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the Development of “Punitivism”**

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## **The Split between Criminal Policy and Social Sciences: the Development of “Punitivism”**

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### **Abstract**

Social sciences and should be based on the need to synthesize the empirical and normative knowledge. This perspective must have multiple scientific impacts and must, above all, have a decisive influence in the design of criminal policy, taking into consideration the empirical analysis of criminal behaviour from a sociological, psychological and criminological point of view, and must play an important role in the choice of methodological principles of criminal law.

The recent alterations of criminal law in western countries within the last 20 years have been directed towards the gradual increase in length of punishments, especially prison sentences, for all types of crimes. The series of alterations has increased the trend called "punitivism", in a clear and decisive way. This gradual increase in punishment has reached its peak with the introduction of the life sentence in countries where previously it did not exist or the excessive increase in imprisonment for more serious crimes. In recent years the works from the scientific community has revolved largely from the critics of the prevailing “punitivism”, developing many different arguments, which cohere in the sense of almost absolute neglect that legislatures and Governments have with respect to the scientific community.

These arguments, in my opinion, revolve around two ideas: On the one hand, as with the emotional or romantic argument, punitivism goes against the ideological background of the conception of the State and the purpose of prison, referred in one way or another in the constitutions. On the other hand, as with the scientific and technical argument, should consolidate with sufficient clarity the idea that empirical and statistical analysis that contributes to the social sciences (Sociology, Psychology and Criminology) should be an indisputable scientific paradigm as well as criminal science and criminal policy.

In this paper I present the scientific basis of this interrelationship and the reason for the frustration from the criminal science on the growth of punitivism from the perspective of the objective analysis of the optimization from the disciplinary legal resources.

**Keywords:** Punitivism, legal populism, criminal policy, social sciences.

## Introduction

The scientific reaction that took place in the 60s and 70s put into question the whole of criminal law science and rethought the relationship between this and the environment. A good example are the earliest writings of GIMBERNAT or ROXIN<sup>1</sup>, which reveal that the law scientists were perfectly aware of the delegitimize that had undergone criminal science and its so distant situation with respect to Criminology.

The need to make effective the Law requires a consistent approach to the social sciences and manifests itself in the need for a synthesis between the empirical and normative knowledge. Along the history of criminal law science the 60s are a turning point towards a regenerated view of the idea of the criminal law as a mechanism of social control. The law, the offence and the penalty are to be observed within the set of means of social control, stands out from the rest mostly because the application of the rules that collect the deviant behaviors and sanctions is performed within the framework of a much more formal process. This contextualization allowed a rational legitimation of criminal law, which went out of criticisms made to the criminal law of exclusively punishment base<sup>2</sup>. The relationship between criminal law and social sciences, and the view of him as an instrument of social control has had multiple scientific implications that go beyond the own utilitarian justification of the *ius puniendi*. Their influence is decisive in the design of criminal policy, taking into consideration the empirical analysis of the conducts to punish, and plays an important role in the framework of dogmatic construction and the choice of methodological principles.

However, the succession of reforms that have been implemented in almost all criminal codes in the last 20 years have eroded that idyllic state between the scientific community and the legislator, mostly because this succession of reforms has been delving into the punitivism, consciously and resolutely, in what refers to the system of penalties. The progressive increase in penalties length has reached its culmination with the introduction of the life imprisonment in some countries where did not even exist, as it is the case of Spain. Literature that has poured on these reforms has revolved largely around criticism to the punitivism ruling, citing diverse arguments but confluent all them in the feeling of almost absolute neglect than the recent legislator has the criminal scientific community. These arguments should not only wield the frustration of the scientific community and not only must wield a substrate ideological conception of the welfare State and law that infuses the constitutional criminal principles. It should wield with sufficient clarity that the statistical and analytical analysis that provide the social sciences, such as Psychology, Sociology and Criminology, to the study of criminal law, as to a greater extent, to the criminal policy, must be more and more transcendent. In

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<sup>1</sup> GIMBERNAT, E.: “¿Tiene un futuro la dogmática penal?”, in *Estudios de Derecho penal*, Madrid, 1990, p.140; ROXIN, K., *Kriminalpolitik und Strafrechtssystem*, Berlin, 1972, p.5.

