



## A Postneoliberal Turn? Variants of the Recent Penal Policy in Argentina

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### Abstract

This paper analysed the connection between the emergence and consolidation of a postneoliberal political program and alliance – Kirchnerism – and penal policies in Argentina. Three key moments are identified in this recent period. After the experience of an intense punitive turn during the 1990s and early 2000s, Kirchnerist political alliances tried to deploy a progressive political discourse and agenda on penal issues. Nevertheless, this initially coincided with a strong wave of penal populism ‘from below’ that continued the precedent trend towards increasing punitiveness. Since 2005, and for a brief moment, this tendency stopped. However, after that and during the presidencies of Fernandez de Kirchner a more volatile and contradictory scenario was generated. The incarceration rate between 2002 and 2014 in Argentina grew substantially as did the rate of convictions. Meanwhile the percentage of suspended sentences as part of the total convictions and the percentage of custodial sanctions both fell. Especially in relation to incarceration, these levels of change are not as stark as those of the preceding decades. However, the trends persist. Therefore, the question of how to transcend the dynamics of the punitive turn remains a pending and urgent political subject. The article argues the importance of analysing why a punitive turn is interrupted and presents an explanation of it.

### Keywords

Incarceration rates; Argentina; Kirchnerism; penal politics; postneoliberalism.

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## Introduction

In Argentina between 1983 and 2003, in the first 20 years of the transition to democracy, national governments were constructed out of different kinds of political programs and alliances. The government of the Radical Civic Union led by President Alfonsín (1983-1989), which built a political program based on a kind of 'social liberalism', began the transition process. The economic crisis of July 1989 led to an early handover of command to the new President, Carlos Menem, who was elected by the opposition Justicialist Party, the institutional form of the Peronist movement. The national government of President Menem developed a series of extreme neoliberal reforms that produced strong and rapid changes. In 1995 President Menem was re-elected and he subsequently governed until December 1999. In his second term, the deepening and defended neoliberal reforms became evident, showing their most crude results in terms of the growth of social vulnerability and exclusion. The Menem government was replaced by that of President De la Rúa, which was a partnership between the Radical Civic Union and the Front for a Country in Solidarity (FREPASO), a new political party formed out of the Justicialist Party after its neoliberal turn, and which was presented as a center-left alternative to 'Menemism'. However, this national government was marked by strong continuities with 'the Menemist decade' and fell abruptly in December 2001 during the most challenging economic, social and political crisis since the beginning of the transition to democracy.

After the interim government of President Eduardo Duhalde, general elections were held in April 2003. Several political forces that competed in these elections were born out of the Justicialist Party and the Radical Civic Union, traditionally the two major political parties as a result of the so called 'representation crisis' which was related to the collapse of 2001. The first place went to former President Menem with 24 per cent of the votes, while second place, with 22 per cent of the votes, was obtained by Néstor Kirchner, governor of the Province of Santa Cruz, who was supported by President Duhalde. A second round of elections was needed for the first time since the Constitutional Reform of 1994. The electoral contest between Menem and Kirchner clearly implied a debate about the 1990s decade within Peronism. While Menem presented himself as a continuity of that period, Kirchner presented himself as breaking with it. Because a strong swing was expected in the electorate against Menem, he resigned from participation, resulting in Kirchner's inauguration as the President in May 2003.

From that moment onward the construction of a new governmental alliance started to slowly undergo significant changes: 'Kirchnerism'. This alliance went on to build a political program that involved a new hybridization of the Peronist tradition with 'postneoliberal' rhetoric and proposals that positioned it as an antagonist to the 1990s, the Menemist decade. After a fragile start, this political alliance and program consolidated during the 2005 legislative elections, and deepened even further after the election of Cristina Fernández de Kirchner – wife of Néstor Kirchner – as President in 2007. She was re-elected after the death of her husband in 2011 but her mandate ended in 2015, in what constituted the closure of this governmental experience.

This paper seeks to explore the relationship during these years between Kirchnerism as a political alliance and program which presented itself as postneoliberal, and penal policy at a national level. Evaluating this appeal towards a postneoliberal character becomes complex. Beyond the rhetoric of the actors that made and sustained this alliance, several changes during this period can be identified in the different sectors of public policy that implied antagonistic turns in relation to the patterns that were constructed during the Menemist decade. For example, there was the change in terms of international politics, from the automatic alignment with the US government to the strategic alliance with Brazil and Venezuela, expressed symbolically in the Ibero-American Summit of Mar del Plata in 2005 and the joint rejection of the Free Trade Areas of the Americas (*Área de Libre Comercio de las Américas* or ALCA) proposal. At the same time, it is also possible to identify continuities with the recent past in various fields and sectors. Importantly, however, this governmental alliance, from the outset, has been considered not only by its adherents but also by

some influential opponents – especially those who are positively related to the neoliberal principles – as a break with the recent past in which neoliberalism as a governmental rationality has played a decisive role. The use of the ‘postneoliberal’ expression attempts to capture this dimension, although not as a means of defining the game of continuities and discontinuities that has produced this political process. In any case, the exploration of the penal field itself that this work proposes can contribute to the realization of this task.

It is possible to construct a periodization regarding the relationship between Kirchnerism as a political alliance and program and the penal field by differentiating three fundamental moments. The distinguishing criterion of these three moments is a predominant attitude towards what appears as the immediate past with regard to penal policy, dominated by a strong punitive turn that, among other results, produced a 98 per cent growth of the rate of incarceration between 1992 and 2002.<sup>2</sup>

### **Following the current**

The campaign for the presidential election of 2003 was strongly marked by the topic of crime, as was its immediate predecessor in 1999. The candidate Menem deployed an ‘iron hand’ rhetoric, by repeating his own past proposals – the introduction of the death penalty, decreasing the minimum age of criminal responsibility, and so on – to which he added reversing the legal prohibition of the Armed Forces to participate in the ‘fight against crime’, which prohibition had been one of the important progresses made at the beginning of the transition to democracy (Kessler 2010: 78). By contrast, as a perverse outcome of the neoliberal reforms carried out in the 1990s, Kirchner constructed an antithetical discourse that strongly linked people’s feelings of insecurity due to crime to the social question – increased poverty, unemployment and social inequality – and advocated for emphasizing ‘social inclusion’ and ‘crime prevention’. This message was combined with an appeal for the need to prosecute the crimes of the powerful, such as corruption or tax evasion. After the inauguration of President Kirchner an official rhetoric from the national government developed that sought to move away from the dynamics of penal populism that had been installed in Argentina in the mid-1990s, echoing his discourses during the election campaign (Sozzo 2016a).

