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Elements of Punitive Populism in the Constitutional Reform Bill on the Introduction of Life Imprisonment in Colombia

Elementos de Populismo Punitivo en el Proyecto de Reforma Constitucional sobre la Introducción de Prisión Perpetua en Colombia

Elementos do Populismo Punitivo no Projecto de Lei da Reforma Constitucional sobre a Introdução da Prisão perpétua na Colômbia

Artículo de Investigación

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Abstract

Introduction: Punitive populism is presented as a phenomenon where legislation is made outside a study of criminal policy, on the contrary, the conjunctures that move social emotions are used to propose draft legislative acts that leave aside in disciplinary analysis of the matter to focus rather on particular interests, such as gaining recognition and therefore voters. **Objective:** The purpose of this research exercise is to unveil the possible elements of punitive populism in the constitutional reform project on the introduction of life imprisonment in Colombia, in this article it is postulated that punitive populism in contemporary times is detrimental to human dignity, which is the backbone of the 1991 Political Constitution. **Methodology:** With a horizon like the previous one, in the present research the position on punitive populism as manipulation of the social masses, both ideologically and in a repressive way, so that it takes shape within the paradigm of socio-legal research, whose method used is the socio-critical and the hermeneutic or interpretive, as these allow a reading from the text and contexts to produce new knowledge in the field of criminal law and philosophy of law, emerging new theoretical alternatives and application in the legal field, in favor of human rights, inclusion and human dignity.

Keywords: Punitive populism; Criminal law; Criminal policy; Ideology; Power; Exclusion.

Resumen

Introducción: El populismo punitivo se presenta como un fenómeno donde se legisla al margen de un estudio de política criminal, por el contrario se utilizan las coyunturas que mueven las emociones sociales para proponer proyectos de actos legislativos que dejan de lado en análisis disciplinar del asunto para centrarse más bien en intereses particulares, como ganar reconocimiento y por lo tanto electores, **Objetivo:** el presente ejercicio investigativo tiene como fin develar los posibles elementos de populismo punitivo en el proyecto de reforma constitucional sobre la introducción de prisión perpetua en Colombia, en este artículo se postula que el populismo punitivo en la contemporaneidad viene en detrimento de la dignidad humana, que es la columna vertebral de la constitución política de 1991. **Metodología:** Con un horizonte como el anterior, en la presente investigación se planteó la postura sobre el populismo punitivo como manipulación de las masas sociales, tanto ideológicamente como de forma represiva, de modo que toma forma dentro del paradigma de investigación socio jurídica, cuyo método utilizado es el socio-crítico y el hermenéutico o interpretativo, pues estos permiten una lectura desde los texto y los contextos para producir nuevos conocimientos en el campo del derecho penal y de la filosofía del derecho, surgiendo nuevas alternativas teóricas y de aplicación en el campo jurídico, en pro de los derechos humanos, la inclusión y la dignidad humana.

Palabras clave: Populismo punitivo; Derecho penal; Política criminal; Ideología; Poder; Exclusión.

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Artículo de Revisión

Resumo

Introdução: O populismo punitivo é apresentado como um fenómeno em que a legislação é aprovada fora do estudo da política criminal, pelo contrário, as conjunturas que movem as emoções sociais são utilizadas para propor projectos de actos legislativos que deixam de lado a análise disciplinar da questão para se concentrarem mais em interesses particulares, tais como ganhar reconhecimento e, portanto, os eleitores, Assim sendo. O**bjectivo:** O objectivo deste exercício de investigação é revelar os possíveis elementos de populismo punitivo no projecto de reforma constitucional sobre a introdução da prisão perpétua na Colômbia, neste artigo postula-se que o populismo punitivo nos tempos contemporâneos é prejudicial à dignidade humana, que é a espinha dorsal da constituição política de 1991. **Metodologia:** Com um horizonte como o acima referido, na presente investigação foi apresentada a posição sobre o populismo punitivo como manipulação das massas sociais, tanto ideológica como repressiva, de modo a tomar forma dentro do paradigma da investigação sócio-jurídica, cujo método utilizado é o sócio-crítico e hermenêutico ou interpretativo, uma vez que estes permitem uma leitura do texto e contextos para produzir novos conhecimentos no campo do direito penal e da filosofia do direito, dando origem a novas alternativas teóricas e de aplicação no campo jurídico, a favor dos direitos humanos, da inclusão e da dignidade humana.

Palavras-chave: Populismo punitivo; Direito penal; Política penal; Ideologia; Poder; Exclusão.

However, as far as the present work is concerned, it refers to the power that is born in politics where "generally" the term "politics" is used to designate the sphere of actions that refer directly or indirectly to the conquest and exercise of ultimate power (supreme or sovereign) over a community of individuals in a territory" (Bobbio, 2003, p.237). The answer goes back to Antiquity, and therefore has been transmitted for centuries until today, "the affirmation that the end of politics is the common good, understood as the good of the community as distinct from the personal good of the individuals who compose it" (Bobbio, 2003, p. 240). Continuing with the clarification of power, it is relevant to note that "political power is distinguished by the use of force, it is demanded as the supreme or sovereign power, whose possession distinguishes in every organized society the dominant class" (Bobbio, 2003, p.243).

Continuing along the same line of argument and bringing up Foucault, we can see that power requires two fundamental elements that are opposed to each other: the first is the knowledge possessed by the one who holds power and this in turn hides and takes care of this knowledge, and the other element is negative, that is, characterized by its absence, in this case the absence of a specific knowledge. According to the thinker "power, when exercised in its fine mechanisms, cannot do so without the formation, organization and circulation of knowledge or, better, of apparatuses of knowledge that are not ideological accompaniments or buildings" (Foucault, 2000, p.42). This element is also identified by Bobbio, who has judiciously studied power and points out that:

> Ideological power is based on the possession of certain forms of knowledge inaccessible to the majority, of doctrines, knowledge, even just information or codes of conduct, in order to influence the behavior of others and induce the behavior of a group to act in one way rather than another. (Bobbio, 2003, p.242).

The empire is therefore composed of a series of elements duly structured and controlled by those who hold that power so that they are not stripped of it, but on the contrary, so that its perpetuity is guaranteed.

In this logic of domination, it is immersed in law, where it is an instrument par excellence of power where knowledge and force converge, since it is elucidated as "the law, sovereign, besieges cities, institutions, behaviors and gestures; no matter what is done, no matter how great the disorder and incuriosity, it has already deployed its powers" (Foucault, 1989, p.6). The norm has the power to regulate behaviors and to make abnormal those that do not conform to the objectives and interests of those who hold power, who also decide what is good and what is bad, what is convenient and what is not for society. By dividing behaviors into normal and non-normal, it is legitimizing exclusion by dividing society between those who comply with the norm and those who transgress it, those who act in accordance with the prevailing law believe they have the power and the capacity to decide on the fate and conduct of those who do not conform to the ideal of truth of the social and political situation in force.

In a scenario such as the above, where social division is called into question, the principle of divide and conquer becomes clear, because when polarizations are accentuated, the dominant power does its thing and imposes itself under the mask of general will, in the words of Bobbio (2003) "In a society strongly divided into opposing classes, it is likely that the interest of the dominant class is assumed and sustained even by means of cohesion as a collective interest" (p.242). It is for this reason that

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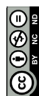

that the domination that is exercised in such a visible way does not turn out to be abominable to the masses and is even accepted in a very good way and implored, since this domination and execution of power is disguised as a false autonomy and freedom that is nothing more than a mechanized obedience to the particular interests of the owners of political power and the economic forces of the market, but that they make it appear as a general interest so that their power is not threatened.

Power is not only the set of norms or the law as such, it has a whole scaffolding that makes it extremely complex, it becomes clear then that the question of power is simplified when it is posed only in terms of legislation or Constitution; or in terms of State or State apparatus. Power is undoubtedly more complicated, or in other words, thicker and more diffuse than a set of laws or a State apparatus (Foucault, 1980, p.10).

Power is so diffuse that in this Foucauldian context almost anyone can put it to work, but not in favor of himself but in favor of the system, which in the end favors those who hold the power and, by the way, are the same ones who create and maintain the system. The system makes each individual exercise a pseudo-power, a dominion over the other, but "the danger of dominating others and exercising a tyrannical power over them comes precisely from the fact that one does not take care of oneself and therefore has become a slave to one's desires" (Foucault 1982, p.119). This situation is complicated because on the one hand the individual as such has no real power over the other, but what is real is that he becomes the slave of his desires, which can lead him to dissent from the moderately accepted con- ductation and therefore to be prone to exclusion.

> In a society such as ours, exclusion procedures are well known. The most obvious, and also the most familiar, is that which is forbidden. It is known that one does not have the right to say everything, that one cannot speak about everything in all circumstances, that anyone, in short, cannot speak about anything. (Foucault, 1970, p.5).