<sup>2</sup> HASSEMER, W., *Einführung in die Grundlagen des Strafrechts*, Verlag, C.H. Beck, 1990, p.391.

this paper is presented the scientific basis of this interrelationship and the reason for the frustration of the criminal science in the age of punitivism from the objective analysis of the optimization of the criminal law resources.

Before is needed to draw attention to the distinction between what is meant by “punitivism” and what has come to be called the "expansion of criminal law." The latter, so criticized by the Frankfurt School and its followers, refers to the growing protection by the legislator of supra-individual or collective interests that often come from the exponential technology of life in society, so different today from decades ago, and that has generated a series of new "legal goods" with different textures with respect to the individual legal goods that are part of the "classic" protection area of the criminal law systems. The options about the selection of these legal goods to protect, as well as the decisions about their relevance and their insertion in the criminal policy, are in any case ideological choices that always remain to the idea of contingency, not immanence, of the constitutional text, and its interpretive flexibility in relation to the social problems of each moment. Punitivism, the distinctive phenomenon, refers to widespread punitive aggravation, aggravation of penalties, especially those involving prison, and the sea referred to this "classic" core of essential individual interests as these new supra-individual legal rights. Punitivism, originally called “mass incarceration”, “mass imprisonment” or the “prison boom”<sup>3</sup>, constitutes a modern trend or fashion that comes from the influence that American criminal policy has had on European criminal policies in the last decades and that has kept them from Theoretical Influences that sought other alternative means at the same time quantitative to try to optimize the performance of state punitive resources<sup>4</sup>.

The phenomenon of populism is not exclusive of peripheral pseudo-democracies. We are witnessing directly the rise and even consolidation of political phenomena that can be attributed to the concept of "populism" in advanced democracies of developed countries. Neither is it a phenomenon of more conservative ideologies nor the most progressive. As PULITANO<sup>5</sup> rightly points out, there is a "right-wing" criminal populism and a "left-wing" criminal populism, that of tendencies of generalized elevation of sentences in pursuit of the sense of "security" (life sentence) and this more concerned with the punishment of adverse ideological options under the mantle of political correctness (ex. crimes of negationism). Both are punitive phenomena originating in legal populisms, ultimately criminal populisms. Obviously the criteria for a well-founded analysis of the phenomenon of punitivism as well as the critique of it also constitute a debate about ideological options about criminal policy. But not only. The gradual development of the social sciences

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<sup>3</sup> GARLAND, D.: “Introduction: the meaning of mass imprisonment”, in GARLAND, D. (Ed.), *Mass imprisonment. Social causes and consequences*, SAGE Publications, Townbridge, 2001, p.4.

<sup>4</sup> GARCÍA ESPAÑA, E./ DÍEZ RIPOLLÉS, J.L., *Realidad y políticas penitenciarias*, Instituto Andaluz Interuniversitario de Criminología, Málaga, 2012, p.35.

<sup>5</sup> PULITANO, D.: “Populismi e Penale. Sulla attuale situazione spirituale della giustizia penale”, en *Criminalia*, 2013, p. 123.

linked to criminal law, especially of criminology, are contributing increasingly to empirical analysis on the performance of criminal resources as well as typing techniques. This evolution translates certain debates into purely empirical and more objective areas. The criteria with which we must analyze the performance of sanctioning resources as well as the options for increment, detriment and selection of one or more sanctioning resources in each case are, or should be increasingly, technical optimization criteria based on the empirical analysis on the application and selection of such resources. This growing, almost exclusive, empirical foundation of the related sciences alters some of the traditional approaches to the relationship between criminal law, criminal policy and Criminology, especially as regards the analysis of the selection of penalties and its duration, where in the scientific community of criminology has been working for a long time.

The object of this paper and the reason for the critique to punitivism as a generalized strategy come not only from romantic ideas about its distance from the guaranties that should govern the use of punitive resources, but also, and above all come from the finding of the lack of performance and effectiveness of criminal policies in the sustained decline of crime rates. Obviously the criteria for a well-founded analysis of the phenomenon of punitivism as well as the critique of it also constitute a debate about ideological options about criminal policy. But not only. The gradual development of the social sciences linked to criminal law, especially of criminology, are contributing increasingly to empirical analysis on the performance of punishment resources as well as typing techniques. This evolution translates certain debates into purely empirical and more objective areas.

