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**Transition to Democracy and Penal Policy
The Case of Argentina**

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**THE TRANSITION TO DEMOCRACY AND PENAL POLICY
THE CASE OF ARGENTINA**

By Máximo Sozzo *

Abstract

This essay aims at examining the development of penal policy in Argentina during the first stage of the transition to democracy. It analyzes the emergence of an elitist mode of penal policy making, which isolated and protected it from the public and persisted beyond changes in governmental alliances. It also shows how penal policy had initially in that context a liberal orientation that became more ambivalent since the 1990s, including measures towards the increase of penal severity and extension. As well, it explores the conditions of possibility of this mode of penal policy making and its changing orientations and its effects in the evolution of punitiveness in this period. This study of a national case could be useful for advancing our understanding of how this complex political and social change is connected with the field of punishment and could be an initial contribution to a line of comparative research about this relation in other contexts that experienced recent similar transformations.

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Introduction

Between 1930 and 1983 six coup d'état occurred in Argentina, which led to military dictatorships of different duration –between one and a half and seven and a half years–, followed by intervals of restricted or limited democracy –with the exception of the periods between 1946-1955 and 1973-1976. Those military dictatorships governed the country for about 24 years in this period of half a century –and 14 out of the 17 years between 1966 and 1983. In 1983 a complex process of transition to democracy began that, notwithstanding its recurrent and huge obstacles and crises,| did not experience a relapse into an authoritarian political regime. As it is well-known, this did not imply that authoritarian practices of government did not survive in different social realms despite the consolidation of this change at the level of the political regime. After a series of military uprisings and insurrections had been overcome, the hazard of a relapse into an authoritarian political regime seemed to be conjured up by the mid-1990s.

This essay aims at examining the development of penal policy in Argentina during this first stage of the transition to democracy, as a national case that could be useful for advancing our understanding of how this complex political change is connected with the field of punishment.

In the first place, this article analyzes the emergence of a mode of penal policy making that kept this area of decisions and actions beyond the competition of political parties in the democratic game, isolating and protecting it from the direct or indirect involvement of the public. This mode gave a central role to the voice of experts –academics and advisors educated within the legal tradition– in dialogue with politicians who were members of the Executive and Legislative Powers and with criminal justice officials. It had the creation of criminal laws as its prime instrument, marginalizing the question of its application, which was to some extent delegated to criminal justice officials who produced their own strategies and interventions within their institutional structures with high levels of autonomy and discretion. This mode of penal policy making is here defined as “elitist”, as it was in the hands of a small –though complex– group of privileged protagonists that kept these decisions and actions away and isolated from citizens, considered to have inadequate views on the subject that needed to be changed

as part of the cultural dimension of the transition to democracy. The present essay shows how this mode persisted with minor alterations, despite the series of economic, social and political changes brought about by the transition from the first democratic government (President Alfonsín, 1983-1989) to the second one (President Menem, 1989-1995).

Another purpose of the present article is to show how, during the first democratic government, the penal initiatives produced by this mode had, in general terms, a “liberal” orientation that aimed at moderating the deployment of the power to punish. It examines the fact that even though the change of government in 1989 did not imply an essential change of its mode of production, it did involve an increase in the number of penal initiatives that, in turn, became ambivalent, which allowed the coexistence of measures of diverse orientations. Within this framework there emerged a tendency with the clear aim of increasing punitiveness.

This essay is also intended to reveal –from the little amount of data now available– how punitiveness evolved during this first stage of the transition to democracy in Argentina, with a strong initial contraction that was followed by a constant expansion that reached, by the mid-1990s, higher levels than those shown at the end of the military dictatorship. Finally, the article puts forward an exploratory reflection about the conditions of possibility for the creation of this mode of penal policy making and its diverse orientations, as well as its effects on the evolution of punitiveness. This reflection is also an attempt to contribute to a broader consideration of the role of “politics” in the sociological analysis of the contemporary transformations of punishment.

Since the mid-1990s in Argentina, and within a context of greater “politicization” of the criminal question, there has been a growing tendency towards a “populist” mode of penal policy making, articulated with a stronger orientation towards the increase in penal extension and severity, which has been associated with the strong growth of punitiveness over the last years. This emergence of “penal populism” has been recently analyzed in the local literature (Sozzo, 2007b; Bombini, 2008; Gutiérrez, 2010) and concentrates almost all the efforts of local research in the field of the sociology of

punishment. A similar trend can also be found in other national scenarios in Latin America (Chevigny, 2003; Beckett-Godoy, 2008; Dammert-Salazar, 2009). In order to understand the emergence of “penal populism” and its implications it is necessary, from my point of view, to have a sounder grasp of the previous moment –what we have here defined as the first stage of the transition to democracy– from which our present differs. However, this task has still not been carried out in the field of sociological and criminological research in Argentina and it also remains unaddressed in many other national contexts in Latin America. This essay is an initial contribution to fill this gap and an attempt to encourage the development of comparative research with the objective of reconstructing the forms of production, orientations and effects of penal policy in the first moments of the transition to democracy in the region and even beyond it, in other contexts of recent democratization.

1. Return to democracy and penal liberalism

After seven years of the most violent and brutal military dictatorship in Argentinean history, which started with the coup d'état on March 24, 1976¹, free elections were held on October 30, 1983, and the candidate of the *Unión Cívica Radical (UCR)*, Raúl Alfonsín, was elected President.² He took office on December 10, 1983, a date that symbolizes the beginning of the process of transition to democracy.

Alfonsín's government (1983/1989) had to permanently deal with two major issues that were the focus of the public and political agenda. In the first place, the consolidation of democracy and the need to confront the military threat, which was closely linked to the

¹ The last military dictatorship was marked by the intensive use of terrorist mechanisms by the State apparatus to persecute political dissidents, which consisted of a massive policy of kidnapping, torture, forced disappearance and murder, and which had a considerable impact on the operation of penal institutions (Bergalli, 1982, 1983; García Méndez, 1983; 1985; 1987).

² The *Unión Cívica Radical* was a political party founded in 1890 that represented the middle classes and – especially until the emergence of *Peronism* in the 1940s- some sections of the popular sectors, and which had, in general terms, a liberal and democratic orientation, although during its long history some of its fractions –its more conservative wing- have promoted and supported military coups and governments. The first coup'état in 1930 was against a national government of this political party, which had won its first general election in 1916 and had been in office since then. After the appearance of the *Partido Justicialista (PJ)*–the institutionalization of *Peronism*- in 1945, the *UCR* only won the presidential election of 1963, after a military coup, with the proscription of the *PJ* and with only 25% of the votes. The general election of 1983 was the first one in which the *UCR* defeated the *PJ*, with 51.7% of the votes. Alfonsín, a leader of the more progressive wing of the *UCR*, tried to reorient his political party from the 1970s towards social-democratic positions and proposals.

prosecution and punishment of crimes of the State committed during the last military dictatorship and the obstacles and conflicts this brought about in the political and social landscape of the time. Secondly, the hard economic crisis, a consequence of the neoliberal economic policies carried out by the military government from 1976, represented by the mounting foreign debt burden and the problem of rising inflation (Gargarella, Pecheny and Murillo, 2010; Novaro, 2009, 23-321).³

As Gabriel Kessler has recently shown, the issue of “street crime” or “micro-criminality” was not placed high on the public and political agenda in that period (2010, 69). This was in sharp contrast with the central role the issue of the “crimes of the State” committed during the last dictatorship and the problem of their investigation, prosecution and legal punishment had in those years. Certain forms of crime created social anxiety in some moments, such as a wave of kidnappings followed by murders, which were especially associated with the recent experience of the military dictatorship –and its legacy, because some offenders were ex-members of the military and the police (Kessler, 2010, 69, 71-74). The media did not consider street crime as a central problem, confining it to the traditional spaces and formats of the “police chronicle” –a special section in the last part of “highbrow” newspapers and in some late night news shows on television-, and to the gruesomeness of the popular press of a rather limited circulation among certain segments of the urban popular sectors. This lack of centrality was also reflected on the results of the first public opinion surveys carried out in that period, which included questions about street crime as one of the possible main social problems (Lorenc, 2003, 32; Kessler, 2010, 74-75). Neither was the problem of crime a fundamental issue in the electoral campaigns for the national and provincial elections in 1985 and 1987, where the economic crisis and the consolidation of democracy or the military issue remained central (Novaro, 2009, 157-171, 224-249). Even some years after Alfonsín’s government was over an observer stated:

³ This, of course, does not mean there were no other issues of importance on the public and political agenda. For example, the severe debate held about the proposal of a legal reform to introduce divorce into Family Law, finally enacted in 1987.

If we analyze the programmatic platforms of the main political parties, and if we remember their leaders' most significant public remarks, we will notice that the space devoted to penal issues is limited, admitting that for the non-specialized part of the population this type of questions are of little interest ... (Vazquez Rossi, 1993, 92).⁴

This relative marginality of the problem of street crime on the public and political agenda was constructed despite the fact that the volume of crime officially reported grew significantly over that period (Kessler, 2010, 72).⁵ As it can be seen in Figures 1 and 2 in the Appendix, between 1983 and 1989, the rate of crime and the rate of intentional homicides recorded by police institutions increased by 73% and 85%, respectively. In some jurisdictions this growth was even higher. In the City of Buenos Aires the rate of property crime –which grew by 65% in the country – increased by 120%, and by 139% in the Province of Buenos Aires. In this province the rate of intentional homicide increased by 137%, and by 140% in the Province of Santa Fe during the same period –see Figures 3 and 4 in the Appendix.

Throughout this period there were no initiatives⁶ clearly oriented to an increase in the

⁴ In the same sense, about the first stage of the transition to democracy in Spain, see Medina-Ariza (2006, 185-186).

⁵ As it is well known, police statistics suffer from two serious problems which prevent them from being considered a reflection of “real criminality”: the “dark figure” and its institutionally manufactured nature (Sozzo, 2008, 21-41). It is possible to speculate that these two limitations in this period in Argentina reached their most extreme levels. It is often believed that intentional homicide is the type of crime which presents these two problems in their smallest degree and this is why I have included it separately.

⁶ Argentina is a federal State where criminal legislation falls within the competence of the National Congress, but criminal procedural legislation falls within the competence of Provincial Legislatures, with the exception of the one that is applicable under federal and national jurisdictions. Federal jurisdiction is defined around certain types of crime, regardless of the place where they are actually committed –for example, drug crimes. National jurisdiction is limited to national territories, that is, those directly dependent on the National Government. At the beginning of the transition to democracy those national territories were the National Territory of Tierra del Fuego, the Antarctica and the South Atlantic Islands – until 1990, when it became a province– and the Federal Capital City –the city of Buenos Aires, which became an autonomous, quasi-provincial entity after the Constitutional Reform in 1994, but whose police institution and criminal justice administration still today mostly depend on the National Government. There are now 23 provincial police forces, criminal justice administrations and prison services. And there are four national police forces –the *Policía Federal Argentina* (*Argentine Federal Police*), the *Gendarmería Nacional Argentina* (*Argentine National Gendarmerie*), the *Prefectura Naval Argentina* (*Argentine Naval Prefecture*) and the *Policía de Seguridad Aeroportuaria* (*Police of Airport Security*)-, a National criminal justice administration, a Federal criminal justice administration, and a Federal prison service.

extension or severity of the penal system.⁷ On the contrary, there were several significant initiatives in the opposite direction to be pointed out.

First, several international treaties on human rights which established important rules for criminal law were ratified, such as the American Convention on Human Rights –Law 23054–, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights –Law 23313–, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment – Law 23338 (Gargarella, 2010, 29).

Second, the promotion of the prosecution and punishment of crimes of the State committed during the last military dictatorship, which took shape in December 1983 with the Decree 158 ordering the prosecution of the first three Military Juntas –which led to the renowned “Trial of the Juntas” between 1984 and 1985– and with the Decree 187 which ordered the creation of the *Comisión Nacional sobre la Desaparición de Personas* (*National Commission on the Disappearance of Persons*), later reinforced by the repeal of the so-called Self-Amnesty Law (Gargarella, 2010, 28). As it is known, Alfonsín’s government itself tried, almost from the beginning, to confine that prosecution and punishment to the leaders and higher officials in the Armed Forces. After military pressures and uprisings, this restriction was translated into the enactment of the so-called “Punto Final” (“Full Stop”) and “Obediencia Debida” (“Due Obedience”) laws, in 1986 and 1987, respectively (Novaro, 2009, 23-72, 145-157, 200-249; 2010).

Third, the enactment of Law 23070, which modified the rules of the Penal Code about recidivism and suspended sentences. In the first place, it restricted the legal notion of recidivism –and its effects– to those cases where individuals had committed a new crime after having served a prison sentence and, to a certain extent, it limited the possibility of applying the “safety measure” regulated in article 52 of “imprisonment for

⁷ In fact, in comparison with what would later take place, there was fairly little legislative production relative to criminal law in this period: only 12 laws which were complementary or reforms of the Penal Code –which are not all the ones that include criminal rules, but which can be regarded as the most relevant – were passed, that is, an average of 2 per year -criminal procedural laws are not included in this number (Gutierrez, 2010, 59).

an indefinite period of time” for multi-recidivists. In the second place, it increased the possibility of applying a suspended sentence for crimes with a maximum sentence legally established of three years in prison and made it more feasible to apply it for the second time, with a computation of the period of time elapsed in order to make it possible which was more favourable to the convict – between 8 and 10 years. Although it was considered “timid”, as a “symbol of change of mentality and ideological attitude”, it was defined as the “start of a new criminal policy” that tended towards a “less stigmatizing criminal law and the restriction of counterproductive incarceration” (Zaffaroni, 1984, 361, 370).

Fourth, the enactment of Law 23070, which established a special computation for those sentenced or on remand who were in prison in the period between March 24, 1976 and December 10, 1983, crediting 3 days for 2 days actually served. This special computation was particularly beneficial to those who had been considered “political prisoners” by the military government, counting 2 days for every day actually served. Even though the government did not grant a general amnesty, Law 23070 recognized –though to a limited extent– certain illegitimacy of the imprisonment determined by the criminal justice during the military dictatorship.

Fifth, the enactment of Law 23077, the so-called Law of Defense of Democracy, which repealed different rules of Law 20840 concerning the “repression of subversive activity”, enacted in 1974 by the National Congress and modified several times by the military dictatorship. This law also abolished different articles of the Law 21338, passed by the military government, which reformed the Penal Code, increasing penal severity for different types of crime, and even restoring death penalty –abolished in 1921 when the Penal Code was enacted.⁸

⁸ We can also mention other significant legal texts in the same direction: Law 23097, which regulated the crime of torture of prisoners (Tozzini, 1984) or Law 23098, which regulated the habeas corpus proceeding (Baigun, 1984). Within the police area, we can also remember the enactment of Law 23554 or Law of National Defense in 1988, which banned the involvement of the Armed Forces in “internal security” affairs (Kessler, 2010, 78).