This principle of exclusion is directly related to power, not to say that power in its nature is exclusion itself. What is forbidden is that which is excluded because it is not in accordance with the ideals of behavior required for a society in accordance with the joint vision of the time and place in question; therefore, whoever acts contrary to this general behavior, that is, whoever does what is forbidden is excluded, becomes the other who is different from us. However, there is another principle of exclusion in our society:

> It is no longer a prohibition but a separation and a refusal. I am thinking of the opposition between reason and madness. Since the most distant Middle Ages, the madman is the one whose speech cannot circulate like that of others: it comes to pass that his word is considered as null and void, containing neither truth nor importance, not being able to testify before justice, not being able to authenticate a party or a contract, not even being able, in the sacrifice of the mass, to allow transubstantiation and to make the bread a body; On the other hand, it often happens that it is conferred, as opposed to any other, strange powers, such as that of enunciating a hidden truth, of predicting the future, of seeing in its full ingenuity what the wisdom of others cannot perceive. (Foucault, 1970, p.6)

Madness is a fundamental concept in Foucault's theory, because the thinker lays his theoretical foundation on analyses of the nature of human behavior, and postulates precisely madness as a ruling class invention to exclude a given population, which is generally

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the group that does not agree with the conception of the world in how it is accepted in its generality, this leaves as a consequence a knowledge of the individuality to be able to dominate and manipulate it effectively, this is how the philosopher intends to show how power is formed in the nineteenth century, "a certain knowledge of man, of individuality, of the normal or abnormal individual, inside or outside the rule; knowledge that, in truth, was born from the social practices of control and surveillance" (Foucault, 2010, p. 6). Taking the above as a precedent, it can be seen that the more the individual is known, the more he/she is violated, because according to the thinker:

> And just as between instinct and knowledge we find not a continuity but a relation of struggle, domination, subordination, compensation, etc., so we see that between knowledge and the things it has to know there can be no relation of natural continuity. There can only be a relation of violence, domination, power and force, a relation of violation. Knowledge can only be a violation of the things to be known and not perception, recognition, identification of or with them. (Foucault, 2010, p. 17).

It is hardly clear and deductible that the knowledge of the subject that is known with the knowledge of the individual is being violated and even more so if that individual subjected to being studied is pri- sioned and observed all the time, in this context the control and observation of the imprisoned individual is already a violation of his rights.

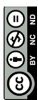
> In this way, nineteenth-century criminality becomes a control not over what the individual does with respect to the law, but over what he can do. It goes without saying that this control is not only carried out by the administration of justice, but by a complex network of institutions (psychological, psychiatric, police, medical, pedagogical, etc.) that make up a power whose function is to correct the virtualities (what they can do) and not the infractions themselves. (Foucault, 2010, p. 23).

This situation is clearly related to the concept of the ideological and repressive apparatuses of the State, which are a series of arms that function as a system with several subsystems that have in common the objective of selecting people and classifying between the normal and the subnormal, as expressed by the thinker Foucault (2010). "The means of introducing at last a cut in the sphere of life that power took over: the cut of what must live and what must die" (p. 230). In this case, death is not murder but the exclusion and rejection of the other, it is then deciding who is in perfect conditions to be part of the homogenizing system and who is susceptible to be excluded and separated from the society of the normal.

The analysis that has been carried out is not merely enunciative, it is a tool that allows us to glimpse the possibilities of action with which the excluded, the insane and those whose rights are arbitrarily violated simply because they do not share their "normality" with those who follow the ideals of the majority have a chance to act and gain ground in the struggle for the respect and recognition of their individuality, as Foucault said:

> The analysis of the mechanisms of power is not intended to show that power is anonymous and at the same time always victorious. On the contrary, it is a matter of pointing out the positions and modes of action of each one, the possibilities of resistance and counter-attack of one or the other (Foucault, 1980, p.13).

Theoretical research and the categorical contextualization of reality only make sense in the context of a specific situation.



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The following category will be continued with the analysis of the concept of punitive populism itself, which is why it is intended to be a concrete action in the phenomenal field and not just a theoretical one.

Thus, continuing with the same line of argumentation, with regard to the concept of punitive populism, an approach is made to what is understood by such concept, which, according to Uribe (2012):

> punitive populism is understood as the type of expressive penal response that - without any hint of efficiency and for eminently electoral purposes - makes use of the sensibilities of the dominant political class - determined by contexts of social emergency typical of the political transition from the Welfare State to the neoliberal model - and is essentially directed against members of minorities, against the "others" (p. 81). (p. 81)

While it is true that Colombia, as many academics argue, is not in the transition from the Welfare State to the neoliberal model, it is minimally true that it is in a social and political situation of great social, political and legal changes where the structures of the State are shaken, Moreover, this situation becomes even more complex if we take into account the post-agreement process in the country, which clearly shows a context of social emergency, this to elucidate the possibility and relevance of speaking of a punitive populism in Colombia, however, there are some elements that constitute punitive populism that according to Uribe (2012):

> Deconstructing the above definition, we have that there will be punitive populism in a society where: 1) An expressive authoritarian criminal law is used, 2) Dominant political sectors use criminal law for electoral purposes regardless of the consequences of effectiveness, or social damage, of the norm. 3) That there is a particular social sensibility produced by the inherent social emergency of the neoconservative political and neoliberal economic model of globalization, the problems of modernity and of the big city; the main gauges of this sensation are economic inequality and labor instability, 4) Society must present an internal division that allows a clear differentiation between the majority and the marginalized groups. There must be an enemy capable of inviting the majority to cohere against it, to identify itself as a result of the exclusion of the "other". (p.81)

Thus, the context in Colombia is such that it is possible to speak of punitive populism, since social and economic inequalities are evident, authoritarian criminal law is growing in recent governments, criminal law is used by politicians to campaign with the needs and fears of the underprivileged classes, and there is not only one enemy but several that threaten the weak institutionalism that exists throughout the national territory, so it is not out of context to speak of punitive populism in Colombia.

On the other hand, it has been argued with respect to punitive populism that this occurs because it is the will of the people, because it is society itself that requires and requests it, a situation that is not entirely true because according to Beckett, quoted by Uribe (2012):

> among other authors, has pointed out how it is usually politicians who guide society's attitude towards crime instead of following it, i.e., how the former increase fears and

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The latter's anxieties and then provide hard and easy solutions through the extension of criminal law to take the credit. (p.83)

From this perspective, it can be clearly seen that in itself it is not the will of the people, because in the last instance and as it was previously stated, the people are numb and manipulated by means of the different ideological and repressive apparatuses of the State, therefore they would not have a lucid and free reason to present their position, on the contrary, most of them are guided by the different mass media at the service of those who hold the political and economic power, those who generally a truth that is not the factual truth but the one that suits each government of the day and each economic group that sponsors them, truths that are aimed at generating a sense of fear and insecurity, in order to sell solutions that are increasingly invasive of the private space of the individual and the freedoms of each subject, and that also are not a real answer to the problem, as Trujillo (2017) said:

> There is a consensus among experts that (...) Punitive populism is the practice of promoting mass incarceration and harsher punishments, with electoral support, using the manipulation of the media and the stimulation of the most primitive emotions (p. 136).

Emotions such as anger, fear, revenge, which ultimately legitimizes a criminal policy that is detrimental to human dignity, since the real problem, as mentioned above, does not cease with these measures taken for the convenience of a few and to the detriment of the least favored population groups, because according to Uribe (2012):

> There is an immeasurable body of research, among which "Public Populism and Public Opinion" stands out, capable of demonstrating, with empirical work throughout the world, that the correlation proposed by these theories is only viable when there is a caricatured view of the public's real opinion regarding crime and justice, that is, that society is not as punitive as legislators and legal operators think it is. (p. 83).

The punitiveness of society is a fallacy that is well known by politicians who make a career out of these unfortunate practices for ordinary citizens, since they legitimize the feelings of a single sector of society that excludes and persecutes the other, who is considered the enemy, Serious studies have shown that when citizens are given information about a given criminal case so that they are the ones to act as judges, the levels of punitiveness drop dramatically, attributing penalties that are usually equal to, or even lower than, those that emanate from the judges and courts. Likewise, they are willing to contemplate alternative penalties to intramural imprisonment and focus the objective of the penalty on the rehabilitation of the convicted person. (Uribe, 2012, p.85).

Thus, punitive populism, the toughening of penalties and expansive criminal law cannot be seen as a necessity emanating from the primary constituent, which is the people in an ideal State of democracy; on the contrary, punitive populism becomes an ideological and repressive apparatus of the State to restrict individual freedoms and pursue the "enemy", since, according to Uribe (2012), "punitive populism becomes an ideological and repressive apparatus of the State to restrict individual freedoms and pursue the "enemy":

> In short, in the shadow of an internal armed conflict, criminal law is instrumentalized to fulfill the political ends of the power that holds it; to the logic of detaining, neutralizing, killing, extinguishing or diminishing the enemy is now added the logic of accusing, detaining and condemning him. (p. 91).

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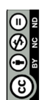

As previously mentioned, this form of exclusion is created for those who think differently, in addition to the purposes of benefiting those who make the proposals, taking advantage of the citizen's feeling of fear and vulnerability, as stated by Aponte, quoted by Uribe (2012):

> In a criminal law situated within the internal conflict, "the offender is treated more as an enemy than as a citizen with an indisposable sphere of rights; he tends to be treated in practice as a military target rather than as a convict" (p.91). (p.91)

This ignores the fact that the accused is a human being and has dignity, a principle that underlies the Colombian legal system and global human rights, which would also violate the right to due process; however, this issue will be discussed in greater detail below.

