Social exclusion and criminal law

Hernán Darío Orozco López[*]

Abstract 1

This essay deals with the problem of the legitimacy of criminal law in relation to the socially excluded in the Colombian context. Based on an analysis of some of the main theoretical proposals in this area, it will outline the main features of a differentiated system of the State's reaction to criminality in the case of Colombia. Given that in cases of social exclusion it is not possible to resort to criminal law in a legitimate way, it will be necessary to explore an alternative sanctioning model applicable to the socially excluded.

I. Introduction

Over the centuries, the criminal law of what it is now Colombia has 2
been based on and evolved according to scientific theories, case law and individual laws developed in Europe, especially those originating in Spain, Italy and Germany.[1] However, both past and present socio-cultural differences between these countries and Colombia are remarkable so that a mechanical transfer of foreign legal concepts may do more harm than good.

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1 See Alfonso Reyes Echandía, *Derecho Penal, Parte General* (11th ed., Temis, 1987) 21 ff.; Fernando Velásquez Velásquez, *Fundamentos de Derecho Penal Parte General* (Ediciones Jurídicas Andrés Morales, 2017) 258 ff.

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Currently, one of the most significant differences concerns the problem of social exclusion. In States such as Germany, which generally guarantee their citizens a high standard of protection and security along with many other supportive services, such as comprehensive health care, education and judicial systems, criminally relevant social exclusion is at worst a marginal problem.[2]

3 In contrast, at least since the middle of the 20th century, Colombia has been embroiled in a series of internal armed conflicts that have prevented the State from exercising a monopoly of force over vast areas of its territory[3] and where almost half of its population still lives in poverty,[4] meaning social exclusion is a reality of tragic proportions.

4 Even though social exclusion represents an enormous challenge for the foundations and practice of criminal law in countries such as Colombia, this issue is rarely discussed in the Colombian context. For this reason, in this text, I intend to make a first and very general approach to this problem, which should be further explored in subsequent studies. Thus, for methodological reasons, I will focus on the problem of the legitimacy of criminal law with regard to the socially excluded. To do so, I will proceed in two steps: The first part (II.) will be devoted to an assessment of the main positions presented in the Hispanic and German literature which have had the most profound influence on Colombian criminal law in recent decades. I will first analyse the majority position that sees the protection of legal interests (*bienes jurídicos*, *Rechtsgüter*) as the essential function of criminal law (II.1.) and then study three influential versions of the so-called 'citizen criminal law', which emphasise the (political) link between the State and the offending citizen (II.2./4.). These three theories, although they are correct in many respects, have relevant shortcomings that make it impossible to apply them in Colombia without further customising them to suit the country's specific context. Hence, in the second part of this paper,

2 In a similar vein Michael Pawlik, *Die bürgerliche Mitwirkungspflicht im Strafrecht und die Stellung der Exkludierten*, in: Fernando J. Córdoba, Eric Hilgendorf and Marcelo D. Lerman (Eds.), *Brücken bauen. Festschrift für Marcelo Sancinetti zum 70. Geburtstag* (Duncker & Humblot, 2020) 151: 'a problem of purely theoretical interest'.

3 According to the International Committee of the Red Cross, there are currently 6 non-international armed conflicts in Colombia; see Comité Internacional de la Cruz Roja, "Colombia: Vivir a la sombra de los conflictos armados" <https://www.icrc.org/es/document/balance-humanitario-colombia-2022-dih> (last accessed 30 April 2022).

4 Official indicators can be found at: Departamento Administrativo Nacional de Estadística, "Pobreza y condiciones de vida" <https://www.dane.gov.co/index.php/estadisticas-por-tema/pobreza-y-condiciones-de-vida> (last accessed 30 April 2022).

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I will outline a possible system of State reaction to criminality adjusted to the Colombian socio-cultural reality (III.). In the first instance, I will refer to the contours of criminal law in Colombia (III.1.). Since I will conclude that it is not possible to legitimately exercise criminal law in cases of social exclusion, in the last section I will present in a very general way some basic features of an alternative sanctioning model applicable to the socially excluded (III.2.).

