition to this, many indigenous social practices, labelled as idolatry, sorcery and bigamy, among others, were pursued by ecclesiastical courts. Colonised native peoples enjoyed some 'privileges' that allowed them to avoid complex ordinary proceedings, granted direct access to the high courts (*Audiencias*), made the provision of proof flexible and allowed the suspects and witnesses to change their statements at any point in the proceeding.[16] This flexible approach was a part of a general precept that tolerated the misconduct of indigenous people related to their rusticity and weakness (in the colonisers' view).

3. Domestic and police powers

Alongside the jurisdictional structures, other less formalised mechanisms 15
of social discipline contributed to keeping order in the colonial world. Among lesser magistrates and domestic authorities (heads of families, foremen, priests, rectors), informal chastisements were a common practice. To a certain extent, they were an expression of a culturally justified domestic/paternal power where, as one theologian noted by way of example, a priest could impose up to 25 lashes without any formal proceeding because he was acting as "a father would with his son".[17] Local magistrates often employed similar reasoning to overlook formal proceedings in punishing minor offences. Most of the population was subjected to a domestic power hierarchy that employed various disciplinary mechanisms exerted by householders and landowners over wives, relatives, servants, peasants and slaves. These widespread micro-social-discipline structures worked day in and day out throughout communities but they barely left written traces.

The Catholic King was said to have the required 'domestic power' (*pot-* 16
estas economica) to apply, among other things, coactive measures without

15 Lauren Benton, *Law and Colonial Cultures. Legal Regimes in World History, 1400–1900* (Cambridge University Press 2001).

16 Paulino Castañeda, 'La condición miserable del Indio y sus privilegios' (1971) 28 Anuario de Estudios Americanos 245.

17 J. de Paz, *Consultas y resoluciones varias, theologicas, juridicas, regulares, y morales* (first pub. 1687, Tournes Bros., 1745), 426.

formal proceedings when he deemed them necessary for the kingdom's protection. This patriarchal image of power would have two meaningful effects during the eighteenth century. On the one hand, for the apologists of the king's powers, it justified absolute obedience, condemning scholastic theses on resistance and tyrannicide. On the other, it provided an ideal model for the development of police power. According to advocates of the emerging field of police science, police measures were not deemed as punishments but as "paternal determinations to improve citizens' customs"; therefore, they did not require ordinary justice proceedings.[18]

17 The Spanish Bourbon's reforms created a new institutional framework for what they called "causes of police". Among the functions associated with them (topography, roads, improvement of farmland, hygiene, decoration of cities and public buildings), royal justices took over the repression of vagrants who must serve in military regiments, on warships, merchant vessels or assist in public works. Furthermore, officers had to collect "the useless" and the "professional beggars" in hospices, whereas the "restless, dangerous or wrongdoer" would be punished with forced labour in mines or *presidio*.[19] Through an extensive network of lesser officers, such as subdelegates, neighbourhood mayors (*alcaldes de barrio*), and rural judges (*jueces pedáneos*), late colonial authorities sought to control a growing population using their policing jurisdiction.

18 In the last few decades of the colonial period, the close connection between domestic and police powers had a clear expression in punitive practice that entailed the imposition of a compulsory labour obligation (*conchabado* or *concertado*) on any vagrants or on those convicted who, after serving the penalty, had to undergo work for an honourable man who would watch over them. Bakeries, butchers and textile mills were other possible destinations for vagrants in different parts of the region's colonies. During this period, institutional punishments became less formalised and more utilitarian, providing soldiers and workers for public and private purposes. At the same time, military jurisdiction had a remarkable expansion while new special jurisdictions (i.e., tobacco revenue, post office) were

18 Markus D. Dubber, *The Police Power: Patriarchy and the Foundations of the American Government* (Columbia University Press 2005); Jesús Vallejos, 'Concepción de la Policía', Marta Lorente (ed.), *La jurisdicción contencioso-administrativa en España. Una historia de sus orígenes* (Consejo General del Poder Judicial, 2009) 117–144.

19 *Real Ordenanza de Intendentes de Exercito y Provincia en el Virreinato de Buenos Aires* (Imprenta Real 1782), 58–60; *Real Ordenanza de Intendentes de Exercito y Provincia en el Reino de la Nueva España* (Ibarra 1786) 68–70.

created to increase royal control. The boundaries between police powers, ordinary justice and special or privileged jurisdictions (*fueros privilegiados*) gave rise to ongoing and intense jurisdictional competition.

III. Revolution, constitutionalism and criminal justice

1. First constitutionalism. A gradual transition

The crisis of the Iberian colonial empires gave rise to political revolutions 19
and the emergence of new States. However, this political transformation did not mean a rejection of the preceding legal tradition. As such, in Spain and its former colonies, Catholic elites favoured gradual adjustments rather than radical revolutionary changes, showing a respectful attitude towards historical law. Most constitutional essays on both sides of the Atlantic declared Catholicism as 'fundamental law', thus keeping the underlying connection between religion and law. Recent studies highlight the original tenor of Iberian constitutionalism that stemmed from a mixture of new principles with tenets rooted in the ancient tradition and, as with most Western constitutional discourses, maintained the basic traits of the colonial culture.[20]