## Theory

The vision of criminal law as social control system allows, above all, to elaborate a rational consequences-oriented criminal policy where the decisions of legal operators are measured in terms of social utility. This "orientation to consequences" takes the system away from the methods of conflict resolution in criminal law with the only idea of punishment. The inclusion of criminal law in the framework of other systems of social control has served to theoretically cement the introduction of alternatives to imprisonment and even alternatives to the criminal law system itself.

The deepening of the relationship between criminal law and the social sciences has also provided to criminal law science new working hypotheses and new forms of argumentation that allow a new approach to the structural elements of criminal law science<sup>6</sup>. The new method, as it is known, has its starting point in the programmatic work of ROXIN *Kriminalpolitik und Strafrechtssystem*, and proposes to break the barrier that separated criminal policy and criminal law science. In words already classic of ROXIN "it is

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<sup>6</sup> DIEZ RIPOLLES, J.L., *Los elementos subjetivos del delito*, Valencia, 1990, p. 90.

necessary to transform the criminological knowledge in criminal political demands and, these in turn, in legal rules of *lege data* or *lege ferenda*". What really stands out is that the reconstruction of crime theory is attempted to rationalize and systematize taking into account the influence of values.

Now, once we say this, we reiterate that if one starts from a teleological method we must agree that we must solve two tasks with urgency. The first is to determine, or rather to confirm, with the highest possible degree of precision what the values (interests, goods) on which the system is based<sup>7</sup>. This task is more important if it is to indicate which values correspond to each section of the criminal law scientific category. And in this sense, within the functional teleological paradigm the differences in the understanding of dogmatics are motivated not so much by the method or the orientation to the ends but, precisely, by the different concretion and importance that each scientific current grants to these values. The second task, proper to any scientific discipline, will be to try to adapt the optimization of punitive resources to the accepted value system, that is, to try to optimize criminal policy decisions in the process of creating law, and the most appropriate possible to that system of values and as effective as possible for the attainment of its goals. This is where the implication between the empirical social sciences and criminal policy certainly comes into play if what is wanted is to find solid answers to the optimization of the performance of punitive resources that are designed or redesigned by the legislator and lead to the process of creation or reform of criminal laws with a serious scientific basis and not moved exclusively by fashions or whims.

## Discussion

As it is been commented, the first scientific task faced for a scientific characterization of criminal policy is to determine or confirm the principles or program of values upon which the criminal system must be built. Criminal policy, as a part of politics in general, is an activity valued and pregnant with ideology. It cannot be otherwise. It is not in vain that criminal policy is that part of politics (politics is equal to decision-making among diverse options based on a program of values) whose task is to define, create, redefine, redo the set of criminal rules in force in a State in a certain historical moment. For this reason, the various models of State can correspond to different models of criminal policy and in the same model of State there are different options for criminal policy, of course<sup>8</sup>. BARBERO SANTOS evidenced this idea with

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<sup>7</sup> NINO, C.S., *Los límites de la responsabilidad penal. Una teoría liberal del delito*, Astrea, Buenos Aires, 1980 p. 78; SILVA SÁNCHEZ, J.M., *Aproximación al Derecho penal contemporáneo*, Bosch, Barcelona, 1992, p.110; BACIGALUPO, E.: "La ciencia del Derecho penal, entre el ideal científico de las ciencias naturales y de las ciencias del espíritu", in *Libro Homenaje al Prof. Beristain*, San Sebastián, 1989, p. 459-469.

<sup>8</sup> DELMAS MARTY, M., *Les grands systèmes de politique criminelle*, Coll. Themis, P.U.F., Paris, 1992, p.45 y ss.

special clarity. It seems clear, therefore, that criminal policy must always be incorporated into the frame of reference of a certain state organizational situation, without forgetting that within this contingency can be diverse options for each<sup>9</sup> decision process.

It is evident, and this is a topic in the scientific community although it seems that the legislator has to be reminded, that today the system of values that functions as the cusp and reference of the legal system must be the system of values configured by the Constitutions in each country<sup>10</sup>. That is why one of the great tasks of criminal policy is to determine and be faithful in the development of its various options to what ARROYO ZAPATERO once called the "Criminal Program of the Constitution"<sup>11</sup>. The paradigm of criminal dogmatism that emerges with the work of ROXIN requires that the different categories of crime theory are brought into connection with specific and concrete options of criminal policy. But if this connection is not sufficiently consolidated and criminal policy is managed among its various options without any support in the system of constitutionally settled values, is needed to reach a point on the road that threatens to lead to axiological relativism similar to that which characterized criminal law during part of the last century.

