The London School of Economics and Political Science

Unconstitutional Punishment: Political Authority and Penal Crises in Colombia

Valeria Ruiz Pérez

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DECLARATION

I certify that the thesis I have presented for examination for the PhD degree of the London School of Economics and Political Science is solely my own work other than where I have clearly indicated that it is the work of others (in which case the extent of any work carried out jointly by me and any other person is clearly identified in it).

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ABSTRACT

This thesis explores the tensions, contradictions, and conflicts behind declarations of unconstitutional states of affairs (massive, systematic, and generalised violations of fundamental rights) made by the Colombian Constitutional Court in the penal sphere. It offers a critical examination of the relationship between punishment and political authority in a context in which the constitutionalisation of penal policy, rather than restraining punitiveness, has bolstered penal inflation and justified the imposition of punishment under 'unconstitutional' conditions which amount to a 'daily transgression of the constitutional order'. I argue that these declarations are premised on a paradoxical recognition of the extent to which the State's claims of authority are undermined. Although punishment is understood as the embodiment of the State's claims of authority, penal inflation and the excessive deployment of coercive force are symptomatic of weakened relations of obedience, allegiance, and authorisation between the State and the citizens. Therefore, the longer these declarations are sustained through time, particularly in the penal sphere, the more they amount to an official recognition of the actual absence of the Constitution's normative order, as well as the lack of a solid material basis on which the political project can be realised.

Turning from the local to the global, I situate these particular dynamics within broader trends, offering insights for the understanding of the conceptual relationship between punishment and authority in a variety of economic, social, and political contexts. On the one hand, penal inflation and expansion in different regions of the world indicate the relevance of the question of political authority. On the other, although declarations of unconstitutional states of affairs are not the rule around the world (perhaps with the exception of Latin America where they are becoming increasingly common), they are reflective of contradictions and tensions inherent to the broader category of systemic legal remedies, particularly where they seek to produce structural social transformations.

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Contents

Introduction

On 12 February 2024, the Colombian Ministry of Justice declared a 'state of carceral emergency' in all penal facilities in the country. This declaration followed a series of 'homicides, assaults, and threats against the personnel of the National Penitentiary and Prison Institute (*INPEC*) in various Colombian prisons'.[1] In addition to this, the Minister of Justice argued, extortion had 'increased by 41%, generating concern among the Colombian population'.[2] In the days leading up to these declarations, one prison guard had been murdered by *sicarios* as he left the San Sebastian de Ternera prison in Cartagena, another guard had been murdered in Cúcuta, and various guards had been attacked in Medellín, Huila, and Valle del Cauca.[3] According to the Minister of Justice, these attacks were coordinated by a prison gang called 'Death to Oppressive Guards' (*Muerte a Guardianees Opresores*-MAGO), and were a response to 'strong blows against leaders of high-impact armed criminal structures'.[4] Emergency measures had the aim of weakening the 'enemy', that is, 'criminal structures'[5] that have gained *de facto* control over prisons and exert considerable influence on illegal markets and other criminal activities both inside and outside of these facilities. According to the Minister, 'criminal structures must know that the rule of law will prevail and that they will be subjected to the law'.[6]

Declarations of emergencies in Colombian prisons are in no way new. In the past ten years, the government has declared four carceral emergencies.[7] More importantly, after decades of semi-permanent states of exception with a lasting impact on ordinary criminal laws, the penal system itself has been submerged in a state of *unconstitutionality* for nearly thirty years. The current declaration of a 'carceral emergency', however, is illustrative not only of the condition that Colombian prisons find themselves in, but also of broader contradictions that plague the Colombian constitutional order. This dissertation explores those contradictions from the perspective of the central concept of political authority, critically examining declarations of *unconstitutional states of affairs* [henceforth '*USoA*'] in prisons, which the Colombian Constitutional Court has made since 1998.

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[1] Ministerio de Justicia, Gobierno de Colombia, 'Gobierno Nacional Declaró Emergencia Carcelaria En Todos Los Centros Penitenciarios Del País' (12 February 2021) <https://www.minjusticia.gov.co/Sala-de-prensa/Paginas/Gobierno-nacional-declaro-emergencia-carcelaria-en-todos-los-centros-penitenciarios-del-pais.aspx>.

[2] ibid.

[3] Paula Calderon B., 'El Gobierno de Colombia Declara La Emergencia Carcelaria' *El País* (2 December 2024) <https://elpais.com/america-colombia/2024-02-12/el-gobierno-de-colombia-declara-la-emergencia-carcelaria.html#> accessed 19 April 2024.

[4] ibid.

[5] Ministerio de Justicia, Gobierno de Colombia (n 1).

[6] Angélica María Cassiani Barrios, 'MinJusticia Pide Declarar La Emergencia Carcelaria Tras Ataque al Inpec' *W Radio* (10 February 2024) <https://www.wradio.com.co/2024/02/10/minjusticia-pide-declarar-la-emergencia-carcelaria-tras-ataque-al-inpec/> accessed 16 April 2024.

[7] In 2013, due to overcrowding; in 2016, due to the liquidation of Caprecom, the health insurance entity that provided health services in prisons; and in 2020, due to the COVID-19 pandemic

In the 1990s, after almost fifty years of internal armed conflict and decades of emergency penal measures enacted through semi-permanent states of exception,[8] the Colombian penal system faced an unprecedented 'crisis'.[9] Although issues like overcrowding and understaffing had been a recurrent theme since at least the 1940s,[10] by the mid-1990s Colombian prisons reached unprecedented levels of overcrowding. From an average of 29537 inmates between 1990 and 1994, the imprisoned population rapidly increased to 31960 inmates by 1995, reaching 40590 inmates by 1998.[11] Furthermore, by 1998, prisons had become a battleground: the 'war on drugs' had produced an extraordinary inflation of imprisonment rates, and confrontations between *guerrillas,* right-wing *paramilitary* groups, and *narcos*[12] led to a series of disappearances and massacres inside prisons.[13] Extreme violence, a serious lack of public services, and poor sanitation and healthcare were the norm in prisons.[14]

These conditions stood in stark contrast with the promise of democracy of the newly enacted 1991 Constitution —a constitution conceived as a 'peace agreement' that would wipe the slate clean and create conditions in which democracy could finally be fully realised.[15] Along with a long and ambitious bill of fundamental rights, the Constitution introduced *tutelas* as one of the main institutional innovations that would allow citizens to easily formulate 'social, political, and

[8] For an overview of Colombian history, see Appendix 1. See Boaventura de Sousa Santos and Mauricio García Villegas (eds), *El Caleidoscopio de Las Justicias En Colombia* (Siglo del Hombre 2001); Rodrigo Uprimny and Mauricio García Villegas, 'El Control Judicial de Los Estados de Excepción En Colombia' in Rodrigo Uprimny, Mauricio García Villegas and César Rodríguez-Garavito (eds), *¿Justicia para todos?: Sistema judicial, derechos sociales y democracia en Colombia* (Norma 2006).

[9] The Court uses terms such as 'crisis' and 'emergency' to describe and characterise the circumstances in prisons, justifying the need for exceptional constitutional remedies and structural interventions. However, the tribunal recognises that the 'crisis' is by no means an irregular, extraordinary, or temporary situation. On the contrary, it says one of the 'main characteristics [of the penal system] is to be in a permanent state of crisis. In particular, overcrowding and conditions of overpopulation in prisons seem to be an element of this system, which have accompanied it from its very origin in English and North American *workhouses*'. *T-388/13* (Constitutional Court of Colombia ['CCC']) ¶7.4.2.2.

[10] *T-153/98* (CCC).

[11] ibid.

[12] Since the 1960s, different armed actors have achieved significant *de facto* control over large territories all over Colombia. These actors include *guerrillas* or insurgent organisations (such as the Revolutionary Armed Forces of Colombia —*FARC*, the National Liberation Army —*ELN*, the Popular Liberation Army —*EP*L, among others); right-wing paramilitary groups (most of which claimed to act in self-defence, in defence of the State, and in defence of the right to property, including the United Self-Defence Forces of Colombia —*AUC*, the Popular Revolutionary Anti-Terrorist Army of Colombia —*ERPAC,* the United Gaitán Self-Defence Forces of Colombia —*AGU*, the Peasant Self-Defence forces of Córdoba and Urabá —*ACCU,* and other social cleansing and independent paramilitary groups, both in cities and rural areas); narco cartels; and criminal bands or organisations (an umbrella term used to describe a wide range of criminal groups, often involved in drug trafficking activities and common criminality, sometimes involving the participation of former cartel members and demobilised paramilitaries and guerrilleros. These include, among others, groups like *Los Urabeños, Los Rastrojos, Águilas Negras,* and the *Oficina de Envigado*).

[13] Libardo Ariza and Manuel Iturralde, 'The Bullet in the Glass: War, Death, and the Meaning of Penitentiary Experience in Colombia' (2020) 30 ICJR 83.

[14] ibid. See also *T-153/98* (n 10).

[15] Julieta Lemaitre, *El Derecho Como Conjuro. Fetichismo Legal, Violencia y Movimientos Sociales.* (Siglo del Hombre Editores, Universidad de los Andes 2009); Mauricio García Villegas, 'Law as Hope: Constitution and Social Change in Latin America' (2002) 20 WILJ 353; Rodrigo Uprimny and Luz María Sánchez-Duque, 'Constitución de 1991, Justicia Constitucional y Cambio Democrático: Un Balance Dos Décadas Después.' (2013) 71 Cahiers des Amériques Latines 33; William Felipe Hurtado Quintero and Carlos Andrés Marín Reina, 'Treinta años de la Constitución Política de Colombia de 1991: antecedentes, origen, cambios y reformas' (2021) 3 Análisis Jurídico - Político 17; Rodolfo Arango, 'Derechos, Constitucionalismo y Democracia' (2004) 33 Serie de Teoría Jurídica y Filosofía de Derecho 193.

economic matters as judicial claims'.[16] In view of existing institutional failures, high rates of violence, extreme inequality, and widespread conditions of marginalization and exclusion, the Constituent Assembly designed this accessible judicial mechanism to seek the immediate and effective protection of fundamental rights. Through *tutelas,* i.e., individual complaints concerning violations of fundamental rights, citizens may seek immediate relief for these violations, with no technical requirements for the presentation of these claims before any judge in the country. Judges must resolve these complaints within ten days, and all *tutela* rulings are then forwarded to the Constitutional Court for discretionary review. After reviewing these decisions, in its role as the guardian of the Constitution, the Court may decide to issue new judgments where necessary for the protection of fundamental rights.

Soon after the enactment of the new Constitution, the number of *tutelas* grew exponentially,[17] becoming overwhelming for the Court. Because many of these *tutelas* concerned similar well-founded claims about violations of individual rights produced by structural failures, the Court felt compelled to resort to an innovative strategy of systemic intervention: declarations of *USoA*. Through these declarations the Court recognises the existence of 'massive, generalised, and systematic violations of fundamental rights'[18] that entail a 'daily transgression of the Constitution and the law'.[19] On the basis of these declarations, the Court orders a series of remedies deemed 'necessary' to protect, realise, and uphold fundamental rights as an essential component of the Constitution. In 1998, due to the overwhelming number of constitutional complaints against the penal system, the Constitutional Court decided to gather thousands of similar *tutelas* together,[20] declaring an *USoA* in the National Penitentiary System.

In this first judgment (*T-153/98)*, focusing on the issue of overcrowding alone, the Court ordered the executive and legislative powers to carry out various structural measures, including the construction and renovation of penal facilities, in order to overcome conditions of *unconstitutionality* in prisons all over the country. Although these plans were mostly accomplished,[21] by 2013 the situation of the penal system remained critical, and the trend towards mass incarceration[22] seemed

[16] Uprimny and Sánchez-Duque (n 15).
[17] Manuel Jose Cepeda-Espinosa, 'Judicial Activism in a Violent Context: The Origin, Role, and Impact of the Colombian Constitutional Court' (2004) 3 Washington University Global Studies Law Review.
[18] *T-153/98* (n 10) ¶54.
[19] *T-153/98* (n 10).
[20] This includes penal policy (T-153/1998, T-388/13, T-762/15, SU-122/22); the protection of the lives of human rights activists and advocates (T-590/98); delays in the payment of pensions to public officials (T-068/98, T-525/99, SU-090/00); tenders for notary positions (SU-250/99); internal displacement (T-025/04); and the rights of Wayúu children in La Guajira (T302/17, T-350/18).
[21] After the first declaration in 1998, plans of prison renovation and construction were carried out by the government. This led to an increase in the capacity of the system and a gradual decline of overcrowding that lasted until around 2007. However, due to harsh penal measures taken as part of Uribe's *Democratic Security* policies (overarching security policies to combat ordinary crime and narcotrafficking as a single phenomenon, involving military and penal strategies), incarceration rates during this period grew at an even higher speed than in the mid 90s. The system was once again overwhelmed in 2008, reaching new peaks of incarceration and overcrowding rates every few years.
[22] It is worth noting that mass incarceration, and the trend towards it, is a multi-faceted phenomenon. Often used as a term that broadly describes the conditions of the US criminal justice system, it encompasses the unprecedented expansion of the penal system, an enormous growth of imprisoned populations, and a generalised reliance on harsh punishment that produces a widespread risk of incarceration (a risk that is distributed unequally across the population,

unstoppable. In the face of thousands of new *tutelas,* the Court made new declarations of *USA*'s in 2013, 2015, and 2022,[23] focusing on the 'volatile, disjointed, and disproportionate' character of criminal justice policy.[24] With the aim of overcoming the 'crisis' of the penal system, the Court created 'minimum standards of constitutionality' for the design, implementation, and reform of criminal justice policy, as well as mechanisms of oversight and review to ensure the harmonic collaboration of all branches. However, these measures have proved to be largely ineffective. Twenty-five years after the Court's first declaration, the Colombian penal system seems to be in a state of permanent *unconstitutionality.*[25]

Notwithstanding some initial criticism, as well as efforts to make the Court's decisions more effective, the literature on declarations of *USoA* has mostly highlighted their potential to 'realise' the Constitution and give a voice to groups that would otherwise be subjected to unending

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affecting certain sectors —African American and Latino males—more than others). In terms of sheer numbers, mass incarceration involves very high rates of imprisonment which, as Garland argues, are 'markedly above the historical and comparative norm', disproportionately affecting minority populations and becoming massive in the sense that it is 'no longer the incarceration of individual offenders', but the 'systematic imprisonment of whole groups of the population'. See Garland, *Mass Imprisonment: Social Causes and Consequences* (n 73) 10. See also Marie Gottschalk, *The Prison and the Gallows: The Politics of Mass Incarceration in America* (CUP 2006); David Garland, *Mass Imprisonment: Social Causes and Consequences* (London : SAGE 2001); Jonathan Simon, *Mass Incarceration on Trial: A Remarkable Court Decision and the Future of Prisons in America* (The New Press 2014); Loïc Wacquant, *Punishing the Poor: The Neoliberal Government of Social Insecurity* (English language edition, Durham North Carolina : Duke University Press 2009); Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New Press 2010).

Beyond this quantitative aspect, mass incarceration also has a strong qualitative aspect: imprisonment is imposed under 'inhumane' conditions, that is, conditions which gravely violate human dignity: imprisonment is imposed under 'inhumane' conditions, that is, conditions which gravely violate human dignity. See Simon; Jonathan Simon, 'Ending Mass Incarceration Is a Moral Imperative' (2014) 26 Federal Sentencing Reporter 271. Although the imprisoned population in the US kept growing throughout the 1990s and early 2000s, these trends seem to have stabilised throughout the 2010s, with significant decreases in some states. See Katherine Beckett, *Ending Mass Incarceration: Why It Persists and How to Achieve Meaningful Reform* (OUP 2022).

Though Colombia has remained far from reaching the incarceration rates of the United States, similar conditions have been identified as constitutive of the *unconstitutional state of affairs:* since the mid-1990s, there has been an unprecedented trend of penal inflation (by Colombia's historical standards), which has resulted in widespread prison overcrowding. This, in turn, has produced the imposition of punishment under 'unconstitutional' conditions that massively violate inmates' dignity and other fundamental rights —a population that, as recognised by the Court, is predominantly made up of young, unemployed, uneducated males from urban centres. See *T-388/13* (n 9) ¶7.6.

[23] *T-388/13* (n 9); *T-762/15* (CCC); *SU-122/22* (CCC).

[24] By 2008, ten years after the first declaration of an *USA*'s in prisons, the prison population had reached 84444 inmates. Later, in 2013, when the Court decided to make a new declaration of *USA*'s, prisons had a population of 120032 inmates. By January 2020, the population had reached 124188 inmates, with an index of overcrowding of 54,9%. Since the enactment of Judgments 388/2013 and 762/2015, and with the exception of a brief decrease in the levels of overcrowding and imprisonment due to emergency measures taken during the COVID-19 pandemic, when the imprisoned population decreased to 96285 inmates, imprisonment levels have been on the rise, reaching 97860 persons deprived of liberty by December 2022 . See Instituto Nacional Carcelario y Penitenciario, Informes y Boletines Estadísticos, available at https://www.inpec.gov.co/web/guest/estadisticas/-/document_library/TWBuJQCWH6KV/view/49294.

The Court recognised the limited effects of the judgments in Judgment SU-122 of 2022, in which it confirmed the persistence of the *USA* and clarified that these conditions have now extended to temporary or transitory detention centres (such as police stations, Immediate Reaction Units —URI's— and others), partially as a result of the closure of jails and prisons according to the rules established in T-388/13).

[25] See the yearly reports presented to the Constitutional Court by the Superior Council for Criminal Justice Policy (Consejo Superior de Política Criminal), available at: https://www.politicacriminal.gov.co/Sentencia-T-762-de-2015. See also the Court's notifications which declare the extension of the declarations of *USA*'s in the Colombian penal system (Auto 121 of 2017, Auto 110 of 2019, Auto 1629 of 2022, Judgment SU-122 of 2022, Auto 065 of 2023, and Auto 066 of 2023).

violations of fundamental rights.[26] This narrow approach, however, has obscured deeper issues raised by these declarations: what do declarations of the *unconstitutionality* of the penal sphere tell us about underlying relations between the state and the citizens? What do they reveal in terms of the relationship between punishment and authority? And what is the role of both punishment and these declarations in broader processes of State-building? Putting the concept of political authority at the centre of inquiry, this project interrogates underlying assumptions, tensions, contradictions, and limitations of declarations of *USoA*. I argue that these declarations are paradoxically premised on a recognition of the extent to which the State's political authority is undermined. In the scheme of constitutionalism, the Constitution contains its own, self-generated source of authority. However, by recognizing the systematic character of long-lasting violations to these fundamental rights and principles, declarations of *USoA* constitute a recognition of the extent to which this source of authority is undermined. The longer these declarations are perpetuated over time, the more they amount to an explicit recognition of the actual absence of the normative order of the constitution.

Methodology

Declarations of *USoA* seek to reaffirm the authority and legitimacy of a regime that is recognised as structurally violated through appeals to fundamental constitutional principles from which, in the Constitution's own normative scheme, authority is derived. Although principles are recognised as norms that require realisation to the greatest extent that is legally and factually possible,[27] these declarations reveal the constitutional order as falling dangerously short of these ideals. This, in the sense that they not only expose the extent to which these principles remain mere promises, but, more importantly, because they reveal that the Constitution cannot generate its own authority so as to realise its core principles and ideals without a solid material basis in social and political life.

This thesis explores the ideological and normative claims made by the State through criminal and constitutional law, taking these claims seriously in their own terms, and exploring the extent to which they may be credibly sustained in practice.[28] In this sense, this thesis presents an immanent critique of authority as constructed by the Colombian constitutional order —a particular

[26] Cepeda-Espinosa (n 17); Rodrigo Uprimny, 'Judicialization of Politics in Colombia: Cases, Merits and Risks.' (2007) 13 Sur -International Journal on Human Rights; César Rodríguez-Garavito, 'Beyond Enforcement: Assessing and Enhancing Judicial Impact' in Malcom Langford, César Rodríguez-Garavito and Julieta Rossi (eds), *Social Rights Judgments and the Politics of Compliance: Making it Stick.* (CUP 2017); Daniel Bonilla Maldonado, *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia* (CUP 2013); Kent Roach, *Remedies for Human Rights Violations: A Two-Track Approach to Supra-National and National Law* (CUP 2021); César Rodríguez-Garavito and Diana Rodríguez Franco, *Cortes y Cambio Social. Cómo La Corte Constitucional Transformó El Desplazamiento Forzado En Colombia.* (DeJusticia 2010); César Rodríguez-Garavito and Diana Rodríguez Franco, *Radical Deprivation on Trial. The Impact of Judicial Activism on Socioeconomic Rights in the Global South.* (CUP 2015).

[27] Robert Alexy, *A Theory of Constitutional Rights* (OUP 2002).

[28] Alan Norrie, *Punishment, Responsibility, and Justice: A Relational Critique* (OUP 2000); Alan Norrie, *Crime, Reason and History* (3rd Edition, CUP 2014); Peter Ramsay, *The Insecurity State: Vulnerable Autonomy and the Right to Security in the Criminal Law* (OUP 2012).

manifestation of the transnational ideology of constitutionalism.[29] By situating declarations of *USoA* in Colombian prisons within broader social, political, and historical conditions, I seek to unveil the contradictions, tensions, and paradoxes underlying the State's claims of authority.

Taking the State's normative and ideological claims seriously implies two things. On the one hand, because these claims have been central to complex historical processes driven by colonial and post-colonial structures of power and domination, the intellectual and conceptual construction of notions like sovereignty, authority, and legitimacy is inevitably tied to these processes. Taking those claims seriously implies treating these notions as if they were 'formally rational'.[30] However, this does not entail uncritical acceptance: they are taken seriously precisely to show their limits, the conflicts they mask, the contested ways through which the State sustains them, and the contradictions and tensions behind the State's attempts to uphold them. In addition, their 'formal rationality' is not divorced from the social, political, and economic context in which they exist. For instance, in the Colombian case —and in Latin America more broadly —the fact that these claims have been made as a manifestation of 'the culture and political identity of [the] European settler populations, not their colonized Indigenous inhabitants',[31] and the effects of these historical forms of social, political, and economic marginalisation, are crucial to understanding the ways in which claims of authority have failed. Therefore, by taking these claims seriously, the aim of this project is to elucidate the power relations embedded in them, revealing their inconsistencies, conflicts, and paradoxes.

On the other hand, precisely because the question of political authority is context-specific, it requires an exploration of how a particular State's claims of authority are made, how the sovereign's rule is established and maintained, and the extent to which conditions for the credible maintenance of these claims exist, all without losing sight of the global relations that have shaped these processes. This implies recognising significant differences between 'Southern' or 'peripheral' contexts and 'Northern' or 'central' ones.[32] However, because these modern conceptual constructions played a key role in the articulation of a global capitalist system, 'shaping societies of the South as they were drawn into the orbit of the European imperial order',[33] the tensions and contradictions that unfold more starkly in the 'periphery' may be illuminating for contexts in which authority is taken for granted as an outcome of modernity. In other words, 'reversing the taken for granted telos of modernity', it may be the case that these 'peripheral' contexts elucidate the 'direction to which point the signposts of history unfolding'.[34] It is in the margins that 'tectonic

[29] See Martin Loughlin, *Against Constitutionalism* (Harvard University Press 2022). The Constitutional Court uses the term 'constitutional order' somewhat loosely, broadly defining it as the set of 'ends, principles, values, and rights enshrined in the Constitution'. See *C-539/11* (CCC) ¶5.2.8.
[30] Norrie, *Punishment, Responsibility, and Justice: A Relational Critique* (n 28); Norrie, *Crime, Reason and History* (n 28); Ramsay, *The Insecurity State* (n 28).
[31] Kerry Carrington, *Southern Criminology* (Routledge 2019).
[32] Máximo Sozzo, 'Reading Penalty from the Periphery' (2023) 27 Theoretical criminology 660; Carrington (n 31); Ana Aliverti and others, *Decolonizing the Criminal Question: Colonial Legacies, Contemporary Problems* (OUP 2023).
[33] Carrington (n 31) 8.
[34] Jean Comaroff and John Comaroff, *The Truth about Crime: Sovereignty, Knowledge, Social Order* (The University of Chicago Press 2016) 40–41.

shifts' are experienced first, 'most visibly, most horrifically —and most energetically, creatively, ambiguously'.[35]

Though these contradictions emerge more 'visibly' and 'energetically' in contexts like that of Colombia, and while they may unfold differently in other ones, this dissertation points towards inherent conflicts of the modern project (particularly those of the relationship between punishment and political authority), building a dialogue between Northern and Southern scholarship. Rather than taking authority for granted as a mere normative benchmark or 'developmental destination',[36] this thesis seeks to uncover the ways in which claims of authority may fail. Instead of being achieved once and for all, political authority depends on the articulation of social relations that may make these claims appear, at different points of history, weaker or stronger, complete or incomplete, more or less eroded.

Constitutionalism

Constitutionalism may be defined as a 'philosophy of governing' with universal aspirations that has spread across the world.[37] It goes beyond the classic modern construction of the constitution as a form of representative government that contemplates institutional mechanisms for the limitation, division, and balancing of powers, promoting individual liberty. In constitutionalism's ideological framework, the text of the constitution establishes a fundamental, comprehensive scheme of governing through a set of rational principles on which the self-sustaining authority of the constitution is founded. In this scheme of government, the system of fundamental, higher-order legality enshrined in the constitution is guarded by the judiciary. In addition to this, the constitution is conceived as expressive of the 'the regime's collective political identity'.[38] Constitutional courts, as the guardians of this system of law, re-interpret its core values in changing conditions to 'pronounce [themselves] on what constitutional justice requires'.[39] In this view, the constitution embodies 'an objective order of values' which '"radiates" into all areas of the legal system'.[40] The validity of all political decisions is subject to challenge where it 'detrimentally affects the interests of an individual', requiring public authorities to justify their actions through exercises of practical reasoning, aimed at demonstrating that these acts are supported by 'good reasons' — often articulated in terms of legality, reasonableness, or proportionality.[41] Because the constitution

[35] ibid.
[36] Carrington (n 31) 5.
[37] Loughlin, *Against Constitutionalism* (n 29).
[38] ibid 7.
[39] Mattias Kumm, 'Who Is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law' (2006) 7 German law journal 341.
[40] ibid; Manuel José Cepeda Espinosa and David Landau, *Colombian Constitutional Law: Leading Cases* (OUP 2017); Rodolfo Arango, *El Concepto de Los Derechos Sociales Fundamentales* (Themis 2012).
[41] Mattias Kumm, '"We Hold These Truths to Be Self-Evident": Constitutionalism, Public Reason, and Legitimate Authority' in Mattias Kumm, Silje A Langvatn and Wojciech Sadurski (eds), *Public Reason and Courts* (CUP 2020); Mattias Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review Rights, Balancing & Proportionality' (2010) 4 Law & Ethics of Human Rights 140.

is conceived as a fundamental, higher order law, the distinction between public and private spheres is transcended or, at least, diluted: all social issues fall under the system of ordering established by the constitution, and may be subjected to 'the court's assessment of whether the actions of public institutions are reasonable under the circumstances'.[42]

This marks the emergence of the 'total constitution'.[43] Though denounced as an 'unhelpful concept' whose Schmittian origins should be mistrusted,[44] defenders of constitutionalism have ambiguously embraced this notion, arguing that the 'total constitution' may turn out to be 'nothing more than a constitution that institutionalizes', in the most successful manner, 'a commitment to complete constitutional justice'.[45] Such a commitment to 'complete constitutional justice' is supported not only on the idea that constitutionalism requires public authorities to justify their actions and decisions. It also relies on the notion that 'constitutionalism connects democracy and human rights, by the rule of law, and installs courts as the backup to make it work'.[46] Courts, in that sense, play the role of 'safety belts for democratic politics that do not hurt anyone', protecting 'those that do not have a voice' under majoritarian rule and who 'need legal protection since politics do not care'.[47] In this sense, courts are 'necessary' for rights-respecting democracies in which Courts 'render [fundamental rights] realities, not mere rhetoric as promises on paper'.[48]

Since the 1990s, constitutionalism has 'scattered its seeds' both in Europe and in post-colonial regimes.[49] Combining, adapting, and appropriating elements from different legal traditions, mainly the American and German ones, constitutionalism has taken a direction of its own in the Global South, with constitutions playing a significant integrative role and constitutional courts standing out as some of the most innovative and creative tribunals around the world, mainly by virtue of their attempts to contribute to the 'structural transformation of the public and private spheres of their countries'.[50] Supported on the basic architecture of constitutionalism and its grammar, tribunals in the South have developed a tradition in which the transformative potential of the constitution is strongly emphasized. The Colombian Constitutional Court has been at the forefront of these developments, not only replicating arguments from 'dominant institutional and academic interpreters of modern constitutionalism',[51] but also reinterpreting the basic features of

[42] Kumm, 'Who Is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law' (n 39).
[43] Ernst-Wolfgang Böckenförde, 'GRUNDRECHTE ALS GRUNDSATZNORMEN: Zur Gegenwärtigen Lage Der Grundrechtsdogmatik' (1990) 29 Der Staat 1; Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2007); Loughlin, *Against Constitutionalism* (n 29).
[44] Kumm, 'Who Is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law' (n 39). Kumm highlights that, though Schmitt did not use the term 'total constitution', it may be understood as the 'counterpart' of the 'total state', in which the relationships between individuals are politicized and in which the pluralistic forces of civil society absorbed and captured the state.
[45] ibid 369.
[46] Susanne Baer, 'The Rule of—and Not by Any—Law. On Constitutionalism' (2019) 71 Current Legal Problems 335, 357.
[47] ibid 356.
[48] ibid 338.
[49] Loughlin, *Against Constitutionalism* (n 29) 13.
[50] Bonilla Maldonado (n 26) 21.
[51] ibid 23.

constitutionalism 'in a new light' or 'rearrang[ing] them in novel ways', [52] including the creation of strategies of systemic intervention and transformation like declarations of *USoA*.

In Colombia, the 1991 Constitution was conceived as a crucial point of rupture that symbolised the promise of a new political reality.[53] The Colombian Constitutional Court was conceived, from its birth, as an instrument to 'bridge the gap' between reality and the Constitution through innovative mechanisms of judicial intervention and activism.[54] Because of a deeply entrenched disrespect for the Congress and the political elites,[55] as well as a 'profound disillusionment with politics'[56], the judicialisation of politics became the main mechanism to 'serve, however paradoxical it might seem, as a mechanism of social and political mobilization, inasmuch as it empowers certain social groups and expedites their social and political action'.[57] Despite some initial scepticism,[58] the dominant literature on declarations of *USoA* has celebrated the Court's creative reasonings and strategies, both locally[59] and transnationally.[60] Where critical, this literature has focused on the impact and effects of these declarations, either pointing out their meaningful

[52] ibid.

[53] García Villegas (n 15); Mauricio García Villegas and María Paula Saffon, 'Is There Hope in Judicial Activism on Social Rights? Assessing the Dimension of Judicial Activism on Social Rights in Colombia' (2007) <https://www.dejusticia.org/wp-content/uploads/2017/04/fi_name_recurso_65.pdf.>; Lemaitre (n 15).

[54] Cepeda-Espinosa (n 17); Eduardo Cifuentes Muñoz, 'El Constitucionalismo de la pobreza' (1995) 4 Revista Xurídica da Universidade de Santiago de Compostela; Rodrigo Uprimny, 'Latin American Constitutionalism: Social Rights and the "Engine Room" of the Constitution', *Law and Society in Latin America. A New Map.* (Routledge 2014).

[55] Uprimny (n 26) 58.

[56] ibid 56.

[57] ibid 62. Rodrigo Uprimny, Juan F Jaramillo and Diana Guarnizo, 'Intervención Judicial En Cárceles' (DeJusticia 2006).

[58] Critiques of the Court's activism have mostly come from 'conservative' groups that argue that constitutions should be limited to setting principles which ensure the separation of powers, rather than being understood as 'aspirational bills of rights'. Other critics have argued that judicial activism represents a manifestly undemocratic trend. These ideas, however, have received little attention and been criticised by mainstream academics for contradicting basic constitutional principles. See María Paula Saffon and Mauricio García Villegas, 'Derechos Sociales y Activismo Judicial. La Dimensión Fáctica Del Activismo Judicial En Derechos Sociales En Colombia.' (2011) 13 Revista Estudios Socio-Jurídicos 75.

[59] Uprimny (n 26); Rodríguez-Garavito and Rodríguez Franco, *Cortes y Cambio Social. Cómo La Corte Constitucional Transformó El Desplazamiento Forzado En Colombia.* (n 26); Rodríguez-Garavito (n 26); Beatriz Ramírez, 'El "Estado de Cosas Inconstitucional" y Sus Posibilidades Como Herramienta Para El Litigio Estratégico de Derecho Público. Una Mirada a La Jurisprudencia Colombiana y Peruana', *Anuario de investigación del CICAJ 2015* (Pontificia Universidad Católica del Perú 2016); Leonardo García Jaramillo, 'La Doctrina Jurisprudencial Del Estado de Cosas Inconstitucional. Respuesta Judicial a La Necesidad de Reducir La Disociación Entre Las Consagraciones de La Normatividad y La Realidad Social', *Constitucionalismo deliberativo. Estudio sobre el ideal deliberativo de la democracia y la dogmática constitucional del procedimiento parlamentario* (UNAM 2015); Omar Huertas Díaz, Ana Alice de Carli and Bruno de Paula Soares, 'El Estado de Cosas Inconstitucional Como Mecanismo de Exigibilidad de Respeto y Garantía de Los Derechos Humanos En Colombia y Su Aplicación En Brasil Por La Corte Suprema' (2017) 3 Revista Direito UFMS 33; Uprimny (n 54).

[60] See Chapter 6. Roach (n 26); Bonilla Maldonado (n 26); Manuel Iturralde, 'Access to Constitutional Justice in Colombia' in Daniel Bonilla (ed), *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia* (CUP 2013).

symbolic effects,[61] criticising the shortcomings of the Court's orders,[62] or envisioning more effective forms of judicial intervention.[63]

This thesis interrogates the self-standing notion of authority presupposed by constitutionalism, identifying the tensions and contradictions inherent to declarations of *USoA* as a tool for the 'realisation' of the constitutional order, as well as the implications of these contradictions in the penal sphere. This involves analysing the extent to which the Constitution has the potential to achieve social and political integration, taking into account underlying material obstacles and inherent contradictions reflected by this particular form of systemic remedies.[64] On the one hand, I argue that the paradoxical character of these declarations is revealed: the declarations go to exceptional lengths in their attempts to reaffirm the authority of a constitutional regime that is officially recognised as structurally, massively, and systematically violated. On the other, because of the meagre practical effects of these declarations over the past 25 years, this thesis asks whether these strategies have been successful in promoting democracy and enhancing the rule of law, or whether, in attempting to do so, they have fostered a fetishist culture of bad faith.[65] This, in the sense that the prolongation of declarations of *USoA* through time reveals the extent to which, in practice, the normative order imposed by the Constitution is absent. Although these questions can only be examined in retrospect, and there may be variations among different jurisdictions, the analysis of the Colombian case may offer important insights about similar challenges in other contexts: though declarations of *USoA* are not the rule around the world, their underlying rationale may be understood as reflective of the contradictions inherent to global constitutionalism.

The perspective of political authority

Though fundamental to existing practices and institutions —including punishment—, the concept of political authority has been largely absent from the framework of constitutionalism due to deep misapprehensions about its nature and significance.[66] On the one hand, authority and sovereignty, while resting at the basis of the application and enforcement of the law, have been almost entirely

[61] Rodríguez-Garavito (n 26).
[62] Libardo Ariza and Manuel Iturralde, *Los Muros de La Infamia: Prisiones En Colombia y En América Latina* (Universidad de los Andes, CIJUS 2011); Libardo Ariza and Mario Torres, 'Constitución y Cárcel: La Judicialización Del Mundo Penitenciario En Colombia.' (2019) 10 Revista Direito e Práxis 630.
[63] Ariza and Iturralde (n 62); Libardo Ariza, 'La Prisión Ideal: Intervención Judicial y Reforma Del Sistema Penitenciario En Colombia' in Daniel Bonilla and Manuel Iturralde (eds), *Hacia un Nuevo Derecho Constitucional* (Universidad de los Andes, CIJUS 2011); Libardo Ariza and Mario Torres, 'Definiendo El Hacinamiento.' (2019) 21 Revista Estudios Socio-Jurídicos 227.
[64] See Chapter 6
[65] In Koskenniemi's words, 'a political culture that officially insists that rights are foundational ('inalienable', 'basic') but in practice constantly finds that they are not, becomes a culture of bad faith'. Martin Koskenniemi, 'The Effects of Rights on Political Culture' in Philip Alston (ed), *The EU and Human Rights* (OUP 1999) 100. See also Martin Loughlin, 'The Constitutional Imagination' (2015) 78 Modern Law Review 1.
[66] Martin Loughlin, 'Why Sovereignty?' in Richard Rawlings, Peter Leyland and Alison Young (eds), *Sovereignty and the Law: Domestic, European and International Perspectives* (Hart Publishing 2013).

supressed from recent constitutional thought.[67] Assumptions about the autonomy of the law, in both their formalist and anti-formalist variations,[68] have done away with the political character of sovereignty and authority. Whether as part of positivist attempts to rid the law of its political and moral dimensions and establish the law as a formal science,[69] or as an effect of the anti-positivist exaltation of law's intrinsic morality —from which constitutionalism derives its self-generated, internally cogent notion of 'authority'—,[70] the political nature of authority has been effaced from constitutional theory. The constitution, therefore, appears as an autonomous, self-generated, and authoritative normative scheme.[71]

On the other hand, though the relationship between punishment and authority is presupposed by the very existence of this institution, dominant accounts in criminal law theory have, until recently, taken a normative approach to the justification of punishment. Retributivist, utilitarian, and hybrid accounts alike have defined crime as a moral wrong, triggering the state's necessary response and overlooking the aspects that distinguish punishment as a distinctive form of coercion.[72] Other socio-legal accounts, though exploring the cultural, institutional, political, and economic shifts that have led to the massive use of punishment as a strategy of social control — many of which tell valuable stories about the ways in which claims of authority may be undermined in different contexts—[73] have mostly neglected the idea of authority as a central component of enquiry. Where it appears, as is the case in Garland's highly influential account, it does so only as a component of the 'myth' of the sovereign state that is simultaneously asserted and denied through the hysterical deployment of the criminal law.[74] Although the concept of authority has started to resurface as part of a broader 'political turn' of criminal law theory,[75] it has not yet been treated as a central concept.[76]

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[67] Mattias Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State' in Jeffrey L Dunoff and Joel P Trachtman (eds), *Ruling the World?: Constitutionalism, International Law, and Global Governance* (CUP 2009).

[68] Loughlin, 'Why Sovereignty?' (n 66).

[69] Hans Kelsen, *Introduction to the Problems of Legal Theory: A Translation of the First Edition of the Reine Rechtslehre or Pure Theory of Law* (Bonnie L Paulson and Stanley L Paulson trs, Clarendon 1997); Neil MacCormick, 'Beyond the Sovereign State' (1993) 56 Modern Law Review 1.

[70] Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State' (n 67); Ronald Dworkin, *Law's Empire* (Fontana Press 1986); Alexy (n 27).

[71] Loughlin, 'Why Sovereignty?' (n 66) 38.

[72] Malcolm Thorburn, 'Criminal Punishment and the Right to Rule' (2020) 70 The University of Toronto Law Journal 44, 53.

[73] Garland (n 22); David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Clarendon 2001); Wacquant (n 22); Jonathan Simon, *Governing through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (OUP 2007); Alexander (n 22); Gottschalk (n 22); Nicola Lacey, *The Prisoners' Dilemma: Political Economy and Punishment in Contemporary Democracies* (CUP 2008).

[74] Garland (n 73).

[75] Christoph Burchard and others (eds), *The Political Turn in Criminal Law Scholarship* (Bloomsbury Publishing PLC 2024) <https://www.foyles.co.uk/book/the-political-turn-in-criminal-law-scholarship/christoph-burchard/9781509936809> accessed 28 May 2024; Rocio Lorca, 'Punishing the Poor and the Limits of Legality' (2022) 18 Law, Culture and The Humanities 424.

[76] Accounts where political authority features as a central concept include: Peter Ramsay, 'A Democratic Theory of Imprisonment' in Albert Dzur, Ian Loader and Richard Sparks (eds), *Democratic Theory and Mass Incarceration* (OUP 2016); Peter Ramsay, 'The Sovereign's Presumption of Authority (Also Known As the Presumption of Innocence)' [2020] LSE Legal Studies Working Paper No. 15/2020 <https://papers.ssrn.com/abstract=3743730> accessed 26

Perhaps one of the reasons why the concepts of authority and sovereignty have been so marginal in these bodies of literature is because of the commonplace assumption that these terms are intimately connected with absolutism and authoritarianism.[77] However, this is symptomatic of a confusion and misapprehension as to the meaning and role of these concepts. As explained in more detail in Chapter 4, the concept of political authority that animates this project is a relational and dialectical one.[78] Based on Loughlin's theory of political jurisprudence, which draws on the historical development of the modern constitution, authority may be understood as the outcome of the dialectical relationship between two distinct forms of power: *potentia,* that is, instrumental power and the capacity to govern; and *potestas,* i.e., the symbolic dimension of power through which the right to govern is articulated, giving meaning to collective existence.[79] Sovereignty signifies, in jural form, the political relationships upon which authority is based, expressing the absolute legal authority of the ruling power in two dimensions: external (that is, the recognition as a sovereign by other sovereign entities) and internal (the recognition of its absolute law-making powers by those subjected to them). Sovereignty exists alongside the abstract entity of the State —the basic institutional arrangement through which the sovereign's supreme governing authority is expressed and enforced. Political authority, in this framework, presupposes the rightful character of these relations of and their legal form, that is, their legitimacy, which entails an expectation of obedience and subordination.[80] Authority involves the legitimate holding and exercise of power, justified by reference to beliefs shared by governors and governed, including the idea that the structure of public power serves a 'recognisably general interest, rather than simply the interests of the powerful'.[81]

Though intimately tied to the project of modernity, authority and sovereignty should not be understood as fixed features or final outcomes of processes of modernisation. Because of their relational character, they entail ideological claims that may always be contested, and which may be more or less realised in different historical moments. These claims, in turn, rest on underlying social and political relationships through which their credibility may be bolstered or undermined. As opposed to the self-sustaining notion of authority of constitutionalism, in this relational view, authority is not a necessary, self-generated feature of the State or the constitution. Instead, it is the outcome of contingent historical processes of collective action and ordering —processes inscribed in a field of inevitable struggle and contestation.

In this thesis, I offer an exploration of the penal sphere as one in which these struggles unfold in a particularly stark manner, analysing how the deployment of coercive force as a tool for the production of social order (as opposed to an *ultima ratio* instrument to reaffirm authority) may

February 2023; Ramsay, *The Insecurity State* (n 28); Rocio Lorca, 'Punishing the Poor and the Limits of Legality' (2022) 18 Law, Culture and The Humanities 424; Henrique Carvalho, *The Preventive Turn in Criminal Law* (OUP 2017).

[77] Loughlin, 'Why Sovereignty?' (n 66) 35.

[78] Martin Loughlin, *Foundations of Public Law* (OUP 2010).

[79] Martin Loughlin, *Political Jurisprudence* (OUP 2017); Loughlin, *Foundations of Public Law* (n 78).

[80] David Beetham, *The Legitimation of Power* (2nd edition., Palgrave Macmillan 2013).

[81] ibid 17. Legitimacy is used in a social-scientific rather than a normative sense. The relevant question is not whether there is adherence to a particular normative view. Instead, the question is whether people in fact believe that power is exercised rightfully —that is, whether it is justified on the basis of shared beliefs between governed and governors.

undermine the ideological claims that justify the very existence of punishment. In the first part of the thesis, I explore the particular challenges that the Colombian State has faced —challenges inscribed in a violent history of modernisation and reinforcement of colonial and neo-colonial forms of exclusion and marginalisation.[82] The 'crisis' of *unconstitutionality* in prisons makes these tensions explicit: rather than allowing the State to reaffirm its authority, the excessive use of imprisonment reveals, instead, the deterioration of the social and political relations on which political authority is founded, and through which it is sustained, both inside and outside prisons. Despite seeking to 'realise' the Constitution, declarations of *USoA* confront the Constitutional Court with the material limits of this political project.

These tensions may seem unsurprising because of Colombia's particular history: at first glance, the 'weakness' of the State may be attributed to its long-standing incapacity to enforce the legal order and maintain the monopoly of force over the whole of the national territory. However, this 'weakness' is not merely the result of the lack of institutional and governmental capacity. Instead, it reflects more profound failures in the formation of relations of authorisation and universal representation. These failures and weaknesses should not be taken as an essential feature of certain types of state (as 'failed state' theories would posit).[83] Instead, where I speak of 'weaknesses' or 'failures', I use these terms to illustrate the contradictory character of the reassertion of authority through the excessive deployment of force, or the affirmation of the constitution through the recognition of its structural denial.