The Cádiz Constitution (1812), which entered into force in most Spanish 20
colonial dominions and influenced the drafting of other constitutions in the region, offers a good starting point for analysing the new constitutional framework. Whereas some provisions reflected ancient tenets (the need for previous information of the facts of the case to impose a punishment found in Art. 287 and the personal responsibility of judges required by Art. 254), others were shaped by reformers' demands, such as the prohibition of torture (Art. 303), repealing the requirement for the accused to confess under oath (Art. 291) and the need for brief proceedings to avoid delays in administering justice (Art. 286). Future legislation would provide a body of uniform procedural law that neither the King nor the courts could ignore (Art. 244). The Cádiz Constitution provided the possibility to introduce a form of trial by jury (judges of the facts) for criminal cases (Art. 307) while

20 Marta Lorente and José M. Portillo (eds.), *El momento gaditano. La constitución en el orbe hispánico (1808–1820)* (Congreso de los Diputados 2012); Bartolomé Clavero, *Constitucionalismo colonial. Oeconomía de Europa, Constitución de Cádiz y más acá* (Universidad Autónoma de Madrid 2016).

the *Cortes* could suspend some guarantees in cases involving extraordinary circumstances threatening State security (Art. 308).

21 The constitutional design was, in essence, an attempt to replace the jurisdictional paradigm with a law-centred one. The *Cortes* with the King would exert legislative power (Art. 15), and should not exercise judicial competencies (Art. 243). The magistrates' role should be limited to the strict judicial application of the laws (Art. 17, and 245), meaning they could no longer pass general regulations (Art. 246). The civil, criminal and commercial codes would be "the same for the entire Empire, notwithstanding the variations that the *Cortes* may introduce due to particular circumstances" (Art. 258).[21] There would only be "one jurisdiction (*fuero*) for all classes of persons" in "common civil and criminal cases" (Art. 248), although the ecclesiastical and military *fueros* were maintained (arts. 249–250). Therefore, by allowing regional variations in the codes and preserving personal *fueros*, the liberal ideal of one simplified uniform law had two traditional limitations. Beyond the Constitution, the *Cortes* of Cádiz passed other significant reforms.[22] Arguably the most important of these was the abolition of the Holy Inquisition in 1813, but when coupled with the repealing of seigniorial jurisdictions, decreed in 1811, these represented another significant step for jurisdictional unification, despite the aforesaid limitations.[23]

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21 "El Código civil y criminal y el de comercio serán unos mismos para toda la Monarquía, sin perjuicio de las variaciones que por particulares circunstancias podrán hacer las Cortes" (Art. 258, Spanish Constitution of 1812).

22 The Cortes of Cádiz (1810–1814), a Parliament composed of representatives from Spain and overseas, not only acted as a constituent power to sanction the Spanish Constitution of 1812 but also functioned as a legislative power and even performed some jurisdictional functions. See, Carlos Garriga and Marta Lorente, *Cádiz, 1812. La Constitución Jurisdiccional* (Centro de Estudios Políticos y Constitucionales 2007) 373–392.

23 The repealing of the seigniorial regime entailed depriving the noble estates of their jurisdictional privileges (government, administration of justice, feudal taxes, etc.) over their lands. They only retained the right to private ownership of the land. On the new judges established to replace the seigniorial justice, see Fernando Martínez, *Entre Confianza y Responsabilidad. La justicia del primer constitucionalismo español* (Centro de Estudios Políticos y Constitucionales 1999) 437–448. On the Constitution of Cádiz and criminal law, Alejandro Agüero and Marta Lorente, 'Penal Enlightenment in Spain: from Beccaria's reception to the first criminal code', in J. Astigarraga (ed.), *The Spanish Enlightenment Revisited* (The Voltaire Foundation 2015) 259. On parallelisms with the Brazilian case, see Carlos Garriga and Andréa Slemian, 'Em trajes brasileiros: justiça e constituição na América ibérica (C. 1750–1850)' (2013) 169, Revista de História, 181–221.

2. Restoration, insurgencies, resiliencies

The restoration of Ferdinand VII to the Spanish throne in 1814 meant 22
the total repealing of the Cádiz Constitution. However, most of the new constitutions in the region shared its moderate reformist mood and independence declarations did not bring immediate effective changes in the administration of criminal justice in the former colonies. Amidst civil wars and political instability, traditional practices continued while the bulk of Spanish colonial law remained in force. During this transitional period, the hegemonic position of Catholicism contributed to maintaining communitarian and hierarchical social structures, hindering the emergence of a strong notion of individual rights. The social strength of the Catholic church, alongside the militarisation of politics, discouraged attempts to abolish ecclesiastical and military *fueros*.

