Penal populism

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Abstract 1

This essay will discuss the relevance of the concept of penal populism to describe the changes in Western criminal legislation at the turn of the century from both a historical and theoretical point of view. The essay will then examine the evolution of Chilean criminal legislation in this regard as a historical example of its application in Latin America. From a theoretical perspective, the background of penal populism as a critical idea from liberal penal elitism and its differences with penal republicanism will also be briefly detailed. The concluding section will argue that effectively applying constitutional boundaries is a more viable approach to dealing with penal law rather than seeking answers in the criminal ideas of past centuries.

I. Introduction: What is penal populism?

According to John Pratt, one of the disseminators and leading critics of 2
the concept, penal populism is the current punitive practice of Western Anglo-Saxon societies,[1] clearly distinguishable since the end of the 20th century. Pratt stated that such populism "speaks to the way in which criminals and prisoners are thought to have been favoured at the expense of crime victims in particular and the law-abiding public in general [...] It feeds on expressions of anger, disenchantment and disillusionment with the criminal justice establishment". This includes a rejection of 'expert' knowledge (of 'liberal' judges and criminologists), which, when replaced by the 'common sense' of everyday speech and media expression, leads to the adaptation of legislation to this 'common sense' and the pressures of the media (and street demonstrations) in the face of particularly horrendous crimes. This common sense would be the main cause of a broadening and intensification

1 By Western Anglo-Saxon States we mean mainly the U.K., New Zealand, Australia and U.S.A. The text also refers to other Western States that are not English-speaking, but share a liberal democratic tradition, social market economy and religious freedom.

of the penal response that is more emotional than rational, which may be demonstrated by the existence of laws with names in memory of the victims of the respective crimes. In States with popular referenda and elections with majority electoral systems, this kind of pressure would translate into increasingly severe criminal legislation voted for in referenda and a hardening of stances towards criminality among candidates elected to office.[2]

3 In Argentina, Sozzo argues that this phenomenon exists despite the undeniable cultural differences between Argentine and Western Anglo-Saxon societies.[3] Larrauri and Díez Ripollés argue that the same is true for Spain.[4]

4 Disagreement with this situation has spilt outside the borders of academic debate to involve figures such as Pope Francis who, in a public speech addressed to the members of the International Association of Penal Law, described penal populism as "the belief that it is possible that [...] punishment can obtain those benefits that would demand the application of a different type of social and economic policy as well as social inclusion". The pontiff went on to note that this would lead to "a tendency to deliberately fabricate enemies: stereotyped figures who represent all the characteristics that society perceives or interprets as threatening", before adding that "the mechanisms that form these images are the same that allowed the spread of racist ideas in their time". Given his obvious concern about such developments, he points out that "the mission of jurists cannot be other than that of limiting and containing these tendencies".[5]

5 In short, the current manifestation of penal populism is a reaction by a segment of society that disagrees with how Western penal systems have developed since the end of the 20th century, with this dissenting segment attributing most of the changes to irrational measures promoted by the liberal media and interest groups. This results in legislation being passed that is primarily geared toward satisfying the loss and pain of victims

2 John Pratt, *Penal Populism* (Routledge, 2007) 12. See also David Garland, *The Culture of Control* (Oxford University Press, 2001) 8–20 and Anthony Bottoms, 'The Philosophy and Politics of Punishment and Sentencing' in C. M. V. Clarkson and Rodney Morgan (eds.), *The Politics of Sentencing Reform* (Clarendon Press, 1995) 39.

3 Máximo Sozzo, 'Democratization, politics and punishment in Argentina' (2016) 18 *Punishment & Society* 3, 301–324.

4 Elena Larrauri, 'Populismo punitivo... y como resistirlo' (2006), *Jueces por la Democracia* 55, 15; José Luis Diez Ripollés, 'El nuevo modelo penal de la seguridad ciudadana? (2004) 6 *Revista Electrónica de Ciencia Penal y Criminología,* 3, 1–34.

5 Address of Pope Francis to the delegates of the International Association of Penal Law, Hall of Popes, Thursday, 23 October 2014.

and the feelings of the average voter, without any mollification from or consultation with jurists and criminologists.