Finally, and beyond the legal initiatives, it is possible to include here the birth of a jurisprudential trend, during the first years after democracy was restored, that declared unconstitutional the punishment for possession of illegal drugs for personal use legally established (article 6, Law 20771), when it occurred within the private sphere. This position would eventually be adopted by the national Supreme Court of Justice in 1986 in the Bazterrica case, based on an argument on the defense of individual rights and their protection in the National Constitution (Aureano, 1997, Cap. VIII, 1.a), b), c); Kessler, 2010, 78, 83; Gargarella, 2010, 32).⁹

These initiatives relied on the active involvement of some experts who were part of President Alfonsín's group of advisors from the beginning of his government and who had significant academic trajectories in the field of law, such as Carlos Nino and Jaime Malamud Goti, who were in turn assisted by a number of young lawyers who would later pursue important academic careers at different Argentinean universities (Novaro, 2009, 34). Part of that group gained institutional status when the President created the *Consejo para la Consolidación de la Democracia (Council for the Consolidation of Democracy)* in 1985, through the Decree 2446, with the aim of "building a vast project to consolidate our republican and democratic system, oriented towards the modernization of Argentinean society". It consisted of "political and intellectual personalities with publicly-known trajectories in serving the Nation", and it would constitute "a space for discussion and participation that contributes projects and advice to government activity" (*Fundamentos*, Decree No. 2446; Gargarella, 2010, 33). The Council was chaired by Nino –with a group of assistants and advisors– and was formed by politicians from different political parties and personalities from the academic and

⁹ Even though these judicial decisions cannot be associated with an initiative by the Executive Power, they were in tune with the general orientation of the drugs policy carried out by Alfonsín's government, which promoted the development of preventive and therapeutic, rather than repressive, strategies, through the creation of the *Comisión Nacional sobre Narcotráfico y Drogadicción (National Commission on Drug-trafficking and Drug Abuse Control)* (Decree 1383) in 1985. Not only did this policy explicitly move away from the guidelines followed by the military dictatorship about this problem but also from the growing pressure the United States were exerting on Latin America as part of the hemispheric expansion of their "war against drugs", which put emphasis on prohibition and the strengthening of repressive interventions. However, by 1989, in the last months of that government, a shift had already been taken place towards positions that were closer to the ones promoted by the US government, in search of support to deal with the economic crisis (Del Olmo, 1988, 1992; Malamud Goti, 1992; Aureano, 1997, Cap. VIII 1.d), e); Touze, 2006).

cultural spheres. Throughout the four years it operated, it developed different initiatives –among which it is worth mentioning a project to reform the National Constitution and a law project about the media-, one of which was related to the penal system: the design of a new national Criminal Procedural Code. It was certainly one of the most ambitious government initiatives of penal reform in that period. This task was given in 1986 to Julio Maier, a renowned Professor of Procedural Law, who wrote a bill -with the help of Alberto Binder and Gustavo Cosacov- that promoted, from their perspective, the modernization and democratization of criminal justice administration, making it more efficient and transparent and guaranteeing the rights of the accused. It encouraged a shift from an inquisitorial towards an adversarial model, including the participation of laypeople in criminal trials, the principle of opportunity and probation. They also wrote a complementary bill concerning the organization of the national and federal criminal justice and designed its implementation process (Maier, 1988; Binder, 2008, 59). This project was debated in a *Comisión sobre Administración de la Justicia Penal (Commission on Criminal Justice Administration)* which had been previously set up by the President to study possible changes and reforms, and which was formed by experts - Maier himself among them-, deputies and senators (Maier, 2005, 992). At the same time, it was also debated by experts from the academic world and different concerned institutions invited by the Council to give their opinion. As part of the debate, an International Symposium on the Transformation of Criminal Justice Administration was organized at the University of Buenos Aires in 1988, in which renowned Argentinean and foreign professors of criminal law and criminology took part -among those professors, well-known for their progressive and critical views, were Bergalli, Ferrajoli, Pavarini, Baratta and Aniyar de Castro (Consejo para la Consolidación de la Democracia, 1989).¹⁰ The law project was presented to the National Congress in 1987, but after a long parliamentary procedure –and although it was supported by sectors in both majority parties– it was not passed (Maier, 1986; Vazquez Rossi, 1993, 30-31; Langer, 2007, 637-641; Binder, 2008, 51).¹¹

¹⁰ A few years later, one of its participants –and supporter of the law project- commented: “Hardly ever has a major piece of legal work had such diffusion and gathered the efforts and contributions of the best experts” (Vazquez Rossi, 1993, 31).

¹¹ This does not mean that this initiative did not have subsequent effects. At the provincial level, it was used as an important antecedent in a series of criminal procedural reforms –such as the one in the

Despite such failure, this law project -like the rest of the political initiatives that were carried out in the penal field during this government- materialized a mode of producing penal policy in which the expert had a central role. These experts, whose authority derived from their experience and position in the academic world were not part of a State, professionalized and specialized bureaucratic structure specifically concerned with the penal system.¹² Within the undifferentiated national *Ministerio de Educación y Justicia* (*Ministry of Education and Justice*), there was only a *Secretaría de Justicia* (*Secretariat of Justice*) run by a government official directly appointed by the President –throughout this period, usually politicians who were part of the *UCR* structure- and which did not have this type of bureaucratic organization.¹³ Besides, those experts were in direct and unmediated dialogue with those professional politicians in charge of taking decisions –in the Executive as well as the Legislative Powers and even with the President of the Republic– and who did not generally give this type of issues a central role in their agenda nor made it the focus of the competition against their political opponents in the democratic game. Most of the laws on the subject produced during President Alfonsín’s government were originated in the Executive Power¹⁴, which did

province of Córdoba– and it later even influenced the movement to transform the criminal process in Latin America (Langer, 2007, 641-646; Binder, 2008, 60). One of the main reasons why the reform of the national Criminal Procedural Code Project failed was the active opposition it met from the most conservative sectors of the national Judicial Power, which was made evident in different ways (Sarrabayrouse, 1998, 25, 29-32). As one of the supporters of this reform pointed out in an interview, those segments joined the most conservative sectors of the *PJ* who became stronger after Carlos Menem won the 1988 primary elections for the Presidency. Other actors have also mentioned the internal opposition from certain *UCR* deputies to some of the ideas in the project (Interview to Leon Arslanian, Red de Archivos Orales de la Argentina Contemporánea; Sarrabayrouse, 1998, 25).

¹² They did not either belong to the bureaucratic structure of the political party in office, the *UCR*.

¹³ This is in direct opposition to what happened in other contexts of consolidated liberal democracies, in the decades that followed WWII, where the design of the penal policy depended on the active and significant involvement of experts who were career officers in specialized bodies of public administration and, to a certain extent, independent from popularly elected officials, and who had a certain amount of social trust and prestige –for English-speaking countries see Garland (2001, 37); Ryan (2003, 16-19); Zimring-Johnson (2006, 273); Loader (2006, 565-566); Pratt (2007, 24, 42-46); for Germany, see Savelsberg (1994, 931; 1999, 48, 53; 2002, 695) and for Scandinavian countries see Pratt (2007, 166; 2008, 131, 134).

¹⁴ There were also exceptions like the Law 23070, originated in law projects presented by *PJ* and *UCR* senators and the Law 23098, originated in a project by a *UCR* senator. But, in any case, these measures were supported by the Executive Power from the beginning. This great influence of the Executive Power on the design of penal initiatives –even when they involve legal reforms– is linked to the strong presidentialism of Argentine democracy originated in the 19th century constitutional design and reinforced by a political tradition that promotes “decisionist” and “personalistic” leaderships (Svampa, 2005, 57-61).

not prevent the political opposition –or part of it– from accepting them¹⁵. This seems to reveal that there was a certain degree of consensus among the majority political parties as regards these particular initiatives and, to some extent, as regards the general orientation of the penal policy and the role the experts played in its formulation.¹⁶

The voice of the experts embodied a type of knowledge that was associated with a prescriptive perspective –“what ought-to-be”-, typical of the academic tradition of law schools in Argentina –and, in general, in Spanish-speaking countries. Even though “data” about “what is happening” –“law in facts” as opposed to “law in books”– were introduced in their debates, they did not develop out of the systematic application of empirical research techniques typical of the social sciences to crime and criminal justice issues –a type of research which hardly existed in that period in Argentina, as in many other Latin American countries, with some embryonic exceptions–, but rather, out of the observations made by those experts through their first-hand experiences as privileged protagonists in the penal field –many of them were also lawyers and magistrates. This did not mean that some of these protagonists did not recognize the need to carry out empirical research on the operation of the penal system in order to produce valid and accurate information to take legal and political decisions. In this way, and as regards the national Criminal Procedural Code project, Maier refers to the fact that Cosacov was assigned “a comparative empirical study on the application of the national Code in effect and the one used in the province of Córdoba with oral and public trials, in order to provide the law project with a factual basis which allowed designing realistic judicial institutions” (Maier, 1986, 646). However, there are no significant

¹⁵ However, there were legal reform initiatives promoted by some sectors of the political opposition which did not have the same fortune, even though they seemed to have a similar orientation. One of the most significant was the law project presented by the peronist deputies Perl and Fappiano in November 1987 – and written by the prestigious criminal law professor Eugenio R. Zaffaroni– which tried to introduce a structural reform of the system of penalties of the Penal Code, with the aim of “democratizing the penal system”, eliminating “any trace of authoritarianism” and substantially reducing “the scope of prison sentence to what is essential or inevitable” (Amedo, 1988, 169; cfr. also García, 1989). As it was mentioned above, as regards the reform project of the National Criminal Procedural Code, there had also been cases where important sectors of the political opposition blocked some proposals from the Executive Power.

¹⁶ The lack of strong disagreements between majority political parties about penal issues has recently been described as a typical feature of the way in which penal policy was made in consolidated liberal democracies in the decades after WWII and until the 1970s (Garland, 2001, 37-38; Ryan, 1999, 2, 6; 2003, 28-34; Lacey, 2008, 21; however, there have also been warnings against overstating such consensus: Zedner, 2002, 344-345; Brown, 2005, 37-38)

references to the results of that empirical study in the “*Exposicion de Motivos*” –where the Executive Power presents the Legislative Power the reasons that justify a law project- or in the notes to the law project, even when they refer to the “collapse of the current system” (Maier, 1986, 654-655). There is also a general reference to this study in the justification of the law project for a new judicial organization (Maier, 1988, 338). However, one of the supporters of these reforms pointed out in an interview that the results of that empirical study were very important in the discussion of those projects in two different ways. In the first place, they played a key role to support the proposal of introducing the principle of opportunity, as the empirical data showed that there already was a high level of “selectivity” in the criminal justice administration and it was therefore claimed that it was necessary that such selection was based on rational and well-grounded arguments and was carried out in a transparent way (cfr. also Cosacov, 1988, 62-71). In the second place, they played a very important role in the debate about the design of the future implementation of the new judicial organization (cfr. also Cosacov, 1988, 102-108). In spite of this, this other type of knowledge did not seem to have reversed the prevailing influence the type of knowledge associated with the local legal tradition had at that moment on the development of these penal initiatives.¹⁷ And, in any case, it certainly turned out to be an exception in the general landscape of penal policy making. In other words, the expertise was predominantly about “what ought to be”, built upon debates around philosophical and legal norms and principles.¹⁸

This type of expertise was closely connected to the central place given to the creation of laws as the defining feature of the penal policy design, regardless of the complex question of its application and the related need to plan and implement policies oriented towards this aim (Bergalli, 1989, 101-102). Those experts often acted as -borrowing an

¹⁷ Cosacov himself tells an anecdote about a “well-known criminal law professor” who claimed, in a debate at the School of Law of the University of Buenos Aires in those years, that the empirical research he was trying to develop was pointless, and that it was necessary to start from the “fundamental principles.” Then he stated with irony: “If the fundamental principles are enough, it is clear that the attempt at describing, analyzing and explaining some of the behaviors of the system through tedious empirical studies is like switching on a light in the middle of a field on a bright, sunny day” (Cosacov, 1988, 19).

¹⁸ It was a type of expertise different from the one that accompanied the centrality of the expert in the making of crime control policies in countries such as the US or UK in the decades after World War 2, which was in turn linked to the development of criminology as a field of knowledge within and outside the academic world and to the “evidence led policy” ideal (Garland, 2001, 36; Feeley-Simon, 2003, 90; Zedner, 2003, 208-209; Ryan, 2003, 22; Loader, 2006, 565-568).

idea from Dario Melossi (1996, 76-77)- “ingenuous jurists”, in the sense that they assumed that “social, political, economic or legal problems” can be solved by a mere “legislative change”.¹⁹ The fact that the strategies to govern the application of criminal law were not explicitly formulated in the dialogue between politicians and experts during this period, did not mean that they were not put into practice by penal institutions, following traditional ways of thinking and acting which were daily reproduced in their organizations and cultures, marked by the strong legacy of the authoritarianism present throughout their history, particularly promoted by their colonization by the Armed Forces during the last two military dictatorships.

This was particularly true in the case of the institutions of the penal system that depended on the Executive Power –police and prison service- both at national and provincial levels. Elected political authorities during this first moment of the transition to democracy delegated this faculty to high-rank police and prison officials who built their own institutional strategies, as autonomous organizations, beyond any kind of accountability, with their own knowledge and techniques, respected and recognized by professional politicians –that could be criticized but not displaced or replaced by those experts that participated in the construction of penal policy. These strategies rested on immense degrees of discretion, which were allowed by the existing legal frames but also, when it was needed, they went beyond those limits. Examples of this could be seen in this period in the systematic abuses of the powers to stop citizens and to use violence by police institutions (Oliveira-Tiscornia, 1990; Gingold, 1997; Zaffaroni, 1993, 42-46; Chevigny, 1995, 181-201).

As for the administration of criminal justice, this autonomy was founded on the constitutional principle of the independence of the Judicial Power and made possible by the wide discretion traditionally left by Argentinean criminal law to penal judges in their

¹⁹ As the author of the empirical research above mentioned (carried out in the context of the elaboration of the judicial and procedural reform projects) pointed out in another text where he defended this type of exploration and its importance for penal policy: “Traditionally, the field of justice administration has been completely abandoned to the intuitions of jurists, who have primarily focused on the production of legal projects and have overlooked the problem of the efficacy of normative systems” (Cosacov-Pereyra-Vazquez-Rodriguez, 1989, 471).

decision making process about prison on remand and sentencing. In the beginning, President Alfonsín's government had to deal with the dilemma of what to do with the judicial officers who had not been expelled by the military dictatorship and had taken an oath to uphold the *Estatuto del Proceso de Reorganización Nacional* (*Statute of the National Reorganization Process*) written by the same dictatorial government, placing it before the National Constitution and who, in most cases, represented conservative and traditional positions. Even though there were proposals to replace all the judges of different ranks, a more moderate option was chosen, which was the complete replacement of the national Supreme Court of Justice and of those judges whose level of commitment with the military dictatorship was considered unacceptable. This selective replacement also took place in provincial justice administrations, and it aimed at producing a subsequent "top-down" effect, from the superior levels of the Judicial Power (Vazquez Rossi, 1993, 39; Novaro, 2010a, 44; Binder, 2008, 51). This partial replacement of criminal justice staff promoted from within the political sphere might be considered as an attempt to exert some influence on their everyday practices. Its impact seemed to be moderate, having become evident in certain jurisprudential changes such as the reduction of prison sentences for some crimes and declaring unconstitutional the legal punishment for the possession of illegal drugs for personal use, which we have already mentioned above (Kessler, 2010, 78, 83; Gargarella, 2010, 32). On the other hand, the debate on the law projects referring to the criminal process and judicial organization at national level -at least in this jurisdiction- could be considered a point of departure of an attempt from the political realm to exert greater influence on the practices of criminal justice²⁰, which could be contrasted with the absolute absence of reform projects of police and prison laws during this period, although they were enacted in its great majority during military dictatorships.²¹

²⁰ Furthermore, some of their key supporters explicitly admitted that these legal projects were only a starting point for a transformation which did not end in the "mere enactment of a normative system" (Maier, 1988, 339). In fact, apart from the legal reform projects, according to what one of its supporters stated in an interview, an important part of the job done by the working groups formed around those projects between the *Consejo para la Consolidación de la Democracia* and the national *Secretaría de Justicia* was the design of an implementation plan for the judicial and procedural reform, once the legal texts were passed.