The continued presence of strong provincial governors hindered the 23
effective separation of powers. Endowed with extraordinary competencies, governors continued exercising functions related to the administration of justice and police power in many regions, which often overlapped with repressive policies. In addition to provisions aimed at suppressing political opponents, many local laws were passed with the twofold purpose of shortening legal proceedings and increasing penalties for the most frequently committed crimes, such as banditry and cattle rustling.[24]

Provisions against vagrants remained the main instrument of social dis- 24
cipline imposed on the lower classes. A special court (*Tribunal de Vagos*) was established in Mexico in 1828 just for this purpose while in the Argentine Confederation, provincial laws reinforced the practice of imposing forced labour on anyone who lacked property or gainful employment *(conchabo)*. A Colombian law systematised these practices by establishing penalties for vagrants to (a) serve as forced labour for individuals or public institutions or perform military service for a period of two to six years, or (b) be sent to new communities in desert lands (Law of April 6, 1836). Many minor offences against public order, such as drunkenness, gambling and brawling, broadened the scope of such laws against vagrants. The repression of these offences and the social control thus exerted in rural

24 Alejandro Agüero, ‘‘Ancient Constitution or paternal government? Extraordinary powers as legal response to political violence (Río de la Plata, 1810–1860)’ (2016), Max Planck Institute for European Legal History, Research Paper Series (2016–02) http://ssrn.com/abstract=2841769; Águeda G. Venegas de la Torre, ‘Nuevas Perspectivas sobre los Delitos y Castigos en México, 1824–1835’ (2014) 2 Historia y Justicia 10.

areas was assigned to police corps and local agents, both of which were subordinate to the executive branches that accumulated multiple functions, including responsibility for judicial and police procedures.

25 Outside the region's relatively large capital cities, attempts to establish modern court structures faced the challenge presented by the shortages of qualified lawyers. Nevertheless, and despite both failures and delays throughout this period, the gradual transformation of the legal culture had begun, including the emergence of criminal law as a specific legal field that offered a new conception of punishment to promote and maintain a new social order.

IV. Modernising criminal law

1. Modernity's double face

26 For a long time, codification was regarded as the best method for realising modern ideas on criminal law. Newer approaches tend to remark that codification was not the only liberal way of replacing ancient regime practices and that not all codes reflect the same values. Besides, codes also "supplied the optimal method of legal control for the consolidation of political power".[25] In line with Foucault's criticism of the hidden disciplinary face of enlightened reforms, other scholars have noted that, alongside liberal tenets, modernity involved the development of powerful mechanisms to maintain social discipline. As Dubber suggests, modernity encompassed not one but "two foundational modes of governance" that have been in tension since the very beginning of the liberal project: *Rechtsstaat* versus *Polizeistaat*, the liberal ideal of law based on individual self-government versus governance based on the State's police power.[26]

27 Similarly, Zaffaroni has pointed out the need to distinguish criminal law from what he calls 'punitive power'. While the latter refers to all agencies and forms, historical and present, that wield repressive powers, criminal law denotes the legal knowledge aimed at interpreting the law and

25 Mathew C. Mirow, *Latin American Law: A History of Private Law and Institutions in Spanish America* (University of Texas Press, 2004), 98

26 Markus D. Dubber. 'European criminal law in the nineteenth and twentieth centuries' in Heikki Pihlajamäki, Markus D. Dubber, and Mark Godfrey (eds.) *The Oxford Handbook of European Legal History*, (OUP, 2018) 1065–1067.

supplying guides to restrain a State's punitive power.[27] These approaches all focus on addressing the same concern, namely avoiding teleological narratives that read the history of criminal law just as an evolutionary story of humanising punishments.

28 Any study of the history of modern criminal law in Latin America must not ignore the parallel processes which led to the reinforcing of police agencies and their powers, the exercise of political control over judiciaries and the systematic use of states of exception and/or military governments. From current historical perspectives, the history of modern criminal law is simply a part of the history of State building, a model of governance that did not exist before the cycle of revolutions that changed the Western world between the eighteenth and nineteenth centuries. This was, or arguably is a non-linear process that has faced several challenges in Latin America.

2. Criminal law codification: first experiences

29 The first criminal codifications in Latin America did not replace the Spanish legal tradition overnight. New codes were often used as an additional text complementing existing laws and doctrines while the old dynamics of normative hetero-integration and multi-normativity continued.[28] Following the Spanish code of 1822 (Preliminary title, Chap. XIII), the first codes in the region provided that all crimes not included in the code should be punished by their respective laws. The Spanish code, a mixture of ancient laws set in the formal structure of the Napoleonic Penal Code of 1810 (hereafter the French code), placed crimes against the State and public order in the first place of the 'special section.' No wonder the French code had been qualified as a law "approved to ensure a despotic government".[29] While Haiti and the Dominican Republic adopted the French code, the Spanish code was the main source for codification for most other former

27 E. R. Zaffaroni, A. Alagia and A. Slokar, *Manual de Derecho Penal. Parte General* (Ediar, 2007) 165–166.

28 Alejandro Agüero and Matías Rosso, 'Coding the Criminal Law in Argentina: provincial and national codification in the genesis of the first penal code' in Aniceto Masferrer (ed.) *The Western Codification of Criminal Law. A Revision of the Myth of its Predominant French Influence*, (Springer 2018) 297–332.

29 Aniceto Masferrer, 'The Myth of French Influence over Spanish Codification: The General Part of the Criminal Codes of 1822 and 1844' in Masferrer (ed.), *The Western Codification* (n 28) 210.

colonial territories, including Salvador (1826), Chihuahua (1827), Bolivia (1831/1834), Veracruz (1835), Ecuador (1837) and Colombia (1837).

30 Although the bulk of the old penalties was maintained, some that were regarded as ignominious, such as whipping or being sent to the gallows, were done away with. Public executions were regulated in detail and the garrotte became the preferred method for implementing death penalties ("without any torture or maltreatment").[30] Infamy and deprivation of civil/political rights or office continued among the non-corporal punishments while the Spanish Code, and most codes based on it, excluded public humiliation as punishment, though the codes of El Salvador (Arts. 31, 66) and Colombia (Arts. 18, 51) maintained the latter.