II. Social exclusion and legitimacy of punishment

1. Criminal law for all

In the Spanish-speaking world, which is strongly influenced by German criminal law doctrine, the most influential theory on the function of criminal law continues to be the theory of legal interests. According to this theory, criminal law is oriented towards the protection of legal interests.[5] From this perspective, there is no relevant difference in the legitimacy of criminal law between the crimes committed by fully socially integrated citizens and those perpetrated by the excluded. Thus, the theory of legal interests leads to the equal application of criminal law to all persons, irrespective of the political, social and economic background of them. 5

Proponents of this approach put forward two main arguments in favour of the application of criminal law to the socially excluded. The first is that adopting this approach provides a more protective (*garantista*) legal system that is much more beneficial for socially excluded citizens as they would be guaranteed all criminal law prerogatives that may not apply in other regulatory frameworks which are less protective. This is obviously positive, especially if we consider that we are dealing with one of the most vulnerable social groups. However, this does not mean that if for one reason or another, the full extent of criminal law is not applied to them, rights such as the presumption of innocence or the prohibition of torture do not apply in their favour. On the contrary, criminal law guarantees, many of which already have constitutional roots, could be developed that have equally protective content in other law areas, a fact that undermines the robustness of this first argument. The second argument is stronger. It 6

5 See, for example, Claus Roxin and Luis Greco, *Strafrecht Allgemeiner Teil* (5th ed., C. H. Beck, 2020) § 2 mn. 7 ff.; Francisco Muñoz Conde and Mercedes García Arán, *Derecho Penal, Parte General* (9th ed., Tirant lo Blanch, 2015) 63 ff.

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concerns the importance of criminal law for social stability. In countries such as Colombia with high rates of poverty and serious inequalities in the distribution of wealth, a significant share of criminality can be associated with these phenomena. Hence, a general exemption from criminal law norms in favour of the socially excluded could lead to chaos and social disintegration.

7 While it is true that the risks to social stability are a powerful argument in favour of the application of criminal law in such situations, the price to be paid for this in terms of legitimacy vis-à-vis the socially excluded, who are those directly affected by the most grievous coercive measure available to the State, is too high. Thus, advocates for the 'citizen criminal law' model that is drawn from the continental-European tradition, such as Michael Pawlik, argue that the exercise of punitive power can only be legitimate to the extent that the State has previously guaranteed the basic services that allow everyone to live in peace and freely exercise their rights. Since, in the case of the socially excluded, the State has not adequately provided these services, it lacks the legitimacy to react against them by means of punishment for legal missteps they may take.[6] A similar conclusion is reached by authors from the Anglo-American legal culture, such as Victor Tadros, who highlights the hypocrisy and especially the complicity of States that react so in such circumstances. In general terms, complicity here means that one person's entitlement to hold another responsible for his wrongdoing is eroded because the first person must regard himself as responsible, to some degree or other, for the other person's wrongful action. Similar to interpersonal relations, in the case of the State as representative of the public, this would mean, according to Tadros, that to the extent that economic injustice emanating from the State generates criminogenic conditions, the State would become complicit in any crimes committed by the socially excluded and, therefore, its power to hold them accountable would be eroded.[7]

8 In conclusion, this approach presents significant difficulties in legitimising the use of criminal law in the case of the socially excluded. Therefore, in the following lines I will analyse some of the main theoretical efforts that have been concerned with studying the possibility of criminally punishing the socially excluded from the point of view of a demanding legitimisation

6 See Pawlik (n 2) 150 ff.

7 See in detail Victor Tadros, *Poverty and Criminal Responsibility* (Journal of Value Inquiry, 2009, 43) 391 ff., especially, 399–400, 404 ff.

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criterion such as the so-called 'citizen criminal law' (see sections 2.-4. below).

2. Natural duties and acquired obligations

In the Spanish-speaking world, two of the authors who have dealt in the greatest depth with the problem of the political legitimacy of punishment regarding the socially excluded are Jesús-María Silva Sánchez and Javier Cigüela Sola. Despite some terminological and conceptual differences, these authors identify two types of obligations or duties whose infringement would generate different legal consequences. In the case of the so-called acquired obligations, which would group together the *mala quia prohibita* and the non-violent *mala in se*, it would only be possible to make a judgment of criminal blame if there is a sufficiently strong link between the individual and the legal order which would take the form of the concept of citizenship. As this link is too tenuous in the case of the socially excluded it is not possible, according to the above reasoning, to legitimately punish them. However, this would not exclude other types of measures.[8] On the contrary, in the case of the so-called 'natural duties' that would correspond to the core of the *mala in se,* even an unprotective State that does not guarantee basic rights could legitimately resort to criminal law because, as Cigüela soberly notes, "otherwise the State would end up disappearing by renouncing its most basic duty of protection and compromising its future legitimacy with the rest of the citizens".[9] 9

Although at first glance this distinction is rather persuasive, a closer analysis reveals at least two major shortcomings. The first of these is the differentiated treatment of the legitimacy of punishment with regards to the socially excluded, which is problematic insofar as the distinction between *mala in se* and *mala quia prohibita* lacks clear contours. Although there is a significant number of cases that can be assigned to one of these two areas without much difficulty, the boundaries between them are too blurred. This is evident, for example, in the different abortion regulations that can be 10

8 See in detail Jesús-María Silva Sánchez, *Malum passionis. Mitigar el dolor del Derecho penal* (Atelier, 2018) 68 ff.; Javier Cigüela Sola, *Crimen y castigo del excluido social. Sobre la ilegitimidad política de la pena* (Tirant lo Blanch, 2019) 253 ff.