Of course it must be recognized that occidental Constitutions present an open program and assume some ambiguity in values. More than a certain ambiguity, it is a question of the possibility of interpreting these values in a multi-directional way and not in a single sense. In the process of interpreting constitutional principles and values (of which they have special relation with criminal law or any others) not only the valence proper to each principle or value, its extension and its limits, the position of predominance within the constitutional system itself, but also the relationship that this principle holds with the rest of those present in the constitutional text. The understanding and delimitation of these edges cannot be sought to be solved or concretized by a process of univocal and simple interpretation. But this, as ARROYO ZAPATERO indicates, more than a demerit represents precisely the essence of modern Constitutions, which "design a type of open society, which does not consecrate the existing order of values and even normatively promote social progress"<sup>12</sup>. Moreover, the Constitutions, which assume the value of pluralism and the "sovereignty of the living generations", are characterized precisely by contemplating several alternatives, all of them according to the Constitution. On the other hand, SILVA is also right to emphasize the importance of the use of legal philosophy within the Constitutional framework. Nor is the option here undermined, since the complex task of interpreting the Constitution is often based on sources such as dominant cultural values, and therefore legal philosophy itself is a necessary part of the materials and resources normally used in the process of interpretation of the Constitutions.

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<sup>9</sup> BARBERO SANTOS, M., *Política y derecho penal en España*, Túcar, Madrid. 1977.

<sup>10</sup> Vid. ZIPF, H., *Kriminal politik. Ein lehrbuch*, C.F. Müller, 1980, p.24.

<sup>11</sup> ARROYO ZAPATERO, L., "Fundamento y función del sistema penal: el programa penal de la Constitución", RJCLM, n.º 1, 1987, p.101.

<sup>12</sup> ARROYO ZAPATERO, L.: "Fundamento y función...", op.cit., p. 99.



What is the situation in which the values or constitutional principles relative to the purposes of the penalty are found? As for the purposes of punishment, the presuppositions of the new criminal policy that emerged in the 60's can be condensed into two emblematic phrases: "farewell to Kant and Hegel," which expresses the rejection of retributionism, and "penalties are a bitter necessity within the community of imperfect men that men are", which announces the predominance of a preventive conception. The 60's and first 70's suppose the resurgence of the idea of the re-socialization as a primordial end of the prison penalties. But the confidence in the re-socializing proposals was nevertheless as spectacular as its fall, and voices began to be heard that warned of both their failures and the loss of guarantees (ex. indeterminate judgments, principle of legality, ideological freedom, proportionality) to which he had a re-socializing program configured without fissures. The failure of resocialization did not, however, break the faith of criminal science in preventive approaches despite a climate, certainly prone to a return to retributionism, which would happen later in the countries that had been most committed to resocialization: the Scandinavian countries and the United States. Undoubtedly, the proximity of the periods of intense retributionism in countries like Germany or Spain provoked a rejection to its renew.

In any case, to observe this problem from a global perspective in the current discussion on the purposes of punishment, should be indicated that the idea of re-socialization remains the point of reference in the contemporary criminal policy programs. The criticism that this has received has certainly prevented it from being defined as the only purpose of punishment, but it has not been called into question that in the context of general prevention and, in particular, at the time of the execution of the imprisonment, it is necessary to attend to re-socializing objectives, even if they are the only ones, and always referring to the concept of re-socialization promoted by BARBERO as "future life without crime" of the condemned as well as to a scrupulous respect of their individual rights.

General positive prevention implies or must consist in the restoration of the confidence of citizens in the validity of the rule, which has been broken by the crime. In pursuit of this overall positive preventive purpose, the application of disproportionate and imposed penalties without respecting the guarantor principles of criminal law cannot increase the confidence of citizens. The idea that underlies punitivism and that advocates the general revision of the system of penalties to increase their duration, especially of the custodial, even going so far as to establish life imprisonment in a direct or covert way, as has happened in the recent reforms seems contrary to this vision of general positive prevention as we have just shaped it. It seems obvious that from a conceptual point of view the idea of resocialization cannot be achieved through very long term custodial sentences and certainly in no case through the penalties of unlimited or almost unlimited deprivation of liberty. But this, so to speak, runs the risk of being precisely a mere conceptual debate on the content of a constitutional principle.