31 Alternative models came up from two different sources. On the one hand, the Livingston's draft for Louisiana (1825), which was translated into Spanish and adopted in Guatemala and Nicaragua (1837), has been said to be much more humanistic, technical and liberal than its contemporaries.[31] For the first time, the death penalty was excluded from the list of punishments in a Latin American territory, with the majority being reduced to various prison sentences and fines (Art. 100). On the other hand, the Brazilian code of 1830, although influenced by the French, Bavarian and Spanish codes, as well as Livingston's draft, has been qualified as an original

30 Spanish Penal Code of 1822, Art. 38: "El reo condenado á muerte sufrirá en todos casos la de garrote, sin tortura alguna ni otra mortificación previa de la persona, sino en los términos prescritos en este capítulo".

31 Eugenio Raúl Zaffaroni 'Los códigos penales de Latinoamérica' in Suprema Corte de Justicia de la Nación (ed.) *Códigos penales de los países de América Latina* (ILANUD, 2000) 43. When Louisiana was acquired by the United States, Edward Livingston was appointed by the state's Legislature, in 1820, to prepare a systematic code of criminal law. Three years later he had finished his work consisting of a Code of Crimes and Punishments; a Code of Procedure; a Code of Evidence; a Code of Reform and Prison Discipline; and a Book of Definitions. Although his system did not receive the sanction of the Legislature ("it was not to be the good fortune of Louisiana to possess a Penal Code so far in advance of any system hitherto promulgated"), printed versions circulated in England, France and Germany, and the most advanced thinkers of the age, like Bentham and Jefferson, acknowledged its merits. See, Salmon P. Chace 'Introduction' to *The Complete Works of Edward Livingston on Criminal Jurisprudence* (National Prison Association of the United States of America, 1873) VI-VII; Elon H. Moore, 'The Livingston Code' (1928) 19 3 Journal of Criminal Law and Criminology 344. Carl Mittermaier, in his Treatise on Evidence (*Die Lehre vom Beweise im deutschen Strafprozesse*, Heidelberg 1834, translated into Spanish in 1851, then printed in México in 1853), praises Livingston's work, especially in the topic regarding evidence in jury trials. See Carl J. A. Mittermaier, *Tratado de la prueba en materia criminal* (first pub. 1851, R. Rafael 1853) 35, 122, 397.

"advanced and unique" text for its time.[32] It served as one of the main sources for the Spanish code of 1848 which, in turn, became a model for the next generation of Latin-American codes. Thus, the first Brazilian code is a good example of the intense circulation of legal culture back and forth across the Atlantic Ocean.[33]

Drafted for societies in which slavery was practiced, the Livingston 32
draft excluded crimes committed by slaves to be regulated by special laws (Art. 64 Spanish version). The Brazilian code preserved whipping as a punishment (up to 50 lashes for slaves, Art.60) if it was decided they did not deserve death or service on a galley for insurrection (Art. 113). These provisions were in line with a legal culture that still relied on domestic-social powers and the responsibility of fathers and masters or any other who had "legitimate faculty to punish others by themselves" (Spanish Code of 1822, Art. 607 § 6; Brazilian Code of 1830, Art. 14 § 6). Interestingly, if those being punished died as a result of individuals exercising such powers, it was always presumed to be an involuntary act (Spanish Code of 1822, Art. 625; Colombian Code of 1837, Art. 606, § 6). This highlights something of a chasm between formal law and punitive practices which, according to Zaffaroni, is at least partially attributable to the fact that the first Latin-American criminal codes were a product of 'learned elites' not overly concerned with limiting the mechanisms used to exert social control.[34]

3. Liberalism, scholarship, new codes

The last decades of the nineteenth century witnessed more political stability 33
in Latin America that, in turn, fostered deeper liberal reforms and the modernising of national laws (adopting Western models), a process seen as a requirement to integrate Latin American economies into world markets.

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32 Ignacio M. Poveda Velasco and Eduardo Tomasevicius Filho, 'The 1830 Criminal Code of the Brazilian Empire and its Originality' in Masferrer (ed.) *The Western Codification* (n 28) 365. On the importance of Livingston work in the Brazilian first codification of criminal and procedural law, Monica Duarte Dantas, 'Da Luisiana para o Brasil: Edward Livingston e o primeiro movimento codificador no Império (o Código Criminal de 1830 e o Código de Processo Criminal de 1832)' (2015) 52 Jahrbuch für Geschichte Lateinamerikas 173.

33 Bernardino Bravo Lira 'La fortuna del código penal español de 1848. Historia en cuatro actos y tres continentes: de Mello Freire y Zeiller a Vasconcelos y Seijas Lozano' (2004) 74 Anuario de Historia del Derecho Español, 23–58.