This rhetorical shift was accompanied by some significant decisions and actions. In the policing field, the avoidance of the use of force was a noteworthy change in the intervention strategies of the federal security forces with regard to protests and public demonstrations (CELS 2003, 2008). In addition, some major purges of these police forces reclaimed the fight against police corruption and the political control of police institutions and activities. Some other ambitious measures and reform plans were also announced that, however, never developed further (Sain 2012a, 2012b).

In the penal field, the impetus given by the national government to the prosecution, judgment and punishment of State crimes during the last military dictatorship importantly generated various measures. This included the legislative annulment of the so-called Due Obedience Law and the Final Point Law in August 2003, which, although supported by several political parties, had the fundamental backing of the governing party (CELS 2003). From this moment onward a strong alliance was developed between most of the human rights organizations in Argentina and Kirchnerism, which produced multiple subsequent effects. This resulted in a strong presence of the human rights theme in both the official agenda and rhetoric, especially in relation to the State crimes committed during the last military dictatorship. As a result, an important process in relation to the trial and punishment of these crimes by the federal criminal justice system gradually emerged (CELS 2013; Feierstein 2014; Zysman Quiros 2015). This decision, which was sustained over time, played a crucial role in terms of the attitude towards Kirchnerism as a political ally in relation to penalty. As I have argued with respect to penal policy at the beginning of the transition to democracy (Sozzo 2011b, 2013), the cultivation and maintenance of the memory of State crimes as a paroxysmal example of the abuse of power during the last military

dictatorship made it relatively difficult for the governmental actors to promote a rhetoric in favor of increased punitiveness for street crime in the public and political debate. The risk of falling in its excess is an image that was constantly evoked and that had the potential to generate, at least for its members and supporters, an insurmountable contradiction. Another important decision of the national government was the impetus provided for the rejuvenation of the Supreme Court of Justice of the nation, changing its former composition that had repeatedly been denounced for its collusion with the Menemist political alliance during the 1990s. For the first vacant post, President Kirchner proposed the appointment of the prestigious criminal law professor Eugenio R Zaffaroni, who had high symbolic value due to his liberal and moderate penal orientation (CELS 2003).

Then, in March 2004 a phenomenon emerged that blocked these first discourses and actions. Axel Blumberg – an upper-middle class young student from Greater Buenos Aires – was kidnapped and murdered. This generated a strong social mobilization, due to the activism of his father, which called for the need to change penal and policing policies. A petition, which gathered more than five million signatures,<sup>3</sup> requested the executive and legislative authorities of the national government and the government of the Province of Buenos Aires implement reforms that focused on the increase of penal severity. This request was accompanied by the constant presence of Blumberg's father in the mass media and by a number of massive demonstrations that pressured political bodies. The first, which was held in front of the National Congress on 1 April 2004, brought together around 150,000 people.

The self-proclaimed 'Axel Crusade' signified the emergence of 'bottoms-up penal populism' in Argentina. That is to say, a form of populist penal policy-making, in the name of 'what the people think and want', emerged which leaned toward increasing punitiveness but was, to some extent, structured and accompanied by the mobilization of certain sectors of the public that were built around the figure of the victim as a subject, with moral authority born out of suffering.<sup>4</sup> This collective mobilization appealed strongly to the deployment of emotions and feelings of a negative nature – hate, anger, fear – among citizens with regard to the offense and the offender but also creates a 'we', the 'honest' citizens that could always become the victims of crime. Certain elements with an alleged 'common sense' approach to the crime problem – mainly amongst the middle-class – are redeemed here in opposition to the expert knowledge. This development shakes and challenges 'the establishment' in the field of crime control policies. In the case of the Axel Crusade, the establishment consisted of law professors and judicial officials who, since the late 1990s, had frequently been stigmatized with the adjective of 'garantista', and in so doing reviled as the 'defenders of the criminals'. But professional politicians, actors who had only lent an ear to the expert knowledge, had also moved away from 'what the people think and want'. On many occasions, Blumberg himself insisted on his 'apolitical' nature, overcoming political divisions in the interest of an 'all' that identified with 'the people'. Somehow, these collective mobilizations connected with the political activation of various social groups during the 2001 crisis and the subsequent crisis of representation which involved the traditional political parties (Grimson and Kessler 2005: 173-174; Schillagi 2009: 30; Svampa 2005: 263-266, 271-272). With the use of various methods – petitions, demonstrations, and so on – these mobilized sectors of the public, in the name of the people who had a hostile attitude towards politicians and experts, were amplified by the media, following the trends observed from the second half of the 1990s (Sozzo 2016b: 307-311). The media made this new 'wave of insecurity' – linked specifically to extortive kidnapping followed by death, and the public reaction to it, which was mainly manifested by the Axel Crusade – a prime news topic in 2004, and in so doing strongly colonized various media spaces (Calzado and Van den Dooren 2009: 98-101).

The Axel Crusade generated strong responses, both from the Executive Power and from the Legislative Power at national and at provincial levels, especially in the Province of Buenos Aires, the epicenter of the Blumberg case. Consensus was constructed that cut across the political parties in relation to the need to 'urgently' react to what was visualized as a demand from 'the

citizenry' in favor of police and penal hardening, without at any moment problematizing the actual composition of these collective mobilizations. The preferred instrument for this reaction, as during the first wave of penal populism produced 'from above' since the late 1990s (Sozzo 2016b: 307-311), was the creation of the penal law. As posed by Calzado and Van den Dooren (2009) on a national level, in many cases this meant revitalizing legal change initiatives that had already been presented in the National Congress and in a few cases involved the proposal of new legal projects. In any case, the key to making headway and getting legislative approval was the connection of these initiatives to the demands of the Axel Crusade. Blumberg himself and his advisers were present during the debates of the Chamber of Deputies and Senators and in some cases they were even allowed to participate in the debates of the Commissions of both Chambers (Calzado and Van den Dooren 2009).