Giving continuity with the common thread, fear is insisted on as that primitive feeling alluded to by politicians to subject citizens to repressive policies since according to Trujillo (2017), he refers that:

> On the exploitation of fear in the population by demagogues in order to fill prisons, Hawkins and Zimming argue that increasing society's fear is an obvious technique for getting citizens to voluntarily allow a government to reduce their own freedoms. (p. 136)

From this perspective, it can be said that government is governed on the basis of fear; however, this basis is not naked, on the contrary, it is disguised in many forms, one of which is that of law, that in terms of criminal law is no longer there to defend the citizen from the arbitrary power of the state but the state has been turning it into another repressive apparatus to perpetuate its power and make its increasingly expansive and invasive power of the private spheres of the individual seem legitimate, this was already foreseen by Meza (2019) when he affirmed that:

> Punitive power is exercised by political, judicial and police agencies, while criminal law and criminology are responsible for generating an intellectual and theoretical framework that aims to influence the development of punitive power (Melossi and Pavarini, 1985). Criminal law has a relative capacity to influence punitive power, since punitive power is not always created along the lines of criminal law and criminology in the way that doctrinarians have proposed (p. 169).

The influence of criminal law on the punitive power of intellectuals and bodies specialized in criminal policy is becoming less and less, since criminal law is becoming more and more prison-like and less respectful of individual liberties, with no respect for human dignity and the harmful consequences of a law of punishment and revenge for a society that is only just developing the foundations of a political and legal culture that is not contextualized with its culture. Criminal policy research remains only in documents and never reaches the academy because, according to Pérez et al. (1999)

> As regards criminal policy as the entity empowered "to examine the usefulness of the State's penal intervention and, consequently, to reorient such intervention, recommending its

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> In the case of criminal policy, it must be said that this very function could explain why the term "criminal policy" is intended to designate a body of theory drawn from various fields (criminology and criminal law, for example), and why a certain differentiated status is claimed for it. However, on the one hand, the consideration of such possibilities - reorientation, reduction or elimination of penal intervention - still remains exclusively in view of criminological research and reflection, which today not only asks itself about the problem of deviance or crime, but also questions the penal system. (p.22).

And it calls into question criminal law in terms of its effectiveness, since from the social rule of law where it implies a satisfaction of the basic needs of citizens and therefore an intervention of the State in the achievement of such ends, this also implies a full and effective participation of citizens in power, leaving as a consequence an intrinsic plurality that is expressed in a social system, From this perspective, human dignity is given as the backbone of respect and inclusion, and it is also the principle that has been the basis of human rights, however, in reality these rights have been undermined taking into account the criminal legal system in Colombia and even more so in terms of the enforcement of the sentence.

With a panorama such as the above, it is pertinent to look at this line of human rights in relation to a tangible reality of the Colombian penitentiary system where there are possible violations of the rights of inmates, although it is true that they have made mistakes, they are still human beings with inalienable dignity, Moreover, if we take into account Article 4 of Law 599 of 2000 on the functions of punishment, "Punishment will fulfill the function of general prevention, fair retribution, special prevention, social reintegration and protection of the convicted person. Special prevention and social reintegration operate at the time of the execution of the prison sentence" (Law 599 of 2000, art. 4). In this regard, the question arises: Is the current Colombian penitentiary system fulfilling the functions of the sentence? Unveiling this situation would allow an objective dissertation, which implies a possible significant step in doctrinal and legal issues regarding the subject, but according to Díez (2004):

> The impression is given that the emphasis on the resocialization of the offender objectively constituted a smokescreen that veiled the responsibilities of society as a whole, of the most favored social sectors of society and of the control organs themselves in the emergence of delinquency or even in the definition of what could be considered as such. The critical criminology movements themselves play an important role in this respect from outside and from within the resocializing model. (p. 5)

Resocialization, then, is not taken in the real sense that it was proposed for the recognition of human dignity, precisely because the offender is treated as an enemy obeying the politicization of crime, thus, in this sense:

> The emergence of penal populism is explained by the fact that there are some professional politicians who have politicized the issue of crime and find in it a scenario in which to compete politically and electorally and obtain advantages, betting on the promotion of measures and initiatives with political tendencies (Gómez, 2012, p.4).

The foregoing reaffirms the position that criminal law is one thing in positive law and another in the factual application of criminal law, since according to an interview with Mr. Máximo Sozzo by Andres

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Gómez and Fernanda Proaño (2012) and regarding the question of how penal populism manifests itself in practice, this indicated:

> We have many examples of criminal measures that increase punitiveness in the books, but do not translate into action. An example that is very characteristic in many Latin American countries in the last 15 or 20 years are the legal reforms that have increased the penalties for corruption-related crimes, as in the case of Argentina or Brazil. In general, after major corruption scandals, one of the responses of political actors has been to promote the reform of criminal laws to introduce a more severe treatment for this type of criminal act. However, this harsher treatment does not translate into the functioning of the criminal justice system, which initiates criminal proceedings in very few cases of corruption and in even fewer cases is able to impose a conviction. Therefore, there is a distance between the criminal law of the articles and the criminal law of the facts in the increase of punitiveness that is very large, that is very evident and that makes some of these punitiveness initiatives symbolic" (Gómez and Proaño). (Gómez and Proaño, 2012, p.7)

These are then the consequences of legislating with ignorance of the functioning of criminal law, because these norms are not based on the advice of criminal policy specialists but on the basis of particular interests, which call into question an inopportune criminal law, which they try to justify with the State of Emergency, which, according to Rivera (2005).

> I have expressly tried to show that such a belief - also in the case of error about the presuppositions of the state of supra-legal necessity - is totally wrong and that normally in such cases even the application of the penalty of recklessness would be unnecessary and inappropriate. (p.92)

This state of emergency is a politically created fallacy, hence the importance of the rule being based on academic studies, as noted by Varona (2008). "One of the "star topics" of 21st century criminology is research on the punitive attitudes of citizens. This derives fundamentally from the growing concern about the phenomenon known in criminological literature as "punitive populism" (p.1).

If academic research is not carried out, reality is distorted and the need for tougher penalties is made to appear, according to Uribe (2012). "Thus, what is explicit turns out to be a positive attitude towards the expansion of criminal law and what is implicit, what underlies it, is an attitude of anger, fear and disagreement on the part of today's vulnerable society" (p.75). The purpose of the research is to make the implicit explicit and to show that social punitiveness is nothing more than political stratagems to maintain power, according to Giraldo (2007). "The political strategy is based on the electoral copying of the representative system and the legal strategy on minimizing the legal-civil costs of the violent origins of their wealth and the legal-criminal costs of their insane maelstrom of violence" (p.2). With a panorama such as the above and bringing up Uribe (2012), it can be seen that:

> By following these models, the current logics of punishment start from a context of vulnerability: societies charged with insecurity, discomfort, instability, anger, fear, dissatisfaction, are precisely those that most need an exorcizing punishment to be able to discharge these feelings and move forward. (p.75).

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Today's society, being in a transition, requires special attention from the State, but this attention to mitigate the problems is not in criminal law, on the contrary, these strategies of applying criminal law to the problem is to divert attention from the real problem, which does not allow working on the solutions required by today's society, according to Uribe (2012):

> the truth is that criminal law seems to be the burning nail to which politicians are fastened to give an answer, even symbolic or substitute, to the worries and disconcerts of people in societies with more poverty, inequality and lack of common referents, thus producing, evidently, an ever more expansive criminal law. (p. 75)

And besides being expansive and invasive, it is less effective, since it is being applied in a field that is not the proper field of criminal law, or at least that does not correspond to it, to a problem of rage, fear and disa- zon of a society it would be better to think in economic, social and even psychological strategies, but never criminal and less in the way it is manipulating the masses to legitimize the operation of punitive populism, because the malaise in society is real and the causes are the imposed economic model and those who hold political and economic power are aware of this phenomenon, but will not take real action because it does not suit their particular interests, however, neither can they seem undaunted by social demands, so they perform populist actions to give a sense that something is being done, according to Uribe (2012):

> punitive populism has as its backdrop a context identical to that of the culture of control: neoconservative policies and economic neoliberalism produce social emergency, which manifests itself in feelings of anguish and despair in the public; sensitivities that are diligently picked up by the politician of the moment who with a great deal of cynicism offers, as pharmakon, the head of one of the others, of any of the members of any class without any political representation or participation - blacks, immigrants, the poor, etc. (p. 81). (p. 81)

It is from this perspective that, according to Garland, quoted by Uribe (2012), says:

> The dominant voice of criminal policy is no longer that of the expert, or even the operator, but that of the suffering and underserved people, especially the voice of "the victim" and of the fearful and anxious members of the public. (p.79)

They also have a media perspective influenced by the mass media, which those in power take advantage of to build their legislative projects based on the needs and feelings of a group of people, but which have a direct impact on votes to maintain political and economic power.

Punitive Populism, the Law and Jurisprudence in Colombia

Punitive populism has been a phenomenon that has not been alien to our legal system, which is why its characteristics repeatedly appear both in laws and in judgments of our high courts, this social phenomenon is on the rise thanks to the fact that the Colombian political class does not miss any opportunity given by any situation that is occurring in our society for them through bills to try to look good with a society hungry for penalties for the alleged offenders of criminal law.