34 Zaffaroni, 'Los códigos penales' (n 31) 26.

In time, criminal law became a specialised subject within the local legal landscape, increasing the circulation of related ideas. A growing number of lawyers were available to assume roles within judicial structures and, in this context, new European academic developments, such as the Italian and French doctrines, would reach the Hispanic world thanks to the works of Spanish scholars. The Studies on Criminal Law (Madrid, 1842–1843) by Pacheco, and his commentaries on the new Spanish penal code of 1848, for example, would prove to have a remarkable influence on Latin-American scholars.[35]

34 The Spanish code of 1848, revised in 1850 and 1870, brought technical improvements in systematising general principles and standards to graduate penalties and reduce judicial discretion. Nevertheless, even after the 1870 reform it still contained a large list of minutely graduated punishments. Alongside the death penalty, whose public execution was slightly moderated, most punishments consisted of different forms of imprisonment, *presidio*, banishment, disqualification, and civil interdiction. It expressly abolished the penalty of infamy (Art. 23). In its 'special part', before crimes against the State, the Spanish code had a title on crimes against religion, punishing attempts to abolish Catholicism, the public worship of other cults and public apostasy (Book II, Title I). These provisions were replaced in 1870 with a title on crimes against 'freedom of worship' (Book II, Title II, Sec. III).

35 The Spanish code of 1848 influenced reforms in countries that had adopted the 1822 code. It was an important source for the first Chilean criminal code of 1874, which also was influenced by the Belgian code of 1867. In 1872, the Belgian code was adopted in Ecuador, though in this case the code included a chapter on crimes 'against religion' aimed to preserve Catholic intolerance (Book II, Chap. II). Also in 1872, the first criminal code of Mexico's Federal District entered into force before then being adopted in most states of the federation. Based on many different sources, Mexico's code reflected the influence of scholars such as Pacheco, Chauveau and

35 Besides the influence of Francesco Carrara, Pacheco adopted the scientific orientation of Pellegrino Rossi, who had applied the philosophical eclecticism of Victor Cousin to criminal law, see Emilia Iñesta Pastor, 'La proyección hispanoamericana del código penal español de 1848' in Luis E. González Vale (ed.) *XIII Congreso del Instituto Internacional de Historia del Derecho Indiano* (Asamblea Legislativa de Puerto Rico 2003) vol. 2, 493–520, especially, 494–95, 507.

Hélie.[36] It is noteworthy that its special section departs from the French and Spanish models by placing crimes against property and persons in the first place (Book III, Chaps. I-III).

Setting 'private crimes' before 'public crimes' (offences against the State) 36
mimics Feuerbach's Bavarian code of 1813. Regarded as an alternative liberal model when compared to the Napoleonic Code, the Bavarian code had had little influence in Latin-American until its translation into French in 1852. Carlos Tejedor declared that the Bavarian code was the main source for his project (1866–1867) of drafting the first Argentine criminal code, however, his draft and commentaries seemed to reveal greater influence from the older laws and Spanish codes, as well as other Latin American codes of the time.[37] After a long revision process, Tejedor's draft was eventually passed in 1886. In the meantime, it had been provisionally adopted in most Argentine provinces and Paraguay (1880).[38] Later codes that drew liberal inspiration from the model of the first Italian code drafted by Zanardelli (1889) took root in newly republican Brazil (1890), Venezuela (1897) and Colombia (1922), although the latter was soon repealed.

This patchwork of nineteenth-century Latin-American codes, inspired by 37
mixed if not contradictory sources, says little about the effective practice of punishment. Structural challenges to uphold independent judiciaries, alongside increasing police regulations and special laws, weakened the pretence of liberal standards. Economic difficulties and the lack of modern penitentiaries often justified the continuation of old forms of punishment and the death penalty. Except for some early short-lived experiences (Brazil in 1834, Chile in 1844 and Peru in 1862), the use of penitentiaries would only become a widespread mechanism within the various States' punishment systems in the twentieth century.[39]

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36 Óscar Cruz-Barney, 'The Mexican Codification of Criminal Law: its foreign influences' in Masferrer *The Western Codification* (n 28) 386.

37 Thomas Duve, '¿Del absolutismo ilustrado al liberalismo reformista? La recepción del Código Penal Bávaro de 1813 de Paul J. A. von Feuerbach en Argentina y el debate sobre la reforma del derecho penal hasta 1921' (1999) 27 Revista de Historia del Derecho 125–152.

38 Zaffaroni, 'Los códigos penales' (n 31) 28. The draft Code of Tejedor underwent a long revision in the Argentine Congress, where an alternative draft was presented by the revising commission. This is what explains the delay between the first draft (1866) and its sanction, with slight modifications, as the first Argentinean Criminal code in 1866, see Agüero & Rosso (n 28) 302–306.

39 Ricardo Salvatore and Carlos Aguirre, 'The Birth of the Penitentiary in Latin America: Towards an Interpretative Social History of Prisons' in Ricardo Salvatore and

38 Similar pragmatic reasons were invoked to justify the deferral of reforms regarding procedural laws. In 1891, a Chilean scholar claimed that the constitutional guarantees were a 'dead letter' due to the lack of a procedural code.[40] This claim may reflect the reality of procedural practice in most countries throughout the region at the time. Procedural codification came late to Latin America and it essentially only systematised a variety of slight modifications to the traditional inquisitive model, giving rise to a so-called 'mixed system' that maintained existing written procedures with their division into *sumario* and *plenario*. The first phase (*sumario*), generally delegated to the police corps, was decisive for a trial where a single judge was to carry out the entire procedure with scant participation from prosecutors or complainants. Although most constitutions provided for jury trials, these were implemented only in very few countries (Ecuador, Colombia, Mexico, and Costa Rica) and for short periods, except for Brazil, where they have continued since their introduction in 1822.[41] The long persistence of the mixed system has led scholars to speak of an 'inquisitorial culture' in the history of criminal procedure in Latin America.[42]

4. The twentieth century: New approaches, new codes, old troubles

39 Since the last decades of the nineteenth century, the ideas of positivist criminology began to spread in Latin America. Theories by Lombroso, Ferri and Garofalo reoriented academic attention towards the study of crime and the delinquent as naturally or socially determined phenomena.[43]

Carlos Aguirre (eds.) *The Birth of Penitentiaries in Latin America: Essays on Criminology, Prison Reform, and Social Control, 1830–1940* (University of Texas Press, 1996), 1–43.