The normal and the exceptional

a. Constitutional normality and exceptions

The tension between normality and exception is one of the central dilemmas of liberal constitutionalism. The 'normal' conditions of constitutions are strained by emergencies stemming from internal or external threats, including economic crises, wars, epidemics, and natural disasters. Resort to emergency powers, from the Roman tradition to modernity, has been conceived as a 'necessary component of a well-functioning republic'.[84] In the liberal view, the rights and liberties enshrined in constitutions can 'prevent government from responding efficiently and energetically

[82] Sozzo (n 32); Aliverti and others (n 32).
[83] Patricia Moncada Roa (ed), *Los Estados Fallidos o Fracasados: Un Debate Inconcluso y Sospechoso* (2007); Robert I Rotberg, *When States Fail: Causes and Consequences* (Princeton University Press 2004); Cristopher Clapham, 'The Global-Local Politics of State Decay' in Robert I Rotberg (ed), *When states fail: Causes and Consequences* (Princeton University Press 2004); Robert I Rotberg, *State Failure and State Weakness in a Time of Terror* (World Peace Foundation, Brookings Institution Press 2003); Ana María Bejarano and Eduardo Pizarro, 'Colombia: El Colapso Parcial Del Estado y La Emergencia de Los "Protoestados"' in Luis Javier Orjuela (ed), *El Estado en Colombia* (Universidad de los Andes, Colombia 2010)
[84] John Ferejohn and Pasquale Pasquino, 'The Law of the Exception: A Typology of Emergency Powers' (2004) 2 International Journal of Constitutional Law 210, 213.

to enemies that would destroy those rights and, perhaps, even the constitutional order itself'.[85] In its attempts to deal with this tension, liberal constitutions tend to include provisions on emergencies—that is, regulations for the declaration of exceptions, including temporal limits, formal requirements, subjection to constitutional review, and other mechanisms to ensure that the legal order is restored, that emergencies are averted, and that no abuses of power occur.[86] Furthermore, the enactment of exceptional powers through ordinary legislation (whether delegating special temporary powers via ordinary statutes,[87] or enacting ordinary laws that display key features of emergency powers[88]) has become increasingly common, with legislatures increasingly assuming a role in the definition of emergencies.

Both the constitutionalisation of the exception and the legislative's growing role in defining the exception (which Ferejohn and Pasquino, in Schmittian vein, have referred to as a 'legislative dictatorship')[89] present serious challenges to liberalism's distinction between constitutional exception and normality. Though the exception seems to be largely regulated and spelled out in detail, attempts to constrain the sovereign's capacity to decide upon the exception tend to reveal the impossibility of its elimination.[90] In other words, as much as modern constitutionalism seeks to eliminate the figure of the sovereign and its capacity to decide exceptions through their regulation, such elimination remains impossible.

While the liberal constitution attempts to deal with the exception through its regulation, constitutionalism has introduced significant changes to the role and scope of exceptional powers. Under the scheme of constitutionalism, in which all aspects of social life are susceptible of constitutionalisation, 'there can be no room for a regime of exception'.[91] Because constitutionalism is based on a universal, all-encompassing normative project, all public institutions must aim to protect fundamental constitutional rights and principles.[92] Special regimes for emergencies, rather than being exceptional in a meaningful sense, are therefore framed within rule of law principles like reasonableness, legality, and proportionality.[93] Calls for judicial 'ex post or continuing control over the conduct of emergencies', which include the refusal to 'enforce unlawful or unconstitutional orders',[94] are an example of the extent to which emergency regimes have been constitutionalised and, therefore, deprived of their truly exceptional character.

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[85] ibid 210.
[86] Clinton L Rossiter, *Constitutional Dictatorship: Crisis Government in Modern Democracies* (Princeton University Press 1948) 158.
[87] Ferejohn and Pasquino (n 84) 217-218.
[88] Zelia A Gallo, 'Punishment, Authority and Political Economy: Italian Challenges to Western Punitiveness' (2015) 17 Punishment & Society 598; Manuel Iturralde, 'Emergency Penality and Authoritarian Liberalism. Recent Trends in Colombian Criminal Policy' (2008) 12 Theoretical Criminology 377; Ramsay, *The Insecurity State* (n 28); Mark Neocleous, 'The Problem with Normality: Taking Exception to "Permanent Emergency"' (2006) 31 Alternatives: Global, Local, Political 191; Carvalho (n 76).
[89] Ferejohn and Pasquino (n 84) 219.
[90] Loughlin, *Against Constitutionalism* (n 35) 153-157. See also Carl Schmitt, *Dictatorship: From the Origin of the Modern Concept of Sovereignty to Proletarian Class Struggle* (1st edition, Polity 2013).
[91] Loughlin, *Against Constitutionalism* (n 29) 159.
[92] David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (CUP 2006).
[93] ibid.
[94] Ferejohn and Pasquino (n 84) 236-237. See also Dyzenhaus (n 93).

Declarations of *USoA* not only make these tensions explicit, but they show us the directions that 'exceptional' powers may take under constitutionalism.[95] First, with the semi-permanent declarations of states of exception during the height of the war on drugs and the internal armed conflict in the 80s and 90s in Colombia, the exercise of exceptional penal and military powers became somewhat 'normalised'.[96] However, though semi-permanent, these powers were officially presented as formally and normatively exceptional. Second, during the 90s and 2000s, the government turned from explicitly exceptional powers (that is, from formal declarations of states of exception) to formally ordinary laws of 'Democratic Security' and 'Citizen Security', which preserved some of the main features of 'emergency penality', expanding their scope to encompass common criminality and targeting particularly marginalised groups of the Colombian population.[97] Through a complex combination of discourses of security, anti-impunity, and victims' rights, these policies led to an unprecedented growth of the State's penal apparatus, evidenced not only by penal inflation but also by the overall harshness of the criminal law. Declarations of *USoA* appeared in this context and have produced a third dimension of exceptionality that has received little scholarly attention. Presented as 'necessary' constitutional powers aimed at realising fundamental rights and principles, these declarations have opened up a new sphere of exceptional constitutional intervention upon public policy through which *unconstitutionality* is normalised and institutionalised.

Declarations of *USoA* invert the logic that underlies the institutionalisation of states of exception:[98] rather than regulating the exception, they create a sphere in which conditions that should be exceptional under the rule of law are constitutionalised and normalised. Instead of normalising exceptional powers through their semi-permanent reiteration, or through their enactment as ordinary laws, their point of departure is the recognition of the exceptional character of constitutional 'normality'. Moreover, instead of being produced by a 'sovereign decision', they emerge as a constitutionally-mandated strategy for the realisation of an undermined constitutional order. While declarations of states of exception arise form a political judgment of internal or external threats to the state, declarations of *USoA* arise from the normative assessment of the failures of the state. Because of these characteristics, declarations of *USoA* represent a further step in the constitutionalisation of exceptions: these declarations introduce a sphere in which the actions of public authorities, despite being blatantly contrary to constitutional principles, can be reconciled with them through the exercise of practical reason. In the field of punishment, for instance, regardless of its unconstitutional character, the deployment of coercion is justified as proportional, necessary, and legitimate.

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[95] See Chapters 1 and 2.

[96] Uprimny and García Villegas, 'El Control Judicial de Los Estados de Excepción En Colombia' (n 8); Uprimny and García Villegas, '¿Controlando La Excepcionalidad Permanente En Colombia? Una Defensa Prudente Del Control Judicial de Los Estados de Excepción' (n 8); García Villegas (n 8); ibid; Neocleous (n 88); Iturralde, 'Emergency Penality' (n 89).

[97] Iturralde, 'Emergency Penality' (n 88).

[98] See Chapter 3.

Therefore, even where the Court recognizes that public authorities are acting *unconstitutionally,* the institutional safeguards that it provides ensure that those unconstitutional acts may be aligned with the Constitution. While states of exception remain potentially unconstitutional, declarations of *USoA* are located within a sphere of super-legality derived from the Constitution's internal rationality. In this sphere, the declarations will always remain coherent with constitutional aims, values, and principles, and will never be fully *exceptional.* Put differently, the *unconstitutional state of affairs* is never truly exceptional because it can be addressed, and made compatible with, the Constitution's scheme of higher-order principles. Unconstitutional conditions are thus reconciled with the Constitution through appeals to necessity, proportionality, and harmonic inter-institutional collaboration. The declarations, incapable of ever violating the constitutional order, are potentially as unbound as constitutional interpretation allows them to be, and as endless as the process of materialisation of constitutional rights and principles.

b. Penal normality and exceptions

In the penal sphere, conditions of constitutional normality entail expectations of generalised obedience to the sovereign's command. Where significantly challenged, constitutional normality also entails the State's capacity to vindicate its authority. Though not explicit in dominant moral theories of the criminal law, these ideological claims and the expectations derived from them are presupposed by the existence of the institution of punishment. At first sight, the imposition of punishment may seem like a mere iteration of this constitutional 'normality'. However, as explained in Chapter 4, punishment inevitably implies a relative weakening of the sovereign's claims to political authority, in the sense that it amounts to a recognition of the fact that specific forms of criminal offending represent a significant challenge to the sovereign's absolute authority. Punishment is therefore normatively constructed as an exceptional, *ultima ratio* measure for the vindication of authority.

Where punishment is deployed as a mechanism to manage marginality,[99] to consolidate order, or as an instrument to achieve other ends, it loses its character as an *ultima ratio* measure for the vindication of political authority. Rather than vindicating authority, the excessive imposition of punishment (whether because of generalised disobedience, or due to an ideological abandonment of the presumption of obedience)[100] paradoxically reveals the extent to which underlying relations of allegiance and obedience are undermined —that is, the relations on which the existence of punishment, as legitimate coercion rather than arbitrary force, is premised.[101] Where punishment is deployed excessively, it betrays the weakness of the claims of authority upon which it is based, relying instead on the limited and temporary effects of force. Though this may generate some degree of obedience, the maintenance of authority must be premised on more

[99] Wacquant (n 22).
[100] Ramsay, 'The Sovereign's Presumption of Authority' (n 76).
[101] Lorca (n 76); Thorburn (n 72); Hannah Arendt, 'What Is Authority?', *Between Past and Future* (Penguin Publishing Group 2006).

complex political relations that transcend the instrumental use of force — that is, relations which produce a significant degree of obedience and allegiance through inclination rather than mere fear of coercion.[102] This reveals two contradictions, produced at different analytical levels. First, at an empirical level, high imprisonment rates (as well as more subtle conditions, such as the tendency towards penal inflation or expansion) imply that disobedience, crime, and victimisation are normal features of the collective experience, rather than atypical ones.[103] At an ideological level, this presupposes an underlying inability to generate and sustain relations of allegiance and obedience, exposing the weakness of the State's claims of sovereignty.[104] Disobedience, crime, and victimisation are therefore normalised, rather than being constructed as exceptional occurrences under the sovereign's rule.[105]

In the Colombian case, penal inflation and the unconstitutional conditions of imprisonment it has produced demonstrate the extent to which authority is undermined, both empirically and ideologically.[106] Such weakening of authority, I argue, is officially and explicitly recognised by the Court through declarations of *USoA*. In the context of long-standing armed conflict, the weakness of the State's claims of authority may seem somewhat obvious: it may be understood as the logical outcome of the State's perennial incapacity to enforce the legal order and establish an effective monopoly over the use of force, inside and outside prisons. This reading of the issue of sovereignty, which focuses on institutional failures, has been dominant in local literature. According to this perspective, the simultaneous strength of the Colombian State in certain areas and its absence from others has created *archipelagos* of sovereignty, which have as their outcome a 'relatively failing' State.[107] However, focusing on the State's governmental incapacity, this perspective loses sight of the fact that these institutional shortcomings are the result of deeper failures to establish relations of authorisation, obedience, and representation. Anthropological and sociological approaches, on the other hand, have focused on how alternative actors have produced those relations and maintained social order where the State has not. But these perspectives lose sight of the symbolic and juristic nature of the idea of the State —an idea that constitutes the very scheme of intelligibility of our political world.[108] Without it, and the special claims that it entails, there would be no way of distinguishing punishment from the mere exercise of force. Where the State faces significant challenges, these dimensions remain all the more important: they distinguish punishment, as an embodiment of the normative claims of exclusive authority of the sovereign, from the *de facto* powers of alternative actors.

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[102] See Max Weber, *Economy and Society*, vol 1 (Guenther Roth and Claus Wittich eds, University of California Press 1978) Chapter 1, s. 7.5, at 37 and s. 16 at 53. See also Arendt (n 101).
[103] Ramsay, *The Insecurity State* (n 28); Simon (n 73); Garland (n 73).
[104] Ramsay, 'The Sovereign's Presumption of Authority' (n 76).
[105] Ramsay, *The Insecurity State* (n 28); Garland (n 22); Simon (n 73).
[106] Chapter 4.
[107] Patricia Moncada Roa (ed), *Los Estados Fallidos o Fracasados: Un Debate Inconcluso y Sospechoso* (2007); *El Estado En Colombia* (1st edn, Universidad de los Andes, Colombia 2010); Bejarano and Pizarro (n 83); Mauricio García Villegas and Boaventura de Sousa Santos, 'Colombia: El Revés Del Contrato Social de La Modernidad.', *El caleidoscopio de las justicias en Colombia.* (Siglo del Hombre 2001).
[108] Loughlin, *Political Jurisprudence* (n 79).

I argue that the perspective of political authority allows us to better account for the institutional, relational, and juristic elements that have produced the 'crisis' of *unconstitutionality* in prisons. In addition, an analysis centred on political authority highlights the tensions and contradictions underlying declarations of *USoA*. First, these declarations imply an official recognition of the fact that, despite being presented as an exercise of legitimate authority, punishment is incompatible with the fundamental rights and principles that —in constitutionalism's own normative construction— justify and sustain the very existence of this coercive power. Second, through declarations of *USoA*, as mentioned above, the Court recognizes the extent to which the 'normal' conditions of the constitutional order are actually exceptional. However, paradoxically, by appealing to the same language of principles and rights on which the declarations of *unconstitutionality* are premised, the Constitutional Court claims the authority of the State to impose punishment under unconstitutional conditions: unconstitutional punishment, in this sense, is normalised, with the Court creating a semblance of 'authority' while preserving those unconstitutional conditions indefinitely.

Outline

This thesis is divided into two parts. The first one deals with the Colombian case, taking into account its particularities and building a theoretical framework for the identification of tensions and contradictions inherent in declarations of *USoA*. The second one draws on these insights, exploring how they may inform our understanding of the relationship between punishment, authority, and the constitution in other social, political, and economic contexts.

The first Chapter starts with a historical reconstruction of the 'crises' in Colombian prisons, as well as the emergence of the Court's attempts to address penal inflation and prison overcrowding through declarations of *USoA*, situating them within a complex history of State attempts to consolidate the project of modernity, from the post-independence period to this day. As is the case in other post-colonial contexts, the criminal law, rather than emerging as an 'outcome' of modernity, has appeared as a driver of various projects of modernisation, democratisation, and consolidation of the rule of law.[109] However, the expansive and volatile use of punishment has revealed the extent to which those projects have been undermined, and the extent to which the State's claims of authority remain unfulfilled. Exploring the main penal 'crises' that have emerged throughout Colombian history, and highlighting the various discourses, conflicts, and struggles that have shaped different periods and 'crises', this Chapter examines the role that the criminal law has played in the creation of a semblance of coercive might which, paradoxically, reveals the weakness of the State's claims of political authority. I argue that, taking a turn from semi-permanent states of exception in the 80s and 90s, and in line with transnational trends, since the mid-90s Colombian penal policy has been defined by a significant ideological

[109] David S Fonseca, 'Reimagining the Sociology of Punishment Through the Global-South: Postcolonial Social Control and Modernization Discontents' (2018) 20 Punishment & Society 54.

shift: a combination of discourses of security, anti-impunity, and human rights has provided the rationale for the further expansion of the penal sphere, justifying and enabling not only harsher punitive policies but also legitimising the unconstitutional conditions in which the State's coercive powers are deployed.

Chapter 2 focuses on the emergence of declarations of *USoA* as a manifestation of the ideology of constitutionalism. Described as an expression of the democratic and progressive character of the 1991 Constitution, the characteristics and justification of this particular form of systemic remedies have remained largely unexplored. This Chapter questions dominant accounts according to which the declarations represent the 'dichotomous opposite' of the state of exception, analysing the role that both powers, despite important differences, have played in State-building strategies. In addition, it explores key transformations that states of exception have undergone in the conceptual scheme of constitutionalism. In Colombia, despite the formal maintenance of a 'democratic' regime through the nineteenth and twentieth centuries, most of this period was spent under constitutionally-authorised regimes of exceptional rule. Though the semi-permanence of these measures blurred the line between normality and exception, these measures remained formally exceptional. With the 1991 Constitution, states of exception were entrenched deeper into the constitutional architecture, not only subjecting the executive's exceptional powers to procedural and formal requirements, but also requiring them to be coherent with the scheme of aims, principles, and values of the Constitution. Declarations of *USoA*, therefore, rather than being the 'dichotomous opposite' of the classical state of exception, may be better understood as a further development of the tendency of constitutionalism to normalise and institutionalise the exception. While giving the Court extraordinary powers to intervene in public policy and monitor compliance with its orders, declarations of *USoA* are never truly exceptional: even though unconstitutional circumstances are recognised as conditions that should be 'exceptional' under the Constitution, they are simultaneously normalised through the interpretation and elaboration of constitutional principles. Through this process, paradoxically, constitutional normality becomes the exception.

The paradoxical character of declarations of *USoA* becomes even more stark in the sphere of punishment. Chapter 3 situates these declarations within the context of diverse challenges to the Colombian State's claims of sovereignty and legitimacy. I first analyse two main bodies of literature, highlighting their shortcomings and suggesting that a relational approach to political authority is more productive for the understanding of declarations of *USoA* in Colombian prisons. On the one hand, mainstream accounts are based on a dualist perspective according to which the institutional presence of the state in the main towns and cities and its absence in large parts of the national territory have produced a 'hybrid' form of sovereignty in which 'contractualised' and 'savage' areas coexist. However, such dualism is particularly reductive when it comes to prisons, an institution which hardly fits into this dichotomous cartography. On the other, anthropological accounts take a more relational approach which focuses on the role of alternative actors in the consolidation of the social order inside and outside prisons. While the institutional approach loses

sight of the relational character of authority, anthropological perspectives brush aside the juristic and political claims made by the State, which are essential for the characterisation and justification of punishment as legitimate coercion. By turning to the juristic and political dimension of the State's claims of authority, the empirical and ideological tensions behind declarations of *USoA* become clearer, revealing the State's own negation of its authority on both levels through an official recognition of the extent to which disobedience has become the norm, as well as the weakened character of underlying bonds of authorisation and allegiance.

In the second section of Chapter 3, I explore the question of why the Court has engaged in the difficult exercise of justifying punishment even in conditions which blatantly contradict the Constitution —that is, conditions which seriously negate the legitimacy of this institution. I argue that these declarations have produced a strategy of inwards-looking legitimation which, combining administrative and normative logics, justifies and enables penal expansion and the imposition of punishment in unconstitutional conditions. In other words, the very mechanism that is used to denounce punishment as unconstitutional has been used to allow its normalisation. Despite its *unconstitutionality*, unconstitutional punishment will never be in complete contravention of the Constitution, as long as the Court can symbolically bring it back in line with abstract constitutional aims and principles.

In the fourth Chapter, I turn to what these contradictions may show in terms of the conceptual relationship between punishment and political authority. Despite the particularities of the Colombian context, this case offers key insights on the relationship between these two concepts. Furthermore, Chapter 4 explores how recent transformations of the concept of authority in constitutionalism may impact the penal field. First, I analyse the relationship between political authority and punishment, and argue that the concept of authority plays a key role in the justification of this form of legitimate coercion. Second, I explore recent transformations of the concept of authority in constitutionalism, as well as the implications they may have for the institution of punishment, drawing relevant examples and evidence of ideological shifts from the Colombian case, including the primacy that discourses of anti-impunity and victims' rights have gained. Thus, without overlooking the embeddedness of punishment in the local context, I analyse the tensions that arise from the Colombian example at a more abstract level, exploring their consequences for the justification of punishment more broadly.

Part two turns to the global sphere, exploring how the experience of Colombia connects with wider developments. In Chapter 5, drawing on the theoretical tools established in previous chapters, I analyse trends of penal inflation, 'penal populism', the hollowing out of democracy, and the porousness of prisons at a global scale. I argue that, despite local particularities, the concept of political authority offers a valuable framework for the analysis of potential commonalities that pertain to a (somewhat) globalised punitive turn, while being flexible enough to capture the social, political, economic, and cultural specificities of each context in different historical periods.

In Chapter 6, I turn to the recent proliferation of systemic remedies in various jurisdictions across the world, particularly in Southern contexts. While declarations of *USoA* are not yet the rule around the world —although they are becoming increasingly common in Latin America—, the Colombian case can offer key insights about the limitations, tensions, and contradictions inherent to systemic remedies as a tool for structural transformation. Distinguishing the Colombian declarations from systemic remedies in other jurisdictions, I argue that one of the key features of these declarations is the fact that they involve a general assessment of the state of the constitutional project, rather than being restricted to violations to specific constitutional provisions. However, systemic remedies hide similar failures as those exposed by the Colombian remedies, pointing towards the shortcomings of constitutional projects, both when measured by their own standards and when considered through the lens the relations of authorisation on which the enforcement and application of legal systems depend. Exploring institutional, social, and cultural elements that have produced the distinctive Colombian strategy, as well as how the declarations have been borrowed by tribunals in the region, I argue that, despite being symbolically potent, declarations of *USoA* confront constitutional courts with the tensions, contradictions, and material constraints underlying constitutionalism.

The thesis ends with reflections on the general tensions and contradictions that are made explicit through declarations of *USoA* in Colombian prisons, through more or less globalised trends of penal inflation and punitivism, and through systemic remedies more broadly. The perspective of political authority not only allows us to see these contradictions more clearly, but reminds us that collective existence requires serious efforts to expand and renew our political imagination

PART I

The Colombian Case: Political Authority and the *Unconstitutional State of Affairs*

Chapter 1
Perpetual 'crisis':
Security, human rights, and the production of the *unconstitutional state of affairs* in Colombian prisons

An overview of the history of the Colombian penal system seems to indicate that prisons have been in a permanent 'crisis' since the moment of their creation. In fact, the Constitutional Court has gone as far as stating that the 'crisis' is 'connatural' to prisons, with overcrowding and inhumane conditions accompanying this institution from its very origins in American and British workhouses.[1] This oversimplified view, however, risks ignoring the role that various discourses, conflicts, and social struggles have played in shaping the emergence of different periods of 'crisis'. In this chapter, I locate these 'crises' within broader attempts to 'modernise' the penal system and establish the authority of the State in the face of serious challenges by armed and unarmed actors. Through an exploration of the ruptures and continuities between these 'crises', I analyse the normative and ideological shifts that have produced different periods of penal inflation and expansion.

The first section focuses on a long period of 'crises', ranging from the early independence days up to the 1970s, in which the penal apparatus played a key role as a driver of the nation-building process, particularly in the management of violent confrontations between the main political parties, as well as constant strikes, protests, and insurgency. Though the system was always over capacity, it was not until the 1940s that a first 'crisis' of overcrowding was identified: as resistance to industrialisation and modernisation intensified, both in the cities and the countryside, punishment became a primary tool for the suppression of forms of political opposition that the State considered a threat to its existence, increasingly resorting to emergency powers at the expense of more far-ranging, inclusive, and political solutions to the underlying conflict.

The second section examines the 'crisis' that emerged from semi-permanent declarations of states of exception in the 1980s, in the context of intense social uprisings, political violence, and the rise of narcotrafficking, as well as increasing marginalisation and political exclusion of broad sectors of the population. Semi-permanent emergencies created a cycle of increases and decreases of the prison population: rapid increases of incarceration rates driven by punitive emergency measures were followed by mass releases of inmates (also enacted as exceptional measures), only to be followed by new spikes of the prison population. Through their perpetuation, states of exception became normalised. This implied that crime featured prominently in their justification, and that the 'normal' conditions of the sovereign's authority could not be taken for granted. But crime had not yet been normatively constructed as a 'normal' social fact. Instead, it appeared as an

[1] *T-388/13* (CCC) §7.4.2.2., citing Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Alan Sheridan tr, Penguin Books 1979); Dario Melossi and Massimo Pavarini, *The Prison and the Factory: Origins of the Penitentiary System* (Macmillan 1981).

exceptional threat requiring an equally exceptional deployment of force, distinct from the ordinary criminal law.

The third section turns to a new 'crisis' that unfolded in the 1990s, leading to the first declaration of an *USoA* in the Colombian penal system in Judgment T-153 of 1998. Despite the enactment of the 1991 Constitution as a symbol of peace and 'democratisation', neoliberal economic reforms intensified conditions of inequality, marginalisation, and exclusion.[2] Meanwhile, armed actors presented increasingly violent challenges to the State's authority, producing widespread feelings of insecurity and anxiety among the population. The penal sphere also underwent significant transformations. On the one hand, the 1991 Constitution introduced more strict constitutional controls to states of exception, which led to less frequent declarations.[3] However, key aspects of these exceptional measures were gradually incorporated into the legal system through ordinary laws. On the other, the inclusion of victims' rights in the 1991 Constitution, as well as the popularity of transnational discourses of anti-impunity and security, gradually led to the consolidation of a significant ideological turn towards highly punitive ordinary criminal laws.

In the fourth section, I analyse the crystallisation of this ideological shift, which produced the normalisation of criminality, insecurity, and victimisation as legally significant collective experiences.[4] From the early 2000s, the political prominence of discourses of security (and strong pressures to enact reforms in accordance with the American penal model) led to a general harshening of ordinary criminal law. On the one hand, certain laws incorporated key features from emergency legislation and extended them to common criminal offences, rather than only offences connected to 'terrorism' and narcotrafficking that had originally been targeted by those exceptional measures. On the other, discourses of victims' rights and anti-impunity provided justifications for the strengthening of the State's coercive apparatus, all while giving it a 'powerful human and rights-bearing face'.[5] Because of these harsh penal policies, by 2010, incarceration rates and overcrowding were increasing at unprecedented rates, leading the Court to make new declarations of *USoA* in prisons in 2013, 2015, and 2022.[6] As discussed in the fifth section, despite the Court's intervention, the 'crisis' continues to this day.

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[2] Manuel Iturralde, 'Democracies without Citizenship: Crime and Punishment in Latin America' (2010) 13 New Criminal Law Review 309; Helena Alviar, 'Neoliberalism as a Form of Authoritarian Constitutionalism' in Helena Alviar and Günter Frankenberg (eds), *Authoritarian Constitutionalism: Comparative Analysis and Critique* (Edward Elgar Publishing 2019).

[3] See Chapter 2. According to Uprimny and García Villegas, while between 1970 and 1991 82.1% of these years were spent under a state of exception. Between 1991 and 2002 this percentage decreased to 17.5%. See Rodrigo Uprimny and Mauricio García Villegas, '¿Controlando La Excepcionalidad Permanente En Colombia? Una Defensa Prudente Del Control Judicial de Los Estados de Excepción' (DeJusticia 2005) 32.

[4] Jonathan Simon, *Governing through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (OUP 2007); David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Clarendon 2001); Peter Ramsay, *The Insecurity State: Vulnerable Autonomy and the Right to Security in the Criminal Law* (OUP 2012).

[5] Kent Roach, 'Four Models of the Criminal Process' (1999) 89 The Journal of Criminal Law and Criminology 671, 691.

[6] *T-388/13* (n 1); *T-762/15* (CCC); *SU-122/22* (CCC).

1. The first 'crisis': the building of a nation and the criminal law

After the process of independence in the 1810s, the elites of the newly-formed Colombian State faced a difficult challenge: establishing a 'modern', unitary authority that could replace the colonial regime while, at the same time, sustaining the power of traditional social actors that were fundamental both for the maintenance of social order and for the advancement of the elite's own economic interests (for example, the Church and landowners).[7] Conflicting national projects produced a succession of civil wars between the Liberal and Conservative parties, and the coexistence of colonial laws and newly enacted legislation had resulted in a chaotic legal landscape. In this context, the criminal law played a key role as a driver of contested projects of modernisation, appearing, to both Liberals and Conservatives, as the embodiment of the type of public authority that they aspired to. Thus, in the 1800s, the enactment of various penal codes[8] and the construction of Benthamite prisons symbolised the coercive might of a State that, although still under construction, was capable of protecting itself through the imposition of punishment.[9] Penal codes and prisons were at the core of the political imagination of the new State: on the one hand, it was necessary to substitute the chaotic colonial legislation with systematic, scientific codes; on the other, public and violent forms of punishment, characteristic of colonial times, were to be replaced by the more 'humanitarian' modern prisons, which had the potential of reforming and reintegrating offenders to society through work and education.[10] The criminal law mainly targeted behaviours perceived as a threat to the existence and integrity of the legal order, including treason, conspiracy, and other conducts against the State, social peace, and health— as well as, during the Conservative regimes, morals, religion, and faith.[11]

In addition to legal chaos, conditions of social, economic, and political exclusion —largely inherited from the colonial regime—[12] had lasting effects. Citizenship was narrowly defined,

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[7] María Teresa Uribe de Hincapié, 'Órdenes complejos y ciudadanías mestizas: una mirada al caso Colombiano' [1998] Estudios Políticos 25.

[8] As a 'scientific' enterprise, criminal codes aimed to be systematic and self-contained. However, most criminal codes throughout Colombian history have been criticised due to the fact that they have mostly 'import[ed] foreign models without understanding their ideology and rationale, rarely taking into account the local reality, and combining solutions from different models in an inconsistent way'. Juan Carlos Ferré Olivé, Miguel Angel Núñez Paz and Paula Andrea Ramírez Barbosa, *Derecho Penal Colombiano* (Tirant lo Blanch 2010).

[9] María Catalina García Zapata, 'En Busca de La Prisión Moderna: La Construcción Del Panóptico de Bogotá, 1849-1878' (2010) 10 Museo Nacional. Cuadernos de Curaduría.

[10] ibid.

[11] For instance, during the Conservative period known as the *Regeneration,* the Law *Disposición K* (1886-1910) gave the executive exceptional powers and discretion to repress 'abuses by the press', offences against public order, conspiracies, and other conducts perceived as a threat against the existence of the State. See Uribe de Hincapié (n 7); Álvaro Tirado Mejía, *El estado y la política en el siglo XIX* (El Ancora Editores 1981).

[12] These forms of exclusion were based on race, gender, socio-economic status, and regional or local origin, among others. In terms of race, for instance, from the establishment of the first colonies in what would become Colombia, positions in the government were reserved only to Spanish men (particularly Christian men whose ancestors had not converted from Islam or Judaism), as well as their descendants ('criollos'). Indigenous and African persons, as well as their descendants, were therefore excluded from access to positions of power and from the government of the colony. Due to the mixed character of the population, this gradually transformed into a system of castes and differentiations based on 'degrees of incorporation and appropriation of the Castilian language and the catholic faith'. See Luz Adriana Maya Restrepo, 'Racismo institucional, violencia y políticas culturales. Legados coloniales y políticas de la diferencia en Colombia' [2009] Historia Crítica 218.

excluding various groups of the population, and undergoing numerous processes of expansion and retraction throughout the unstable governments of the nineteenth century.[13] On the one hand, 'radical' Liberals believed in the power of abstract ideas of freedom and equality as a solid basis for national identity, regardless of existing material inequalities. 'Republican' liberals were sceptical of the notion of a unitary national identity, which they saw as a mere rhetoric device that was 'absolutely disconnected from social and cultural reality'.[14] Meanwhile, Conservatives conceived the nation as a 'community of believers', in which access to citizenship was dependent on criteria such as faith, literacy, and income.[15] Though citizenship gradually expanded throughout the twentieth century, women, peasants, afro-Colombians, and indigenous persons (who were considered to be 'outside' the legal system due to their permanence in a 'state of savagery or semi-savagery')[16] remained excluded from significant participation in politics and the economy.[17] In addition to this, distinctions between neighbourhoods, towns, and cities (which had previously entailed the recognition of varying collective rights under monarchic rule) had produced vast socio-economic differences amongst regions.[18]

The early twentieth century was characterised by ongoing political and economic dissent among the elites, which allowed foreign capital to dominate the national economy (particularly mining, agriculture, and public transport).[19] Initially committed to minimum State intervention in the economy, in the 1920s the government decided to take a more active role in the creation of conditions to strengthen internal markets and support exports.[20] These economic measures, as well as the construction of new roads and railways, produced processes of migration from the countryside to the cities,[21] a gradual urbanization of colonial villages,[22] and violent struggles over land ownership in the countryside.[23] Industrialisation, migration, and urban growth meant that large groups of the national population (peasants, migrants, indigenous persons, and marginalised urban groups) were 'turned *en masse* into beggars, robbers, vagabonds',[24] and then treated by the law as 'voluntary criminals' when they failed to adequately take part in the wage system. In response to the failure of these groups to adapt to the newly established forms of discipline that the market required, and without a background of welfare policies that could 'integrate' those who remained

[13] Uribe de Hincapié (n 7).
[14] ibid 30.
[15] Uribe de Hincapié (n 7); María Teresa Uribe de Hincapié, 'La Elusiva y Difícil Construcción de La Identidad Nacional En La Gran Colombia' (2019) 16 Co-herencia 13; Restrepo (n 12).
[16] Libardo José Ariza, 'Legal Indigeneity: Knowledge, Legal Discourse and the Construction of Indigenous Identity in Colombia' (2020) 27 Identities (Yverdon, Switzerland) 403, 406.
[17] Restrepo (n 12).
[18] Uribe de Hincapié (n 7); Uribe de Hincapié (n 15); Mauricio Archila Neira, *Cultura e Identidad Obrera En Colombia: 1910-1945* (CLACSO 2024).
[19] Archila Neira (n 18).
[20] ibid.
[21] ibid.
[22] ibid 48.
[23] Ana María Ibáñez Londoño, *El Desplazamiento Forzoso En Colombia: Un Camino Sin Retorno Hacia La Pobreza* (CEDE, Ediciones Uniandes 2008).
[24] Karl Marx, *Capital: A Critique of Political Economy. Vol. 1* (Penguin 1976). See also Dario Melossi, 'Servitude for a Time: From the Permanent Slavery of the Unfree to the Slavery Pro Tempore of the Free' (2022) 25 Punishment & Society 1207.

excluded from the market —and who had no real opportunity of being included into society —, the government deployed its punitive power, gradually expanding its scope and intensity. Workers were also subjected to strong penal coercion, particularly when acting collectively to demand labour and welfare reforms.[25]

In the 1930s, workers and students carried out frequent strikes and protests against the government in most major cities. Meanwhile, indigenous persons, peasants, settlers, and landowners were engaged in an increasingly violent conflict over the land in the countryside.[26] The liberal governments of this decade (particularly López Pumarejo's *Revolución en Marcha* –'Ongoing Revolution') were committed to intense 'modernising' reforms, seeking to quiet down social unrest and create conditions for the effective integration of Colombia into the international market through the State's intervention in the economy. Transformations during this period included, among others, agrarian, tax, labour, and education reforms.[27] Though these reforms had broadly inclusionary aims, the criminal law took a turn towards the harsh criminalisation of the conduct of 'crooks, vagrants, and thieves',[28] constructing marginalised individuals as 'dangerous subjects' who threatened 'the constitutional order, the nation, public faith, life, and property',[29] further excluding them from society.

The transformations introduced by the Liberal government in this period were strongly rejected by conservative groups and traditional elites, who described them as a victory of 'communism'. By 1946, the elites' incapacity to politically integrate the interests and concerns of different groups of the population contributed to the rapid escalation of violence in cities and the countryside, marking the start of a period known as *La Violencia.*[30] After the murder of liberal leader Jorge Eliécer Gaitán in Bogotá in 1948,[31] massive riots followed, leading to *El Bogotazo,* a violent confrontation between conservatives and liberals that left the city centre destroyed. Inter-party violence intensified all over the country, and violence between 'conservatives' (supported by traditional elites, the national army, and incipient 'paramilitary' groups that protected the interests

[25] This included both emergency and ordinary measures. For instance, in October 1928, Congress enacted Law 69 (the *Heroic Law*), which criminalised strikes and protests and gave the police special powers to deal with protests, strikes, and other forms of opposition to industrialisation. In November of the same year, approximately 25.000 workers from the *United Fruit Company* went on strike, denouncing the abuses committed by their American employer and condemning the government's lack of intervention. The government responded with a violent military intervention that resulted in the death of an unknown number of workers (between 13 and 2000 workers). Soon after, the government enacted Emergency Decree 2 of 1928, which granted competence to military tribunals to try civilians detained during the strikes. See Eduardo Posada-Carbo, 'Fiction as History: The Bananeras and Gabriel Garcia Marquez's One Hundred Years of Solitude' (1998) 30 Journal of Latin American studies 395; Archila Neira (n 18).

[26] Archila Neira (n 18) 267–268.

[27] Some of the main reforms included the constitutionalisation of the 'social function of property', the right to freedom of religion, and of the right to strike; additional labour protections; progressive taxation; and the creation of the *Ciudad Universitaria,* the campus of the National University. See David Bushnell, *The Making of Modern Colombia: A Nation in Spite of Itself* (University of California Press 1993).

[28] Law 48 of 1936, 'Contra Vagos y Maleantes' (*Law Against Vagrants and Crooks).*

[29] See the Penal Code of 1936, article 36 (which establishes that sanctions shall be applied taking into consideration, among others, the 'circumstances of greater or lesser dangerousness and the personality of the agent'), and article 37 (which takes into account the defendant's history of 'depravation and debauchery' as indicators of their 'dangerousness').

[30] See Bushnell (n 27).

[31] These events are also known as *El Bogotazo.*

of landowners) and the 'liberals' (who had support from 'self-defence' groups that would later develop into guerrillas) reached one of the sharpest points in Colombian history, resulting in approximately 300.000 deaths and the internal displacement of millions of people.[32]

Although prison overcrowding had always been constant, *La Violencia* led to the first 'crisis' of the penal system. According to the Constitutional Court, conditions of 'criminalisation of marginality, unequal regional development, an unemployed population excluded from production and penalised through laws of crooks and vagrants, acute violence in the countryside and the accelerated process of migration that resulted from it, a high number of unfinished prisons, extremely small and old jails that required refurbishments, and horrific levels of overcrowding' left the system in a 'critical state'.[33] Later, during General Rojas Pinilla's military dictatorship (1953-1957), imprisonment rates started growing at an even faster pace due to the criminalisation of strikes, protests, and other 'communist' activities (carried out mainly by trade unions, students, and other social movements).[34] The government increasingly resorted to emergency penal measures, marking the start of a trend that would dominate the following decades.

2. The second 'crisis': armed conflict and the turn towards semi-permanent exceptions

By 1957, when the dictatorship was replaced with the *National Front* (an elite power-sharing agreement that ensured the periodic rotation of power between the two traditional parties),[35] the prison population had reached 35770 inmates, growing at a then unprecedented rate of between 2000 and 4000 new inmates per year.[36] As a result of political exclusion, as well a social and economic marginalisation, *guerrillas* started acquiring significant support in the countryside, while other social movements, led mainly by students and trade unions, gained momentum in cities.[37] What the government perceived as a threat to the recently restored 'democratic' order was met with harsh measures of criminalisation of dissent. Through emergency penal legislation, the

[32] Julio Enrique Romero-Prieto and Adolfo Meisel-Roca, 'Análisis Demográfico de La Violencia En Colombia' [2019] Cuadernos de Historia Económica.

[33] Report presented by the INPEC (National Penitentiary Institution), cited by the Constitutional Court in footnote 34 of Judgment *T-153/98* (CCC).

[34] Rojas Pinilla declared the 'illegality of international communism' through Law 7 of 1954. The government proceeded to criminalise conducts including participation in 'communist activities', membership or contribution to 'communist organisations', and the execution of projects or instructions of 'communist organisations or individuals'. Tried by military tribunals, these offences were sanctioned with up to 5 years imprisonment and the suspension of political rights for up to 10 years (Emergency Decree 434 of 1956).

[35] The agreement ensured rotation of presidential power between the Liberal and Conservative parties every four years, and an even distribution of positions in different branches for 16 years. Although inter-party violence decreased significantly, the agreement trivialised political disagreement and eliminated the possibility of significant debate, excluding alternative political forces entirely. See Mauricio Archila Neira, 'El Frente Nacional: Una Historia de Enemistad Social' (1997) 24 Anuario Colombiano de Historia Social y de la Cultura 189.

[36] *T-153/98* (CCC) ¶ 4.2.2.3.

[37] Bushnell (n 27).

government created expedited trials for certain offences;[38] established military tribunals with competence over a number of offences that 'specially affected the public order';[39] suspended reduced sentences, parole and judicial pardon;[40] instituted mandatory preventive detention; authorised the arrest of suspects of public order offences without a warrant;[41] criminalised protests, strikes, public meetings, and rallies; [42] and authorised the State's security agencies to create lists of 'subversive activities' that could be put under special surveillance.[43] Because of these measures, incarceration rates grew rapidly. Although between 1957 and 1973 the government had constructed new prisons to tackle what was, at that point, 'the worst crisis of overcrowding',[44] the number of inmates kept increasing steeply, reaching 58125 inmates in 1971.[45] To confront this 'crisis', the government enacted emergency measures to reduce the prison population through the release of certain inmates,[46] leading to a period of relative 'stability' that lasted until the early 90s. However, because punishment remained one of the State's main strategies to confront social uprising and manage marginalisation, and because the prison population outgrew the system's capacity, the 'crisis' of overcrowding continued.[47]

Throughout the 1970s and 80s, the government implemented a series of social and economic programmes designed to 'rehabilitate' the areas most affected by *La Violencia* as part of a broader developmental agenda.[48] Powerful private actors (primarily associations of industrialists, landowners, and entrepreneurs, like the *National Federation of Coffee Growers*, the *National Association of Industrialists*, and the *Colombian Association of Agriculturists*)[49] exerted strong influence over Congress, keeping national economic policy in line with their interests and leading to an 'unprecedented concentration of capital which led to the corresponding impoverishment of large groups of the population'.[50] In the context of deep material inequalities and an intensifying armed conflict, the World Bank and International Monetary Fund conditioned their financial aid to compliance with their recommendations for structural adjustment programmes,[51] resulting in an

[38] Article 1, Emergency Decree 12 of 1959; Emergency Decree 7 of 1961.
[39] Some of these offences were rebellion, kidnapping, extortion, offences against property, conspiracy, and sabotage. Emergency Decree 1290 of 1965.
[40] Article 30, Emergency Decree 12 of 1959.
[41] Article 26, Emergency Decree 12 of 1959.
[42] Emergency Decree 252 of 1971. Later on, military tribunals were granted competence in the prosecution of protesters, most of whom were students and workers. Emergency Decree 70 of 1978.
[43] Emergency Decree 2686 of 1966.
[44] *T-153/98* (n 36) ¶ 4.2.2.3.
[45] ibid.
[46] This included the release of inmates accused of petty crimes and the reduction of sentences by virtue of Law 40 of 1967, which was enacted as a result of the visit of Pope Paul VI.
[47] *T-153/98* (n 36) ¶ 14.
[48] Bushnell (n 27).
[49] ibid 315–320.
[50] Fernando Velásquez, 'El Derecho Penal Colombiano y La Ley Importada' (1987) 38 Nuevo Foro Penal 435.
[51] These programmes, adopted mainly in the mid-80s onwards, sought to open up the national market to foreign investment, pushing for austerity, privatisation, and deregulation of financial systems, markets, and labour. See Alfredo F Calcagano, 'Capítulo 4. Ajuste Estructural, Costo Social y Modalidades de Desarrollo En América Latina' in Emir Sader (ed), *El ajuste estructural en América Latina* (CLACSO 2001). Later, in the 90s, some of the main components of these reforms also included strengthening the rule of law and the judiciary.

even more 'inequitable distribution of land, wealth, resources, and political power'.[52] While these programmes arguably led, in the long term, to 'modest economic growth',[53] these benefits were concentrated in specific social groups, mostly in urban areas, such that overall socio-economic inequality remained very high.[54] As violence intensified and armed groups gained strength (and sometimes support) among excluded populations, these groups came to represent not only a direct threat to the State's authority, but also a danger to the stability of the markets, the possibility of foreign investment, and the flourishing of the economy.

The State then turned to semi-permanent declarations of states of exception and the enactment of emergency penal legislation to deal with civil unrest in the cities, violent confrontations in the countryside, and the rise of narcotrafficking.[55] With the growth of drug cartels in the 70s, and with the involvement of armed groups in this activity, the government enacted emergency measures that marked the start of what would later become the 'war on drugs'. In 1975, narcotrafficking and other offences were included under the jurisdiction of military tribunals.[56] In 1978, in response to outbursts of insurgency and social unrest, the government enacted the *Security Statute,*[57] an exceptional regime that increased prison sentences for several offences and granted broad powers to the armed forces, including the competence of military tribunals over offences related to 'subversive conduct'. This unleashed an 'alarming repertoire of actions by the armed forces and the police: home raids without warrants, arbitrary detentions, torture, enforced disappearance, councils of war for civilians', among others.[58]

Following the assassination of Rodrigo Lara Bonilla (the Minister of Justice at the time) under Pablo Escobar's orders in 1984 (the infamous drug baron who led the *Cartel de Medellín*), the government enacted a series of emergency decrees that further expanded the competences of military tribunals over the following years, [59] particularly in relation to narco-trafficking related

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[52] Manuel Iturralde, 'Colombian Transitional Justice and the Political Economy of the Anti-Impunity Transnational Legal Order' in Gregory Shaffer and Ely Aaronson (eds), *Transnational Legal Ordering of Criminal Justice* (1st edn, CUP 2020) 250.