In this context, several legal changes developed that were clearly focused on increasing punitiveness and, in so doing, reproduced a trend that has been observed in other contexts (Pratt 2007: 18-19). These became known not only in political and media discourses but also in academia as the 'Blumberg reforms'. The severity of punishment was increased for several types of offenses: the access to parole and temporary releases for certain convicts was blocked; and the use of prison on remand as a precautionary measure was increased (Sozzo 2016a). These legal changes and the strong presence of the claims for increasing punitiveness in the public and political debate helped prolong a 'climate' (Sparks 2003a: 32) among criminal justice officials, especially judges and prosecutors, around the need to increase the severity of their daily decision-making with regard to the imposition of prison on remand and penalty. This climate, generated during the first wave of 'penal populism from above', was particularly strong in the context of the Province of Buenos Aires and included critical and direct pressure from political actors on the judicial actors around specific cases and decisions (Bombini 2008: 40; CELS 2005: 145-147; Sozzo 2016b: 307-311).

The political alliance of President Kirchner, both at a national level and in the Province of Buenos Aires, had an ambiguous attitude towards the Axel Crusade (CELS 2007; Schillagi 2009). Several key players, including the President himself, met with Blumberg and maintained a cautious attitude towards his demands and proposals. It is true that, on the one hand, some Kirchnerist actors publicly spoke out against his initiatives, especially in the second half of 2004 when they began to observe glimpses of what was identified as a kind of 'politicization' of the social movements that had been generated. However, the national Executive Power launched a General Plan of Security and Justice at the end of April 2004, which was a clear response to the emergence of the Axel Crusade and included some measures that were proposed in the petition, such as the decrease of the minimum age of criminal responsibility. On the other hand, beyond what was publicly said, most of the parliamentary representatives of this political alliance voted in favor of the various national and provincial laws (Sozzo 2016a).

As has been pointed out elsewhere, the preceding wave, from the late 1990s, of 'penal populism from above' had broken with a mode of penal policy-making that was highly elitist, centered around the voice of experts in the field of criminal law, that had a particular focus on the 'ought to be' and was protected from interventions from the 'public'. This first wave, generated by politics and the media, for the first time since the transition to democracy put 'what the people think and want' as a central axis in the penal field. This reference, which was repeated endlessly in the media, produced a strong message that allowed certain social sectors, confronting specific manifestations of the crime problem and from the experience of being victims, to establish themselves as representatives of that entity, 'the people', and from there pose a series of demands in the penal field. In other words, the wave of 'penal populism from below' was cemented by the previous wave of 'penal populism from above', as the first prepared the way for the second, thus making it possible (Sozzo 2016a: 203, 2016b: 313).



The economic, social and political collapse of 2001, which was a paroxysmal manifestation of the crisis of the traditional political parties in Argentina – the main motto of the citizens in the streets during protests at this time was ‘throw them all out so that not even one stays’ – opened the way for the development of new forms of social and political mobilization that had gradually been unfolding during the 1990s. Although there had previously been some forms of social mobilization in relation to the crime problem that acquired a certain level of organization and persistence over time, they were related to the ‘crimes of the powerful’, such as the movement for the trial and punishment of State crimes during the last military dictatorship. With respect to ‘street crime’, the mobilizations had been minor and short-lived. The scenario of the 2001 crisis enabled a phenomenon such as the Axel Crusade – one that was massive and sustained over time – to emerge, amalgamating traces of these various precedents and with some overlap in regard to the criticism and distrust toward political and institutional authorities (Sozzo 2016a: 203-204).

The ‘crisis of insecurity’ in the public and political sphere since the late 1990s also played a significant role in this wave of ‘penal populism from below’. This was strongly tied to the devastating economic, social and cultural effects of the neoliberal reforms during the Menemist decade because they disseminated feelings of social vulnerability and exclusion and a widespread sense of precariousness, transformation and uncertainty, even among the socially included. This found expression and concentration in ‘street crime’. Since the second half of the 1990s, street crimes seemed to be experiencing some growth, especially in the two jurisdictions of the City and the Province of Buenos Aires, both epicenters of the emergence of the waves of penal populism, although the available evidence does not entirely support this (Sozzo 2005, 2012, 2016a, 2016b). However, similar to Katherine Beckett (1997), I believe it is necessary to avoid the naive interpretation that automatically ties the increase in street crime to the increased concern of citizens and the increased punitive demand, what Beckett defined as ‘the democracy at work thesis’. This interpretation is welcomed by political actors who consequently take decisions and actions. The elites, with their privileged access to the media and political debate – especially when they are state officials – have the ability to define social problems by moulding, at least in part, the ways in which segments of the public get to see these issues. Issues are never created out of nothing but, instead, by selecting meanings that resonate with their experiences of everyday life, not univocally but rather through conflicts and struggles (Beckett and Sasson 2001; see also, Barker 2009; Lacey 2008; Savelsberg 1994, 1999; Sparks 2003a; Zimring and Johnson 2006). In fact, as I illustrated earlier, a significant increase of street crime in Argentina during the first stage of the transition to democracy – or at least as registered by the official statistics – was not accompanied by a corresponding growth of punitiveness (Sozzo 2011b; 2013). However, an increase in street crime, especially when rates grow quickly and on an elevated scale, may contribute to a wave of penal populism, given the presence of a series of other political and cultural factors. Street crime by itself is not the catalyst for penal populism which, in turn is not dependent on elevated street crime statistics (Beckett 1997; Nelken 2010a; Pratt 2007; Roberts et al. 2003; Zimring and Johnson 2006).

Well, how can we then explain the attitude of the political alliance around President Kirchner confronting the Axel Crusade, which was marked by a certain rhetorical ambiguity while at the same time supporting the enactment of national and provincial legislative reforms that coincided with movement claims and proposals? The answer is based on what constituted a fundamental feature of Kirchnerism during its initial development phase: its political weakness. This stemmed from obtaining only 22 per cent of the votes in the 2003 elections and from its complex relationship with the sector of the Justicialist Party led by former President Duhalde. The social mobilizations of the Axel Crusade, amplified by the media, appeared impossible to ignore for the governmental alliance which was simultaneously working on the development of its own political identity – meaning the new postneoliberal face of the Peronist tradition – as it sought to gain political and electoral consensus centered on an agenda of reform measures; for example, the payment and release of external debt, human rights policy, and so on. A large number of

Kirchnerists acted out of 'convenience' marked by weakness and urgency, generating a pragmatic response to perceived sustained and univocal social pressure. However, there were also Kirchnerist actors who acted out of 'of conscience', as they had actively supported the preceding first wave of 'penal populism from above' since the mid-1990s (Sozzo 2016b: 307-311). This evidences the heterogeneous nature of this governmental alliance.