40 Robustiano Vera, 'El azote, la tortura y las incomunicaciones como medios de descubrir los delitos' (1891), 8 Revista forense chilena 586–591.

41 Andrés Harfuch and Cristian Penna, 'El juicio por jurados en el continente de América' (2018) 17 Sistemas Judiciales, 21, 114.

42 Alberto F. Binder 'La reforma de la justicia penal en América Latina como política de largo plazo' in Catalina Niño Guarnizo (ed.) *La reforma a la justicia en América Latina. las lecciones aprendidas*, (Friedrich-Ebert-Stiftung, 2016) 53–103.

43 Cesare Lombroso (1836–1909), Enrico Ferri (1856–1929), and Rafaelle Garofalo (1851–1934) promoted the ideas of positive criminology from the Italian journal *Scuola Positiva*. Despite their different perspectives, they shared a scientistic approach which, in addition to its influence on criminal law, contributed to the development of medico-legal approaches and techniques for the treatment of criminals. See, Gabriel I. Aituna, *Historia de los pensamientos criminológicos* (Editores del Puerto 2005)

This new approach prompted severe criticism of the liberal ideas that had inspired penal codification. In turn, it provided an allegedly 'scientific' explanation for their failure, as evidenced by a perception of growing criminality and glaring gaps between liberal principles and effective practices. The racist episteme underpinning some of the new theories reinforced colonial prejudices and provided an appropriate discourse to implement repressive policies based on dangerousness and racial discrimination. Subsequent medico-legal approaches encouraged the development of specific institutions for the surveillance, control and treatment of potential criminals. Within this framework, penitentiaries acquired a new impulse as they became part "of a common project aimed at normalizing, segregating, and correcting the subordinate".[44] However, due to regional economic and political circumstances, older prisons continued to be used alongside modern penitentiaries.[45]

The reception of the positivist approach was uneven as it had a significant impact on scholarship and public policies but failed to translate into the new generation of penal codes. To the extent that the positivist criminology rejected free will, and could challenge the principle of *nulla poena sine lege* (by advocating preventive measures, indeterminate sentences, etc.) and the division of powers (insofar as a medical-administrative office could deal with delinquency better than the judiciary), positivist ideas could lead to altering the entire conceptual structure of legal knowledge. For this reason, the constitutional frameworks conditioned their legislative impact. New codes based on "the twofold notion of criminal liability and dangerousness" sought to harmonise liberal tenets with positivist claims for criminal treatment and social defence.[46] 40

In line with Stoos's 1893 draft criminal code for Switzerland, some new Latin American codes, such as those of Argentina (1921), Peru (1924) and Mexico (1931), maintained the classical structure of crime (*teoría del* 41

182–191. On the radicalisation of the biological approach during the German National Socialism, and its subsequent implications in criminal law, Kai Ambos, 'Nazi Criminology: Continuity and Radicalisation' (2020) 259 Isr.L.Rev. 261 ff.

44 Salvatore & Aguirre (n 39) 8.

45 Zaffaroni, 'Los códigos penales' (n 31), 29, 76–77; Salvatore & Aguirre (n 39) 1–43; Rosa del Olmo, *América Latina y su criminología* (Siglo XXI 1981).

46 Michele Pifferi, 'Global Criminology and National Tradition: The Impact of Reform Movements on Criminal Systems at the Beginning of the 20th Century' in Thomas Duve (ed.) *Entanglements in Legal History: Conceptual Approaches* (Max Planck Institute for European Legal History 2014) 543–564.

delito), while introducing provisions related to the positivist programme, such as measures of security, indeterminate reclusion for recidivism and dangerousness as a circumstance for graduating punishments or conceding conditional release. The new Italian code of 1930 (Rocco's Code) issued in the context of Italian fascism was also an expression of a 'two-track system' (punishments and measures of security). While Ferri's positivist draft for Italy (1921) influenced penal codes enacted in Colombia (1936) and Cuba (1936), Rocco's text inspired the new codes drafted for Uruguay (1933) and Brazil (1940). Despite his fascist leanings, Rocco's methodological approach defined criminal law as a normative science that relied on an exegetical method as opposed to the empiricist approaches of positivist criminology.[47]

42 Rocco's technical method, as well as that of other Italian and Spanish scholars, resulted in Latin American scholarship drifting toward German theories. Jimenez de Asúa, an exiled Spanish jurist, had a prominent role in this process. His translations into Spanish of von Liszt's works had begun as early as 1915 and, despite his changing theoretical positions, he is said to have fostered a scientific revolution in criminal law studies in the Spanish-speaking world.[48] In turn, Sebastian Soler made a remarkable contribution to consolidating the German-centric approach in Argentina. By 1929, he had published a critical study against theories on the state of dangerousness and, in the following years, he translated the works of Ernst von Beling into Spanish. In 1940 Soler began publishing his treatise on penal law to reinforcing respect for law through its doctrinal or theoretical reconstruction. Five years later, in Caracas, Jimenez de Asúa's "La ley y el delito. Curso de dogmática penal" was published.[49]

43 Intense circulation of German legal theories would follow in later decades and the consolidation of doctrinal approaches by the mid-century led to a renewal of the study of criminal law.[50] The translation into Spanish

47 Massimo Donini, 'El problema del método penal: de Arturo Rocco al Europeísmo judicial' (2011) 7 Revista Nuevo Foro Penal 76.