[53] Manuel Iturralde, 'Emergency Penality and Authoritarian Liberalism. Recent Trends in Colombian Criminal Policy' (2008) 12 Theoretical Criminology 377.

[54] See Francisco Javier Lasso and others, 'Macroeconomía, Ajuste Estructural y Equidad En Colombia: 1978-1996' (CEPAL 1998). The opening up of the Colombian economy has benefitted the political and economic elite while hitting the most vulnerable classes the hardest (that is, 'those social groups who are excluded from financial and labour markets, as well as from public assistance programs'). Manuel Iturralde, 'Colombian Prisons as a Core Institution of Authoritarian Liberalism' (2016) 65 Crime, Law, and Social Change 137, 156.
More generally, research has found that IMF programs tend to increase income inequality within counties due to 'decreasing absolute incomes for the poor'. As Lang notes, the IMF itself has recognised the negative effects and limited focus of its economic programs on the quality of social spending, social protection, and inequality. See IMF 2019 *Review of Program Design and Conditionality,* cited in Valentin Lang, 'The Economics of the Democratic Deficit: The Effect of IMF Programs on Inequality' (2021) 16 The Review of International Organizations 599.

[55] Between 1985 and 1996, out of 274 emergency decrees, 40.5% included exceptional measures of criminal justice to confront the threat of narcotrafficking. Mauricio García Villegas, 'Constitucionalismo Perverso. Normalidad y Anormalidad Constitucional En Colombia: 1957-1997.' in Boaventura de Sousa Santos and Mauricio García Villegas (eds), El caleidoscopio de las justicias en Colombia (Siglo del Hombre 2001).

[56] Emergency Decree 1142 of 1975.

[57] Emergency Decree 1923 of 1978.

[58] 'La Comisión busca la verdad del Estatuto de Seguridad durante el gobierno de Julio César Turbay' (Comisión de la Verdad) <> accessed 3 May 2024.

[59] Emergency Decrees 1038, 1042, 1056, 1058, 1290 of 1984; Emergency Decrees 3664 and 3671 of 1986.

offences. The Supreme Court later declared that these measures were unconstitutional because they subjected civilians to the military jurisdiction.[60] In response to this, acting under a state of exception, the government created 'special jurisdictions' to fill in this gap.[61] These included secretive tribunals that guaranteed anonymity for judges and witnesses, such as 'special courts' and 'public order tribunals',[62] later renamed 'regional justice' tribunals,[63] which had competence over drug-related offences, kidnapping, extortion, and related conducts, and, later on, rebellion, sedition and similar conducts that threatened the 'security and existence of the state'. In 1988, the government enacted the *Statute for the Defence of Democracy* (also known as the *Anti-terrorist Statute*),[64] which established a broad definition of 'terrorism' that included wide-ranging activities, such as participation in protests and strikes,[65] and granted the military and the police special powers of search, seizure, and arrest without warrant in 'urgent' cases. In practice, the Statute did not lead to a decrease in violence, but to the arrest and conviction of workers and students who participated in protests, as well as a few low-rank criminals, leaving the structures of the cartels, *paramilitary* groups, and *guerrillas* almost entirely untouched.[66]

In this period, despite the extensive use of emergency penality and the persistence of overcrowding, the overall prison population remained relatively 'stable', at an average of 30000 inmates per year between 1980 and 1994.[67] Stability was maintained through a combination of emergency measures for the release of inmates (mostly those on remand due to petty crimes),[68] followed once again by sudden increases of the prison population due to the application of the *Statute for the Defence of Democracy* and other emergency penal laws.[69] It must be noted, however, that the government also used emergency measures to prevent certain offenders (particularly those under the Regional Justice system, who had committed offences related to 'terrorism and narcotrafficking') from being released.[70] Despite the ambiguous relationship of emergency measures with incarceration rates, semi-permanent states of exception paved the way for the normalisation of harsh punitiveness in the decades that followed.

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[60] Supreme Court of Colombia, Judgment No. 1562 (235-E) of 1986, which declared Decree 3671 of 1986 unconstitutional.
[61] See Emergency Decree 1631 of 1987, Emergency Decree 2490 of 1988.
[62] Emergency Decree 474 of 1988.
[63] Emergency Decree 2700 of 1991, Sunset Clause No. 5.
[64] Emergency Decree 180 of 1988.
[65] ibid.
[66] Manuel A Iturralde, *Punishment and Authoritarian Liberalism: The Politics of Emergency Criminal Justice in Colombia (1984-2006)* (2007) 122.
[67] *T-153/98* (n 36).
[68] Emergency Decree 1853 of 1985. See *T-153/98* (n 36) ¶13.
[69] *T-153/98* (n 36). Other emergency measures included Emergency Decree 2790 of 1990; Emergency Decree 99 of 1991; and Emergency Decree 2271 of 1991.
[70] See Emergency Decree 1793 of 1992. Despite more strict constitutional controls to emergency measures under the 1991 Constitution, the Court developed an ambiguous position towards these measures, sometimes declaring them compatible with the Constitution and other times declaring them unconstitutional but giving the government significant room for manoeuvre. See Law 15 of 1992, *C-301/93* (CCC); *C-426/93* (CCC); *C-300/94* (CCC).

3. The third 'crisis': Human rights and the expansion of penality

In the context of new peaks of violence, the 1991 Constitution was enacted as a symbol of hope: a first step towards strong institutions, democracy, and the consolidation of the rule of law, which would in turn create adequate conditions for the market to flourish —that is, security, stability for foreign investment, guarantees of legal certainty and predictability, and a greater capacity to adapt to complex forms of litigation.[71] The progressive Constitution also contemplated strong protections for the market,[72] which enabled another period of wide-ranging neoliberal economic reforms that included further deregulation; privatisation; the free movement of goods, services, and financial exchanges; increased protection to foreign investments; and fiscal austerity in an already precarious welfare system.[73] In addition, through the creation of independent central banking and regulatory agencies, economic policy became increasingly isolated from public deliberation.[74] Notwithstanding the seemingly progressive and protective character of the 1991 Constitution, and because of its compatibility with the neoliberal economic project,[75] 'poverty remained unchallenged and social inequality increased',[76] resulting in further social fractures, exclusion, and marginalisation.

As the Constitution was enacted, violence intensified. *Guerrillas* were becoming stronger and extending their presence over the national territory; *paramilitaries* gained more power through association with various actors (land-owners, *narcos* , local and regional elites, politicians, and even State officials); and cartels were flourishing despite Escobar's death.[77] The government confronted armed actors through the deployment of a strong military campaign, which had as its counterpart the use of emergency penal jurisdictions and the inflation of incarceration rates. Invoking transitional clauses in the Constitution, measures that had previously been taken under states of exception were incorporated into the legal system.[78] On the one hand, emergency measures were

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[71] Mauricio García Villegas, 'Law as Hope: Constitution and Social Change in Latin America' (2002) 20 WILJ 353; César Rodríguez-Garavito and Rodrigo Uprimny, '"¿Justicia Para Todos o Seguridad Para El Mercado? El Neoliberalismo y La Reforma Judicial En Colombia' in César Rodríguez-Garavito, Rodrigo Uprimny and Mauricio García Villegas (eds), *¿Justicia para todos? Sistema judicial, derechos sociales y democracia en Colombia* (Norma 2006).

[72] See, for example, Articles 333 (on the protection of free markets and private initiative), 365-369 (on the participation of private actors in the provision of public services), 371 (on the functions and special regime of the independent Central Bank).

[73] Alviar (n 2); Rodríguez-Garavito and Uprimny (n 71).

[74] Alviar (n 2).

[75] The 1991 Constitution recognises that 'the general direction of the economy is a function of the State' (article 333), and that markets require the support of governmental action to thrive. Therefore, it establishes guarantees for the preservation and functioning of market freedoms. This includes broad constitutional protections to the market, to 'private enterprises as the basis of development', and to 'economic freedom' (articles 333 and 334); the promotion of 'productivity and competition' (article 334); strong protections to financial activities (article 335); limitations to redistributive economic policies; the establishment of a legal framework for privatisation of public services or the participation of privates in their provision; and the creation of a special regime for central banking (article 371).

[76] Iturralde, 'Colombian Prisons' (n 54) 153.

[77] Manuel Iturralde, *Castigo, liberalismo autoritario y justicia penal de excepción* (Siglo del Hombre Editores 2010).

[78] For instance, provisions from the *Statute for the Defence of Democracy* (ED 180 of 1988) and the *Statute for the Administration of Justice* (Law 2790 of 1990, which created the system of Regional Justice) remained in force until 1 July 2002.

normalised through their enactment as ordinary laws, although some had temporal limits. For instance, the government created a system of 'Regional Justice', an exceptional jurisdiction for offences related to narcotrafficking and terrorism (for which preventive detention was mandatory). In this temporary jurisdiction, judges and witnesses could maintain anonymity to ensure their security.[79] Other emergency measures were normalised through the enactment of Decree 2271 of 1991, which incorporated procedural aspects established in previous emergency decrees.[80]

On the other hand, the government enacted new exceptional measures aimed at defeating narcotraffickers, illegal armed groups, and 'common criminality' in cities —which started becoming a single 'criminal' threat, gradually transforming the 'war on drugs' into a broader 'war on crime'.[81] The 'war on crime' was to be fought through the incorporation of the main traits of emergency penality into the ordinary law: lengthier sentences, exclusion from *beneficios* and *subrogados*,[82] the hardening of criminal procedures, and the expansion of the scope of the criminal law through the creation of new offences.[83] In addition, Law 228 of 1995 transformed emergency regulations concerning 'special petty crimes' into permanent provisions,[84] while Law 365 of 1997 increased prison sentences and limited access to *subrogados* for all offences committed in relation to "organised crime". Generalised punitiveness, based on public protection rationales, became a key feature of ordinary penal legislation.[85]

As a result of these measures, the prison population reached new records by the mid-1990s. Imprisonment rates had reached 39574 inmates by November 1996 and 40590 inmates by January 1997. In 1998, the State was facing the worst penal 'crisis' yet.[86] Overcrowding, a constant inflation of the imprisoned population,[87] and lack of basic public services and healthcare created 'infernal' conditions of reclusion.[88] In addition to this, the internal armed conflict seemed to have

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[79] Emergency Decree 2790 of 1990 was incorporated through Decree 2266 of 1991, Law 15 of 1992, and Law 81 of 1993. The jurisdiction remained in place until 2002. Other laws which incorporated emergency measures into the ordinary regime included Law 104 of 1993, on the exceptional regime for the reintegration of former member of 'subversive' groups; Law 218 of 1995, on tax exemptions in zones affected by floods; and Law 228 of 1995 which integrated the emergency measures of Decree 1410 of 1995, on measures to 're-establish citizen security'.

[80] 45 of the 237 emergency decrees enacted between 1984 and 1991 were enacted as ordinary laws under the transitional constitutional regime. Most of these decrees concerned penal measures. Mauricio García Villegas and Boaventura de Sousa Santos, 'Colombia: El Revés Del Contrato Social de La Modernidad.', *El caleidoscopio de las justicias en Colombia.* (Siglo del Hombre 2001).

[81] Iturralde, *Castigo, liberalismo autoritario y justicia penal de excepción* (n 77).

[82] *Subrogados* are non-custodial measures which include suspended sentencing, probation, home detention or arrest, and hospital detention or arrest. *Beneficios* are reductions in sentencing and special permits granted to inmates for 'good behaviour' (including 72-hour permits, 15-day permits, weekend permits, preparatory release, and work and education permits). See Law 599 of 2000 (Penal Code), articles 63,64, and 68), Law 750 of 2002, and Law 65 of 1993.

[83] Law 228 of 1995, Law 365 of 1997.

[84] These offences included possession of prohibited substances, theft, offences against the person, sale of instruments for the interception of communication, and possession of instruments to attack private property, among others.

[85] Iturralde, *Castigo, liberalismo autoritario y justicia penal de excepción* (n 77); Manuel Iturralde, 'Emergency Penality and Authoritarian Liberalism. Recent Trends in Colombian Criminal Policy' (2008) 12 Theoretical Criminology 377.

[86] Between 1989 and 1999, the prison population rose by more than 40%, and overcrowding levels had reached 34%.

[87] While controversial measures for the mass release of inmates had been taken in previous decades, during the 1990s the government took a strong stance against these measures, arguing that it would worsen conditions of insecurity and unleash even more violence. Iturralde, *Castigo, liberalismo autoritario y justicia penal de excepción* (n 77).

[88] *T-153/98* (n 36) ¶8.

moved into prisons: confrontations between narcotraffickers, *guerrilleros*, and paramilitaries produced frequent massacres, forced disappearances, and even kidnappings.[89] These conditions led thousands of inmates to make *tutelas* against the State, claiming that their fundamental rights were being systematically violated. Lower-level judges and the Constitutional Court initially responded to these constitutional complaints through individual remedies, emphasizing on the positive obligations that result from the 'special relation of subjection between the State and the prisoner'.[90] Because all *tutela* rulings must be forwarded to the Court for discretionary review, by 1998 the tribunal realised that the judiciary was facing an overwhelming number of similar well-founded complaints that resulted from systemic failures of the State, and which could not be dealt with through individual remedies. Therefore, the Court decided to declare the existence of an *USoA* in the National Penitentiary System, that is, generalised, massive, and systematic violations of the rights of persons deprived of liberty. The Court described the situation as follows:

> For many years, society and the State have crossed their arms in the face of [overcrowding], watching the day-to-day tragedy of prisons with indifference, although it represents a daily transgression of the Constitution and the law.
> […]
> Colombian prisons are characterised by overcrowding, serious failures in the provision of public services and healthcare; the rule of violence, extortion, and corruption; and the lack of opportunities and means for resocialization. The Ombudsman is right in his conclusion that prisons have become mere storage houses. This situation fits perfectly with the definition of an *unconstitutional state of affairs*. Therefore, we conclude that there is a flagrant violation of a wide range of fundamental rights of inmates in Colombian prisons, including dignity, life and personal integrity, the rights to family, health, work, and the presumption of innocence, etc.[91]

In light of these conditions, and in order to preserve the 'integrity and effectiveness' of the Constitution, the Court designed a set of public policy measures which, ordinarily, would be under the competence of the legislature and the executive power. Because overcrowding was understood as the root cause of the 'crisis', the Court dictated that Congress, as well as all other competent public authorities, were to take all necessary measures to design and implement a plan of construction and renovation of prisons across the country.[92] Other orders included separating inmates who had been sentenced from those awaiting trial; transferring inmates who belonged to the Public Forces to special facilities to ensure their security; hiring more personnel to address

[89] Libardo Ariza and Mario Torres, 'Constitución y Cárcel: La Judicialización Del Mundo Penitenciario En Colombia.' (2019) 10 Revista Direito e Práxis 630; Libardo Ariza and Manuel Iturralde, *Los Muros de La Infamia: Prisiones En Colombia y En América Latina* (Universidad de los Andes, CIJUS 2011).
[90] See Judgments *T-522/92* (CCC); *T-786/92* (CCC); *T-795/96* (CCC); *T-705/96* (CCC). See also Ariza and Torres (n 89).
[91] *T-153/98* (n 36) ¶53 and 54.
[92] ibid, orders No. 3-5.

understaffing; and taking all other necessary measures in order to guarantee public order and fundamental rights in penal facilities.[93]

The Court's emphasis on overcrowding as the sole root of the 'crisis' kept the tribunal from analysing the role of emergency penality and the severity of ordinary criminal law as the main causes of the unprecedented and dramatic increase of incarceration rates.[94] Furthermore, the Court overlooked a fundamental question: if punishment is imposed under structurally *unconstitutional* conditions, can it still believably be upheld as a form of legitimate coercion? As pointed out by Ariza, by ignoring this fundamental problem, the Court sent the message that it was 'legitimate to systematically use pre-trial detention and anticipated sanctions in conditions which violate human dignity, and that what is actually wrong is that there is not enough space to lock people up'.[95] According to Ariza, the Court should have addressed the 'crisis' in prisons from the point of view of the prohibition of cruel, inhuman or degrading treatment or punishment. This would have made it unjustifiable to keep inmates in prisons unless conditions coherent with human rights were guaranteed,[96] and would have led to 'more effective measures' such as the release of inmates that had been 'incarcerated on pre-trial detention for disproportionate amounts of time'[97] and the 'incorporation and application of alternative measures of deprivation of liberty, many of which are already established in the UN Standard Minimum Rules for Non-custodial Measures'.[98] In Ariza's view, the Court simply did not do enough to protect human dignity as a moral imperative, 'sacrificing' inmates in exchange for the maintenance of the State's penal power.[99]

It is at this point in the history of Colombia's criminal justice policy that the question of the relationship between penal inflation, systemic rights violations, and the legitimacy of punishment arose —a question at the core of this thesis. Ariza's analysis presents the question of the legitimacy of punishment under unconstitutional conditions as a matter of morality —one which essentially concerns what it is *right* for the State to do in terms of respect to human dignity. In a similar vein, in the American context, Simon has argued that ending mass incarceration must become a 'moral imperative', presenting the protection of human dignity as the State's central mission.[100] However, although the question of whether it is morally right for the state to impose punishment under inhumane conditions is relevant, it does not exhaust the question of legitimacy in its social and political dimension[101] —that is, as a matter of political authority. By focusing solely

[93] ibid, orders No. 1-11.
[94] Ariza and Iturralde (n 89); Libardo Ariza, 'Los Derechos Económicos, Sociales y Culturales de Las Personas Presas y La Intervención de La Corte Constitucional En El Sistema Penitenciario Colombiano' in Daniel Bonilla (ed), *El Constitucionalismo en el Continente Americano* (Siglo del Hombre Editores 2016); Iturralde, 'Colombian Prisons' (n 54); Iturralde, *Punishment and Authoritarian Liberalism* (n 66).
[95] Libardo Ariza, 'Reformando El Infierno: Los Tribunales y La Transformación Del Campo Penitenciario En América Latina' in Libardo Ariza and Manuel Iturralde (eds), *Los muros de la infamia: Prisiones en Colombia y en América Latina* (Universidad de los Andes, CIJUS 2011) 90.
[96] Ariza, 'Reformando El Infierno' (n 95).
[97] ibid 91. See Libardo José Ariza, *Tres décadas de encierro. El constitucionalismo liminal y la prisión en la era del populismo punitivo* (Siglo Editorial 2023).
[98] Ariza, 'Reformando El Infierno' (n 95) 92.
[99] Ariza, *Tres décadas de encierro* (n 97).
[100] Jonathan Simon, 'Ending Mass Incarceration Is a Moral Imperative' (2014) 26 Federal Sentencing Reporter 271.
[101] See David Beetham, *The Legitimation of Power* (2nd edition, Palgrave Macmillan 2013).

on the idea that, to be legitimate, punishment must be compatible with human dignity, a broad range of issues become obscured: the fact that punishment is imposed under conditions which permanently and systematically violate the constitutional order affects the credibility of the State's claims of political authority, as well as its capacity to uphold punishment as rightful coercion as opposed to the mere, arbitrary deployment of force.[102]

Around the same time as the first *USoA* in prisons was declared, President Pastrana's government started working towards coordinated strategies with the United States in order to tackle the challenges posed by *guerrillas*, paramilitary groups, and narcotrafficking, as well as the issue of common delinquency in the cities, as a single, overarching security issue.[103] Because narcotrafficking had become the main source of income of illegal armed groups, a counternarcotic strategy was presented as the most efficient way of debilitating the various actors that continuously challenged the State's authority. After the failure of peace negotiations between Pastrana and the FARC (1999-2001), the Colombian and US governments started implementing *Plan Colombia,* a six-year campaign of counter-narcotics and pacification strategies, with financial, military, and non-military support from the US government.[104] The campaign was accompanied by strong pressure on the Colombian government to enforce harsher penal measures and to move towards an adversarial criminal justice system, based on the American model.[105] Law and order policies were sponsored and financed as 'ideal mechanisms to combat violence, disorder, transnational threats, and crimes, and to strengthen democratic institutions and the rule of law'. [106]

Reforms enacted under *Plan Colombia* also included significant transformations to 'modernise' the penal system.[107] Great efforts were devoted to bringing the criminal justice system in line with international standards, amongst which guarantees to the rights of victims were a crucial point.[108] Throughout the 1980s and 90s, in cases concerning States' failures to investigate and sanction serious human rights violations, the Interamerican Court of Human Rights (IACtHR) had established that anti-impunity was a core component of victims' rights.[109] In the 1990s, this discourse was also adopted by international bodies, which emphasised the role of anti-impunity provisions as a 'firm basis for the rule of law'.[110] Defined broadly, anti-impunity discourse identifies justice with criminal prosecution, individual accountability, and punishment, turning towards the

[102] See Chapters 3 and 4.
[103] Jonathan D Rosen, *The Losing War: Plan Colombia and Beyond* (SUNY Press 2014).
[104] This included military training for Colombian counternarcotic battalions, the provision of helicopters and intelligence assistance, supplies for coca eradication, and additional programmes for diplomatic, economic (including opening the national market to international trade), and social support.
[105] Iturralde, *Castigo, liberalismo autoritario y justicia penal de excepción* (n 77); Astrid Liliana Sánchez Mejía, *Victims' Rights in Flux: Criminal Justice Reform in Colombia* (Springer International Publishing AG 2017).
[106] Iturralde, 'Colombian Transitional Justice' (n 52) 235.
[107] Law 599 of 2000. See Aura Helena Peñas Felizzola and Mauricio Molina Galindo, 'Siete teorías para comprender las reformas a la parte especial del código penal (tipos penales)' (2023) 44 Derecho Penal y Criminología 179.
[108] The very concept of 'victims' rights' was a site of contestation and had multiple meanings proposed by various political and social actors, which resulted in tensions and contradictions with the role and regulation of the rights of victims in the Penal Code of 2004 (Law 906). Sánchez Mejía (n 218).
[109] Karen Engle, 'Anti-Impunity and the Turn to Criminal Law in Human Rights' (2015) 100 Cornell Law Review 1069; Daniel Pastor, 'La Deriva Neopunitivista de Organismos y Activistas Como Causa Del Desprestigio Actual de Los Derechos Humanos' [2006] Jus Gentium; *Case of Velásquez Rodríguez v Honduras Judgment of June 29, 1988* (IACtHR).
[110] Vienna Declaration and Programme of Action ¶60.

criminal law as the natural and uncontested response to serious human rights violations and international crimes. Punishment, in that sense, is understood as central to the victims' rights to truth and justice.[111] Conversely, impunity is 'narrowly defined as foreclosing the option of criminal punishment'.[112] The failure to investigate and adequately sanction offenders amounts not only to a 'failure to remedy human rights violations', but a 'unique cause of them'.[113] This transnational discourse was integrated into the domestic sphere through article 93 of the 1991 Constitution.[114] But victims' rights had already been entrenched at the heart of the Constitution: conceived as a 'peace agreement',[115] it contemplated strong protections to the victims of Colombia's longstanding armed conflict, including the rights to peace, life, personal integrity, justice, and reparation,[116] as well as a 'positive obligation of putting the satisfaction of the rights of victims at the centre, and, in that sense, of complying with the principles of the Constitution'.[117]

As a result of these developments, which sought to bring the criminal justice system in line with guarantees of non-impunity, Colombian penal policy definitively shifted towards accountability and punishment as key components of the global human rights project,[118] putting the rights of victims at the centre of debates on criminal adjudication. This was not done through a mere transplant of legal models to the Colombian system. Instead, it involved a complex process of appropriation and transformation of those ideas, practices, and discourses,[119] drawing from a particular history of 'intensive use of punishment discourses to uphold, through violent means, a highly exclusive political and economic order to the benefit of elite groups of Colombian society'.[120] However, in contrast to this previous history, the late 90s represented a significant ideological turn: vulnerability and crime started becoming normalised, through (ordinary) criminal law, human rights, and constitutional principles, as constitutive characteristics of the legal and

[111] Engle (n 109); *Case of the Massacres of El Mozote and Nearby Places v El Salvador Judgment of October 25, 2012* (IACtHR); *Case of Barrios Altos v Peru Judgment of March 14, 2001* (ICtHR).
[112] Engle (n 109) 1119.
[113] Engle 1077
[114] Article 93 of the 1991 Constitution. 'International treaties and covenants ratified by Congress, which recognise human rights and prohibit their limitation during states of exception, prevail in the domestic order. The rights and duties contemplated in this Charter, shall be interpreted in accordance with international treaties on human rights ratified by Colombia'. See, for example, the 1985 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power and the Rome Statute and the Rules of Procedure and Evidence of the ICC. For a detailed account of the history of these trends, see ibid.
[115] Rodrigo Uprimny and Luz María Sánchez-Duque, 'Constitución de 1991, Justicia Constitucional y Cambio Democrático: Un Balance Dos Décadas Después.' (2013) 71 Cahiers des Amériques Latines 33.
[116] Peace (preamble and article 22), life (article 11), personal integrity (articles 11 and 12), justice (preamble).
[117] Dejusticia, '30 Años de Deudas Con Las Víctimas - "La Constitución de La Gente": 30 Años de Una Carta Que Evoluciona.' <https://www.dejusticia.org/especiales/30-anos-de-la-constitucion-de-1991/columnas/30-anos-de-deudas-con-las-victimas/> accessed 17 April 2023.
[118] Mattia Pinto, 'Historical Trends of Human Rights Gone Criminal' (2020) 42 Human Rights Quarterly 729, 753; Engle (n 109).
[119] Iturralde, 'Colombian Transitional Justice' (n 52) 238.
[120] Manuel Iturralde and Libardo Ariza, 'Transformations of the Crime Control Field in Colombia' in Kerry Carrington and others (eds), *The Palgrave Handbook of Criminology and the Global South* (Springer International Publishing AG 2018) 691.

social order. This implied, as declarations of *USoA* in prisons show, an official recognition of the vulnerability of the State's authority.[121]

4. The fourth crisis: Security and the rights of victims

After more than 60 years of internal armed conflict and high rates of violence, vulnerability to crime easily —and, perhaps, justifiably— gained a strong hold on the political imagination. Supported on discourses of constitutionalism and human rights, crime and victimisation gained centre stage in the 2000s, resulting in a fourth, even worse 'crisis' of the penal system. In the years that followed the first declaration of an *USoA* in prisons, plans of prison renovation and construction were carried out by the legislative and executive branches, increasing the system's capacity and leading to a gradual decline of overcrowding that lasted until 2007.[122] However, as capacity increased, so did the prison population. Because of *Democratic Security* policies enacted during Uribe's governments,[123] incarceration rates in the 2000s grew at an even higher speed than when the *USoA* was first declared, making the Court's plans to increase the system's capacity and overcome overcrowding futile.[124]

Democratic Security policies explicitly incorporated the normative language of victims' rights and anti-impunity, portraying crime as a common collective experience, rather than an exceptional and atypical one.[125] The role of the State, according to these policies, was to engage in an 'upfront struggle against impunity to reduce criminal offending', which required 'strengthening the State's investigatory and punitive system in order to punish homicides and other violent actions against […] victims of intolerance and, over all, impunity'.[126] In line with these discourses of crime, security, and the rights of victims, a series of legal reforms that sought to 'modernise' the criminal justice system followed,[127] including the enactment of a new Code of Criminal Procedure (2004) that adopted features from the American adversarial system.[128] But, well before the drafting and enactment of the new Code, the Constitutional Court had already interpreted the role of victims in the penal process as one which went beyond civil compensation, establishing that they had a

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[121] The official recognition of the State's vulnerable authority is discussed in detail in Chapter 4. For a similar development, though in a very different material and ideological context, see Peter Ramsay, 'Pashukanis and Public Protection' in Markus D Dubber (ed), *Foundational Texts in Modern Criminal Law* (OUP 2014).

[122] In 2002, as a result of the plans of prison construction and refurbishment, the prison population was at an average of 51276 inmates, with a relatively low level of overcrowding of 15,6%. *T-388/13* (n 1).

[123] A national security policy implemented during Álvaro Uribe's government in order to fight the 'threats' of terrorism, narcotrafficking, common crime, and corruption through a combination of military strategies and harsh penal measures.

[124] According to the CONPES 3086, the prison population was growing at a rate of 315.39% per year, compared to an increase in capacity of 173,39%. Departamento Nacional de Planeación, 'Documento CONPES 3086-Ampliación de La Infraestructura Penitenciaria y Carcelaria' (DNP 2000).

[125] Garland (n 4).

[126] Presidencia de la República, Ministerio de Defensa Nacional, 'Política de Defensa y Seguridad Democrática' (2003) 37, ¶ 68.

[127] Sánchez Mejía (n 105).

[128] Law 906 of 2004.

'right to non-impunity'.[129] This right encompasses victims' interests in reparation, truth, and justice, which in turn entail the prosecution and punishment of offenders.

At first, the new Code seemed to contribute to the reduction of incarceration and overcrowding,[130] owing mostly to restrictions to the imposition of detention on remand.[131] However, *Democratic Security* policies led to a generalised 'zero tolerance' approach to crime that led to a fast increase of incarceration rates. Reforms that followed adopted a punitive stance: Law 890 of 2004 increased the minimum sentences by one third and the maximum sentences by half for all criminal offences.[132] Later, Law 1142 of 2007 introduced greater flexibility for the imposition of remand,[133] allowing judges to assess the 'seriousness of the conduct' and the 'dangerousness' of the defendant, regardless of any mitigating circumstances. In addition to this, various laws introduced restrictions to the substitution of incarceration with other forms of detention,[134] first for offences related to narcotrafficking, and later for other forms of offending considered especially serious or damaging, such as sexual offences (particularly against minors)[135] and offences against the public administration.[136]

The introduction of these modifications led to a 'spectacular increase of the prison population and overcrowding levels'.[137] In 2010, by the end of Uribe's government, the prison population had reached a then unprecedented total of 84444 inmates and overcrowding levels of 40%. President Juan Manuel Santos then took office, seeking to preserve and expand the legacy of Uribe's *Democratic Security* through a new programme of *Democratic Prosperity*. With armed actors relatively weakened, Santos' policies focused on the fight against urban criminality, particularly targeting offences against the person and against property (such as theft and robbery). In 2011, Congress enacted Law 1453, the *Law of Citizen Security,* which introduced more flexibility for the

[129] *C-228/02* (CCC) ¶4.4. See also Chapter 4.

[130] The percentage of inmates on remand went from 39% in 2005 to 27% in 2011. In addition to this, the reform seemed to contribute to the overall efficiency of the system: between 2004 and 2009, 44.8% of the cases were cleared. Between 2005 and 2014, the number of cases cleared increased to 82%. However, this was mostly due to the filing or closure of cases in which there was no evidence that a crime had been committed. See Manuel Iturralde, 'The Legal Fiction of the Right to Defense in the Colombian Criminal Justice System' (2020) 27 Indiana Journal of Global Legal Studies 289.

[131] Article 308 of Law 906 of 2004 established that preventive detention could only be imposed if it is proved that '(1) the measure is necessary to avoid obstructions of justice by the defendant; or (2) the defendant constitutes a danger to society or the victim; or (3) it is probable that the defendant will not appear in court or will not comply with the full sentence'.

[132] The maximum prison sentence in Colombia went up to 60 years for numerous crimes.

[133] The *Law of Citizen Coexistence and Security* (1142 of 2007) granted judges greater discretion in the imposition of remand by eliminating previous legal requirements, excluded the possibility of *beneficios* (probation, house detention, electronic surveillance) for various offences, as well as for individuals with prior convictions. According to the Grupo de Derecho de Interés Público, Universidad de los Andes, these reforms meant that approximately 21% of the prison population (approximately 25058 inmates) would have to serve their full prison sentences, as they were excluded from probation and electronic surveillance. Fernando León Tamayo Arboleda, Manuel Iturralde and Libardo José Ariza, *Cárcel, derecho y sociedad: Aproximaciones al mundo penitenciario en Colombia* (Universidad de los Andes 2021).

[134] Law 1142 of 2007 restricted access to other forms of detention for 21 different offences, including domestic violence, theft, grand larceny, and fraud. It also raised the minimum sentences for 12 offences, including domestic violence, threats, and electoral fraud.

[135] Law 1098 of 2006 established mandatory remand for sexual offences against minors.

[136] Law 1474 of 2011 (*Anticorruption Statute*).

[137] Iturralde, 'Colombian Prisons' (n 54) 155.

imposition of remand: the seriousness and *modalidad*[138] of the criminal offence were sufficient criteria to justify this measure.[139] In addition, it further restricted access to penal *beneficios* for various offences (sexual offences, drug related offences, aggravated conspiracy, terrorism, unlawful possession of weapons, and money laundering), and for persons who had previously been convicted of 'serious' offences.[140] By the end of 2011, the prison population had reached 110451 inmates, almost doubling that of 2004, a spike that was mainly caused by the imposition of mandatory preventive detention for drug-related offences, greater flexibility in the imposition of remand, and the exclusion of several offences from access to *subrogados* and *beneficios.*[141] In 2014, the prison population had increased to 118968 inmates, while overcrowding peaked at 56.16%.[142]

By 2013, the Court had once again accumulated an overwhelming number of *tutelas* against the National Penitentiary System. As a result, the tribunal decided to engage in a new structural analysis of the 'crisis'. According to Judgment T-388 of 2013, generalised violations of fundamental rights persisted and required a new declaration of an *USoA,* with an accompanying set of structural remedies.[143] As highlighted by Ariza and Torres,[144] this marked a turn in the Court's analytic framework. Overcrowding was no longer seen as the main issue affecting prisons. Building new prisons, therefore, would be insufficient to face the new 'crisis'. Instead, the Court argued that the root cause of these unconstitutional circumstances was the 'excessive and overwhelming use of the penal system'[145] which, in turn, had resulted from 'populist' penal policies which were 'disjointed, reactive, volatile, incoherent, ineffective, devoid of a human rights-based perspective, and subjected to policies of national security'.[146] The penal 'crisis', therefore, was constructed as a failure by the political branches to create penal policies in accordance with constitutional principles.

In this lengthy judgment, which spanned over 400 pages, the Court established a complex set of 'minimum criteria' for penal policy, highlighting the State's positive obligations to ensure adequate living conditions in prisons, including, among others, guarantees of access to health, water, and sanitation; adequate nutrition; and access to resocialization and education programmes.[147] These conditions were interpreted in light of detailed and technical international standards, which gained a central role in the definition of the content of inmates' fundamental rights. Furthermore, the Court created two detailed rules for the management of prisons, regarding

[138] This term refers, roughly, to what common law systems would classify as types of *mens rea.*
[139] Law 1453 of 2011, Article 65.
[140] Law 1453 of 2011, Article 68 A.
[141] Manuel Iturralde, 'Neoliberalism and Its Impact on Latin American Crime Control Fields' (2018) 23 Theoretical Criminology 471; INPEC, 'Impacto Legislación Penal En La Población Penitenciaria y Carcelaria a Cargo Del INPEC. 1998-2015' (INPEC 2015).
[142] INPEC, 'Impacto Legislación Penal En La Población Penitenciaria y Carcelaria a Cargo Del INPEC. 1998-2015' (n 141).
[143] *T-388/13* (n 1) ¶ 4.
[144] Ariza and Torres (n 89).
[145] *T-388/13* (n 1) ¶8.2.12.3.
[146] ibid.
[147] *T-388/13* (n 1).

the competence to order temporary closures due to 'serious and imminent threats to human dignity and human rights'[148] and restrictions to the entry of new inmates to overcrowded prisons.[149]

In Judgment T-762 of 2015, the Court reiterated the *USoA* declared in 2013, providing more detailed 'criteria of constitutionality' for the design and reform of penal policies. The criteria comprised abstract principles that, in line with international standards, would serve as a general guideline of the essential criteria of *constitutional* penal policies. In other words, these principles constitute standards of legality through which penal policy is constitutionalised, guiding the branches of power in the creation of constitutional policies and establishing 'verifiable minimum conditions' to 'guide public authorities' in the gradual overcoming of unconstitutional conditions in prisons.[150] For instance, among the general principles for the 'minimum standards of human rights',[151] the Court insisted on the role of proportionality as a limit to penal policy,[152] both as a general guideline and as a restraint on sentencing in particular cases.[153] Furthermore, Judgment T-762 also created complex monitoring mechanisms, including a set of measurable 'baseline indicators',[154] which the Court considered essential for the diagnosis of current circumstances and the assessment of gradual progress in terms of human rights enforcement.[155]

In both judgments, the Court insists on the impact of 'penal populism'[156] on the unprecedented inflation of imprisonment rates and overcrowding. However, the tribunal also recognises that the situation of prisons is largely owed to widespread judicial delays, particularly regarding petitions relating to probation and home detention. In other words, the Court acknowledges that criminal courts are largely to blame for the creation and perpetuation of *unconstitutional* conditions of imprisonment,[157] but the measures created to address *unconstitutionality* were mainly addressed to other branches of power. Meanwhile, the judiciary was only directed to

[148] ibid ¶ 10.3.13.
[149] ibid ¶ 9.1.4.2.1., ¶ 9.1.4.2.1.
[150] *T-762/15* (n 6) ¶50.
[151] ibid ¶50-60. The standards include the following principles: (i) criminal policy must be of a preventive character and the criminal law must be used as the last resort; (ii) criminal policy must respect the principle of personal freedom in a 'strict and reinforced manner'; (iii) criminal policy must have as its main aim the effective resocialization of inmates; (iv) pre-trial detention must be exceptional; (v) all custodial measures must be exceptional; criminal policy must be (vi) coherent, stable, and consistent; (vii) based on empirical elements; (viii) sustainable in economic terms; and (ix) protective of the human rights of inmates.
[152] By this point, proportionality was already a well-established principle in Colombian constitutionalism, drawing mainly from Alexy's theory. See *T-015/94* (CCC); *C-022/96* (CCC); *C-309/97* (CCC); *C-581/01* (CCC); *T-530/02* (CCC); *C-835/13* (CCC). On the role of proportionality in the declarations of *USoA* in prisons see Chapter 3.
[153] See, among other remarks, order 11 *T-762/15*. These rules will be discussed in detail in Chapter 3.
[154] *T-762/15* (n 6) ¶109.
[155] Academic groups such as the *Grupo de Interés Público,* a legal clinic from Universidad de los Andes, had designed a 'litigation strategy' which sought the creation of follow-up and monitoring mechanisms to *T-153/98*. Although the strategy was initially denied in *T-388/13*, the Court took note of these suggestions in the 2015 ruling. See Ariza and Torres (n 89) 15; César Rodríguez-Garavito, 'Beyond Enforcement: Assessing and Enhancing Judicial Impact' in Malcom Langford, César Rodríguez-Garavito and Julieta Rossi (eds), *Social Rights Judgments and the Politics of Compliance: Making it Stick*. (CUP 2017) 7.
[156] The tribunal does not provide a detailed definition of the term, but describes it vaguely as 'pressures from society and the media which advocate for penal repression as the sole way of countering delinquency' and which 'assume that the solution to problems of impunity or rise in criminal offence must always be the drastic increase of punishment' (*T-762/15*, ¶45 and 34). See Chapter 3.
[157] *T-762/15* (n 6) ¶159.

create 'legal aid units' to speed up timely releases of inmates where applicable.[158] The dominant academic view has been that the Court could not go further than this without jeopardizing the separation of powers, because ordering criminal courts to release inmates would 'imply an excessive interference in areas that are outside of [the tribunal's] competence'.[159] However, more critical scholars have correctly pointed out that this position reveals a tension between the Court's restraint when it comes to interfering with the judiciary, on the one hand, and its readiness to intervene in public policy where it deems it necessary, despite implying a 'total reform of the penal system' which may override its competences, [160] on the other.

This reticence to interfere with the decisions of lower-level judges could be interpreted as the Court's attempt to protect itself, and the judiciary, in the face of 'penal populism'. In this view, the massive release of inmates would potentially be received with public backlash and demands for harsher penal policies. In addition to this, according to the Court, massive releases could have a detrimental effect on the rights of victims.[161] Thus, even though imprisonment is recognised as structurally unconstitutional, victims' rights seem to overpower the rights and interests of inmates. In the words of the tribunal, despite unconstitutional conditions,

> inmates do not acquire an immediate subjective right to be released. There are multiple constitutional rights, principles, and values at stake, and they cannot be ignored by *tutela* judgments. The rights of victims, the right to due process, the right to live in a just order, the right of all persons to see offenders convicted and offences prevented, and respect towards judicial decisions by Constitutional judges, must all be balanced by *tutela* judges at the moment of solving these petitions. Allowing the release of inmates would imply a strong protection of the rights of the person who is on remand or serving a sentence, but it would also imply a huge sacrifice of the rights of victims of the criminal offences for which they are detained or convicted […]. Furthermore, it would be unconstitutional and unreasonable to stop using the state's punitive power when the effective enjoyment of the victims' fundamental rights depends on it.[162]

Imprisonment, in the Court's reasoning, is *unconstitutional,* but the release of inmates would be both *unconstitutional* and *unreasonable,* due to its effects on victims' fundamental rights —truth, justice, reparation, non-repetition, and, as seems to be assumed by the Court, a general right to the protection of 'security in society'.[163] As Ariza argues, although inmates are constructed as subjects who require strong judicial protection, they are, at the same time, placed in a 'liminal constitutional space' in which meaningful protection is impossible.[164] Inmates, therefore, are 'abandoned' and 'sacrificed' in the name of victims' rights and security.[165]

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[158] ibid order 14.
[159] Rodrigo Uprimny, Juan F Jaramillo and Diana Guarnizo, 'Intervención Judicial En Cárceles' (DeJusticia 2006) 13.
[160] Ariza, 'Reformando El Infierno' (n 95) 94.
[161] *T-388/13* (n 1) ¶8.2.5.1. The role of the moral language of victims is analysed in more detail in Chapter 4.
[162] *ibid.*
[163] ibid ¶8.2.6.
[164] Ariza, *Tres décadas de encierro* (n 97).
[165] ibid 35.

Furthermore, the recognition of the judiciary's role in the perpetuation of the crisis reveals a problematic tension. Despite the tribunal's insistence on the role of 'penal populism', and the need to insulate criminal justice policy from society's punitive desires, it seems like judges have played a key role in giving a concrete form to these demands. In fact, it has been argued that criminal courts tend to conceive imprisonment as desirable, in the sense that it helps 'achieve the excessively repressive objective' of producing a sense of 'calm' and subjective security in the citizenship, due to the 'backlash that these decisions often get from the media'.[166] However, recent research has indicated that judges in criminal courts dispute the extent to which 'penal populism' and backlash influence their decisions.[167] This brings up the question of the extent to which the 'crisis' in prisons is a result of the judiciary's possibly mistaken assumptions about the public's perception of security, rather than an actual demand for penal severity. Although this question exceeds the scope of this project, it sheds light on a relevant problem: assumptions about the public's punitive desires may conceal deeper problems affecting Colombian democracy. Despite a long history of violence, inequality, and generalised political exclusion, an obvious question has been conspicuous by its absence in discussions about the 'crisis' of the penal system: to what extent is the tendency towards mass incarceration the result of a deep democratic deficit (understood in terms of the lack political equality, public participation, and representation), rather than the consequence of a generalised public inclination towards penal severity?

Whether such public demand for a punitive criminal justice system exists or not, in the Court's eyes, technical standards of human rights and criteria of proportionality are a safer path towards penal moderation than the 'dangerous',[168] 'unreasonable', and 'disproportionate' option of ordering mass releases of inmates. Emphasis on the 'dangerousness' of prisons, the risks of 'penal populism', and the State's positive obligation to protect the rights of victims has allowed the Court to present its intervention in penal policy as necessary, despite the fact that it perpetuates conditions of unconstitutional imprisonment which contradict the basic principles upon which the State's claims of authority are based. Human rights have played a paradoxical role in the production of these circumstances: they have both supported and enabled the expansion of the State's coercive apparatus by reference to 'non-impunity' as a fundamental right of victims, as well as justified the imposition of unconstitutional punishment, sacrificing the fundamental rights of inmates in the name of security and the rights of victims.

[166] Norberto Hernández, *El Derecho Penal de La Cárcel. Una Mirada al Contexto Colombiano Con Base En El Giro Punitivo y La Tendencia al Mayor Encarcelamiento* (Siglo del Hombre Editores 2018) 24.
[167] ibid.
[168] The Court defines prisons as a 'university of crime' and a 'danger not only to persons who are deprived from liberty […] [but also] [a]s reported by the national press, prisons imply a real and imminent risk for persons in liberty'. *T-388/13* (n 1) §5.1.1.3.