However, following the methodological proposal of this article, the conceptual debate on the content and extent of constitutional principles and values should not be confined just as a confrontation of ideas about their contents based on opinions or preferences or ideological tendencies. In this case there is an easy risk that the complexion of the principle or value is biased, partial and does not respond to its real purpose. Obviously the process of interpretation of a constitutional value or principle is not simple nor can it respond to a mere application syllogism as it does to other levels of legal rules of less abstraction. Precisely in the formulation of the content and extension of a principle or constitutional value, which is something very abstract, value judgments intervene that respond to the ideological, social and cultural conjuncture of a society at a given moment. If we have defended the idea that constitutional programmatic values are open and flexible to allow historical and cultural contingency at any moment, we cannot veto the entry of those criteria into the process of interpretation of the content of the values that are at any given time carry out. Do not forget that the process of interpretation on the content of a constitutional principle or value is not ambiguous to infinity nor to have as many options as ideological presuppositions have the interpreter. Also involved in the process of interpretation are criteria that have an objective scientific basis and are based on prognostic judgments that come from observation and statistical analysis either from the social sciences or from the physical sciences, and which cannot and should not be ignored.

Following the course of our proposal, the second scientific task that must be faced is therefore to determine the necessary involvement of criminal policy with the empirical sciences that can provide objective and firm support from which to fulfill its mission, especially with Criminology. One of the angular characteristics of contemporary criminal science is that the barrier between criminal and dogmatic criminal law has been broken, and the implication between them must be deeper and more intensified. There is now a broad agreement that criminal dogmatics, as an essentially mediating science that allows the application of the law to the concrete case, must begin with the construction of its different proposals for a specific criminal policy program. The current criminal policy must know how to combine utilitarian elements and guarantors. In an idyllic framework of scientific relations the empirical knowledge provided by Criminology should be filtered through principles derived from the rule of law. According to MIR PUIG, criminal law has the function of establishing the axiological premises of criminal law based on the contemplation of the conclusions obtained by Criminology about the reality of crime and punishment<sup>13</sup>. As can be seen, only once criminal policy has ceased to be exclusively utilitarian, to become an empirical value science, it has been possible to abolish the barriers that separated it from criminal dogmatic<sup>14</sup>. What essentially differentiates criminal policy from Criminology is that it is an

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<sup>13</sup> MIR PUIG, S., *Introducción a las bases del Derecho penal*, 2ª ed., B de F, Buenos Aires, 2003, p.306.

<sup>14</sup> GARCÍA RIVAS, N., *El poder punitivo en el Estado democrático*, Servicio de Publicaciones de la Universidad de Castilla-La Mancha, Cuenca, 1996, p.102 y ss.

empirical and value science. Criminal policy is not exclusively a science of being. In this way, it is not only the task of providing legislation with effective strategies to combat crime, but also establishes the principles for the configuration of criminal law in each context and moment. At the level of strategies until recent times has been prevalent the conception of FEUERBACH, for whom the criminal policy referred to all the repressive procedures through which the State reacts to crime. Criminal policy was, in this sense, a science of repressive measures. Faced with this idea, I believe that the current approach is that the strategies to fight crime are not only repressive. Obviously criminal law is the main instrument, but the importance of other non-criminal (administrative sanctions) and non-repressive instruments as prevention, mediation and restorative justice) is emphasized, and what is even more surprising, not all state or public. However, the consideration, choice and design of these strategies must start from the knowledge provided by Criminology about the morphology of criminal behavior, the explanation of its development and the characteristics of its combat<sup>15</sup>.

The criminal law constitutes the legal framework that determines the conduct that is considered criminal in a society at a certain historical moment. Previously, a decision must be made on the very existence of the criminal law, its structure and its essential characteristics, that is to say, there is a criminal policy decision based on the need for criminal intervention on each conduct which is criminalized. Criminology completes the knowledge of the criminal act by means of the generic explanation of human behavior that violates the law and therefore becomes criminal, by systematically analyzing the strategies, tactics and means of social sanction to achieve an optimized control of crime, and propose and determine reforms of those aspects considered politically-criminally inappropriate. Criminal policy is the necessary bridge between empirical knowledge and the normative concretion that constitutes criminal law. It has been pointed out that the role of Criminology lies mainly in providing the empirical basis for a rational and guarantor criminal policy. For this, its object of study must necessarily be broad and multidisciplinary, the more the better. The totality of criminological paradigms and theories of criminality are necessary and useful, because of all of them can criminal policy and dogmatics draw relevant consequences.

