

THE PRINCIPLE OF HUMANITY IN PENAL LAW

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In order to maintain its legitimacy, the *ius puniendi* of the state, in its condition of a "juridical" power, must respect a set of fundamental axioms¹: necessity, legality, *mens rea*², culpability, and its corresponding corollaries: subsidiarity, minimum intervention, fragmentary character of penal law, legal certainty, basic penal guarantees (criminal, penal, procedural and in the execution), prohibition of pure objective responsibility (for result), personal responsibility...

Certainly, in a democratic society, centered on the value of the person, the principle of humanity must be respected. Although this principle has not been studied very intensively to date, it is without doubt "no less important" than those mentioned above.³

1. Content and scope

According to BERISTAIN, the fundamental axiom of humanity implies "that all human relationships, personal and social arising from justice in general and criminal justice in particular, should be set on the basis of respect for human dignity"⁴, together with the right to "full development of personality" being the consequence of the former⁵.

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¹ Beristain, A., "Axiomas fundamentales de la Criminología ante la globalización y la multiculturalidad", *Eguzkilo*, 17, 2003, pp. 89 et seq.

² In my opinion, *mens rea* should be distinguished from culpability. In the *mens rea* axiom I refer to the need of a subjective responsibility, not a merely objective one; within culpability individual blame is considered, taking into account if someone has acted freely or he was an insane De la Cuesta Arzamendi, J.L. "Presupuestos fundamentales del Derecho penal", *Eguzkilo*, 3, 1989, p. 58 (n. 15).

³ Beristain, A., *Nueva Criminología desde el Derecho Penal y la Victimología*, Valencia, 1994, p. 14.

⁴ Beristain, A., "Axiomas fundamentales", cit., p. 93.

⁵ E. Bloch, E., *Derecho natural y dignidad humana*, Madrid, 1980.

The concept of dignity, which causes so many difficulties for its proper definition⁶, is identified in KANT's philosophy as a quality of man being "an end in itself" and not "a mere means" serving to certain aims⁷, i.e. a product of a set of biological, psychological, social and cultural determinations, but in the same time full of prospective fulfilments, desires and freedom.

After having identified the principle of humanity with dignity, its natural consequence is the prohibition of submitting the offender to offenses or humiliation. The aspect which is most commonly emphasised, when defining the scope of the principle of humanity in criminal law, is the prohibition of any treatment of a cruel, inhuman or degrading character. And it is usual to underline in this regard the consequences of this postulate in the field of punishments and other juridical consequences of crime⁸.

However, in a social and democratic state of law –that does not content itself with the pure formal proclamation of citizens' rights and requires from public authorities the promotion of those "conditions ensuring that freedom and equality (...) are real and effective" as well as the remotion of any "obstacles preventing or hindering their full enjoyment", facilitating "the participation of all citizens in political, economic, cultural and social life" (Art. 9.2 of the Spanish Constitution) –, a thorough understanding of the principle of humanity cannot remain a mere prohibition of cruel, inhuman and degrading treatment (prohibited internationally and in Spain in art. 15 of the Spanish Constitution). As BERISTAIN explained, the principle of humanity, in addition to claiming a treatment of a human being as such in all situations, vows equally for mutual solidarity, social responsibility for offenders, community aid and assistance; this requires "re-personalising" (as far as possible) the offenders (...) and compensating the victims. Moreover, in line with the actual meaning of humanity, "developing the value of compassion" and the importance of urging society "to share the pain of victims and to create a more solidary world" should also be indicated⁹.

The fact that some of the above requirements may point more to "an ethic of virtues" than to a "civil ethic"¹⁰ does not constitute in any way an obstacle to the significant impact of the principle of humanity in those areas other than punishments and other consequences of crime.

⁶ Von Münch, I., "La dignidad del hombre en el Derecho Constitucional", *Revista Española de Derecho Constitucional*, 2, 5, 1982, pp. 18 et seq.

⁷ *Grundlegung der Metaphysik der Sitten* (K. Vorländer Hrsg.), 3^a ed (reprint), Hamburg, 1965, pp. 50 et seq. (specially, p. 58 y 62 et seq.).

⁸ Jescheck/Weigend, *Lehrbuch des Strafrechts. Allgemeiner Teil*, 5th ed., Berlin, 1996, p. 27.

⁹ Beristain, A., "Axiomas fundamentales...", cit., pp. 93 et seq.

¹⁰ Carrera, J., *Mundo global. Ética global*, 2003, p. 22.

For example, in terms of the dogmatic category of culpability –and opposed to those doctrinal positions, that, based on the impossible scientific proof of human freedom, prefer to structure it without any normative reproach content and reduce its function to the affirmation of the necessity of punishment from the preventive point of view–, it is more coherent with the principle of humanity to treat the offender as a human being, generally able to freely lead and direct his or her behaviour. This "mixed empirical-normative"¹¹ understanding of the category of guilt does not require an affirmative check in each case to determine whether it was possible or not to act differently; it is sufficient to verify the absence "of causes that deprived the subject of his or her liberty."¹² This understanding would be fully aligned with the juridical logic, supported equally in social life, in the "mutual attribution of freedom"¹³, and assuming human freedom of choice as an accepted value among different options in a particular situation. Moreover, not applying this logic eliminates or prevents, in a certain way, the risk of evaluating in a given particular case the factual individual's actual capacity to adapt her or his behaviour to the requirements of law, something that is natural in a social and democratic state of law, where it would be intolerable to "treat equally what is unequal"¹⁴. Otherwise stated, assuming that individuals are in principle free does not exclude or preclude the need to evaluate the factual individual's actual capacity to obey to the law in any given particular case.

Over and above the foregoing, there are three main areas where the principle of humanity in criminal law should find its expression:

- the prohibition of torture and all inhuman or degrading punishment or treatment,
- the focus on resocialization, especially in case of imprisonment
- the protection of victims

2. Prohibition of torture and of any inhuman or degrading punishment and treatment

The prohibition of torture and of any inhuman or degrading punishment and treatment is undoubtedly the first practical corollary to the affirmation of the principle of humanity in criminal law.

This prohibition is recognized internationally, not only in the Universal Declaration of Human Rights of 1948 (art. 5) and in the Covenant on Civil and Political Rights

¹¹ Hassemer, W., *Fundamentos del Derecho penal*, Barcelona, 1984, pp. 296 et seq.