This essay will discuss the relevance of the concept of penal populism to explain the changes in Western criminal legislation since the end of 20th century, both from a historical and theoretical point of view. I take the evolution of Chilean criminal legislation as an example because Chile is, in many respects, a Western State that has maintained a democratic system and has been integrated into the international community through trade associations with the world's major powers (the United States of America, the European Union, China, etc.). 6

II. The evolution of criminal law in Chile: The internationalisation of criminal law as a driver of change

It is debatable whether the sociological phenomena described by Pratt and other Anglo-Saxon authors are present in Chile or in other Western States in the same way or to the same degree. In first place, in Latin America and Spain, electoral systems tend towards complex forms of proportional voting and are not necessarily based on the use of majoritarian districts that can be found in many Anglo-Saxon political systems. Furthermore, is it common practice in Chile to hold legislative referenda or plebiscites, although not about criminal policy. 7

However, politicians are, of course, still interested in addressing the concerns and interests of their constituents. Thus, they cannot ignore the sociological phenomenon that is resulting in the public's revaluation of victims of crime, its rejection of and distancing from the criminal justice system, including input from experts (lawyers and sociologists). Civil society activists representing various causes have replaced these experts, and it is now this advocacy that seems to be inevitably leading to the criminal protection of various interest groups through the establishment of new crimes or an increase in the penalties for existing crimes. 8

An instance of this has already been seen in Chile regarding the discussions surrounding the so-called 'Emilia's Law' (Law No. 20.770, 16.09.2014), which significantly increased the penalties for cases of drink driving causing death. After the death of 9-month-old Emilia Silva at the beginning of 2013, killed by a drunk driver who fled the scene, an intense public debate began about how harshly society viewed such events and whether the laws applicable to them mirrored this view. This was not a crime where 9

culprits were not being punished, however, the severity of the penalty, which generally resulted in probation rather than prison, was discussed as being disproportionate to the crime's consequences. Over the course of this public debate, the victims' voices replaced that of the specialists as the parents of the deceased minor, who had no training as criminal lawyers or sociologists, formed a foundation with the express purpose of changing the applicable criminal law. Their efforts, and that of their foundation, were facilitated by being able to effectively lobby and present their views both on national television and in the National Congress. The result: a significant change in the penalties for vehicular homicide, the introduction of the crime of 'hit and run' and an increase in the penalties for 'ordinary' homicide to differentiate it from severe cases of vehicular homicide.

10 Prior to these changes, the concern of contemporary legislators throughout the country about the risk posed by drink driving, and particularly about the deaths caused in such cases, was indisputable. However, possibly because of an unconfessable concern for many ("it could happen to any of us who habitually drive drunk"), this concern was incongruent with existing law that imposed the same penalties for committing vehicular homicide while drunk as committing theft or fraud.

11 According to its doctrine and jurisprudence, German law punishes vehicular homicide as reckless homicide, with six months in prison as the minimum penalty. Spain, after several reforms, has established a system that generally imposes a sentence of 2.5 to 4 years for vehicular homicide, to be served in prison, plus the confiscation of the motor vehicle used in its commission, understanding it to be an instrument for the commission of the crime. In France's penal code, there is a unique system of penalties for reckless deaths caused by a motor vehicle driver, imposing a heavy fine and a prison sentence of up to seven years for drink driving causing death and where the judge can increase this sentence to ten years in some instances. Finally, in the United States, especially since the 1980s, legislation, courts and juries in several states have established material assimilation between murder and vehicular manslaughter caused while intoxicated, with state legislatures imposing sentences of up to 25 years for these offences. In all these jurisdictions, there is also a separate offence or penalty for a refusal to submit to a breathalyser test, provided as an alternative in cases where drink driving cannot be proven because immediately flees the scene or simply outright refuses to take such a test.

12 Looking beyond vehicular homicide and penal populism driven by purely domestic sources, different regulations have been introduced in

Chile for femicide, human trafficking, corruption and even environmental crimes that seem to follow another pattern. This began with changes to the laws concerning drug trafficking and money laundering crimes in the late 1980s as the result of the implementation of several international treaties. There was and still is intense activism and organised groups behind the local momentum to change these laws, however, it is undeniable that multilateral agreements —usually preceded by the work of experts such as those of the United Nations Office on Drugs and Crime — were the principal drivers of change. The importance of these treaties for States is unquestionable, as their implementation is a prerequisite for the integration into a globalised international community.