The object of study of Criminology consists of crime, delinquency (as social reality), the delinquent, the victims and the means of control against crime. This vision brings us closer to the concept that most leads us to the synthesis that requires the work of delimitation of the object of the science of Criminology: delinquency. In the last decades of criminological investigation, it has been verified that the orientation of most of the studies carried out has focused on the analysis of some aspects of this phenomenon, and thus has been the statistical weighting of its frequency, Its consequences, its genesis, the variables that motivate and lead it. Consequently Criminology is the science

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<sup>15</sup> DELMAS MARTY, M., *Les grands systèmes...*, op.cit., p.13.

that is dedicated to the study of crime and its social control systems. Criminology studies criminal behavior and social reaction against it<sup>16</sup>.

Criminal behavior is a human action and as such has a normative reference expressed in characters and magnitudes of such behavior, which is what criminal law carries out. In it, the normative determination of human behaviors that are criminal is made, although the investigation of these behaviors cannot be exhausted in the exclusive area of its normative formalization, but must address environmental, social, psychological, educational and other factors that generate or facilitate the criminal conduct that finally is stipulated as a crime. In this regard, modern Criminology is aware of the multitude of variables that influence criminal behavior, the multitude of areas from which the components of these variables come and the need to evaluate them as completely as possible to discern the incidence of each in the investigation that is carried out<sup>17</sup>. The study of criminal behavior, from criminological science, therefore encompasses a series of variables that are obviously different from those of criminal law science. The social reaction generated in the face of criminal behavior also includes formal mechanisms, which are those established stately from the procedural and administrative rules that structure the procedural, police and penitentiary means of reaction to crime, to informal mechanisms of control that start from the family, work, friendly, and all ties that come from any relational links of the individual performing criminal behavior<sup>18</sup>. Criminology also deals with the study of the mechanisms of social reaction to criminal behavior and the consequences that the application of these mechanisms, whether formal or informal, have on the further action of the delinquent subject<sup>19</sup>.

From this perspective, Criminology is evidently based essentially on Criminal Law, Psychology and Sociology, but it is evident that the observation of criminal human behavior and social reaction exceeds, or rather, the difference in its contents, research techniques and patterns of knowledge of each of these sciences and gives it an obvious investigative autonomy. The mere use of the study of criminal law cannot offer all the answers to the criminal phenomenon, and essentially deals with the characterization of human criminal behavior punctual, in relation to the law that typifies it, the interpretation of said rule which is applicable to such behavior and the expected legal consequences. Without other scientific references, neither Psychology nor Sociology could explain the mechanisms of social reaction to the criminal behavior nor the origins of the same or its determinants. The union of all of them, the Criminology, provides a complete and essential perspective

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<sup>16</sup> HASSEMER, W./ MUÑOZ CONDE, F., *Introducción a la Criminología y al Derecho penal*, Tirant lo Blanch, Valencia, 1989, p.25.

<sup>17</sup> GARLAND, D. / SPARKS, R.: "Criminology, Social Theory and the Challenge of our Times", en GARLAND, D./ SPARKS, R. (Eds.), *Criminology and social Theory*, Oxford University Press, 2000, p. 7.

<sup>18</sup> HIRST, P.: "Statism, Pluralism and Social Control", in GARLAND, D./ SPARKS, R. (Eds.), *Criminology and social Theory*, Oxford University Press, 2000, p. 127 y ss.

<sup>19</sup> REDONDO, S., "Prólogo", in GARRIDO, V./ GÓMEZ, A., *Diccionario de Criminología*, Tirant lo Blanch, Valencia, 1998.

from which to analyze each one of these facets to obtain an integral panorama. Neither does it mean that criminal law has to be subordinated to criminology or *vice versa*. The interrelation between both sources of knowledge, the point of useful connection is achieved assuming that the object of criminal law science should not be only the science of the interpretation of current norms but also science or the essential support to the science of construction of the future norms, both in the aspect of the definition of behaviors typified as criminal and of penalties<sup>20</sup>.