²¹ On the other hand, high-rank prison and police officials did not have any involvement in or influence on the main political initiatives of Alfonsín's government in the penal field, whereas some penal judges participated actively. Clearly, this differentiation was also associated with the traditionally higher social

This mode of penal policy making can be well defined as “elitist” (Ryan, 1999, 1-6; 2003, 13-16, 20-21; Johnstone, 2000, 161-162; Garland, 2001, 37, 50-51; 2010, 3; Feeley-Simon, 2003, 103; Loader-Sparks, 2004, 19-20; Loader, 2006, 563; Pavarini, 2006, 122). First of all, in the obvious sense that it was in the hands of a relatively small group of privileged people that built up a network: some elected politicians -from the Executive as well as the Legislative Powers-, experts –advisors and academics- and judges and prosecutors.²² This network was formed through formal –made at official bodies like a Council or a Commission – as well as informal contacts, that were closed and protected –in some cases, even secret– from the interference of other actors –most especially, the “public”.²³

But it could be also defined as “elitist” in another sense. This network operated without any reference to what “the public” feels, thinks or wants about these issues. “What ought to be”, as changeably determined by the experts on legal knowledge, was the focus of their debates, using, only marginally, unsystematic observations of “what is happening” in the field of crime and punishment -with the exception already mentioned of the project of judicial and procedural reforms. It also included calculations and tactics associated with the mutations in the balance of political forces, not only expressed through political parties but also through pressures from officers of the penal institutions. It was part of its participants’ beliefs the compelling need to guide and form

prestige and deference the judicial profession had when compared to the other professions in the penal system such as the ones related to the police or the penitentiary system, which had a lower economic status.

²² One of the supporters of the judicial and procedural reform projects we have interviewed put emphasis on the fact that they opened, in an unprecedented way, many possibilities for diverse actors to participate in its elaboration –something already pointed out by another supporter of such initiative, see note 10-, breaking with the tradition that those proposals were devised by “five technicians in an office”, and in a way “very much in tune with the spirit of those years which tried to expand democratization”. However, those mechanisms for consultation did not seem to go beyond the “legal” sphere –lawyers, criminal justice officials, academics. In this sense, even though the number of participants was greater, they remained within the boundaries of the categories traditionally involved in the development of penal policy. In any case, it is a question to be carefully explored in a particular research project – how those consultations were carried out, who were involved in them, and the effect they had on the design of the proposals. And again, in that period it was an exception rather than the rule.

²³ An important part of the participation in this network –especially by experts and judges – was based on certain affinity with the political program represented by President Alfonsín’s government and, because they were not institutionalized within the State bureaucratic structures, they were essentially provisional and volatile, dependent on the continuation of that governmental alliance.

the public opinion on this subject.²⁴ Within this initial moment of the transition to democracy, some kind of “paternalistic” vision sustained by these actors usually regarded the public as consisting of citizens who, due to the cultural impact of authoritarianism in the recent past, could be dangerously inclined to beliefs and values seen as incompatible with the grounds on which the democratic and republican order was being built. This portrayal of this mode of producing penal policy is consistent with Gargarella’s analysis about the “policy of rights”, generally speaking, of Alfonsín’s government, as being built “from the top”, from a view of a society that “lags behind” and that needs to be modernized with the help of experts and politicians, rather than with an impulse “from the bottom”, marked by social support and mobilization, and regarded as a finish point rather than as a starting point (Gargarella, 2010, 33-34, 41-42).²⁵

The penal policy initiatives during Alfonsín’s government, as regards their contents, were generally inscribed in the logic of “penal liberalism” –coherent with the general political program of Alfonsín’s government-, defined as a penal rationality and program that puts emphasis on setting limits to the use of penal power, trying to avoid excess or abuse, always attempting to construct a “restricted economy of punishment”.²⁶ Those initiatives range from the decrease in the severity of punishments for certain crimes produced by Law 23077, to the special computation of prison time served during the last military dictatorship by Law 23070, through the general claim for recognition of human rights, which also includes the rights of the accused and the convicted, and the prosecution and punishment –though limited– of the crimes of the State during the last military dictatorship, or the increase of the punishment for torture on detained persons –as materializations of abuse or excess of state power. As a professor of criminal law

²⁴ Ian Loader has shown that this belief was a key component of “liberal elitism”, as a “mindset” in the creation of crime control policies in the -very different- context of England and Wales during the decades after WW2 (2006, 568-570).

²⁵ It is interesting that there are many points in common between this way of penal policy making in the beginning of the transition to democracy in Argentina and what has recently been pointed out about the case of Spain, using the metaphor of “invisibility” (Varona, 2000, 221; Medina-Ariza, 2006, 184-185).

²⁶ On the idea of a “restricted economy of punishment”, apart from the use of this notion by Foucault (1995, 73-134) to describe the ideas of the Enlightenment about crime and punishment, it is interesting to highlight Hallsworth’s (2000, 2002, 2005) recent attempt to define it, in spite of his reference to it as typical of “penal modernity” as an era or period, from which this conceptualization in terms of a penal rationality and program keeps deliberately away –see also Sozzo (2007a).

who supported this orientation and took part in the promotion of the criminal procedural reform above mentioned stated, the general aim was to “liberalize criminal law”, rejecting “authoritarianism” and “any excess or abuse of power” (Vazquez Rossi, 1993, 29). Of course, the scope of the –mainly legal– initiatives actually produced during Alfonsín’s government –as this participant himself admitted (Vazquez Rossi, 1993, 33-34)– was rather narrow in comparison with such ambitious objectives.²⁷

2. The rise of Menemism and penal ambivalence

Alfonsín’s government was strongly marked by a permanent economic crisis manifested in a cyclical rise of inflation, depreciation of salaries and growth of poverty. This was a consequence –to a large extent– of the first attempt to adopt neoliberal economic policies by the military dictatorship from 1976, which implied a strong and sudden opening of the domestic market, a resulting process of deindustrialization with its multiple negative social effects and the mounting of the foreign debt burden –that went from USD 13 billion in 1976 to USD 46 billion in 1983. These economic changes began the “latinoamericanization” of Argentine society, characterized by the growth of poverty and social inequality. In 1974, 10% of the households with the highest income concentrated 27% of the social wealth, but in 1989 this proportion grew to 41.7% (Pegoraro, 2000, 115; Svampa, 2005, 22-24). During a good part of this first democratic government, there were efforts to control the economic crisis by resorting to “interventionist” or “heterodox” economic policy measures. However, this tendency started to change after the governing political party lost the 1987 elections, with the incipient introduction of neoliberal perspectives (Svampa, 2005, 31). At the beginning of 1989, the economic crisis deepened and the country was racked with hyperinflation, which caused serious riots and social turbulence. Within this context, the *UCR* lost the presidential elections that year to the *Partido Justicialista (PJ)*, whose candidate was

²⁷ Some of them had a “symbolic” rather than “substantive” nature. There is always some distance between “law in books” and “law in facts”. In the Argentinean scene, such distance can be extraordinary – as in other Latin American contexts (Iturralde, 2010, 313). That is, there are legal reforms whose application in the daily operation of the penal system is almost inexistent; as a consequence, their practical effects remain severely limited. This is what we mean here by its merely “symbolic” nature. Usually, this happens when an issue that can only exceptionally be the object of criminal justice is regulated as a criminal offense, whether the problem is equally exceptional in social life or frequent, but for different reasons the application of the criminal law does not occur. (Tonry, 2001a, 532; 2007, 12-13; Matthews, 2005, 179; Roche, 2007, 474-475; Gutierrez, 2010, 57-63).

Carlos Menem. The economic situation worsened subsequently and there was an early transfer of power which made Menem take office in July, 1989 (Kessler-Grimson, 2005, 59-65; Novaro, 2009, 293-321).

Peronism, a movement that articulated the “national and popular” political tradition in Argentina during the second half of the 20th century –with all its complex characteristics that make it difficult to define– had mounted strong opposition to Alfonsín’s government –through the *PJ* as well as through the labor union structures clustered around the *Confederacion General del Trabajo* (CGT)–, especially in the area of the economic policy, which they defined as “anti-people” and dependent on the orientations promoted by international organisms such as the IMF and the WB. As a candidate, Menem built his electoral discourse from this point of view, opposing sectors from his own political party that presented a more moderate position at the end of Alfonsin’s government. Once he won the elections, however, he started to produce a major political shift which made him firmly adopt a neoliberal vocabulary, and build up a strong alliance with big local corporations, managing to achieve an unexpected adaptation of his political force, but keeping considerable support from popular sectors throughout the process.²⁸ The abyss of hyperinflation was an essential support in this operation: in October, 1989, poverty reached 47.4% of the population –it was 26.3% in 1983 and 5.1% in 1974 (Kessler-Grimson, 2005, 66-69; Svampa, 2005, 26-27; Novaro, 2009, 317, 329). In addition to this, the fall of “real socialism” and a weakening in the interventionist economic and social programs in the so-called “First World”, allowed this Menemist alliance to present their shift as a consequence of the fact that the world had changed and that Argentina had to get on the “train of history”. This was accompanied by an unprecedented alignment in the foreign policy with the US government. All this was materialized, after a first moment of hesitation and difficulty –including a second bout of hyperinflation– in the policies introduced by President Menem which, in a brisk, abrupt and unprecedented way, brutally dismantled the traditionally strong presence of the State in the economic activity: aperture to the world market, deregulation,

²⁸ This extreme political turn could be understood through the traditional self-characterization of *Peronism* as a “movement” rather than as a political party, whose structures were weak and dependent on the relationship with its charismatic leader –Peron until his death in 1974, role that Menem attempted to play from his first electoral triumph in 1989 (Svampa, 2005, 30, 32).

stimulation of foreign investment, privatization of State companies – water, gas, electricity, telephones, trains, oil, roads and freeways–, flexibilization of labor legislation which eroded or eliminated workers’ rights and guarantees, “reform of the State”, managerialism in public administration and “rationalization” of public expenditure, a peso-dollar fixed exchange rate from 1991 with the sanction of the Convertibility Law, control over inflation and the reform and privatization of the pension system (Svampa, 2005, 33, 35-43). The Menemist hegemony, built through this new neoliberal identity intricately intertwined with elements of *Peronist* tradition, began with the triumph in the 1991 legislative and provincial elections and was ratified with the legislative elections held in 1993. This paved the way for the reform of the National Constitution in 1994, which allowed –among other changes- presidential reelection, and enabled Menem to run in the 1995 presidential elections, win them, and take office for the second time for a period of four years –something that had not occurred in Argentina since Perón’s reelection in 1952 (Kessler-Grimson, 2005, 68-75; Novaro, 2009, 323-486).

From 1991, the stability revealed by the drop of inflation, the economic growth and the decline in poverty levels –which would fall to 16.1% at the beginning of 1994 – were presented by Menemism as the evidence of its successful economic policy, convincing very different sectors of the public, both privileged and unprivileged. This happened in spite of the growth in the volumes of unemployment –a traditionally very limited phenomenon in the Argentine context- which started to become evident in 1991 and reached 9.9% in 1993 -percentage that should be added to the 8.8% of underemployment. This situation was going to get worse with the 1994 international financial crisis and its recessive effects on Argentine economy. In this way, unemployment reached 12.2% in October, 1994 and 18.6% in May, 1995 –taking into account those who were underemployed, the percentages of people with work problems were of 22.7% and 30.4%, respectively. Social polarization and fragmentation became extremely marked, adding to the growth of poverty and social inequality that had started to develop earlier, the constant and diffuse phenomena of unemployment and precariousness (Pegoraro, 1997, 54-59; 2000, 115-116; Svampa, 2005, 33-34; Kessler-Grimson, 2005, 104-105; Novaro, 2009, 483).

Within this economic and social context, the volume of officially recorded crime in the country –as it can be seen in Figures 1 and 2 in the Appendix– fell by 28% in the first two years of Menem’s government –and intentional homicides, by 11%. But from 1991 it grew significantly, going back, in 1995, to the levels in 1989 –something that did not happen with intentional homicides, which remained at 7.5 per 100,000 inhabitants. In the City of Buenos Aires the same evolution was more drastic, with a stronger initial decrease and an equally strong subsequent increase. In this way crime officially recorded in this jurisdiction grew by 187% between 1991 and 1995 –in comparison with the 38% increase in the country, 39% in the Province of Buenos Aires and 15% in the Province of Santa Fe –see Figures 3 and 4 in the Annex. The intentional homicides officially recorded in these jurisdictions fluctuated in different ways. In the provinces of Buenos Aires and Santa Fe there was an initial decrease but then it is possible to observe different evolutions: between 1989 and 1995 there was a decrease of 30% in the former and a growth of 15% in the latter. On the other hand, in the City of Buenos Aires there was a strong initial fluctuation and a very marked growth in the last two years that made the rate of intentional homicides reach a level by the end of the period 440% higher than in 1989 – even though it was still inferior to the ones in other jurisdictions and to the national average (see Figures 3 and 4 in the Annex).