It may be useful to think about this particular reaction – and, in general, about the strategies of the political actors during these waves of 'penal populism from below' in times of crisis – in terms of an embryonic idea posed by Durkheim and picked up by Garland (1996). The weakness of democratic political authorities in times of uncertainty and social turbulence, which are linked to perceptions of mistrust and illegitimacy of those authorities by the citizens, tends to generate an authority's resort to repressive instruments as a way to at least provide the appearance of maintaining social order and, in this framework, its own privileged position as a political authority (also see Pratt 2007; Sparks 2003a; 2003b; Zimring and Johnson 2006).

We can now turn our attention to what happened to punitiveness in Argentina during these years (see Sozzo 2011b, 2013 for more about this complex notion). There are few indicators available in this respect. On the one hand, we have official data that allow us to approach the evolution of imprisonment rates. It has repeatedly been pointed out that the number of incarcerated persons or the incarceration rate per 100,000 inhabitants is not the only indicator to measure levels of punitiveness (Brodeur 2007; Kommer 2004; Nelken 2005, 2010a, 2010b; Pease 1994; Tonry 2007). But it must be recognized that it allows us to approach the crucial phenomenon of the degree of extension of the penal system (Beckett and Sasson 2001; Cavadino and Dignam 2006; Lacey 2008). On the other hand, we have official data about the growth in the number of convictions. These statistics allow us to approach the numbers dimension of punitiveness. But the characteristics of these convictions allow us to approach the degree of penal intensity, its other dimension.

With regard to imprisonment, the rate of 123 prisoners per 100,000 inhabitants in 2002 increased to 144 prisoners per 100,000 inhabitants in 2005. Excluded from this are persons deprived of their liberty in police headquarters and precincts that were to be prosecuted or convicted, which number was not officially reported. This implies an increase of 17 per cent in three years. With regard to convictions, the number increased from 25,538 in 2002 to 32,965 in 2005, an overall increase of 29 per cent. In 2002 42 per cent of the convictions were of a conditional compliance nature and 58 per cent were of an effective compliance nature. In 2005 they became, respectively, 35 per cent and 65 per cent. In 2002 81 per cent of the sanctions were custodial, while the remaining 19 per cent were noncustodial; in 2005 the percentage of the first increased to 85 per cent, reducing the latter to 15 per cent. In 2002, custodial sanctions of less than three years were 71.8 per cent of the total; in 2005 this proportion fell to 66 per cent. As can be observed, punitiveness experienced a significant growth according to all these indicators as a result of this wave of 'penal populism from below', which came to ratify and deepen the trend that was born out of the first wave of 'penal populism from above' from the mid-1990s (Sozzo 2016a: 210-213, 2016b: 311).<sup>5</sup>

### **Against the current?**

The year 2005 became very important in the consolidation of Kirchnerism as a governmental alliance and program. This was produced through the campaign for the legislative elections in which the alliance clearly defeated the opposing sectors, inside and outside of Peronism. It was also a year in which the national government was able to present various achievements related to its postneoliberal identity: the economic recovery as evidenced by the growth of the GDP and declining poverty and unemployment levels through a heterodox economic policy strategy against the 'Washington consensus'; the renationalization of public services that were privatized during the Menemist decade; the update of wages and public pensions; the repeal of some

neoliberal labor reforms and the restoration of collective labor agreements; the alignment with the progressive governments of the region such as Brazil and Venezuela; the early debt repayment to the IMF; and so on (Novaro 2010: 298; Svampa 2011: 23-27, 2013: 14).

Within this context the fourth March of the Axel Crusade occurred in April. The new public demonstration organized by Blumberg was received with a certain detachment by the ruling political alliance. Moreover, it had no impact in terms of specific measures that were designed to generate criminal hardening (Schilaggi 2009; Sozzo 2016a).

In parallel with this, an initiative was launched by the national government that clearly went in the opposite direction to the recent waves of penal populism. The Ministry of Justice and Human Rights created a committee of experts to draft a new Criminal Code. This decision meant returning to a method of penal policy-making that had prevailed in the early stages of the transition to democracy; that is, valuing the experts' voices in the field of criminal law and creating a space for debate and decision making, without any direct public involvement (Sozzo 2011a, 2011b, 2013). The committee presented a preliminary draft in May 2006, which included many innovations that clearly moved towards moderating levels of penal severity. It was publicly identified as a 'Garantista' initiative. However, in July of the same year, the provisional draft was 'frozen' by the new Minister of Justice and Human Rights who claimed that it was not a priority for the national government (Sozzo 2016a: 216-217).

At this time, in August 2006, Blumberg organised his last march, which had a much lower turnout than the previous ones and which posed as one of its fundamental claims that the draft be disregarded. In general, this last march triggered a critical response from the Kirchnerist alliance, which identified it as the start of the politicization of the mobilization of 'the victims of insecurity,' adopting a 'right-wing' position and entering into the political and electoral arena. This response became harsher as time passed (CELS 2007: 232-233, 239; Schillagi 2009: 11-12; Sozzo 2016a: 217-218).

Another important element was also incorporated at the start of 2005 within the Province of Buenos Aires. The Center for Legal and Social Studies, one of the most important human rights organizations in Argentina, had in 2001 presented a collective action of corrective *habeas corpus* – which was joined by various non-governmental organizations – for the overcrowding of the police headquarters and precincts to be declared illegal in the Province of Buenos Aires. After various procedures and judicial remedies, the Supreme Court of Justice of the nation ruled in its favor in May – known as the Verbitsky case – ordering all courts in the Province of Buenos Aires to cease operating in ways that worsened the detention conditions in their territory. Furthermore, the Government of the Province of Buenos Aires was ordered to generate a roundtable discussion with the complainants in order to improve the detention conditions and to consider the rules that determined the Minimum Standard for the Treatment of Prisoners as developed by the United Nations (Ales, Borda and Alderete Lobo 2005; CELS 2005, 2007). That said, the most important outcome of the case was the triggering of a criminal procedure reform that reversed some previous changes made to the Criminal Procedure Code in relation to prisoners on remand. This ruled out the existence of offences in which it was mandatory to use this precautionary measure, promoting the use of alternative measures and installing mechanisms for the periodic review of them (CELS 2007).