There is already a great deal of scientific studies which have shown that the widespread rise of the most serious penalties (long term imprisonment and the death penalty) is not effective in combating attacks on legal assets such as life or the most serious ones to physical integrity or attacks against sexual freedom in its most violent aspect. Neither the death penalty nor life imprisonment achieve the general preventive effect of those who advocate their widespread incorporation, or persistence where they already exist into western punitive systems. They fail to be an effective method in the optimal fight to reduce crime rates related to serious crimes against life, physical integrity or sexual freedom. The proposals on the widespread elevation of custodial sentences, or maximum compliance limits, usually come from manipulating the sense of security or insecurity that those responsible for criminal policy derive from the population (a serious terrorist attack, a striking case of sexual assault and homicide) and that lead to the acceptance by a large part of the population and the defense to the utmost of those responsible for the criminal policy of a concrete punitive approach.

## Conclusion

The general framework of the constitutional value system, which, in addition to having other missions, must also govern the theory of legislation as well as the transfer of the statistical knowledge and objectives that Criminology provides and which must be assumed by criminal policy, and all the contributions to scientific knowledge provided by researchers in criminal law science, succumb when giving such a specific and so conscious weight to the vindictive and punitive approaches that underlie the position of the victim *ex post delicto*. These approaches lack a scientific basis that supports them, lack an objective contrast based on a statistical methodology, objective, less historic or minimally reflective<sup>21</sup>. Legal populism in criminal matters, the so-

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<sup>20</sup> NUVOLONE, P.: "Diritto penale e Criminología", en FERRACUTI, F. (Dir.), *Trattato di Criminología, Medicina Criminologica e Psichiatria Forense*, Vol.3, Giuffrè Editore, Milano, 1987, p.2.

<sup>21</sup> LEVITT, S., "The effect of prison population size on crime rates: evidence from prison overcrowding litigation", *The Quarterly Journal of Economics*, Vol. 111, nº2, 1996, p.319; MARVELL, T.B./ CARLISLE, M.Jr.: "Prison population growth and crime reduction", *Journal of Quantitative Criminology*, Vol. 10, num. 2, 1994, p. 109; KOVANDZIK, T.V./ VIERAITIS, L.M.: "The effect of county-level prison population growth on crime rates", *Criminology and Public Policy*, Vol.5, núm.2, p.213.

called "criminal punitivism", revolves around approaches that promote and practice, wherever they are reflected in positive law, around the generalized increase of penalties; Increasing compliance limits (especially in relation to certain crimes, such as terrorism or attacks on sexual freedom accompanied by extreme violence or homicide); the introduction or maintenance of life imprisonment or other euphemistic names; and the introduction or maintenance of the death penalty for the most serious forms of crime related to the most serious forms of crimes against life.

The fracture between empirical sciences and criminal policy is particularly serious when a concrete measure of the intended optimization of a sanctioning resource has no more support than the achievement of a placebo effect in the target population of that measure. It is the mere sensation of renewed security in the population that obtains an extreme punitive measure and that feeling of false new security usually backs up the support of a majority sector of the population to the criminal policy, and to the other policies, of whom adopts the concrete punitive measure. It is not a case of symbolic criminal law, although the mechanism, germen and development of the measure and political consequences is the same, but of real "legal populism", in this case "criminal populism".

The support of a criminal policy measure must always be based, and as far as possible, on the conclusions reached by the empirical sciences that have analyzed the performance of a specific measure with respect to the aims to be pursued. The fracture between criminal policy and empirical sciences delegitimizes it, especially when in the process of adopting a concrete measure there is no serious scientific contrast that supports the adoption of the measure. The situation is as serious as if the health policy decided to dispense with a technique or an operating procedure that has been operating in a different way for surgical intervention or if it has decided to substitute a drug for another in the market when there is no scientific support for the new drug works, just because the population "reassures" the presence of this new drug because it is protected by a friendly advertising campaign in the *mass media*. The example is somewhat absurd, of course, but very representative of what a normative policy decision (whether criminal or not) contravenes scientific conclusions reached by empirical methods.

A criminal policy decision that does not fulfill the mission entrusted to it, and which is none other than the optimization of a method of conflict resolution, departs from a model of monitoring the opportunity and performance of that intended optimization from a purely objective and scientific point. The situation is significantly aggravated when, in addition, the adoption of a measure is highly erosive with the constitutional values that govern our general legal framework and the relationship between the positive norm and the target citizen of the norm.

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