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This chapter develops a series of laws and sentences in which punitive populism makes its presence felt with regulations to actions repudiated by the population and to which citizens ask the executive to toughen their punishment or create it if it does not exist, a situation that some politicians and magistrates take advantage of to gain followers with the presentation of bills, approval of bills and sentences with which the community is at ease, thinking that the problem will end with the hardening of the penalty, a situation that as we already know does not solve the problem of crime in a society that is dissatisfied with the inequality of the country.

In the first part of this chapter we will try to show how the penalties in our penal system have been increasing through laws. For which we will show chronologically how legislators over the years have been promoting punitive populism with their decisions, approving bills that seek more severe punishment, believing that this will end the problem that is being punished, we will start with Law 95 of April 1936 and that in its Article 45 stated the following:

"Article 45: the duration of penalties is as follows:

Imprisonment, from one to twenty-four

years, Imprisonment, from six months to

eight years. Arrest, from one day to five

years.

Confinement, from three months to three years.

Prohibition to reside in a certain place, from three months to five years.

Interdiction of public rights or functions, from one to ten years, when it is not established as perpetual.

Prohibition or suspension from the exercise of an art or profession, from ten days to four years, when it is not established as perpetual.

Good behavior bond, from one to five years.

Relocation in "penal agricultural colonies, from one to twenty years.

Suspension of parental authority, from one to five years". (Law 95 of 1936, Art. 45)

As can be observed, at that time there was a variety of penalties, with the highest penalty being 24 years, a sanction that has been increasing over the years as a consequence of social situations, This has been increasing over the years as a consequence of social situations, which have increased the citizens' awareness in demanding an increase in the penalties and thus appearing a number of politicians who take advantage of the effervescence of the moment to propose these increases in bills and have a better reception by the citizenship in electoral contests.

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With the appearance in January of Decree 100 of 1980, the first increase in penalties was seen, increasing them by 25%, which included the following:

ARTICLE 44. Duration of sentence. The maximum duration of the sentence is as follows:

- Imprisonment for up to thirty years.
- Arrest up to five years.
- Home restriction for up to five years.
- Interdiction of public rights and functions for up to ten years.
- Prohibition of the exercise of an art, profession or trade, industry or commerce for up to five years.
- Suspension of parental authority for up to fifteen years and prohibition to consume alcoholic beverages for up to three years (Decree 100, 1980, Art.44).

This article was in force for more than a decade, until it was modified by Law 40 of 1993, which toughened it by up to 100%, leaving the maximum prison sentence at 60 years, in its Article 28, which established the following:

ARTICLE 28. Amendments to Article 44 of the Criminal Code. Article 44 of Decree-Law 100 of 1980, Penal Code, shall read as follows:

Duration of sentence. The maximum duration of the sentence is as follows:

- Imprisonment, up to sixty (60) years.
- Arrest, up to five (5) years.
- Home restriction, up to five (5) years.
- Interdiction of public rights and functions, up to ten (10) years.
- Prohibition of the exercise of an art, profession or trade for up to five (5) years.
- Suspension of parental rights for up to fifteen (15) years (Law 40 of 1993, Art. 28).

This stiffening of penalties had its origin in a series of actions by armed groups in which the kidnapping modality was used in an alarming manner, a fact that led Colombian legislators to significantly increase penalties. A report by Radio Na- cional de Colombia (2016) argued, "According to different newspaper reports, in 1978, 78 cases were registered. In 1988 it went to 721 and in 1990 the figure reached 1,331." The history of kidnapping in Colombia is recorded since the mid-1960s, at the same time when the FARC, ELN and EPL guerrilla groups were formed.

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Armed groups found in this crime a practical and effective method to finance their activities, requesting large sums of money in exchange for the freedom of their victims, mostly large businessmen, cattle ranchers, diplomats and political leaders. However, over the years, kidnapping has affected ordinary citizens and small businessmen, as this practice has also been used by criminal gangs operating in large cities.

One of the most shocking events in the country's recent history is the seizure of the Palace of Justice by the M-19 guerrillas, where civilians were detained and hostages were killed, some of whom are still missing.

Cases continued to shock the country and it was in the 1990s when drug cartels used kidnapping to pressure laws or interfere in popular elections. Kidnapping has also been one of the weapons against free expression, making journalism one of the most dangerous professions to practice in the country.

As was to be expected, this violent environment led the exalted citizenry to request the increase of penalties so that the alleged offenders of the crime of kidnapping would be deprived of their freedom for a longer period of time, and from then on, with the issuance of the new penal codes, we can only observe a number of articles loaded with extremely high penalties so that society, in its eagerness for justice, believes that the legislature is doing something for the security of the citizenry, In its desire for justice, society believes that the legislature is doing something for the security of citizens, a situation that is totally out of touch with reality, since these penalties do not have an impact on the reduction of crime, nor is it a good practice of criminal policy, as expressed by Cotes and Fuentes (2012).

> three key political-electoral messages about criminal policy can be extracted: a) criminal issues have the potential to be central issues in political debates; b) rulers or politicians have to demonstrate at any cost that they are tough on crime; and, c) even if the political-criminal proposals of political parties contain welfarist solutions, these should not appear as part of the criminal policy whose discourse should focus on toughness against crime. (p.66)

This same article highlights three bills that were very popular among the Colombian population because they dealt with sensitive issues such as sexual abuse of minors, jail for drivers caught drunk or the famous Colombian cancer of corruption, quoting the following:

> One of the most controversial in our country is the proposal of life imprisonment for rapists, murderers, kidnappers, and child abusers promoted by the Green Party Senator Gilma Jimenez, who in the last election obtained the 7th highest vote, thus evidencing her high popularity index. (Cotes and Fuentes, 2012. p. 67).

On the other hand, a legislative initiative by Senator Roy Barreras, proposing immediate imprisonment for drunk drivers, is in process. This initiative is supported by the Minister of Transportation Germán Cardona, who expresses the Government's support to the initiative. "A person in a state of drunkenness is a potential murderer, said the minister. He added that it is necessary to send a message of enormous responsibility to Colombians, and to tell them that driving while intoxicated leads to imprisonment". (Cotes and Fuentes, 2012. p. 68).

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The anti-corruption statute is one of the bills that was already sanctioned by the then President of the Republic Juan Manuel Santos. "It is composed of about 150 articles that put a magnifying glass on public contracting and political campaign financing. It also extends the term of investigations and statute of limitations" (Cotes and Fuentes, 2012. p, 68).

In view of this, after the congressional elections, we can note that the politicians who led these initiatives were very well received by the voters, leading them to keep their seats and being among the most voted candidates by the Colombian people.

To these initiatives, two more bills were added in the days after the congressional elections, which can be taken as populist actions of candidates to these seats, and thus obtain a great reception from voters at the polls, for which the newspaper El Tiempo narrated "Congress may be incurring in 'populist' attitudes by passing laws that are economically unsustainable for the country but that have a great media impact and generate good political returns for parliamentarians, especially in a year prior to the elections".

This is what happened with two bills approved by the legislature that were objected to by the Government, arguing lack of resources for their implementation.

The initiatives stopped by the Executive, of a highly social nature, are the one that reduces by 150 weeks the contributions of women earning up to two minimum wages and who reach the age of 57 and the one that lowers from 12% to 4% the health contributions of pensioners.

The projects related to pensions alone would cost the State about 10 billion pesos, and so far it is not known what the source of financing will be, since it is clear that public resources will have to be made available.

The Government's annoyance is based on the fact that the projects were approved by Congress despite repeated warnings about the lack of resources to implement them.

In other words, according to the Executive, the congressmen passed the bills even though they were aware of their inconvenience and left to the administration of President Juan Manuel Santos the political cost of stopping the initiatives, since if they did not do so, new sources of financing would have to be sought, including new taxes or a reduction in the budget for other items.

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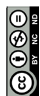

"It is well known that, during their last year of term, when they start their campaign, congressmen avoid discussing projects that generate discomfort in the people and seek, on the contrary, to approve those that have a high popular impact." (Política, 2017) this shows the manipulation that exists from the legislators towards the Colombian people, formulating these laws only with the objective of gaining followers for a close electoral contest, knowing as the previous article says that these initiatives will not reach a happy end because they are projects that do not have a budget and that will not be sanctioned by the executive, but the rapporteurs will receive from the citizenship a great support since they think that it was the executive the guilty party for the projects not becoming laws beneficial to the interests of the community.

And we can find thousands of other initiatives like these, in which politicians seek to make a profit.

They used the sensibility and needs of the population, launching proposals such as increasing the minimum wage, lowering taxes, ending corruption, sowing peace in the territory, etc., etc., only with the purpose of holding their seats or reaching them, having a position in the executive and receiving all the benefits that working in the state brings, but at the moment of truth they only remain as nice proposals, which were used for personal purposes.