The relationship between Kirchnerism and penal policy encountered another important moment during the campaign for the general elections in 2007 at the end of President Kirchner's term. The alliance presented President Cristina Fernández de Kirchner as its candidate and won with 45 per cent of the votes, compared to the 23 per cent of the coalition in second place. Kirchnerism also won the election for the Governor's position in the Province of Buenos Aires and other provinces, but lost in some important districts such as the City of Buenos Aires and the Province of Santa Fe. Cristina Fernández marginalized the issue of crime during her campaign and, on the



few occasions that she did refer to the matter, adopted the general position which had also characterized the electoral rhetoric of her husband in 2003 (CELS 2008; Colombo 2011). She focused on other topics that were strongly linked to what, at the time, already constituted a program around a postneoliberal identity of the Peronist tradition (Svampa 2011). In general, this electoral campaign involved a withdrawal of the crime problem and, in particular, a reduction of gestures in favor of increased punitiveness in the political and electoral debate that had had such prominence in Argentina since the mid-1990s.

In the last three years of the government of President Néstor Kirchner, no penal initiatives were supported by his political alliance that were deliberately oriented towards the growth of penal severity, unlike the first eighteen months of his mandate.<sup>6</sup> The Kirchnerist alliance helped in that regard by marginalizing the crime problem in the political and electoral debate, especially towards the end of this period. This occurred despite social movements that sought to promote punitive measures 'from below' similar to those that had occurred during his first year and a half in the national government. This resistance was not generated by directly or openly confronting punitive proposals – although some alliance actors did so at certain times – but rather with a tactic that combined silence with a general rhetoric that connected the criminal question to the social question. But fundamentally, Kirchnerism maintained this approach by promoting other topics that were strongly tied to the consolidation of its political program as postneoliberal. This is a good example of how the politicization – understood in terms of electoralization – of crime and punishment is not an irreversible process born out of an alleged epochal change but rather a product of, and is therefore subject to, the results of political struggle (Sparks 2003b). In this sense, the politicization of crime and punishment is a consequence of the de-politization of other issues, which opens the possibility for situations to arise that produce a reversal of such a trend (Zedner 2002).

During this period Kirchnerism even created certain incipient actions that advanced in the opposite direction, towards the reversal of previous waves of penal populism. Some of these actions did not develop from actors that could strictly be considered part of the Kirchnerist alliance, as with the human rights organizations and the Supreme Court of Justice of the Nation in the Verbitsky case. However, generally, these actors had been supported by the government of President Kirchner since the beginning of his mandate. Moreover, within the specific context of the implementation of that court ruling, some Kirchnerist actors from the Province of Buenos Aires also provided their support for some actions, such as the criminal procedure reform of 2006. In relation to the draft for a new penal code, the initiative was caught between internal tensions and contradictions within this political alliance around a far-reaching measure towards penal moderation. In any case, this attitude of the Kirchnerist alliance with regard to penal policy was constructed at a time of political strength – just after the 2005 elections – when it drastically opposed the extreme weakness that was observed during the gestation period of the first wave of 'criminal populism from below'.

One may also think that these barriers with regard to the reproduction and amplification of the punitive turn were supported by the process of economic and social recovery that became evident in this period. This recovery generated concrete social effects in terms of the reduction of unemployment and poverty; the reconstruction of the purchasing power of wages; and the strengthening of labor guarantees for the formal sectors of the labor market. In this economic and social scene, it became somewhat more difficult than in the recent past for street crime to be transformed into a catalyst for widespread feelings of uncertainty, insecurity and social instability. This in turn could have been supported by some decline of these forms of crime, which coincidentally can be observed in a major part of the various available indicators (Sozzo 2016a).

Now, what happened to the punitiveness during this second part of the Kirchner government? With regard to the incarceration, the numbers decreased from 144 inmates per 100,000 inhabitants in 2005 to 133 prisoners per 100,000 inhabitants in 2007, implying a decline of 8 per

cent in two years. With regard to convictions, the number went from 32,965 in 2005 – of which 35 per cent of the convictions were of conditional compliance and 65 per cent were of effective compliance – to 29,804 in 2007, a decrease of 10 per cent. In 2007 conditional and effective compliance convictions became, respectively, 38 per cent and 62 per cent. In 2005 85 per cent of the sanctions were custodial, while the remaining 15 per cent were non-custodial. These percentages were similar in 2007. In 2005, the custodial sanctions of less than three years were 66 per cent and this percentage was the same for the year 2007. As observed, the punitiveness between 2005 and 2007 did not grow, with some of the available indicators even showing a slight decline and, in so doing, breaking a trend that had been strong since the mid-1990s (Sozzo 2016a).

### **Crosscurrents**

With the inauguration of President Cristina Fernández in December 2007 a new moment opened in the development of Kirchnerism. This third period was marked by the consolidation of its ‘national and popular’ identity and, closely related to this, by the deepening of the social antagonisms around various governmental initiatives that were launched as central themes in the political and public debate. The first initiative, at the beginning of the government of President Fernández and the international economic crisis of 2008, was the attempt to increase taxes on the export of cereal products. This triggered a protest from various agricultural sectors, especially by the large and medium producers, which materialized in a lockout that lasted more than three months and was accompanied by roadblocks and strong public demonstrations that were supported by various political opposition parties and sections of the middle classes. In the end, the Kirchnerism proposal was defeated by a key vote on the matter in the National Congress, which triggered a series of conflicts within the alliance that resulted in its weakening. In fact, this defeat was directly tied to the alliance’s defeat in various jurisdictions during the legislative elections of 2009. Now, from this moment onward, a series of other initiatives were launched: the nationalization of Aerolíneas Argentinas and the pension system; the new Broadcasting Act; the creation of the Universal Assignment per Child, a financial aid for parents of children from 12 weeks of pregnancy until 18 years of age; unemployed or informally employed whose income does not exceed the minimum wage; the Marriage Equality Act; and so on. These initiatives generated various political triumphs, reinforced the postneoliberal elements of its political program, and reactivated the historical binary schemes of the Argentinean politics: the ‘popular’ and the ‘anti-popular’; ‘Peronism’ and ‘anti-Peronism’. The death of Néstor Kirchner in October 2010 had a very important effect. During 2008 and 2009 the Kirchnerist militancy had experienced steady growth, but this event triggered additional momentum in this direction. This reconstruction of Kirchnerism after the electoral defeat in 2009 translated into a victory in the 2011 presidential elections in which Cristina Fernández was re-elected with 54 per cent of the votes, a higher level of adherence compared to that of 2007 (Svampa 2011, 2013).