9 Cigüela (n 8) 263; see also Silva (n 8) 111–2.

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found in countries with the same legal tradition.[10] The second shortcoming concerns the rationale of the concept of *mala in se*. Even though Silva and Cigüela make a very important effort to politically legitimise punishment in relation to the infringement of so-called 'acquired obligations', they do not address the problem of whether there are duties prior to and independent of the existence of a legal community, the infringement of which can be criminally sanctioned. To make up for this deficit one could, for example, resort to the idea of natural law. However, this would be highly problematic in terms of legitimising the duty to obey the legal order since such a duty would not be derived from the close connection with a State that guarantees at least peace and security. Rather, this duty would be based, as Pawlik sharply criticises, on the "image of a normative order that practically floats in a vacuum and whose executors would be precisely those States whose actual manifestation generally has very little to do with the higher justice that they supposedly serve".[11]

11 Most probably, Silva and Cigüela's underlying reason for defending the distinction between natural duties and acquired obligations, and thus being able to uphold the legitimacy of criminal sanctions for the infringement of rules of elementary importance, is the fear of the social destabilisation that would be generated if serious crimes were not criminally sanctioned. In the Colombian context, precisely due to the institutional deficits that spark off social exclusion, it is not possible to formulate an optimal solution that can maintain a high standard of legitimacy towards those who have harmed very important individual and/or collective interests and, at the same time, guarantee the stability of society through a sufficiently serious State reaction such as punishment. Nevertheless, it does not seem that affirming the legitimacy of criminal punishment when its institutional requirements are clearly absent is the best alternative. The fact that a State cannot respond legitimately through criminal law does not mean, however, that it cannot react in other ways with other less demanding parameters of legitimisation and, consequently, with less drastic reactions than those involving criminal law.

10 Correctly Cristián Irarrázaval Zaldívar, *El vínculo de ciudadanía como límite a la aplicación extraterritorial del Derecho penal: una revisión crítica* (InDret 1.2021) 243 ff.

11 Pawlik (n 2) 152.

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3. A Criminal Law for Semi-citizens

12 Ivó Coca Vila and Cristián Irarrázaval have recently argued, in an interesting and innovative way, in favour of strict political legitimisation of criminal law. More consistent with the central idea of 'citizen criminal law' that Silva and Cigüela, Coca and Irarrázaval consider that criminal law can only be applied legitimately when there is a political link between the offender and the State. In doing so, they expressly reject the notion of natural duties whose violation would constitute *mala in se* that could be legitimately punished by criminal law, regardless of the nature and intensity of the link between the individual and the State.[12]

13 While Coca and Irarrázaval highlight the virtues of the variants of 'citizen criminal law', they criticise them for working with a binary understanding of the notion of citizenship that would apparently allow a clear distinction between full citizens and non-citizens. To solve this and other problems without renouncing the central premise of a political link as a prerequisite for (legitimate) punishment, Coca and Irarrázaval propose understanding citizenship as a typological concept. According to them, citizenship would be a gradable concept constituted by four groups of rights (civil, political and social rights as well as those rights directly associated with nationality), with each group having three levels of intensity (strong, moderate, and weak). Thus, Coca and Irarrázaval describe the relevant citizenship in the criminal sphere as a continuum ranging from the full citizen type, in which the individual is materially guaranteed all his or her rights strongly, to the minimal semi-citizen type, in which the subject only enjoys some of his or her rights in a very weak way. This should have repercussions on the severity of sanctions imposed for criminality, which is synthesized by these authors in the following formula: 'fewer (lower quality) rights guaranteed = weaker political obligation = less punishment'.[13]

14 Coca and Irarrázaval's understanding of citizenship as a typological concept is undoubtedly an innovative idea that could help to overcome some of the difficulties of 'citizen criminal law' models. One of its great advantages is that it would make it possible to capture social reality more adequately since modern societies are characterised by the fact that many

12 See Ivó Coca Vila and Cristián Irarrázaval Zaldívar, *A Criminal Law for Semicitizens* (Journal of Applied Philosophy, Vol. 39, 2022) 59, 66. Already previously Irarrázaval (n 10) 242 ff.