¹² T.S. Vives Antón, T.S., "Reforma política y Derecho Penal", *Cuadernos de Política Criminal*, 1, 1977, p. 107.

¹³ Roxin, C., "¿Qué queda de la culpabilidad en Derecho Penal?", *Cuadernos de Política Criminal*, 30, 1986, p. 678.

¹⁴ Torío López, A., "El concepto individual de culpabilidad", *Anuario de Derecho Penal y Ciencias Penales*, 1985, p. 297.

of 1966 (art. 7), but in the totality of international human rights texts and instruments (universal and regional). The most detailed regulation of the prohibition of torture is provided for in the United Nations Convention of 1984 that followed the United Nations Declaration of 1975 on the protection of all persons from being subjected to torture and other cruel, inhuman or degrading treatment or punishment. The Convention defines a basic international understanding of torture as an abuse of power¹⁵, related to causing serious physical or mental pain or suffering for investigative, punishment, intimidation or discriminatory purposes, suggesting its criminalisation as a intentional multi-offence, consisting in the production of certain result by specific persons and possible to be committed through omission¹⁶. In addition to torture, inhuman or degrading penalty or treatment are prohibited (art. 16) and must be pursued by the States.

Many efforts have been made in order to elaborate the distinction between torture and other abuse. Among them the jurisprudence of the Supreme Court of the United States, decisions of the Human Rights Committee of the UN and the work of the European Court of Human Rights in Strasbourg applying art. 3 of the European Convention on Human Rights should be emphasised especially and particularly¹⁷.

As far as the prevention of torture is concerned, the necessity of establishing effective systems that would allow interventions prior to acts of torture and not only reacting to them afterwards, led to the adoption of systems of visits to prisons and other installations, inspired by the mechanism established in the Geneva Conventions (1949) and in its Additional Protocol I (1977). In 1987 the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (Strasbourg, 26 June 1987) established the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and also instituted a system of visits that has also been renown, since 1987, as an instrument for prevention of torture and other treatment in the Facultative Protocol of the Convention against Torture and other cruel, inhuman or degrading punishment or treatment, adopted by the General Assembly of the United Nations in 2002.

A) Significance for the Special Part of Penal Law

The commitments assumed by the signing and ratification of general and specific international human rights instruments, oblige states to criminalize and punish the

¹⁵ De la Cuesta Arzamendi, J.L., "La tortura como abuso de poder: aspectos penales", *La Criminología frente al abuso de poder*, San Sebastián, 1992, pp. 149 et seq.

¹⁶ De la Cuesta Arzamendi, J.L., *El delito de tortura*, Barcelona, 1990, pp. 24 et seq.

¹⁷ Pérez Machío, A.I., *El delito contra la integridad moral del artículo 173.1 del Código Penal*, Bilbao, 2005, pp. 49 et seq. y 64 et seq.

acts constituting torture and other internationally prohibited treatment in domestic law.

Article 15 of the Spanish Constitution declares the right of everybody "to life and to physical and moral integrity, without under any circumstances being subjected to torture or to inhuman or degrading punishment or treatment". This right is enforced, *inter alia*, by the provisions of art. 173 to 177 (Title VII of the Second Book of the Penal Code), entitled "On tortures and other offences against moral integrity". This is not the place to analyse various issues raised by this partly new regulation of the Criminal Code of 1995. However, the most striking of them is the delimitation of the concept of moral integrity, together with the controversial way of regulating the cases of conflict of incriminations (art. 177),¹⁸. Strictly connected with dignity, moral integrity is infringed "when the freedom (formation or expression) of will of the victim is violated or illegally counteracted (being forced to do or to omit what the victim want or does not want, or to bear an unwanted situation) through acts of diverse nature and characteristics, directed to (or implying) instrumental treatment of the victim, i.e. his or her reification". These acts, which do not necessarily involve the use of violence, are required to cause "mental pain or suffering" and be "humiliating, degrading, debasing", as required by the Constitutional Court.

Another related issue of utmost importance is the possibility or impossibility of penal justification for torture¹⁹. Rejection of any practice or act of torture even in exceptional circumstances is widespread in the international framework. The question that arises from the penal perspective is whether torture may be allowed in case of self-defence or necessity, which are justifications not expressly excluded by the Convention of 1984 (as opposed to obedience to superior orders). To the contrary, the European Convention on Human Rights of 1950 does not allow any exception, whatsoever. Thus the prohibition of torture in the

¹⁸ De la Cuesta Arzamendi, J.L., "Torturas y atentados contra la integridad moral", *Estudios Penales y Criminológicos*, XXI, 1998, pp. 68 et seq.

¹⁹ De la Cuesta Arzamendi, J.L., "¿Justificación de la tortura? Insuficiencias de la normativa penal internacional", in *Criminología y Derecho Penal al servicio de la persona. Libro Homenaje al Profesor Antonio Beristain*, Donostia-San Sebastián, 1989, pp. 695 et seq. See also, Roxin, C., "¿Puede admitirse o al menos quedar impune la tortura estatal en casos excepcionales?", *Nueva Doctrina Penal*, 2004, pp. 547 et seq.; and Ambos, K., *Terrorismo, Tortura y Derecho Penal. Respuestas en situaciones de emergencia*, Barcelona, 2009, pp. 19-66. On the issue of torture under the Bush Administration, Bassiouni, M.Ch., *The Institutionalization of Torture by the Bush Administration. Is Anyone Responsible?* (Intersentia, 2010); Blakesley, Ch.L., *Terrorism and Anti-Terrorism: A Normative and Practical Assessment* (Brill 2006), p. 279-316; and "Ruminations on Terrorism. Expiation and Exposition", *New Criminal Law Review*, Vol. 10, Number 4, p. 554-581.

European context must be considered absolute²⁰. This is also the correct and proper solution in Spanish law, which refuses to accommodate torture "in any case" in accordance with art. 15 of the Constitution.

B) Impact on the field of punishment

The prohibition of torture and other inhuman or degrading treatment not only produces its effects on the special part of criminal law, but also causes significant impact in the field of punishment.