Now, these last years were strongly marked by a number of economic problems that were linked to the international economic crisis but also to the characteristics of the economic policies adopted by the Kirchnerist governments since 2003. Fundamentally, this was crystallized in high inflation and in its impact on the purchasing power of wage earners which was partly moderated, however, by annual wage increases between formal workers. But it was also translated as problems related to the exchange market and tax policy. Additionally the popularity of the national government, especially among the middle classes, was affected by the emergence of corruption scandals intensively covered by the mass media, particularly by those enterprises that opposed this governmental alliance and program (Svampa 2013). In this new time of political weakness, Kirchnerism lost the legislative elections of October 2013 in the most important jurisdictions but remained the political force with the highest number of votes at a national level even though the numbers were far from the levels of adhesion during the presidential elections. This political weakness spread during the final two years of the government of President Fernández and culminated in a defeat of Kirchnerism – led by the candidate Daniel Scioli – in the

2015 general election, in the runoff against the 'Let's Change Alliance' that was headed by the *Republican Proposal (Propuesta Republicana or PRO)*, a center-right political party that emerged from the crisis of 2001 and was driven by the newly elected President Mauricio Macri.

On a national level, a more ambiguous rhetoric with regard to crime and punishment can be observed among key Kirchnerist actors from the beginning of the governments of President Fernández. At certain times and on certain issues it incorporated elements that supported the increase of penal severity – such as the need to be more restrictive with parole or the decrease of the minimum age of criminal responsibility – but it never completely lost the fundamental features that were previously registered. These punitive drifts in the official rhetoric occurred especially in times of political weakness such as during the campaigns for the legislative elections in 2009 and 2013. Conversely, at a time of political strength during the campaign for the presidential elections in 2011, the tactics of this political alliance presented some characteristics that were very similar to those of the 2007 elections. The Kirchnerist candidates, especially the President, took the crime problem off center stage and avoided making comments in favor of increasing punitiveness. It is within this context that re-election was achieved. In this way, Kirchnerism demonstrated through three consecutive presidential elections that it was possible to win these kinds of electoral disputes, after the waves of penal populism of the late 1990s and early 2000s, without raising proposals that promoted police and penal hardening (Sozzo 2016a).<sup>7</sup>

Between 2008 and 2014 Kirchnerism did not activate any initiatives that sought to increase penal severity similar to the style adopted during the preceding waves of penal populism, with two exceptions. Firstly, there was the failed efforts of some of its sectors in 2009 to achieve a law on juvenile criminal responsibility, a complex initiative in terms of its orientation but that included a profile of penal hardening. However, to a large degree, this initiative was finally not approved by the opposition of the Kirchnerist sectors. Secondly, in the context of the sanction of the new Code of Criminal Procedure for the nation that was debated and finally adopted in December 2014, some proposals were introduced by certain Kirchnerist sectors that were clearly punitivist with regard to prison on remand and the expulsion of undocumented foreigners in cases of '*in flagrante delicto*'. An opposition of various political and social actors managed to eliminate some of these rules, but they did not modify other problematic points in the formulation of this new law (Litvachky and Turfo 2015).

The Kirchnerist political alliance did, however, support and promote a series of successful initiatives that increased punitiveness. Some had a certain practical impact but others were linked to crimes whose victims were predominantly women, children and adolescents, and were tied to scandals related to specific cases widely publicized by the media, and with pressures from women's movements and international organizations. In part these penal changes had different characteristics than those generated in the recent past even though they shared an element of increased punitiveness, including the central figure of the victim, although in this case within the context of inequalities (of gender, between age groups) and constituting an attempt to denounce and reverse those inequalities. In this way, it promoted the enactment of the 2008 law on Prevention and Punishment of Human Trafficking and the Assistance of its Victims, with 2012 reforms increasing sentence severity. Similarly, in late 2012 the alliance supported the introduction of a form of 'femicide' as aggravated homicide, imposing life imprisonment. Finally, the reform of the Penal Execution Law with regard to those convicted of crimes related to sexual integrity in 2013 was supported by the Kirchnerist political alliance, which imposed additional requirements to access various prison benefits and parole.

Simultaneously this governmental alliance promoted the enactment of some laws related to prison life, in which it sought to ameliorate the conditions of detention, albeit of a limited character. In this way, from 2009 it became possible for pregnant women or women with children under the age of five to fulfil their imprisonment in the form of house arrest. There was also in 2011 a reform of the legislation on penal execution in order to improve educational services in

prisons. This also had its negative side as it again included the exercise of the right to education in the logic of the rewards system that was typical for the legal prison regime in the country (Gutiérrez 2012; Sozzo and Ghiberto 2014). Lastly, in 2013 the law that created the national mechanism for the prevention of torture and other cruel and inhumane treatments was approved (CELS 2009, 2011, 2012, 2013; Litvachky and Asprela 2013).<sup>8</sup>