5. An ongoing crisis: Transitional justice, the pandemic, and the fourth declaration of an *USoA* in Colombian prisons

During his government, and against his party's wishes, President Santos carried out peace negotiations with the FARC,[169] concluding a historic agreement with this guerrilla in 2016. After its rejection in a referendum,[170] the agreement was re-negotiated and ratified by the Colombian Congress in November 2016. Among other important matters (including agrarian reform, policies related to narcotrafficking, political participation, and reintegration into society), the peace agreement designed a separate jurisdiction (the *Special Jurisdiction for Peace*) to determine accountability for war crimes and crimes against humanity committed by State and non-State actors in the context of the internal armed conflict.[171] This particular point has polarised Colombian society for the last decade,[172] further solidifying the idea that the criminal justice system should be designed, first and foremost, to ensure non-impunity and protect victims' rights. As pointed out by Iturralde, it is striking that, in the midst of this polarisation, both sides have mobilised similar anti-impunity discourses that see human rights, and victims' rights more particularly, as essential components of justice.[173] Though the final agreement makes no mention of imprisonment, creating a system of sanctions for those who recognise their responsibility (restricting their liberty through mechanisms of surveillance, but allowing enough flexibility for offenders to comply with the restorative components of the sanction),[174] the attribution of individual criminal responsibility is seen as the sole solution and response to the conflict, limiting 'the political and legal imagination to deal with law breaking through alternative, more inclusive, far-reaching forms of justice'.[175]

While restorative justice has gained attention with the peace process, penal harshness has continued to dominate ordinary criminal justice. Law 1709 of 2014, for example, established a long list of 'serious' offences that are completely excluded from *subrogados*. These especially 'serious' offences coincide with those that had the highest incarceration rates at that time, such as drug-

[169] The agreement was subjected to a referendum, the result of which was unexpectedly close, with 50.2% votes against and 49.8% in favour, forcing President Santos and the FARC to renegotiate key aspects of the agreement.
[170] After renegotiation, the agreement was 'fast-tracked' in Congress (an exceptional and transitory abbreviated procedure created specifically for the enactment and implementation of the peace agreements, as established in Act No. 1 of 2016). No substantial changes were made to the basic structure of the Jurisdiction for Peace during this special legislative procedure.
[171] Jurisdicción Especial para la Paz (JEP).
[172] Diana Rico and Idaly Barreto, 'Unfreezing of the Conflict Due to the Peace Agreement with FARC—EP in Colombia: Signature (2016) and Implementation (2018)' (2022) 28 Peace and conflict 22.
[173] Iturralde, 'Colombian Transitional Justice' (n 52) 254.
[174] Those who fully confess and recognize their crimes, ask for forgiveness and take restorative actions aimed at repairing the victims will be given a more lenient sentence of between 5 and 8 years, to be served under a system of restriction of liberty under surveillance and control (including a restriction of the freedom of movement and residence) but with a degree of flexibility which allows compliance with the functions of reparation and restoration of the sanctions. It is currently unclear how the sanctions will be imposed, as there is no infrastructure for the restrictions to liberty or mechanisms to ensure adequate surveillance. See Clara Sandoval, Hobeth Martínez-Carrillo and Michael Cruz-Rodríguez, 'The Challenges of Implementing Special Sanctions (Sanciones Propias) in Colombia and Providing Retribution, Reparation, Participation and Reincorporation' (2022) 14 Journal of Human Rights Practice 478; Norberto Hernández Jiménez, 'De la privación a la restricción de la libertad y otras sanciones penales ¿hacia un paradigma restaurativo en la justicia especial para la paz colombiana?' (2020) 69 Vniversitas 1.
[175] Iturralde, 'Colombian Transitional Justice' (n 52) 254.

related offences and theft.[176] Law 1709 had a positive impact for a brief period of time between 2016 and 2017 (because it allowed for greater flexibility regarding requests for the substitution of imprisonment with non-custodial measures),[177] when incarceration rates and overcrowding decreased. However, after this period the prison population increased steadily.[178] In addition, although overcrowding decreased in certain years, this was due to an increase in prison capacity, rather than a decrease in prison population.[179] Later on, following the *estallido social* (a series of protests and riots that started brewing in 2019 and reached their peak in 2021),[180] Iván Duque's government enacted a new *Law of Citizen Security,*[181] which aimed to 'strengthen legal instruments' to combat social disorder and insecurity. This law augmented the maximum sentences for attacks on public officials, criminalised the possession of knives and blades, imposed harsher sentences for the obstruction of public roads and other conducts associated to protests, and criminalised the 'obstruction of the public function'.[182] More recently, under Petro's government, calls for a broad penal reform to 'humanise' and 'modernise' criminal justice policy have been met with considerable opposition by Congressmen from a coalition of various parties,[183] who have argued that the project represents a risk to the rights of victims, given the 'situation of security and public order' in the country.

The Court's strategies have been largely ineffective, both in terms of ameliorating conditions of incarceration and of leading to the creation of more moderate penal policies. In 2019, the Monitoring Commission highlighted that there is still a 'clear lack of coordination between the different organs of public power',[184] and that the standards of constitutionality established by the Court have done nothing to 'moderate the punitive culture that permeates the legislative branch'.[185] Recent reports have focused on the measurement of complex indicators, providing no concrete answers as to the extent to which *unconstitutionality* has been overcome.[186] At the start of 2020, the prison population had reached its highest peak in Colombian history, while overcrowding rates reached the highest levels since 2013.[187] However, an unexpected public health

[176] INPEC, 'Impacto Legislación Penal En La Población Penitenciaria y Carcelaria a Cargo Del INPEC. 1998-2015' (n 141).
[177] ibid. In 2014, overcrowding decreased to 45.9% one of the lowest rates since 2011. The prison population decreased at a rate of 1.6% in 2016 and 3.2% in 2017 but started growing once more in 2018 (3.3%) and 2019 (4.5%).
[178] INPEC, 'Informe Estadístico. Población Privada de La Libertad. Enero 2020.' (INPEC 2020).
[179] Although prison population decreased to 118532 in 2016 (with an overcrowding rate of 44.9%), and reached a low of 114750 in 2017 (and an overcrowding rate of 44.9%), the population has remained at an average of 118500 inmates since 2018. By the start of 2020, prisons had a population of 124188 inmates and overcrowding rates reached a new peak, at 54.9%.
[180] See Appendix 1.
[181] Law 2197 of 2022.
[182] Article 20 of Law 2197, which modified Article 429D of the Penal Code.
[183] Paloma Valencia (*Centro Democrático*), Jorge Enrique Benedetti Martelo (*Cambio Radical*), Jorge Benedetti Martelo (*Alianza Verde*).
[184] Consejo Superior de Política Criminal, 'Quinto Informe Semestral de Seguimiento a La Sentencia T-762 de 2015' (Ministerio de Justicia y del Derecho 2019) 26 <http://www.politicacriminal.gov.co/Portals/0/documento/Quinto_Informe_Semestral_de_Seguimiento_al_Estado_de_Cosas_Inconstitucional_del_Sistema_Penitenciario_y_Carcelario..pdf>.
[185] ibid.
[186] Monitoring reports may be found at https://politicacriminal.gov.co/Seguimiento-ECI
[187] INPEC, 'Informe Estadístico. Población Privada de La Libertad. Enero 2020.' (n 178).

emergency led to a significant reduction of these figures: the COVID-19 pandemic forced the government to implement emergency measures in order to ensure social distancing, proper sanitation, and hygiene conditions to prevent the spread of the virus inside prisons. These included Emergency Decree 546 of 2020, which granted home detention for a period of six months to particularly 'vulnerable' inmates (that is, those at higher risk of contagion or serious illness).[188] However, a long list of 'serious offences' was excluded from access to home or hospital detention (homicide, sexual offences, domestic violence, femicide, drug-related offences, and aggravated theft, among others),[189] creating a more restrictive regime of home and hospital detention than the one established in ordinary legislation.[190]

With the public health emergency, incarceration and overcrowding reached the lowest rates of the decade. But, ironically, Emergency Decree 546 had little to do with this. In this period, sentencing judges seem to have engaged in a particular form of 'judicial activism', undertaking the task of rapidly granting *subrogados* to those eligible.[191] Of the 35099 inmates that were released by October 2020, most were granted parole or probation under the ordinary regime, while only 2% were released on the basis of Decree 546.[192] These circumstances have once again raised the question of whether these decisions could have been taken under normal circumstances, highlighting an issue that was mentioned in the previous section: the 'crisis' of Colombian prisons is, to a great extent, the result of the judiciary's own unwillingness to grant releases from prison, even where all legal requirements are met, as well as a generalised reluctance to impose alternative forms of deprivation of liberty where applicable.[193]

In 2021, the prison population remained relatively stable at an average of 96176 inmates. However, with the stabilization of the health emergency and the 'return to normality' since 2021, incarceration rates have started growing once again.[194] In fact, in 2022, the Constitutional Court extended the declaration of the *USoA* to include centres for transitory detention. Due to the rules established in judgment T-388/13 on the temporary closure of jails and prisons, a number of inmates were transferred to temporary detention centres, extending conditions of overcrowding to these facilities. Recent research has shown that the relatively low rates of incarceration and overcrowding since 2020 have actually been masked by the 'transfer' of inmates to police stations

[188] Emergency Decree 546 of 14 April 2020. The groups considered to be at a higher risk were persons over 60; pregnant women; women with children younger than 3 years old; and persons with serious illnesses or diseases, disabilities or reduced mobility.

[189] Article 6, Decree 546 of 2020. See Manuel Iturralde, Nicolás Santamaría and Juan Pablo Uribe, *Covid-19 y La Crisis Estructural de Las Prisiones En Colombia. Diagnóstico y Propuestas de Solución.* (Friedrich-Ebert Siftung 2020).

[190] Under the ordinary regime of the Statute, all inmates, regardless of the offence, may be granted home or hospital detention if they suffer from medical conditions or illnesses that are 'incompatible with life in prison'. (Penal Code, Article 68). On the contrary, under Emergency Decree 546, inmates awaiting trial or convicted for 'serious offences' can no longer be released on home or hospital detention, regardless of any medical conditions which may put them at a higher risk during the pandemic.

[191] Iturralde, Santamaría and Uribe (n 189) 19.

[192] ibid.

[193] ibid.

[194] In 2022, the prison population reached an average of 97176 inmates, with an increase of 0.3% in relation to 2021. The population reached a total of 98821 inmates by January 2023, and 101781 inmates in January 2024. INPEC, 'Informe Estadístico. Población Privada de La Libertad. Febrero 2023.' (2023); INPEC, 'Boletín Estadístico' (2024).

and *Immediate Reaction Units*, due to the fact that official statistics do not take into account the number of persons deprived of liberty in these centres.[195] Punishment, therefore, remains systematically and massively unconstitutional.

6. Conclusion

Penal policy has appeared, throughout different periods of Colombian history, as one of the main drivers of various projects of modernisation, embodying the coercive might of the State despite its inability to establish conditions under which its claims of authority may be credibly maintained. From the first years of Colombia's post-colonial history, punishment has been one of the main mechanisms to confront violent challenges and political opposition to the economic and political projects of the elites. Although overcrowding had characterised prisons from their birth, the 'first' official 'crisis' resulted from extraordinary incarceration rates produced by the government's resort to punishment as an instrument of pacification in the context of *La Violencia*. But penal inflation and expansion did not stop once democracy was 're-established' by the *National Front*. In fact, the 'crisis' became more acute as emergency penal measures became more and more frequent as a tool for the suppression of social uprisings and outbursts of violence. Later, with the rise of narco-trafficking, as well as the gradual involvement of armed groups in this activity, the penal system was deployed as part of the State's exceptional efforts to assert its authority, revealing, however, its fragility. During the semi-permanent states of exception of the 1980s and 90s, high levels of violence and crime were treated as a phenomenon that could only be addressed through emergency powers.

The enactment of the 1991 Constitution, though symbolizing the hope of democratic renewal, paradoxically marked the start of an even more violent period as well as a more alarming 'crisis' in prisons. Furthermore, significant normative and ideological shifts started crystalising in this period. First, the government started turning from explicitly exceptional measures towards formally ordinary legislation. Although some of the main features of exceptional penality gradually disappeared (like the expanded competence of military tribunals), more subtle characteristics of emergency legislation (mandatory remand, the constant expansion of the criminal law through the creation of new offences, limitations to *beneficios* and *subrogados,* and lengthy sentences) were not only incorporated through ordinary laws, but expanded towards offences unrelated to narcotrafficking or terrorism (that is, the conducts that had justified the existence of emergency regimes).

Second, the transformations of penal policy that started in the 90s, as well as the first declaration of an *USoA* in Colombian prisons, set the scene for the normative incorporation of discourses of security, anti-impunity, and victims' rights in the next decades. The mid and late 90s marked a shift towards the normative articulation of crime and insecurity as normal collective

[195] Hernández Jiménez (n 174).

experiences, both in criminal and constitutional law. While security was constructed as a central concept in penal policy, anti-impunity and victims' rights gained prominence as its constitutional counterpart. It may be the case that the appropriation of human rights rhetoric has simply allowed various governments to disguise repressive policies that aim to benefit the interests of the elites,[196] without benefitting the victims in any way. But the key point is that the language of human rights has been used, both by 'authoritarian' governments[197] and by the progressive Constitutional Court to enable the expansion of the penal system and legitimise the conditions in which it functions.[198]

The normalisation of crime and insecurity, and constant resort to the 'mystifying' force of the penal apparatus, however, contained an implicit official recognition of the weakness of the State's claims of authority.[199] Such a recognition became more explicit with declarations of *USoA* in prisons in 2013 and 2015. Invoking constitutional principles, the rights of victims, and society's interest in security, the declarations had the effect of justifying the imposition of punishment under *unconstitutional* conditions. Excessive resort to punishment exposes the normalisation of crime and insecurity as premises of the criminal law, while constitutional discourse constructs imprisonment as necessary, that is, required by the fundamental rights of victims and by constitutional principles. Furthermore, these declarations normalise the imposition of punishment under conditions that are blatantly contrary to the fundamental principles upon which the rational, self-generated authority of the constitutional order is based. In other words, punishment is presented as an exercise of the sovereign's legitimate authority, while, at the same time, the Court makes an official recognition of its incompatibility with the constitutional order that justifies the existence of this coercive power. Thus, prisons appear as an unconstitutional site at the heart of the State's claim to political authority. Herein lies the paradoxical character of declarations of *USoA* in prisons, which will be explored in more detail in the following chapter.

[196] Iturralde, 'Colombian Transitional Justice' (n 52).
[197] Iturralde and Ariza (n 120); Iturralde, 'Colombian Prisons' (n 54).
[198] Pinto (n 118); Laurens Lavrysen and Natasa Mavronicola (eds), *Coercive Human Rights: Positive Duties to Mobilise the Criminal Law under the ECHR* (Hart 2020); Engle (n 109).
[199] See also footnote 121 of this chapter and Ramsay (n 121). The contradictions underlying this 'weakness' will be developed in Chapter 4.

Chapter 2
The unconstitutional state of affairs: A paradoxical power

The semi-permanent states of exception described in the previous chapter have been interpreted as expressive of an 'authoritarian impulse' that pushed the Colombian State outside the framework of the social contract. As opposed to this, in the dominant view, the 1991 Constitution has been understood as a symbol of an antithetical impulse of democratisation.[1] Acting as the guardian of the Constitution, the Constitutional Court has played a fundamental role as a driver of democracy and consolidation of the rule of law, protecting the constitutional order from the abuses of power and arbitrariness of the past.[2] Presented as the 'democratic' counterpart of the authoritarian states of exception of the 1980s and 1990s,[3] and despite not being explicitly established in the Constitution, declarations of *USoA* have been understood as the necessary outcome of the constitutional mandate to ensure the progressive materialisation of the Constitution. They do so, the argument goes, both through the recognition of rights and interests of social groups that would otherwise remain excluded from politics,[4] and through innovative strategies for dialogic inter-institutional collaboration that will eventually lead to overcoming structural failures in different fields of public policy.[5] In this chapter, I interrogate the dominant approach to declarations of *USoA*, situating the emergence of these declarations within the broader ideology of the 1991 Constitution and exploring what these declarations may show us about the tension between exceptions and normality in the framework of constitutionalism.

In the first section, I contextualise the emergence of the Constitution as a symbol of democratic hopes, describing the complex social, economic, and political circumstances in which these aspirations emerged. The Constitution appeared as a 'new social contract' designed to bring peace, stability, and order to a fragmented society through the imposition of the law, with all aspects of social life being subjected to constitutional examination. However, the Constitution was

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[1] César Rodríguez-Garavito, *Más Allá Del Desplazamiento: Políticas, Derechos y Superación Del Desplazamiento Forzado En Colombia* (Universidad de los Andes 2010); Rodrigo Uprimny, 'Judicialization of Politics in Colombia: Cases, Merits and Risks.' (2007) 13 Sur -International Journal on Human Rights; Rodrigo Uprimny and Luz María Sánchez-Duque, 'Constitución de 1991, Justicia Constitucional y Cambio Democrático: Un Balance Dos Décadas Después.' (2013) 71 Cahiers des Amériques Latines 33.

[2] Rodríguez-Garavito, *Más Allá Del Desplazamiento* (n 311); César Rodríguez-Garavito and Diana Rodríguez Franco, *Radical Deprivation on Trial. The Impact of Judicial Activism on Socioeconomic Rights in the Global South.* (CUP 2015); Rodríguez-Garavito, 'Beyond Enforcement' (n 25).

[3] See Chapter 1.

[4] In the context of prisons, see *T-388/13* (CCC) ¶7.7. More generally, see César Rodríguez-Garavito and Diana Rodríguez Franco, *Radical Deprivation on Trial. The Impact of Judicial Activism on Socioeconomic Rights in the Global South.* (CUP 2015); Mauricio García Villegas and Jose Rafael Espinosa, *El Derecho al Estado: Los Efectos Legales Del Apartheid Institucional En Colombia* (Dejusticia 2013); César Rodríguez-Garavito, 'Beyond Enforcement: Assessing and Enhancing Judicial Impact' in Malcom Langford, César Rodríguez-Garavito and Julieta Rossi (eds), *Social Rights Judgments and the Politics of Compliance: Making it Stick.* (CUP 2017).

[5] Uprimny and Sánchez-Duque (n 1). See also Kent Roach, *Remedies for Human Rights Violations: A Two-Track Approach to Supra-National and National Law* (CUP 2021).

also conceived as a legal and institutional framework that could create conditions for the flourishing and functioning of the market,[6] producing a series of economic policy reforms that generated further marginalisation and exclusion, which, in turn, exacerbated complex structural issues that could hardly be addressed through individualised judicial mechanisms (including, for instance, penal inflation and the worsening of the 'crisis' in prisons).[7]

In the second section, I analyse the emergence of declarations of *USoA* as a strategy to deal with these structural issues. Although individual complaints about fundamental rights (that is, *tutelas*) were inadequate to deal with the violations produced by systemic issues, these claims unsurprisingly gained popularity after the enactment of the Constitution.[8] Judicial intervention seemed like a more effective alternative to political mobilisation, both due to the lack of legitimacy of a corrupt and discredited Congress, as well as the abundance of violent threats against journalists, social and political leaders, and human rights activists.[9] The Constitutional Court soon became overwhelmed by individual complaints against the State, which led to the creation of declarations of *USoA* as wide-ranging systemic remedies to address massive and systemic violations of fundamental rights. The doctrine became more sophisticated as time passed, but the Court provided scarce justifications and descriptions of the type of power that these declarations entailed.

In section three, I discuss the characterisation and justification of these declarations in more detail, questioning dominant accounts according to which these declarations represent the dichotomous opposite of the state of exception. Modern constitutions have tried to deal with the tension between norm and exception through the institutionalisation of states of exception, incorporating them into the constitutional architecture and regulating the circumstances in which they may be declared, the formal requirements for their declaration, their duration, etc. This tendency has been clear, in the Colombian context, from the enactment of the 1886 Constitution, and even more so with the strict criteria introduced by the 1991 Constitution.[10] Though highly regulated, states of exception remained, formally, *exceptional.* However, the 1991 Constitution paved the way for a further shift in the relationship between normality and exceptions: declarations of *USoA* not only allowed the Court to expand its powers extraordinarily, but also created a new

[6] César Rodríguez-Garavito and Rodrigo Uprimny, '"¿Justicia Para Todos o Seguridad Para El Mercado? El Neoliberalismo y La Reforma Judicial En Colombia' in César Rodríguez-Garavito, Rodrigo Uprimny and Mauricio García Villegas (eds), *¿Justicia para todos? Sistema judicial, derechos sociales y democracia en Colombia* (Norma 2006); Helena Alviar, 'Neoliberalism as a Form of Authoritarian Constitutionalism' in Helena Alviar and Günter Frankenberg (eds), *Authoritarian Constitutionalism: Comparative Analysis and Critique* (Edward Elgar Publishing 2019); Manuel Iturralde, 'Neoliberalism and Its Impact on Latin American Crime Control Fields' (2018) 23 Theoretical Criminology 471.

[7] Manuel Iturralde, 'Emergency Penality and Authoritarian Liberalism. Recent Trends in Colombian Criminal Policy' (2008) 12 Theoretical Criminology 377.

[8] Manuel Jose Cepeda-Espinosa, 'Judicial Activism in a Violent Context: The Origin, Role, and Impact of the Colombian Constitutional Court' (2004) 3 Washington University Global Studies Law Review.

[9] Uprimny (n 1).

[10] Julieta Lemaitre, *El Derecho Como Conjuro. Fetichismo Legal, Violencia y Movimientos Sociales.* (Siglo del Hombre Editores, Universidad de los Andes 2009); Rodrigo Uprimny and Mauricio García Villegas, 'El Control Judicial de Los Estados de Excepción En Colombia' in Rodrigo Uprimny, Mauricio García Villegas and César Rodríguez-Garavito (eds), *¿Justicia para todos?: Sistema judicial, derechos sociales y democracia en Colombia* (Norma 2006); Rodrigo Uprimny and Mauricio García Villegas, '¿Controlando La Excepcionalidad Permanente En Colombia? Una Defensa Prudente Del Control Judicial de Los Estados de Excepción' (DeJusticia 2005).

space for the normalisation of exception. On the one hand, unconstitutional conditions are recognised as circumstances which should be exceptional; on the other, through the articulation of mechanisms of inter-institutional collaboration and supervision, the Court constitutionalizes *unconstitutionality,* ensuring that, as long as it intervenes to preserve constitutional principles, such circumstances shall never be fully outside the limits of the Constitution. The normalisation of *unconstitutionality,* by means of the doctrine created by the Court, presents a paradox that undermines the State's claims of authority, particularly where the State's authority is understood as a self-generated characteristic of the Constitution, and yet the State officially recognises the generalised negation of core constitutional principles and values.

1. A new hope: The 1991 Constitution as the antidote to an authoritarian past

During the civil wars that followed Colombia's independence, eight Constitutions were enacted in the traditional parties' attempts to solidify their nascent political projects.[11] A period of 'radical' liberal rule (1863-1885), the Conservative party regained power (1879-1898) and enacted a new Constitution to advance their project of 'Regeneration'. Through the 1886 Constitution, which remained in force (with significant reforms) until 1991,[12] the Conservative government replaced the liberal's federal regime with a unitary, central government, and declared Catholicism as the official national religion, putting law at the centre of social and political transformation.[13] However, because of existing conditions of inequality (in terms of income, wealth, access to resources and land ownership) and various forms of exclusion (based on race, gender, income, literacy, and region of origin),[14] the Constitution was not received peacefully. The decades that followed its

[11] Hernando Valencia Villa, *Cartas de Batalla. Una Crítica al Constitucionalismo Colombiano* (Cerec–Universidad Nacional de Colombia 1987).

[12] At least seventy significant reforms were enacted between 1886 and 1991, which often involved the creation of constituent assemblies and the closure of Congress. Between 1906 and 1909, twenty reforms had already taken place. Some of the most relevant reforms were those of 1910 (which established the principle of constitutional supremacy and introduced judicial review by the Supreme Court on the basis of individual actions presented by citizens), 1936 (during liberal president Alfonso López Pumajero's government, which included the creation of greater powers of State intervention in the economy, the inclusion of social rights in the Constitution, the derogation of Catholicism as the national religion, and the establishment of universal suffrage for male citizens), 1945 (mainly regarding the functions of Congress and the State Council), 1954 (which granted women electoral rights), and 1959 (which established the National Front, a power sharing agreement between the traditional Liberal and Conservative parties).

[13] Julieta Lemaitre and Esteban Restrepo-Saldarriaga, 'Law and Violence in the Colombian Post-Conflict: State-Making in the Wake of the Peace Agreement' (2019) 2019 Revista de Estudios Sociales 2.

[14] Racial, gender-based, regional, and economic forms of exclusion, largely inherited from colonial times, were determining for the development of citizenship from the moment of independence. Despite the liberals' insistence on equality and freedom, the first notions of citizenship were founded on the colonial concept of 'vecinazgo': citizenship was recognised to those previously categorised as 'vecinos' (neighbours), propertied men who inhabited houses in towns or cities, who contributed to the economic sustenance of their towns, and who were 'honourable and distinguished persons'. María Teresa Uribe de Hincapié, 'Órdenes complejos y ciudadanías mestizas: una mirada al caso Colombiano' [1998] Estudios Políticos 25.

Although indigenous communities were given collective citizenship, mechanisms for their inclusion and participation in politics remained extremely limited. Since the abolition of slavery in 1851, African groups and Afro-Colombians

enactment were filled with demands of inclusion from various social groups —mainly peasants, workers, and women—, leading to several constitutional reforms throughout the twentieth century.

These demands, rather than being incorporated by the traditional parties, were often met with the use of emergency powers, combining harsh penal measures and military strategies in the State's attempts to generate obedience and stability. Social and political turbulence had led to an early recognition of the need to enshrine these exceptional powers in the Constitution, ensuring that the State would be able to invoke them where necessary.[15] As described in the previous chapter, exceptional powers were frequently invoked throughout the twentieth century, reaching their peak in the 1980s and 90s as violence from different armed actors intensified. This process led to the 'normalisation' of the exception, both because of the permanence of emergency measures beyond the circumstances that justified these powers, [16] or because of the incorporation of key features of emergency powers into ordinary laws.

After the siege of the Palace of Justice in 1985,[17] which symbolised 'the fall of the promise of the rule of law caused both by the violence of illegal armed actors, as well as the State's own authoritarianism',[18] various political groups came together, seeking the enactment of a new constitution 'for the democratic transformation of Colombian society'.[19] During the 1990

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have remained largely excluded from politics, society, and the economy until this day (despite their recent recognition as an ethnic minority by Law 70 of 1993). These early notions of citizenship were replaced by a modern liberal one during the radical liberal period, in which universal (masculine) citizenship was seen as a strategy for the inclusion of disenfranchised subjects. These reforms, however, were not received peacefully by conservatives, and the threat of civil war led to unorthodox deals with the Church, landowners, and the army, allowing each federal state to define their own conditions of citizenship, and creating varied categories across the national territory.
Later, during the Conservative *Regeneration,* the nation was envisioned as a Catholic community and the citizen was conceived, first and foremost, as a 'good Christian'. Access to citizenship was restricted to males over 21 years of age, 'in exercise of a profession, art, or trade, or who have a legal occupation or otherwise legitimate and known means of subsistence'. See María Teresa Uribe de Hincapié, 'Órdenes complejos y ciudadanías mestizas: una mirada al caso Colombiano' [1998] Estudios Políticos 25.

[15] Political Constitution of 1886 ['CP 1886'], Article 121.

[16] Mauricio García Villegas, 'Constitucionalismo Perverso. Normalidad y Anormalidad Constitucional En Colombia: 1957-1997.' in Boaventura de Sousa Santos and Mauricio García Villegas (eds), *El caleidoscopio de las justicias en Colombia* (Siglo del Hombre 2001) 337.

[17] The M-19 was an urban-based *guerrilla* which took over the Palace of Justice with the aim of staging a popular trial against President Betancur for his 'betrayal of the people'. 400 individuals, including the President of the Supreme Court and other Justices, were taken hostage, and the armed forces responded by seizing the Palace. An armed confrontation of almost 30 hours followed. Though much of what happened that day is still unknown, the Centre for Historical Memory estimates approximately 100 deaths occurred. Various NGO's have claimed that the military were responsible for most deaths and disappearances, as well as various other human rights violations that occurred during the siege. See 'Treinta años después, ¿esperanza o dolor?' (*Centro Nacional de Memoria Histórica*, 2 March 2020)). Available at: https://centrodememoriahistorica.gov.co/treinta-anos-despues-esperanza-o-dolor/ accessed 3 August 2023.

[18] Uprimny and Sánchez-Duque (n 1). See also Lemaitre (n 10).

[19] Uprimny and Sánchez-Duque (n 1). Student groups played a key role in the process that led to constitutional reform. Through diverse, some of the most influential sectors studied at private universities, under the tutelage of professors that had studied in prestigious American universities, such as Fernando Carrillo and Manuel José Cepeda (who later became a judge in the 'golden era' of the Constitutional Court). These professors, inspired by the legal philosophy of Ronald Dworkin and Robert Alexy, played a key role in shaping the approach taken by the Constituent Assembly, and insisted on the urgent need to 'dismantle the state of siege, eliminate the institutions that allowed and promoted clientelism in Congress, open up electoral politics to minority (left-wing) parties, and strengthen respect to human rights through the law'. See Lemaitre (n 10) 92–94.

parliamentary elections, the student movement made a call for the people to 'convene itself' through the inclusion of an unofficial 'Seventh Ballot' demanding a plebiscite and the creation of a constituent assembly. Students started receiving widespread support from the population: the press, traditional political parties, industrial and agricultural unions, and even sectors of the FARC expressed their approval of the 'Seventh Ballot', despite considerable political differences between various groups.[20] Although the ballots were not officially counted, it was clear that there was strong social support for a constitutional reform, leading president Barco to enact an emergency decree ordering electoral authorities to include, in the upcoming presidential elections, a ballot on the creation of a constituent assembly.[21] The ballot received a record number of votes, with 88% in favour of the constituent assembly.[22] The constituent assembly was thus convened, in accordance with Emergency Decree 1926 of 1990.[23]

The consolidation of the constituent assembly in 1990 came to represent the revitalisation of democratic hopes in a climate of extreme violence, exerted both by armed groups and the State.[24] The resolution of Colombia's main issues was seen as a legal matter: more and better laws would bring peace, democracy, and inclusion. The new Constitution was therefore conceived as a civilizing, pacifying, and ordering force[25]. On the one hand, exclusion (both from electoral politics and socio-economic exclusion resulting from poverty and marginalization) was understood as one of the main causes of violence. Therefore, crafting a new social pact to protect the core values of inclusion, dignity, and plurality was seen as the necessary path towards peace. On the other hand, arbitrariness and violent abuses of power by the State (enabled by semi-permanent exceptions) were seen as an outcome of the absence of proper legal regulation. Because of this, one of the main points of the constitutional reform was to create a stricter regulation of the executive's power

[20] The student movement itself was not completely unified and displayed various internal fractures. For instance, students from Universidad Nacional (the largest public university in the country), expressed their rejection to the National Constituent Assembly because it failed to create 'alternatives to the traditional political sectors […] [and because] it cannot be anything other than a mechanism to find new means of legitimation and legality precisely for that political class'. Jorge Armando Orjuela and Víctor Hugo Rodríguez, *Semilla En Tierra Seca: La Constituyente de Sueño Juvenil a Negocio Político.* (Gustavo Ibáñez 1993) 104.

[21] Emergency Decree 927 of 1990. This was contrary to the 1886 Constitution, which established that the Constitution could not be reformed through a plebiscite. The Supreme Court declared the decree constitutional, arguing that the State's 'institutions have become inefficient and inadequate (…) to combat forms of intimidation and attacks which were unimaginable a few years ago and, therefore, their redesign is necessary'. Supreme Court, Judgment of the 24th of May 1990.

[22] John C Dugas, 'The Origin, Impact and Demise of the 1989-1990 Colombian Student Movement: Insights from Social Movement Theory' (2001) 33 Journal of Latin American Studies 807.

[23] Lemaitre (n 10) 114. The constituent assembly, in accordance with Emergency Decree 1926 of 1990, was to be elected by popular vote in December 1990, and was meant to include the M-19 and other minorities. However, participation in this election was comparatively low, and there was a 'lack of popular interest in this project'. Despite this, the government insisted on the plurality of the assembly (which included the participation of left-wing groups that had traditionally been excluded from politics, indigenous persons, students, activists, and trade unionists) as a sign of its legitimacy and highlighted the function of 'political inclusion' in the construction of peace. See ibid 135.

[24] Mauricio García Villegas and Boaventura de Sousa Santos, 'Colombia: El Revés Del Contrato Social de La Modernidad.', *El caleidoscopio de las justicias en Colombia.* (Siglo del Hombre 2001).

[25] Lemaitre (n 10) Chapter 3.

to make declarations of states of exception.[26] These two civilizing trends coexisted with a neoliberal economic project, for which fundamental rights were not merely tools to fight poverty and exclusion, but also instruments to protect individual freedoms, ensure conditions for the flourishing of markets, and attract foreign investment. The Constitution, in that sense, was also seen as a tool for the creation of a stable economy capable of competing in the global market.[27]

Though the neoliberal aspects of the Constitution are often presented in the dominant literature as its 'exclusionary' strand, the seemingly 'inclusionary' project of human rights has played a significant role in the consolidation and advancement of neoliberalism. While human rights seem to provide a language for the denunciation of the detrimental effects that the market may have upon individuals' rights, they leave the conditions in which those rights violations occur unchallenged,[28] and fail to articulate the type of critiques and political movements required to dismantle and undermine the neoliberal model. Understood as a tool for social transformation, 'emancipation', and protection from the State's abuse of power, the idea that human rights offer 'enhanced social protection' has as its counterpart 'enhanced social control and the defence of the arrangements that throw up (and keep throwing up) the need for protection'.[29] As declarations of *USoA* reflect, human rights discourse tends to treat structural problems as mere 'misguidedness' by responsible officials,[30] requiring simply more serious and careful attention to their positive obligations —which the Court seeks to enhance, in the context of prisons, through a 'dialogic' model of inter-institutional collaboration, monitoring mechanisms, and technical indicators.[31] Years later, however, these declarations seem to have left the structural issues that they seek to tackle almost entirely unchanged. Though it may be said that the 'inclusionary' force of human rights and the 'exclusionary' tendencies of the neoliberal model may not necessarily be entirely converging projects,[32] the discourse of human rights is, at best, a 'powerless companion of the explosion of inequality' that neo-liberalism has ignited.[33] In that sense, though seemingly sensitive to 'the need to remediate poverty', human rights have been no more than a 'weak tool to aim at sufficient provision', [34] leaving underlying material inequalities unchallenged.

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[26] It is worth noting that states of exception were already subjected to automatic judicial review by the Supreme Court, but these controls were often centred on procedural matters. Such formal controls were considered insufficient, and strict constitutional review by the Constitutional Court was seen as a necessary reform.

[27] Alviar (n 6); Jorge Andrés Díaz Londoño, 'Estado Social de Derecho y Neoliberalismo en Colombia: Estudio del cambio social a finales del siglo XX' (2009) 11 Revista de Antropología y Sociología: Virajes 205.

[28] Susan Marks, 'Four Human Rights Myths' in David Kinley, Wojciech Sadurski and Kevin Walton (eds), *Human Rights. Old Problems, New Possibilities* (Edward Elgar Publishing 2013); Naomi Klein, *The Shock Doctrine: The Rise of Disaster Capitalism* (Penguin 2008).

[29] Marks (n 28) 228; Wendy Brown, *Politics out of History* (Princeton University Press 2001).

[30] Brown (n 29) 36.

[31] *T-388/13* (n 4); *T-762/15* (CCC).

[32] See Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Harvard University Press 2018)., arguing against Marks (n 28); Klein (n 28).

[33] Moyn (n 32) 176.

[34] ibid.

While the 1991 Constitution aimed to establish a clean, peaceful break from an authoritarian past,[35] providing a utopian image of 'the good society to come, promising to bridge the gap between present reality and future ideals',[36] its aspirations have remained far from being realised. On the one hand, the constitutional *telos* of legal inclusion, and the institutional arrangements designed to pursue its realisation,[37] unfolded in conditions of extreme socio-economic inequality and political exclusion which, due to the neoliberal reforms that accompanied the Constitution, were further exacerbated throughout the 90s.[38] At the same time, 'illegal economies' intensified their battles for territorial control, leading to an increase of violence throughout the nineties, providing a justification of the expansion of the State's penal and military powers.[39] These conditions constituted the challenging background against which declarations of *USoA* were created, as part of the Court's attempts to fulfil its mandate and gradually 'materialise' the Constitution.

2. Declarations of *USoA*: From individual remedies to structural intervention

Once the 1991 Constitution was signed, President Gaviria ended the state of exception that had been in force since 1984. While the 1886 Constitution had been driven by the classic liberal aims of limiting the State's power and protecting negative freedoms,[40] the 1991 Constitution took a significant turn towards positive obligations and aspirations of social justice and equality, symbolising peace and unity in the collective imaginary,[41] though hardly holding up to this image in practice. This is reflected, for instance, by high rates of inequality, which have not improved significantly since the enactment of the Constitution and have, for the most part, worsened in comparison to 1991: in 1992 the Gini index was 0.515, increasing to 0.587% in 2000, and reaching its lowest point in 2017 (0.497%). Since then, income inequality has once again worsened, increasing to 0.548 in 2022.[42] On the other hand, even after the peace agreements with FARC in

[35] Lemaitre (n 10); Mauricio García Villegas, 'Law as Hope: Constitution and Social Change in Latin America' (2002) 20 WILJ 353; Rodrigo Uprimny, 'Latin American Constitutionalism: Social Rights and the "Engine Room" of the Constitution', *Law and Society in Latin America. A New Map.* (Routledge 2014).
[36] Martin Loughlin, *Against Constitutionalism* (Harvard University Press 2022) 192; Martin Loughlin, 'The Constitutional Imagination' (2015) 78 Modern Law Review 1. For a description of the utopian aspects of the 1991 Constitution, see Cepeda-Espinosa (n 8).
[37] Such as *tutelas,* discussed in the second section, and other forms of participation for minorities and historically marginalised groups.
[38] Alviar (n 6); Consuelo Ahumada, *El modelo neoliberal y su impacto en la sociedad colombiana* (El Ancora Editores 1996); Londoño (n 27); Rodríguez-Garavito and Uprimny (n 6).
[39] See Chapter 1. This includes, for instance, the creation of special exceptional jurisdictions (like *Justicia Regional*) during the 90s, as well as the construction of a broader 'war on crime' through ordinary criminal law.
[40]Valencia Villa (n 11); Antonio Barreto Rozo, 'El Proyecto Constitucional de La Separación de Poderes En El Estado Colombiano: Apuntes Sobre Su Desenvolvimiento a Lo Largo Del Siglo XX', (2011) 122 Vniversitas 213.
[41] The representation of unity through the Constitution, beyond the classic modern feature of the regulation of the relations between the branches of power, is a feature not just of the Colombian 1991 Constitution, but of the trends of constitutionalism within which it is inscribed. See Loughlin, *Against Constitutionalism* (n 36).
[42] World Bank Data, Gini Index -Colombia. Most recent value: 2022.

2016, and despite a significant reduction of violence (particularly in terms of homicides related to the internal armed conflict),[43] various armed actors remain a serious challenge to this day, carrying out frequent acts of large-scale violence (including massacres, internal displacement, forced disappearances, and other serious crimes against civilians).[44]

In line with developments of global constitutionalism,[45] yet with its own particularities,[46] the 1991 Constitution established a system of principles, both explicit in the text (like dignity[47] and the supremacy of the Constitution[48]) and implicit to it (like constitutional integrity and proportionality), which articulate and express collective social values.[49] As established in the Preamble and Article 1 of the Constitution, the 'people', 'in exercise of their sovereign right' and 'with the aim of strengthening the unity of the Nation',[50] give themselves a Constitution based on the values of 'life, coexistence, work, liberty, equality, justice, knowledge, and peace'.[51] The State is founded as an *Estado Social y Democrático de Derecho* (roughly translated as 'Social Democratic State of Law'),[52] which the Court has interpreted as a guiding principle in itself. The *Estado Social de Derecho* captures the combination of a 'democratic' system, subjected to the rule of law, in which the state not only has the obligation to protect political and civil rights, but also a 'constitutional mandate' to 'construct a just political, economic, and social order', including minimum indispensable conditions to ensure a 'dignified life within achievable economic conditions'.[53]

A 'long and very detailed text', the Constitution contains a number of routinely conflicting principles and provisions, requiring 'the technique of proportionality in order to weight these conflicting rights and interests'.[54] Under this scheme, all aspects of social life may be formulated as issues of rights, requiring an exercise of interpretation for their resolution.[55] The Constitutional Court was given the key function of 'guarding' the Constitution both through its interpretation — determining what the Constitution requires from all branches of power in a varied array of social

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[43] Centro Externadista de Paz, 'Balance en materia de homicidios, afectaciones de derechos humanos y enfrentamientos armados en Colombia durante el año 2023 Reporte 1-2024' (*Universidad Externado de Colombia*, 11 March 2024) <https://www.uexternado.edu.co/centro-externadista-de-paz/balance-en-materia-de-homicidios-afectaciones-de-derechos-humanos-y-enfrentamientos-armados-en-colombia-durante-el-ano-2023-reporte-1-2024/> accessed 6 May 2024.

[44] Lemaitre and Restrepo-Saldarriaga (n 12); Human Rights Watch, 'Colombia: Eventos de 2021' (2021) <https://www.hrw.org/es/world-report/2022/country-chapters/colombia> accessed 26 February 2023.

[45] See Chapter 1.

[46] Daniel Bonilla Maldonado, *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia* (CUP 2013).

[47] Political Constitution of 1991 Article 1. ['PC 1991']

[48] ibid. Article 4.

[49] Cepeda-Espinosa (n 8); ibid.

[50] PC 1991, Preamble.

[51] ibid.

[52] ibid., Article 1. See Manuel José Cepeda Espinosa and David Landau, *Colombian Constitutional Law: Leading Cases* (OUP 2017). See also Manuel Iturralde, 'Access to Constitutional Justice in Colombia' in Daniel Bonilla (ed), *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia* (CUP 2013).

[53] Cepeda Espinosa and Landau (n 52) 151.

[54] ibid 15–16.

[55] Mattias Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review Rights, Balancing & Proportionality' (2010) 4 Law & Ethics of Human Rights 140; Cepeda Espinosa and Landau (n 52); Cepeda-Espinosa (n 8).

and legal conflicts— and through strict controls of the actions of all powers and institutions, ensuring compliance with the Constitution.[56]

Along with an extensive bill of rights (interpreted expansively by the Constitutional Court) and the subjection of states of exception to strict scrutiny by the Constitutional Court,[57] one of the main innovations of the 1991 Constitution was the creation of the *acción de tutela,*[58] an individual constitutional complaint through which individuals may claim the protection of their fundamental rights from unlawful restrictions or violations, seeking immediate remedies from any judge in the country with almost no formal requirements.[59] This legal mechanism was considered, from its creation, a 'formidable tool for the population to defend itself from arbitrariness, arrogance, and abuses of power both from public authorities and private actors'.[60] After the enactment of the Constitution, *tutelas* quickly gained popularity: in a context of widespread public policy failures, poverty, and deep inequalities, thousands of citizens resorted to these flexible and accessible complaints seeking judicial protection of a broad range of interests. In fact, one of the reasons why the jurisdiction of the Court was created was awareness of the fact that the Supreme Court, 'already overburdened with its function as *cour de cassation* or the highest tribunal for civil, criminal, and labour cases',[61] would not be able to handle the vast number of *tutelas* that would rapidly inundate the system,[62] justifying the creation of a constitutional jurisdiction. As expected, *tutelas* rapidly gained a reputation as an effective and accessible mechanism that could both grant individual remedies and ignite legal reform, while avoiding the very real risks that accompanied political action and mobilization in an extremely hostile and violent environment.[63] Judicial activism also appeared as a more attractive alternative because of the 'deep disrespect for Congress and the so-called political class',[64] rooted in the population's distrust of the corrupt and clientelist networks of the

[56] Cepeda-Espinosa (n 8); Rodríguez-Garavito and Rodríguez Franco (n 4).
[57] See section 3 below.
[58] Similar mechanisms for immediate relief and reparations, such as *amparo* and *recursos de protección,* exist in other Latin American countries. Though their scope varies and *tutela* is arguably the most extensive of these mechanisms, it is representative of Latin American 'neo-constitutionalism'. See Felipe Curcó Cobos, 'The New Latin American Constitutionalism: A Critical Review in the Context of Neo-Constitutionalism' (2018) 43 Canadian Journal of Latin American and Caribbean Studies 212.
[59] Political Constitution of 1991, Article 86; Decree 2025 of 1991. *Tutelas* can be made by individuals themselves, without a lawyer or intermediary, verbally or in writing, through an informal description of the rights violations the claimant faces. *Tutelas* may be presented to any judge in the country, and judges must respond to these claims within 10 days, deciding whether a right violation has occurred and, if so, determining the relevant remedies and measures that the authorities or private parties responsible for the violation must comply with to guarantee and re-establish those rights. The Constitutional Court has the power to review every single tutela decision. However, because of the high number of *tutelas*, the Court only reviews a small number of cases, which are constitutive of 'constitutional precedent'. Although *tutelas,* in principle, have *inter-partes* effects, the interpretation of constitutional rights and principles by the Court has *erga omnes* effects. The majority of the first seven Justices of the Constitutional Court were academics at the forefront of 'neo-constitutionalism' who contributed to the consolidation of a progressive body of constitutional case law. See Diego López, *El Derecho de Los Jueces: Obligatoriedad Del Precedente Constitucional, Análisis de Sentencias y Líneas Jurisprudenciales y Teoría Del Derecho Judicial* (Ediciones Uniandes 2006).
[60] Rodolfo Arango, 'Derechos, Constitucionalismo y Democracia', (2004) 33 Serie de Teoría Jurídica y Filosofía de Derecho 193, 302.
[61] Cepeda-Espinosa (n 8) 550.
[62] Cepeda-Espinosa (n 8).
[63] Uprimny (n 1).
[64] ibid 58.

legislature and the executive. As Uprimny highlights, disinterest from political parties and governments regarding sensitive political issues, which they saw as issues that could affect their electoral credibility, contributed to the delegation of these matters to judges.[65]

Precisely because of their popularity and accessibility, as well as generalised conditions of poverty and precarity, *tutelas* also entailed the risk of transferring 'an excessive number of problems to be resolved by judges'.[66] Soon after the enactment of the Constitution, the judiciary became overwhelmed by the massive number of cases at hand, many of which concerned structural issues that could not be adequately dealt with through individual remedies.[67] Because all *tutela* rulings must be forwarded to the Constitutional Court,[68] the tribunal realised that the judiciary was facing a massive number of similar well-founded complaints relating to specific areas of public policy in which structural failures had led to the widespread violation of fundamental rights: if each one of the individuals affected by those failures resorted to *tutelas,* the judiciary system would simply collapse.