The problem of “street crime” began to reach a more significant role in the public and political debate during President Menem’s administration, when compared to the previous moment. During this period it is possible to observe a change in the way the media addressed this issue –associated with the process of growth, privatization and commodification they went through– increasing the number of news reports on the subject and using a dramatic and sensationalist tone for selected “violent” crime stories, where the offenders were poor and marginalized individuals and the victims were middle or upper class people, and which were presented in a completely “decontextualized” way (Rodriguez, 2000, 186, 195; Pegoraro, 2000, 119; Martini, 2002, 88; Lorenc, 2003, 72-75).²⁹ One of the few empirical researches done on the subject in

²⁹ For interesting contemporary photographs about these images of crime in the media, see Gingold (1992, 48-50), Abregu (1992, 63-68) and Tiscornia (1992, 17). At the same time it was also possible to observe a greater relevance of the so-called “crimes by the powerful” –especially, corruption among government

that period analyzed news stories from four newspapers of national circulation – *Clarín*, *La Nación*, *Página 12* and *Crónica* – during the month of June in the years 1991, 1992 and 1994. The daily average of news stories on crime in the press grew in the following way: 4.96 in 1991, 9.41 in 1992 and 10.54 in 1994 (DNPC, 1999, 136).³⁰

It is possible to observe that there was a greater presence of the street crime problem and mainly in relation with illegal drugs, in the public discourse of the main actors of the National Government, especially President Menem and Vice-President Duhalde, compared to what had happened in the previous moment and perhaps associated with this change in the way the media addressed the problem and with the more general “mediatization of politics” (Lorenc, 2003, 104-107; Novaro, 2009, 402). President Menem even suggested reintroducing death penalty for “drug trafficking” and sent in a law project on the subject (Touze, 2006; Novaro, 2009, 400).³¹ But, in any case, that emphasis, though liable to be associated with a greater number of penal initiatives, as we will see, was not completely transferred to the political competition, and largely remained in a marginal position in the electoral campaigns, which were heavily focused on economic and institutional reforms, and from the point of view of the political opposition, on the scandals of corruption around them. In this sense, this first stage in the development of a neoliberal political program in Argentina in the 1990s, with all its

officials– in some media (Rodríguez, 2000, 192-196; Martini, 2002, 93-94). And even of the social mobilization to protest on behalf of some “victims of the power” –which were not associated with the experience of the military dictatorship– such as the María Soledad Morales case or the massacre in Ingeniero Budge (Tiscornia, 1992, 19; Gingold, 1992, 51; 1997).

³⁰ The greater relevance of “street crime” in the media from the beginning of the 1990s had different forms and dimensions that went well beyond what had happened in the newspapers of national circulation. In relation with changes in the link between television and criminal justice in those years, see ver Rodríguez (2000, 197-286). In relation with what happened with some specialized popular press about crime, see Vilker (2006). In general, the analysis of changes in the connection between media and crime in this first phase of the transition to democracy is an important task that is only in its infancy in this national context.

³¹ This might be understood as a reflection of the above mentioned obsequious alignment of President Menem’s administration with the US government, which had been promoting the idea, as we said in note 9, that drug policies should be toughened up in Latin America, strengthening a repressive orientation. In July 1989, at the very beginning of his term, President Menem created the *Secretaría de Programación para la Prevención de la Drogadicción y Lucha contra el Narcotráfico* (*Secretariat for the Prevention of Drug Addiction and Fight against Drug Trafficking*) (Decree 671), which depended directly on the Presidency and gave the issue a high status within the national cabinet. This Secretariat, in charge of Alberto Lestelle until 1995 –deputy of the *PJ* who had chaired the Commission on Drug Addiction of the Chamber of Deputies in the 1980s– became a centre that produced conservative discourses and proposals on the subject (Aureano, 1997, Cap. VIII 2; Touze, 2006).

local peculiarities, was not accompanied by an immediate, decisive and intense “politicization” of street crime, as it had happened before in other cultural contexts.

However huge and traumatic those economic and political changes suffered in an extremely short period were, the mode of producing penal policy that had been structured during the initial moment of the return to democracy was not radically modified. It continued to be “elitist” and remained far and isolated from the “public”. Due to the fact that the limited network of participants in this mode was largely not institutionalized in permanent State structures and had the affinity with a political program as an important requisite to be part of it, the change of government produced an almost complete replacement of its privileged members –particularly, academics, advisors and judicial officials. Again, one of the main elements which would bring them together was their affiliation to a political orientation, now represented by Menemism. This replacement did not imply a significant change as regards the central place of experts in the operation of this mode. Not even in the type of expertise recognized as a source of authority within it. It was basically the same traditional knowledge built in the legal field, around “what ought to be”, based on discussions over philosophical and legal principles and rules. Nevertheless, the theoretical orientations of these experts were then in some cases different to those that prevailed in the previous moment.³²

Even so, it is possible to identify an innovation that occurred in this moment, which was the creation of a bureaucratic structure whose aim was to produce information and advice for the development of crime control policy. An independent national *Ministerio de Justicia (Ministry of Justice)* was created at the beginning of 1991, chaired by León Arslanián, who had been part of the criminal court in the “Juicio a las Juntas”, and who would eventually resign in September 1992 because he was against the decision of the Executive Power to appoint lawyers who had been involved with the military dictatorship for positions in the national criminal justice administration (Interview to

³² As part of the replacement of specific participants, it is also possible to observe a relative shift as regards the academic institutions where those actors were trained and remained active, with a growing influence from certain private universities, associated with the neoliberal and neoconservative ways of thinking, such as the *Universidad del Salvador*, the *Universidad Católica Argentina* or the *Universidad de Belgrano* –which was in turn part of a more general shift as regards the technical cadres (Novaro, 2009, 467).

León Arslanian, Red de Archivos Orales de la Argentina Contemporánea). The *Dirección Nacional de Política Criminal* (National Directorate of Criminal Policy) was structured within this framework. In 1993, a Director selected by official examination who had a technical profile was appointed to that office.³³ Government officials from this *Dirección Nacional* took active part in the design of some of the penal initiatives that were produced during these years, becoming another actor –though mediated by political officials– in this network.³⁴

As it occurred in the beginning of the transition to democracy, during the first government of President Menem the creation of criminal laws continued to be the axis of the design of penal policy, displacing the question of its application by the institutions of the penal system and the planning of strategies for that purpose. As I said about the previous government, this displacement implied that those penal institutions designed almost autonomously their own strategies and interventions, based on their traditional ways of thinking and acting, reproduced in their organization and culture. This became especially evident within the police forces and was clearly manifested with the creation of the *Secretaría de Seguridad y Protección a la Comunidad* (Secretariat of Security and Protection of the Community), dependent on the national *Ministerio del Interior* (Ministry of the Interior) in July, 1994, as a response to the terrorist attack to the *Asociación Mutual Israelita Argentina (AMIA)* that had occurred some days before, even though it was also publicly presented as the implementation of Law 24059 or Law for Interior Security passed in 1992. The creation of this *Secretaría* could be initially seen as an attempt from the political field to exercise more influence and control over

³³ The creation of this office could be associated with a more general tendency that was promoted as part of the “State reform” which would introduce in the public administration technical teams who would earn high salaries and would be elected by official examination, and whose aim was to promote “the economy, the efficacy and efficiency of public management”. However, in many cases it was mainly political affiliation that prevailed at the moment of carrying out those appointments, with official examinations that failed to be transparent or impartial, and which made it possible that political staff became permanent staff of the public administration (Novaro, 2009, 482). This was not the case with the appointment of the official in charge of this *Dirección Nacional*, as his political orientation was different from the one that prevailed among the governmental alliance. Of course, as he declares in an interview, this did not prevent him from suffering political pressure and influence on his work all throughout this period.

³⁴ This *Dirección Nacional* also started to produce quantitative information on different aspects related to crime and criminal justice. However, such information was not connected to the political initiatives on the subject introduced by the national government in that period and was not effectively used in its development.

the strategies and interventions of the federal police forces –*Policía Federal Argentina (PFA)*, *Gendarmería Nacional Argentina (GNA)* and *Prefectura Naval Argentina (PNA)*. Nevertheless, Retired Brigadier General Andrés Antonietti, a member of the military who had strong connections with the PNA and the GNA, and who had been Chief of the Argentine Armed Forces during the first years of President Menem's administration, was appointed as its first *Secretario* (Decreto 1193/94). This appointment clearly represented the defense of the traditional orientations and interests of the federal police forces and the embracement of a more general conservative political position that reinforced its autonomy (Lorenc, 2003, 59, 62). One of the most evident results of this continuous delegation by political authorities in the police field, was that the expansion of the systematic abuses of the powers to arrest citizens and use of physical force by the *PFA* in the City of Buenos Aires –and also by the Police of the Province of Buenos Aires in the Greater Buenos Aires.³⁵

A similar dynamics was registered in the penitentiary field. The *Secretaría de Política Penitenciaria y Readaptación Social (Secretariat for Penitentiary and Social Readaptation Policy)* was also created in July 1994, within the national *Ministerio de Justicia*, chaired by Andrés Marutian –an ex judicial official who had worked in the Army and the *PFA* (Decreto 1115/194). It could also be considered a measure that sought a greater degree of influence of the political sphere on the strategies and practices of the *Servicio Penitenciario Federal (Federal Penitentiary Service, SPF)*, but the orientation the political and administrative officials in that area had was strongly associated with the ways of thinking and acting that traditionally prevailed in that penal institution, usually presented in a “technical” disguise. This was also revealed at the end of the period under study with the launching of the *Plan Director Penitenciario Nacional (National Penitentiary Director Plan)* adopted by the Executive Power in March, 1995 (Decree 426/95), which included a series of measures to be developed in the 1995-1999 period that were presented as “a deep change in the penitentiary field” but were clearly part of the traditional “correctional model” that had reigned in Argentine prison policy

³⁵ Reports about these abuses were systematically produced from that period by human rights organizations such as the *Centro de Estudios Legales y Sociales* and the *Coordinadora contra la Represión Policial e Institucional* (Chevigny, 1995, 181-202; Pegoraro, 1997, 60; CELS-HRW, 1998; Tiscornia-Oliveira, 1998; Tiscornia, 2000, 2009).

since the last quarter of the 19th century (Sozzo, 2007b). There was an attempt to reform this model through a “pedagogic-socializing methodology” that was presented as a novelty, the launching of a series of new programs –Pre-Freedom, Assisted Freedom, etc. - and a plan for building new federal prisons.³⁶ Nonetheless, within this field it is possible to observe an initiative with an opposite orientation: the creation in 1993 of the *Procuración Penitenciaria Federal*, dependent on the national *Ministerio de Justicia*, a sort of ombudsman office for the external control of conditions of imprisonment in the *SPF* and the protection of the prisoners’ human rights, through visits and inspections, reception of complaints and denounces, reports and suggestions for the Executive Power, and which produced a series of positive –though limited– effects on federal prisons from the moment it was created (Decree 1583/93, www.pppn.gov.ar).

In the field of criminal justice administration, its traditional autonomy was limited to a certain extent. From the beginning of President Menem’s administration, the influence the Executive Power exerted on the Judicial Power increased as part of a clear “politicization” process. In April 1990 President Menem encouraged the replacement of the members of the national Supreme Court of Justice by increasing their number -from five to nine– and by appointing lawyers with little academic and professional prestige, but clear political affinity, as its members. This led to the so-called “automatic majority”, which favored the interests –even when they were illicit– of this governing alliance. This process was repeated at inferior levels of federal and national criminal justice administration –and frequently in provincial courts-, by appointing new judges and prosecutors with the same political affinity, which to a certain extent was possible due to a judicial and procedural reform in 1991 –with which we will deal again later (Sarrabayrouse, 1998, 26-27, 30-31; Binder, 2008, 52-55; Novaro, 2009, 369-371; 441, 481). Now, this “politicization” was clearly associated with assuring immunity for those actors who operated within the economic and institutional reforms with its high levels of corruption (Pegoraro, 1997, 60-61). However, apart from these cases of “crimes of the powerful”, it seemed to affect -though to a lesser degree– the decisions taken in criminal courts as regards “street crime” or “crimes of the weak”, on which they were

³⁶ Eventually, this plan was poorly implemented, with the exception of the building of new penitentiary institutions.

selectively and traditionally focused, by introducing judicial officials with conservative orientations and positions and, less frequently, through the specific interference the Executive Power tried to exert on certain issues.³⁷

During this period there was a significant growth in the number of criminal laws produced and, contrary to what had happened during Alfonsín's government, it is possible to identify some legal instruments which were clearly oriented towards the increase in the severity and extension of the penal system. 27 relevant criminal laws – complementary or reforms of the Penal Code- were passed –an average of 4.5 per year–, many of which implied the criminalization of new behaviors or the increase in punishments for already criminalized behaviors. However, most of them had a marginal impact on the operation of the penal system, of a symbolic rather than substantive nature (Gutierrez, 2010, 59-60).

One of those laws, nevertheless, seemed to produce some immediate practical effects of penal toughening, which was Law 23737 or the so-called Anti-Drugs Law, passed in September 1989, after some years of parliamentary debate over different projects that tried to replace the legislation in effect. Those projects were of diverse orientation and had originally been presented by members of the Parliament belonging to different political parties (Aureano, 1997, Cap. VIII 1.e). Finally, that legal text punished again the possession of illegal drugs for personal use which had been declared unconstitutional by the national Supreme Court of Justice in 1986, clearly choosing to expand the penal system in this aspect, which was coherently combined with a considerable increase of the severity of penalties for other criminal types related to illegal drugs, rising maximum sentences to 15 years' imprisonment (Virgolini, 1989, 729, 735-737; Aureano, 1997, Cap.

³⁷ An example of this was the way in which the President, the Minister of Justice and the Secretary concerned with the drug issues reacted to a sentence that depenalized the possession of drugs for personal use passed in the city of Buenos Aires in 1994, after a legal reform we will discuss later. They made public their discontent with that decision and the Minister even wrote an article in one of the national newspapers with the largest circulation where he described drug consumers as “zombies that cause great harm to public security” and then added that it is “naïve to talk about human rights in the case of these zombies”. The following year, the national Supreme Court of Justice revoked that sentence (Aureano, 1997, Cap. VIII 2.g).

VIII, 1e.).³⁸ This law was created within the context of the transition between both national governments. In fact, the law project was approved by the Chamber of Deputies in February, 1989 – based on another project presented by a radical deputy – and, after the change of government it was turned into a law by the Chamber of Senators. It was supported by both majority political parties in both chambers. President Alfonsín's administration had started to change their attitude towards this issue, especially about the possession of illegal drugs for personal use and that mutation got closer to the most conservative positions expressed by the *PJ*, especially after Menem became a candidate and then President of Argentina (Aureano, 1997, Cap. VIII 1.e). This law marked a significant discontinuity in the treatment of this issue which had been settled via jurisprudence in the criminal justice in the previous moment. And it was complemented by the change of criteria by the National Supreme Court of Justice – after the number of judges had been increased and its members changed – in the Montalvo case in December 1990, dominated by conservative arguments, and which brought about a new interpretation that continued to be supported throughout the period – even though it came up against some opposition (Aureano, 1997, Cap. VIII 2).

A clearer sense of change away from Alfonsín government's general orientation in the penal field can be seen in what had been one of the privileged areas in the previous moment: the reform of the criminal process at national level. In 1991 the National Congress passed the new national Criminal Procedural Code (Law 23984), based on a project written by Ricardo Levene (jr), who had served as a judge at the National Supreme Court of Justice during the previous *Peronist* government –and had been removed by the 1976 coup d'état– and was appointed again for the same position in 1990 when President Menem promoted an increase in the number of judges in that Court. Levene, a jurist strongly committed to the *Peronist* tradition, had been one of the greatest critics of the 1986 project, and a supporter of a conservative interpretation of the “modern” criminal procedural codes in Argentina during the 20th century, which he

³⁸ This law also considers a complex system of “security measures” aimed at the “detoxification and rehabilitation” of those convicted of certain crimes who were defined as “addicts” when they depended physically and psychologically on illegal drugs. The purpose of those measures was to create a rehabilitative dimension and they were presented as forms of “diversion” but from the time they were adopted they were already critically regarded as forms of “widening the net” (Virgolini, 1989, 737-743).

translated in the above mentioned project that would eventually become a law.³⁹ This conservative orientation was crystallized in the maintenance of the “investigative judge” and the generous faculties given to the police forces and in the rejection of some key proposals of the alternative project designed by Maier and his colleagues in 1986, like the jury, the principle of opportunity or the probation (Sarrabayrouse, 1998, 25-26; Langer, 2007, 641; Binder, 2008, 60).