The most prominent initiative in terms of its ambitions in this direction was the creation of a new Commission by the Executive Power for the development of a draft for a new Criminal Code in 2012, presided over by Judge Eugenio Zaffaroni, a clear antagonist, as aforementioned, against criminal hardening. The Commission was not compromised of experts from the field of law – with the exception of Zaffaroni – but of prominent members of political parties with the largest presence in parliament – the PRO, the Radical Civic Union, the Socialist Party, and the Justicialist Party – which members in some cases had a professional and political career that was related to the penal field. This Commission unfolded its debate in a reserved space, among its members and advisors, which is reminiscent of the typical mode of penal policy-making during the first stage of the transition to democracy (Sozzo 2011a, 2011b, 2013). But there was a fundamental difference; namely, the significant weight of the ‘political arm’, in addition to a context in which the opposition had a majority position over the ruling party, as a kind of legacy of the politization process of crime and punishment that had developed since the mid-1990s. The draft for the new Criminal Code was presented to the Executive Power in February 2014. It was moderate in its orientation in some relevant aspects and was immediately targeted by certain sectors of the political opposition, especially by the Renewal Front, which had emerged from the 2013 elections as a detachment of Kirchnerism. This new political party constructed a strong campaign against the draft, claiming that it was ‘soft’ on crime, with the use of slogans, such as ‘No to the new Penal Code’ and ‘What goes around comes around’, which were heavily publicized by the media. The campaign involved the collection of signatures for a petition, which was quite unusual, that aimed for the National Congress not to address the proposal, in the event that it would be formed into a bill. By the end of May 2014 more than two million signatures were presented. This led to other political parties such as the Radical Civil Union (UCR) and the PRO to distance themselves from the draft, even though some of its members had actively participated in the initiative. Some of the sectors of the Kirchnerist alliance even sent similar messages into the public space. As a result the draft was completely ‘frozen’ in the context of a new general election campaign (Litvachky and Turfo 2015: 256-257; Sozzo 2016a: 237-241).

Now, what happened to the punitiveness during the administrations of President Fernández? With regard to imprisonment, the rate increased from 133 prisoners per 100,000 inhabitants in 2007 to 162 prisoners per 100,000 inhabitants in 2014 – the last available year for data – which represents an increase of 23 per cent in seven years, to reach the highest rate since the official start of these statistics. Convictions increased from 29,804 in 2007 to 33,688 in 2014, an increase of 13 per cent over seven years. Of these convictions 38 per cent were of conditional compliance and 62 per cent effective compliance in 2007. In 2014 this became, respectively, 34 per cent and 66 per cent. In 2007 custodial sanctions of less than three years constituted 66 per cent of the total; this fell slightly to 64 per cent in 2014. As shown, punitivity increased in Argentina between 2007 and 2014, although more sharply for the incarceration rate than convictions (Sozzo 2016a).

### **To conclude**

This work has approached the relationship in Argentina between Kirchnerism as a postneoliberal governmental alliance and program, and penalty. The main question posed was to what extent did this political change bring ruptures to the dynamics that surrounded the penal field in the recent past, especially during the long decade of neoliberal reforms from 1989, with the rise of Menemism, until the economic and political crisis of 2001.

Vanessa Barker (2009: 13-14, 170-171, 180-181) has insisted on the issue of 'path dependency' in relation to penal policy in her analysis of penal trajectories of certain jurisdictions in the United States. In other words, penalty at a given time is the result of an accumulation of decisions and actions that have unfolded over time in the past which may not be proximate to the present that we are trying to understand. When some very radical changes in penal policy develop within a scenario, a kind of furrow develops from which it is very difficult to move. Between 1992 and 2002, the incarceration rate – not including processed and convicted individuals in police headquarters and precincts – grew by 98 per cent in Argentina; the number of convictions grew by 38 per cent; the percentage of suspended sentences as part of the total number of convictions fell by 26 per cent and the percentage of custodial sanctions of less than three years as part of the total number of custodial sanctions decreased by 12 per cent.

Obviously the challenge of reversing such a punitive turn was not a small one. But the exploration developed here shows that it is possible in certain situations, and depending on certain decisions and actions in the world of politics, to block its reproduction and even initiate an opposite course. Kirchnerism as a political alliance and program greatly contributed to the generation of the conditions that made this possible between 2005 and 2007. This occurred for the first time since the fall of the punitiveness indicators at the start of the transition to democracy in Argentina between 1983 and 1984 (Sozzo 2011a, 2011b, 2013). It was not so much because direct and specific actions and initiatives were promoted in this direction, although some were, with a limited scope. This outcome was, instead, produced indirectly by Kirchnerism, by filling the public and political debate with other themes that were related to its political program, which generated intense social conflicts and antagonists. In so doing, it displaced the crime problem from its previous center-stage, a fruitful position for a dynamic of penal hardening within the game of electoral and political competition. The process of economic recovery and its positive social effects, generated by post-crisis public policies within a favorable international context, also contributed in this direction. This was by putting up barriers for the translation of social insecurity concerns – in the form of anxieties and demands around insecurity in relation to street crime – to which the slight decrease in levels of street crime itself might also have contributed. This 'virtuous' result occurred despite the fact that this political alliance, in its formative stage, had contributed to the prolongation of the punitive turn in relation to a wave of 'penal populism from below'. I think that it is as important to analyze why a punitive turn does not occur, is interrupted or reversed in different scenarios as it is to describe and understand it, and already there exists an emerging literature on the subject (Nelken 2005; O'Malley and Meyer 2005; Pratt 2007, 2008a, 2008b; Van Swaaningen 2013).

From then on this political alliance has followed a path traversed by tensions and contradictions, tied largely to its moments of political and electoral weakness and strength, but also to the heterogeneity of its composition, especially in certain provincial jurisdictions, something not explored in detail here (see, instead, Sozzo 2016b).<sup>9</sup> This implies recognizing the volatile and ambiguous nature of the relationship between this postneoliberal political alliance and the penal field, which is connected to its lack of definition and uniformity within this slippery terrain. This was possible because crime and punishment were not a central part of the postneoliberal promise around which this governmental alliance and program was historically constructed. As a consequence, various segments of this alliance advanced different proposals and initiatives that spoke to partially dissimilar political and electoral audiences, at times creating a positive result in terms of adhesion, sometimes out of 'convenience' and sometimes out of 'conviction'. Perhaps we could even extend this consideration to all contemporary political alliances, if we look at Pat O'Malley's (1999) contribution about the relationship between penal policy and the New Right that has been crucial in the construction of the perspective of this paper. O'Malley, looking at the heterogeneity of political alliances in relation to penalty, emphasized its link to the co-presence of different governmental rationalities – in his case, neoliberalism and neo-conservatism – and not so much to the weight of 'pragmatism', 'contingencies' and 'junctures', although he also assigns them a certain role (O'Malley 1999: 185). But more recently he has also emphasized the



open, permeable and labile nature of governmental rationalities, while avoiding to paint them as free of conflict and internal inconsistencies (O'Malley 2004, 2015). It is crucial for our objectives in this paper that such conflicts and tensions between governmental rationales or within the same governmental rationality are not necessarily a matter of instability but may even contribute to the strength of an alliance in contemporary democratic politics (O'Malley 2004). The insistence by O'Malley (2004: 185, 192) that changes that occur 'cannot be reduced to the level of party politics' in my opinion largely reflects the spatial and temporal circumstances of their observations: the erosion of borders in programmatic terms between the major political parties in English-speaking countries like the United States, Great Britain, Australia or New Zealand, especially in the last 25 years. This seems difficult to sustain in the light of the wave of postneoliberal changes in South America – especially in their most radical forms – beyond the cautious interpretation that we have developed in relation to the rhetorical claims around these mutations.