13 See in detail Coca e Irarrázaval (n 12) 56 ff.

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of their members do not fit the 'standard' citizen profile who fully enjoys all of his or her rights, but are various types of semi-citizens with partial and/or weak guarantees for some or all their rights. However, these authors' development of the typological model of citizenship is also subject to several shortcomings that need to be addressed to apply it in a materially and methodologically correct manner.[14]

15 First, in relation to the identification of the elements of the typological concept of citizenship, Coca and Irarrázaval start, without offering further explanation, from the assumption that none of the four groups of rights (civil, political, social and nationality-based) is indispensable and that there is no hierarchy between them. However, insofar as positive State services, such as the right to the vital minimum depend, as Silva rightly argues,[15] on the State having first guaranteed its population peace and security, it seems that this last negative protection service is indeed an indispensable element of the concept of citizenship.

16 Secondly, in relation to the graduation of the four elements of the concept of citizenship, Coca and Irarrázaval content themselves with postulating three levels of intensity and exemplifying them through some (paradigmatic) cases but do not offer guiding principles to outline them in a manner that allows practical real-world application, so that the risk to legal certainty is too high.

17 Thirdly, Coca and Irarrázaval also fail to address the interconnection of the levels of intensity of these groups of rights to establish the various types of citizenship, which creates at least two problems. On the one hand, having three levels of intensity applied across four groups of rights produces so many possible combinations that such a typological series would be difficult to manage in practice. On the other hand, Coca and Irarrázaval end up accepting, without further consideration, that the mere presence of a weak intensity in one of the four rights leads to a form of semi-citizenship, in the criminally relevant sense, meaning that in practice only absolute outsiders would be excluded from the scope of legitimate criminal law. In doing so, their conception does not differ substantially from the theories that legitimise criminal law seeking the protection of legal interests and, consequently, the authors' proposed approach ends up calling into question the limiting

14 On the methodological rules for the construction of typological concepts and series see in detail Hernán Darío Orozco López, *Beteiligung an organisatorischen Machtapparaten* (Mohr Siebeck, 2018) 298 ff.

15 See Silva (n 8) 75 ff.

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power of 'citizen criminal law'. This seems somewhat counterproductive as they consider this to be one of the main virtues of 'citizen criminal law' models. This becomes evident when they state that "legitimate punishment could also be imposed on the socially excluded, which from a symbolic perspective means reaffirming their membership in the community"[16]. Against this last statement, which could well be summarised under the maxim of 'social exclusion but criminal inclusion', one can also raise the reproach of cynicism already discussed (see *infra* II.1.), which leaves Coca and Irarrázaval's position in favour of imposing punishment on the socially excluded open to the serious legitimacy concerns that plague other approaches.

4. Duty of cooperation and social exclusion

18 One author who has made one of the most important efforts to offer a rationale for 'citizen criminal law' is Michael Pawlik[17]. In short, from Pawlik's perspective, punishment is the response to crime, where the latter consists of an infringement of a duty to cooperate with the community. However, the legitimacy of this duty to cooperate does not derive from public interests but is based on freedom as the guiding idea of modernity. Hence, the State's guarantee of peace, which includes the possibility of everyone to freely develop their life as best they can, would legitimise the duty to cooperate and thus, in the event of its violation, validate the imposition of punishment by the State.[18] Consistent with this general approach, Pawlik argues that the excluded, those who have not benefited to any significant extent from basic State services, do not have the citizen's duty to cooperate, meaning that the State's exercise of coercive power against them using criminal law lacks a legitimate basis. Consequently, the relationship between the State and its excluded citizens should be conceived differently. In this respect, Pawlik considers three options and opts for the last of them,

16 Coca e Irrázaval (n 12) 66.

17 See only Michael Pawlik, *Das Unrecht des Bürgers. Grundlinien der Allgemeinen Verbrechenslehre* (Mohr Siebeck, 2012) 61 ff.; Michael Pawlik, *Normbestätigung und Identitätsbalance* (Nomos, 2017) 29 ff.