However, during Menem’s first government there were also other initiatives which resumed a similar orientation to the one that prevailed in the previous government. A significant step in this direction, highly relevant from a symbolic point of view, was the inclusion of the international treaties on human rights in the text of the new National Constitution passed by the 1994 Constitutional Assembly (Article 75, 22), giving them constitutional status. That inclusion was going to produce, over time, a series of consequences in judicial decisions and also in the creation of criminal laws.

In fact, one of these initiatives of legal reform was justified as a regulation of a norm of the American Convention on Human Rights (article 7, 5), which acquired constitutional status. It was Law 24390, the so-called “Two-for-one” Law, passed by the National Congress towards the end of 1994, under the pressure exerted by the appalling situations of overcrowding in federal and Buenos Aires province prisons, translated into different protests and riots by prisoners. This law established a maximum period of two years to be remanded in custody in the criminal process, after which it could be exceptionally extended, provided it was well-founded, for one more year, by judicial decision, and then the person had to be released. Every day the person remained in prison after that maximum period was finished was to be counted as two days serving the prison sentence they could eventually receive. In the message that accompanied the law project, the Executive Power emphasized the “more than worrying situation” that 57% of the inmates in Argentine prisons were “prisoners without sentence”, as a

³⁹ Even though some members of the national government, like the Minister of Justice, promoted that the Criminal Procedural Code project designed by Maier in 1986 should be adopted, it was President Menem himself who made the decision to move along with Levene’ project with some minor changes because of its more conservative nature and because of its strong political affinity (Interview to León Arslanian, Red de Archivos Orales de la Argentina Contemporánea)

consequence of the long duration of criminal processes, which was a “serious violation” of the right of freedom and the principle of innocence. It pointed out:

In this way, we are in the presence of an inversion of the basic principles of respect for human dignity in the criminal process, for only with the mere sign – and sometimes with the mere suspicion– the punishment is imposed –in a purely retributive sense or of mere pain infliction– to then establish if the person is guilty (Message No. 2655 from the EP, Senado de la Nacion, 12/29/1993, 5417).

There is no official information to determine what kind of impact this law had on prison population, but it seems reasonable to think that it had a certain reductive effect considering the long duration of remand periods so frequent in that moment (Gutiérrez, 2010, 60).

Another example in the same sense was the reform of the Criminal Code implemented by Law 24316, in the same year, which introduced a sort of “probation”, the “conditional suspension of trial”, in Argentine criminal justice.⁴⁰ It is a measure that suspends the development of the criminal process, in the case of minor offenses, provided that certain conditions are met during a certain period. Since the legal reform was adopted, the implications of this sort of “probation” have been under debate. The prevailing interpretation has been that those who are able to ask for this benefit are those accused who, depending on the circumstances of the case, will receive a sentence of less than 3 years of prison, have not been convicted before, and fulfill a series of subjective and objective requirements that have to be evaluated by the tribunal. The accused will be in supervision in the community for a period from one to three years, depending on the seriousness of the crime, determined by the tribunal that can establish rules of behavior that the accused has to follow. It is essential that during this period the accused effectively repair the damage caused by the offense, do not commit another crime, and follow the established rules of behavior, in order that the criminal action extinguishes. If that is not the case, the criminal process will continue, and the accused will receive a

⁴⁰ In fact, the Criminal Procedural Code project written by Maier in 1986 included a similar proposal (Maier, 1986, 669; Langer, 2007, 640).

punishment.⁴¹ The introduction of this sort of “probation” in the Penal Code was justified by the Message from the Executive Power which accompanied the project, appealing to the rehabilitative ideal: “it attempts to strengthen the judicial function of special prevention with whom has committed a criminal act” –something that was widely echoed among the legislators when they debated it. But it also introduced a “managerial” argument in the official rhetoric, which stressed the fact that this mechanism contributed to the “possibility of clearing some critical points” of the “judicial organization”, referring also to the role of “modern techniques of management control”, showing statistical data about the operation of the criminal justice that revealed its little “productivity”, as measured by the comparison between initiated cases and cases that were solved through sentences. It is also difficult to identify the impact of “probation” on the operation of the penal system, as there is little official information about it. However, it did not seem to have a significant reductive effect on imprisonment, as it was given in cases when the suspended sentence was traditionally used. Still, by avoiding the imposition of a penalty, those benefited with probation were given a sort of “second chance” without being affected by a precedent conviction (Gutiérrez, 2010, 60).

As it is easy to observe, the penal initiatives promoted throughout this period cannot be thought to have one single orientation. In fact, there seemed to be coexisting or alternative penal rationalities at play during this moment. It is possible to identify some more or less clearly “liberal” initiatives –as the constitutionalization of the international treaties on human rights, the “Two-for-One Law” or the creation of the *Procuración Penitenciaria Federal*– and some more or less clearly “conservative” measures –as the Anti-Drugs Law or the new national Criminal Procedural Code. At the same time, some “neoliberal” or “welfarist” features could also be detected in some of these penal initiatives –as in the “managerial” justification of the introduction of probation or the “rehabilitative” justification of the same legal reform. This ambivalence seems to be partly due to the fact that the different initiatives created within the network of the

⁴¹ This penal reform did not create a probation service or office. The decision concerning whether the accused has fulfilled the imposed conditions or not during the established period to declare, if it was the case, the extinction of the criminal process, has been left in the hands of criminal courts, with no material or human resources to carry out supervision work.

penal policy making was in the hands of diverse actors who promoted their own particular orientations which were at least partially diverse –for the French case, in the same sense, see Roche (2007, 473). Different key interviewees have pointed out that the *Dirección Nacional de Política Criminal* played a very important role in the design of penal reforms such as the “Two-for-One Law” or the introduction of probation, through the interaction with the Secretary of Justice in those years, who was unanimously described as a lawyer of “liberal” orientation. In the same sense, prisoners themselves were, to a certain extent, also involved in the creation of the “Two-for-One Law”, through their protests and riots, perhaps in a way they had never been before.⁴² On the other hand, other actors seemed to have significant roles in the production of other initiatives, such as the Anti-Drugs Law or the National Criminal Procedural Code: politicians of conservative orientation belonging to the majority political parties, penal judges and prosecutors from the most traditional sectors.

But this feature was also related to the more general ambivalence shown by Menemism as a political program, worshiping pragmatism and making the most of the ability to adapt to different circumstances and situations, which was an important element in the *Peronist* tradition, just as it had been formed by Perón himself –something Menem used to remind the public about (Novaro, 2009, 396, 439, 468). In general terms, this involved a strategy of developing political initiatives of different nature, using diverse vocabularies to justify them, setting alternative goals, which appealed to different audiences. Pragmatic adaptation and contradictory moves were also features that were effective to maintain this peculiar governmental alliance that, as never before in the Argentine case, joined up the support of broad segments of the popular sectors with high and middle-high classes. Penal ambivalence was therefore part of a more general characteristic of this political program –for different contexts, but in a similar sense see O’Malley (1999, 185-192; 2000, 162-164; 2004, 187-188).

In sum, the mode of producing penal policy during the first government of President Menem remained largely similar to the one developed in the first stage of the transition

⁴² I thank Gabriel Bombini for drawing my attention to the relevance these mobilizations had to the creation of this legal product.

to democracy, in spite of the major economic and political changes it generated. It was elitist –a small group of privileged people far and isolated from the “public”–, centered around the expert’s voice –with the addition, in this second moment, of a weak and incipient bureaucratization–, which was based on the local tradition of legal knowledge focused on “what ought to be”, with the creation of laws as its main instrument, and based on a solid affinity with the governing political alliance. But this mode, unlike the previous moment when it introduced a number of penal initiatives of homogeneously liberal orientation, developed diverse and contradictory penal initiatives –some of them even similar to the ones developed during the first democratic government– which led to a certain penal ambivalence. We will discuss the conditions that made the construction of this mode of producing penal policy possible and the shift in its orientation between these two moments in the transition to democracy in Argentina in the last section of this work. But we will now turn our attention towards another fundamental dimension of penal policy.

3. From the contraction to the expansion of punitiveness.

As Ryan has well stated it: “One thing is to design penal policy and another thing is to implement it” (2003, 26). We will approach this other aspect by analyzing the evolution of “punitiveness” in Argentina throughout this first stage of the transition to democracy. Roger Matthews (2005) has criticized the extensive use of this notion in the recent literature on the sociology of punishment for not being clearly defined. He highlights what, from his point of view, are its normal connotations of excess, related to punishment beyond or above what is necessary or appropriate, and putting forward the logical problems about how to define those levels of necessity or adequacy (Matthews, 2005, 179) –in a similar sense, Pease (1994, 118) and Roche (2007, 539-541). This definition fits in what the literature has recently defined as the “new punitiveness” (Pratt et al., 2005, XII-XIII) and which allows to sustain the existence –by opposition– of “non-punitive societies” (Pratt et al., 2005, XVIII; Nelken, 2005, 218). It has to be admitted that it is a complicated notion to define, but the way in which it is conceptualized can create more difficulty.

It is possible to think of punitiveness in simpler and more useful terms, in a general way, as the level of pain or suffering produced by the penal system (Christie, 1982). In this sense, it is practically a contradiction in its own terms to refer to “non-punitive sanctions” or “non-punitive societies”. Sanctions always imply, from this point of view, a certain amount of pain or suffering and therefore, they are always “punitive”, to a greater or lesser degree. Of course, this way of defining punitiveness also creates great difficulty for its empirical research –as regards quantitative research, see Pease (1994); Kommer (1994, 2004); Tonry-Blumstein-Van Ness (2005); Tonry (2007, 7-13). However, as a starting point it is possible to differentiate two interrelated dimensions (see Snacken, 2010, 274). First, the degree of extension: in principle, a penal system is more “punitive” than another when it applies penalties or other control measures - which are not legally defined as punishments but produce pain or suffering, as prison on remand, for example– to a larger number of individuals. Second, the degree of intensity or severity: a penal system is more “punitive” than another when it applies punishments or control measures that produce a higher level of pain or suffering. Of course, this second dimension is very complex and hard to be fully translated into quantitative indicators. But there are certain clear points that could be considered: a penal system that imposes death penalty is more punitive than one that does not; a penal system that imposes more custodial sanctions than non-custodial sanctions is more punitive than one that does the opposite; a penal system that imposes longer prison sentences is more punitive than one that imposes shorter ones; a penal system that gives few opportunities for transitory release or parole for prisoners is more punitive than one that does the opposite; etc. Integrating both dimensions is an intricate and always relatively unfinished task but our efforts have to be oriented in this direction.

There are few available empirical indicators about the evolution of punitiveness in this first moment of the transition to democracy in Argentina, so the question about the effects of this mode of penal policy making and its orientations becomes difficult to answer.⁴³

⁴³ In general, a serious problem in sociological research on crime and punishment in Argentina –and in Latin America- is the lack or weakness of basic official statistical information (Sozzo, 2008; Dammert-Ruz-Salazar, 2008). In this way, the production of relevant data becomes part of the research process

To start with, we have some data about the evolution of imprisonment in the *Servicio Penitenciario Federal* (SPF), the *Servicio Penitenciario de la Provincia de Santa Fe* (*Penitentiary Service of the province of Santa Fe, SPSF*) and the *Servicio Penitenciario de la Provincia de Buenos Aires* (*Penitentiary Service of the province of Buenos Aires, SPBA*) during this period.⁴⁴ As it has been repeatedly pointed out, the volume of penitentiary population or the imprisonment rate every 100000 inhabitants are not the only or best indicators to measure the levels of punitiveness (Pease, 1994, 117; Kommer, 2004, 9; Nelken, 2005, 220-221; Tonry, 2007, 5, 7-9; Brodeur, 2007, 61-63), but are yet some of the few that are available for these years in this context, and it at least allows us to approach the crucial phenomenon of changes in the extension of the penal system (Becket-Sasson, 2001, 4; Cavadino-Dignam, 2006, 4; Lacey, 2008, 43).

Secondly, we have some data about the evolution of the volume of sentences at national and provincial level. It is a very weak indicator of punitiveness, but I include it because there are no others available to complement the picture that emerges from the previous ones, as an approximation to the phenomenon of the extension of the penal system.⁴⁵

itself. In this case, the statistical data about prison population in the Province of Santa Fe were built using daily reports –corresponding to the last day of every year- from the penitentiary institutions that are collected in the archive of the *Dirección General del Servicio Penitenciario* (*General Directorate of the Penitentiary Service*). The situation of official statistics in Argentina has improved since the late 1990s, with the role of the *Dirección Nacional de Política Criminal*, but it is still far from being ideal, especially as regards the criminal justice. The further we get from that moment towards the past, the more complex and hard the reconstruction of statistical data becomes.

⁴⁴ As referred in note 6, in Argentina there is the *SPF* which coexists with 23 provincial penitentiary services. As for the population incarcerated in the *SPF*, it is not possible to build rates every 100,000 inhabitants. In federal prisons there are those who have been incarcerated by the criminal justice of the City of Buenos Aires as a consequence of “common” crimes as well as those who have been imprisoned by the federal criminal justice as a consequence of “federal” crimes committed anywhere in the country. Therefore, we will always refer to the volume of people incarcerated by December 31 every year in this jurisdiction. As regards the other two penitentiary services (*SPSF* and *SPBA*), it is possible to draw rates of incarceration every 100000 inhabitants and we will refer to both indicators in these cases. In 1983, the only year of this period in which we have data about the whole country, the incarcerated people in these three jurisdictions represented 51% of the national penitentiary population.

⁴⁵ Unfortunately, these figures also include suspended sentences. The data available about this period in the *Registro Nacional de Reincidencia* (*National Registry of Recidivism*) does not allow us to make this useful differentiation, identify different types of sentences or diverse levels of severity of the imposed prison sentences for the whole period. We are working to produce that information in the near future. In 1982, 44% of the sentences imposed in the country were suspended sentences and in 1996, that percentage was 50%. According to the system of punishments provided by the Penal Code of 1921, which has not been changed throughout this period, the great majority of available and imposed penalties imply imprisonment – in 1982, 25% of them were of another kind (fine and disqualification) and in 1996 they only represented 15%.

Let us analyze separately the two moments we have isolated in this study in relation to the first two governmental periods, between 1983 and 1989, and 1989 and 1995.