I think that the history of the relationship between Kirchnerism and the penal field shows the weight of the junctures in the logic of contemporary democratic politics, such as the role of the public scandals around specific cases in the unfolding of the waves of penal populism (Loader and Sparks 2004; Pratt 2007; Zimring 1996). This gives rise to a certain 'pragmatism' by political actors who try to capture the 'voter as a consumer' – and no longer through a 'grand narrative' – (Ryan 2005: 143) even in the context of postneoliberal change processes. In this sense, I consider the key interpretive point by Joachim Savelsberg about the 'historical contingencies' (2004: 374, 389-391; see also, Savelsberg 2002; for the Argentine case, but in relation to the first moment of transition to democracy, see Sozzo 2011b; 2013) to be useful when thinking about the patterns of contemporary punishment, understood as 'events that are largely unpredictable for social theory but nevertheless bring consequences with it'. Of course, it also means taking the role played by moments of strength and political weakness of governmental alliances into consideration. In particular, crises of confidence and legitimacy can impact government decisions and actions in the penal field in unpredictable ways (Barker 2009; Sparks 2003a, 2003b; Pratt 2007).

It turns out to be difficult to undo what has been done. The incarceration rate between 2002 and 2014 grew by 32 per cent in the country. Meanwhile the rate of convictions increased by 32 per cent; the percentage of suspended sentences as part of the total convictions fell by 19 per cent and the percentage of custodial sanctions of less than three years as part of the total number custodial sanctions decreased by 11 per cent. Especially in relation to incarceration, these levels of increase are not as stark as those of the preceding decades. However, the trend persists. Therefore, the question of how to transcend the dynamics of the punitive turn remains a pending and urgent political subject.

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<sup>1</sup> This article was originally published in Spanish (available at [http://biblioteca.clacso.edu.ar/clacso/gt/20160404115404/Postneoliberalismo\\_penalidad.pdf](http://biblioteca.clacso.edu.ar/clacso/gt/20160404115404/Postneoliberalismo_penalidad.pdf)) and was translated for this special issue.

<sup>2</sup> I have worked on the emergence of this punitive turn in Argentina from the mid-1990s onwards as part of a more general overview of the field of crime control (Sozzo 2005, 2012) and in relation to the changes inside prisons (Sozzo

2007, 2009). More recently, I have addressed this issue in more depth in relation to the notion of 'penal populism' (Sozzo 2016a, 2016b)

- <sup>3</sup> The role of referenda and citizen's initiatives in the production of waves of penal populism has been analysed in other contexts (see Pratt 2007; Pratt and Clark 2005; Zimring 1996).
- <sup>4</sup> The Axel Crusade involved the consolidation of a trend whose symptoms were first observed in the late 1990s. Until then, the place of the 'victim' as a source of social and political mobilization in the Argentinean public and political debate had, since the beginning of the transition to democracy, been occupied by the 'victims of power'. In the first place and par excellence, there were those who had experienced the crimes of the state during the last military dictatorship and who had given rise to a rich network of organizations and social movements since the 1970s. Next, consider the victims of police and institutional violence in the democratic context, since the 'slaughter of Ingeniero Budge' in 1987 and the cases of Walter Bulacio and Miguel Bru in 1991, which led to various organizations and social movements. But there have also been other 'crimes of the powerful' that were linked to the political elites, from the case of Maria Soledad Morales in 1991 to the case of José Luis Cabezas in 1997, which also led to political social activation (Gingold 1997; Grimson and Kessler 2005; Pita 2010). Compared to these precedents, the Axel Crusade consolidated the reference to the 'victims of insecurity', to the victims of 'street crime' that contains a generic appeal - 'we can all be victims' - and tended to publicly prevail other possible incarnations of this figure although, of course, not completely (see Gutiérrez 2006, 2010; and especially the detailed analysis of this 'dispute' in Schillagi 2009).
- <sup>5</sup> There is, of course, the complex question around how to discern to what extent the changes in these various punitiveness indicators resulted from this new wave of penal populism and not because of other variables that could be lost from our sight when we focus on this process. Considering that this process played a key role in this evolution, this does not imply ruling out other elements that can contribute to its understanding (Sozzo 2016a).
- <sup>6</sup> With the exception of the enactment of the so-called Antiterrorist Law in 2007, with the consent of the Executive Power and the majority of the Kirchnerist legislators. The legal text was criticized by numerous human rights organizations as well as by professors of criminal law. But it was a largely symbolic initiative because it had no practical impact until today.
- <sup>7</sup> However, partly in tension with this dynamic at a national level, since his inauguration as the Governor of the Province of Buenos Aires in late 2007, Daniel Scioli and his governmental alliance, still within the context of Kirchnerism, gave very clear signs that they would put the crime problem at the center of their agenda and would promote police and penal hardening, which gave this governmental alliance during this third moment a strong level of heterogeneity - and not only in this area - across the national and provincial levels. This heterogeneity was extended and deepened in 2015 when the Governor became the presidential candidate of Kirchnerism (Sozzo 2016a).
- <sup>8</sup> In the policing field, the revival of a reformist impulse could be mentioned in late 2010, with the creation of the national Ministry of Security, with ambitious prospects but only limitedly deployed in 2011 and 2012 and with a sharp decline in the last three years (CELS 2012, 2013; Sain 2012a, 2012b; Sozzo 2014).
- <sup>9</sup> This ratifies the importance of exploring the weight of the sub-national politics in federal states like Argentina when fully trying to grasp the link between politics and penalty, given that there can exist sources of divergence between the federal and provincial levels - as has been sustained in the case of the United States, among others (Barker 2006, 2009; Beckett and Western 2001; Greenberg and West 2001; Lynch 2009, 2011; Miller 2008; Newburn 2010; Sasson 2000; Sheingold 1991).

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