Art. 1 of the Convention of 1984 excludes from the scope of torture those "pains or sufferings being caused only by legitimate sanctions or inherent or incidental to them". Nevertheless legality cannot be a way to legitimize any penalty, which is exclusively directed to cause suffering or humiliation; these will not fall outside the scope of international prohibition if they amount to cruel, inhuman or of a degrading nature.

a) Death Penalty

Regardless of corporal punishment, whose incompatibility with the international prohibition is undisputed (despite its persistence in many places)²¹, the debate focuses currently in the first place on the death penalty, which was abolished in Spain in 1978 at the constitutional level (art. 15 of the Constitution), allowing the death penalty only for those cases "provided for by military criminal law in times of war"; nowadays no provision in the military Spanish legislation imposes the death penalty for crimes even in times of war.

On the international level, several concerns of humanitarian nature have led to the adoption of various moratoria on the use of the death penalty²², restricted by art. 6 of the International Covenant on Civil and Political Rights²³. Also, the abolition of the death penalty is called for by the Second Optional Protocol, aiming at the abolition of the death penalty, adopted and proclaimed by General

²⁰ De la Cuesta Arzamendi, J.L., "Consideraciones acerca del delito de tortura a la luz del Convenio de Roma de 1950", in *Giza Eskubideak European / Los Derechos Humanos en Europa / Les droits de l'homme en Europe / The Human Rights in Europe* (Donostia-San Sebastián, 12-14 diciembre 1988), Vitoria-Gasteiz, 1989, pp. 190 et seq.

²¹ The discussion on the appropriateness of chemical castration of sex offenders remains open, however, Robles Planas, R., "Sexual Predators". Estrategias y límites del Derecho penal de la peligrosidad", *InDret*, 4, 2007, pp. 8 et seq.

²² For example, at the United Nations level, on 18 December 2008 the General Assembly adopted a second resolution on a moratorium on the use of the death penalty. This was through Resolution 62/149 (November 15, 2007).

²³ The penalty is only applicable to the most serious crimes, with full respect for the principle of legality in its substantive and procedural aspects, the right to seek pardon or commutation, not applicable to persons less than 18 years old or to women during pregnancy.

Assembly resolution 44/128 of 15 December 1989. In Europe article 2.2 of the Charter of Fundamental Rights of the European Union prohibits the death penalty, but the most important role is played by two special additional protocols to the Rome Convention: Protocol number 6 (1983), on the abolition of death penalty in time of peace and Protocol number 13 (2002) that provides for its abolition in any circumstances.

The very nature of these instruments evidences the limited scope of the rejection of the application of the death penalty by the states: according to the most common opinion about the prohibition of the death penalty does not derive simply from the international prohibition of cruel, inhuman and degrading punishments and treatment.

Nevertheless, questions concerning its legitimacy, both in terms of specific aspects of its execution and of general character, become more pertinent. In this regard, already in 1977, the Stockholm Declaration, adopted by the countries participating in the International Conference on Abolition of Death Penalty organised by Amnesty International, qualified death penalty as "the most cruel, inhuman and degrading punishment", and urged governments to "take measures for the total and immediate abolition of the death penalty" as an evident violation of the right to life.

Also the Human Rights Committee²⁴ (and the European and Inter-American courts) declared the death penalty's incompatibility with the contents of international conventions. In Europe, the painful situation of detention in the so called "death rows" was qualified in 1989 by the European Court of Human Rights²⁵ to be a violation of article 3 of the Rome Convention. Equally, in *Öcalan v. Turkey* (2005), the Court declared the death penalty imposed in an unfair process and by a court whose independence and impartiality was doubtful to be in violation of article 3. This European jurisprudence, emitted mainly in matters of extradition and obliging States to require guarantees prior to surrender, has been taken up by some legal instruments, for example, the Protocol amending the European Convention on the Suppression of Terrorism from 1977 (2003).

The methods of executing people have also caught the attention of the European jurisprudence, which in 2000 declared the expulsion of a woman to Iran where

²⁴ The Human Rights Commission of the United Nations, the forerunner of the Human Rights Council, pointed out in its resolution 2005/59, that "the abolition of the death penalty is fundamental to the protection of the right to life."

²⁵ *Soering v. United Kingdom*, 1989. However, the Human Rights Council, in its consequent case law, has not been so favorable to this issue and has required exceptional circumstances in order to admit a violation of art. 7 of the International Covenant (like e.g. in *Lavende v. Trinidad and Tobago*, 1997; *Errol Johnson v. Jamaica*, 1996).

she could be sentenced to death by stoning to be incompatible with article 3²⁶. For its part, the Human Rights Committee, which requires that the death penalty be executed "so as to cause the least possible suffering"²⁷, has admitted that the method of execution may constitute an inhuman or degrading treatment²⁸, but declared also that execution by lethal injection could be consistent with the requirements of the International Covenant; however execution by asphyxiating gas, was considered to be "particularly horrifying"²⁹.

Certainly, the incompatibility of the death penalty, as such, (and not only of the phenomenon of waiting in a death row or of some forms of execution) with any accurate understanding of the principle of humanity, focused on respect for the human being, as such, is full and absolute. In this sense, its abolition still represents (unfortunately) a major unresolved issue at the international level, as well as at the domestic level in many countries. Therefore, the example of the Statutes of the International Tribunals for the Former Yugoslavia and for Rwanda and the Rome Statute of the International Criminal Court³⁰ deserve special attention, both internationally and domestically; all of these institutions, being competent to prosecute the most serious international crimes have renounced the inclusion of death penalty as being among punishments that they are allowed to pronounce.

b) Life imprisonment and very long sentences

The death penalty's inconsistency with the principle of humanity, noted above, may also apply to certain forms of deprivation of liberty. According to article 10 of the International Covenant on Civil and Political Rights, deprivation of liberty should be executed "with humanity and with respect for the inherent dignity of the human person" (section 1), in a prison system which "shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation" (section 3).

In this sense, the problem of the inhumane character of life imprisonment has been discussed for over two centuries³¹, and this discussion may also be extended to the issue of very long sentences of deprivation of liberty. The

²⁶ *Jabari v. Turkey*, 2000.

²⁷ *General comment* 20 (44), 3 April 1992.

²⁸ *Kindler v. Canada*, 1993.

²⁹ *Charles Chitat Ng v. Canada*, 1994.

³⁰ Schabas, W.A., "Life, Death and the Crime of Crimes. Supreme Penalties and the ICC Statute", *Punishment and Society*, 2, 2000, pp. 263 et seq.