I. As regards incarceration, the first democratic government started with a significant initial decrease in the prison population in the *SPF*, *SPSF* and *SPBA* as we can see in Figure 5 in the Annex. Between 1983 and 1984 there was a reduction in the number of prisoners of 51%, 42% and 27%, respectively. From that year on, throughout President Alfonsín's government, there was a steady growth of the volume of imprisonment in all these jurisdictions. At federal level, such increase occurred at an average annual rate of 11% reaching the number of 4108 prisoners by the end of the period, that is, 74% more than in 1984, even when they represented 15% less than at the end of the military dictatorship. In the Province of Santa Fe, the growth occurred at an average annual rate of 12% -with an extraordinary increase of 23% between 1984 and 1985– reaching the number of 1129 prisoners by the end of the period, that is, 76% more than they were by the end of 1984 and almost the same number as they were by the end of the military dictatorship. In the Province of Buenos Aires, the annual growth rate was lower –8.4% - with a significant increase of 17.5% in 1988, reaching the number of 8211 by the end of the period, which implied an increase of 49% in relation to 1984 and 8% more than at the end of the military dictatorship.

If we analyze the evolution of the incarceration rate in these last two jurisdictions –see Figure 6 in the Annex– the panorama is a bit different. In the Province of Santa Fe there was a rate of 44 every 100,000 inhabitants in 1983 that changed to 41 every 100,000 inhabitants in 1989 –that implied a 5% reduction, but 66% more than in 1984 when it reached a minimum of 24 every 100,000 inhabitants. In the Province of Buenos Aires the incarceration rate was of 65 every 100,000 inhabitants in 1983, changing to 66 in 1989 –43% more than in 1985 when it reached a minimum of 47 every 100,000 inhabitants.

As regards sentencing –see Figure 7 in the Appendix-, at national level, there was a constant reduction during this period –with the exception of the year 1987-, with the result that the number of convictions in 1989 in the whole country were 21% less than at

the end of the military dictatorship. This evolution could also be seen in the jurisdictions about which we have incarceration data for this period. If we compare the first and last years of President's Alfonsín government in the city of Buenos Aires –whose accused or convicted people were and are imprisoned at the *SPF*– the decrease was of 24% and in the Provinces of Buenos Aires and Santa Fe the reduction was of 23%.

In general terms, at national level, and as regards these two indicators, compared to the situation towards the end of the military dictatorship, it seems that during the first democratic government there was not a significant tendency towards the extension of the penal system. In the case of sentences, this is clear both at national level and in all the jurisdictions we explore specifically. Nevertheless, as regards imprisonment, the great initial drop was followed by a turn that brought things back to the level at the beginning of the transition to democracy –more clearly in the *SPSF* than in the *SPF*- or even, in the case of *SPBA*, surmounted it.

II. Now, how did these indicators of punitiveness evolve during the following governmental period?

As it can be seen in Figure 5 in the Appendix, federal imprisonment experienced a steady growth, reaching a significant increase of 52% between 1989 and 1995, with an annual rate of growth of 7%. This meant that in that last year federal prisoners were 28% more than at the end of the military dictatorship. In the case of the *SPSF*, there is a far more moderate growth, of 15%, with an annual rate of growth of 2,5% -and some years of decrease (1992 and 1993)- reaching at the end of the series a volume 17% higher than at the beginning of democracy. Finally, in the Province of Buenos Aires, there is a fairly bigger general growth of 22%, with an annual average of 3.2% -and some years of slight decrease (1992 and 1993)- reaching at the end of the series a volume 32% higher than at the end of the military dictatorship.

As regards these last two jurisdictions –and as it can be seen in Figure 6 in the Appendix– it is possible to analyze the evolution of imprisonment in terms of rates every 100,000 inhabitants, which shows a more moderate growth. In Santa Fe it goes

from 41 in 1989 to 44 in 1995 –almost the same level as at the end of the military dictatorship. In Buenos Aires, it goes from 66 in 1989 to 75 in 1995 –a 14% increase in comparison with the rate at the return of democracy. In these two jurisdictions, it is important to make clear that these volumes of imprisonment, in absolute and relative terms, do not include detained people –prosecuted or even convicted– in police units, where they have been a significant number, particularly from this period onwards. This exclusion could hide greater levels of imprisonment and larger degrees of growth during these years, but we do not have official information about it during this period. According to the *Centro de Estudios Legales y Sociales*, in 1994 there were 2387 detained people (prosecuted or convicted) in police units of the province of Buenos Aires, whereas in penitentiary institutions there were 9836. In 1995 these numbers grew to 2576 and 10048, respectively (CELS, 2008, 150). The growth of detained people between these two years in police units is bigger than the one recorded in penitentiary institutions –8% and 2%, respectively. This would support the assumption that if we were able to include detained people in police units, the level of growth of imprisonment in this jurisdiction would be bigger. The rate of people deprived of liberty in the province of Buenos Aires in 1994 and 1995, including these two populations would be significantly higher than the one we built only taking into account the data on penitentiary institutions: 92 and 94 every 100000 inhabitants, respectively.⁴⁶

On the other hand, during this period –as it is shown in Figure 7 in the Appendix- it is possible to observe a significant growth, at national level, in the volume of sentences, especially in the first two years and it remains at that level throughout the period, going back to the quantity shown at the beginning of the transition to democracy. Between 1989 and 1995 there was a general growth of 23%. As regards those jurisdictions with data about imprisonment, it is possible to observe the same trend with more fluctuations: in the City of Buenos Aires there was a growth of 40% -even 7% more than at the end of the military dictatorship-; in the Province of Santa Fe, there was an increase of 43% -even 10% more than at the end of the military dictatorship-; and in the Province of Buenos Aires there was a growth of 26%

⁴⁶ In general, as regards these provinces, we still face this problem in the present.

Contrary to what happened in the first stage of transition to democracy, during the first government of President Menem, according to the available indicators, there was a real extension of the penal system. This was evident in the significant increase of sentences - especially in jurisdictions like the City of Buenos Aires and the Province of Santa Fe. And it could also be seen in the noteworthy growth in federal prison population and, in a more moderate way, in the prison populations of Provinces of Santa Fe and Buenos Aires.

4. Elitist mode and penal policy orientations: conditions and effects.

In this section we will first recapitulate what we have learnt so far about the characteristics of the mode of penal policy making and its orientations during the first stage of the transition to democracy in Argentina, to then venture an exploratory analysis of what could have been its conditions of possibility. In the second place, we will resume our description in the previous section about the evolution of punitiveness during this period, and we will problematize its connection with the observed characteristics of penal policy.

I. As we have seen, during the first stage of the transition to democracy in Argentina an “elitist” mode of penal policy making was structured. This mode put the expert’s voice onto the center stage. It was an expert about “what ought to be”, formed in the local legal tradition, within debates on philosophical and legal principles and rules. These experts, however, were able to introduce asystematic observations about “what is happening” with crime and criminal justice, based on their professional experience and trajectory in the penal system, with some limited exceptions in which the social science knowledge was incorporated. This centrality of this type of expert’s voice emerged within a network of formal and informal contacts involving a relatively limited number of privileged actors: politicians, advisors, academics, judges and prosecutors. In this network, the visions of the “public” about these problems were marginalized. Penal policy making had to be isolated and protected from them and it was even claimed that, as part of the process of the transition to democracy, they had to be shaped or formed in order to avoid the diffuse cultural legacy of authoritarianism in the field of crime and

crime control. In both senses, this mode of penal policy making might be well described, as we said before, as “elitist”.

Having certain affinity with the political program of the governmental alliance was a unifying element in that network of penal policy making and, consequently, the first change of national government implied a general replacement of its members, introducing certain amount of instability. During the second democratic government there was an incipient and weak attempt at building a bureaucratic structure, professionalized and specialized in crime control policy, which became a new actor, though subordinated to the mediations of professional politicians. However, this minor innovation did not substantially alter the general mode of penal policy making, which was closed and isolated from any interference by other actors who were not part of the elites involved.

The products of this mode revolved mainly around the creation of criminal laws –to a large extent, as a consequence of the dominant knowledge within this network–, displacing almost completely the problem of its application and the subsequent design and implementation of strategies and interventions about it. In this sense, it was a mode that reproduced and amplified the traditional gap between “criminal law in books” and “criminal law in action”. There was a strong delegation from this network to the high-rank officials in the penal institutions –especially in the institutions that depended on the Executive Power, as penitentiary and police organizations, but also, in a different way and based on other grounds, in criminal courts– who reproduced, with a high dose of autonomy, logics based on traditional ways of thinking and acting, largely built around the authoritarian inheritance.

What were the conditions of possibility of this elitist way of penal policy making within a political and cultural context characterized by the promise of democratization? Some authors, writing about a very peculiar setting of a consolidated liberal democracy as it is the case of England and Wales, state that in that scene it has been founded on a more general “deference” that would often make citizens recognize the authority of the members of the “establishment”, their values and views, accepting that governmental

issues in general, and especially those about penal policy, are their “property”, as part and parcel of their general trust in institutions and traditions (Ryan, 1999, 5-6; 2003, 36-39; 2005, 140; Loader, 2006, 581; Pratt, 2007, 37-49). In the Argentine recent situation it does not seem possible to hypothesize on the existence of such a condition. The “plebeian” cultural impact of Peronism as a social and political movement in Argentina from the 1940s onwards -with its central recuperation of the experience and visions of the “*descamisados*”, the “*cabecitas negras*”, the oppressed and marginalized social groups- helped to dismantle different traditional forms of deference in social relations (Svampa, 2005, 163-167; in particular, about this effect on penal culture, see Caimari, 2002). The traumatic experiences of authoritarian political regimes during half-a-century created, in turn, a general mistrust and suspicion of government actors and actions, in vast sectors of both middle and working classes. The return of democracy might have removed part of this mistrust as regards authorities elected by the people but, in any case, it was temporary and it depended on the success of their policies and interventions about problems considered socially relevant.

I think the main conditions of possibility of this elitist mode within this national context should not be sought in “bottom-up” cultural processes, but rather in certain “top-down” political dynamics. “Crimes of the weak” or “street crime” has not been at the center of the political and public agenda in the first stage of the transition to democracy, that was dominated by other major issues: from the consolidation of democracy or the military threat to the persistent inflation and the depretiation of salaries, from the growth of unemployment and labor precariousness to corruption, from neoliberal economic reforms to the reform of the National Constitution. These problems concentrated the visions and interventions not only of professional politicians and political parties, but also of the media and social organizations and movements. As we have seen, this occurred in spite of the important growth of officially recorded criminality –as usual, “street crime” or “crimes of the weak”–, especially towards the end of both President Alfonsín and President Menem national governments. In any case, this seems to challenge the common-sense assumption –though many times supported in the criminological literature– that the “politicization” of this issue in contemporary democracies is the simple and immediate reflection of a growth in

officially recorded criminality –in the same sense, see Scheingold (1995, 162); Beckett (1997, 3-6, 16-23); Beckett-Sasson (2001, 119); Roberts et al. , 2003 (12-13); Pratt (2007, 37).

The political programs of the different national governments during this period did not pose it as one of the main problems of social life. Professional politicians did not choose to place it there because they did not identify it as a key source for the production of legitimacy, except from the rise of Menemism, but even then, it was only limited to certain members of this governmental alliance. This was mostly due to the prevalence of “great narratives” in the political arena that promoted the construction of strong antagonisms throughout it around general social and political transformations, linked to the different interpretations of the promises of democratization. In this sense, it does not seem to be accidental that the development of the vernacular form of neoliberalism embodied by Menemism, with its appeals to a “*pensée unique*” and its sense of inevitability, revealed the first symptoms in an opposite direction.

But neither did other actors, such as the media –despite the changes in the way they dealt with this issue as we have pointed out–, social organizations or lobbies –as the ones that emerged after this period– and finally, citizens, encourage that displacement to the center of the political and public agenda. Instead, some of those actors seem to have been more inclined to highlight different forms of “crimes of the powerful” –crimes of the State during the military dictatorship, corruption, police violence, violent crimes or crimes related to illegal drugs connected to professional politicians, etc.– in general terms, with limited effects on penal policy and practices.

As a consequence, “crimes of the weak” or “street crime” were not transferred to the political and electoral competition during this period. Hence, as we have pointed out, the repeated cooperation and agreement between actors from both majority political parties on the construction of diverse penal initiatives. The absence of this kind of “politicization” facilitated the development of a mode of penal policy making that moved the decision-taking processes “backstage”, which restricted them to a limited network of

privileged actors, and protected and isolated them from the interference of the “public”.

At the same time, some of the key characteristics of this elitist mode of penal policy making, as the central position of jurists as experts about crime and crime control, the concentration of all the efforts in the creation of criminal laws displacing almost completely the problem of its application –as a consequence of the type of knowledge involved- and the isolation from the public, were long-lasting features of penal policy making in Argentina, which goes back to the emergence of modern penal institutions in the 19th century.⁴⁷ These features were perfectly appropriate in the context of dictatorial governments, in which jurists specialized in criminal law directly collaborated in the production of penal initiatives in dialogue with military or civil officials in charge of positions in the Executive Power, in secret and reduced spaces completely far away from citizen involvement and public discussion.⁴⁸ The transition to democracy did not alter these features significantly during this period. They were easily adapted to the characteristics of the democratic regime, modifying the type of state authorities that participated in this limited network –professional politicians that were elected members of the Executive and Legislative Powers or appointed officials of the public administration (ministers, secretaries, directors, etc). In that way, at least some of the features of this mode of penal policy making could be also considered as an inheritance of the authoritarian past.

II. In this first stage of the transition to democracy, the change of government did not imply a substantial difference in the mode of penal policy making, but it did generate a shift in its orientation.

During President Alfonsín’s government, this mode homogeneously developed measures of “liberal” orientation, mostly aimed at setting limits for the deployment of

⁴⁷ I would like to thank Maximo Langer for having pointed me out the need to emphasize the continuity of this long-term element in the penal policy making.

⁴⁸ This connection has to be researched more deeply in the Argentine context, at least during the experience of the last two military dictatorships (1966-1973 and 1976-1983). Some interesting contributions in this direction could be seen in Bergalli (1982; 1983) and Garcia Mendez (1983, 1985, 1987).

the power to punish, trying to block any excess or abuse of penal authorities, which were characteristic of the authoritarian past. One of the conditions of possibility this liberal orientation had was the content of the political program carried out by this first democratic government in more general terms, which was ambitiously aimed at reversing the authoritarian legacy in political and social life. Hence the importance the issues of the rule of law and human rights had in this governmental alliance discourse, through different areas of public policy.

Nevertheless, this type of discourse also found an echo in relevant sectors of the *Partido Justicialista*, the principal political opposition in those years. In this sense, that liberal orientation was also based on another basic condition: the political and cultural weight of the recent experience of massive crimes of the State during the last military dictatorship that dominated the first democratic government, spreading over wide sectors of the public, beyond those who participated in or supported this governmental alliance, and whose memory was kept alive by the constant debate about the prosecution, trial and punishment of those responsible for those crimes. In this way, that experience and memory worked, as Savelsberg has identified it –for the German case and in relation to Nazism– as a “historical contingency” (Savelsberg, 2002, 698; 2004, 374, 389) that had a significant impact on the nature of the penal measures adopted. In this setting it was difficult to be committed to an increase of punitiveness in the political field without evoking the images of the multiple and recente excesses of “State terrorism”.