The first structural cases that came to the Court's attention concerned the State's failure to enrol public school teachers to the National Pensions System. After gathering thousands of similar *tutelas* based on similar facts and circumstances, the Court decided to treat this group of complaints as a single structural case. The Court defined this situation as a 'state of affairs which contradicts the Political Constitution' because it involved generalised, massive, and systematic violations of fundamental rights, and declared the existence of 'state of affairs that is openly unconstitutional'.[69] Since the first declaration in 1997, the Court has resorted to this strategy in 13 judgments in the last 30 years (including, among others, the 'crisis' of Colombian prisons, the situation of internally displaced persons, and the rights of children in La Guajira).[70] In the first judgments,[71] the term 'unconstitutional state of affairs' was used to describe generalised violations of the Constitution requiring structural rather than individual remedies. The term later became a more technical doctrine with elaborate criteria for the identification of circumstances constitutive of an *USoA*. The declarations started evolving into a more cohesive doctrine with Judgment T-153 of 1998 (discussed in the previous chapter), achieving its most sophisticated formulation in Judgment T-025 of 04 (on the rights of internally displaced persons). In this judgment, the Court established a set of factual criteria that must be assessed for the tribunal to declare the existence of an *USoA*.

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[65] Uprimny (n 1).
[66] ibid 12.
[67] *SU-559/97* (CCC).
[68] On this function, the Court argued that its mission, as part of the 1991 Constitution's contribution to national peace, 'was to realise the aims of the *Estado Social de Derecho'* and to 'revive the faith of our citizens in the true possibilities of the law as an element in the distribution of justice'. *C-276/93* (CCC).
[69] *SU-559/97* (n 67) ¶31.
[70] CCC, Judgments *T-068/98* (on delays in responses to complaints about CAJANAL pensions); *T-153/98* (on overcrowding in prisons, detailed below); *T-590/98* (on the failure to protect the lives, personal integrity, security and other rights of human rights activists and advocates); *SU-250/98* (on failures in public tenders for notary positions); *T-525/99* and *SU-090/00* (on delays in the payment of retirement pensions to public officials); *T-025/04* (on the rights of internally displaced persons); *T-38/13*, *T-762/15*, and *SU-122/22* (on the rights of persons deprived of liberty, detailed below); *T-302/17* and *T-359/18* (on the rights of indigenous children of the Wayúu community in La Guajira).
[71] *SU-250/98*, *T-068/98*, *T-289/98*, *T-590/98*, *T-606/98*, *T-525/99*.

To make these declarations, the Court must first verify the existence of the following conditions: (i) massive, systematic, and generalised violations of fundamental rights; (ii) 'prolonged omissions' by public authorities of their duties to guarantee fundamental rights; (iii) a lack of legislative, administrative, or budgetary measures required to guarantee those rights; (iv) 'complex social issues that require the intervention of various public institutions and significant budgetary commitments', and (v) evidence of judicial congestion due to multiple *tutelas* concerning similar matters.[72]

Despite the fact that the power to declare an *USoA* is not explicitly established in the 1991 Constitution, the Court has presented these declarations as naturally derived from the supremacy of the Constitution and the principles of 'constitutional integrity and effectiveness'.[73] On the one hand, the tribunal has interpreted the principle of 'constitutional integrity' as a mandate to ensure 'harmonic collaboration with the other branches of power in the realisation of the aims of the State',[74] including the duty to make 'orders to public authorities so that they implement measures […] that may eliminate the circumstances which generate states of affairs that are openly unconstitutional.'[75] In that sense, the power to declare an *USoA,* as well as the structural interventions in public policy that follow, have been presented as the natural outcome of the Constitution's system of values and principles whose integrity must be preserved above all other institutional or instrumental considerations.[76] On the other hand, the principle of 'constitutional effectiveness' has been interpreted as a mandate to carry out all necessary actions to realise and fulfil constitutional aims and principles.[77] In the Court's view, overwhelming numbers of *tutelas* blatantly contradict this principle, justifying the tribunal's power to intervene in public policy in order to ensure compliance with the State's positive obligations and avoiding excessive resort to constitutional complaints.[78]

Justifications of the power to declare an *USoA* are very brief and limited, and often constitute simple appeals to these constitutional principles, both in the Court's rulings and the scholarship on the matter. Straightforward justifications of the power to declare an *USA* are only offered in Judgment SU-559 of 1997 (that is, the first judgment in which the term was used). In the words of the tribunal, 'if urging diligent compliance with the constitutional obligations of a public authority contributes to reducing the number of constitutional complaints, which would otherwise inevitably be made, [the duty to collaborate harmonically with other organs of the State in order to fulfil its aims] becomes a legitimate mechanism through which the Court can accomplish its function as the guardian of constitutional integrity and effectivity'.[79] In subsequent rulings, the Court simply states that it has a duty to make these declarations in order to uphold

[72] CCC, Judgment T-025 of 2004, number 7.
[73] *SU-559/97* (n 67) ¶31.
[74] ibid.
[75] ibid.
[76] This principle, in Colombian constitutionalism, may be found in CP 1991 Article 4 (on constitutional supremacy). However, this is a claim which underlies moral normativism more broadly. See Martin Loughlin, 'On Constituent Power' in Michael W Dowdle and Michael A Wilkinson (eds), *Constitutionalism Beyond Liberalism* (CUP 2017) 149—150.
[77] *SU-559/1997* (n 67), ¶ 31(1).
[78] ibid, ¶ 31(2)
[79] ibid.

constitutional rights when they are systematically and massively violated. Based on the principles of institutional collaboration, constitutional integrity, and effectiveness, declarations of *USoA* have therefore been understood as naturally and necessarily derived from the rational structure of constitutional aims and principles, as well as pragmatically required to deal with the overwhelming number of *tutelas* that has plagued the judiciary.

According to the Court, the preservation of the Constitution includes, among other obligations, the duty to bring all branches of power and state institutions in line with constitutional principles and values, presenting declarations of *USoA* as the constitutionally mandated and necessary solution to address structural failures, as well as the self-evident path towards the consolidation, maintenance, and enhancement of democracy —which includes, as its core component, the progressive realisation of fundamental rights.[80] Academic discussions and critiques of these declarations have largely focused on its pragmatic aspects (such as the symbolic and material impact of the judgments) and on strategies to make the Court's strategies more effective,[81] leaving the issue of the justification and characteristics of the power unexplored.

3. The institutionalisation of exceptions and the normalisation of *unconstitutionality*

Based on its role as the authoritative interpreter and guardian of the Constitution, the Constitutional Court presents itself as having the duty to define what is normatively required to adequately safeguard the 'constitutional order'. In the words of the Court, it has

> [L]egal powers to ensure the effectiveness and supremacy of constitutional mandates within [the] legal system. Since the Court is in charge of maintaining the integrity and supremacy of the Constitution, its decisions are a source of law for authorities and private citizens […]. Consequently, the interpretation of the Constitution […] has, as its main objective, to guide the legal order towards superior constitutional principles and values.[82]

Declarations of *USoA* are understood as an embodiment of such constitutional mandate. But the assertion that these declarations are 'mandated' by the Constitution not only takes the existence of this power for granted as a self-evident truth, avoiding a serious engagement with its definition and justification, but also says very little about its scope, limits, and characteristics. While the Court has provided a list of conditions in which these declarations may be made,[83] academics have attempted to fill in the gaps in the characterisation of this power, but the matter has only been mentioned in passing and has not sparked further discussion. In Rodríguez' view, the only way to

[80] Uprimny and Sánchez-Duque (n 1); Uprimny (n 1); Arango (n 60).
[81] Rodrigo Uprimny, Juan F Jaramillo and Diana Guarnizo, 'Intervención Judicial En Cárceles' (DeJusticia 2006); Uprimny and Sánchez-Duque (n 1); Rodríguez-Garavito (n 1); Uprimny (n 35); Rodríguez-Garavito (n 4).
[82] *T-292/06* (CCC) ¶9.
[83] *T-025/04* (n 70), ¶5.3.

make sense of these declarations is to interpret them as an exceptional power, one which is 'analogous, yet opposite in sign, to the classic exceptional figure of modern constitutionalism: the state of exception'.[84]

However, the claim that the classic state of exception and the declaration of *USoA* are 'analogous, yet opposite in sign' is obscure. In what sense are they analogous? First, both imply an extraordinary expansion of the powers of a certain branch of power: those of the executive, in declarations of states of exception; and those of the Constitutional Court in declarations of *USoA*. Second, both states of exception and declarations of *USoA* must be temporary: both powers must have the aim of defeating or overcoming the conditions that led to the suspension of normality.[85] Although in practice declarations of *USoA* seem to have no clear temporary limits, Rodríguez argues that, like states of exception, declarations of *USoA* only 'make sense to the extent that they are useful in the promotion of conditions which make them unnecessary. Therefore, […] the maintenance of multiple and simultaneous *USoA* to address multiple structural issues would not only be a symptom of the ineffectiveness of this measure, but would also lead to its constitutional and political devaluation'.[86] In this sense, according to Rodríguez, although temporary judicial intervention creates a 'dialogic' collaboration between branches,[87] the indefinite prolongation of declarations of *USoA* would inevitably cause significant disturbance to the constitutional principle of the separation of powers.[88]

But, in this respect, there seems to be an important difference between the two declarations. On the one hand, states of exception allow the deployment of emergency powers with the aim of reinstating order in the face of serious threats to the state (ranging from threats to security to natural disasters, health-related emergencies, and economic crises). Their persistence beyond the conditions in which they are deemed necessary leads to the problematic 'normalisation of emergency'.[89] On the other hand, declarations of *USoA* point to the State's own structural failures and shortcomings as threats to the legal order. Their indefinite prolongation not only entails 'high political costs in terms of the tribunals' democratic credentials',[90] but, more importantly, reveals the extent to which those structural failures undermine the constitutional

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[84] Rodríguez-Garavito (n 1).

[85] Whether the exception leads to reestablishing the old order or creating a new one, the suspension of the legal order must be temporary. Even dictatorship —the political form taken by the exception— is conceived as a temporary form of ordering that appears under specific conditions (i.e., where the goal is to destroy or nullify a political enemy). If perpetuated indefinitely, the dictator becomes sovereign and imposes a new legal order. See Carl Schmitt, *Dictatorship: From the Origin of the Modern Concept of Sovereignty to Proletarian Class Struggle* (1st edition, Polity 2013) 118–119; Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (University of Chicago Press 2005).

[86] Rodríguez-Garavito (n 1) 439.

[87] Rodríguez-Garavito (n 4).

[88] Rodríguez-Garavito (n 1).

[89] Giorgio Agamben, *State of Exception* (University of Chicago Press 2005); Mark Neocleous, 'The Problem with Normality: Taking Exception to "Permanent Emergency"' (2006) 31 Alternatives: Global, Local, Political 191. In the European context, see Jonathan White, 'Authority after Emergency Rule' (2015) 78 Modern Law Review 585.

[90] Rodríguez-Garavito (n 1) 438. See also, in the Colombian context, Antonio Barreto Rozo, 'Normalidad y Excepcionalidad: La Indescifrable Regularidad Contemporánea de La Excepción' (Universidad de Palermo 2006); Mauricio García Villegas, 'Constitucionalismo Perverso. Normalidad y Anormalidad Constitucional En Colombia: 1957-1997.' in Boaventura de Sousa Santos and Mauricio García Villegas (eds), *El caleidoscopio de las justicias en Colombia* (Siglo del Hombre 2001).

project more generally. In the constitutional imagination behind the 1991 Constitution, the authority of the Constitution is understood as a self-evident feature, presupposed by principles that give expression to collective values and fundamental political aims. Declarations of *USoA* amount to an official recognition of the violation of the fundamental principles and values from which the authority of this system is derived. The longer these declarations are perpetuated over time, the more they amount to an explicit recognition of the material absence of this normative order, notwithstanding that they derive their authority from that undermined Constitution.

In what sense may it be said that the two powers are 'opposite in sign'? One obvious difference is that, while the state of exception concentrates power in the hands of the executive, declarations of *USoA* concentrate extraordinary powers in the Constitutional Court, allowing it to make detailed interventions in public policy and destabilising the 'normal' distribution of competences between the branches. In addition to this, the state of exception is based on the idea that there are circumstances in which it is necessary to suspend the law.[91] Meanwhile, declarations of *USoA* rely on a different reasoning: instead of emerging from a decision to suspend the legal order to ensure its preservation, they derive their existence from appeals to a higher-order normative arrangement (the Constitution), aiming to maximise the legal order and realise its principles to the greatest extent possible. While states of exception arise from the political assessment of threats to the legal order, declarations of *USoA* arise from the normative assessment of the State's own constitutional failures. Rather than deciding on exceptional measures to safeguard the existence of the State, declarations of *USoA* institutionalise the existence of circumstances that, under the Constitution's rule, should be exceptional.

These differences, however, have been absent from the literature. Instead, scholars have distinguished the two powers by pointing out that they are expressive of opposing historical trajectories. On the one hand, against the background of semi-permanent emergencies described in Chapter 1, declarations of states of exception are understood as being fundamentally linked to abuses of power, arbitrariness, and violence.[92] In that sense, they constitute an authoritarian, 'demonic impulse' that pushed the State 'outside' of the social contract by normalising State-sponsored violence and violations of human rights.[93] Declarations of *USoA*, on the other hand, are presented as a key component of the process of democratisation that started with the 1991 Constitution: they maximise legality in order to progressively achieve the materialisation of fundamental rights and the consolidation of democracy, appearing as one of the Constitution's most powerful antidotes against a history of exceptions and authoritarianism.

The image of an authoritarian past and a constitutional present, however, is one-sided. It not only exaggerates the virtues of constitutionalism, identifying democracy with the formal

[91] John Ferejohn and Pasquale Pasquino, 'The Law of the Exception: A Typology of Emergency Powers' (2004) 2 International Journal of Constitutional Law 210.

[92] Uprimny and García Villegas, 'El Control Judicial de Los Estados de Excepción En Colombia' (n 10); García Villegas, 'Constitutcionalismo Perverso' (n 90).

[93] Mauricio García Villegas and Boaventura de Sousa Santos, 'Colombia: El Revés Del Contrato Social de La Modernidad.', *El caleidoscopio de las justicias en Colombia.* (Siglo del Hombre 2001); Uprimny and García Villegas, 'El Control Judicial de Los Estados de Excepción En Colombia' (n 10).

recognition of fundamental rights regardless of the material conditions in which such project exists, but, more importantly, it ignores the role that both powers have played in a broader history of contradictory attempts to consolidate the State's authority —a series of projects of modernisation in which, as described in the previous chapter, the expansion of the criminal law has played a key function, supported by discourses of human rights and constitutionalism. In that sense, rather than truly opposing one another, both powers form a juxtaposition of strategies to impose cohesion and coherence onto a historically fragmented and exclusionary social order. Both are premised on an ideological demand to return to 'normality' and establish the rule of law, [94] and are founded on a generalised sense of constant 'crises' that has been central to narratives of State-building throughout Colombian history.

In addition to this, both the state of exception and declarations of *USoA* are tied together by a tension at the heart of modern constitutionalism, one that speaks of the transformations that have occurred in the transition from the classic liberal constitution to the 'total' constitution.[95] While early modern thinkers recognised that the suspension of written laws was sometimes required for the sake of the public interest and the survival of the political order, rationalising this through the concept of the *reason of state,*[96] it became increasingly difficult to accommodate exceptions within the architecture of the modern constitution. Although exceptional measures are seen by classic liberalism as necessary to preserve the legal order in times of crises, constitutional democracies cannot survive if those measures are boundless and unlimited. In Loughlin's words, 'this is the dilemma of norm and exception: how can exceptional executive powers be granted without normalizing them and thereby converting constitutional democracy into an authoritarian regime?'.[97] Liberal constitutionalism has attempted to resolve this tension by introducing regulations to declarations of states of exception,[98] leaving the question of how it is logically possible for the legal order to suspend itself unanswered.[99]

Latin American governments were well acquainted with this dilemma, frequently resorting to exceptional measures in their attempts to achieve the stability that they had been unable to establish after the creation of independent republics in the nineteenth century.[100] While these powers were mostly used by military regimes in the region, the Colombian case stands out in Latin America as a unique case of 'constitutionally authorised authoritarianism'[101] due to the complex

[94] On the state of exception as a call for normality, see Neocleous (n 89) 208.
[95] See Introduction. Mattias Kumm, 'Who Is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law' (2006) 7 German law journal 341; Martin Loughlin, *Political Jurisprudence* (OUP 2017); Loughlin, *Against Constitutionalism* (n 36).
[96] Loughlin, *Political Jurisprudence* (n 95); Loughlin, *Against Constitutionalism* (n 36). See also Ferejohn and Pasquino (n 91).
[97] Loughlin, *Against Constitutionalism* (n 36) 154.
[98] Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (University of Chicago Press 2005).
[99] This is precisely Schmitt's objection to liberal constitutionalism. See Loughlin, *Against Constitutionalism* (n 36).
[100] Roberto Gargarella, 'The Limits Imposed by the Past upon the New Constitutions' in Roberto Gargarella (ed), *Latin American Constitutionalism, 1810-2010: The Engine Room of the Constitution* (OUP 2013); Roberto Gargarella, 'Democracy and Emergency in Latin America' in Miguel Poiares Maduro and Paul W Kahn (eds), *Democracy in Times of Pandemic: Different Futures Imagined* (CUP 2020); Iturralde, 'Emergency Penality' (n 7).
[101] Loughlin, *Against Constitutionalism* (n 36).

combination of a relatively stable formal 'democracy',[102] on the one hand, and governments that insistently resorted to extraordinary authoritarian measures, on the other. Constant declarations of states of exception produced the deployment of coercive force in a way that was strikingly similar to the military dictatorships of the South.[103] These measures, more importantly, were authorised by the Constitution, producing a process of legitimation of exceptional powers.

As mentioned in section 1 of this chapter, the legal regulation of the exception was one of the key points of constitutional reform in the 1990s. The perpetuation of emergency powers throughout the 80s and 90s and the incorporation of their central features to ordinary laws had led to the normalisation of authoritarian measures.[104] In the imagination of scholars and activists that participated in the process that led to the enactment of the 1991 Constitution, the normalisation of the exceptional powers was enabled by the absence of strict constitutional regulations, on the one hand, as well as the Supreme Court's relatively restrained approach to their (formal) judicial review, on the other.

However, this understanding of the normalisation of the exception misses a key aspect of the process through which legitimation and normalisation were produced: the legitimation of the exception was made possible precisely by constitutional mechanisms, that is, through the formal incorporation of the exception into the Constitution well before 1991. Although the 1886 Constitution established fewer limitations to declarations of states of exceptions, these powers did not exist outside of the legal order. Instead, their existence and justification were internal to it. The 1886 Constitution established formal requirements and procedures for the declaration and operation of states of exception: according to Article 121 of this constitution, states of exception could only be declared in 'conditions of external war or internal commotion',[105] after a prior hearing with the State Council and with the signature of all ministers of government. States of exception were also subject to automatic judicial review by the Supreme Court.[106] While relatively weak in comparison to that carried out by the Constitutional Court under the 1991 Constitution, and limited to formal aspects of the declaration, the Supreme Court and the Constitution played a key role in the legitimation of states of exception as measures that were consistent with constitutional rule.

Though less regulated, states of exception had already been significantly institutionalised by the 1886 Constitution. In other words, the 'normalisation of the exception' in Colombia did not occur merely due to the lack of legal regulation, as mainstream scholars argue, but rather

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[102] Interrupted briefly by a brief military dictatorship from 1953 to 1957. The National Front (a power-sharing agreement between the Conservative and Liberal parties which followed the military dictatorship) is a good example of the high degree of political exclusion despite the existence of formal 'democracy'. See Chapter 1.

[103] Many of the measures taken under states of exception resemble those taken by the military dictatorships of the South of the continent. García Villegas, 'Constitutcionalismo Perverso' (n 90).

[104] ibid 350-360. See also Barreto Rozo (n 40).

[105] Political Constitution of 1886. In addition, according to this article, the state of siege must come to an end once 'public order has been reestablished' or once 'the external disturbance or peril have ceased'. The relevant authorities would remain liable for any abuses committed under the exercise of extraordinary faculties. The characteristics and limitations of the state of exception were subjected to frequent constitutional reforms.

[106] Legislative Act 01 of 1968. Before 1968, judicial review was not automatic, but had to be carried out if requested by Congress.

because the existing legal framework had already started a process of absorption, or institutionalisation, of the exception.[107] Abuses of power, in that sense, may have resulted not solely from the lack of constitutional regulation, but, at least partly, because of the legitimation of exceptional powers that the legal order itself produced —that is, not as a feature of the absence of the law, but rather as its outcome. Under the 1886 Constitution, the executive could claim that, although it was acting in an extraordinary manner, no unlawful measures were being taken as long as the government invoked the appropriate justifications and complied with the formal procedures established in Article 121. The government could easily claim that, despite particular instances of abuses of power, it was acting in accordance with constitutionally-conferred powers, which were further legitimated by the (arguably weak) judicial review by the Supreme Court.

The seed of the normalisation of the exception rested on the integration of the exception into the Constitution. But the constitutional absorption of the exception developed further with the enactment of the 1991 Constitution. A stricter regulation of these powers, including stronger judicial review by the Constitutional Court, was a central point of discussion during the constituent assembly.[108] On the one hand, the new Constitution established temporal limits and restrictions in relation to the protection of fundamental rights during states of exception.[109] Declarations were classified into three types of emergencies ('exterior war',[110] 'state of internal commotion',[111] and 'state of emergency'[112]), all of which had to comply with general[113] and specific requirements to be deemed constitutional. On the other hand, the Constitution established that all states of exception were to be subjected to automatic judicial review by the Constitutional Court, not only regarding formal aspects (as was the case under the 1886 Constitution), but also substantive ones.[114] This includes, for instance, an evaluation of the aims of exceptional measures,[115] the reasons invoked to justify them, the connection between exceptional measures and the 'causes of the disturbance' that make the declaration necessary,[116] the absence of arbitrariness (understood as the prohibition of 'infringements of the essential core of fundamental rights'),[117] and assessments of necessity,[118] proportionality,[119] and non-discrimination,[120] among others.[121] The exception, even where it is

[107] In other words, as Loughlin argues, the normalisation of the exception is inherent to the ways in which constitutions have given institutional form, without eliminating, the logic of the reason of state. Loughlin, *Against Constitutionalism* (n 36) 165.
[108] Lemaitre (n 10).
[109] García Villegas, 'Constitucionalismo Perverso' (n 16).
[110] CP 1991, Article 212.
[111] CP 1991, Article 213.
[112] CP 1991, Article 214.
[113] General requirements, applicable to all three forms of exception, include the enactment of a decree by the President, signed by all ministers, in which the facts that have led to the declaration are explained clearly, and in which a justification for the declaration is provided.
[114] Statutory Law 137 of 1994.
[115] ibid., Article 11.
[116] ibid., Article 8.
[117] ibid., Article 7.
[118] ibid., Article 11.
[119] ibid., Article 12.
[120] ibid., Article 14.
[121] See also articles 47, 49 and 50 of Law 137 of 1994.

invoked and justified as a 'means to protect [the State] from threats to its stability',[122] is so entrenched into the constitutional architecture that it becomes a matter of justification, entirely dependent on the possibility of 'balancing constantly conflicting principles'.[123]

Despite this detailed regulation of declarations of states of exception, emergency powers remained frequent throughout the 90s.[124] Only three declarations of states of exception were deemed unconstitutional,[125] reenforcing the idea that these measures were, for the most part, legitimate, necessary, and proportional. However, in one of the judgments which declared the *unconstitutionality* of a state of exception,[126] the Court engaged with the complex issue of how chronic conditions of violence could be understood under the constitutional order, and what their relationship with states of exception should be. The Court argued that violence from armed actors, despite being extremely serious, had become endemic, and therefore, the government could not justify its resort to exceptional measures to deal with these difficult but expected circumstances. According to the Court,

> The message implicit in the new Constitution could not be clearer: evils that have become permanent must be confronted through equally stable policies, policies that are long-term, carefully thought through and designed. And measures which are only transitory must be reserved for situations of that same character [...]. Common delinquency is unfortunately annexed to every earthly society and the duty of the government is, precisely, to try to extirpate it or at least prevent it from overflowing to the point where it is incompatible with coexistence. For this aim, it has ordinary powers that it should use, first of all, to eliminate the social, economic, and political causes which generate this phenomenon.[127]

In years that followed, however, the Court was more flexible in its interpretation of the circumstances that gave rise to other states of exception —particularly as violence intensified during Samper's government.[128] But the Court's arguments about 'endemic violence' may have contributed to the normative incorporation of crime as a normal social fact, as well as the integration of features of emergency law into ordinary policies, as described in Chapter 1. While states of exception were constitutionalised, requiring a higher threshold of justification from the government and subjecting its powers to more scrutiny than before, some of the most characteristic features of emergency penal legislation were seamlessly incorporated into ordinary criminal laws,[129] enacted as 'ordinary' policies designed to extirpate endemic violence.

Declarations of *USoA* may be understood as a further step in the development of the institutionalisation of the logic of exception into the normative order of the Constitution: they

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[122] Eduardo Cifuentes Muñoz, 'Los Estados de Excepción Constitucional En Colombia' (2002) 8 Ius et Praxis 117.
[123] ibid.
[124] See Chapter 1.
[125] García Villegas, 'Constitucionalismo Perverso' (n 16).
[126] In this judgment, the Court analysed the constitutionality of Emergency Decree 1370 of 1995.
[127] *C-466/95* (CCC) f.5.
[128] *C-027/96* (CCC).
[129] See Chapter 1, section 3.

entrench exceptional conditions so deeply into the constitutional order that, though recognised as *unconstitutional,* they are *constitutionalised*. While states of exception are strictly regulated in the Constitution, declarations of *USoA* open up an unbounded space of judicial intervention that is understood as not only authorised, but also mandated by the Constitution. Such interventions, furthermore, are presented as absolutely necessary for the realisation of constitutional aims and principles, appearing potentially as broad as the interpretation of the Constitution requires these interventions to be. Both the state of exception and declarations of *USoA* appear as constitutionally authorised powers, but there is a fundamental difference between the two. On the one hand, states of exception are subjected to strict regulations and constitutional review by the Court and, to that extent, institutionalised and normalised. It is significant that, because of the structure of principles of the Constitution, as well as its requirements of proportionality and reasonableness, once approved by the Court, states of exception appear as a mere manifestation of constitutional legality. In other words, there is no 'suspension' of the Constitution which is not subjected to constitutional review and authorisation.[130]

On the other hand, declarations of *USoA*, while not regulated, are understood as mandated by the structure of abstract principles on which the Constitution is supported, and from which authority is derived. Although these declarations create extraordinary spheres of intervention in public policy which transcend the Court's normal competences (under the Constitution's own provisions on the division of powers),[131] they locate these powers within the grounds of constitutional interpretation, always internal to the Constitution and mandated by it, and, therefore, never *unconstitutional*. The Court's powers, in that sense, are always within the rational limits set by constitutional principles.[132] Constitutional normality, through this process, now encompasses the exception. Where declarations of *USoA* persist over time, they amount to a recognition that the basic tenets from which constitutional authority is derived are not 'normal' conditions. However, because those conditions are, through the very act of making the declaration, brought back into the sphere of constitutionality, the Constitution's undermined authority becomes normalised.

The boundary between norm and exception is therefore dissolved:[133] while the state of exception is constitutionally regulated, and may be declared unconstitutional, declarations of *USoA* provide such extensive institutional safeguards that conditions of *unconstitutionality* themselves may be aligned with the Constitution. In that way, the declarations generate the perception that, despite the persistence of unconstitutional conditions, the Constitution can maintain its authority intact. This, because authority is presupposed as a self-generated feature derived from the Constitution's internal cogency and rationality. Therefore, as long as something is being done to ensure the progressive realisation of constitutional principles (which are, by definition, a matter of degree), *unconstitutionality* may be normalised. In this way, the recognition of systemic violations of the

[130] David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (CUP 2006).
[131] CP 1991, Art. 113.
[132] On the legitimation of unconstitutional conditions in prisons, see Chapter 3.
[133] Loughlin, *Against Constitutionalism* (n 36) 161.

constitutional order produces an augmentation of the Court's powers as the guardian of a blatantly undermined Constitution. Regardless of their perpetuation through extended periods of time, declarations of *USoA* will always be coherent with constitutional aims, values, and principles, reconciling *unconstitutionality* with this sphere of higher-order legality through arguments of necessity, proportionality, constitutional integrity and effectivity, and harmonic collaboration between all State institutions. Incapable of violating the constitutional order, these declarations may remain valid for as long as the progressive realisation of constitutional rights and principles make them necessary —obscuring the fact that, in existing material conditions, the very possibility of realising those principles is extremely restricted, and that declarations of *USoA* are symptomatic of that unsurmountable limitation. The Constitution, in this sense, is reduced to a mere aspiration: rather than credibly promoting the realisation of constitutional ideals and values, and significantly delivering the social transformations promised by the Constitution, declarations of *USoA* show that the potential to convert constitutional aspirations into political reality is extremely limited.

However, paradoxically, it is these very aspirations that contribute to an augmentation of the Court's powers as the guardian of the Constitution, with declarations themselves embodying the fetishist desire that the rationality of the law will impose itself over existing disorder,[134] eventually leading to the consolidation of the rule of law —fetishism which, in Lemaitre's view, is justified due to the 'enjoyment that progressive law produces independently of its application or, better yet, in excess of its real possibilities of application.'[135] Rather than condemning fetishism, she argues, it might be better to 'build a country of legal fetishists, if you will, of persons who refuse to accept the absence of human dignity as true, and who take pleasure in the ways in which the law denies such absence'.[136] A similar dynamic is reflected by declarations of *USoA*: the reality of the Constitution's undermined authority is recognised (in the sense that generalised *unconstitutionality* points to the material absence of the normative order), but not entirely accepted as true, as the Court insists on the urgent necessity to bridge the gap between reality and the Constitution. Declarations of *USoA,* in this sense, symbolically uphold constitutional principles 'in excess' of their possibilities of application and realisation. Meanwhile, the central contradiction behind the declarations —that is, that the authority of the constitutional order is, by its own standards, severely undermined, and that constitutional normality is exceptional— remains concealed behind this normative fantasy of progressive, principle-based transformations.

Even though declarations of *USoA* have been made in different fields of public policy, the case of prisons stands out as a particularly problematic one due to the intimate relationship between state authority and punishment. While punishment is premised on the existence of sovereign authority, declarations of *USoA* express a recognition of the widespread violation of the principles and values on which that authority is founded by the Constitution's own terms. In that sense, as will be discussed in detail in Chapter 4, despite the fact that prisons are meant to symbolise the realisation of the sovereign's command —restabilising the legal order in the face of the

[134] Lemaitre (n 10).
[135] ibid 385.
[136] ibid 393.

challenges represented by criminal offences through the punishment of those who violate the law and their separation from those who obey it—, declarations of *USoA* reveal the extent to which these institutions have become sites of disorder and abrogation of the Constitution at the heart of the 'walled' spaces of sovereign legality.[137] In other words, punishment is presented as an exercise of the legitimate authority of the sovereign, while at the same time the Court makes an official recognition of its incompatibility with the constitutional order that justifies and sustains the existence of this coercive power.

4. Conclusion

While states of exception have become increasingly institutionalised since the enactment of the 1886 Constitution, and even more so with the strict regulations and scrutiny of the 1991 Constitution, declarations of *USoA* reflect the directions in which the tendency to constitutionalise the exception may develop. Whereas the state of exception became gradually normalised through its institutionalisation and constitutional regulation, declarations of *USoA* represent an extraordinary expansion of judicial power that is never fully exceptional, in the sense that it is derived from constitutional principles and, therefore, always within its limits —never external to those principles, always proportional and necessary for the advancement of constitutional aims, subjected to periodic monitoring by the guardians of the Constitution.

The 1991 Constitution was conceived, from its drafting during the constituent assembly, as a democratising force, one that would lead to the consolidation of the rule of law and create conditions for the progressive realisation of constitutional rights and principles. Although constitutional realisation is a matter of degree, and there will 'always be a gulf between the norm (the written constitution) and the actuality (the way of being)'[138], declarations of *USoA* are symptomatic of the absence of political conditions in which constitutional legality may be realised. In the promotion of legal ordering through the Constitution, the significance of the political foundations on which such a project rests is marginalised,[139] but, as revealed by declarations of *USoA*, material conditions push strongly against this normative enterprise.

The self-generated authority of the Constitution is both reaffirmed and denied through these declarations. The act of bringing *unconstitutionality* in line with the Constitution, reiterating the existence of abstract principles that ought to be realised, seems, in the eyes of the Court and mainstream academics, to be enough to reaffirm its authority. However, they fail to see that, through this very process, the 'unconstitutional' conditions that these declarations seek to eliminate become normalised. As the counterpart of this process of normalisation, constitutional 'normality' is revealed as exceptional. The perpetuation of these declarations for extended periods of time exposes the extent to which the State is unable to uphold its own claims of authority. In other

[137] Wendy Brown, *Walled States, Waning Sovereignty* (Zone Books 2010).
[138] Martin Loughlin, 'On Constituent Power' in Michael W Dowdle and Michael A Wilkinson (eds), *Constitutionalism Beyond Liberalism* (CUP 2017) 165.
[139] ibid 152.

words, because declarations of *USoA* are grounded on an official recognition of the systematic and structural violation of essential rights and principles, and because the Constitution is understood as the ultimate source of authority, these declarations amount to an acknowledgment of the undermined character of the State's own authority.

In the penal sphere, the enactment of the 1991 Constitution and the development of the Court's progressive case law coincided with an unprecedented 'crisis' which the Court has attempted to ameliorate through declarations of *USoA*. After more than twenty-five years, however, the 'crisis' remains largely unchanged. The ineffectiveness of this strategy seems to be more than the mere result of contingent failures of particular institutions. On the one hand, as explained in the previous chapter, the expansion of the penal sphere and the unprecedented rates of imprisonment it has produced are not only compatible, but enabled by the language of human rights, particularly by the rhetoric of victims' rights as a justification for coercive security-based policies —rhetoric which has been used both by authoritarian governments and by the progressive Court alike. On the other hand, the paradoxical character of declarations of *USoA* is emphasised by the maintenance of 'unconstitutional' conditions in the penal sphere: while punishment is presented as an exercise of the sovereign's legitimate authority, the Court makes an official recognition of the incompatibility of this institution with the constitutional order on which authority is founded. Punishment, despite being the embodiment of the sovereign's authority, is paradoxically recognised as generally, massively, and systematically unconstitutional.

Chapter 3
Unmasking unconstitutionality: The State's claims of sovereignty and legitimacy

Declarations of *USoA* in prisons have created a sphere of exceptional judicial intervention in penal policy aimed at progressively overcoming structural and generalised *unconstitutionality*. This process, in the Court's rhetoric, reinforces and reaffirms the self-generated authority of the Constitution, engaging all State institutions in the enterprise of preserving constitutional integrity, collaborating to achieve significant degrees of constitutional effectivity, and 'bridging the gap' between the Constitution and reality.[1] However, paradoxically, the prolongation of these declarations over time reveals the failure of those claims of authority: they demonstrate the extent to which this normative scheme is actually exceptional. In this chapter, from the perspective of political authority, I offer a more robust analysis of the paradoxical character of these declarations, their successes, and their failures, locating the judgments within a broader social and political context, and exploring underlying tensions within the State's claims of sovereignty and legitimacy. I argue that these declarations expose the State's weakened claims of political authority, despite the Court's attempts to uphold constitutionalism's conception of rational, self-generated authority. In the first section, I explore the relationship between these declarations and the State's claims of sovereignty in the context of a long history of internal armed conflict. I argue that, to understand the problematic character of the Court's declarations of *USoA* in prisons, it is necessary to pay attention not only to the institutional and relational aspects of State authority, but also to the uniqueness of the juristic and political claims that the State makes through punishment.

Taking these dimensions into consideration helps explain why the Constitutional Court has engaged in the awkward exercise of justifying and legitimating punishment despite the persistence of unconstitutional conditions of imprisonment, insisting on the rightfulness of this institution despite the ideological and empirical contradictions that the tendency towards mass incarceration entails. In the second section, I analyse the Court's justificatory enterprise and discuss the extent to which it may be considered successful. Although the declarations have produced very limited material transformations, they have allowed the State to maintain its power to punish under conditions that systematically contradict the basic tenets of the Constitution. In addition to this, the declarations have given rise to a process of self-legitimation that confirms the Court's identity as the guardian of the Constitution, generating administrative power for the tribunal and allowing it to further expand its powers of intervention in penal policy. This 'success', however, is limited:

[1] Manuel Jose Cepeda-Espinosa, 'Judicial Activism in a Violent Context: The Origin, Role, and Impact of the Colombian Constitutional Court' (2004) 3 Washington University Global Studies Law Review; Manuel José Cepeda Espinosa and David Landau, *Colombian Constitutional Law: Leading Cases* (OUP 2017); César Rodríguez-Garavito, 'Constitutions in Action. The Impact of Judicial Activism on Socioeconomic Rights in Latin America' (Routledge 2014).

the declarations produce self-legitimation at the expense of an official recognition of the material and ideological failures of the constitutional project.

1. Punishment and the sovereign's claims of authority

As discussed in the previous chapters, long-standing challenges to the Colombian State's authority, particularly from armed actors, have severely affected the State's capacity to govern and to exercise an effective monopoly of the use of force —conditions which have justified resort to exceptional measures, as well as the expansion and intensification of ordinary penal legislation. The ways in which these challenges have affected the State's claims of sovereignty and processes of state-formation have been analysed by two main bodies of literature. On the one hand, mainstream accounts focus on the institutional dimension of the State,[2] distinguishing between areas with strong State presence and those where the State has been 'absent', throwing them into circumstances which resemble the state of nature. On the other hand, anthropological scholarship rejects the centrality and uniqueness of the State,[3] focusing instead on the role that armed actors have played in the creation, articulation, and maintenance of the bonds of allegiance required for the consolidation of authority inside and outside prisons. While mainstream accounts confuse capacity to govern with sovereignty and lose sight of the relational character of authority, anthropological perspectives brush aside the juristic and political claims made by the State, that is, the claims upon which the rightful power to punish is based. As an alternative to these bodies of literature, I suggest a more relational approach, which takes into consideration the uniqueness of the State's ideological claims of sovereignty and their expression through punishment. By turning attention to the juristic and political aspects of State authority, the paradoxical character of declarations of *USoA* in prisons is revealed with full clarity.

[2] By 'mainstream accounts', I am referring to dominant academic discourses on the problem of statehood and sovereignty in Colombia, which focus on the State's partial incapacity or failure to enforce the social contract in the whole of the national territory. The mainstream academic view has also become commonplace in political discourse. See Patricia Moncada Roa (ed), *Los Estados Fallidos o Fracasados: Un Debate Inconcluso y Sospechoso* (2007); Luis Javier Orjuela E. (ed), *El Estado En Colombia* (1st edn, Universidad de los Andes 2010); Ana María Bejarano and Eduardo Pizarro, 'Colombia: El Colapso Parcial Del Estado y La Emergencia de Los "Protoestados"' in Luis Javier Orjuela E. (ed), *El Estado en Colombia* (Universidad de los Andes, Colombia 2010); Mauricio García Villegas and Boaventura de Sousa Santos, 'Colombia: El Revés Del Contrato Social de La Modernidad.', *El caleidoscopio de las justicias en Colombia.* (Siglo del Hombre 2001).

[3] Teo Ballvé, *The Frontier Effect: State Formation and Violence in Colombia* (Cornell University Press 2020); María Clemencia Ramírez, 'The Idea of the State in Colombia: An Analysis from the Periphery' in Krupa, Christopher and Nugent, David (eds), *State Theory and Andean Politics: New Approaches to the Study of Rule* (University of Pennsylvania Press 2015); Winifred Tate, 'The Aspirational State: State Effects in Putumayo' in Christopher Krupa and David Nugent (eds), *State Theory and Andean Politics : New Approaches to the Study of Rule* (University of Pennsylvania Press 2015); Christopher Krupa and David Nugent, *State Theory and Andean Politics: New Approaches to the Study of Rule* (University of Pennsylvania Press 2015).

1.1. The institutional perspective: a dichotomous cartography

The Constitutional Court has interpreted the tendency towards mass incarceration and the existence of unconstitutional conditions of imprisonment as symptoms of a broader socio-economic crisis that has led to the expansion of the State's power to punish. According to the Court, in the context of the war on drugs, the government enacted penal measures imposing harsh sentences for criminal offences that were considered the root cause of generalised social disorder and insecurity. This led to an extraordinary inflation of imprisonment rates, resulting, in turn, in unprecedented conditions of prison overcrowding and violence. The 'crisis' in prisons gave rise to two main issues at the constitutional level. First, generalised, systematic and massive violations of the fundamental rights of inmates, particularly human dignity.[4] Second, a lack of official control over prisons, as unofficial actors (mainly former guerrilla and paramilitary members) established *de facto* control in prisons all over the country, resulting in frequent riots, massacres, and disappearances.[5]

Such lack of official control in prisons, the Court argued, mirrored the State's lack of an effective monopoly over the use of force outside of them. According to the Court, the 'internal armed conflict and its entanglement with narcotrafficking',[6] along with highly punitive, security-oriented tendencies behind criminal justice policy,[7] were the main culprits of the penal 'crisis'. Broader problems such as 'economic inequality […], regional and social diversity, varying degrees of state presence in different zones of the country, and the complexity of certain focalised criminal phenomena (narcotrafficking, corruption, the armed conflict, among others), inequality, and poverty'[8] were also identified by the Court as the causes of the 'disjointed, reactive, incoherent, [and] ineffective' character of criminal justice policy. According to the Court, the subjection of penal policy to 'policies of national security' had led to an extraordinary inflation of the prison population.[9] Penal inflation, in turn, produced circumstances in which former members of illegal armed groups and drug cartels easily took over *de facto* control in prisons, all in an environment of extreme violence. In the words of the Court, 'in a place where […] the guards do not have the capacity to impose respect towards established rules, it is only natural that the survival of the strongest will become the law'.[10]

[4] The role of dignity in the Court's declarations is analyzed in detail in section 2.
[5] *T-153/98* (CCC). See also Manuel Iturralde, 'Prisiones y Castigo En Colombia: La Construcción de Un Orden Social Excluyente' in Libardo Ariza and Manuel Iturralde (eds), *Los muros de la infamia: Prisiones en Colombia y en América Latina* (Universidad de los Andes, CIJUS); Libardo Ariza and Mario Torres, 'Constitución y Cárcel: La Judicialización Del Mundo Penitenciario En Colombia.' (2019) 10 Revista Direito e Práxis 630.
[6] *T-762/15* (CCC) ¶38.
[7] See Chapter 1.
[8] *T-762/15* (n 6) ¶37.
[9] *T-388/13* (CCC) ¶5.8.1. *T-762/15* (n 6) ¶17,37, 38.
[10] *T-153/98* (n 5) ¶48.