13 To the extent that the implementation of international treaties means adaptation to current international requirements,[6] including changes in criminal law, the argument that changes were driven by penal populism (at least in Chile) becomes weaker. Indeed, many of the crimes covered by international treaties and conventions are not new in any way, except in their somewhat novel forms of manifestation because of technological advances, especially in communication and transport arising from the globalisation of national economies. However, politically driven murder, corruption, organised crime, trafficking of illicit substances, piracy, counterfeiting, abuse of minors, kidnapping and innumerable economic crimes, are just as punishable in modern treaties as they were nineteenth-century codes, including the Chilean Penal Code of 1874, although the actual punishments may have changed over time. Therefore, rather than an expansion of criminal law *per se* —driven by penal populism—, we have experienced its updating and internationalisation where the intent is to avoid leaving "jurisdictional havens" for criminality and to facilitate international cooperation when required.

III. The future: The end of elitism and the rise of penal republicanism

14 According to Shammas, penal elitism is understood as the doctrine that criticizes, at the same time, the existing criminal populism and proposes a vision of the penal system where criminologists and jurists make the funda-

6 See e.g. Kai Ambos, 'Internationalisierung des Strafrechts das Beispiel „Geldwäsche"' (2002) 114 *Zeitschrift für die Gesamte Strafrechtswissenschaft* 1, 236; in Spanish: Internacionalización del derecho penal: el ejemplo del "lavado de dinero". Cuadernos de Conferencias y Artículos No. 44 (Bogotá, Colombia: Universidad Externado de Colombia. Centro de Investigación Filosofía y Derecho, 2011).

mental decisions about what should be punished, including the penalties and their functions. In this sense, penal elitism could be critically characterised as "a doctrine that favours granting experts and professionals the authority to shape the politics of punishment". Shammas went on to note that

> "The central proposition of penal elitism is that experts in law, crime, and punishment possess a set of unique technical competencies that grants them the right to devise crime control policies in place of politicians and the public, who are held to be excessively capricious, emotive, or unenlightened".

15 Therefore, penal elitism is to be understood as a reaction to penal populism, with the claim of replacing democratic processes and decisions with technical ones based on scientific knowledge instead of emotions.[7]

16 However, Loader suggests that the reaction of penal elitism against populism would be belated, as elitism would belong to the past, not to the present, let alone the future. He points out that in England in the 1950s and until the 1970s, the group that was, in effect, in charge of the criminal system, indeed responded to the ethos of penal elitism. According to this author, this group was a small metropolitan elite of politicians, civil servants, reformers, academics and criminologists, with access and power in the various ministries and agencies of the criminal justice system and academia dedicated to the subject, "wedded to the belief that government ought to respond to crime (as well as public anger and anxiety about crime) in ways that, above all, seek to preserve 'civilised values'" while understanding that rehabilitation should be a watchword for the prison system. Loader calls this group the Platonic Guardians, whose self-assigned mission was "producing and deploying expert knowledge in a bid to handle the crime question in ways that struck a balance between the competing claims of effectiveness and humanity, liberty and order". This group no longer has the influence and power it enjoyed in previous decades as the '*Nothing works*' onslaught of the 1970s, followed by the *Law-and-Order* campaigns in the 1980s and the emergence of popular demands against certain heinous crimes, has made 'crime-fighting' a standard motto in English political parties since the turn of the 21st century. At this time,

7 Victor L. Shammas, 'Who's afraid of penal populism? Technocracy and 'the people' in the sociology of punishment' (2016) 19 *Contemporary Justice Review: Issues in Criminal, Social, and Restorative Justice* 3, 325.

penal elitism and Platonic Guardians were replaced by penal populism, politicians, and victims.[8]

When casting his gaze to the future, Loader adds that it is no longer possible or desirable to re-establish this liberal elite in the governance of these matters as he believes it is sociologically impossible: 17

> "Elitism made sense in, or was at least fitted to, a world where the crime was less prevalent as an act and more settled as a cultural category; a world where people evinced trust and deference towards social authority and had more patient expectations of government; a world marked by greater equality and solidarity and less ambient precariousness and insecurity".