³¹ Van Zyl Smit, D., "Life imprisonment as the ultimate penalty in International Law: a human rights perspective", *Criminal Law Forum*, 9, 1999, pp. 28 et seq.

negative psychological and social effects generally linked to long-term detention³² –which are seriously aggravated if we add the loss of all hope of eventual release and the harsh conditions that often accompany such sentences (increasing the risk of suicide in prison)– can make them a sort of “slow torture and psychological mutilation”³³ and therefore constitute a significant argument proving the incompatibility of these penalties with the principle of humanity. Nevertheless the severity of these effects (whose theoretical inevitability is constantly discussed) is not the essential problem, even when, taking into account the ordinary conditions of detention in the vast majority of countries, it cannot give rise to any doubts, at least from a practical point of view: its radical contradiction to the principle of human dignity derives from its disregard of “specific characteristics of a human being,”³⁴ and deprivation, “of his basic right to a second chance in the society after having served the deserved sentence”³⁵.

In spite of what has been said above, although there are states, like Spain, that do not impose life imprisonment or that forbid life sentences in their constitutions –like, for example, Brazil (art. 5 XLVII b), Columbia (art. 34) or Portugal (art. 30.1)³⁶– and even when extradition treaties exclude it, refusing extradition when that penalty could obtain, the presence of life imprisonment in various legal orders is still considerable, especially taking into account that this punishment has replaced in many cases death penalty after its abolition³⁷. Moreover, life imprisonment is the punishment prescribed by Article 77 of the Statute of the International Criminal Court, as the most severe penalty for persons convicted for

³² So, in addition to classic works like Clemmer (*The Prison Community*, New York, 1958) or Goffman (*Asiles. Etudes sur la condition sociale des malades mentaux et autres reclus*, Paris, 1968), Haney, C., *Reforming Punishment: Psychological Limits to the Pains of Imprisonment*, Washington, 2006.

³³ Murphy, J.G., *Retribution, Justice and Therapy*, 1979, p. 240.

³⁴ Torío López, A., “La prohibición constitucional de las penas y tratos inhumanos o degradantes”, *Poder Judicial*, 4, 1986, p. 81.

³⁵ F. Savater, F., “Contra la cadena perpetua”, *El Correo digital* (23.08.08) (<http://www.elcorreodigital.com/vizcaya/20080823/opinion/contra-cadena-perpetua-20080823.html>).

³⁶ Art. 30.1 of the Portuguese Constitution excludes penalties and measure of deprivation or restriction of liberty of perpetual character or of unlimited or indefinite duration. However, Section 2 of this article allows, in case of danger based on a serious mental disorder together with the impossibility of treatment in an open environment, a successive extension of deprivation or restriction of liberty if this state remains. The decision must be taken by judicial authorities.

³⁷ Van Zyl Smit, D., “Abolishing life imprisonment?”, *Punishment and Society*, 2001, p. 300.

one of the crimes referred to in Article 5, "when justified by the extreme gravity of the crime and the individual circumstances of the convicted person"³⁸.

The issue of the constitutionality of life imprisonment has also provoked the intervention of the highest judicial bodies in some countries³⁹. According to an extensively accepted opinion in the literature and in the jurisprudence the admission of life imprisonment cannot be unconditional⁴⁰, but must only be the result of a thorough consideration of the conditions of its execution where the possibility of its revision at the end of serving a certain number of years be rendered by an independent body with full respect to the rights of defence. This has been, for example, the line followed by the European Court of Human Rights in relation to life sentence imposed in the United Kingdom⁴¹.

In a very important judgment, due to its scope and impact, German Constitutional Court in 1977 (BVerfGE 45, 187) analysed this issue in relation to art. 1 of the German Constitution (inviolability of human dignity)⁴². The Constitutional Court refused to qualify, directly and due to its nature, life imprisonment automatically as an inhuman punishment but declared it only to be constitutionally acceptable when certain conditions are accomplished⁴³: identifying the attack "on the essence of human dignity" linked to the fact that "the prisoner, despite his

³⁸ However, it has not been directly mentioned in the Statutes of the International Criminal Tribunals for the Former Yugoslavia and Rwanda. These refer to the point in terms of determining "the terms of imprisonment (...) to the general practice regarding prison sentences in the courts" of Yugoslavia and Rwanda taking "into account such factors as the gravity of the offence and the individual circumstances of the convicted person" (art. 24 and 23 of the respective Statutes). Even though in Yugoslavia the maximum prison sentence was 20 years (Rwanda allowed life imprisonment), it did not prevent the International Criminal Court to admit that art. 24 provides sufficient flexibility to apply the penalty of life imprisonment. Critically D. VAN ZYL SMIT, "Life imprisonment...", cit., pp. 16 et seq.

³⁹ In Spain, several Supreme Court decisions have highlighted the inconsistency of life imprisonment with the content of art. 15 of the Constitution. See, for example, judgment of the Supreme Court 1822/1994 of 20 October, judgment of the Supreme Court 343/2001 of 7 March, judgment of the Supreme Court 734/2008 of 14 November.

⁴⁰ Verelst, S., "Life imprisonment and human rights in Belgium", *Human Rights Law Review*, 3-2, 2003, p. 283.

⁴¹ Verelst, S., *ibidem*, pp. 282-283. In 1983 (*Solem v Helm*), the lack of possibility of conditional liberty was also the decisive reason in the USA of its qualification as disproportionate (and therefore contrary to the Eighth Amendment: cruel and unusual punishment). However, subsequently, despite intensive debates and split votes within the Supreme Court life imprisonment without possibility of conditional liberty has been considered fully constitutional Verelst, S., *ibidem*, p. 281.

⁴² Weber, H.M., *Die Abschaffung der lebenslangen Freiheitsstrafe: Für eine Durchsetzung der Verfassungsanspruchs*, Baden-Baden, 1999.

⁴³ Verelst, S., "Life imprisonment...", cit., pp. 280-281.

personal evolution, has to lose all his hope to regain one day his liberty" (BVerfGE 45 187, 245).