In Judgment T-388/13, the Court described the State's incapacity to maintain the monopoly over the use of force as one of the main causes of inhumane conditions of imprisonment,[11] arguing that:

> [A]lthough [violence] is prohibited, it is widely known that it frequently occurs, and it has become a state of affairs that is *de facto* accepted and tolerated. […] However, the situation of violence has become so institutionalised and normalised that it seems like it is plainly accepted. It is well-known that acts of inhumane and extreme violence take place [in prisons], yet no adequate or necessary measures are ever taken to avoid them […]. [I]n fact, individuals are murdered under the custody of the State, in entirely foreseeable circumstances which remain unpunished due to the law of silence that rules inside prisons. Perhaps a proof of the grievous situation of persons deprived of liberty in Colombia is that they are at a risk of kidnapping. Although it seems unbelievable, a person deprived of liberty may become a victim of kidnapping in prison. Organised groups with power inside prisons may bring individuals outside of their assigned *patios* and hide them in other cells or places until relatives or friends pay a sum of money so that the victim may be set 'free', going back to their normal conditions of deprivation of liberty. Kidnapping an inmate, inside a prison which the State itself has sent him to, whether as punishment or pre-emptively, is perhaps one of the clearest demonstrations of the crisis that the Colombian penal system is currently going through.[12]

According to the Court, Colombian prisons are governed 'unfortunately, by parallel powers such as *caciques*, sometimes belonging to illegal armed actors', who impose 'unreasonable and disproportionate restrictions on the effective enjoyment of fundamental rights' of inmates.[13] Though phrased in terms of fundamental rights, the description of the 'crisis' in prisons is, at its core, a description of the extent to which the State's claims of sovereignty are undermined. Whilst the phenomenon of lack of official control over prisons and the establishment of alternative orders is not exclusive to Colombia (and is, in fact, widely spread across Latin America and other regions of the world),[14] the official and self-declared incapacity of the State to maintain an effective monopoly of force, both inside and outside prisons, stands out as a striking particularity.

The lack of an effective monopoly of force has also been recognised as a key issue in mainstream literature on the question of sovereignty in Colombia, and the Court's portrayal of the 'crisis' in prisons resonates with dominant academic descriptions that highlight the State's historical inability to fully enforce the social contract and establish its presence over the whole of the national territory, allowing illegal armed actors to take over *de facto* control.[15] In this view, regions of the

[11] The Court describes 'infernal conditions' of violence, including 'lynching and rapes, which may end in the murder, dismembering, and disappearance of the person's body, in cruel and inhumane ways. These facts have been reported in journal articles and legal complaints, as well as official reports and cases before tribunals'. *T-388/13* (n 9) ¶5.5.1.5.
[12] ibid ¶5.5.1.5-5.5.1.6.
[13] ibid ¶7.5.3.3.
[14] David Skarbek, *The Puzzle of Prison Order: Why Life Behind Bars Varies Around the World* (OUP 2020). See also Chapter 5 of this thesis.
[15] Boaventura de Sousa Santos and Mauricio García Villegas (eds), *El Caleidoscopio de Las Justicias En Colombia* (Siglo del Hombre 2001). It is worth noting that, since the Peace Agreement between the government and FARC in 2016,

country with little institutional presence have long been excluded from the social contract, becoming the 'battle ground' where persistent challenges to the State's authority have played out.[16] The Colombian State is characterised by a strange dualism: on the one hand, the State has managed to effectively enforce the social contract in a significant part of the territory, maintaining stable democratic institutions despite a long-lasting armed conflict.[17] On the other, a large part of the national territory has been 'abandoned', leaving these areas in circumstances 'akin to the state of nature',[18] that is, conditions in which the population is largely excluded from civil society and political participation, permanently thrown into a state of 'anxiety about the present and the future, misruled expectations, and continuous chaos regarding even the simplest acts, like survival and coexistence.'[19] The State's attempts to reassert its sovereignty through the deployment of military and penal powers have further accentuated marginalisation and exclusion, while 'normalising' conditions of extreme violence and abuses of power.[20]

The coexistence of 'contractualised' areas (those with a significant degree of enforcement of the social contract) and 'savage' ones (where the social contract seems to hold little significance) entails a 'partial failure' of the State.[21] Mainstream academics have described the Colombian State's claims of sovereignty as 'relatively failing'[22] —fragmented, partial, precarious—, though not entirely failed: despite their fragility, the State has not abandoned said claims, and has persistently maintained the ability to present itself, with credibility and international recognition, as the only source of rightful, legitimate power.[23] In fact, it has gone to great lengths in its attempts to give credibility to the 'myth of sovereignty', however weak this myth may be,[24] engaging in intense,

violence has significantly decreased, and it may be argued that the State has achieved a higher degree of sovereignty and monopoly over the use of force than it had in the last 60 years of history. In fact, a great portion of the agreement has the aim of extending the presence of the State in areas previously controlled by FARC, as well as enhancing the political participation and representation of these communities. However, the State still faces serious challenges: dissident FACR groups, the ELN guerrilla, and newly formed armed groups (made up by former guerrilla combatants, former paramilitaries, and other common criminals) have continued to challenge its authority through extremely violent means, including massacres, internal displacement, forced disappearance, and other serious crimes against civilians. See Human Rights Watch, 'Colombia: Eventos de 2021' (2021) <https://www.hrw.org/es/world-report/2022/country-Chapters/colombia> accessed 26 February 2023; Julieta Lemaitre and Esteban Restrepo-Saldarriaga, 'Law and Violence in the Colombian Post-Conflict: State-Making in the Wake of the Peace Agreement' (2019) 2019 Revista de Estudios Sociales 2.

[16] These challenges include both direct violent confrontation and more subtle mechanisms of widespread disobedience and informality.

[17] de Sousa Santos and García Villegas (n 15); Mauricio García Villegas and Jose Rafael Espinosa, *El Derecho al Estado: Los Efectos Legales Del Apartheid Institucional En Colombia* (Dejusticia 2013).

[18] de Sousa Santos and García Villegas (n 15) 24–25.

[19] ibid.

[20] Mainstream scholars refer to these strategies as a 'dirty war' waged by the Colombian State. By 'dirty war', they refer to violent penal and military strategies that have blurred the line between legality and illegality, justifying violations to human rights and abuses of power in the name of national security and the defence of public order. See Rodrigo Uprimny and Mauricio García Villegas, 'El Control Judicial de Los Estados de Excepción En Colombia' in Rodrigo Uprimny, Mauricio García Villegas and César Rodríguez-Garavito (eds), *¿Justicia para todos?: Sistema judicial, derechos sociales y democracia en Colombia* (Norma 2006).

[21] de Sousa Santos and García Villegas (n 15).

[22] Moncada Roa (n 2); Orjuela E. (n 2); Bejarano and Pizarro (n 2); García Villegas and Santos (n 2).

[23] García Villegas and Espinosa (n 17).

[24] Manuel Iturralde, 'Emergency Penality and Authoritarian Liberalism. Recent Trends in Colombian Criminal Policy' (2008) 12 Theoretical Criminology 377; Manuel Iturralde, 'Democracies without Citizenship: Crime and Punishment in Latin America' (2010) 13 New Criminal Law Review 309.

long-lasting military campaigns and deploying harsh penal measures which have resulted in the extraordinary increase of incarceration rates.[25] In this sense, the 'crisis' in prisons has, at least in part, resulted from the State's attempts to ensure security and assert its sovereignty.

In this dichotomous reading, sovereignty is understood as a static, self-willed property that is either present or absent: the social contract is conceived as simply being enforced in certain areas (those with institutional presence) and missing in others (in which institutions and the capacity to govern are lacking). However, this static conception ignores the dynamic character of sovereignty as the jural form of relations of political authority.[26] Although the idea of a 'partial' failure of the State may help understand the institutional weaknesses that have generated unconstitutional conditions inside prisons, it is unhelpful in understanding underlying tensions in the formation of political authority, which go beyond merely institutional factors and involve sociological, juristic, and political dimensions. Because of this insufficiency, all that the mainstream reading can tell us about declarations of *USoA*'s in prisons is that, to face a complex socio-economic conflict, the Constitutional Court has tried to enforce the Constitution (understood, in this framework, as the ultimate expression of the partial success of democracy),[27] while the State's institutions have been too weak to enforce the social contract and materialise fundamental rights inside and outside prisons. Sovereignty, in this sense, is confused with the State's capacity to govern, and the Court's intervention is presented as a necessary mechanism to enhance governing power.

Furthermore, prisons cannot be adequately located in the dichotomous cartography found in mainstream literature. By reducing the issue of authority in prisons to a sharp distinction between 'contractualised' and 'savage' spaces, the mainstream view fails to capture a key underlying paradox behind declarations of *USoA*'s: although prisons are meant to be at the centre of the State's ideological claims of sovereignty, embodying the realisation of the legal order through the act of separating offenders from the rest of society, these declarations reveal the extent to which that separation has failed. The walls of prisons are porous: they are not as secluded and isolated from the dynamics of the 'outside' world as we imagine them to be in the sense that, despite the existence of physical walls, lawlessness and disorder seem to have become the rule.[28] In that sense, although punishment presupposes the existence of the sovereign's authority, declarations of *USoA* in prisons entail an official recognition of the failure of this act of separation, as well as the existence of a fundamental incompatibility between the State's power to punish and the legal order that justifies the very existence of that power. Therefore, these declarations amount to a concession of the unauthorised character of the act of separation symbolised by imprisonment.

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[25] Iturralde, 'Emergency Penality' (n 24).
[26] Martin Loughlin, *The Idea of Public Law* (OUP 2004).
[27] Rodrigo Uprimny, 'Judicialization of Politics in Colombia: Cases, Merits and Risks.' (2007) 13 Sur -International Journal on Human Rights; Rodrigo Uprimny and Luz María Sánchez-Duque, 'Constitución de 1991, Justicia Constitucional y Cambio Democrático: Un Balance Dos Décadas Después.' (2013) 71 Cahiers des Amériques Latines
[28] See Libardo Ariza and Manuel Iturralde, 'Tales from La Catedral: The Narco and the Reconfiguration of Prison Social Order in Colombia' in Massimo Sozzo (ed), *Prisons, Inmates and Governance in Latin America* (Palgrave Macmillan 2022).

In addition to this, mainstream accounts fail to capture the complex role that the criminal law has played throughout Colombian history: rather than appearing as the product of a long-term process of modernisation, and as the outcome of a complex historical process of consolidation of a single source of authority, Colombian criminal law —as is the case in other post-colonial contexts— has been a driver of such processes.[29] The deployment of the penal apparatus symbolises the State's aspiration for strong, centralised, and unified authority. However, its excessive and volatile use inevitably reveals the State's incapacity to coherently uphold such claims of authority. In other words, because of its focus on institutional presence and capacity to govern, the mainstream view is unable to capture the contradictory character of the creation of a semblance of absolute authority through mechanisms which are, paradoxically, premised on the weakness of relations of authority.

1.2. Anthropological and sociological approaches: alternative social orders

In response to the mainstream narrative, anthropological and sociological approaches have questioned the centrality of the State in the consolidation of the Colombian social order, focusing instead on the role of unofficial actors in the production of the relations upon which social ordering is based. Rather than seeing State authority as a static and self-willed outcome of institutional presence, anthropological research has focused on the symbolic and material formation of bonds of allegiance, as well as the practices and discourses that have been key to the consolidation of social governance.[30] In this view, illegal actors, rather than 'filling the void' left by the State, have produced a surfeit or 'hyper-presence' of 'state-effects'.[31] More importantly, these unofficial actors have played a central role in the 'practices through which bonds of identification are bestowed (or not) on the agents of the state',[32] that is, in the consolidation of the bonds of allegiance which the State has failed to create and maintain. In that sense, armed actors have acted as *proxies* of statehood, giving 'concrete existence to the inherently unwieldly abstraction of the state in a space where it supposedly doesn't exist'.[33]

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[29] David S Fonseca, 'Reimagining the Sociology of Punishment Through the Global-South: Postcolonial Social Control and Modernization Discontents' (2018) 20 Punishment & Society 54. See Chapter 1 of this thesis.

[30] Ramírez (n 3); Akhil Gupta, 'Viewing States from the Global South' in Christopher Krupa and David Nugent (eds), *State Theory and Andean Politics: New Approaches to the Study of Rule* (University of Pennsylvania Press 2015); Gyanendra Pandey, '"Off-Centred States: An Appreciation" in Cristopher Krupa and David Nugent (Eds), State Theory and Andean Politics: New Approaches to the Study of Rule (University of Pennsylvania Press 2015) 261.' in Christopher Krupa and David Nugent (eds), *State Theory and Andean Politics: New Approaches to the Study of Rule* (University of Pennsylvania Press 2015); Ballvé (n 3).

[31] Winifred Tate, 'The Aspirational State: State Effects in Putumayo' in Christopher Krupa and David Nugent (eds), *State Theory and Andean Politics: New Approaches to the Study of Rule* (University of Pennsylvania Press 2015). Researchers have noted how alternative projects of rule do not necessarily stand in opposition to official regimes of distribution and accumulation, sometimes even contributing to them. Paramilitary groups, for example, have worked along with official development projects aimed at the construction of governance, strengthening official institutions and increasing political participation, both through illegal activities (such as violence and money laundering) and legal ones (capturing government-led projects and controlling local and regional electoral politics). See Ballvé (n 3).

[32] Krupa and Nugent (n 3) 11.

[33] Ballvé (n 3) 9.

Anthropological research shows that, beyond institutional shortcomings, the State has failed to realise its authority because of its incapacity to produce the social relations upon which authority rests. Furthermore, this type of research often presents a critique of the idea of the State as the 'mystical centre' that organises and expresses the interests of the collectivity.[34] In this perspective, such abstraction can only make sense through concrete practices of governance which 'embody' the State, and which are often carried out by alternative actors that have been traditionally described as 'opposing' it, or as filling the vacuum left by its absence. However, rather than being absent from the consolidation of these forms of governance, and against the commonplace notion that areas controlled by those actors have been pushed into a Hobbesian nightmare,[35] this type of research has shown that the idea of the State has played a key symbolic role in the production of conflicting projects of rule, creating a 'hyper-presence' of State effects in those spaces where it is portrayed as missing.[36]

Similarly, criminological research has unveiled the ways in which *narcos* , paramilitaries, and *guerrillas* have reconfigured the social order inside prisons, establishing alternative forms of self-governance which sometimes involve negotiations with official authorities, and in other occasions entail an outright 'replacement' of the State.[37] Just as it has occurred outside prisons, 'organised groups of prisoners have taken over many of the functions that should be performed by the State and that are key to guaranteeing their government and daily operations',[38] achieving a significant degree of stability based on a 'fragile and tense order which may be broken by prisoner groups' struggles to control markets, exact taxes on other prisoners and exercise control within prison pavilions'.[39] The transformations that Colombian *narcos* have introduced to the carceral space are illustrative of this point.[40] As Ariza and Iturralde show, after 'negotiations' between Pablo Escobar and the Colombian State in the 80s, which ended with him 'surrendering' to the government, Escobar was allowed to choose the location and conditions for his sentence. He decided to be 'imprisoned' in a fortress he had built himself, which allowed him to run his business from within, safe from any possible threats. From the moment he was 'imprisoned', he was in complete control of the fortress: he chose the guards that were allowed to work there, paid their salary, filled the prison with whatever luxuries he desired (including a bar and disco, a game room, and a cinema, among others), and even made decisions about the inmates that were allowed to share the 'prison' with him. The State, on the other hand, faded, 'together with its legitimacy and only reach[ed] the

[34] Christopher Krupa and David Nugent, 'Off-Centered States: Rethinking State Theory Through an Andean Lens' in Christopher Krupa and David Nugent, *State Theory and Andean Politics: New Approaches to the Study of Rule* (University of Pennsylvania Press 2015) 11.
[35] Ballvé (n 3).
[36] Tate (n 3); Teo Ballvé, 'Everyday State Formation: Territory, Decentralization, and the Narco Landgrab in Colombia' (2012) 30 Environment and Planning D: Society and Space 603; Ballvé (n 3); María Clemencia Ramírez, 'The Idea of the State in Colombia: An Analysis from the Periphery' in Krupa, Christopher and Nugent, David (eds), *State Theory and Andean Politics: New Approaches to the Study of Rule* (University of Pennsylvania Press 2015).
[37] Ariza and Iturralde (n 28). See also, in other regions and contexts, Skarbek (n 14).
[38] Ariza and Iturralde (n 28) 66.
[39] ibid 70.
[40] ibid 74.

external walls of prison —its function being primarily to protect the *Narco* and his henchmen from external threats'.[41]

The permeability of prisons to structures of the non-carceral society, as well as the State's fading power to control these spaces, point to the instability of the mainstream distinction between the 'contractualised′ areas of urban centres and the 'savage' zones of the marginalised periphery. As mentioned in the previous section, prisons cannot be accurately located in this dichotomous cartography, and their walls are more porous than it seems. While their very existence as physically secluded spaces presupposes the existence of absolute authority,[42] the State's lack of control over life in prison speaks of the fragmentation of that authority, pointing to its unstable and undermined character. The sovereign's claims of authority, in that sense, are not realised through the act of imprisonment: although physical walls exist, there is only a partial separation between those who violate the sovereign's authority and those who do not. Although the physical distinctiveness of prisons is maintained through the state's coercive power, the sovereign's claims of exclusive authority are not materially realised therein. As Iturralde and Ariza argue, 'prisons are a façade of Latin American States' rule and legitimacy: from the outside, they look to society as highly securitized spaces, built to incapacitate dangerous individuals, where the State has sovereign power over the bodies and life of prisoners. From the inside, different rules apply —for the most part, the State is only a peripheral actor in the construction of social order'.[43] It is worth noting, however, that there is a risk of overstating the State's 'absence' in prisons. In fact, recent research has begun exploring the ways in which, rather than passively leaving a vacuum of authority in prisons, States actively enable organised groups of inmates, particularly gangs, to build and project their power inside and outside the prison walls.[44] These alternative forms of governance and coercion arise not because of the state's absence, but precisely because of its actions —that is, the implementation of harsh criminal justice policies which create conditions of overcrowding and disorder in which prison gangs can amass and exert immense influence.[45]

Similarly, anthropological research has shown that, where governance by unofficial actors becomes more stable and long-lasting, it is usually mediated by varied forms of institutionalisation. For instance, armed actors often define and legitimise themselves by reference to the State, co-opting local and regional elections, using State-sponsored conflict resolution mechanisms, and

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[41] Ariza and Iturralde (n 28).

[42] Peter Ramsay, 'The Sovereign's Presumption of Authority (Also Known As the Presumption of Innocence)' [2020] LSE Legal Studies Working Paper No. 15/2020 <https://papers.ssrn.com/abstract=3743730> accessed 26 February 2023; Malcom Thorburn, 'Punishment and Public Authority' in Antje du Bois-Pedain, Magnus Ulväng and Peter Asp (eds), *Criminal Law and the Authority of the State.* (Hart Publishing 2017); Malcolm Thorburn, 'Criminal Punishment and the Right to Rule' (2020) 70 The University of Toronto Law Journal 44; Alan Brudner, *Punishment and Freedom a Liberal Theory of Penal Justice* (OUP 2009).

[43] Ariza and Iturralde (n 28) 82.

[44] Benjamin Lessing, 'Counterproductive Punishment: How Prison Gangs Undermine State Authority' (2017) 29 Rationality and Society 257, 259.

[45] According to Lessing, this entails 'a paradox of state punitive power' […]. State responses to crime, particularly measures like mass arrests and harsher sentences, lead to an increase of overcrowding and other conditions in which prison gangs can flourish. This, in turn, leads to increased leverage on the streets, as 'the harsher, longer, and more likely a prison sentence, the stronger outside affiliates' incentives to stay on good terms with imprisoned gang leaders, and hence the greater prison gangs' coercive power over those who anticipate incarceration'. ibid.

influencing regulatory and legislative procedures in order to give some institutional form to their power, allowing them to strengthen and sustain their control over the territory.[46] Likewise, despite important differences with armed actors outside prisons (and although in some prisons the function of official actors is limited to protecting their perimeter and preventing outbursts of violence), organised groups of prisoners[47] who exercise *de facto* control over prison *patios*[48] often cooperate —with varying degrees of formality— with State officials, particularly guards, because negotiations between official and unofficial actors tends to produce a more stable environment with less frequent explosions of violence.[49]

The anthropological perspective persuasively demonstrates that, beyond severe institutional failures that produce a weak monopoly over violence, 'the more consequential monopoly of the state is the one it has on our political imaginations'.[50] However, the idea of the State in these anthropological approaches seems to be limited to its symbolic dimension, receiving attention only to the extent that it provides the background against which projects of rule and governance are consolidated and sustained in practice.[51] But there is a danger here of leaving aside a key aspect of the idea of the State, which may explain the hold that it has on our political imagination, even in contexts in which the monopoly of violence seems weak and where challenges to official authority abound. The idea of the State, rather than functioning as a mere background for the production of practices of governance, is the very scheme of intelligibility of our political world.[52] Put differently, this idea, along with the institutional forms that embody it (that is, that give shape to the relations of representation that characterise this form of association), 'brings into existence a comprehensive way of seeing, understanding, and acting in the world'.[53] This, in turn, generates a justification of authority as a rightful public power that transcends mere coercion or dominion.[54]

As useful as anthropological research is to understand the fragmented and complex character of Colombian society, these perspectives tend to lose sight of the uniqueness of the State's ideological claims of absolute authority, and the role that they play in the configuration of a particular form of collective association. It is those juridical and political claims of rightful and unitary authority that differentiate the State from both government and governed,[55] and from the

[46] Ballvé (n 3); Ramírez (n 3); Tate (n 3).
[47] Organised groups in prisons tend to reflect similar dynamics to outside groups, and are usually constituted by *narcos*, *guerrilla*, or paramilitary members who take control of 'markets' inside the prison, sometimes maintaining control over operations on the outside. Though these groups are complex and vary greatly amongst regions, they are often headed by a *Cacique* or chief that dominates all cells in a *patio* (prison pavilions), setting a weekly rent for cells, fees for the use of common spaces, allocating cells to inmates for their use, etc. *Caciques* also set 'taxes' for commercial transactions in their *patios*. See Ariza and Iturralde (n 28).
[48] Jails and prisons in Colombia are divided in wings, which are in turn divided into *patios* or pavilions, according to various rationales (health-related reasons, the characteristics of the offence, national origin, higher or lower security, among others).
[49] Ariza and Iturralde (n 28); Skarbek (n 14).
[50] Ballvé (n 3) 170.
[51] Ballvé (n 36); Ballvé (n 3).
[52] Martin Loughlin, *Foundations of Public Law* (OUP 2010) 208.
[53] ibid.
[54] Loughlin, *Foundations of Public Law* (n 52).
[55] ibid.

'competitors' that establish *de facto* authority within its territory. These claims are precisely what lies behind the power to punish: however undermined, claims of political authority are central to the intelligibility of punishment as an expression of a distinctive form of rightful power. The State's power to punish through imprisonment is the embodiment of the normative claims of exclusive authority of the sovereign, as opposed to the merely descriptive claims of *de facto* power over a territory and population held by unofficial actors.[56] The 'crisis' of Colombian prisons, and the declarations made by the Court to try to overcome it, cannot be understood in isolation from the grammar of the State and the political world it is inscribed in.[57]

1.3. A relational approach: punishment and the claims of rightful authority

The authority of the State is often taken for granted as a fixed, self-generated property, resting at the foundation of the power to punish and of the Court's role as the interpreter and guardian of the Constitution. Where it is not, the State seems to lose all claims to a special sort of power, being reduced to a mere negotiator amongst multiple social actors with similar claims and interests. However, declarations of *USoA*'s in prisons shine light on the special character of the State's claims of sovereign authority, although only through an official recognition of the extent to which political authority is undermined —that is, through an official negation of the absolute character of the State's ideological claims. In that sense, these declarations reveal authority as an unstable and contingent relation, rather than a stable, self-generated, and unconditional one. From the point of view of political authority, understood in a relational sense, this official negation occurs at two conceptually different, yet interconnected levels.

At first sight, it may seem like the mere act of punishment reaffirms the sovereign's status as rule-maker, because imprisonment is the authorised legal response to violations of the law —in other words, it embodies the vindication of State authority in response to those who challenge the sovereign.[58] But where punishment is imposed on a massive scale, it seems to betray this premise, revealing, instead, the weakness of the sovereign's claims by discrediting the presumption that there exists a 'certain minimum of voluntary submission' to the law.[59] At an empirical level, the 'crisis' in prisons shows the extent to which the sovereign's law has become exceptional. In Colombia, a combination of the State's institutional incapacity to maintain an effective monopoly of force in the national territory (as highlighted by mainstream accounts), coupled with its inability to generate and maintain bonds of allegiance in many regions (which anthropological accounts

[56] See Chapter 4.
[57] Loughlin, *Foundations of Public Law* (n 52).
[58] See Chapter 4. Thorburn, 'Punishment and Public Authority' (n 42); Thorburn, 'Criminal Punishment and the Right to Rule' (n 42); Ramsay, 'The Sovereign's Presumption of Authority' (n 42); Peter Ramsay, 'Rights of the Sovereign: Criminal Law as Public Law' [2024] LSE Legal Studies Working Paper No. 5/2024.
[59] Max Weber, *The Theory of Social and Economic Organization* (The Free Press 1947) 324.

highlight), have produced circumstances in which such 'minimum' of voluntary submission is itself under question. This means that, despite the fact that punishment entails a vindication of the legal order, and that incapacitation is often equated with crime reduction,[60] increased incarceration presupposes significant levels of disobedience which, by themselves, undermine the sovereign's authority.[61]

At the same time, at an ideological level, declarations of *USoA*'s in prisons reveal an official abrogation of the State's claims of political authority: imprisonment should be an exceptional occurrence under the sovereign's rule, in the sense that, under conditions of strong bonds of allegiance and authorisation, the sovereign's authority will normally be respected.[62] On the contrary, where punishment becomes generalised, and where it is used primarily as an instrument to *generate* authority, its imposition is premised on the assumption that challenges to the legal order have become normalised, and, therefore, that the State's authority is severely undermined. In other words, the greater reliance on penal coercion, the greater the denial of the state's authority requiring a penal response, and the more undermined the underlying political relations will be.[63]

Declarations of *USoA*'s in prisons presuppose that the State's claims of sovereignty are undermined at both empirical and ideological levels. The self-declared generalised and massive violation of the constitutional order presupposes an underlying inability to generate and sustain the relations which are constitutive of political authority —that is, collective bonds of allegiance which express a relation of authorisation and representation between the state and its citizens, symbolic or ideological as it may be. Reliance on the penal system implies an attenuation of those political relations, and the State's display of coercive might only exposes the weakness of the sovereign's ideological claims. Where disobedience is widespread and relations of authorisation are fragile or missing, the State will be unable to generate the type of power that allows its authority to be sustained through time, turning to the continuous expansion of coercion as a way of maintaining a *façade* of authority.

The claims of authority that States seek to realise through imprisonment involve a dimension of legitimacy which characterises and defines this practice as rightful and justified, as opposed to arbitrary and illegitimate coercion. In addition to the two levels at which the State's claims of sovereign authority are undermined, declarations of *USoA*'s in prisons entail an official recognition of the chronically illegitimate conditions under which punishment is imposed. However, paradoxically, it is through these same declarations, which negate the State's claims of

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[60] This effect, however, tends to be 'marginal' or 'minimal' in practice. See Lessing (n 44); Bert Useem, *Prison State: The Challenge of Mass Incarceration* (CUP 2008); M Keith Chen and Jesse M Shapiro, 'Do Harsher Prison Conditions Reduce Recidivism? A Discontinuity-Based Approach' (2007) 9 American Law and Economics Review 1.

[61] Rather than securing obedience and ensuring crime reduction, penal inflation can have the opposite effect by expanding the power of organised groups of prisoners, allowing them to easily take control over life in prisons and strengthen their influence over crime in the streets, while enjoying the additional advantage of the State's provision of security within prisons. See Lessing (n 44). On the reduced and potentially negative effects of incapacitation in terms of crime reduction, see Useem (n 60); Chen and Shapiro (n 60).

[62] This point will be developed in more detail in Chapter 4.

[63] See Ramsay (n 57); Peter Ramsay, 'A Democratic Theory of Imprisonment' in Albert Dzur, Ian Loader and Richard Sparks (eds), *Democratic Theory and Mass Incarceration* (OUP 2016).

political authority, that the Court manages to preserve the State's power to punish, even under conditions that contradict basic constitutional principles. To make up for the absence of those political relations, and the weakness of their juridical manifestation, the Court relies on the Constitution's structure of abstract and rational principles, engaging in an awkward exercise of justification of the same practices that it denounces as inhumane and blatantly immoral.

2. Legitimacy and the justification of unconstitutional punishment

Declarations of *USoA*'s in prisons put the State in a difficult position: a self-declared democratic regime that imposes punishment on a massive scale, under 'infernal' and violent conditions, and in a society characterised by high levels of inequality and structural injustice, finds itself at odds with its own claims of legitimate authority —particularly where legitimacy is understood as compliance with constitutional principles and human rights standards.[64] To manage these conditions of chronic illegitimacy, the Court produces a two-prong strategy of legitimation designed to bring punishment, and penal policy more generally, back into the sphere of constitutional legality. First, through the abstract principles of human dignity and proportionality, the Court reaffirms the State's moral standing to imprison offenders and justifies the moral necessity of punishment, even under conditions that contradict the constitutional order. Second, and on the basis of these principles, the Court establishes technical standards and criteria for the imposition of punishment, creating a sphere of *super-legality* supported on a framework of abstract principles that supposedly restrain punitiveness and constitutionalise penal policy. By doing so, the tribunal justifies the exercise of this coercive power and sustains its imposition in unconstitutional conditions under an unfeasible promise of gradual and progressive attainment of *constitutionality*. The combination of these strategies with the moral justification of punishment produce what I will call inward-looking legitimation,[65] expanding and enhancing the Court's power to intervene in penal policy, despite its little material effects.

2.1. The State's standing to punish offenders: a normative issue?

In the 2013 and 2015 judgments,[66] the Court recognised that declarations of *USoA* in prisons necessarily entail a dimension of chronic illegitimacy that casts doubt upon the overall legitimacy of the Colombian State. As explained in Chapter 2, in Judgment T-388/13, the Court argued that the 'disjointed' and 'volatile' character of criminal justice policy was the main cause behind massive

[64] On the relationship between extreme poverty, punishment, and legitimacy, see Rocio Lorca, 'Punishing the Poor and the Limits of Legality' (2022) 18 Law, Culture and The Humanities 424.
[65] Rodney Barker, *Legitimating Identities: The Self-Presentations of Rulers and Subjects* (CUP 2001).
[66] See Chapter 1, section 4.

violations of the fundamental rights of inmates. To address them, the Court established 'minimum criteria of constitutionality' (encompassing both general principles and technical guidelines relating to conditions of imprisonment) and complex rules for the closure of overcrowded prisons. Meanwhile, Judgment T-762/15 focused on the creation of monitoring mechanisms led by the Court, which included tools such as technical indicators for the diagnosis of existing circumstances and the assessment of progress. In the nearly 700 pages of these two judgements, the Court engaged in a detailed evaluation of the facts (that is, the circumstances and failures constitutive of the *unconstitutional state of affairs*); analyses of reports presented by various institutions involved in the criminal justice system, as well as those submitted by NGO's, academics, and research groups; and lengthy considerations of constitutional principles, making only a few references to the issue of the legitimacy of punishment.[67]

According to the Court, the imposition of punishment in conditions which contradict the Constitution, and which violate the principle of dignity, 'cannot, under any circumstances, be justified'.[68] To be legitimate, the Court argues, punishment must be compatible with the principle of human dignity. The concept of dignity serves a double function: on the one hand, it is presented as a justification of punishment, in the sense that offenders 'fail to respect the dignity of the victim who suffered the harm caused by the offence'.[69] On the other, it serves as a limit to the scope and severity of punishment, in the sense that 'respect to human dignity is a basic requirement of every penal system'.[70] It is precisely State-sponsored violations to human dignity which 'turn [the State's] own penal institutions into centres of massive violations of fundamental rights', a *state of affairs* that is contrary to the Constitution.[71]

The legal content of the right to dignity has been extensively developed in the Court's case law. It appears simultaneously as a 'founding value of the legal order and, therefore the State',[72] a constitutional principle, and an 'autonomous fundamental right'[73] with a broad scope of protection. This scope of protection, in turn, involves the classic Kantian formulation of human dignity —the State must treat citizens as ends in themselves—, which is given constitutional form through three main positive duties by the State: the protection of autonomy (understood as the 'possibility to design a life project and make decisions accordingly');[74] guarantees of 'concrete material conditions for existence' (that is, the State must ensure conditions in which those life projects may unfold);[75] and guarantees of physical and moral integrity (understood as the prohibition of inhuman, degrading, or humiliating treatment or punishment).[76] Declarations of

[67] The effects of the *unconstitutional state of affairs* in prisons on the overall legitimacy of punishment are only discussed in Judgment *T-388/13* (n 9) ¶8.2.1.4, 8.2.5.2, and 8.2.8.1. Some of these passages are cited in passing in *T-762/15* (n 6).
[68] *T-388/13* (n 9) ¶7.9.1.12.
[69] ibid ¶8.2.8.1(iv).
[70] ibid.
[71] *T-762/15* (n 6) ¶65.iii.
[72] *C-143/15* (CCC).
[73] ibid.
[74] *C-147/17* (CCC).
[75] ibid.
[76] ibid.

USoA in prisons imply a recognition that the State has systematically and seriously failed to protect human dignity in all of these dimensions, as well as a more generalised 'denial of human dignity, the founding principle of the *Estado Social de Derecho*'.[77]

Because the Constitutional Court frames the situation in prisons primarily as an issue of human dignity, the question of the legitimacy of punishment is formulated in strictly normative terms. Massive, systematic, and structural violations of this fundamental right of inmates inevitably lead the Court to questioning the extent to which such injustices undermine the State's standing to blame and punish offenders.[78] In the words of the Court,

> A State that violates, in its own prisons and with impunity, the dignity and integrity of persons, loses legitimacy before the eyes of its citizens. One of the main purposes of State institutions is to ensure the existence of minimum life conditions for all persons; to respect the condition of all persons as ends in themselves, instead of using them as means to an end; to respect minimum conditions of existence and not to subject anyone to cruel, inhuman, or degrading treatment. When the state deliberately fails to fulfil its essential purpose, it seriously undermines its very foundations. It dismisses the very reason for its existence. How can it have the authority to impose criminal punishment on individuals, when the penal system carries out and allows acts as grievous as those committed by the most dangerous criminals whom it incarcerates?[79]

As recognised by the Court, the State's moral standing to blame and punish offenders is undermined by inhumane conditions of imprisonment.[80] In the Court's view, it is hypocritical for the State to hold offenders accountable when its own institutions systematically engage in permanent and structural violations of the fundamental rights of citizens. In addition to this, the Court acknowledges that the State shares a significant degree of vicarious responsibility for generalised offending due to its complicity in the maintenance of conditions in which criminality seems to bloom, arguing that the government's own socio-economic policies have made offending 'far more difficult to avoid for some groups because of, for instance, racial or economic inequalities and injustices which the State has the power —indeed, the obligation— to mitigate'.[81] The existence of a profound social and economic crisis (which involves conditions of widespread poverty, unemployment, lack of educational opportunities, extreme exclusion, and inequality) is recognised by the Court not only as a contributing factor to high rates of offending, but also as entailing a disproportionate use of the criminal justice system against particularly marginalised

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[77] *T-388/13* (n 9). For a definition of this term, see Chapter 2.
[78] See Matt Matravers, 'Who's Still Standing? A Comment on Antony Duff's Preconditions of Criminal Liability' (2006) 3 Journal of Moral Philosophy 320; RA Duff, 'Blame, Moral Standing and the Legitimacy of the Criminal Trial' (2010) 23 Ratio 123; Peter Chau, 'Duff on the Legitimacy of Punishment of Socially Deprived Offenders' (2012) 6 Criminal Law and Philosophy 247; Nicola Lacey and Hanna Pickard, 'Why Standing to Blame May Be Lost but Authority to Hold Accountable Retained: Criminal Law as a Regulative Public Institution' (2021) 104 The Monist 265; James Edwards, 'Standing to Hold Responsible' (2019) 16 Journal of Moral Philosophy 437; Victor Tadros, 'Poverty and Criminal Responsibility' (2009) 43 Journal of Value Inquiry 391.
[79] *T-388/13* (n 9) ¶8.2.8.1(iv).
[80] ibid.
[81] Lacey and Pickard (n 78) 271.

groups of the population. According to the Court, criminal justice policy 'mercilessly targets certain social classes, generally those most affected by social and economic inequality'.[82] In the words of the tribunal,

> Structural flaws of the system have been merciless due to the selectivity of the criminal law and the tools for its application, which have caused great harm to the rights of persons who belong to social groups towards whom the State has special constitutional duties of protection. The prior conditions of marginalisation of the imprisoned population are enhanced by the exclusion caused by their deprivation of liberty, even if only through preventive detention.[83]

In these passages, the Court acknowledges the extent to which the State's standing to blame and punish offenders is undermined, due to a combination of structural injustices, the targeted application of the criminal law, and inhumane conditions of imprisonment. The Court presents the question of legitimacy in a brief yet striking way in the passage cited above, arguing that unconstitutional conditions of imprisonment 'undermine the very foundations' of the State, and asking how the State could have 'the authority to impose criminal punishment on individuals' when it commits violations of human dignity that are as grievous as those committed by 'the most dangerous criminals'.[84] However, after introducing this crucial question, the Court quickly shifts its attention to the principles that will allow the tribunal to bring the penal system back in line with the Constitution. Appealing to the principle of human dignity, the Court turns towards the relationship between punishment and the rights of victims. It argues that, regardless of the cruel, inhumane, and degrading conditions under which punishment is imposed, 'it would be unconstitutional and unreasonable to stop using the State's punitive power when the effective enjoyment of the victims' fundamental rights depends on it'.[85] In this framing, the State not only preserves its moral standing to punish offenders, but reaffirms the moral necessity of punishment as an essential component of the rights of victims.[86]

Criminal justice is therefore constructed as a relationship between offenders and victims, rather than offenders and the State, emphasizing the moral and normative aspects of punishment while effacing its political dimension.[87] In the Court's words, 'the State cannot sacrifice the liberty of those in prison in unreasonable and disproportionate ways in order to defend security and the rights of the victim and society in general. But neither can the State do the contrary, that is, it

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[82] *T-762/15* (n 6) ¶37.
[83] ibid ¶7.13.2.
[84] *T-388/13* (n 9) ¶8.2.8.1(iv).
[85] ibid ¶8.2.5.1.
[86] For an analysis of the moral implications of weighing the rights of victims and the interest in security over the rights of persons deprived of liberty, see Libardo José Ariza, *Tres décadas de encierro. El constitucionalismo liminal y la prisión en la era del populismo punitivo* (Siglo Editorial 2023).
[87] It may be argued that, from a political perspective, punishment is also a necessary response to crime, in the sense that it reaffirms and reinstates authority in the face of its violation. However, this is not necessarily the case. The more confident the sovereign is in its authority, the less it will rely on punishment (and on imprisonment, in particular) to deal with criminal offending. In this conception, therefore, punishment may not appear as a logical necessity, and its imposition might be, in principle, more limited. See Ramsay, 'A Democratic Theory of Imprisonment' (n 63).

cannot sacrifice the rights of victims and of society just to protect, without hesitation, the rights of persons deprived of liberty'.[88] In the Court's reasoning, although the State's moral standing to blame offenders is severely undermined due to its responsibility in the maintenance of conditions of injustice which produce criminal offending, it must nevertheless impose punishment under unconstitutional conditions to protect the rights of victims, maintaining the 'appropriateness of holding the wrongdoer *responsible* and to account'.[89] The exclusively normative framing of the issue of legitimacy allows for the paradoxical affirmation of the *unconstitutionality* of punishment and of its justifiability.

Circumventing the difficult question of legitimacy, the Court turns towards the reaffirmation of constitutional principles through the creation of broad-ranging policy guidelines and technical standards, understood as tools that will ensure a disciplined interaction between all branches of power, eventually leading to overcoming *unconstitutionality*. While the moral dimension of the situation in prisons is undoubtedly relevant and has serious implications for the overall perception of the rightfulness of punishment,[90] it reduces the question of legitimacy to the narrow idea of human-rights compliance. In this framing, the penal 'crisis' is constructed as a matter of competing interests, in which the dignity and rights of victims, as well as society's interest in 'security', must prevail over the rights and interests of inmates (who are subjected, indefinitely, to inhumane conditions of imprisonment).[91] However, this narrow perspective cannot, by itself, give a satisfactory answer to the question of the extent to which conditions of chronic illegitimacy may be sustained before reaching a 'tipping point' where 'all bets are off' and 'citizens can properly think of themselves as having returned to the state of nature'.[92]

2.2. *Super-legality*: The legitimation of punishment

In the framework of constitutionalism within which the Court operates, the Constitution is understood as the 'expression of society's fundamental principles and values'.[93] As the guardian of the Constitution, the Court attempts to give the greatest possible effect to constitutional values and principles. In the context of imprisonment, this requires 'establishing adequate public policies which respect the values and principles that inspire the current constitutional order, and that determine when it is justified to imprison someone, as well as establishing guidelines for public policies of those characteristics'.[94] Based on these abstract principles and values, which 'inspire' the constitutional order, the Court carries out a process of justification and practical reasoning that

[88] *T-388/13* (n 9) ¶10.2.3, Fifth point.
[89] Lacey and Pickard (n 78) 267.
[90] Ariza (n 86).
[91] ibid.
[92] Matravers (n 78) 327. From the point of view of political authority, it may be said that conditions of structural injustice, such as extreme poverty, undermine authority to such a great extent that they 'completely subvert[t] the meaning of punishment and rende[r] it into an instance of pure force'. Lorca (n 64).
[93] Martin Loughlin, *Against Constitutionalism* (Harvard University Press 2022) 161. See also Chapter 3 of this thesis.
[94] *T-388/13* (n 9) ¶10.3.5.

is meant to reveal what this invisible constitutional structure requires from penal policy. These principles and processes of practical reasoning constitute a dimension of *super-legality* that allows the Court to re-legitimise punishment, despite the persistence of unconstitutional conditions of imprisonment and the continuous expansion of the scope and severity of the criminal law.

The arena of *super-legality*, that is, of the objective justification of punishment according to abstract constitutional principles to which governmental action is subjected, involves two different yet interconnected strategies through which the Court seeks to re-legitimise and justify the imposition of unconstitutional punishment. First, through the introduction of the principle of proportionality as the ultimate guide of penal policy and as an antidote against populism (which the tribunal considers one of the main causes of the 'crisis'),[95] the Court attempts to limit the scope and intensity of punishment. Second, and on the basis of the overarching principle of proportionality, the Court created 'minimum standards of constitutionality' for criminal justice policy, as well as detailed guidelines and rules for the administration of prisons,[96] including complex mechanisms of diagnosis, assessment, and surveillance requiring disciplined relations of inter-institutional collaboration.

Because legitimate punishment, in the Court's own definition, is that which is proportionate and reasonable, the principle of proportionality is the central component of both strategies. According to the Court, '[t]he character of the deprivation of liberty as a last resort measure (*ultima ratio*) does not imply that it is unconstitutional or illegitimate. This depends on the way in which punitive power is exercised. Its use is legitimate when it is proportional, and illegitimate when it is disproportionate or unreasonable'.[97] The invocation of proportionality both as an inherent limit to punishment and a source for its legitimation is not surprising: this principle has played a key role in contemporary constitutional discourse by 'establishing a criterion of appropriateness' for the exercise of discretionary power 'in the form of a normative relationship between an exercise of power and that (the wrongdoing or harm inherent in or proceeding from the relevant conduct) in relation to which the power is being exercised'.[98] In addition to this, proportionality plays a key role in the construction of authority in the framework of constitutionalism: the self-evident authority of the legal system is fundamentally derived from its demonstrable and rational justifiability.[99] Hence, the principle of proportionality institutionalises a

[95] See Chapter 1.

[96] Among other measures, the Court created rules for the partial or total closure of jails and prisons in cases where it is proved that relevant institutions have failed to take measures to guarantee 'minimum conditions of constitutionality' in prisons. These rules have only been invoked by a small number of institutions and the measure has been largely unsuccessful, leading to the transfer of inmates to temporary establishments of reclusion (such as police stations or Immediate Reaction Units. The Court has recently declared an *USoA* in these temporary facilities due to conditions of overcrowding. See *SU-122/22* (CCC); *T-089/24* (CCC). Ariza and Torres (n 5).

[97] *T-388/13* (n 9) ¶8.2.5.1.

[98] Nicola Lacey, 'The Metaphor of Proportionality' (2016) 43 Journal of Law & Society 27, 31. See also Nicola Lacey and Hanna Pickard, 'The Chimera of Proportionality: Institutionalising Limits on Punishment in Contemporary Social and Political Systems' (2015) 78 Modern Law Review 216.

[99] Mattias Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review' (2010) 4 Law & Ethics of Human Rights 142.