Furthermore, Loader considers it politically undesirable to return to the past because "the idea that crime should be kept out of public life, safely handled by a coterie of experts, was and remains profoundly anti-democratic". The author adds that the powers of the Platonic Guardians over the criminal justice system 18

> "also entail specific distributions—or, more accurately, redistributions—of power, in the present case, away from open forums of political dialogue towards the closed, self-corroborating world of officials and those who advise them".[9]

Adding to the above, Shammas provides a further observation that the empirical assumptions of penal elitism do not seem to correspond to reality: despite their declarations not to be contaminated by the public's thirst for revenge, practitioners and academics have not, neither during the 20th century nor now, always, and everywhere been champions of rehabilitation and opponents of retribution. However, their active participation in concrete reforms and proposals has not always diminished the use of the death penalty or reduced imprisonment rates and terms, as exemplified by their involvement in the laws that allowed for the punishment of Nazi collaborators in Norway and the Minnesota Sentencing Guidelines Commissions of the 1980s.[10] By way of a final example, one that goes a little further back in time, this pattern can also be found in the strong support of German 19

8 Ian Loader, 'Fall of the 'platonic guardians': Liberalism, criminology and political responses to crime in England and Wales' (2006) 46 BJC 4, 561.

9 Ibid, 582.

10 Shammas (fn 5), 6–13.

criminal law scholars for the National Socialist regime in the 1930s and 1940s.[11]

20 Under these conditions, young scholars have increasingly begun to propose *penal republicanism* as an alternative that employs the principles of non-domination, self-government, and deliberative democracy. In its robust form, penal republicanism opposes both populism and elitism as it encourages the active participation of citizens in the deliberations of the legislative process, in the use of routine reviews as well as check and balances on the agencies of the penal system (police, prosecutors, judges and prisons), a procedure that extends to judicial decision-making itself through jury systems.[12]

21 In its weak form, penal republicanism prefers only to avoid the dangers of populism in that it only seeks to restrict the participation of citizens in the deliberation of criminal matters in a technical capacity, with the involvement of groups of victims, prisoners, sociologists and experts in criminal law, acting autonomously in a manner similar to the relationship between a national government and its central bank, where the bank needs report to the legislature and executive on its proposals but is free to design the proposal by itself.[13]

22 In conclusion, we should not assume that the British policies led by the Platonic Guardians since the 1950s until the 1970s are realistically transferrable to the globalised and digitally interconnected world of the 21st century. As such, we must accept that the time when criminal systems were under the exclusive control of criminalists and criminologists belongs to a bygone era. Criminal systems and those involved with them need to pay attention to the political, social, and scientific changes that ceaselessly ripple through societies and consider how these changes impact the democratically expressed preferences of a population. However, it is also true that democracy requires limits for its continued existence and that not every choice expressed in a vote or other populist forum lays out a concrete path forward that must be followed (e.g., if a majority decides to discriminate against or even extermination a minority group). Having limits is a core

11 Jean Pierre Matus A., La trasformación de la Teoría del Delito en el Derecho Penal Internacional (Atelier, 2008), 149–158, with further references.

12 José Luis Martí, 'The Republican Democratization of Criminal Law and Justice', in José Luis Martí and Samantha Besson, *Legal Republicanism: National and International Perspectives* (Oxford University Press 2009), 123.

13 Phillip N. Pettit, 'Is Criminal Justice Politically Feasible?' (2001) 5 *Buffalo Criminal Law Review*2), 427.

notion that is inherent to functional constitutional democratic societies. In the context of this essay, these limits do not carve out exclusive territory for criminal law scholars and criminologists regarding the form and function of penal codes. Therein lies our challenge, to coexist with each other within a diverse society regulated by a criminal law system that draws functionality from and has limits based on the principles of a democratic society, constitutionally limited by respect for fundamental rights, including both those of the perpetrators and victims of crime.

Further Reading

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