18 In this regard, in detail Pawlik, (n 17), *Das Unrecht des Bürgers* 90 ff.

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which consists of a mixed strategy combining social reform with sanctions oriented by the idea of defence against threats (*Gefahrenabwehr*).[19]

19 Of the many virtues of Pawlik's conception, I am interested here in highlighting three aspects. Firstly, his central premise, according to which it is only within the framework of a legal order that guarantees peace and freedom that punitive power can be legitimately exercised, is more restrictive than the 'citizen criminal law' variants analysed above (*supra* II.2./3.). Pawlik has also explored the implications of this position and outlined the means for its consistent application where, in short, he rejects the use of criminal law against the socially excluded, even in cases of so-called *mala in se*. Finally, he is realistic enough to understand that in circumstances where it is not possible to legitimately apply criminal law, such as in cases involving socially excluded persons, the State must react in a different way to address the risks to the social order that many of these behaviours entail.

20 Pawlik's conception, however, also has some shortcomings that need to be addressed to provide a better response to the problem of social exclusion.

21 To begin with, and in relation to one general aspect of his conception, Pawlik is not entirely clear about the nature of the State services that would legitimise the duty to cooperate. While some parts of his work give the impression that certain positive services would be required to legitimise the duty to cooperate[20], in other passages that seem definitive Pawlik emphasises the idea of protection that would constitute "the 'precondition of personality' and thus also of the legitimacy of any state bound by the idea of personal freedom"[21], which seems to be corroborated by his criticism of authors who appeal to the right to democratic participation as a basis for criminal obligations.[22]

22 However, regarding the specific issue of social exclusion, Pawlik's treatment of the problem and his proposals are, first and foremost, too general. To illustrate this, although he acknowledges that the boundaries between partial inclusion and exclusion are blurred, Pawlik makes no attempt to outline the field of relevant exclusion in a criminal sense and is content

19 See Pawlik (n 2) 154 ff. For a more detailed exposition of Pawlik's position on the treatment of the socially excluded see Hernán Darío Orozco López, *El tratamiento jurídico de los excluidos sociales en la obra de Pawlik* (RDP 2021–12) 30 ff.

20 cf Pawlik, (n 17), *Das Unrecht des Bürgers* 186–7.

21 Pawlik, (n 17), *Das Unrecht des Bürgers* 104–5.

22 See Pawlik, (n 17), *Das Unrecht des Bürgers* 107 with fn. 594.

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to note that there are clear cases of social exclusion, such as that of favela dwellers. In addition, certain aspects of his position on the treatment of the socially excluded are problematic, as is the case with his proposal to orientate a State's response toward the idea of defence against threats. As mentioned above, Pawlik analysed three alternative ways of reacting to the socially excluded and opted for the last of these, which is a mixed strategy combining social reform with threats defence. His assessment of the idea of defence against threats, however, seems to be contradictory. In relation to the second alternative, which he strongly criticises, he states that "[a] right of intervention consistently guided by the idea of the defence against threats harbours considerable risks for those affected"[23], which he exemplifies by means of the theory of negative general deterrence and the theory of special deterrence. Conversely, with regard to the third alternative which he defends, Pawlik speaks of "a defence against threats which does not treat the socially excluded as enemies to be destroyed or at least kept at bay, but as fellow citizens whose personalities are to be respected and whose inclusion is to be encouraged"[24]. Pawlik's position thus faces the following dilemma: Either he stands by his fierce criticism of deterrence theories, and therefore it would be inadequate to resort to the idea of defence against threats, even in the case of the socially excluded; or, on the contrary, he recognises that the preventionist paradigm is not as harmful as he interprets it, meaning that it would be possible to use it as a basis for a State's reaction to the socially excluded.[25]

III. Models of State reaction to criminality in Colombia

The previous considerations have shown that the positions analysed, al- 23
though they are correct in many aspects, suffer from various problems that need to be solved to offer a well-functioning response to the situation in Colombia. Based on the conclusions reached there, I will now attempt to make an initial approach to the question of how the Colombian State can react to socially excluded people who commit crimes. To begin with, I will try to delineate in a very general way the legitimate realm of criminal law in Colombia (III.1.). Since, according to the position adopted there, the

23 Pawlik (n 2) 153.
24 Pawlik (n 2) 155.
25 In this regard see Orozco López (n 19) 32.

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exercise of criminal law is not legitimate in cases of social exclusion, in the following section I will endeavour to outline the main features of an alternative sanctioning model applicable to the socially excluded (III.2.). Of course, the intention here is not to offer a definitive answer to the problem, but rather to lay a rudimentary foundation for a model that will have to be refined and developed in the future to hone its long-term viability.