In addition to these initiatives taken to the congress by its honorable congressmen, we have other examples that also became law and that today are known in the national context with the name of the victims, an example of this is the law 1773 of 2016 or Natalia Ponce de Leon law, this initiative comes as a result of an attack on a woman with a chemical agent which produces considerable wounds on the face and all over her body of the aforementioned and creates in society such a commotion that it is inevitable the request to be considered an action that needed a special criminalization, it was so sensitive for our society the narration of the victim that foundations against abuse with chemical agents begin to appear in the country for which the newspaper El Espectador narrated the following:

> The indignation was overwhelming, and the activism of women such as Gina Potes, who created the Reconstructing Faces Foundation, as well as that of Natalia Ponce de León herself bore fruit. At the beginning of 2015, a bill began its way through Congress proposing the creation of a criminal offense (a separate crime) for acid attacks, as well as stiffening sentences up to 50 years in prison depending on the severity of the injuries, and generating a comprehensive care route for victims. The bill, which was presented by the MIRA party, was supported by all political parties (Rubiano, 2016, p. 33).

Such was the furor that by January 6, 2016 Law 1773 is sanctioned, which brought modifications to both Law 599 of 2000 and Law 906 of 2004 and in its Article 1 adduced the following "Add Article 116A to Law 599 of 2000, as follows:

> Article. 116A. Injuries with chemical agents, acid and/or similar substances. Whoever causes harm to another's body or health, using for such purpose any type of chemical agent, alkalis, similar or corrosive substances that generate destruction upon contact with human tissue, shall incur a prison sentence of one hundred fifty (150) months to two hundred forty (240) months and a fine of one hundred twenty (120) to two hundred fifty (250) legal monthly minimum wages in force.

When the conduct causes permanent deformity or damage, partial or total, functional or anatomical loss, the penalty shall be two hundred and fifty-one (251) months to three hundred and sixty (360) months of imprisonment and a fine of one thousand (1,000) to three thousand (3,000) legal monthly minimum wages in force.

If the deformity affects the face, the penalty shall be increased by up to one third.

"ARTICLE 3. Modify article 358 of Law 599 of 2000, which shall read as follows:

> Article 358. Possession, manufacture and trafficking of dangerous substances or objects. Whoever unlawfully imports, introduces, exports, manufactures, acquires, has in his possession, supplies, traffics, transports or disposes of dangerous, radioactive or nuclear substances, waste or residues; or acids, alkalis, solar or corrosive substances that generate destruction when in contact with human tissue; shall be considered to be in possession of a dangerous substance, waste or residue; or acids, alkalis, solar or corrosive substances that generate destruction when in contact with human tissue; shall be considered to be in possession of a dangerous substance, waste or residue that generates destruction when in contact with human tissue.

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(48) to one hundred and forty-four (144) months and a fine of one hundred and thirty-three point thirty-three (133.33) to thirty thousand (30,000) legal monthly minimum wages in force.

The penalty indicated in the preceding paragraph shall be increased by up to half, when as a consequence of some of the described conducts there is a release of nuclear energy, radioactive elements or pathogenic germs that endanger the life or health of persons or their property...). (Law 1773 of 2016. Art.1, Art. 3).

In addition, this law excludes the benefits of the criminal subrogations mentioned in Article 68 A of Law 599 of 2000, preventing the perpetrators of such actions from enjoying house arrest or conditional suspension of the execution of the sentence.

As expected, this law did not put an end to the problem of acid attacks in the country, since for the period between 2016, the year in which Law 1773 was enacted, and 2019, 164 cases of attacks with chemical agents were recorded, of which 96 were made against women, with Valle, Antioquia and Bogota as the places with the most reported cases, according to El Especta- dor (Redacción Cromos, 2019). This is a sign that the creation of new penalties is not the solution to reduce or end any criminal action in our country, since the fear of criminal punishment has been lost.

Not only did the victims of acid attacks catapult into legal life a law that would increase the penalties and be less flexible with people who were punished after verifying the commission of this conduct, but also this action has led the legislature to present a bill in which the victims of acid attacks would receive differential attention, which prioritizes their rights both in terms of health care and access to sources of employment. This proposal, after going through the necessary debates in Congress, was sanctioned by the Executive and became a law of the Republic. Law 1971 of 2019 seeks to give special recognition to the victims of acid attacks, so it modified Article 5 of Law 1639 of 2013, which now reads as follows "Article 5. Create Article 53A in Law 1438 of 2011 as follows:

> When the personal injuries are caused by the use of any type of acids or similar or corrosive substances, or by any element that generates damage or destruction when entering or having contact with human tissue and generates some type of deformity or dysfunction, the services, medical and psychological treatments, procedures and interventions necessary to restore the physiognomy and functionality of the affected areas shall be free of charge and shall be paid by the State, procedures and interventions necessary to restore the physiognomy and functionality of the affected areas, shall not have any cost and shall be at the expense of the State, exhausting in the first instance the corresponding charges to health policies, prepaid medicine or the General System of Social Security in Health, without this implying any expense or economic disbursement at the expense of the victim or his relatives.

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The Ministry of Health shall guarantee access to the supplies, procedures and technologies required by the treating physician or specialist to provide timely care to a victim of an attack with corrosive chemical substances or agents to the skin.

> PARAGRAPH 1. The providers of medical services have the obligation to keep a record and report to the competent authorities on the persons treated in cases of injuries.

> The health service providers may at any time request the corresponding registration of the health service providers to the police or the competent authorities. At any time, the police or the competent authorities may request the corresponding registration from health service providers.
>
> PARAGRAPH 2. The EPS or the entity exercising its functions shall guarantee the affiliate within 24 hours everything requested by the treating physician for his/her care, from supplies, medical procedures and alternative treatments, from the moment it is requested by the medical professional, regardless of the stage of the process in which the patient is.
>
> PARAGRAPH 3. Under no circumstances may the EPS or the entity exercising its functions suspend treatment, deny procedures or delay them. The Ministry of Health shall verify that the EPS or the entity exercising its functions guarantee the conditions of continuity of all treatment including ordinary and alternative procedures, endorsed and supervised from the country's burn units. (Law 1971 of 2019, Art 5)

All this related to the medical care that victims of toxic agents should receive from the establishments that provide health services in our country, but as noted above, this law not only brings benefits in health care, but also spoke of support to the victims in the issue of access to work, so in its Article 12 it states that "the national government shall regulate measures and mechanisms that enable access to job training, to the public supply of jobs and to the private supply of jobs for the benefit of the victims of attacks with corrosive chemical substances or agents to the skin (Law 1971 of 2019, Art 12). As we can see this law does not bring anything different, since it is the duty of the state to protect the victims of any situation and provide them with health care that solves the needs of the community, it is obvious that there must be groups of patients who receive priority attention and this situation should have been foreseen many years before the disclosure of this law, without the need to take advantage of the furor caused by this practice, but as always we need events like these to take action.

Following the same sense, we see that article 12 of this law does not give any specific benefit, it only commits to regulate measures and mechanisms, which as we know will remain in letters and nothing more, but that impacts the community and creates some illusions, which will be reflected at the time of exercising the vote, recognizing the will of these populist politicians who know that access to work for these people will only be regulated in optimal conditions when we are close to another election day and thus receive the acceptance of this group and victims who will look very favorably on the actions of the legislature.

As Colombia is a country of moments and situations, it is time to bring up the event that occurred in the city of Bogota, where a young man was punished for supporting street vendors who did not have the necessary permits to operate in the public space of the capital, on that occasion the consumer who was enjoying some delicious empanadas was surprised with a comparen- do, As was to be expected, this police action caused great repudiation and indignation on the part of Colombian society as a whole, to the point of calling for a march and a collection to help the young man pay the fine for eating an empanada.

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This situation was taken advantage of by a political party to develop an initiative that will regulate the exploitation of public space and thus gain recognition of both informal traders in our country, which is a large number, as well as the people who consume food in these places.

This is how Senator Carlos Guevara of the MIRA party presents before Congress the bill that seeks to protect about 1,200,000 street vendors throughout the country, arguing that this project seeks to formalize this employment and ensure savings for old age, since according to Guevara most of the payment made by traders will go to a fund that can be used at a certain age. And so was born the famous law 1988 of 2019 or fiercely known as the law of the empanada, a law from which the parliamentarian who had such initiative will receive very good revenues, since he took advantage of one of the many situations that happen in our country, to gain recognition of this sector.

In short, this law seeks, as stated in Article 1, to establish a series of guidelines for the formulation of public policies that guarantee a series of fundamental rights to street vendors, among them human dignity, work, minimum living standards and coexistence in public spaces. In addition, it classifies street vendors into 6 groups, which Article 3 summarizes as follows:

ARTICLE 3. For the purposes of this law, informal vendors are classified as follows:

a) Informal itinerant vendors: Those who carry out their work, present diverse ar- tistic expressions or provide their services by walking the roads and other spaces of public use, without parking temporarily or permanently in a specific place, using their abilities, a portable mobile element or their own body to transport the goods;

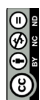
b) Semi-stationary informal vendors: Those who carry out their work by walking the roads and other spaces of public use, parked in a transitory manner in one place, with the facility of being able to move to another different place in the same day, using elements, such as carts, carts, rugs, mats, fabrics, suitcases, rolling or plastic crates to transport the merchandise;

c) Stationary informal vendors: These are persons who, in order to offer their goods or services, establish themselves permanently in a specific place in the public space, previously determined by the respective municipal or district authority, through the use of kiosks, awnings, showcases, booths or similar elements;

d) Periodic informal vendors: They carry out their activities on specific days of the week or month, or at specific times of the day, with working hours that may be less than eight hours;

e) Occasional or seasonal informal vendors: They carry out their activities during specific seasons or periods of the year, linked to festivities, commemorative events, special events or school or end-of-year seasons;

f) Temporality: The term temporary for the purposes of this law refers to the term of im-.