48 Enrique Bacigalupo Zapater, 'La recepción de la dogmática penal alemana en España y Latinoamérica' (2019) 2–19. InDret: Revista para el análisis del Derecho, 1–22; Enrique Roldán Cañizares, *Luis Jiménez de Asúa. Derecho penal, República, Exilio* (Dykinson 2019).

49 Jimenez de Asúa's title: "The law and the crime. Course on penal dogmatic". The term "dogmatic" refers to the conceptual and systematic reconstruction of the meaning and sense of the laws, especially, the penal codes. I use "doctrinal" or "theoretical" here for this notion.

50 See on this in more detail the contribution by Greco y Teixeira in this volume.

of works by Welzel and Dohna further promoted the diffusion of new finalist theories, although the causal theory of crime continued to dominate among scholars in the region.[51] Between 1963 and 1979, several academic meetings held in different countries debated the options for and viability of a project to establish a Latin American criminal code type. Though it never received any official backing, it inspired reforms in Bolivia (1973), Panama and several other Central American countries. Further developments in the German school, coupled with the advent of the German Code of 1974, continued to influence Latin American reforms in the 1980s and 1990s.[52]

Academic and legislative changes throughout the twentieth century ran 44
parallel to, rather than always in opposition to, coups d'état and de facto governments. The latter enacted numerous special laws and police regulations to punish political crimes and apply martial law to the civilian population. Citing reasons of national security, para-institutional practices were deployed, including illegal detentions, the use of torture and the forced disappearance of persons. Beyond these specific contexts, the late decades of the twentieth century gave rise to a new 'critical criminology' in Latin America that adopted a sociological perspective that showed how, behind the aseptic discourse of liberal law, the daily functioning of criminal justice selectively punished the lower classes, young people and ethnic groups. Studies focused on prison conditions showed the failure of penitentiary systems, pointing to evidence of chronic and acute overcrowding and mistreatment. Unfortunately, awareness has not led to redress as increasing rates of incarceration, abuse of pre-trial detention and delays in proceedings are still a matter of concern despite an overall improvement in the region's procedural laws.[53]

Regarding procedural law, except for some singular experiences (such as 45
Córdoba, Argentina, in the 1940s), it was not until the 1980s that a reformist movement sought to overcome the inquisitive procedure.[54] The objective was to design an accusatory model, based on oral trials, with adversarial control and the separation of the criminal investigation from the trial itself.

51 Kai Ambos, '100 años de la "teoría del delito" de Beling. ¿Renacimiento del concepto causal de delito en el ámbito internacional?' (2007), 09–05, Revista Electrónica de Ciencia Penal y Criminología, 10–11.

52 Zaffaroni, 'Los códigos penales' (n 31) 91–97.

53 Eugenio R. Zaffaroni, *En busca de las penas perdidas Deslegitimación y dogmática jurídico-penal* (Ediar, 2003); Máximo Sozzo (ed.) *Postneoliberalismo y penalidad en América del Sur* (CLACSO, 2016).

54 See on this in more detail the contribution by Duce y Fuentes in this volume.

In 1988, the Ibero-American Institute of Procedural Law elaborated a Model Code of Criminal Procedure, thus providing the main source for further procedural reforms that had the dual purpose of improving the efficiency of Latin American judicial systems and ensuring due process. They also prompted the adoption of alternative measures to punishment such as probation, plea bargain and mediation while different forms of jury trials were also established in some areas (for example, in several provinces in Argentina, Panamá, Nicaragua, El Salvador, Venezuela, and Bolivia).[55]

V. Final remarks, contemporary challenges

46 Despite economic and political troubles, the academic and legislative developments of the second half of the twentieth century served to reinforce the rise of a liberal perspective on criminal law in the region. After the impact of positivist criminology, liberal principles soon recovered their theoretical relevance and are now enshrined in most Latin American constitutions as well as criminal and procedural codes. This includes provisions on the restrictive interpretation of criminal laws and prohibitions on application by analogy. The widespread use of penitentiary systems also contributed to the progressive abolition of the death penalty. By the end of the twentieth century, most countries in the region had largely abolished the death penalty with it being limited exclusively to cases involving wartime activities or within military jurisdictions. Nevertheless, the gap between theoretical and normative designs and effective repressive practice continues as evidenced, and as previously noted, by overcrowded prisons and abuses by police forces of their powers.