However, both conditions, as we have seen, did not hinder the perpetuation of authoritarian penal practices, distant from political and legal declamations, which were reproduced in the traditional ways of thinking and acting of the penal institutions, and whose persistence was paradoxically possible because of the levels of delegation and autonomy allowed by this mode of penal policy making, almost exclusively focused on the creation of criminal laws.⁴⁹

⁴⁹ In the case of the first stage in the Spanish transition, similar elements have been considered relevant to understand the development of penal policy: the “shadow of the dictatorship as a dominant cultural

During President Menem's administration, the orientation of penal policy became ambivalent, as penal initiatives of diverse orientation coexisted. On the one hand, there emerged a new tendency explicitly oriented towards a greater penal extension and harshness –even when many of these measures were only symbolic. The Anti-drugs Law of 1989 was a clear example of this, as it was the first legal product to break with what had been a constant until then. It was supported by important sectors from the two majority political parties, and had a significant practical impact. However, it is also important to take into account the “therapeutical” dimension of this legal product, which made it look, at least in the eyes of certain actors, less unequivocally oriented towards penal toughening. As we have seen, that measure in particular was taken under the external pressures from the US Government at a regional level –which until then had been withstood by President Alfonsín's government– but it also channeled some conservative views –on the relationship between crime and illegal drugs– which were present in both majority political parties in this national context. Those conservative views became more important with the rise of Menemism as a political program, as it gave them a prominent role and even promoted them actively in the public sphere. Nevertheless, this tendency coexisted with some penal initiatives of the opposite orientation, which seemed to be still part of the prevailing “liberal” logic of the previous moment, such as the so-called “Two-for-One Law” or the introduction of “probation” – though in both initiatives it is possible to find managerialist motivations connected with a “neoliberal” orientation. As we have seen, one of the conditions of this penal ambivalence was the plurality of actors involved in the different penal initiatives. But also, and above all, the more general plasticity of Menemism as a political program, which –as we have observed– took full advantage of pragmatism and the ability to adapt to different circumstances and situations, an important element in the Peronist tradition itself, and which facilitated the sustainability of a complex governmental alliance where highly diverse sectors coexisted.

It seemed that the barrier against the creation of penal measures that explicitly sought to increase punitiveness, born out of the political and cultural weight of the experience

theme” and the initial concern of political parties for “restoring civil liberties and fundamental rights” (Medina-Ariza, 2006, 186).

and memory of “State terrorism” during the last military dictatorship, continued to exist to a certain extent during this second democratic government. But the decisions on that particular subject taken by President Menem, who completed the reversion of the modest achievements that had been made about the prosecution and punishment of those responsible for the “crimes of the State”, in the name of a supposed “national reconciliation”, which in fact was a “policy of oblivion”, certainly contributed to break this barrier. In this way, at that moment of the transition to democracy it became possible to use a political and public language that was oriented towards increasing the extension and severity of the penal system as regards certain kinds of crime, which would become highly significant considering the subsequent development of penal policy in Argentina (Pegoraro, 1997, 2000; Sozzo, 2007b; Bombini, 2008, Gutierrez, 2010; Rangugni, 2011).

III. According to the indicators available, as we have observed, the evolution of punitiveness during this first stage of the transition to democracy in Argentina shows an initial contraction –which is easily observed in the reduction of volumes and rates of incarceration but also in the quantity of sentences– followed by an expansion that took those indicators in 1995 beyond the levels recorded at the end of the military dictatorship.

This evolution is a complex and multidimensional phenomenon where different factors and processes outside and inside the penal field take part -as regards only the volume of incarceration, see Snacken et. al (1995); Caplow y Simon (1999); Pavarini (2004; 2006, 135-154); Tonry (2004, 21-59); more in general, see Tonry (2007, 13-16). We do not intend here to give a full account of this phenomenon during this period in the Argentine case⁵⁰, but we would rather suggest that the mode of penal policy making and the shifts in its orientation we have explored in the present work –and the actual

⁵⁰ For which it would be essential to have, among other things, more detailed empirical data about the phenomenon: numbers of annual prison admissions, number of annual prison releases, number of custodial and non-custodial sentences each year, duration of prison sentences imposed each year, types of crimes committed by those who were sentenced each year, quantities of prisons on remand imposed each year, etc. As we have said before, we are currently embarked on the difficult job of collecting a greater amount of data and we therefore expect to continue this exploration in the near future, although some important information is already revealed as impossible to recover.

measures taken—, have been, to some extent, one of the factors of such evolution – in the same sense, for other contexts, see Snacken et al. (1995, 32-37) and Brodeur (2007, 63-64).

It is difficult to claim that the evolution of punitiveness in Argentina during this period was associated with the mode of penal policy making we have studied in this essay, because it remained stable throughout the first stage of the transition to democracy, although there was an initial contraction and subsequent extension of the penal system.⁵¹ However, some characteristics of that mode might be considered significant, especially to understand the expansive movement, as we will now see. What did seem to have had a more evident effect on the evolution of punitiveness were the changeable orientations penal policy had throughout this period and their translation into certain concrete penal measures.

The “liberal” orientation of penal policy that prevailed during President Alfonsín’s government played a key role in the initial contraction of punitiveness. Law 23070, which worked as a sort of quasi-amnesty, was a key factor in the abrupt decrease of penitentiary population recorded in 1984. It seems more difficult to associate the decrease in the level of sentences that became more significant halfway through this governmental period with some of the legal reforms actually adopted. The partial replacement of criminal justice staff encouraged by the first democratic government –as we have already pointed out– might have had an impact on the direction taken by judicial decisions, as it clearly happened in the decriminalization of the possession of illegal drugs for personal use. In fact, the volumes of criminality officially recorded by police institutions became significantly bigger in those years, so there could have been more cases available for the criminal justice –we do not know it with certainty as there is

⁵¹ In some cotemporary sociological and criminological literature produced in central countries about penal transformations it seems to be assumed, in an implicit rather than explicit way, that an “elitist” mode of penal policy making, as opposed to a “populist” mode, would be associated with a certain dynamics of penal moderation. Regardless of the quantitative leap in terms of the increase in penal extension and severity represented by the emergence of “penal populism” –for our context, see Sozzo (2007b), Bombini (2008) and Gutierrez (2010)-, that assumption does not seem to be appropriate to the Argentinean case.

no official information available about the number of criminal cases started in those years. This would justify even more the potential influence of the judicial officers' orientations to produce relatively small numbers of sentences.⁵²

The subsequent expansion of the level of incarceration, which started almost immediately in the mid-1980s, is not initially associated with a change of orientation in penal initiatives. However, it is a recurrent phenomenon in other contexts with measures of this kind, which even though they reduce prison population, they do not change the essential processes that generate it (Snacken et al., 1995, 32; Kensey-Tournier, 2001, 146; Roche, 2007, 502-503; Levy, 2007). It could be affirmed that the initiative chosen to create an impact on the volume of incarceration implied this ulterior result, as the rest of the penal measures taken in those years, even when they could have a tendency to moderate criminal law “in books”, had a very limited practical impact – mainly focused on suspended sentences and recidivism–, which did not prevent a fast recovery of the prison population. In addition to this, as we previously said, the mode of penal policy making itself, focused on the creation of criminal laws, delegating its application to the strategies and interventions autonomously designed by penal institutions could have played a major role in this expansion, considering the limited scopes of the legal reforms produced, as it allowed the persistence of traditional modes of thinking and acting in everyday penal practices. For example, as regards prison on remand, in 1983, 41% of federal prisoners were prosecuted and that percentage grew to 60% in 1989; whereas in the Province of Santa Fe, that proportion was of 43% in 1983 and of 45% in 1989. As we can see, during those years the traditional practice of the extensive use of prison on remand during criminal proceedings remained stable and even seems to have grown at federal level.

The change of orientation of penal policy from the beginning of President Menem's government, with its more ambivalent pattern, contributed to the increase in

⁵² It would be also important to take into consideration the general warning Nelken has given about the Italian case: usually, “leniency” is not so much due to a conscious strategy devised by penal actors as it is to inefficacy, delay and lack of resources (Nelken, 2005, 221). Downes (2007, 100) has highlighted the importance of the “judicial culture” to explain why the levels of punitiveness in the Netherlands remained low in the period between 1950 and 1980.

punitiveness, as it allowed a number of penal initiatives that were explicitly oriented in this sense, some of which actually had some practical impact. An example of them was the Anti-drugs Law of 1989. With the official information available we cannot determine exactly its impact, but it can be deemed significant. The first year it came into force, in 1990, 418 prison sentences were passed in the country as regards crimes related to illegal drugs –unfortunately, from the available information we cannot distinguish the kind of sentence imposed. The following year that number grew by 21%, to 508 and in 1992, by 11%, to 565. In 1993 it remained stable, but in 1994 it grew by 49%, to 837 and in 1995 by 64%, to 1373.⁵³ In those years there was also a significant increase in the volume of incarceration in the Federal Penitentiary Service, the privileged penitentiary space where those who commit crimes related to illegal drugs were and are imprisoned - even when due to agreements reached with different provinces there also were and are prisoners for this kind of offense in provincial penitentiary services. In general terms, the greater growth in the level of federal incarceration throughout this period, in comparison with the provincial jurisdictions about which we have official information, could be associated with this legal change –unfortunately, we do not have data about the type of crimes for which inmates were incarcerated during those years that would help to determine its impact more precisely.

Besides, the replacement of members of the judiciary produced by the “politicization” encouraged by Menemism, with a prevalence of new judicial officials who had conservative views on criminal issues –which, as we have already seen, became evident, for example, with the jurisprudential change regarding the possession of illegal drugs for personal use– could have been another element that made a significant contribution to the increase observed in the number of sentences throughout this period.

On the other hand, the “liberal” legal products at that time, such as the “Two-for-One Law” or the introduction of probation, passed both in 1994, might have had a limited practical impact, but they were, however, unable to reverse the tendency towards an

⁵³ It is also true that throughout those years there was a constant growth in the number of allegedly criminal acts in relation to illegal drugs recorded by the police and probably this produced some impact in the caseload of the criminal justice.

increase of punitiveness. In this sense, since 1990 there had been annual increases in the number of sentences of effective enforcement in the country: of 12% in 1991, 6% in 1992 and 2% in 1993. This growth also occurred in 1994, though to a lesser degree – 1.5%– but it stopped in 1995, when there was a decline of 3%. This could be associated with the introduction of the probation, because the volume of suspended sentences continued to fluctuate as in the previous years. However, of course, other factors could have intervened in that evolution. On the other hand, the volume of incarceration grew in both years -1994 and 1995- although with dissimilar degrees in the different jurisdictions: 2.4% and 14% in the *SPF*, 3.6% and 2.1% in the *SPBA* and 7.7% and 6.1% in the *SPSF*. And the number of prisoners on remand, which the first initiative above mentioned explicitly tried to reduce, remained stable in those two years: in the *SPF*, 55% and 54%, and in the *SPSF*, 51% and 49%. It can be hypothesized that, at best, these penal measures contributed to limit the level of extension and severity of the penal system.

5. The force of politics

The relations we have established in an exploratory way in the previous section as conditions of possibility of the mode of penal policy making and its orientations in the first stage of the transition to democracy in Argentina, are probabilistic and they do not hinder the interaction with other elements or processes (Savelsberg, 2004, 378). We have taken the same direction when establishing connections between those aspects of penal policy and the evolution of punitiveness during this period. This is an initial exploration that needs further development in order to throw light on other facets and dimensions.

In the literature of the sociology of punishment of recent years, there have appeared some narratives that, from different perspectives, have been highlighting the dependence of penal policy transformations –including punitiveness– on some structural mutations in social life. These mutations, in turn, are understood in diverse ways in the different readings but in some cases they are given the status of both an epochal and global change. However, these relations are often established in a way that does not provide a full answer to “how” those diverse elements or processes are

effectively connected (O`Malley, 2004a, 185; Matthews, 2005, 183; Beckett-Godoy, 2008, 155-156).

The conditions of possibility presented here of this mode and orientations of penal policy and, therefore, partially and indirectly, of the evolution of punitiveness in Argentina during this period, are essentially of a “political” nature, associated with the results –always to some extent contingent and contestable (Scheingold, 1998, 887)– of the struggles and conflicts among social and political actors in those precise times and places. This does not mean that certain dimensions beyond those struggles and conflicts, which restrict and have an impact on their development, did not have a tangible and lasting influence on the elections and actions that took place within that sphere. But it implies emphasizing their central role, which in some cases is lost in the contemporary sociological and criminological debate about penal changes that often trivializes the role of politics (O` Malley, 2000, 162, 164; 2004a, 185, 188; Brown, 2005, 42).

It is important to remember that a large number of interesting recent contributions to the sociology of punishment have recognized the weight of “politics” in the production of contemporary penal transformations (Savelsberg, 1994, 912; 1999, 50; 2002, 692; Beckett, 1997, 3-13, 2001, 912-914; Scheingold, 1998, 875-879; O`Malley, 1999; 2004a; Sasson, 2000, 249; Becket-Sasson, 2001, 47-74; Garland, 2001, 201-202; Sparks, 2003a, 32; 2003b, 149; Feeley, 2003, 117; Simon-Feeley, 2003, 77, 104; Hudson, 2004, 52; Penna-Yar, 2004, 546; Zimring-Johnson, 2006, 267-269; Pavarini, 2006, 230-235; Medina-Ariza, 2006, 198; Lacey, 2008, 50-51; Snacken, 2010, 275). Not all these contributions understood “politics” in the same way. Some of them focused on “institutional” elements –the diverse electoral systems, the constitutional structure, the existence or non-existence of the popular election of judicial officials, etc– which we have not highlighted here but that might be significant to understand certain characteristics of penal policy in specific contexts and especially in comparative studies. We have emphasized the role of the struggles and conflicts between political and social actors that promoted different governmental rationalities and programs and the choices

and actions taken within this framework. Of course, there is a risk, as David Garland warns us about:

...it is possible to overestimate the scope for political action and to overstate the degree of choice that is realistically available to governmental and non governmental actors...such choices are always conditioned by institutional structures, social forces and cultural values. Political actors operate within a structured field of forces, the logic of which they are usually obliged to obey (Garland, 2004, 181).⁵⁴

But beyond recognizing their limits and constraints, a more “substantively political” account of penal changes (O’ Malley, 1999, 189; Sparks, 2001, 195), imply as Sparks and Loader put it: “...to insist upon a method that sees political combat as pivotal in determining the character of crime control under late modern conditions, rather than epiphenomenal to the master patterns of structural change” (Sparks-Loader, 2004, 16). The exact delimitation of the force of politics must be, in any case, something to be deeply explored in certain historical and cultural contexts (Melossi, 2000; 2001; Melossi-Sparks-Sozzo, 2011; Nelken, 2011). I believe that exploration certainly is a condition for the resistance and contestation against some contemporary penal developments that amplify the levels of suffering and pain produced by penal systems (O’ Malley, 2000, 162; Brown, 2005, 36). This essay embodied a first attempt in this direction, for the Argentinean case and during the first stage of the transition to democracy.