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The temporary expression may under no circumstances be interpreted as a peremptory term imposed by the administration on informal vendors". (Law 1988 of 2019, Art.3)

This leads us to think that we are a country that regulates how many situations arise on a daily basis and that the Colombian political class does not miss any opportunity to gain a favorable image among the population, with the presentation of bills that are attractive to citizens, which in turn leads them to support them in a future electoral race, and on many occasions this is the main objective of politicians.

The third part of this chapter will focus on a class of rulings of the high courts, in which populist laws are supported by declaring the exequibility of their articles and also requesting the issuance of other series of regulations that the community in its effervescence demands. As we have seen in recent years, these courts have lost confidence in the Colombian community, both for corruption scandals of their magistrates, as well as for the lack of diligence in the determination of sentences that benefit the community and not the state institutions, as often happens with their positions. First we will reflect on some sentences and finally we will look at the pending rulings of a popular nature that has the entire political and social community on tenterhooks, as they are involved in scandals of high renown in Colombian politics.

We will begin by taking a look at the judgment C-108/2017 with which it was tried to leave without legal life an expression that brings the law 890 of 2004, with which the penal code was modified and added, the expression sued with this judgment is found in article 14 of the aforementioned law and sought to increase in the third part of the minimum and in half in the maximum for crimes contained in the special part of the criminal code. The citizen who filed the lawsuit argued that it went against the preamble and articles 1, 2 and 13 of the Political Constitution with judicial justification from the Supreme Court of Justice, which in a ruling issued in February 2013 held "that the punitive increase established in article 14 of Law 890 of 2004, in addition to being unjust and contrary to human dignity, lacks grounds and disregards the guarantee of proportionality of the penalty" (Ruling C-108, 2017), an annotation that motivated the plaintiff to request the unenforceability of said expression. Entities such as the Ministry of Justice, Attorney General's Office, Colombian Academy of Jurisprudence and universities such as the Free University of Colombia. Ibagué and Externado de Colombia shared the same position of affirming that said expression does not violate the principle of proportionality and that the punitive increase arising from the challenged norm was made for reasons of criminal policy and that the legislator acted in the development of the power recognized by the constitution to set penalties as well as to create crimes.

The position of the court in this decision was centered on the arguments that "By virtue of the general clause of normative competence that corresponds to the Congress of the Republic, derived from Articles 114 and 150 of the Constitution, this body has the generic power to develop the higher man- agement through the issuance of legal provisions, This includes the power to develop public policies, among them the design of the State's criminal policy, which entails the determination of the legal assets that deserve criminal protection, the nature and amount of the sanctions and the procedure through which they are imposed and executed.

Based on this attribution, the legislative body is recognized as having competence in criminal matters.

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This exclusive and broad power finds full constitutional support in the principles of democracy and popular sovereignty (arts. 1 and 3 above). Based on this power, the criminal legislature may create, modify and suppress criminal offenses; introduce classifications among them; establish punitive modalities; graduate the applicable penalties; and fix the type and magnitude of these according to criteria of attenuation or aggravation of the penalized conducts; all in accordance with the appreciation, analysis and weighting made on the phenomena of social life and the greater or lesser harm that certain behaviors cause to the social conglomerate.

The exclusive and broad power conferred on the legislator for the conception and design of criminal policy is also based on the need for the criminal response to be preceded by the broadest collective and democratic discussion.

> The purpose of this popular representation in the drafting of criminal laws derives not only from respect for the separation of powers, and the controls that this implies for the protection of individual freedom, but should also allow for a public process of debate and learning in the conception and execution of criminal policies, i.e. a more democratic elaboration of criminal law. This public discussion should ensure that the criminal response is not a contingent resource that the political power uses at its discretion, without debate, to deal with the difficulties of the moment. The penal response must be proportional to the conduct that is the object of the sanction, must be suitable, operate only when there are no other alternatives, and must not be criminogenic, i.e., cause more problems than it solves. This is only possible if criminal policies are defined through a broad democratic discussion, and not through an inflation of hastily promulgated criminal norms. As we can see, strict respect for the principle of legality operates not only as a mechanism for the protection of fundamental freedoms, but also obliges collective and democratic discussion of criminal policies in order to avoid useless and harmful criminal intervention. The principle of legality is an expression not only of the rule of law, but also of the requirements of the democratic state, because thanks to its rigorous respect, the interests of all members of the community can come to be represented in the elaboration of criminal policy. (Judgment C-108, 2017).

Likewise, the Court has specified that in matters of criminal policy there are no objective criteria that allow the constitutional judge to determine which criminal behavior deserves a more severe public or even penitentiary treatment than another, a decision that, in a Social and Democratic State of Law, belongs to the legislator who, taking into account ethical-political considerations and opportunity, will determine the penalties to be imposed and the manner of executing them. In effect, the legislator can establish, thanks to a wide margin of configuration, on which crimes it allows what type of penal benefits and on which it does not. Among these criteria, the most important are: (i) the analysis of the seriousness of the crime and (ii) the very nature of the design of criminal policies, whose meaning includes political reasons that cannot be appropriated by the constitutional judge.

Thus, it is clear that criminal policy and criminal law are not defined in the constitutional text, but it is up to the legislature to develop them and, in the exercise of its powers, it cannot go beyond the Constitution and is subordinate to it because the Charter is the norm of norms (CP art. 4). But, as a function of pluralism and democratic participation, the Legislator may make different choices within the framework of the Charter. This is what comparative constitutional doctrine has called the freedom of democratic formation of will or the Legislator's freedom of political configuration." (Sentence C-108, 2017).

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All this indicates that the Constitutional Court approves the parameters and guidelines on which the legislator based when presenting and approving the bill that led to the enactment of Law 890 of 2004 and the way in which Article 14 of the same law was drafted. In their opinion, the law never violated the principle of proportionality and the increase in penalties was the result of a criminal policy study carried out by the proponents. As at the beginning we considered that in Colombia laws were enacted in order to give solution to the clamor of the people before some situations, it can be said that this law 890 can also be enlisted in one of the many laws that had its origin in a citizen request, in this case the Colombian society will always be hungry for higher penalties because it considers that it is the solution to the problem of criminality facing our country, This situation leads the legislator to try to calm the electorate with laws such as these that substantially raise the penalties for all crimes that can be found in the special part of our criminal code, an event that can be considered populist because as is already known this does nothing to solve a problem that requires more forceful actions such as the creation of formal employment, more access to higher education, better control of public spending, improved health care conditions and hundreds of other situations that truly have a great impact on our society. For this reason, when we see that the constitutional court approves the previous law, we can conclude that it is having a totally populist position as well, in order to sustain a favorable image before society and avoid further criticism from personalities who think that it should be penalized more and more severely.

To conclude and after having reviewed some of the experiences from both the legal and jurisprudential spheres, it can be affirmed that punitive populism in Colombia has been around for a long time and is here to stay, this phenomenon is almost an essential element when proposing a legislative act in our country and our political class does not waste any possibility where the emotions of the electorate are altered in order to satisfy their requests for justice, All this with the promulgation of hundreds of bills that have the intention of improving some aspect of the daily life of the administered, but that in the end only remain in a file because it does not receive the necessary support of the majority of the parliamentarians or because the executive classifies it as unfeasible for the economy of the country.

It is very common to find among the Colombian political class phrases such as "he who does it pays" or "firm hand with the corrupt" and all this pleases this society hungry for justice, so this populist demagogy makes us think that these are the leaders that our country needs, but unfortunately they are only playing with feelings and taking advantage of the ignorance of ordinary citizens, because as it was noted at the beginning of this chapter, many parliamentarians have taken advantage of social situations in the country to promote bills that make them visible to the electorate in times close to elections with those issues that are highly sensitive for the country, Many parliamentarians have taken advantage of social situations in the country to promote bills that make them visible to the electorate in seasons close to elections with those issues that are of high sensitivity for the citizenship, but finally these bills will not bring substantial changes in the daily life of the Colombian electorate, because as mentioned above, most of these projects do not receive the majority needed or simply do not pass the control of legality made by the constitutional court or even the president does not sanction them because he considers them unfeasible.

Finally, and bringing up the issue that concerns us as it is the punitive elements in the implementation of life imprisonment in our country, it is more than clear that with the approval in eighth debate of the legislative act 001 of 2020, which amends Article 34 of our constitution, the political sector of our country is totally ignoring the unconstitutionality of the law.

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This new law that has just been approved, which is framed and has as its main objective to change the bad perspective that the citizenship has for a congress that has been legislating for years only in favor of the upper and wealthy classes of this country, for this reason this new law is an example of the manipulation of the political sector with its populist demagogy to quench the thirst for justice of their constituents, Unfortunately, this law will be difficult to overcome the control of constitutionality when it is demanded, since as we know it lacks many constitutional supports to be applied in our country and will surely be declared unconstitutional and will become one more of the samples of will of our politicians who from the beginning knew that this would not become a reality, but what ultimately interests them is to collect their votes produced by these legislative initiatives.