47 Current scholarship debates and legal reforms have taken a number of contradictory paths. On the one hand, different versions of the doctrinal approach have consolidated their role in legal analysis and teaching. On the other hand, phenomena such as terrorism, organised crime and drug trafficking have prompted reforms that facilitate policing activities focused on providing security and order rather than applying liberal law tenets. In this sense, the notion of the 'policification' of criminal law, a term coined to highlight "the dominance of police over the law as a model of

55 Máximo Langer, 'Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas from the Periphery' (2007) 55 American Journal of Comparative Law, 617–676; Harfuch & Penna (n 41).

penal governance"[56], may well describe the overarching regional trend.[57] This situation is further complicated by the proliferation of special statutes created to face new forms of criminality and an increase in the severity of punishments to deal with such; this has led scholars to speak of the de-codification, chaos and inflation of criminal law now gripping many Latin American States.[58]

The international human rights system has also influenced this process, 48
creating a new legal space for multi-normativity. In this regard, the Inter-American System of Human Rights has had two opposite effects: On the one hand, reports and jurisprudence of the Inter-American Commission and Court of Human Rights have prompted reforms to improve State criminal justice systems, particularly in the aftermath of dictatorial governments. On the other hand, these bodies have compelled States to prosecute and punish human rights violations, stating that 'all amnesty' or 'provisions on statute of limitations' are inadmissible when they are intended to prevent punishment "for serious human rights violations" (Barrios Altos v. Peru, 2001). For some scholars, these kinds of statements, alongside the principle of universal jurisdiction, while expanding criminal law and judicial activism serve to undermine liberal guarantees and State sovereignty. Nonetheless, adopting these standards has made it possible, for example, to try and punish crimes against humanity committed by military governments in Argentina and to start prosecutions in other countries for similar reasons, showing the resolve of new democratic governments to break from the past.[59]

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56 Dubber, 'European criminal law' (n 26) 1069–70.

57 On Police forces in the region, see the comparative study coordinated by Kai Ambos, Juan-Luis Gómez Colomer, Richard Vogler (eds.), *La policía en los estados de derecho latinoamericanos* (Instituto Max-Planck para Derecho Penal Extranjero e Internacional 2003).

58 Daniel R. Pastor, *Recodificación penal y principio de reserva de código* (Ad-Hoc, 2005).

59 For an example of opposing perspectives on this topic, see Ezequiel Malarino, 'Judicial Activism,' 'Judicial Activism, Punitivism and Supranationalisation: Illiberal and Antidemocratic Tendencies of the Inter-American Court of Human Rights', (2012) 12 International Criminal Law Review 665–695; and Gabriel Pérez Barberá and Alejandro Agüero, 'Contrapunitivismo y neopunitivismo. Perspectiva histórica y moral' (2012) 2(2) Derecho Penal y Criminología 249–263. For a critical analysis of the Inter-American System of Human Rights and the case law of the Inter-American Court see Kai Ambos, Ezequiel Malarino and Gisela Elsner (eds.), *Sistema interamericano de protección de los derechos humanos y derecho penal internacional* (Fundación Kon-

49 The liberal ideal of uniform sovereign State law in the region also currently faces other challenges. Gender perspectives, for example, have prompted the decriminalisation of conduct related to sexual and reproductive rights while requiring new criminal types linked to gender-related offences (Convention of Belem Do Para, 1994, Art. 7). Furthermore, gender perspectives involve a need for reinterpreting the entire legal order to remove its deep-rooted patriarchal traits. As such, gender violence remains a pressing issue in the region. In this sense, decriminalising of abortion remains the subject of current debate despite recent reforms.

50 Multiculturalism and decolonisation have also affected the idea of employing uniform and homogeneous State law. Convention 169 of the ILO (1989) stated that, in applying national laws to indigenous and tribal peoples, "due regard shall be had (!) to their customs" (Art. 8) and that in imposing penalties on members of these peoples "account shall be taken of their economic, social and cultural characteristics" while avoiding "confinement in prison" (Art. 10). The UN Declaration on the Rights of Indigenous Peoples (2007) enshrines the right to promote, develop and maintain indigenous institutional structures and, in the cases where they already exist, incorporate their juridical systems and customs under international human rights standards (Art. 34). Having said that, many Latin American jurists trained in the Western tradition have shown a reluctance to recognise indigenous jurisdiction in criminal matters.[60] However, notwithstanding that reluctance, conditions have been created for the development of autonomous indigenous jurisdictions as a part of plurinational State organisations (Ecuador 2008, Bolivia 2009). While this is a promising development, the extent to which it is possible to harmonise and integrate indigenous peoples' rights with the dominant 'western-colonial' conceptions of constitutional law and human rights is a question that remains open.[61]

51 Looking at the long-term history, one may say that just when it seemed that the liberal ideals of an uniform criminal law were beginning to consolidate in the region, new political contexts opened the door for a return to

rad-Adenauer 2010, 2011, 2013), available at https://www.cedpal.uni-goettingen.de/index.php/publicaciones/libros-gledpi

60 Idón Moisés Chivi Vargas, 'El largo camino de la jurisdicción indígena' in Boaventura de Sousa Santos and José Luis Exeni Rodríguez (eds.) *Justicia indígena, Plurinacionalidad e interculturalidad en Bolivia*, (Fundación Rosa Luxemburgo/Abya-Yala, 2012) 275–379.

61 Bartolomé Clavero, *Derecho de otras gentes entre genocidio y constitucionalidad* (Olejnik 2019).

pluralism and multi-normativity where magistrates are again called upon to interpret a textual universe that exceeds positive state law and local standards.

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