1. The legitimisation of criminal law in Colombia

24 In a State governed by the rule of law, State power is subject to criteria of legitimisation and restrictions that vary according to the field of action. In the field of criminal law, the very nature of punishment requires special legitimisation since it implies, from a symbolic-communicative perspective, an expression of blame as a reaction to a crime and, from the factual-afflictive perspective, the imposition of harm that generally consists of the deprivation of elementary rights such as freedom of movement.[26]

25 In contrast to some of the most influential criminal law conceptions of the twentieth century, today's main theoretical efforts are aware that the legitimisation of criminal law cannot operate in isolation from a specific society and time.[27] Consequently, the problem of interest here is that of the legitimate realm of criminal law in modern-day Colombia. As was shown in the previous section (II.), legitimate punishment presupposes a sufficiently close link between citizens and the State not only in the case of the 'acquired obligations', but also in that of 'natural duties'. As was also shown in section II, while the advocates of the 'citizen criminal law' model concretise such a link in the services that States owe to their citizens, their advocacy differs as to the nature and relationship of the State services that legitimise *ius puniendi*. Thus, the central question in this context is to

26 See only Silva (n 8) 113 ff.

27 Fundamental in this respect, see Michael Pawlik, *Das Strafrecht der Gesellschaft. Sozialphilosophische und sozialtheoretische Grundlagen von Günther Jakobs' Strafrechtsdenken*, in: Urs Kindhäuser, Claus Kreß, Michael Pawlik and Carl-Friedrich Stuckenberg (Eds.), *Strafrecht und Gesellschaft. Ein kritischer Kommentar zum Werk von Günther Jakobs* (Mohr Siebeck, 2019) 229 ff. From the Comparative Criminal Law standpoint, see Kai Ambos, *The Current State and Future of Comparative Criminal Law – A German Perspective* (*24 UCLA J. INT'l L. FOREIGN AFF. 9, 2020)*, 11 ff., in particular 30–4 (for a shorter version in German see Kai Ambos, *Stand und Zukunft der Strafrechtsvergleichung* [*RW, 3, 2017*], 247 ff.).

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establish which State services legitimise the application of criminal law in modern-day Colombia.

This is where the negative State service of protection and various positive State services come into consideration. In this respect, Coca and Irarrázaval argue that there is no hierarchy between these services and the corresponding citizenship rights.[28] Although it is difficult to establish a hierarchy among the plethora of State services, it seems clear that the negative protection service has a priority from an institutional point of view. Thus, it is possible for a State to adequately guarantee social peace and security against aggression by others without being able to guarantee relevant positive services. On the contrary, it seems untenable to suggest that a State can guarantee health, work and education if it cannot provide a general state of peace and security.[29] 26

The question is, therefore, whether the provision of negative protection is sufficient for the legitimisation of criminal law in Colombia or whether other positive services are also necessary. As mentioned above, the answer to this problem cannot be universal and timeless, but only in relation to a specific society and its time. In general terms, the standard to legitimise criminal law should not be too high as this would call into question its application in a larger number of cases with consequent risks to social stability. This is an even more salient issue in Colombia as the country has experienced a prolonged period of serious internal armed conflict that has prevented the State from providing basic positive services such as health, education and work to a large part of its population. This is evident, for example, by a multidimensional poverty index of 16 %, a monetary poverty rate of 39.3 % and an extreme monetary poverty rate of 12.2 % in 2021,[30] which is why it does not seem advisable to link the punitive power of the State to the provision of positive services. Thus, in Colombia, for the exercise of criminal law to be considered legitimate it is a minimum requirement that those subject to it are beneficiaries of the basic State service of the protection of their legal rights against aggression by third 27

28 See Coca e Irrázaval (n 12) 65.

29 Pawlik (n 2) 149 and Silva (n 8) 75 broadly agree with this position.

30 These official indicators can be found at: Departamento Administrativo Nacional de Estadística, "Pobreza y desigualdad" <https://www.dane.gov.co/index.php/estadisticas-por-tema/pobreza-y-condiciones-de-vida/pobreza-multidimensional> and <https://www.dane.gov.co/index.php/estadisticas-por-tema/pobreza-y-condiciones-de-vida/pobreza-monetaria> (last accessed 30 April 2022).

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parties.[31] This position does not require the provision of other services of a positive nature typical of a true social State under the rule of law despite these other services being both highly desirable and desperately needed. Nevertheless, it is at least in line with the liberal notion of a State governed by the rule of law, a notion which is largely based on the guarantee of social peace.