Punitive Populism and Draft Legislative Act 001 of 2019

After having laid the foundations of punitive populism theoretically with the support of different authors, both national and international, and secondly to present some laws and jurisprudence that account for the populist measures taken by legislators in Colombia, we proceed to conduct an analysis of the draft legislative act 001 of 2019, on the implementation of life imprisonment in Colombia that was approved and that to date only needs to be signed by the presidency of the republic to be a legislative act itself.

The first is to bring up the elements that are taken into account in this research work in order to configure punitive populism, which according to Uribe (2012):

1. Authoritarian expressive criminal law is used.

2. Dominant political sectors use criminal law for electoral purposes regardless of the consequences of the effectiveness, or social harm, of the norm.

3. There is a particular social sensitivity produced by the social emergency inherent to the neoconservative political and neoliberal economic model of globalization, the problems of modernity and the big city; the main gauges of this sensation are economic inequality and labor instability.

4. Society presents an internal division that clearly differentiates the majority from the marginal groups.

5. There must be an enemy capable of inviting the majority to cohere against it, to identify itself as a result of the exclusion of the "other". (p.81)

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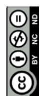

Taking into account these elements, it is evident that in the justification of the draft legislative act 001 of 2019 under analysis, these elements are evidenced "1 Authoritarian expressive criminal law is used" this is evident to the extent that it is intended that criminal law is an instrument to impose an ideology, a way of understanding crime and the guilty, this can be en- trevered in the first paragraph of the justification of the draft legislative act in question which states that:

> In recent years, since the conception of the social rule of law, changes have been made to the country's legal system with the aim of ensuring that the current public health system will be able to meet the needs of the most vulnerable sectors of the population.

> In our opinion, and that of society in general, it is aberrant given the segment of the population that is most affected: minors. But not only because of this fact in itself, but also because when considering their state of inde- fension, children and adolescents are the ones who most concentrate the crimes of sexual violence. (Draft Legislative Act 001, 2019, p.4)

Emphasis is placed on the phrase "that the current accusatory criminal system responds effectively to crimes that, in our opinion, and that of society in general" to note that the responsibility for resolving this situation is being placed on the shoulders of criminal law, when in any case it is a matter that should be dealt with in a comprehensive manner, as it is a matter of public health, as the draft legislation itself recognizes:

> Therefore, sexual violence must be addressed in a comprehensive manner, since it has been considered worldwide as a public health problem, which manifests itself in different social spheres, that is, at home, at school, at work, in the street, that is, in scenarios where there is human interaction in a close and proximate level. (Draft Legislative Act 001, 2019, p. 4-5)

If it is recognized that it should be treated in a comprehensive manner, then why is the responsibility of the criminal law, when it is well known that with the conditions that exist in Colombia in the penitentiary and prison system, there is no treatment aimed at re-socialization, Thus, a review after 25 or 30 years becomes a chimera, because if the conditions do not exist for a prisoner to achieve re-socialization, then there is no sense in such a review:

> The purpose of the penalty is resocialization; it is a right that all persons deprived of their liberty should have. In this sense, sexual crimes have very high penalties. For a person who is sentenced to 20 or 25 years, the limit of 60 years is quite a lot. We should ask ourselves: what kind of social rule of law is society looking for? Do they want to leave the population forever in prison? Cases like (Luis Alfredo) Garavito's or Yuliana Samboní's exist, but they are not the generality, the pattern. According to Forensic Medicine, sexual crimes occur (more) inside homes. The question is what we want to do with these parents, grandparents and uncles (abusers). One of the purposes of this article is to raise awareness on these points. We are not saying that there is no punishment, because they are serious crimes, but we think that life imprisonment is not solving in a structural way what sexual violence crimes imply. (Olarte, 2020, El Espectador Interview).

Also, since it is a public health issue, why these measures of authoritarian and repressive criminal law? Furthermore, if we take into account the Colombian context when in the different territories there is a total abandonment of the state, where families live in precarious conditions, which do not conform to the ideal of the social state of law, where it is assumed that citizens have their basic needs covered, on the contrary, the abandonment is such that the state only appears to repress, but where was the state when the citizen required education, culture, healthy leisure spaces? Simply absent, thinking about how to repress and win votes with legislative projects that do not solve or even mitigate a structural problem of society.

As professor and researcher at the Externado University Angélica María Pardo would say: The

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jail as it is is expensive. It costs $18 million a year to keep a person in jail. It is very expensive and it means that money is not being spent on other things. The budget of Inpec and Uspec is also very high, they have more than $2 billion. Now, this does not mean that since it is very expensive to keep a person alive, we support the death penalty. We do not agree with either the death penalty or life imprisonment, nor with prolonged terms of deprivation of liberty because that does not solve the crime problem. We believe more in investing money in things like education, work and agriculture because if that is the case, people will stop going to prison. Only 3% of the people who are deprived of their freedom have higher education (Pardo 2020, Interview with El Espectador).

There is a clear correlation between the lack of education, and therefore of unmet needs, state neglect, and criminality, which should be the first analysis to be made when taking measures against crime, not as those who propose these legislative initiatives do, knowing that they will not solve the social problems being analyzed.

The second element that is questioned is "2) Dominant political sectors use criminal law for electoral purposes without regard to the consequences of effectiveness, or social damage, of the norm" for this is brought up by the research professor of the Universidad Externado, Ana Lucia Moncayo, who refers that:

> The projects and (legislative) initiatives have no empirical basis. That is, although they seek to protect the integrity and freedom of children, they only mention that sexual violence has increased, but in no case is there any relationship or evidence that says that implementing life imprisonment will improve the protection of children. There is no relationship that shows that such implementation is suitable. Nor do these projects demonstrate the impact they have on the convicted person or the family. Nor do they demonstrate the impact that life imprisonment will have on the penal and penitentiary system. In conclusion, these are projects in which uncertainty reigns, they are populist, they distract people to make public opinion believe that sexual violence against children and adolescents is being addressed, but they only seek political gain or benefit. That is to say, there is a punitive populism (Moncayo, 2020, Interview with El Espectador).

It is clear that if there is no serious criminal policy study to support these legislative initiatives, they will fail, especially when there are research studies that show that criminality is linked to state neglect and poverty, and there are also rigorous academic analyses that show that stiffer penalties do not reduce criminality, according to researcher Ángela Marcela Olarte, who states that:

> Sexual violence against children and adolescents is a social problem that life imprisonment is intended to solve. However, there is no empirical evidence to justify that such a harmful measure actually reduces the commission of crimes of sexual violence. Since 2001, sentences for crimes against freedom and sexual integrity and training have increased by 110%, i.e., between 10 and 12 years. And what the figures from the Legal Medicine show us is that even so, the crime continues to increase. So, it is not because we have higher penalties that the crime of sexual violence is reduced. This requires a study of the structural causes of the crime. In addition, in order for criminal policy to have a deterrent effect, it is necessary that

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the justice system is effective and Colombia has quite high impunity rates (Olarte, 2020, Viewer interview).

Therefore, it is known that whoever legislates in this sense in favor of these initiatives to toughen the penalties, is not interested in the real resolution of the problem but has particular interests in it, which, most of the times are electoral interests where they go directly to the emotionality of Colombians to capture votes and this does not put in the scenario of the third element to be analyzed, which reads as follows: "3) There is a particular social sensitivity produced by the social emergency inherent to the neoconservative political and neoliberal economic model typical of globalization, the problems of modernity and of the big city; the main gauges of this sensation are the eco- nomic inequality and labor instability". For which, it is clear that this element is also present, since the current social and political situation is debated in the midst of social and economic inequality, marked by the logics of neoliberalism that implies phenomena of consumerism, individualism, and globalization, This, of course, leads to the emotional vulnerability of a people battered by waves of violence in which the state itself has participated either by action or omission, leaving the citizen in conditions conducive for politicians to sell them false ideas of freedom, justice and security.

With a horizon such as the above, there remains a propitious environment for the fourth element of punitive populism to take shape, which consists of the following: "4) Society presents an internal split that allows to clearly differentiate the majority from the marginal groups" in front of this point has played a quite important role the social and political polarization caused by the political parties in Colombia since long ago where the people have been divided and have been killed by colors, ban- deras and ideologies, it is the logic that whoever thinks differently is wrong, and therefore is relegated, marginalized, excluded.

The current political practice in Colombia shows a polarization where the country is divided, a situation that is considered harmful for democracy and ordinary people in the country. Political partisanship has had harmful consequences; this experience has already been lived with the war between conservatives, liberals and the national front. It is argued that those who do not belong to a party on a permanent basis and defend a certain ideology are "lukewarm" and lack ethical principles, colloquially speaking. That is to say, in the current Colombian political culture, political partisanship and social polarization are urged, which configures a culture of all or nothing, of those who are not in favor are against. No middle ground is recognized, achieving a narrowing of the perceptive field, that is to say that stereotypes of us and them are created, where they are excluded, per- followed, they are in error and we are the ones who have the absolute and immovable truth, achieving a strong emotional charge, where the nuances are relegated and political disputes become personal situations. Ideas are not debated, the image of the person is attacked, even against common sense.