Summarising, in the circumstances described above and also as specified by the Council of Europe in 1977⁴⁴, imprisonment of a person for life without any hope of release is not compatible with the principle of humanity. Hence, to make life imprisonment acceptable from this point of view, the prisoner must have a concrete and realistic expectation of potential release, provided by a reasonable normative regulation of the (even if restricted)⁴⁵ awarding of parole⁴⁶. Obviously, the possibility of revision or of a conditional release (parole) after a period of an effective enforcement of the penalty (period of security) introduces a significant element to life imprisonment: according to many opinions it facilitates to a significant extent overcoming the challenge of its constitutionality⁴⁷, especially if the period of security (so diverse in the different legal systems)⁴⁸, does not exceed 15 years. It also softens the objections that life imprisonment generates, due to its lack of precision as far as the duration of the penalty is concerned, and of those from the perspective of resocialization⁴⁹. On the other hand, it does not solve numerous criminological and legal problems arising from the implementation of the review mechanisms.

Nevertheless, some legal systems that do not provide for life imprisonment have introduced penalties of such long imprisonment (accompanied by rules aimed at its full execution), that the situation of those offenders, who are sentenced to these lengthy penalties, hardly differs from the conditions to which are exposed the prisoners sentenced to life imprisonment. This is also the case in Spain, especially due to the reform of 2003 and, more particularly, since the interpretation given by the Supreme Tribunal in the judgment of 28 February 2006 (*Parot case*). Nevertheless, it is to be emphasized that the same Supreme Tribunal has repeatedly recognized that the achievement of the constitutionally aim of punishment (resocialization) "cannot be realised or results very difficult (...) when the punishment, depending on the circumstances, is excessively

⁴⁴ Council of Europe, *Treatment of long-term prisoners*, Strasbourg, 1977, p. 22.

⁴⁵ In this sense also, ECHR, *Kafkaris v. Cyprus* (2008).

⁴⁶ See Van Zyl Smit, D., "Abolishing...", cit., p. 299.

⁴⁷ Rodríguez Ramos, L., "Constitucionalidad de la prisión perpetua", *El País*, November 17, 2000. http://www.elpais.com/articulo/opinion/ESPANA/CONSTITUCION_ESPANOLA_DE_1978/CODIGO_PENAL/Constitucionalidad/prision/perpetua/elpepiopi/20001117elpepiopi_14/Tes?print=1.

⁴⁸ Van Zyl Smit/Dünkel (eds.), *Imprisonment Today and Tomorrow*, 2nd ed., The Hague, 2001. Art. 110.3 of the Statute of the International Criminal Court provides for a review and, where appropriate, for a reduction of life imprisonment imposed after 25 years.

⁴⁹ Van Zyl Smit, D., *Taking Life Imprisonment Seriously in National and International Law*, The Hague, 2002, pp. 146 et seq.

aggravated". In this sense, in its Judgment 1822/1994, the Supreme Tribunal correctly considered that "the disregard of the focus on rehabilitation and social reintegration, which is inspired by constitutional provisions, would lead to 'inhuman treatment', taking into account the fact that the person, deprived of the benefits of art. 70.2 of the Penal Code, would be supposed to spend much more than thirty years in prison. It would result in a deprivation of the opportunity of social reintegration of the offender and therefore lead to humiliation or a feeling of debasement much stronger than the one simply accompanying the sentence. Hence, it could be considered as inhuman and degrading treatment forbidden by art. 15 of the Constitution".

In reality, as pointed out by BERISTAIN⁵⁰, "deprivation of liberty lasting for more than 14 or 15 years is abominable": any detention lasting more than 15 years runs a serious risk of irreversible damage to the prisoner's personality and this period should therefore constitute the upper limit of effective imprisonment. Obviously this type of limitation –more and more difficult to imagine nowadays in this "punitive society"⁵¹, obsessed with the extension of length of imprisonment and with its full and effective enforcement– requires rules on treatment of dangerous offenders, who after having served their sentences, continue to present a significant risk of committing serious criminal acts⁵². Other legislation, as the German model (§ 66 StGB) offer in these cases various solutions, usually resulting in heavy criticism from part of the doctrine because they suppose an extension of the intervention of the penal system beyond the length of the imposed sentence, which, in a state that respects guarantees of individual rights, should be considered as an unbreakable barrier of punitive intervention⁵³. The latest reform of the Spanish Penal Code (2010) has introduced so called monitored liberty (*libertad vigilada*: article 106): a security measure for offenders who are deemed to remain criminally dangerous after having served their prison sentence. Most particularly this applies to sex offenders and to those who have served sentences for acts of terrorism. Composed of a set of obligations, prohibitions and rules of conduct, the monitored liberty –up to ten years, if the Code expressly allows it (art. 105.2)– must be declared from the beginning, by the

⁵⁰ *Derecho penal y Criminología*, Bogotá, 1986, p. 198.

⁵¹ Garland, D., "The Punitive Society: Penology, Criminology and the History of the Present", *The Edinburgh Law Review*, I, 2, 1997. Also, Díez Ripollés, J.L., "El nuevo modelo penal de la seguridad ciudadana", *Jueces para la Democracia*, 49, 2004, pp. 25 et seq.

⁵² Zugaldía Espinar, J.M., "Medidas de seguridad complementarias y acumulativas para autores peligrosos tras el cumplimiento de la pena", *Revista de Derecho Penal y Criminología*, 1, 2009, pp. 197 et seq.

⁵³ Sanz Morán, A.J., *Las medidas de corrección y de seguridad en el Derecho penal*, Valladolid, 2003, p. 56.

sentence of conviction, but its execution begins at the end of execution of the deprivation of liberty only if the predicted dangerousness is judicially confirmed at that time.

Being preferable to detention, in any case, the new regulation can constitute a more reasonable response to cases of subsisting danger, if the length of imprisonment is maintained in adequate limits in the sense described above. However, significant doubts arise, taking into account that the Spanish legislator has multiplied in recent times the possibilities available to impose accessory penalties to be served after the convict's liberation (art 57 of the Penal Code) and has extended the deprivation of liberty (together with rules that guarantee its full execution), establishing security periods and restricting the access to conditional liberty. These facts, together with the difficulties linked to the reliability of any type of prognosis of dangerousness⁵⁴, justify a critical attitude towards a measure that, in practice, will without doubt toughen the penal response to crime, while also allowing, an unfortunate disregard of the principle of proportionality, to the extent that penal consequences are applied to persons who have already served the penalties foreseen in the Penal Code, as appropriate for the committed offences.

c) Inhuman or degrading prison system

The principle of humanity is not only encountered by considering the very nature of certain penalties. It must also have important impact on the prison system, which obviously has to respect the human being and, therefore, avoid any inhuman or degrading treatment. Art. 10.1 of the International Covenant on Civil and Political Rights requires that "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person". Various international recommendations –like, for example, the International Standard Minimum Rules (and the European Prison Rules)– constitute in this sense an important development of the principle of humanity and serve as a reference for the courts in course of verification in specific cases of the compatibility of the questioned measure with that provision (or with art. 3 of the Rome Convention).