'commitment to a critical, reason-driven process of justice-seeking' which may be 'reasonably accepted even by the party who has to bear the greatest part of the burden'.[100]

In the context of declarations of *USoA*, the Court sees itself as engaging in a reason-driven process of justification, such that punishment may appear as a constitutionally protected practice, rather than an arbitrary display of State power.[101] In terms of the limitation of punishment, proportionality plays two key roles.[102] First, it establishes a 'relationship between the offence and punishment', [103] in the sense that it is only 'constitutionally reasonable to impose deprivation of liberty to a person in proportion to the seriousness of their actions'.[104] Second, proportionality ensures 'that the deprivation of liberty and the criminalisation of a conduct are adequate, necessary and proportional in a strict sense', [105] that is, when weighed against the ends that justify the deployment of the criminal law to protect a constitutional aim or good. To fulfil these functions, proportionality provides an 'analytical framework to assess the necessary and sufficient conditions under which a right takes precedence over competing considerations',[106] allowing the Court to establish 'individually necessary and collectively sufficient conditions for an act to be substantively justifiable in terms of public reason'.[107]

Proportionality therefore plays a fundamental role in determining what constitutional values demand from criminal justice policy. However, in practice, because of the level of abstraction of this and other constitutional principles, it does little to establish significant restraints to punishment. On the contrary, the language of fundamental rights within which proportionality operates may further extend the scope of the criminal law, as 'it is not necessary to make an extraordinary hermeneutical effort to connect a penal prohibition with some principle, right, or constitutional guideline'.[108] Therefore, rather than providing clear restrictions to punishment, proportionality and fundamental rights allow for a potentially unlimited intensification of the State's punitive power if such form of intervention is considered necessary and justified for the protection of a certain right, including, for instance, the victim's rights to truth, justice, and reparation, as well as guarantees of non-impunity.[109]

Similarly, the constitutional aims of punishment (retribution, resocialization, and deterrence)[110] provide no inherent limits to criminalisation:[111] as long as they are perceived as

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[100] ibid 157.
[101] *T-388/13* (n 9) ¶7.5.3.1.
[102] *T-762/15* (n 6) Orden 11.
[103] Gloria Patricia Lopera Mesa, *Principio de Proporcionalidad y Ley Penal. Bases Para Un Modelo de Control de Constitucionalidad de Las Leyes Penales.* (Centro de Estudios Políticos y Constitucionales 2006) 26.
[104] *T-388/13* (n 9) ¶8.2.5.2.
[105] Lopera Mesa (n 103).
[106] Kumm (n 99) 147.
[107] Mattias Kumm, '"We Hold These Truths to Be Self-Evident": Constitutionalism, Public Reason, and Legitimate Authority' in Mattias Kumm, Silje A Langvatn and Wojciech Sadurski (eds), *Public Reason and Courts* (CUP 2020) 159.
[108] Luis Prieto Sanchís, *Justicia Constitucional y Derechos Fundamentales* (Trotta 2003) 280. On the framing of a wide array of interests as components of constitutional rights, see Kumm (n 88); Kai Möller, *The Global Model of Constitutional Rights* (OUP 2015).
[109] See Chapters 2 and 5.
[110] *T-388/13* (n 9) ¶7.11.
[111] Lacey (n 98).

somewhat possible, constitutional aims will function as sufficient reasons to justify the massive imposition of punishment. For instance, according to the Court, resocialization is the primary aim of punishment, as it protects not only the rights of offenders, but also 'constitutes the main guarantee of non-repetition both for victims and for the rights of society more generally'.[112] Although this aim is hardly achieved in practice, largely due to the existence of unconstitutional conditions,[113] the Court insists on this aim as one of the main justifications of the necessity of punishment. The Court's reasoning is circular: legitimate punishment is that which is proportional, and proportionality is assessed against the abstract principles and values that inspire the constitutional order (such as human dignity). This, in turn, determines the constitutionally legitimate aims which justify the imposition of punishment (such as the protection of the rights of victims and the resocialization of offenders), regardless of the persistence of materially unconstitutional conditions.

One of the main reasons why proportionality has failed to provide significant restraints to the severity and scope of punishment is that it requires weighing abstract values and goods against each other in a framework in which there is no natural order according to which they may be balanced.[114] When particular constitutional principles (such as security or dignity) are weighed against the aims of punishment, abstract reasoning does little work to determine which goods and aims require penal protection, or the type and amount of punishment that will be necessary, reasonable, and proportional for their protection. Rather than being exclusively a matter of practical reason, the determination of the aims, goods, and values of the criminal justice system requires a background of dense public discussion and disagreement.[115] In a context in which these discussions have been practically non-existent (due to longstanding political violence and the dominance of clientelism in local and regional politics), the Court is inevitably limited by the abstract characteristics of its own reasoning, and its efforts can only lead to equally abstract standards and criteria with little material impact.

In its attempt to give concrete content to the abstract principles of proportionality and reasonableness, and in line with the idea that the State has a positive constitutional duty to guarantee minimum conditions of welfare for the materialisation of the fundamental rights of inmates (particularly the right to human dignity),[116] the Court created two main mechanisms of structural intervention. First, it established 'minimum standards of constitutionality' for penal policy,[117] that is, a set of general principles and technical criteria for the administration of the penal system (including detailed standards such as the number of beds that must be available to inmates,

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[112] *T-388/13* (n 9) ¶7.11.1.1.

[113] The Court recognises that, due to the inhumane, degrading, and infernal conditions in prisons, lack of resocialization is one of the main violations of the rights of offenders. Rather than providing opportunities for resocialization, prisons have become the contrary, functioning as 'universities of crime' where inmates, 'far from putting an end to their criminal careers, learn to commit offences in even more effective and varied ways, acquiring new contacts and support networks for criminal offending'. ibid ¶7.11.1.3.

[114] Loughlin, *Against Constitutionalism* (n 93).

[115] Lacey (n 98).

[116] *T-388/13* (n 9); *T-762/15* (n 6).

[117] See Chapter 1 (n 1.

the available space per inmate, amount of light per inmate, amount of water per inmate, specific characteristics of daily meals, visitation rights and spaces available for them, availability of health-related services and resources, guidelines for budgets and expenditures, resocialization programmes, etc).[118] Second, the Court created 'baseline indicators' to assess and diagnose gradual progress towards the constitutionality of the penal system. In order to develop these indicators,[119] and due to the lack of information about specific conditions in jails and prisons all over the country, the Court established a technical information-gathering commission led by the Ministry of Justice and created periodic monitoring mechanisms to ensure accountability from all the institutions involved in penal policy.[120]

Through the creation of 'minimum standards of constitutionality' for criminal justice policy and their accompanying measures of supervision, the Court fuses together the juridical logic of fundamental rights with the administrative logic of inter-institutional coordination. Discipline and harmonic collaboration, in the Court's reasoning, will allow each one of the institutions involved in penal policy, with its particular expertise, to provide the evidence and technical tools required to overcome conditions of *unconstitutionality* in prisons, eventually leading to the realisation of the principles and rights enshrined in the Constitution. Furthermore, through the measurement of baseline indicators (an activity which is entirely distinct from normal parliamentary procedures,

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[118] These standards aim to guarantee the right of human dignity, understood in the context of a 'special relation of subjection' between persons deprived of liberty and the State. The standards established by the Court are based on the United Nations 1977 Standard Minimum Rules for the Treatment of Prisoners and the more technical specifications of the International Committee of the Red Cross 2013 document on 'Water, Sanitation and Habitat in Prisons'.

[119] In Judgment *T-762/15*, the Court established a series of indicators that the Special Technical Committee must develop through their data-gathering mission. However, this task has proved to be nearly impossible. Though great efforts were devoted to determining how the indicators were to be understood and measured, a long process of consultation resulted in a fruitless back-and-forth with the Court. See Ministry of Justice and Law, Indicators of Human Rights in the Penitentiary System, First Report, November 2017.

As a result of the initial process of consultation and research, in 2019, the Ministry of Justice and the Ombudsperson presented a document containing around 1.200 indicators to be measured, which were heavily criticised by NGO's and the civil society due to their 'formalist approach' and their limited potential to contribute to the realisation of the rights of inmates. In addition to this, the lack of adequate sources of information to carry out the measurements was highlighted as a key difficulty in the diagnosis and assessment of the indicators. See Dejusticia, 'Indicadores que miden la crisis carcelaria en Colombia deben reformularse' (*Dejusticia*, 25 October 2018) <https://www.dejusticia.org/hace-falta-replantear-los-indicadores-de-seguimiento-y-medicion-de-la-crisis-carcelaria/> accessed 27 February 2023.

In 2020, the Court issued Auto 428 (which monitors progress and the adoption of relevant measures), in which it established guidelines based on the indicators presented by the Ministry of Justice and the Office of the Ombudsperson, and instructed these institutions to adjust some of the indicators and create at least 20 new ones. The Court also determined that the government must provide yearly reports on data-collection and advances made in the assessment and measurement of the indicators.

By August 2022, the Ministry of Justice and the Office of the Ombudsperson carried out the first pilot study to obtain information from a small number of prisons chosen by the Council for Criminal Justice Policy. The pilot revealed various difficulties: members of staff were unfamiliar with the measurements and their requirements, presenting inaccurate information; there was an overwhelming lack of technological tools to save the information, process it and analyse it; and most of the data available was incompatible with the data sets required by the indicators. See Ministerio de Justicia and Defensoría del Pueblo, 'Respuesta al Auto 1629 de 2022 Frente al Seguimiento a Las Órdenes Estructurales Contenidas En Las Sentencias T-388 de 2013, T- 762 de 2015 y SU-122 de 2022.' (2022) <http://www.politicacriminal.gov.co/Portals/0/autos/1629/RESPUESTA%20AUTO%201629%20DE%202022%20COMITE%C2%B4%20INTERDISCIPLINARIO%2015%20Nov.pdf?ver=2022-11-16-142243-797> accessed 27 February 2023. The indicators were still under revision and development in January 2023, pending approval from the Constitutional Court, as stated in *Auto 065 de 2023* (CCC).

[120] *T-762/15* (n 6).

executive action, and judicial proceedings), all institutions involved in the penal system are meant to feed 'scientifically acquired evidence' into the governmental process,[121] always under close supervision by the Court as the ultimate authority. This, in turn, provides the Court with enough 'evidence' to subject policy decisions to constant review against the constitutional principles of reasonableness and proportionality. In this framework, the legitimacy of punishment is derived from the Court's own *modus operandi*: as long as all institutions involved in penal policy can demonstrate their integrity, discipline, and technicality —or at least meaningful efforts to participate in processes of data-gathering and diagnosis—, unconstitutional punishment will remain 'legitimised'.

In practical terms, as shown by the yearly reports presented to the Court, these strategies have not had a significant impact on the moderation of penal policy or the improvement of conditions inside prisons.[122] However, the strategies designed by the Court imply that the government may, in practice, impose punishment under unconstitutional conditions as long as there is some effort to gradually and progressively make penal policy more proportionate and reasonable. Even under conditions of more robust public deliberation about penal policy, this gradualist solution would be problematic for the same reasons: for a considerable amount of time, and perhaps indefinitely, the State would impose punishment under conditions which contravene its own claims of authority. In practical terms, this entails subjecting inmates to inhumane conditions of existence for whatever time is required to bring penal policy in line with the Constitution.[123] But the success of the Court's declarations does not seem to rest in their scarce material effects. Instead, it is important to turn attention to the symbolic and ideological dimension of the process of justification and legitimation that the tribunal's normative and administrative strategies have produced.

2.3. Inward-looking legitimation: the success of constitutionalism?

Because of the persistence of conditions of unconstitutional punishment, it may be thought that the Court's efforts to justify and legitimise punishment have failed: since the 2013 and 2015 judgments, and with the exception of a brief decrease in the rates of overcrowding and imprisonment caused by emergency measures taken during the COVID-19 pandemic,[124] the tendency towards mass incarceration has remained practically unchanged. This apparent empirical failure, however, should not distract from the significant symbolic and ideological impact of the declarations. Practices of legitimation involve inward-looking, self-justifying processes, which play a key role in the activity of making claims of authority. Although this activity is significantly limited

[121] Loughlin, *Against Constitutionalism* (n 93).
[122] Superior Council of Criminal Justice Policy (n 12). See also Ariza and Torres (n 5).
[123] Ariza (n 86).
[124] See Chapter 1.

to 'narrow elite groups',[125] this self-referential process allows the Constitutional Court not only to justify its extraordinary powers, but also to vindicate and sustain the imposition of punishment under unconstitutional conditions.

Declarations of *USoA* in prisons produce rites which represent the 'reality of the state's existence',[126] allowing the Court to identify itself, and the Colombian political project more broadly, with a particular idea of liberal democracy.[127] The self-confirmation of the Court's identity as a beacon of democracy is reflected by mainstream narratives about the role of the tribunal in the protection of the democratic system,[128] as well as its distinguished reputation in the region, where other tribunals have imitated the Court's declarations to deal with their own penal 'crises'.[129] The receivers of this process of self-legitimation are not the citizens themselves, but the institutions involved in the imposition of punishment and those that participate in the design and enforcement of criminal justice policy, as well as tribunals elsewhere in their role as *peers* of the Constitutional Court.[130] Declarations of *USoA*'s function as a self-confirmatory activity which enables the Court 'to function, not with the consent of [the] subjects, but with the consent of their own conception of themselves and their social and governmental identities'.[131]

The fact that, twenty-five years since the first declaration, prisons are still in a state of generalised *unconstitutionality,* may also be interpreted as an expression of the success of the Court's self-justificatory enterprise: the Court has been able to preserve its power as the guardian of the Constitution, as well as the State's standing and power to punish, even under conditions which this supreme body itself has declared to contrive the basic tenets of the Constitution. This has allowed the Court to further expand its power, creating ever more detailed, intensive, and technical interventions in penal policy which combine both normative and administrative logics, subjecting all governmental action in this field to the Court's surveillance and review. In that sense, the success of declarations of *USoA*'s in prisons is not only that they generate more power for the Court, but also that they effectively normalise the imposition of punishment under conditions that contradict the State's own claims of political authority.

In this way, punishment on a scale which would ordinarily be exceptional —ideologically and empirically—, as well as conditions of imprisonment that systematically violate the constitutional order, have become normalised by means of the same declarations that seek to transform them. Through declarations of *USoA*, the Court has constructed such complex

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[125] Barker (n 65) 20.
[126] ibid 86–87.
[127] This is defined in the Constitution as an 'Estado Social y Democratico de Derecho' (see Chapter 3), which combines elements of the classic liberal tradition of protection of civil and political rights with a more 'active' protection of the 'material well-being of all citizens through the enactment and protection of their economic and social rights'. Manuel Iturralde, 'Access to Constitutional Justice in Colombia' in Daniel Bonilla (ed), *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia* (CUP 2013) 362.
[128] Rodrigo Uprimny and Luz María Sánchez-Duque, 'Constitución de 1991, Justicia Constitucional y Cambio Democrático: Un Balance Dos Décadas Después.' (2013) 71 Cahiers des Amériques Latines 33; Mauricio García Villegas, 'Law as Hope: Constitution and Social Change in Latin America' (2002) 20 WILJ 353.
[129] See Chapter 6.
[130] Loughlin, *Against Constitutionalism* (n 93); Alexander Somek, *The Cosmopolitan Constitution* (OUP 2014).
[131] Barker (n 65) 50.

institutional safeguards and inward-looking justifications that it has become virtually impossible for the State to act in absolute contravention of the constitutional order. As long as State institutions can show that they are making some effort to gather information and meet the standards set by the Court, the State will remain justified in imposing punishment under unconstitutional conditions. Unconstitutional punishment is thus legitimised through the same normative language that is used to condemn *unconstitutionality*, appealing to the progressive realisation of constitutional principles in the penal field. Measured by the standards of constitutionalism, the Court's exercise of legitimation is successful: the legitimacy of punishment requires the constant production of practical judgments which lead to an abstract reconciliation between conflicting values, aims, and principles, and the Court's monitoring mechanisms create the space for these judgments to unfold.

This success, however, is limited, in the sense that declarations of *USoA*'s expose the ideological and material tensions behind constitutionalism and its institutional safeguards. On the one hand, the standards of constitutionality, follow-up mechanisms, and broad powers of review established by the Court allow it to generate administrative power in relation to aspects such as the distribution and disposition of resources, the regulation of social conflict, and the (alleged) promotion of the welfare of inmates. On the other, however, the persistence of these declarations undermines the State's claims of political authority,[132] and betrays the insufficiency of purely administrative power. In other words, while the complex structural remedies created by the Court generate power in an administrative dimension, the persistence of generalised unconstitutional conditions undermines the State's ideological claims of rightful authority, exposing the fragility of the relations upon which the legal order is based. Therefore, the Constitution and the penal system seem to be left resting on unstable foundations.

3. Conclusion

The institution of punishment is theoretically based on the existence of the sovereign's legitimate authority. The imposition of imprisonment may therefore be conceived, at first sight, as evidence of the stability and fixed character of authority. However, the generation and preservation of relations of authorisation between the State and the citizens requires constant processes of actualisation and reproduction of the juridical and political justifications which distinguish the State's coercive power as rightful. Declarations of *USoA*'s in Colombian prisons demonstrate the extent to which institutional and relational shortcomings may undermine the State's claims of sovereign authority, to the point where it may be asked whether punishment represents an act of law or, rather, an act of unjustified violence or hostility.[133] At an empirical level, the 'crisis' of the penal system signals the State's incapacity to achieve minimum levels of obedience, as well as its

[132] See Chapters 5 and 7.
[133] Lorca (n 64).

inability to maintain the monopoly of the force inside and outside prisons, despite the excessive expansion of the penal system. At an ideological level, the 'crisis' shows the extent to which the defiance of the sovereign's law has become generalised, normalising disobedience. More importantly, penal inflation and the 'crisis' that it has produced provide evidence of the 'weakening of the relation of authorisation and obligation on which political authority is founded'.[134]

In order to justify the imposition of punishment under unconstitutional conditions, and despite the State's diminished capacity to produce the moral and normative engagement required to sustain its authority, the Court has created a complex combination of juridical and administrative logics that has allowed it to re-legitimise the exercise of this power. Through declarations of *USoA*, the Court provides a justification of punishment according to the moral values underlying the Constitution, bypassing the question of political authority and legitimacy that the 'crisis' points to. The rational and abstract discourse of constitutional principles has produced a dimension of supra-legal principles and inter-institutional collaboration which has allowed the tribunal to maintain the legitimacy of punishment under conditions that blatantly contradict the Constitution.

Despite their limited practical effects, declarations of *USoA* have been successful to the extent that they have allowed the Court to justify and 'legitimise' and normalise *unconstitutionality*. Punishment, though implying a daily violation of fundamental rights, cannot ever be in absolute contravention of the Constitution. As long as the Court retains its powers of periodic review, and State institutions demonstrate that they are making an effort to diagnose and 'overcome' unconstitutional conditions, unconstitutional punishment will be symbolically brought back in line with abstract constitutional principles. The declarations, in this sense, seem to institutionalise the very weakness upon which they are premised: they create a semblance of authority derived from the rational structure of the Constitution while preserving conditions that contradict the most basic foundations of that abstract edifice of constitutional principles. Herein lies the failure of these declarations: though successful in terms of the Court's inward-looking process of self-legitimation, they reveal the actual absence of the Constitution's normative claims. The Constitution's idea of rational, self-standing authority, therefore, is revealed as being insufficient, while the unconstitutional deployment of punishment unmasks the empirical and ideological shortcomings of the political foundations on which the constitutional project depends.

[134] Ramsay, 'The Sovereign's Presumption of Authority' (n 42) 11.

Chapter 4
Constitutionalism, punishment, and authority: Conceptual tensions behind the Colombian case

Though State punishment is presented as an exercise of the sovereign's legitimate authority, declarations of *USoA* in Colombian prisons reveal the extent to which the claims that justify the existence of this institution have been undermined, both ideologically and empirically. Despite their lack of practical effectivity, these declarations have played a key role normalising and justifying the imposition of punishment in 'unconstitutional' conditions, appealing to the progressive realisation of constitutional principles and the protection of the rights and interests of victims. In this chapter, while keeping the Colombian case in sight, I turn to more conceptual and abstract questions that concern the relationship between punishment and authority, as well as the transformation of this relationship with recent constitutional developments, at both domestic and transnational levels. I argue that, despite the particularities of the Colombian case, it is illustrative of broader contradictions and tensions underlying the conceptual relationship between punishment and authority, as well as broader transformations of the role and understanding of this concept in the framework of constitutionalism.

In the first section, I analyse the conceptual relationship between political authority and punishment, focusing on the central role of the State's claims of political authority in the justification, characterisation, and definition of the scope of punishment as a form of legitimate coercion, as opposed to mere force or arbitrary violence. I present a relational understanding of authority which explains the particular institutional form of punishment as a tool for the vindication of the sovereign's laws, and which brings out a tension inherent to punishment: though it is the mechanism through which the State seeks to reaffirm the authority of its laws, the imposition of punishment, particularly where extensive or excessive, implies an official concession of the failure of the claims of authority that justify the existence of this institution. In the second section, I turn to recent transformations in the role and understanding of authority in the framework of constitutionalism, returning to the Colombian example to illustrate how, although claims of authority are presumed by the existence of punishment, a robust understanding of these claims as inherently political has been displaced from the centre of the institutional articulation and justification of punishment. In line with regional and international trends, I show how the entrenchment of victims' rights in the Constitution and the criminal law has not only contributed to the production of the 'crisis' of Colombian prisons, as explained in Chapter 1, but, more importantly, transformed the way in which punishment itself is understood. In the third section, I analyse how recentring the notion of political authority as a relational concept may allow us to identify the contradictions and tensions inherent to those transformations more clearly, while also questioning naturalised assumptions about the role and justification of penal coercion.

1. Punishment and authority: a political relationship

The relationship between punishment and authority, though presupposed by the very existence of this institution, has often been ignored by the literature. Likewise, the concept of authority, though central in modern political theories that underlie existing theories of punishment, has been largely absent from justifications of punishment. Moral accounts of punishment (such as retributive, utilitarian, and hybrid theories),[1] which dominated criminal law theory until recently, frame crime as a moral wrong that triggers the State's necessary response. By doing so, they not only overlook relations of authority as a defining element of the justification of legitimate coercion, but find it difficult to explain and justify the limits and scope of the State's coercive powers. Moral retributivism,[2] on the one hand, aims to show that interpersonal morality requires (or at least justifies) the punishment of offenders, in the sense that they deserve to suffer by virtue of their wrongdoing. However, retributivist theories fail to explain why the State should involve itself in the imposition of what interpersonal morality is thought to endorse or require, particularly through the harsh treatment of individuals. Because our social and political world is not organised around 'a moral order structured in terms of symbolically anchored notions of desert or appropriateness',[3] there is simply no agreement as to what interpersonal morality requires.[4] Weaker forms of retributivism, which focus on the function of punishment as moral communication or censure,[5] are similarly unable to offer a justification of *why* the State has the standing to communicate moral censure through hard treatment.[6] This special entitlement (that is, to legitimately deprive someone of their basic legal rights and liberties) cannot be explained without recourse to the concept of political authority.[7]

Utilitarian accounts, on the other hand, recognise the role of punishment as an instrument of State policy.[8] Because punishment is recognised as an evil, it may only be justified as a means to

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[1] The question of State authority has been largely absent in Anglo-American, continental, and Latin American literature alike, though there has been a recent 'political turn' in Anglo-American literature. Moral accounts have not only been dominant in Anglo Saxon literature (which has become increasingly influential in countries like Colombia), but also in continental approaches and in Latin American legal theory. On the influence of moral approaches to punishment throughout Colombian history, see Velásquez F, *Fundamentos de Derecho Penal. Parte General.* (Quinta Edición, Ediciones Jurídicas Andrés Morales 2013).

[2] In the Anglo-Saxon context, see Michael S Moore, *Placing Blame: A Theory of the Criminal Law* (OUP 1997); Michael Moore, 'The Moral Worth of Retribution', *Placing Blame* (OUP 2010); RA Duff, *Punishment, Communication, and Community* (OUP 2001). Retributivism, though less influential (and relatively unpopular) in the continental context, has re-emerged as a potential limit to preventive theories. See Juan Antonio García Amado, 'Retribución y Justificación Del Castigo Penal' (2017) 1 Revista Foro FICP 1; Alfredo Alpaca Pérez, 'Sobre La Imposición de La Pena Como Retribución' (2020) 22–21 Revista Electrónica de Ciencia Penal y Criminología 1.

[3] Nicola Lacey and Hanna Pickard, 'The Chimera of Proportionality: Institutionalising Limits on Punishment in Contemporary Social and Political Systems' (2015) 78 Modern Law Review 216, 238. See also Thomas Scanlon, *What We Owe to Each Other* (Harvard University Press 1998) 274.

[4] Thorburn (n 492) 13.

[5] RA Duff, *Punishment, Communication, and Community* (OUP 2001); Andrew Von Hirsch and Andrew Ashworth, *Principled Sentencing: Readings on Theory and Policy* (2nd ed., Hart Pub 1998).

[6] Malcom Thorburn, 'Punishment and Public Authority' in Antje du Bois-Pedain, Magnus Ulväng and Peter Asp (eds), *Criminal Law and the Authority of the State.* (Hart Publishing 2017) 12.

[7] Malcolm Thorburn, 'Criminal Punishment and the Right to Rule' (2020) 70 The University of Toronto Law Journal 44.

[8] Thorburn (n 6).

an end beyond hard treatment in itself.[9] The suffering entailed by punishment is understood as a justifiable side-effect of the pursuit of collective goods and aims (including the prevention of crime, the reduction of harmful behaviours, or the attainment of security more broadly). But, as Thorburn argues, while the fair distribution of effective deterrent sanctions may accurately explain the rationale behind regulatory offences, it fails to account for the imposition of punishment in relation to true crimes, for which the offender is considered *deserving* of punishment by virtue of their blameworthiness.[10] Hybrid accounts,[11] attempting to combine elements of both theories, similarly fail to produce 'the right sort of justification for criminal punishment'[12] because they cannot articulate unifying principles to make sense of the justification and limits to State punishment. Lacking the background of a consistent political theory against which different demands and interests may be weighed, tensions between the general aims of punishment and the principles of distribution seem irresolvable.

On the one hand, hybrid theories that define the general justifying aim in accordance with utilitarian principles, constraining the distribution of punishment by reference to retributive considerations,[13] fail to see that distributive considerations are necessarily contained within the general justifying aim: if the general aim is utilitarian, so are the distributive principles —and it is precisely these utilitarian rationales that are particularly vulnerable to objections.[14] Without integrating these justifications to 'those of general political philosophy',[15] there can simply be no answer to the questions of why, and to what extent, punishment is justified. Conversely, in theories that take the general justifying aim to be retributive and the principles of distribution to be based on utilitarian considerations, the commission of a criminal offence gives the State a *prima facie* right to punish the offender (who has forfeited her rights through the commission of the criminal conduct). But the right to punish is limited by consequentialist considerations, with consequentialist arguments (such as the public interest or social protection) providing only sufficient reasons for punishment.[16] The problem of the indeterminacy of the appropriate amount of punishment is reproduced at the level of the general aim of retribution, while there is no explanation of 'why the two principles appealed to need to be blended and how the blending may be achieved coherently'.[17] In other words, these theories offer no explanation of how the different demands of each level of justification shall be balanced if and when they conflict.

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[9] Jeremy Bentham, *A Fragment on Government with an Introduction to the Principles of Morals and Legislation* (Wilfrid Harrison ed, Blackwell 1948); HLA Hart, *Punishment and Responsibility* (Clarendon Press 1968). In the continental context, see Anselm Ritter von Feuerbach, *Revision Der Grundsätze Und Grundbegriffe Des Positiven Peinlichen Rechts* (Henningschen Buchhandlung 1799); Günther Jakobs, *Staatliche Strafe: Bedeutung Und Zweck*, vol 390 (Brill Schoningh 2004).
[10] Thorburn (n 6) 15.
[11] John Braithwaite and Philip Petit, *Not Just Deserts: A Republican Theory of Criminal Justice* (Clarendon 1990); Von Hirsch and Ashworth (n 5). In the continental context, see Claus Roxin, *Strafrechtliche Grundlagenprobleme* (De Gruyter 1973).
[12] Thorburn (n 6) 16.
[13] Hart (n 9).
[14] Nicola Lacey, *State Punishment: Political Principles and Community Values* (Routledge 1988) 52.
[15] ibid 53.
[16] ibid 55.
[17] ibid.

Moral theories fail to offer plausible explanations to the questions of why the State is justified in imposing punishment beyond certain desirable aims, what makes punishment a distinctive form of rightful coercion, and why the deployment of legitimate coercive force is the appropriate response to criminal wrongdoing. Although criminal law theory has recently taken a 'political turn',[18] aiming to better integrate the justification and scope of punishment into a general political theory, political authority has been largely absent as a central articulating concept.[19] Putting political authority at the centre of the justification of punishment —and understanding punishment as an expression of the underlying ideological construction of the political world— may provide a more comprehensive account of the characteristics, scope, and adequacy of punishment, shedding light on problematic aspects that moral accounts tend to obscure. By political authority, I refer to the relationships between governors and governed that produce particular forms of rightful political and constitutional ordering.[20] Authority, in this view, is not reduced to a series of instrumental reasons which guide the conduct of individuals,[21] nor to the mere exercise of domination or instrumental power.[22] It is not merely the outcome of individual consent, and its binding nature is not dependent on this individual act.[23]

Instead, authority encompasses the production, maintenance, and reproduction of a specific political and legal order through an intricate combination of the exercise of might and the production of norms accepted as rightful. While power ensures the conditions for the establishment of social and political ordering, normative claims (that is, claims of rightful power) provide the conditions for the acceptance, recognition, maintenance, and strengthening of that order. Authority, in that sense, is the result of attempts to reconcile power and right through the production of governing institutions capable of maintaining stability, normality, and order.[24] Therefore, the consolidation of authority is not exclusively a matter of a State's capacity to exercise

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[18] Christoph Burchard and others (eds), *The Political Turn in Criminal Law Scholarship* (Bloomsbury Publishing PLC 2024); RA Duff, 'Defending the Realm of Criminal Law.' (2020) 14 Criminal Law and Philosophy 465; Christoph Burchard, 'Criminal Law Exceptionalism as an Affirmative Ideology, and Its Expansionist Discontents' (2023) 17 Criminal Law and Philosophy 17; Christoph Burchard and Antony Duff, 'Criminal Law Exceptionalism: Introduction' (2023) 17 Criminal Law and Philosophy 3.

[19] Exceptions include Peter Ramsay, 'Rights of the Sovereign: Criminal Law as Public Law' [2024] LSE Legal Studies Working Paper No. 5/2024; Peter Ramsay, 'The Sovereign's Presumption of Authority (Also Known As the Presumption of Innocence)' [2020] LSE Legal Studies Working Paper No. 15/2020 <https://papers.ssrn.com/abstract=3743730> accessed 26 February 2023; Peter Ramsay, *The Insecurity State: Vulnerable Autonomy and the Right to Security in the Criminal Law* (OUP 2012); Henrique Carvalho, *The Preventive Turn in Criminal Law* (OUP 2017); Thorburn (n 7); Thorburn (n 6); Rocio Lorca, 'Punishing the Poor and the Limits of Legality' (2022) 18 Law, Culture and The Humanities 424; Rocio Lorca, 'Could We Live Together Without Punishment? On the Exceptional Status of the Criminal Law.' (2023) 17 Criminal Law and Philosophy 29.

[20] Martin Loughlin, *Foundations of Public Law* (OUP 2010); Martin Loughlin, *The Idea of Public Law* (OUP 2004).

[21] See, for instance, Raz's practical account of authority, dominant in most legal scholarship, which focuses on instrumental reason as the defining feature of authority —that is, that we simply have we have good reasons to follow the State's directives. Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of Legal System* (2nd ed., Clarendon 1980).

[22] Max Weber, *Economy and Society*, vol 1 (Guenther Roth and Claus Wittich eds, University of California Press 1978).

[23] The idea that the authority of the state can only be justified over those who consent to it, and that conditions in which the state could extend its authority to all citizens cannot be met, may be found in Leslie Green, *The Authority of the State* (Clarendon 1988). See also Alan John Simmons, *Justification and Legitimacy. Essays on Rights and Obligations* (CUP 2000).

[24] Loughlin, *Foundations of Public Law* (n 20).

pure force, but also of its ability to make believable claims of rightfulness. Authority is not merely an attribute that the sovereign possesses, nor does it reside in any particular laws or institutions. Rather, it is the product of the dialectical relationship between might and right.

Drawing on the evolution of this concept throughout modernity, Loughlin defines authority as the outcome of the dialectical relationship between two distinct notions of power, that is, between *potestas* and *potentia*.[25] *Potentia* —understood as the exercise of instrumental power, the capacity to control and distribute resources, and the relations of subordination and superordination that underlie such control[26]—acquires political form through the institutionalisation of commands, that is, through *potestas,* understood as the 'power generated by being-in-common'.[27] *Potestas,* the right to rule, encompasses the symbolic and imaginative dimension of power through which a group may see itself as embarked in a common project or association, power which is expressed through an institutional dimension in which significant relations of equality may be formulated, and through which collective experiences of governing and freedom acquire meaning.[28] Drawn into a tense relation of alignment, the 'dialectic interplay' of *potentia* and *potestas* allows for the constitution of a particular form of public power,[29] establishing both limits to the exercise of political power and mechanisms for its enhancement. While the State emerges as the scheme of intelligibility of this dialectic interplay,[30] constitutions play the role of allowing the stabilisation of institutional forms, augmenting authority by placing institutional constraints on power.[31]

The source of this modern concept of authority is the *people.* The dialectic of *potestas* and *potentia* is mediated by the symbolic process of imagining a collectivity as universally represented by the sovereign —a process which is itself constitutive of political reality.[32] Herein lies the ideological character of claims of political authority: they give legal and political shape to the 'scheme of symbolic representation of the constitution of collective existence',[33] achieving social and political integration while also masking various forms of domination inherent to constitutional arrangements.[34] Harnessing *potestas* through the act of collective imagination (which can be conceived, or rather idealised reflectively, as one of consent),[35] in which the interests of some are portrayed ideologically —with sufficient acceptance and credibility[36]— as those of all, the constitution establishes an institutional framework that both limits and augments the sovereigns'

[25] Benedict de Spinoza, 'Tractatus Politicus [C1677]' in RHM Elwes (tr), *Tractatus Theologico-Politicus, Tractatus Politicus*, vol I (George Bell and Sons 1891); Michael Oakeshott, *Lectures in the History of Political Thought* (Imprint Academic 2006); Loughlin, *Foundations of Public Law* (n 20) 102–104.
[26] Loughlin, *Foundations of Public Law* (n 20).
[27] Martin Loughlin, *Political Jurisprudence* (OUP 2017) 123.
[28] Jean-Jacques Rousseau, *The Social Contract and the First and Second Discourses* (Susan Dunn ed, Yale University Press 2002).
[29] Loughlin, *Political Jurisprudence* (n 27) 123.
[30] Loughlin, *Foundations of Public Law* (n 20).
[31] ibid.
[32] Martin Loughlin, 'The Constitutional Imagination' (2015) 78 Modern Law Review 1.
[33] ibid 12.
[34] ibid 14.
[35] Paul Ricœur, 'The Political Paradox' in David M Rasmussen (ed), Charles A Kelbley (tr), *History and Truth* (Northwestern University Press 2007); Loughlin, *Foundations of Public Law* (n 20).
[36] David Beetham, *The Legitimation of Power* (2nd edition., Palgrave Macmillan 2013).

potentia (that is, the ability to control resources).[37] The sovereign's right to rule with absolute legal authority is thus conferred through institutional arrangements of governing in which a multitude gets together and binds itself 'through promises, covenants, and mutual pledges'.[38] Sovereignty, in this sense, 'stands as a representation of the autonomy of the political domain and as a symbol of the absolute authority of that domain'.[39]

The State, in its status as rule-maker, claims exclusive and legitimate power to define how life should be organised within its jurisdiction.[40] In this relational understanding of political authority, punishment is the institutional form taken by the State's claims of exclusive authority over its jurisdiction. In other words, punishment may be understood as an institutional expression of the interaction between *potentia* and *potestas*. Punishment plays a fundamental function in the expression of *potentia,* particularly through its role in the production of 'obedient and productive subjects',[41] the maintenance of order and security, and the regulation of conflict.[42] However, it does so not merely by force, but rather by virtue of its institutionalisation, and therefore, its conditioning as rightful. Such conditioning, in turn, builds up or augments political power.[43] Punishment, in that sense, embodies not only the coercive might of the State, but also the ideological claim of universal representation which, in turn, justifies the sovereign's right to rule over the subjects.[44] Through the combination of both dimensions, punishment constitutes the means through which the State restores its law-making authority at the face of the challenges embodied by criminal wrongdoing. Criminal offences imply not only a failure to conform to those rules, but, more importantly, a challenge to the sovereign's status as the sole authority that may define the terms for social interaction.[45] In an ideological sense, criminal offending represents the offender's claim of power to define how she shall relate to others, bypassing and disobeying the sovereign's command.[46] In the face of these challenges, through punishment, the State claims 'the last word over the normative position of the offender' by reasserting its authority over the offender and the jurisdiction more generally.[47]

State punishment can only exist in the context of these particular claims of political authority, which distinguish it from mere coercion and identify it as an exercise of public power.[48]

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[37] Loughlin, *Foundations of Public Law* (n 20).
[38] Hannah Arendt, *On Revolution* (Faber & Faber 2016) 204.
[39] Martin Loughlin, 'Why Sovereignty?' in Richard Rawlings, Peter Leyland and Alison Young (eds), *Sovereignty and the Law: Domestic, European and International Perspectives* (Hart Publishing 2013) 43.
[40] Thorburn (n 6); Loughlin, *The Idea of Public Law* (n 20) 75. These absolute claims should not be understood as merely factual or empirical, but rather, ideological. In that sense, the degree to which these claims are realised in practice may vary throughout history.
[41] Loughlin, *Foundations of Public Law* (n 20) 416. See also Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France, 1977-78* (Palgrave Macmillan 2007).
[42] Loughlin, *Political Jurisprudence* (n 27) 123.
[43] Loughlin, *Foundations of Public Law* (n 20); Loughlin, *Political Jurisprudence* (n 27).
[44] Thorburn (n 7).
[45] Thorburn (n 6); Ramsay, 'The Sovereign's Presumption of Authority' (n 19).
[46] This is not to be understood as a descriptive statement regarding what offenders think or intend during the commission of a crime, but rather as an ideological representation of the legal and political dimension of crime, that is, of offending as understood from the point of view of the law-maker.
[47] Thorburn (n 7) 9.
[48] Lorca (n 19).

Put differently, State punishment, as distinct from pure coercion or domination, expresses a claim of exclusive rightful rule which articulates the institutional framework in which legitimate coercion may unfold.[49] It is precisely these claims that distinguish punishment from other forms of social control such as morality, religion, custom, education, and other social institutions.[50] Punishment serves not only as a mechanism of control, nor just as a manifestation of the claim of effective power over a territory, but also embodies the State's claims of normative power —that is, that the State holds exclusive rule-making power, including the right to determine the content and scope of the law and to create remedies to address the violation of those laws (i.e., the mechanisms that render legal entitlements meaningful by making their vindication possible).[51]

Because of these unique characteristics, it may be said that State punishment transcends the mere use of force. Moreover, claims of political authority preclude the use of force, in the sense that, due to their normative character, they presuppose a dimension of discipline and obedience that is motivated by inclination rather than mere fear of direct force.[52] Although obedience and discipline may be achieved through mere domination, and power asymmetries may be established and preserved through the sole use of force, political authority involves a normative dimension that goes beyond the exercise of purely instrumental power. Punishment and violence may appear as two faces of coercion, one of which seems to seamlessly substitute the other,[53] both playing the function of forcefully generating obedience and introducing order into societies. However, where obedience is only achieved and sustained through coercion, or fear thereof, these circumstances reveal the absence of relationships of authority. Obedience, though a precondition of this political relationship, is not its content.[54] Political authority requires obedience without the necessary instantiation of coercion[55] precisely because in this relationship subordination is conditioned by a sense of right —that is, by a sense that the subordinates consent to subject themselves to the normative standards of the superordinate, whatever their personal persuasions or convictions may be.

That punishment is tied so closely to the State's claims of political authority does not entail that this institution is, by itself, authority-generating: stable and meaningful relations of allegiance and obedience cannot be produced through coercion alone. On the contrary, the imposition of punishment, and particularly of harsh or excessive punishment, can be an indication of the failure

[49] Lacey (n 14) 100.
[50] ibid 100.
[51] Thorburn (n 7).
[52] See Weber (n 22) Chapter 1, s. 7.5, at 37 and s. 16 at 53. The inclination to obey without the exercise of force is a key component of the sovereign's ideological assumptions, which may be undermined both at this conceptual level, or, more explicitly, at the empirical level (that is, through widespread disobedience). Though interrelated, both levels are analytically distinct. See Ramsay, 'The Sovereign's Presumption of Authority' (n 19); Peter Ramsay, 'A Democratic Theory of Imprisonment' in Albert Dzur, Ian Loader and Richard Sparks (eds), *Democratic Theory and Mass Incarceration* (OUP 2016).
[53] Hannah Arendt, 'What Is Authority?', *Between Past and Future* (Penguin Publishing Group 2006).
[54] Arendt, 'What Is Authority?' (n 53) 122. See also Spinoza's reference to Seneca's aphorism: 'no one who relies on the use of violence will be able to govern long', cited in Loughlin, *Foundations of Public Law* (n 20) 104.
[55] Arendt, 'What Is Authority?' (n 53).

of authority.[56] Even though the criminal law is the remedy that seeks to reinstate the State's authority,[57] and must be, in principle, available as a tool for its vindication, the imposition of punishment should be exceptional, an exclusively *ultima ratio* mechanism to be applied only where strictly necessary —that is, only where the bonds on which authority is founded are undermined to a significant extent.[58] The tendency towards mass incarceration, in this sense, implies that the 'normal' conditions of security and protection that the sovereign should guarantee,[59] and which justify the existence of the power to punish, have become somewhat exceptional, making the *ultima ratio* resource for the restoration of authority too frequent —and, consequently, conceding that a wide array of conducts represent a significant or serious threat to the State's authority. When punishment becomes an instrument in the State's attempts to produce conditions of obedience and security, rather than to merely restore them, the State concedes the failure of its own claims of authority.

Such a failure results from a contradiction at the core of punishment. In principle, as the institution designed to vindicate the State's claims of authority, punishment entails a reaffirmation of these claims. However, it may also be destructive of them, in the sense that punishment is premised on an official recognition of the extent to which criminal wrongdoing undermines the State's authority —presumably seriously enough to merit the deployment of this *ultima ratio* resource. In other words, punishment entails a recognition that the factual and normative relations on which authority is constructed have been significantly undermined. In Arendt's words, 'where force is used, authority itself has failed'.[60] Though seemingly unproblematic at an individual scale, because punishment exists precisely to reaffirm the sovereign's claims of authority, the self-destructive character of punishment is revealed more clearly as the scope of punishment expands and trends towards mass incarceration solidify. The more the State resorts to punishment, the more it concedes the weakness of its authority.[61] Because the sovereign constructs its claims of sovereignty as absolute, disobedience should be futile and minimal, and punishment should be an exceptional occurrence.[62] Conversely, the greater the sovereign's reliance on punishment, the clearer its recognition of the weakness of its own claims of authority. Overreliance on punishment reveals an incapacity to sustain the conditions in which claims of authority may be believably made.[63]

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[56] In Thorburn's words, '[t]o have a system of criminal punishment in place is a necessary condition for the state's right to rule, but each time we punish, and especially when we punish harshly, we have failed a little as a society'. Thorburn (n 7) 63. Similarly, citing Rosseau, he argues that criminal wrongdoing should be 'infrequent' and punishment 'even more seldom', while frequent punishment is a 'sign of weakness or slackness in government'. ibid 50.

[57] Thorburn (n 6); Thorburn (n 7).

[58] Rousseau, cited in Thorburn (n 7) 50.

[59] Arguably, the basic conditions that should be guaranteed by the sovereign have developed historically and are no longer limited to security and protection (the 'minimal' obligations in the classic Hobbesian view), but may also include conditions that we consider 'essential' for the sovereign's claims of political authority, such as a certain degree of equality and accessibility of basic resources. See Lorca (n 19).

[60] Arendt, 'What Is Authority?' (n 53) 92.

[61] Ramsay, 'The Sovereign's Presumption of Authority' (n 19).

[62] ibid 10–11.

[63] Ramsay, 'The Sovereign's Presumption of Authority' (n 19); Ramsay, 'Rights of the Sovereign' (n 19).