2. Alternative sanctioning model for socially excluded persons

28 In the previous section, an attempt was made to positively delineate the realm of criminal law in Colombia. In this way, the realm in which the State cannot legitimately exercise punitive power, namely when legal protection is very deficient or (practically) non-existent, is predefined *ex negativo*. Since the borderline between these two dimensions is blurred, to guarantee an adequate level of legal security it is necessary to distil types of social exclusion in which it is clearly not possible to speak of real legal protection. Take for example the case of peasants whose livelihood is entirely derived from the cultivation of small illicit crops in remote areas controlled by illegal armed groups and, therefore, do not enjoy any protection from the security forces and cannot effectively access the State's justice system.[32]

29 According to the position defended here, it is not possible to legitimately impose a punishment for criminal conduct entered into by persons in a situation of social exclusion, such as in the scenario just mentioned. The question is, therefore, whether or not a State can legitimately react through a legal regime other than criminal law.

30 As the State has in the past failed to provide the minimum services to all its citizens, hence giving rise to the socially excluded and the issues of legitimacy discussed here, one option would be to focus entirely on the future and only act in cases where they represent a threat to legal interests of a certain level of importance. This would thus be a response

31 For a more detailed conceptualisation of the negative protection service and a discussion of its relationship to positive State services see Hernán Darío Orozco López, *Exclusión social, criminalidad y reacción estatal*, in: Hernán Darío Orozco López, Yesid Reyes Alvarado and Carmen Eloísa Ruiz López (Eds.), Libro homenaje a Alfonso Reyes Echandía en el nonagésimo aniversario de su nacimiento (Universidad Externado de Colombia, 2022).

32 For a more detailed discussion of types of social exclusion in the Colombian case, see Orozco López (n 31).

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guided by the paradigm of special deterrence. At first glance, this seems an attractive option insofar as it takes the previously weak position of the socially excluded quite seriously. However, the question is whether the other interests at stake, namely social stability and victims' rights, can also be adequately considered in this way. In line with what has been said in the previous section relating to the scope of criminal law, it is not possible to offer a universal and timeless answer here either as this will depend on the specifics of the society under consideration and the particularities of the day. In very stable societies where social exclusion is only a marginal problem, it may be possible to limit State responses to those oriented by the idea of special deterrence. This view, however, is unrealistic in the case of highly unstable societies such as Colombia where the restriction of State action to cases in which the socially excluded represent a threat to certain legal interests in the future poses too great a risk to the fragile social stability. This stems, to a certain extent, from the message that would be conveyed, namely that if there is no risk of reoffending, the conduct of the socially excluded would be exempt from any type of State reaction. In addition, given that the position of the victim also deserves full recognition by the State[33] and in Colombia it is difficult to find other ways of processing a conflict such as reparations for a victim at the expense of society, a State response that is oriented by the idea of special deterrence does not seem adequate from this point of view either.

31 Since a model of State reaction to the socially excluded guided by the idea of special deterrence would fail to take into account the legitimate interests of victims and broader society in cases involving non-dangerous subjects, I would like to conclude these reflections by outlining some general lines of a model of State reaction that may be able to adequately guarantee these interests while simultaneously taking into account the uniquely challenging position of the socially excluded.[34]

32 Cases of social exclusion, such as that of the peasants mentioned above, constitute situations of State absence in which the State's legal system does not effectively operate, assuming it operates at all. In Colombia, while the State has not failed in general, it has failed in specific sectors, such

33 In this regard, see Yesid Reyes Alvarado, *Víctimas, fin y necesidad de la pena en el Derecho penal y en la llamada justicia transicional*, in: Alicia Gil and Elena Maculan (Dirs.), *La influencia de las víctimas en el tratamiento jurídico de la violencia colectiva* (Dykinson, 2017) 191, 195; Tatjana Hörnle, *Teorías de la pena* (Universidad Externado de Colombia, 2015) 39 ff., 53.

34 In more depth Orozco López (n 31).

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as those mentioned. A primary objective of the State must therefore be the (re-)construction of society and the functionality of the State in these sectors.