Both the Human Rights Committee and the European Court of Human Rights have repeatedly dealt with claims related to these problems. The jurisprudence of the Court manifests in recent years an increased attention to violations of the Convention of 1950 based on questionable practices in prisons – although the ECHR had, until 1998, even when it perceived a violation of international norms and standards, not taken into account violations of article 3 in penitentiary matters

⁵⁴ Romeo Casabona, C.M., *Peligrosidad y Derecho Penal preventivo*, Barcelona, 1986, pp. 24 et seq.

(with the exception of some cases of detention by police and security forces)⁵⁵-. Many judgments have already declared that certain practices⁵⁶ and conditions of imprisonment⁵⁷ violate article 3, especially in cases of certain categories of prisoners, which, due to age, mental disorders or serious illnesses, require specific care and should not be subjected to certain disciplinary and/or physical restraint without real and verified necessity⁵⁸. Similarly, the Court has declared contrary to article 3: the force-feeding of inmates on hunger strike, using of extreme methods and without a real therapeutic need⁵⁹, the conditions of detention on the Island of Aruba⁶⁰ and full body searches including anal inspections (after each visit and for a period of two years)⁶¹.

Also the highest judicial national courts are developing their own jurisprudence in this area. In fact the majority of cases of torture and inhuman or degrading treatment analyzed by the Spanish Constitutional Court concern the prison context⁶². The Court has detected violation of art. 15 of the Spanish Constitution

⁵⁵ Gomien/Harris/Zwaak, *Convention européenne des droits de l'homme et Charte sociale européenne : droit et pratique*, Strasbourg, 1997, pp. 118 et seq.

⁵⁶ Chaining of an elderly prisoner to his bed during hospitalization (*Henaf v. France*, 2003), shaving the head as a disciplinary sanction (*Yankov v. Bulgaria*, 2003), treatment of a heroin addict who had withdrawal symptoms and died in prison (*McGlinchey and others v. United Kingdom*, 2003).

⁵⁷ For example, and in combination with other circumstances, such as the length of detention in overcrowded and unsanitary facilities (*Kalashnikov v. Russia*, 2002; *Mameova v. Russia*, 2006), highly insufficient cell dimensions (*Cenbauer v. Croatia*, 2006) or lack of water and food (*Kadik.is v. Latvia*, 2006). It has been considered also a violation of art. 3 to require the person in custody arrest to pay for improvements of the conditions of his detention (*Modarca v. Moldova*, 2007).

⁵⁸ The most important cases are: *Mouisel v. France*, 2002; *Farbthus v. Latvia*, 2004, *Melnik v. Ukraine*, 2006, *Rivière v. France*, 2006; *Popov v. Russia*, 2006; *Khudobin v. Russia*, 2006; *Tariyeva v. Russia*, 2006; *Hüseyin v. Turkey*, 2007; *Gorodnitchev v. Russia*, 2007; *Paladi v. Moldova*, 2007; *Koutcherouk v. Ukraine*, 2007; *Yakovenko v. Ukraine*, 2007; *Dybeku v. Albania*, 2007; *Renold v. France*, 2008; *Kotsaftis v. Greece*, 2008.

⁵⁹ *Nevmerjitski v. Ukraine*, 2005; *Ciorap v. Moldova*, 2007. See also, *inter alia*, *Hunc v. Turkey*, 2004, on treatment used for hunger strikers with Wernicke-Korsakoff syndrome.

⁶⁰ Solitary confinement for excessive and unnecessarily prolonged period, more than seven months, in a cell that did not protect from cold weather and detention in a place where the prisoner could not access the outdoors or the area of exercise, which resulted in severe physical pain following a back injury (*Mathew v. Holland*, 2005).

⁶¹ *Frérot v. France*, 2007. Also on body searches of the detainees, *Salah v. Holland*, *Baybasin v. Holland*, 2006.

⁶² Reviriego Picón, F., *Los derechos de los reclusos en la jurisprudencia constitucional*, Madrid, 2008, pp. 55 et seq. See also, Montero Hernanz, "La jurisprudencia del Tribunal constitucional en materia penitenciaria (1981-2007)", *Revista General de Derecho Penal*, 9, 2008, RI §403783.

in the imposition of medical care against the will of the inmate in case of serious and incurable disease (STC 48/1996), but refused to admit it in cases of: force-feeding of inmates on hunger strike, in cases of refusal to change the penal regime or to grant conditional liberty, in application of means of security and control, in deprivation of intimate communication, in prohibition of application of alternative medical treatment and solitary confinement⁶³.

3. Principle of humanity and resocialization

The consequences of the principle of humanity for penitentiary treatment are not limited to the prohibition of inhuman or degrading treatment in prison. In line with art. 10.3 of the International Covenant on Civil and Political Rights (and in Spain, with art. 25.2 of the Constitution), it is widely accepted that orientation of imprisonment to resocialization is a corollary of the principle of humanity, at least at the execution level. If we accept that the principle of humanity requires the social co-responsibility with the offender, who does not cease to be part of the society, penitentiary institutions must ensure in the first place that stigmatization and separation of inmates, naturally linked with any decision on confinement behind the walls of a prison, is to be reduced and that Prison Administration must try to create as many opportunities as possible to overcome any de-socialization⁶⁴, assimilating as much as possible the life inside prison to the one outside, by fostering communication of inmates with the outside world and facilitating the gradual incorporation of the convict to life in liberty.