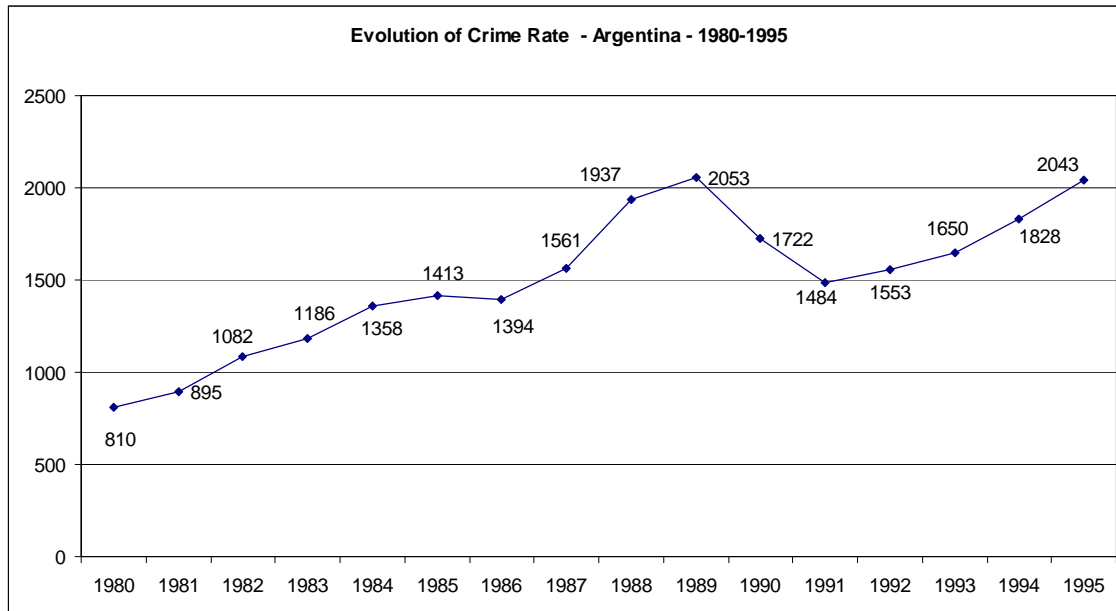
I expect this work could be useful as an initial contribution to a line of comparative research about transition to democracy and penal policy in Latin American contexts, but also in other cultural scenarios of recent similar political changes. Some of the themes this exploration of the Argentinean case highlight could be an initial inspiration for some questions this type of research could address: is it possible to see the emergence of an “elitist” mode of penal policy making in all the recent processes of democratization?; what were the main conditions of possibility of this kind of mode in each context?; did

⁵⁴ Or as Jock Young put it in a more classical and general fashion: “We exist, as it is said, in a world not of our making; we make our history not just as we please, but under circumstances not chosen by ourselves, but encountered and transmitted from the past” (2004, 554).

experts play a crucial role in the design of penal initiatives in all cases?, did they always come from the academic legal field and use a knowledge about what “ought to be,” disconnected from social science research about what is happening with crime and crime control?; has this elitist mode always focused itself on the creation of criminal laws, marginalizing its application and giving large amounts of autonomy to penal institutions?; have the initial penal policy orientations promoted in the first democratic governments always been towards penal moderation?; if this is the case, what were its key conditions of possibility in each context?; did this initial orientation change afterwards and when, how and why?; what happened with the evolution of punitiveness in these diverse contexts of transition to democracy? As it could be easily perceived, this could be a whole area of studies that present a series of new challenges for the sociology of punishment –beyond the central countries- in our present.

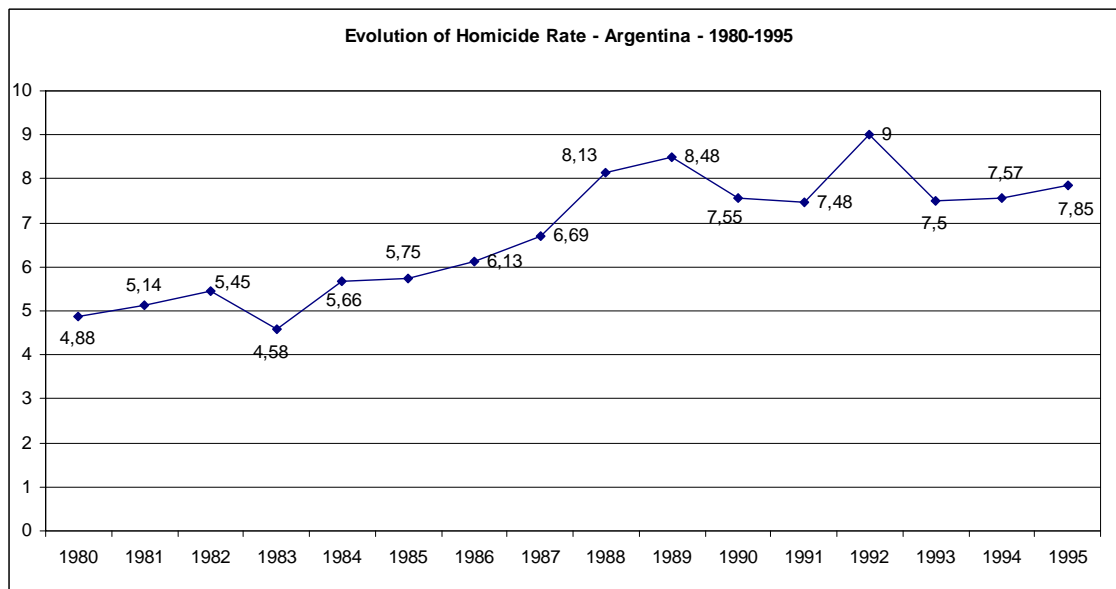
APPENDIX

Figure 1



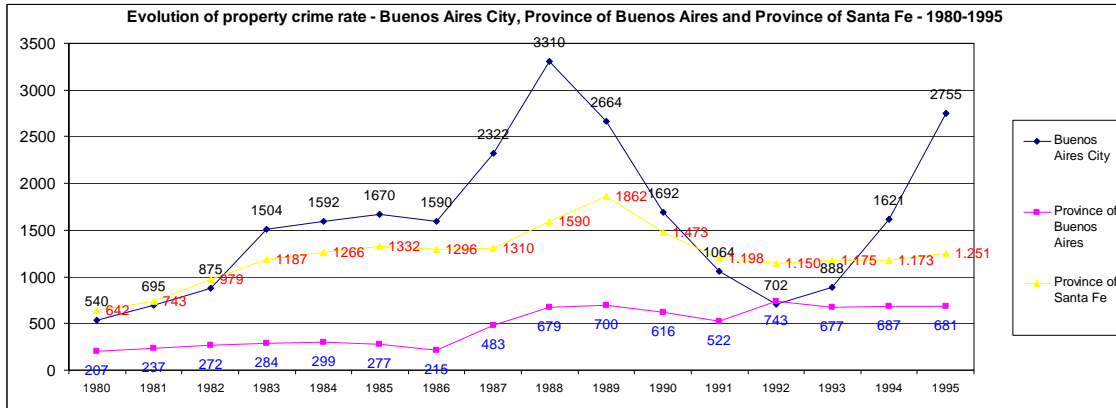
Source: DNPC, Ministerio de Justicia y Derechos Humanos de la Nación

Figure 2



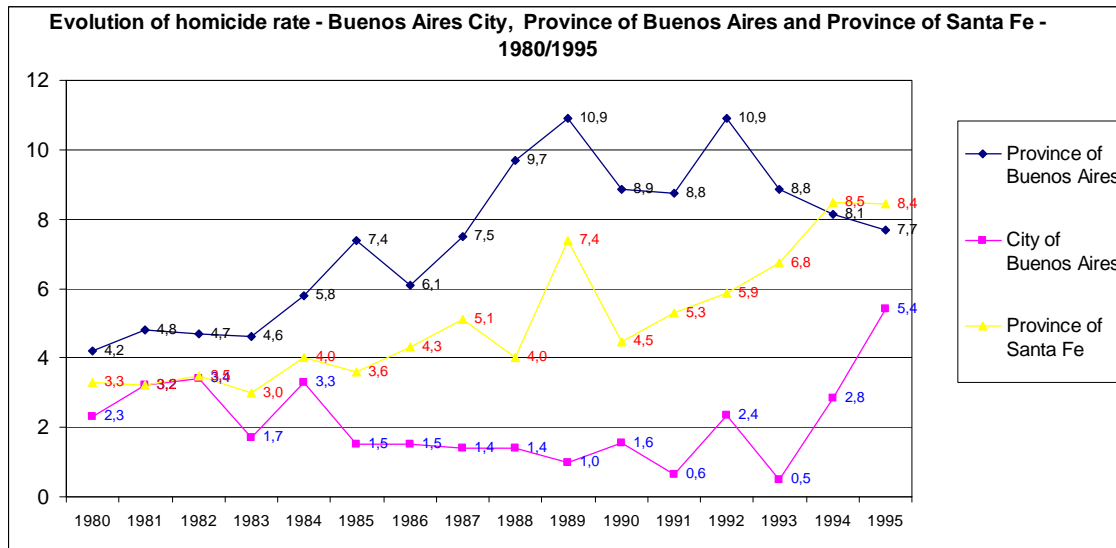
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Figure 3



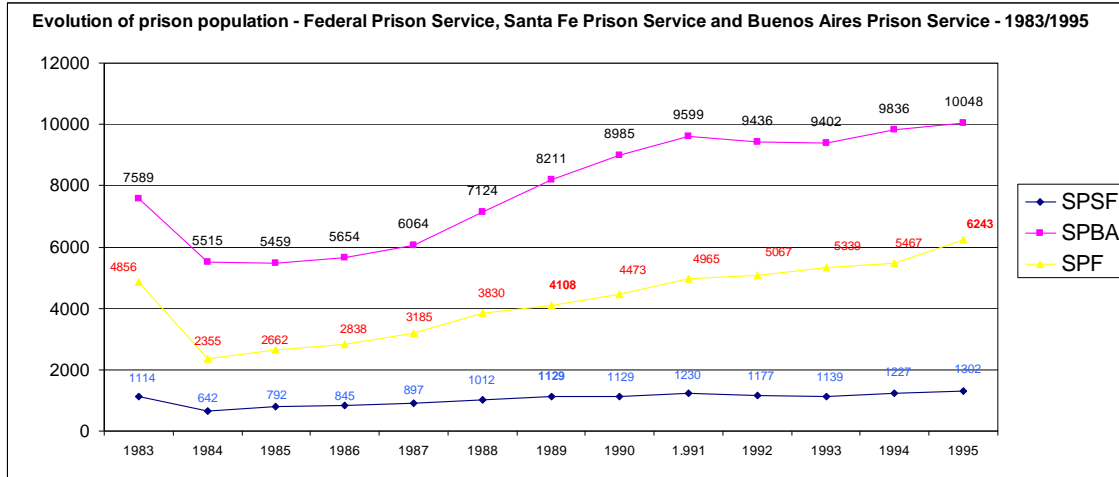
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Figure 4



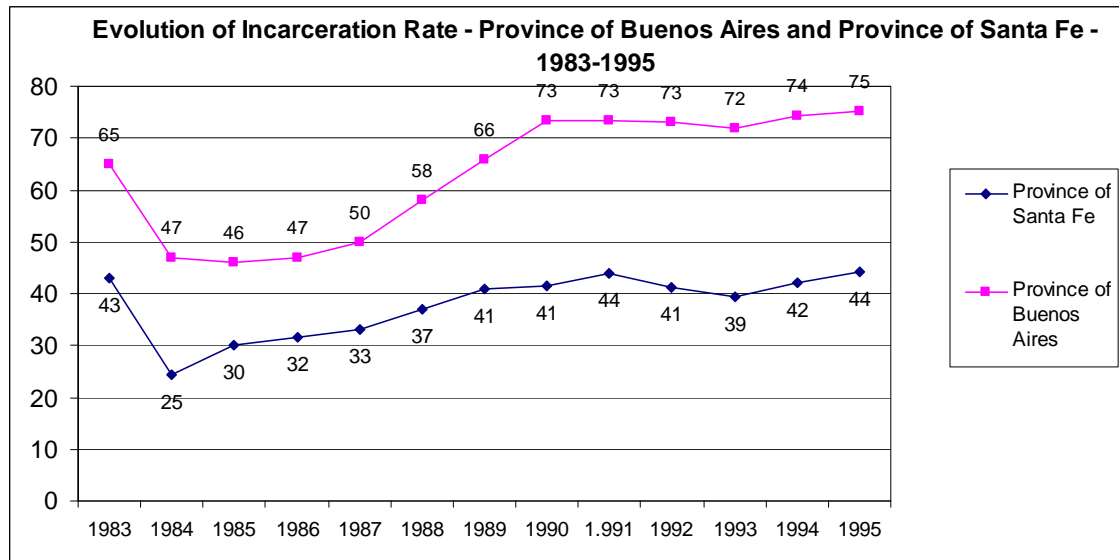
Source: DNPC, Ministerio de Justicia y Derechos Humanos de la Nación

Figure 5



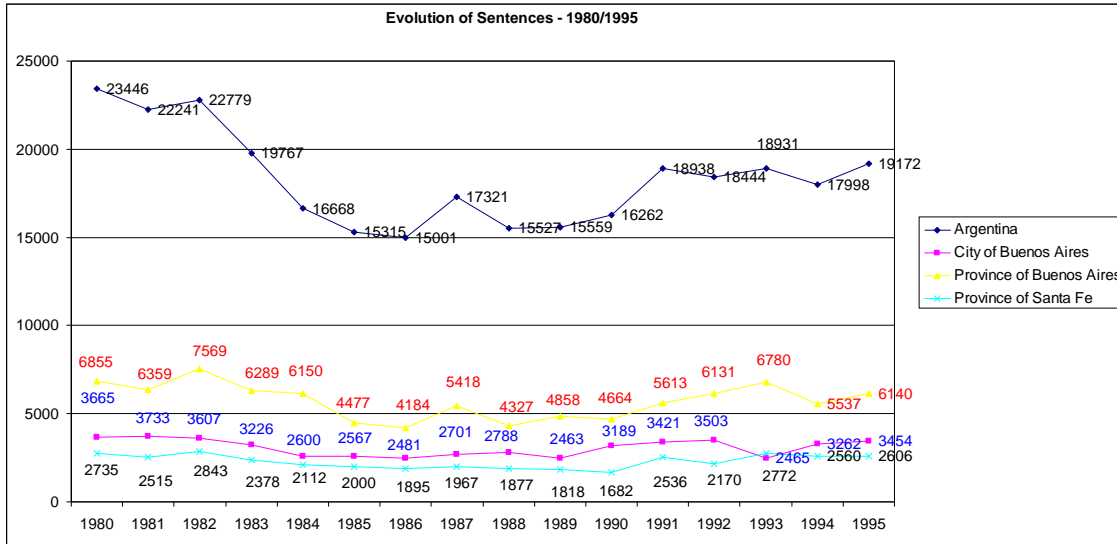
Source: DNPC, SPF, SPBA, SPSF.

Figure 6



Source: DNPC, SPBA, SPSF, INDEC.

Figure 7



Source: Registro Nacional de Reincidencia, Ministerio de Justicia y Derechos Humanos de la Nación.

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