33 This general problem has been dealt with in-depth in the literature on so-called 'failed States'. As Robert I. Rotberg argues, when a State fails or collapses it is possible to make a series of efforts, obviously not always easy to undertake, to "revive, resuscitate and rebuild" it.[35] While Colombia is not a failed State, it is a typical weak State, characterised by a "mixed profile, meeting expectations in some areas and performing very poorly in others".[36] It is precisely in these areas where the Colombian State has failed that the measures for social and State reconstruction mentioned by Rotberg must be focused, more specifically, concerning the disarmament and demobilisation of combatants, the guarantee of peace and security throughout the entirety of Colombia's territory, the restoration of the rule of law and the reactivation of the economy.[37]

34 In my opinion, Colombia's reaction against the socially excluded who engage in criminal behaviour should be aligned to those measures aimed at the above-mentioned (re-) construction, with the specific objective being to contribute to the (re-)establishment of a legal order of peace. Thus, by means of a sanction that satisfies victims' claims for justice (in cases where individual legal interests are affected) and that demonstrates the rejection of certain behaviour that seriously diminish the quality of life in society, the overarching aim should be to send a message to society as a whole that minimum standards of coexistence must be respected. This is a fundamental prerequisite to building a future where there can really be widespread social peace that allows everyone to freely exercise their rights.[38]

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35 See in detail Robert I. Rotberg, *El fracaso y el colapso de los Estados-nación. Descomposición, prevención y reparación*, in: Christopher Clapham, Jeffrey Herbst and Robert I. Rotberg, *Los Estados fallidos o fracasados: un debate inconcluso y sospechoso* (Siglo del Hombre, 2007) 215 ff.

36 ibid. 159.

37 See Rotberg (n 35) 215 ff., 225 ff., 231 ff.

38 In a similar vein, Pawlik has spoken out in relation to the sanctions of international criminal law; see Michael Pawlik, *¿Pena o combate de peligros? Los principios del derecho internacional penal alemán ante el foro de la teoría de la pena* (InDret 4, 2011) 28 ff.; Pawlik (n 17), *Das Unrecht des Bürgers* 124 ff. Reyes (n 33) 197 ff. also defends a similar position in the case of so-called 'transitional justice', such as the Comprehensive System of Truth, Justice, Reparation and Non-Repetition established by the Final Peace Agreement between the Colombian State and the FARC-EP guerrillas.

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A sanction understood in this way obviously needs to consider the right 35
to justice for (possible) individual victims and the interest of peace and stability of the society as a whole. However, for it to be legitimate for all, including the socially excluded on whom it is imposed, it must take their challenging legal position into account in an appropriate manner. In my opinion, this requires at least the following two aspects to be observed.

Firstly, regarding the limits of such sanctions, even though the State has 36
not provided for them the minimum services to which they are entitled, the socially excluded remain an integral part of the community and therefore deserve the same respect as their fellow citizens. This inherently means that when the State imposes coercive measures on them, it must guarantee unrestricted respect for their human rights. Consequently, indeterminate and inhumane sanctions are out of the question[39]. In addition, and as has already been discussed in the analysis of the 'criminal law for all' model (see *supra* II.1.), it is possible to develop a criterion for sanctions against the socially excluded which take into account the particularities of this legal model and that fulfil a limiting function, similar to the principle of culpability in criminal law in the strict sense. In practical terms, this means that the socially excluded cannot be punished more harshly than would be permitted according to the principle of culpability[40].

Secondly, any sanction must be integrated into a programme of social 37
and State (re) construction that serves the needs of the socially excluded upon whom such a system is imposed. Of course, this does not mean that the socially excluded are sanctioned with the aim of granting them a benefit as such an approach would rightly be open to criticisms of cynicism and hypocrisy. On the contrary, if a sanction system is to be seen as a just response to the socially excluded and not merely as an act of power against them, there must be economic and social policy measures that are beneficial to them in addition to and independently of the sanction[41]. In general terms, these are social policy measures aimed at promoting the social integration of the socially excluded and would coincide, to a large extent, with those measures that are dealt with under the heading of 'special

39 On fundamental rights as (external) limits to punishment, see Daniel Rodríguez Horcajo, *Comportamiento humano y pena estatal: disuasión, cooperación y equidad* (Marcial Pons, 2016) 290–1, 295.

40 In the same vein Pawlik (n 2) 154.

41 In a similar vein Pawlik (n 2) 154–5; Reyes (n 33) 202, 204.

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positive deterrence'.[42] In addition, innovative measures and policies would be of particular use here, such as the so-called 'peace seats' agreed in the Final Peace Agreement between the Colombian State and the FARC-EP guerrillas, which grant privileged access to Congress for representatives of those communities most affected by the armed conflict.[43]

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42 In this regard see Bernardo Feijoo Sánchez, *La pena como institución jurídica: retribución y prevención general* (Montevideo – Buenos Aires, 2014) 298 ff.

43 See Final Peace Agreement, section 2.3.6, available: https://www.portalparalapaz.gov.co/publicaciones/809/texto-del-acuerdo/?msclkid=c56ac6b5c64d11ecb8c13a3e9f0509c2 (last accessed 30.04.2022).

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