1. Even if the ambiguity can be considered inherent to the concept⁶⁵, this democratic understanding of the resocialization ideal is based on the assumption that penitentiary resocialization cannot be much different from the model of socialization of other citizens, and must be applied in full respect to their fundamental rights, enabling the inmates to comprehensively develop their personality⁶⁶. Thus, the problem of legitimacy, highlighted on various occasions, can be solved by formulating resocialization as a goal in a way fully compatible with the recognition of the constitutional right to be different, that results in the prohibition to be submitted to any treatment not voluntarily accepted.

⁶³ In respect of searches with full nudity, the prohibition was declared not because of the breach of art 15 of the Spanish Constitution but due to the infringement of the right to privacy.

⁶⁴ Muñoz Conde, F., *Derecho penal y control social*, Jerez, 1985, pp. 89 et seq.

⁶⁵ García Pablos de Molina, A., "La supuesta función resocializadora del Derecho Penal: utopía, mito y eufemismo", *Anuario de Derecho Penal y Ciencias Penales*, 1979, p. 650.

⁶⁶ Bueno Arús, F., "A propósito de la resocialización del delincuente", *Cuadernos de Política Criminal*, 25, 1985, pp. 65 y et seq.

Resocialization is seen, therefore, as an aim of prison intervention as a whole⁶⁷ and not only of the therapeutic interventions. The whole prison system must be oriented toward resocialization⁶⁸ and, therefore, preventing the risk of converting the facilities into mere deposit and warehousing of human beings⁶⁹, which would be the consequence of resignation from the resocialization ideal. Penitentiary organisation must engage, decisively, primarily, and preliminarily, in the humanization of prisons, which is an inevitable pre-condition for any resocialization effort⁷⁰. In the same way, together with the strengthening of guarantees of individual rights of prisoners and with serious programs to increase relations with the outside world, it requires, as a priority, the implementation of effective and constant actions in order to control the overcrowding of prisons⁷¹, which poses so many difficulties for any appropriate and effective penitentiary intervention.

2. On the other hand, the necessary orientation of imprisonment, with regard to resocialization, implies a special effort in the search for alternatives to short prison sentences or, where appropriate, for development of systems and mechanisms leading to its attenuated execution (house arrest, day release, intermediate treatment, half detention, controlled liberty, weekend arrest, etc.). Taking into account that in contemporary penal codes the fine is the most common alternative to imprisonment, the possibilities of conditional suspension (of a trial or of a sentence) and of application of other measures (accessory penalties or other restriction of liberty, prohibitions to exercise certain professions, deprivation or suspension of certain rights, obligation to repair the damages of the victim, penalty waivers or forgiveness are nowadays being multiplied; also expulsion increasingly applied for foreigners.

In any case, community service is widely renowned as the best and most accepted alternative to imprisonment⁷². This punishment implies that the offender is deprived of some of his free time, during which he "voluntarily" agrees to perform a labour of socially positive content, as an exchange for not being

⁶⁷ De la Cuesta Arzamendi, J.L., "La resocialización: objetivo de la intervención penitenciaria", *Papers d'estudis i formació*, 12, 1993, pp. 9 et seq.

⁶⁸ De la Cuesta Arzamendi, J.L., "Reflexiones acerca de la relación entre régimen penitenciario y resocialización", *Eguzkilore*, núm. extraordinario 2, 1989, pp. 59-63.

⁶⁹ Beristain, A., *Derecho Penal...*, cit., pp. 194 et seq.

⁷⁰ Kaufmann, H., *Principios para la reforma de la ejecución penal*, Buenos Aires, 1977, p. 47.

⁷¹ De la Cuesta Arzamendi, J.L., "Retos principales del actual sistema penitenciario", in *Jornadas en Homenaje al XXV Aniversario de la Ley Orgánica General Penitenciaria*, Madrid, 2005, pp. 134 et seq.

⁷² Brandáriz García, J.A., *La sanción penal de trabajos en beneficio de la comunidad*, Valencia, 2009.

incarcerated. However, the success of the punishment of community service does not depend only on a sufficient and adequate legal regulation, but most notably on the existence of an "appropriate infrastructure"⁷³, i.e. a broad network of public and private entities, capable of setting up a wide range of adequate activities. This is the greatest challenge that the development of this penalty is currently facing in Spain, where it was introduced by the Penal Code in 1995 (and significantly reformed in 2003). Its use has increased, especially after the recent reform concerning offenses against traffic security (LO 15/2007). In any case, various reforms of the Penal Code have not been able yet to break with the uncertainty, contradictions and lack of innovation that characterizes this area⁷⁴.

4. Principle of humanity and victims

The principle of humanity traditionally has been focused on the perpetrator of the offense, being one of the most important assumptions aiming at the limitation of the punitive power of the state. Nevertheless the influence of Victimology resulted in a broader understanding of this principle. It is not only impossible anymore to ignore the needs of the victims of crimes, but efforts to understand their situation and to bring them satisfaction are nowadays in the center of criminal justice. Once the limited perspective of the victim as a mere object of crime has been overcome, respect to principle of humanity in penal law requires a transformation of victims "from oblivion to recognition"⁷⁵, guaranteeing their rights, giving them the full role in the criminal justice system and putting the principle of protection of victims at the same level as the prohibition of inhuman and degrading treatment and punishment and as the orientation of penalties on resocialization.

Any criminal policy that extends the principle of humanity also in relation to victims, first of all, must guarantee their rights, a task that goes far beyond the issue of civil responsibility derived from the offence. Victims must be treated in a humane way and with full recognition and respect of their rights as victims: in particular, their right to information and truth, the right to access to justice and to compensation of damages. The right of the victims to compensation –that should at least cover prevention of the feeling of helplessness, together with the compensation of physical and moral damages– should not be restricted to the financial level. If the aggression affects the most personal and important rights, an integral compensation must always be sought, including measures of assistance

⁷³ Sanz Mulas, N., *Alternativas a la pena privativa de libertad*, Madrid, 2000, p. 350.

⁷⁴ De la Cuesta Arzamendi, J.L., "Formas sustitutivas de las penas privativas de libertad en el Código Penal español de 1995", in *Estudios Jurídicos en Memoria de José María Lidón*, Bilbao, 2002, p. 151.

⁷⁵ Subijana Zunzunegui, I.J., *El principio de protección de las víctimas en el orden jurídico penal. Del olvido al reconocimiento*, Granada, 2006.

and public aid in order to overcome the victimization process or syndrome (personal rehabilitation and social reintegration).