The phenomenon of social and political polarization, sequentially allows the fifth element to be fulfilled to affirm that there is a punitive populism in the draft legislative act 001 of 2019, which has already been approved in the congress of the republic,,, said element consists of the following: "(5) There must exist an enemy capable of inviting the majority to cohere against him, to identify themselves as a result of the exclusion of the "other", this element is automatically explained taking into account the social division where the one who thinks differently is an enemy, and even has reached the limit of having a right

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The argument has been made that those who are against the draft legislative act in question are leftists, as if it were a crime to be so, and that they are against the protection of the rights of children and adolescents, justifying at the same time that human dignity should not be taken into account in some human beings, such as those who commit this type of crime, as can be seen in the justification of said draft, when it refers to the following:

> "On the other hand, today it is argued by some detractors of this initiative that the penalty of life imprisonment disproportionately affects the human dignity of the defendant, without taking into account that, precisely, what must be protected is the human dignity of the victim" (Draft Legislative Act 001, 2019, p.7).

This situation is considered a fallacy, since it is not correct reasoning that in order to safeguard the dignity of minors it is necessary to go to the detriment of the dignity of other human beings, since the dignity of minors can be safeguarded taking into account the dignity of the aggressors, This is what Professor Ángela Marcela Olarte, in an interview with El Espectador, states when answering the question "Why is it contrary to the Constitution? Referring to the draft legislative act in question, to which she responds:

> It is totally incompatible. To the point that, if life imprisonment is approved in Colombia, it would be substituting and not reforming the Constitution. It would be changing the Constitution in such a massive way that we could no longer be talking about the 1991 Political Charter, but about something totally different. If they want to put life imprisonment in Colombia, they have to convene a Constituent Assembly. The preamble says that the Colombian people enacted the Constitution to ensure, among others, the freedom and equality of the people. The first article says that the Colombian State is based on human dignity and the second that the State and the authorities are instructed to protect Colombians in their life, honor, property, rights and liberties. All of this should be replaced and not only the article that prohibits life imprisonment.

For as already stated, human dignity is not just any principle, but it is the backbone of the political constitution, it is the raison d'être, it is what makes the political constitution the political constitution and not something else, also understanding that the political constitution is not only a compendium of norms, but it must be understood in a material sense, as the constitutional court has said in the context of the meaning of the law according to Decision C-284/15 of the Constitutional Court of Colombia says that "this expression, contained in Article 230 has been understood "in a material sense" so that it includes all the rules adopted by the authorities to whom the legal system recognizes competences for the effect" (p. 3). Thus, legality is everything related not only to the set of rules in a formal sense, but also to justice and material rights, for which it is necessary to address the concept of the Social State of Law.

Taking into account the above, it is necessary to understand the Social State of Law, which according to the constitutional court citing H.L. Wilensky, (1975) in his sentence (T-406/92) refers that the "social state can be defined as the State that guarantees minimum standards of salary, food, health, housing, education, ensured for all citizens under the idea of right and not simply charity" (p. 4). This has consequences that can be understood as

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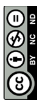

characteristics of the social rule of law, which would be "loss of the sacramental importance of the legal text understood as an emanation of the popular will and greater concern for material justice and for the achievement of solutions that consult the specificity of the facts" Sentence (T-406/92).

Taking into account the above and continuing with the characteristics, the role of the judge becomes relevant, who has a greater relevance to achieve the purposes of the state, because according to the court in the sentence (T-406/92), the judge in his "intervention is not only manifested as

> the necessary mechanism to solve a dysfunction, but also, and above all, as an indispensable element to improve the conditions of communication between law and society". In other words, it acts as a bridge between society as such and rights in a material sense, as evidenced by the fact that in the same sentence (T-406/92), the Constitutional Court states that "in the interventionist State, much of the formal importance (v a l i d i t y) and material importance (justice) of the law vanishes".

Thus, in a material sense, the constitution should be understood not only as a compendium of norms that can be changed whenever one wishes, but also as a philosophy that must be coherent with itself and therefore no norm that weakens or changes its essence, its philosophy and raison d'être, such as human dignity, has any place:

> The concept of human dignity as interpreted by the constitutional court, is a founding value of our political constitution that in light of the judgments handed down by the high court has undergone variations, evolving to the point of motivating implications in our way of understanding law (Draft legislative act 001, 2019, p.7).

This in order to create in the social imaginary, that dignity is relative and changeable and therefore can be suspended or implied in some cases, but this is not possible and if the constitutional court is consistent with its providences and its own raison d'être, it will have to declare the unconstitutionality of this legislative act, following a lawsuit by a person knowledgeable of the law in a material sense as already stated.

It has also been argued to the detriment of dignity by affirming that this issue does not have ancient but contemporary foundations, as can be seen in the following quote, where it is stated that:

> Historically, the discussion of human dignity has not had a treatment of great tradition and antiquity, despite its theoretical basis in the doctrines of great classical philosophers such as St. Thomas Aquinas, Kant and Hegel, among others; this topic is actually belonging to the recent history of humanity. (Draft legislative act, 001, 2019, p.7).

The fact that it has not been explicitly questioned by the great thinkers of antiquity does not mean that it has not been spoken of from other perspectives, which have come to mean the same thing and much less that it does not exist, it is like the law of gravity that exists whether we know it or not, whether we like it or not,

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And secondly, the fact that it is a contemporary issue does not detract from its importance; on the contrary, it is all the more important because it is a phenomenon of our time that is linked to human rights, which are inherent, inalienable and unrenounceable.

OBJECTIVES

General

To unveil the possible elements of punitive populism in the constitutional reform project on the introduction of life imprisonment in Colombia.

Specific

- To review punitive populism in Colombia through the reading of scientific texts, in the contemporary context.
- Describe the elements of punitive populism found in the law and jurisprudence in Colombia.
- Analyze the elements of punitive populism in the draft legislative act 001 of 2019 on the implementation of life imprisonment in Colombia.

METHODOLOGY

The problem of elements of punitive populism in the constitutional reform project on the introduction of life imprisonment in Colombia is analyzed from two perspectives: the socio-critical and the hermeneutic or interpretative, since these allow a reading from the text and the contexts.

V. CONCLUSIONS

This section of conclusions concludes the research report, that is to say, as its name indicates, it concludes the process for which a possible answer to the research question is given in light of the results obtained, in addition to also taking into account the answers to the specific objectives.

Taking into account the above, regarding the elements of punitive populism found in the draft legislative act 001 of 2019 on the implementation of life imprisonment in Colombia, it has to be said that indeed, in accordance with the dissertation, elements that can be considered typical of punitive populism in said legislative act can be glimpsed, such elements are exposed according to Uribe (2012):

1) Authoritarian expressive criminal law is used.

2) Dominant political sectors use criminal law for electoral purposes regardless of the consequences of the effectiveness, or social harm, of the norm.

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3) There is a particular social sensitivity produced by the social emergency inherent in the neoconservative and neoliberal political and economic model of globalization, the problems of humanity and of the big city; the main gauges of this sensation are economic inequality and labor instability.

4) Society presents an internal division that clearly differentiates the majority from marginal groups.

5) There must be an enemy capable of inviting the majority to cohere against him, to identify themselves as a result of the exclusion of the "other". (p.81)

Thus, the context in Colombia is given to speak of punitive populism, since social and economic inequalities are evident, authoritarian criminal law is growing in recent governments, criminal law is used by politicians to make their campaigns with the needs and fears of the underprivileged classes, Moreover, there is not only one enemy but several that threaten the weak institutionalism that exists throughout the national territory, so it is not out of context to speak of punitive populism in Colombia and even less so in the draft legislative act in question where these elements were evidenced.

On the other hand, when reviewing punitive populism in Colombia through the reading of masses of documents in the contemporary context, it is found that there is a very close relationship between legislative acts and the economic and political power groups of a State where many of the legislative acts are mediated by particular interests to maintain the economic monopoly and political power, distancing it from the duty of politics and the division of powers.

In the same sense, the elements of punitive populism found in the law and jurisprudence in Colombia were evidenced, where legislation or judicial decisions are made in a populist manner, so that it is not criminal objectivity and knowledge of criminal policies that lead to proposing draft legislation, but rather proposals based on private interests that move the emotionality of society to gain a group of followers and perpetuate political power and thus continue to fill their pockets with public funds.

Taking into account the above, the importance of the culture of legality for the construction of a less invasive and more participatory penal system became evident, since in the construction of the new socio-political and legal paradigm it is essential to promote the criticism of the established system from its essence and the participatory proposal, inclusive of the otherness, where the different sectors and also the individuals are linked to make a new order from the subjectivities, so that it adjusts in a pertinent way to the needs of the Colombian contemporaneity in relation to Latin America and also globally. Such a construction made from the different, the excluded, the less favored, but prioritizing above all the real dialogue, to achieve an argumentative consensus where we all have voice and vote in the construction of a social, political and juridical conjuncture understood from and for the plurality and the difference where its central axis is the restorative justice.

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