Special attention must be paid to the so called macro-victims (for example, those in terrorist cases)⁷⁶. In such cases the collective dimension of the problem has to be emphasized, which reinforces the necessity of actions of solidarity, care, and full compensation, as well as the adoption of all appropriate measures that can contribute to assurance of the rights of those victims. The rights of these victims, most notably, the recognition of their status as victims, truth and memory, including more specifically protection against possible attacks or harassment, protection of privacy and assistance on the physical, psychological, family, labor and social level are even more pertinent.

Obviously criminal law is not the best instrument for the recognition and guarantee of the rights of victims that, without prejudice to their position in penal process, must be sought first of all in the context of the criminal policy as a whole, ensuring appropriate and effective intervention of public institutions.

However, the importance and impact that reaches the recognition of the principle of protection of victims, as a corollary of the principle of humanity, should also be explained, in opposition to the opinion of those who place the protection of the victim outside the scope of criminal law. SUBIJANA ZUNZUNEGUI explains that it is necessary "to ensure maximum legal protection of the rights of victims within the criminal system without distorting in this way the principles that criminal law must obey in the social and democratic state of law", and, on the procedural level, without "voiding these legal provisions that ensure fair trial, suitable for effective protection of rights and legitimate interests"⁷⁷. Based upon an appropriate definition of victim (which the Spanish Criminal Code currently lacks), this requires the following, at the substantive level:

- Select and properly classify those cases either of desistance or post-offense behaviour as well as those of special relationship with the victims, who deserve a privileged penal treatment; and also those cases in which the offender takes advantage of a particular context or situation of victim vulnerability or significantly weakens the self-protection mechanisms of the latter; these cases should be treated more severely;
- Develop restorative justice, promote mediation, improve the regulation of civil liability, make of compensation a third way of criminal justice, and give community service a function of victim compensation; and in general,
- "[P]lace victims at the heart of criminal justice"⁷⁸ by:

⁷⁶ Beristain, A., *Protagonismo de las víctimas de hoy y mañana (Evolución en el campo jurídico penal, prisional y ético)*, Valencia, 2005, pp. 33 et seq.

⁷⁷ Subijana Zunzunegui, I.J., *El principio...*, cit., p. 23.

⁷⁸ Subijana Zunzunegui, I.J., *ibidem*, p. 128.

- promoting criminal law reactions that protect victims, creating barriers to further victimization processes (for example, special prohibitions relating to the family environment, restrictions to defendants or convicts residing in certain areas, or to approach or communicate with the victim, submission of the perpetrator to cultural, educational, professional, sexual and similar education programs);
- better integrating the circumstances related to the victim within the processes of the judicial determination of criminal punishment, which currently are only focused on the seriousness of the offense and circumstances of the guilty person; and
- opening opportunities for victim participation in the context of enforcement and execution of the punishment⁷⁹.

As far as the principle of *in dubio pro victima*⁸⁰ is concerned, it is a proposal of great interest that should gradually open the way, particularly in the frame of specific legislation related to victims, that can give more possible solutions that would much better serve the victims than substantive or procedural penal law.

RÉSUMÉ

Pour maintenir sa légitimité, le *ius puniendi* doit respecter un ensemble d'axiomes fondamentaux. Dans une société démocratique, fondée sur la valeur de la personne, parmi ces principes (traditionnellement, nécessité, légalité et culpabilité), le principe d'humanité devrait aussi trouver sa place. La première conséquence du principe d'humanité en droit pénal est la prohibition de la torture et de toute sorte de peine ou traitement dégradant. Ceci a des conséquences non seulement sur la partie spéciale du droit pénal, mais aussi sur les sanctions, posant des limites à la peine de mort, à la prison perpétuelle, aux systèmes pénitentiaires inhumains ou dégradants et aux peines privatives de liberté de très longue durée, et considérant la resocialisation comme orientation principale de l'intervention pénitentiaire. Le respect du principe d'humanité devrait aussi trouver application quant aux victimes, lesquelles doivent voir garantis leurs droits et être reconnues comme des acteurs principaux du système de justice pénale dans cette longue marche de l'oubli à la reconnaissance.

SUMMARY

In order to maintain its legitimacy, the *ius puniendi* must respect a set of fundamental axioms. In a democratic society, centered on the value of the person, among these principles (traditionally necessity, legality, *mens rea*, and culpability), the principle of humanity should also be included. First consequence of the principle of humanity in criminal law is the prohibition of torture and all inhuman or degrading punishment or

⁷⁹ Beristain, A., "Protagonismo de las víctimas en la ejecución penal (hacia un sistema penitenciario europeo)", *Actualidad penal*, 37, 200, pp. 798; Ríos Martín, J.C., "La mediación en la fase de ejecución del proceso penal", *Revista de Estudios Penitenciarios*, extra. 2006, pp. 169 et seq.

⁸⁰ Beristain, A., *Protagonismo...*, *cit.*, pp. 321 et seq.

treatment. This produces its effects not only on the special part of criminal law, but also causes significant impact in the field of punishment, putting barriers against death penalty, life imprisonment and very long punishments, inhuman or degrading prison systems and maintaining resocialization as the main focus of the penitentiary intervention. Respect to principle of humanity in penal law should also apply in the field of victims guaranteeing their rights and giving them a full role in the criminal justice system, in this long way from oblivion to recognition.

RESUMEN

Para mantener su legitimidad, el *ius puniendi* debe respetar un conjunto de axiomas fundamentales. En una sociedad democrática, fundada sobre el valor de la personas, entre esos principios (tradicionalmente, necesidad, legalidad, culpabilidad) debería hallar también su lugar el principio de humanidad. La primera consecuencia del principio de humanidad en derecho penal es la prohibición de la tortura y de toda pena o tratamiento inhumano o degradante. Esto tiene consecuencias no sólo en la parte especial del derecho penal, sino también por lo que concierne a las sanciones, poniendo límites contra la pena de muerte, la prisión perpetua, los sistemas inhumanos o degradantes y las penas privativas de libertad de muy larga duración, así como manteniendo la resocialización como orientación primordial de la intervención penitenciaria. El principio de humanidad debería también aplicarse en el campo de las víctimas, las cuales deben ver garantizados sus derechos y ser reconocidas en su papel fundamental en el sistema de justicia penal en esta larga marcha desde el olvido al reconocimiento.