The 'crises' of Colombian prisons, and the Constitutional Court's attempts to manage them through declarations of *USoA*, may be understood as a stark manifestation of the contradictions and tensions that arise in the penal field due to high levels of inequality and political exclusion, the State's incapacity to generate collective normative bonds, and widespread challenges to the State's monopoly of force,[64] all situated within a broader context of colonial and neo-colonial projects of rule.[65] But, even in the context of these overwhelming challenges, claims of authority, however undermined, still underlie the characterisation of punishment as a specific expression of public power. Although the term 'authority' is largely absent from the judgments in which the Court has made these declarations, the lack of an effective monopoly of the use of force has been recognised as a key issue behind the penal 'crisis'.[66] Moreover, in other judgments, the Court has recognised that the monopoly of the use of force is an essential condition for the 'materialisation of democracy' and 'constitutional aims and principles'.[67] In that sense, citing Weber, the Court has recognised that the use of force plays a key role in the 'enforcement of the law',[68] while also insisting on the 'exceptional character of the use of force' [69] and *ultima ratio* nature of punishment.[70] According to the Court,

> [T]he primary and indispensable conditions for the existence of a legal order are, on the one hand, the existence of State power to impose compliance with the law on those persons who are not willing to obey spontaneously, and, on the other hand, the existence of an institutional structure willing to voluntarily apply the law. Just like the State is a condition of possibility of the law, effective power is a condition of possibility of the State. State regimes are denaturalised where norms that restrict the indiscriminate use of force become ineffective.[71]

It is telling that the question of authority, beyond these theoretical observations and the recognition of the extent to which armed actors have endangered the monopoly of the use of force (inside and outside prisons),[72] has been largely absent from the Court's declarations of *USoA* in prisons. The tensions hinted at above, which arise when focus is placed on the destructive effects that punishment may have on authority, remain obscured by the Court's emphasis on individual rights —be it those of persons deprived of liberty or those of victims—and abstract constitutional principles. Such absence may be explained not just because of the Court's lack of attention to these

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[64] See Chapter 3.
[65] Ana Aliverti and others, *Decolonizing the Criminal Question: Colonial Legacies, Contemporary Problems* (OUP 2023); Manuel Iturralde, 'The Weight of Empire: Crime, Violence, and Social Control in Latin America—and the Promise of Southern Criminology' in Ana Aliverti and others (eds), *Decolonizing the Criminal Question* (OUP 2023).
[66] *C-082/18* (CCC). See also Chapter 3.
[67] See Article 223 of the Constitution. The idea of the monopoly of the use of force has been analysed mainly in cases concerning the use of weapons and arms, including cases concerning the right to life of officials in the armed forces (*C-430/19*); police powers and the participation of non-official actors 'in support of police actions and functions' (*C-082/18*); and the possession or use of weapons by civil actors (*C-296/95*, *C-572/97*, *C-1145/00*, *C-082/18*, *C-867/10*).
[68] *C-082/18* (n 66) ¶8.
[69] ibid ¶9.
[70] *T-388/13* (CCC) ¶8.2.5; *T-762/15* (CCC) ¶52.
[71] *C-296/95* (CCC).
[72] See Chapter 3, section 1.1.

questions, nor because of a mere refusal to engage with complex political issues. Instead, lack of attention to these issues may be attributed to the marginal role of the concept of political authority in the architecture of the 1991 Constitution. Despite remaining central to the very existence of the institution of punishment, political authority has been displaced as a core constitutional concept, and attention has turned towards internal cogency within a system of abstract principles and values inherent to the Constitution. Meanwhile, in the field of punishment, attention has turned towards victims' rights and anti-impunity as the central concepts for the justification and definition of the scope of punishment.

2. Punishment and the Constitution: the displacement of authority and the centrality of victims' rights

The notion of political authority rests at the foundation of modern political thought,[73] shaping the very scheme of intelligibility of the State and the constitution,[74] and marking the shift from the incontestable authority of divinely ordained Kings to the autonomous politico-legal entity of the State.[75] This notion exerted great influence on the Latin American elites' projects of rule throughout the nineteenth and twentieth centuries.[76] Inspired by the American Constitution and its subsequent developments, most Latin American countries adopted a model of *negative constitutionalism,* with the constitutional text aiming to establish constraints on governmental power while also enshrining a distinction between the private and public spheres that helped 'protect the interests of dominant property owners'.[77] However, with more recent developments of constitutionalism, constitutions have become a tool for the advancement and promotion of ideals, values, and principles implicit in the rational, internally cogent constitutional architecture.[78] Whether as a positivist strategy to secure the autonomy of the law from political or moral dimensions,[79] or as a consequence of the anti-positivist exaltation of the intrinsic morality of the

[73] Thomas Hobbes, *Leviathan* (Penguin 1981); John Locke, *Two Treatises of Government and A Letter Concerning Toleration* (Ian Shapiro ed, 1st edn, Yale University Press 2003); Rousseau (n 28); Alexander Hamilton, James Madison and John Jay, *The Federalist Papers* (Michael A Genovese ed, Palgrave Macmillan 2010).
[74] Loughlin, 'The Constitutional Imagination' (n 32).
[75] Loughlin, 'Why Sovereignty?' (n 39).
[76] On these projects of rule in the Colombian context, see Chapters 2 and 3. On the Latin American context more broadly, see Roberto Gargarella, 'El Periodo Fundacional Del Constitucionalismo Sudamericano (1810-1860)' (2003) 43 Desarrollo Económico. 305; Roberto Gargarella, *Latin American Constitutionalism, 1810-2010: The Engine Room of the Constitution* (OUP, 2013).
[77] Loughlin, 'The Constitutional Imagination' (n 32); Gargarella (n 76).
[78] Loughlin, 'The Constitutional Imagination' (n 32).
[79] Hans Kelsen, *Introduction to the Problems of Legal Theory: A Translation of the First Edition of the Reine Rechtslehre or Pure Theory of Law* (Bonnie L Paulson and Stanley L Paulson trs, Clarendon 1997); Neil MacCormick, 'Beyond the Sovereign State' (1993) 56 Modern Law Review 1.

law,[80] the notions of political authority and sovereignty, understood in the sense explained above, have been 'radically displaced'[81] from the centre of legal theory.

The dominance of normativism and, more recently, of its cosmopolitan anti-positivist variant,[82] has led to the consolidation of a world-view in which the source of the law is located not in the *people,* but rather in the objective, rational, and abstract construction of constitutional principles.[83] The political nature of authority is therefore effaced, with the constitution appearing as an objective, universal, autonomous, self-generated, and authoritative normative scheme to which all aspects of social life are subjected. Authority, in this context, may be understood simply as adherence to those self-standing principles.[84] However, as illustrated by declarations of *USoA* in Colombian prisons, this theory of law is 'far removed from the world we inhabit'.[85] Moreover, in relation to the concepts of authority and sovereignty, constitutionalism contains a 'more basic theoretical difficulty'[86]: this normative framework, as 'rational' and internally cogent as it may be, cannot be enforced or applied —and, therefore, cannot meaningfully transform reality, or 'bridge the gap' between reality and the constitution— without an underlying structure of political power and material relations that may underpin legal validity. In the absence of those conditions, the normative scheme of the constitution is likely to fail to achieve social integration, and likely to produce further political fragmentation.[87] The *unconstitutionality* of punishment in Colombia is illustrative of the effects of these constitutional tensions in the penal sphere.

As explained in Chapter 2, the 1991 Constitution sought to establish a clean break with Colombia's violent past, and was enacted with the hope that it would achieve an integrative effect and finally bring peace.[88] The Constitution incorporated a generous bill of rights and principles, along with strong mechanisms for their protection, which were considered by many to have immense emancipatory potential, particularly for groups that had been excluded from politics from

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[80] Mattias Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State' in Jeffrey L Dunoff and Joel P Trachtman (eds), *Ruling the World?: Constitutionalism, International Law, and Global Governance* (CUP 2009); Ronald Dworkin, *Law's Empire* (Fontana Press 1986); Robert Alexy, *A Theory of Constitutional Rights* (OUP 2002).

[81] Hans Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts*, cited in Loughlin, 'Why Sovereignty?' (n 39) 35.

[82] Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State' (n 80); Kai Möller, *The Global Model of Constitutional Rights* (OUP 2015); Mattias Kumm, '"We Hold These Truths to Be Self-Evident": Constitutionalism, Public Reason, and Legitimate Authority' in Mattias Kumm, Silje A Langvatn and Wojciech Sadurski (eds), *Public Reason and Courts* (CUP 2020); Felipe Curcó Cobos, 'The New Latin American Constitutionalism: A Critical Review in the Context of Neo-Constitutionalism' (2018) 43 Canadian Journal of Latin American and Caribbean Studies 212; Daniel Bonilla Maldonado, *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia* (CUP 2013).

[83] Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State' (n 80); Mattias Kumm, 'Who Is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law' (2006) 7 German law journal 341.

[84] Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State' (n 80); Loughlin, 'Why Sovereignty?' (n 39) 40–42.

[85] Loughlin, 'Why Sovereignty?' (n 39) 42.

[86] ibid.

[87] Loughlin, 'The Constitutional Imagination' (n 32) 23.

[88] Rodrigo Uprimny and Luz María Sánchez-Duque, 'Constitución de 1991, Justicia Constitucional y Cambio Democrático: Un Balance Dos Décadas Después.' (2013) 71 Cahiers des Amériques Latines 33; Astrid Liliana Sánchez Mejía, *Victims' Rights in Flux: Criminal Justice Reform in Colombia* (Springer International Publishing AG 2017).

the moment of independence.[89] However, at the same time, the Constitution contemplated measures designed to insulate the markets from democratic pressure and to ensure economic freedom,[90] significantly restricting the potential of redistributive and socio-economic policies, and perpetuating conditions of exclusion and inequality.[91] Despite its limited transformative effects on structural socio-economic conditions of exclusion, this constitutional framework brought forth significant transformations of the conceptions of sovereignty and authority that had been dominant from the nineteenth century onwards.

From 1810 to 1991, notions of the 'general will' rested behind the scheme of *negative constitutionalism* that characterised most of Colombia's constitutional history —constitutions which, as described in Chapter 1, failed to produce an integrative effect because they played a merely ideological function, bolstering authoritarian and elitist interests,[92] enhancing socio-economic exclusion, and unsuccessfully sustaining claims of universal representation that had little hold on the collective imagination. Despite their weak credibility, claims of sovereignty rested behind the Colombian State's deployment of coercion, both through ordinary and extraordinary means, in its attempts to defeat armed actors, supress political opposition, and maintain an illusion of strong 'authority'.[93] But with the constitutional transformations of the 1990s, authority came to be (miss)understood as a quality inherent to the constitutional architecture of rights and principles, interpreted through standards of practical reason.[94] After 1991, the Constitution was not only conceived as a tool to constrain the State's powers (including exceptional ones, as explained in Chapter 2), but, primarily, as one designed to promote fundamental aims and values.[95]

Where does punishment fit in this understanding of authority? Although punishment remains closely tied to the State's claims of authority, in the sense that it is constructed as the consequence of the violation of the sovereign's absolute commands, the framework of the 1991 Constitution has produced an immense shift in the penal field. As explained in Chapter 1, punishment has appeared, throughout Colombian history, as a key driver in projects of modernisation and state-building. Before the constitutional developments of the 1990s, the

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[89] Mauricio García Villegas, 'Law as Hope: Constitution and Social Change in Latin America' (2002) 20 WILJ 353; Rodrigo Uprimny, 'Judicialization of Politics in Colombia: Cases, Merits and Risks.' (2007) 13 Sur -International Journal on Human Rights; Manuel Jose Cepeda-Espinosa, 'Judicial Activism in a Violent Context: The Origin, Role, and Impact of the Colombian Constitutional Court' (2004) 3 Washington University Global Studies Law Review.

[90] Helena Alviar, 'Neoliberalism as a Form of Authoritarian Constitutionalism' in Helena Alviar and Günter Frankenberg (eds), *Authoritarian Constitutionalism: Comparative Analysis and Critique* (Edward Elgar Publishing 2019); Wendy Brown, *Undoing the Demos: Neoliberalism's Stealth Revolution* (Zone Books 2015); Jorge Andrés Díaz Londoño, 'Estado Social de Derecho y Neoliberalismo en Colombia: Estudio del cambio social a finales del siglo XX' (2009) 11 Revista de Antropología y Sociología: Virajes 205.

[91] Manuel Iturralde, 'Democracies without Citizenship: Crime and Punishment in Latin America' (2010) 13 New Criminal Law Review 309.

[92] Hernando Valencia Villa, *Cartas de Batalla. Una Crítica al Constitucionalismo Colombiano* (Cerec–Universidad Nacional de Colombia 1987); Gargarella (n 76).

[93] See Chapter 1.

[94] Mattias Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review Rights, Balancing & Proportionality' (2010) 4 Law & Ethics of Human Rights 140; Diego López, *El Derecho de Los Jueces: Obligatoriedad Del Precedente Constitucional, Análisis de Sentencias y Líneas Jurisprudenciales y Teoría Del Derecho Judicial* (Ediciones Uniandes 2006); Rodolfo Arango, 'Derechos, Constitucionalismo y Democracia' (2004) 33 Serie de Teoría Jurídica y Filosofía de Derecho 193.

[95] See the preamble of the 1991 Constitution.

deployment of the penal apparatus was constructed, generally, as a strategy for the consolidation of an effective monopoly of the use of force. Widespread disobedience was normatively constructed as a situation requiring 'exceptional' measures, though the continuous use of emergency powers betrayed the implausible character of the State's claims of authority. Similarly, as explained in Chapter 2, though states of exception had already been institutionalised in the scheme of *negative* constitutionalism of the 1886 Constitution, implying a significant degree of normalisation, they were formally constructed as exceptional powers.

But, with the enactment of the 1991 Constitution, states of exception were further entrenched into the constitutional architecture, regulating them in a more detailed manner and leading both to less formal declarations, on the one hand, and a more subtle incorporation of emergency penal features into ordinary criminal law, on the other. Meanwhile, discourses of security, anti-impunity, and victims' rights produced a normative shift in the conception of crime and insecurity as significant collective experiences.[96] As the 'war on drugs' transformed into a more general 'war on crime', security gained prominence as an overarching concept behind penal policy. The Constitution had incorporated discourses of victims' rights and anti-impunity into the architecture of constitutional principles, allowing various governments to disguise repressive policies through the rhetoric of human rights. While these transformations have unfolded in a particular way in the Colombian context, they are, by no means, exclusive to Colombia, and have resulted from the complex interaction between domestic, regional, and international trends. The displacement of political authority from the core of constitutional thought, as well as the weight given to individual rights and accountability, have produced a shift in the political relevance of the relationship between the offender and the victim —as opposed to the State and offenders—,[97] as well as a discursive emphasis on anti-impunity and security,[98] which have affected both the scope of the criminal law as well as the justification of punishment as necessary for the satisfaction of victims' rights and interests.

The local development of these transformations in the penal sphere was not the immediate outcome of the 1991 Constitution, although criminal justice reforms and the fight against impunity were fundamental concerns during the discussions of the National Constituent Assembly.[99] As explained in Chapter 1, the Constitution established a positive obligation for the State to effectively satisfy and realise the rights of victims, as part of the protection of their rights to peace, life,

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[96] Chapter 1.

[97] Ramsay, 'The Sovereign's Presumption of Authority' (n 19); Ramsay, *The Insecurity State* (n 19); David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Clarendon 2001); Jonathan Simon, *Governing through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (OUP 2007).

[98] Ramsay, *The Insecurity State* (n 19); Karen Engle, 'Anti-Impunity and the Turn to Criminal Law in Human Rights' (2015) 100 Cornell Law Review 1069.

[99] César Rodríguez-Garavito, *La Globalización Del Estado de Derecho* (Universidad de los Andes 2009); Rodrigo Uprimny, César Rodríguez-Garavito and Mauricio García Villegas, 'Justice and Society in Colombia. A Sociolegal Analysis of Colombian Courts', in Lawrence M Friedman and Rogelio Pérez-Perdomo (eds), *Legal Culture in the Age of Globalization: Latin America and Latin Europe* (Stanford University Press 2003).

personal integrity, justice, and reparation.[100] But the figure of the victim gradually gained its central role in the penal system both through the domestic incorporation of regional and international standards on the rights of victims to truth, justice, and reparation, on the one hand; and through the imposition, appropriation, and adaptation of these trends through reforms to the criminal justice system, on the other. Both processes went hand in hand, each playing a fundamental role in Colombia's particular trajectory in the local iteration of broader global trends. The incorporation of regional and international standards,[101] mostly advanced by the Constitutional Court through the interpretation of constitutional principles in the light of international conventions,[102] preceded the crystallisation of these developments in domestic legislation. In the context of crude and longstanding violence, and despite competing visions regarding the definition and implications of the rights of victims, the figure of the victim quickly and unsurprisingly gained prominence not only in electoral campaigns and popular political discourse, but also in the design and justification of developments in the penal sphere.[103]

Until 2002, the rights of victims were legally restricted to economic compensation for the harms suffered,[104] and victims only 'participated' in criminal proceedings through a civil lawsuit which concerned measures for compensation and restitution.[105] Well before legal reforms on the matter, and even before the Court formally overruled its previous doctrine on the conception of the victim as a civil party,[106] the Constitutional Court started developing the idea that, in line with the principles of the 1991 Constitution,[107] victims had rights to truth, justice, and reparation, all of which went beyond mere civil compensation.[108] Initially, the Court explored this idea in the context of offences committed by members of the armed forces.[109] Though the rights of victims were not central to many of these cases —which dealt with the type of offences that fell within the

[100] See articles 22, 11, 12, and the preamble of the 1991 Constitution. See also Dejusticia, '30 Años de Deudas Con Las Víctimas - "La Constitución de La Gente": 30 Años de Una Carta Que Evoluciona.' <https://www.dejusticia.org/especiales/30-anos-de-la-constitucion-de-1991/columnas/30-anos-de-deudas-con-las-victimas/> accessed 17 April 2023.

[101] The incorporation of international instruments and standards has been justified on the basis of the 'block of constitutionality' established in Article 93 of the 1991 Constitution. See Chapter 1 (footnote 114).

[102] Though the Court was the main leader in the official incorporation of international trends, the role of human rights activists should not be understated. Domestic and international NGO's provided the material that would allow these developments to unfold, firstly by engaging actively with regional tribunals and UN bodies (a trend which started in the 1980s through reporting and engagement with the Inter-American Commission), and second, by making *tutelas* and actions of constitutionality as part of a broader strategy of litigation. See Sánchez Mejía (n 88).

[103] Manuel Iturralde, 'Colombian Transitional Justice and the Political Economy of the Anti-Impunity Transnational Legal Order' in Gregory Shaffer and Ely Aaronson (eds), *Transnational Legal Ordering of Criminal Justice* (1st edn, CUP 2020).

[104] Decree 2700 of 1991. In *C-293/95* (CCC), the Court argued that the content of victims' rights was exclusively related to compensation, which could be obtained through engagement in criminal or civil proceedings.

[105] The 'civil party', that is, the victim, had access to the case *dossier,* and could participate in hearings, make submissions, request restrictions to the defendant's property (*medidas cautelares*) to ensure payment of future compensation, and appeal decisions throughout the proceedings. 1991 Code of Criminal Procedure, articles 48 and 52.

[106] Sánchez Mejía (n 88).

[107] Particularly the principle of dignity (article 1), the right to honour (article 15), the right to reputation (article 21), and the constitutional model of participatory democracy (article 2).

[108] Similar ideas were found in the case law of the Interamerican Court of Justice, which largely influenced the Court. See Alberto Nanzer, 'La Satisfacción de La Víctima y El Derecho al Castigo' in Daniel Pastor (ed), *El sistema penal en las sentencias de los órganos interamericanos de protección de los derechos humanos* (AD-HOC 2013).

[109] *C-293/95* (n 104); *C-1149/01 (Dissenting Opinion)* (CCC).

jurisdiction of military courts—, the *obiter dicta* on the matter pointed in the direction that had already been taken by the Inter-American Court of Human Rights [IACtHR].[110] This regional tribunal had been the first to bring attention to the State's 'positive obligations' regarding the protection of victims' rights.[111] According to the IACtHR, impunity implied not only a failure to remedy rights violations, leaving victims 'defenceless',[112] but, more importantly, constituted a 'unique' violation of human rights due to the State's failure to comply with its positive prosecutorial and punitive duties.[113]

These ideas were slowly introduced into the Constitutional Court's own exercise of constitutional interpretation. In a dissenting opinion to judgment C-293 of 1995 (in which the majority of the Court held that the status of victims in criminal proceedings was that of civil actors with an essentially economic interest),[114] the minority argued that States have a positive duty to 'prevent, investigate, and sanction all violations of human rights', particularly those produced by criminal wrongdoing.[115] In that sense, the minority argued, victims have a 'right, within reasonable limits, to demand that the State carries out all necessary efforts to clarify unlawful acts and to sanction, within the framework of criminal justice policy, […] those liable' of criminal offences.[116] These arguments were picked up a few years later by the Court, when the tribunal was called upon to decide on the constitutionality of a number of articles of the Military Penal Code which excluded victims from participation in this jurisdiction.[117] According to the Court, victims had fundamental rights to truth, justice, and reparation, all of which were violated due to their exclusion from criminal proceedings under the military jurisdiction. Declaring said articles of the Military Code *invalid,*[118] the Court insisted on the need to ensure that criminal proceedings respect victims' rights

[110] *Case of Velásquez Rodríguez v Honduras Judgment of June 29, 1988* (IACtHR).
[111] Engle (n 98) 1092.
[112] *Case of Barrios Altos v Peru Judgment of March 14, 2001* (IACtHR).
[113] The IACtHR understands impunity as 'the lack of investigation, prosecution, arrest, trial, and conviction of those responsible for the violation of the rights protected by the American Convention'. *Case of the Ituango Massacres v Colombia Judgment of July 1, 2006* (IACtHR) ¶229; *Case of the "Mapiripán Massacre" v Colombia Judgment of September 15, 2005* (IACtHR) ¶237.
[114] This case concerned the constitutionality of article 45 of Decree 2700 of 1991, which regulated procedural aspects of victims' participation in the criminal justice system. The plaintiff argued that this law was unconstitutional because it limited the victims' rights of access to justice, as it limited their capacity to participate in the investigative stage of the criminal procedure. The Court decided that the Decree was constitutional, stating that the participation of victims was limited to obtaining economic compensation. A similar position was held, though at an individual level, in *tutela T-275/94*. A detailed explanation of why the Court may have reached this 'conservative' or traditional position in regard to the rights of victims may be found in Sánchez Mejía (n 88) 35–37.
[115] *C-293/95* (n 104) Dissenting Opinion. Citing *Case of Velásquez Rodríguez v. Honduras. Judgment of June 29, 1988*. (n 110).
[116] ibid.
[117] Articles 107, 108 no. 3, and 305 of Law 522 of 1999 (Military Penal Code), analysed in *C-1149/01* (CCC).
[118] Rough translation of the term 'inexequible', which entails 'an order for state authorities and private parties not to apply the law or, in other cases, the power not to apply it'. This differs from declarations that a law is 'unconstitutional' (which refers to the incompatibility between a norm and the Constitution), in the sense that *inexequibilidad* refers to the effect of 'expelling' the law from the legal order due to its *unconstitutionality* (inconstitucionalidad). *Inexequiubilidad* is the necessary consequence of *unconstitutionality*. *C-329/01* (CCC).

beyond mere economic compensation, that is, the rights to truth, justice, and reparation, including the 'punishment of offenders' where appropriate.[119]

In 2002, through legal reforms, this reasoning was extended to ordinary criminal proceedings. In its constitutional review of articles 30, 47, and 137 of the new Code of Criminal Procedure,[120] which established a more active role for victims (as part of broader reforms that introduced accusatorial elements to the Colombian penal system),[121] the Court held that the rights of victims encompass not only economic compensation, but, more importantly, the rights to truth, justice, and reparation.[122] These ideas were further developed in other judgments, in connection with the reform of Article 250 of the Constitution by Legislative Act 03 of 2002, which established that the General Attorney had the duty to request whatever measures necessary for the 'protection of the community and, especially, of victims',[123] including preventive detention as a mechanism to guarantee the victims' rights to truth and justice.[124] In addition to this, although regional and international developments regarding victims' rights focused on serious violations of human rights, the Colombian Constitutional Court did not hesitate to extend the scope of victims' rights by arguing that their protection 'in domestic legislation is not limited to said minimal protection, but also includes lesser offences'.[125] Despite recognising that the aims of the criminal procedure are not exclusively retributive, and that the criminal justice system should not become a 'mechanism which solely chases the punishment of offenders',[126] punishment was presented as an essential component of victims' rights in relation to all forms of criminal wrongdoing.

While the Court developed and expanded its case law on victims' rights relatively quickly, legal reforms brought international developments into domestic legislation in a slower and much more limited manner, largely due to political disagreement and conflicting interests between various social actors, particularly regarding the exact meaning of victims' rights and the duties that emerged from them.[127] For instance, the reform to the Code of Criminal Procedure of 2004 included an extensive list of victims' rights, written in somewhat vague terms, accompanied by few mechanisms for their enforcement and application. Academics and activists reacted to the 'failures' of this reform both by criticising its shortcomings, and, more importantly, by engaging in strategic litigation before the Constitutional Court, seeking to expand the understanding and implications

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[119] *C-1149/01* (n 117) ¶7. To support this argument, the Court cites the ICCPR, the IACtHR, and the United Nations, 'Revised Set of Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law (Prepared by Theo van Boven Pursuant to Sub-Commission Decision 1995/117).' (Sub-commission on the Prevention of Discrimination of Minorities) E/CN.4/Sub.2/1996/17. According to this Report, states have an obligation to 'investigate violations, to prosecute perpetrators, and, if their guilt is established, to punish them'. See ¶27.

[120] Law 600 of 2000.

[121] Sánchez Mejía (n 88).

[122] CCC, Judgment 228 of 2002.

[123] 1991 Constitution, Article 250, n. 7 (As reformed by Legislative Act 03 of 2002).

[124] Although presented as a procedural point (because the lack of preventive detention would hinder the victim from requesting a property injunction to ensure future payment of compensation — as per article 60 of Law 600 of 2000), the Court's argument had broader implications in terms of the flexibility with which judges are willing to judge the 'dangerousness' of defendants. This argument is also developed in *C-805/02* (CCC).

[125] *C-228/02* (CCC) ¶6.3.

[126] *C-899/03* (CCC).

[127] Sánchez Mejía (n 88).

of victims' rights by appealing to the Court's interpretation of constitutional rights and principles in line with international standards.[128]

In the judgments that followed the enactment of the 2004 Code, the Court confirmed the centrality of victims' rights in the *Estado Social de Derecho,*[129] expanding the scope of the rights and measures of protection established in the Code. According to the Court, the guarantees of this law were insufficient for the adequate protection of victims.[130] The Court established that the State had a positive duty to carry out all measures necessary to satisfy the victims' 'right to non-impunity',[131] particularly of dignity (which entails the right to 'know what happened and for justice to be made' through a criminal investigation and punishment where appropriate)[132] and access to justice (which involves guaranteeing 'the availability of suitable and effective procedures for the legal determination of rights and obligations' in the criminal justice system).[133] Non-impunity, in turn, was defined as a general guarantee that encompassed the victims' rights to truth (determined through appropriate criminal investigation and through the determination of individual accountability),[134] justice (understood as 'the obligation to investigate, judge, and convict those responsible for criminal offending with appropriate sanctions, and to avoid impunity'),[135] and reparation (which involves both economic compensation and 'the determination of responsibility for criminal wrongdoing').[136]

Throughout this process, despite disagreements and competing visions of the meaning and scope of victims' rights,[137] the figure of the victim has gained increasing centrality in the Colombian penal sphere, justifying both the expansion and enhancement of coercive powers, as well as the maintenance of punishment in unconstitutional conditions.[138] Mediated by these local processes of debate and confrontation, international standards on victims' rights were not simply imported or transplanted into the domestic sphere, but they remained malleable enough to allow their appropriation and adaptation to the particularities of the local context. As has been the case in

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[128] ibid 114–115.

[129] On the definition of *Estado Social de Derecho,* see Chapter 2.

[130] *C-454/06* (CCC) ¶30 and 46. To do so, the Court subjected the rules in the 2004 Code to its interpretation of the rights of victims. Provisions in the Code were deemed constitutional only if interpreted and applied in accordance with the Court's doctrine on the rights of truth, justice, and reparations, which required giving the victims broader participation in criminal proceedings (including leading evidence, calling witnesses, and receiving information about their rights at all stages of the process).

[131] See, among others, *C-579/13* (CCC); *C-180/14* (CCC); *C-694/15* (CCC); *C-084/16* (CCC); *C-471/16* (CCC); *T-564/16* (CCC); *C-471/16*; *C-588/19* (CCC); *C-674/17* (CCC); *C-374/20* (CCC).

[132] The principle of dignity is established in Article 1 of the Constitution. See also *C-004/03* (CCC), in which the Court argues that impunity, particularly for serious violations of human rights, entails a violation to human dignity.

[133] ibid.

[134] In this regard, the Court references both the case law of the IACtHR and UN's Updated *Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity* (E/CN/2005/102/Add.1).

[135] In this regard, the Court references both the case law of the IACtHR and UN's Updated *Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity* (E/CN/2005/102/Add.1).

[136] *C-454/06* (n 130) ¶66.

[137] According to Sanchez Mejia, different social groups have tried to advance their own agendas through conflicting definitions of victims' rights (including, for instance, defenders of an adversarial model of criminal justice with restricted participation of victims in criminal proceedings; activists promoting a restorative justice framework; victims of the internal armed conflict; and groups of women who have been victims of domestic or sexual offences). Sánchez Mejía (n 88). See also, in the context of transitional justice, Iturralde, 'Colombian Transitional Justice' (n 103).

[138] See Chapters 2 and 3.

various other contexts across the globe,[139] criminal accountability and punishment have come to be understood as self-evidently essential and necessary features of the protection of victims' rights: the necessity of punishment has become so naturalised that it is often virtually assumed that victims have a right to the punishment of 'their' offender.[140] In the framework of human rights, punishment takes the form of a positive obligation for the State to protect victims and do moral justice.

The Colombian case may be located within what Engle has called the 'turn to criminal law in human rights', a particular historical trend that, in fact, 'began and developed in Latin America before spreading around the world'.[141] Taking distance from a widespread scepticism towards the State's punitive power among human rights activists, the IACtHR's early case law in the late 1980s 'set the scene' for trends of anti-impunity and criminalisation by constructing punishment as a matter of human rights: the penal apparatus, rather than being part of the problem, became the solution, equating accountability of State actors with criminal prosecution and punishment, and therefore creating positive duties in this regard.[142] However, the centrality of victims in the criminal law was not isolated, nor unique to Latin America. In fact, in the Anglo-American context, a period of intense cultural, social, and economic transformations throughout the 1970's and 1980s led to the prioritization of punitive measures over welfare and rehabilitation.[143] The vulnerability of victims to crime came to stand for the interests of society as a whole,[144] 'requiring' the deployment of the penal apparatus as a mechanism of risk management, contention of danger, and maintenance of security.[145]

In Colombia, both a strong emphasis on the notion of security (a concept that was central to the American-led wars on drugs and crime, along with the legal reforms that accompanied them) and the influence of the normative language of human rights (interpreted in line with the Constitutional Court's doctrine and the IACtHR's case law) contributed to the crystallisation of the notion that the State has a positive duty to protect victims through the deployment of the criminal law. Moreover, in addition to the individual protection of victims, the State has a broader positive duty to guarantee 'anti-impunity' as a collective social good.[146] The framework of constitutionalism, through the formulation of all social issues as a matter of individual rights, provided a normative and ideological framework in which the language of victims' rights found a fertile terrain. Punishment is no longer constructed primarily as an expression of the State's claims

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[139] See Chapter 5.
[140] Nicola Lacey and Hanna Pickard, 'To Blame or to Forgive? Reconciling Punishment and Forgiveness in Criminal Justice' (2015) 35 Oxford Journal of Legal Studies 665.
[141] Engle (n 98) 1070.
[142] Engle (n 98).
[143] Simon (n 97); Garland (n 97); Ian Loader, 'Fall of the "Platonic Guardians": Liberalism, Criminology and Political Responses to Crime in England and Wales' (2006) 46 The British Journal of Criminology 561. See also Chapter 5 of this thesis.
[144] Simon (n 97) 76.
[145] Garland (n 97); Ramsay, *The Insecurity State* (n 19).
[146]Juan Oberto Sotomayor Acosta and Fernando León Arboleda Tamayo, 'La integración de las normas internacionales sobre derechos humanos al derecho penal: una interpretación garantista' (2018) 20 Estudios Socio-Jurídicos 207, 212.

of authority, but rather as the embodiment of the relations between victims and offenders. In this scheme, punishment, as a key part of the State's institutional framework, acquires meaning through constitutional principles (including those elaborated by international tribunals), as its relationship with the sovereign's claims of authority is overthrown by the rational edifice of the Constitution's self-standing values.

It is worth noting that non-impunity may also be conceived as a necessary feature of a more political conception of punishment —that is, one which puts the relations between the State and the citizens at its centre, and which conceives punishment as the embodiment of those relations of authorisation. If punishment is a tool for the vindication of the State's monopoly of force, then its effective imposition is required to ensure said aim. But the key point is that punishment may not *always* be necessary to reassert these claims: in fact, where punishment becomes a 'necessary' response to all forms of wrongdoing, this betrays the weakness of the sovereign's claims of authority. As Thorburn argues, 'states have the right to rule and the associated right to punish those who violate that right, but good government involves ordering a society so that criminal wrongdoing is infrequent and the resort to punishment in response is even more seldom'.[147] Thus, despite punishment being a component of the right to rule, overuse of punishment undermines the State's authority, both ideologically and empirically. This is a key distinction in relation to the more naturalised conception of punishment as *the* necessary response to wrongdoing that has developed on the basis of human rights discourses since the 1980s, and which has become increasingly dominant in the penal sphere more broadly. In Colombia, the 'punitive turn' of human rights has not been restricted to cases of serious human rights violations, as has been the case at the regional and international levels.[148] Instead, it has extended to include other forms of wrongdoing which are constructed as generalised threats to security, such as theft and narcotrafficking related offences.[149]

Paradoxically, however, by embracing punitivism, the human rights project has undermined itself in two ways.[150] First, despite its emphasis on the interests of victims, recent research in Colombia has shown that this legal framework has failed to produce actual, meaningful protections for them.[151] Second, though not producing any significant improvements in this regard, excessive resort to imprisonment has produced a seemingly insuperable 'crisis' of human rights in prisons. Though punishment in these conditions is denounced as immoral and inhumane, implying

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147 Thorburn (n 7) 50.

148 Engle (n 98). See also, in relation to the use of human rights rhetoric in the ECtHR, Laurens Lavrysen and Natasa Mavronicola (eds), *Coercive Human Rights: Positive Duties to Mobilise the Criminal Law under the ECHR* (Hart 2020).

149 See Chapter 1.

150 This is not to say that human rights discourse is, by itself, perverse or malevolent. This discourse has played a fundamental role in local attempts to capture the scale of suffering and violence experienced in Latin America (for instance, during the dictatorships of the South or as a product of the Colombian armed conflict) and to expose the involvement of official actors in these forms of violence. Its value, therefore, should not be downplayed. However, where truth and justice are equated with individual criminal responsibility, and where peace is understood as the necessary consequence of the attribution of liability, the structural character of violence is obscured, allowing punishment to be presented as a necessary solution at the expense of more broad-ranging reforms and redistributive measures. On this last point, see Iturralde, 'Colombian Transitional Justice' (n 103).

151 See Chapter 4 in Sánchez Mejía (n 88). See also, in relation to violence caused by drug trafficking, Katja Franko and David Rodríguez Goyes, *Victimhood, Memory, and Consumerism: Profiting from Pablo* (First edition, OUP 2023).

the subjection of inmates to 'humiliations which differ from those which deprivation of liberty itself entails'[152] —that is, to disproportionate, unjustified, and therefore illegitimate suffering—, punishment is still presented as necessary for the protection of actual and potential victims, and for the preservation of security more broadly. While the discourse of human rights enables the intensification and expansion of coercion, the chronic *unconstitutionality* of punishment is accepted as a regrettable condition which is nonetheless necessary and justified.

3. Recentring political authority

The punitive turn in human rights has been criticised because it reinforces a depoliticised, 'individualized and decontextualized understanding of the harms' that punitive expansion seeks to address;[153] because of its expansive effects in domestic criminal law;[154] due to its inability to effectively protect the rights and interests of victims;[155] and because of its incompatibility with basic principles of liberal democracies,[156] or the principles and spirit of human rights themselves.[157] But, in addition to all this, the coercive dimension of human rights may also be re-examined and criticised in light of a relational understanding of political authority, showing various dimensions of this issue that have remained obscured due to the displacement of this concept from the core of constitutionalism and from the penal sphere.

With recent developments of constitutionalism, authority has come to be understood as a feature which constitutions possess by virtue of their rational architecture and internal cogency, rather than one that is attained through the generation of particular political relations between ruled and rulers.[158] Though hybrid justifications of punishment are invoked to rationalise its deployment, the institution has been primarily concerned with the satisfaction of the rights of victims —understood, despite being contested and historical, as the only option compatible with the system of human rights.[159] Putting the relationship between victims and offenders at the centre of the penal system, and constituting them as politically representative subjects,[160] punishment has come to be seen as a site for the materialisation of the 'political imperative' that 'victims must be protected, their voices must be heard, their memory honoured, their anger expressed, their fears addressed'.[161]

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[152] *T-388/13* (n 70) ¶7.5.5.3.
[153] Engle (n 98) 1071.
[154] Mattia Pinto, 'Sowing a "Culture of Conviction"' in Laurens Lavrysen and Natasa Mavronicola (eds), *Coercive Human Rights: Positive Duties to Mobilise the Criminal Law under the ECHR* (Hart Publishing 2020).
[155] Sánchez Mejía (n 88).
[156] Nina Peršak, 'Positive Obligations in View of the Principle of Criminal Law as a Last Resort' in Laurens Lavrysen and Natasa Mavronicola (eds) (Hart 2020).
[157] Natasa Mavronicola, 'Coercive Overreach, Dilution and Diversion' in Laurens Lavrysen and Natasa Mavronicola (eds), *Coercive Human Rights: Positive Duties to Mobilise the Criminal Law under the ECHR* (Hart Publishing 2020).
[158] Loughlin, *Foundations of Public Law* (n 20).
[159] Engle (n 98).
[160] Garland (n 97) 102, 143–144; Simon (n 97) 11–12, 76; Ramsay, *The Insecurity State* (n 19) 227–229.
[161] Garland (n 97) 143.

In this sense, the coercive face of human rights has contributed to the ideological inversion of the 'normal' conditions of authority: whether actual or potential, victimhood has become the representative collective experience, constructing distrust, disobedience, and vulnerability as 'normal' conditions.[162] Through this inversion, the 'normal' conditions of authority are displaced by 'coercive duties' which necessarily trigger a penal response,[163] significantly limiting the possibility of imagining alternative forms of managing crime.[164] While the function of punishment as an expression of *potentia* is emphasised, its connection to the collective relations which institutionalise it as a rightful power (that is, with *potestas*) is obscured, turning instead to its coherence with international human rights standards as a definitive legitimating element. From a 'reserved and essentially negative obligation to use the criminal law only as a last resort' —that is, an exceptional mechanism that is only to be used to confront serious threats to the sovereign's authority—, punishment has transformed into the State's natural and necessary response to an increasingly broad range of conducts, turning towards 'positive obligation[s] to favour it and to implement it in practical terms'.[165]

By bringing attention back to political authority, understood as a relationship that must be constantly regenerated and reproduced, we may gain valuable insights about the conditions in which the ideological inversion described above has occurred, the paradoxes it conceals, and the shape that these processes have taken in different social, political, and economic contexts. Re-politicising our approach to punishment may also contribute to destabilizing naturalised assumptions about the relationships which this institution articulates, as well as taking the *ultima ratio* character of this institution more seriously: in order to credibly sustain their claims of authority, States should generally resort to less intrusive and coercive means of intervention, addressing the subjective harms created by various forms of criminal wrongdoing through alternative strategies.[166] Adopting such a standpoint, which puts the relationship between State and offender at the centre of the justification of punishment, does not entail that the interests of victims are irrelevant to the criminal law. Instead, while still recognising the 'moral seriousness of the underlying conduct',[167] this perspective does away with the assumption that it is necessarily in the

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[162] Ramsay, *The Insecurity State* (n 19) 215–219.

[163] Liora Lazarus, 'Positive Obligations and Criminal Justice: Duties to Protect or Coerce' in Lucia Zedner and Julian Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (OUP 2012) 136.

[164] Manuel Iturralde, 'The Weight of Empire: Crime, Violence, and Social Control in Latin America—and the Promise of Southern Criminology' in Ana Aliverti and others (eds), *Decolonizing the Criminal Question* (OUP 2023); Iturralde, 'Colombian Transitional Justice' (n 103).

[165] Françoise Tulkens, 'The Paradoxical Relationship between Criminal Law and Human Rights' (2011) 9 Journal of International Criminal Justice 577, 594.

[166] These may include, for instance, including 'aid, support, care, insurance, and licence arrangements'. Nils Jareborg, 'Criminalization as Last Resort (Ultima Ratio)' (2005) 2 Ohio State Journal of Criminal Law 521. A similar argument may be found in Thorburn (n 7).

[167] Thorburn (n 7) 63. Similar claims, though not strictly from the point of view of authority, have been made in anti-carceral feminist literature. See Cheryl Hanna, 'No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions' (1996) 109 Harvard law review 1849; Isabel Cristina Jaramillo Sierra, 'El Hogar ¿público o Privado? A Propósito de La Jurisprudencia de La Corte Constitucional Colombiana En Materia de Violencia Entre Cónyuges.', *Derecho Constitucional: Perspectivas Críticas* (Siglo del Hombre 1999); Linda G Mills, 'Killing Her Softly:

victim's interest to prosecute, convict, and punish the offender,[168] and that the function of the criminal law should be 'singlehandedly to right the wrongs in a given society, to give offenders their due, and to offer solace to victims'.[169]

4. Conclusion

In a somewhat simplistic view, declarations of *USoA* in Colombian prisons may be read as symptomatic of the transition of a post-colonial society from relatively 'subtle' forms of authoritarian rule, disguised under a veneer of long-lasting formal democracy, towards true democracy and the consolidation of the rule of law. Throughout the last five Chapters, I have offered an alternative reading of declarations of *USoA* as reflective of contradictions inherent to the relationship between punishment and authority in their contemporary understanding. Recent constitutional developments, which have taken place at a global scale, as well as the local iteration of transnational punitive trends, have produced profound transformations in the Colombian penal sphere. Constitutional principles have come to be understood as a source of self-standing authority, overthrowing the more robust notion of political authority and, with it, deviating attention from the jural form taken by these relations (that is, claims of sovereignty). However, even in the framework of rational, self-generated authority, the Constitution's most fundamental conditions have been officially recognised as systemically and massively violated, and constitutional normality has been shown to be, in reality, exceptional.

Meanwhile, punishment, rather than expressing political relations of authorisation between the State and the citizens, appears as the institutional framework through which the State gives effect to its positive obligations to protect the rights of victims. As victims take centre stage transnationally, punishment is constructed as necessary and essential for the protection of their rights and interests, obscuring the ideological and historical particularities that have led to the assumption of this model as natural and desirable at a global scale. In this way, individual accountability and punishment, whether as traditional imprisonment or more recent (and vague) forms of 'restrictions of freedom', are understood as the only 'effective remedy to guarantee the rights of access to justice and to know the truth'.[170] Thus, the figure of the victim has become institutionalised as representative of a universal political experience which transcends the domestic context —an experience in which the question of the relation of authority between the State and the citizens seems to have become virtually irrelevant.

By virtue of these developments, the exceptional character of punishment, and its definition as a measure of last resort, have become inverted: the imposition of punishment has become normalised as a natural response and a necessary resource for the enforcement of

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Intimate Abuse and the Violence of State Intervention' (1999) 113 Harvard Law Review 550; Julieta Lemaitre, 'Justicia Injusta: Una Crítica Feminista a La Conciliación En Violencia Conyugal' (2002) 27 Revista de Derecho Privado 73.

[168] Engle (n 98); Mills (n 167).

[169] Thorburn (n 7).

[170] *Case of the Massacres of El Mozote and Nearby Places v El Salvador Judgment of October 25, 2012* (IACtHR) ¶209.

interpersonal morality. Because authority is largely removed from the analytic panorama, the tensions inherent to this inversion remain obscured. On the one hand, from the point of view of political authority, the imposition of punishment (particularly at a large scale or when imposed harshly) entails an official recognition of the State's own failures. But, on the other, from the point of view of victims' rights, it may be interpreted as a 'victory',[171] despite the fact that this punitive enterprise has given rise to, and contributes to the reproduction of, massive and systematic violations of human rights. In this sense, even though the punitive turn in human rights has displaced authority as a key concept in the justification of punishment, it has led to a stark manifestation of contradictions inherent to this institution: punishment is imposed in a way that undermines and destroys its own constitutive conditions —particularly in contexts of structural violence and inequality, in which constitutional ordering faces significant complexities and challenges.

However influential and central the rights of victims have become, I suggest that rediscovering the foundational and constitutive character of political authority may lead to valuable insights and considerable intellectual and political challenges. Though displaced from the constitutional edifice and undermined in practice, relations of authority remain at the basis of the very possibility of constitutional ordering —its consolidation, maintenance, and even the enforcement and vindication of the law. Beyond critiques of the incompatibility of punitive trends and the 'spirit' of human rights, the concept of political authority invites us to re-politicise our conception of public power, interrogating the connection between State coercion and broader justifications of the legal order.[172] This, in turn, may lead to a more meaningful discussion of the values and political principles through which we make sense of our collective existence,[173] as well as how they may be reflected by institutions like punishment.

So far, I have presented the challenges, paradoxes, and tensions behind declarations of *USoA* in Colombian prisons, exploring the conceptual relationship between constitutionalism, punishment, and political authority. But despite the embeddedness of this relationship in the local context, similar tensions arise in various 'Northern' and 'Southern' contexts. Although declarations of *USoA* are not the rule around the world, in the second part of this thesis I will explore the extent to which these local insights may inform our understanding of broader regional and global trends and tensions. The failures of the Colombian State are, to this extent, not merely a local defect, but rather a particular manifestation of the contradictions inherent to transnational political and economic trends.

[171] Daniel Pastor, 'La Deriva Neopunitivista de Organismos y Activistas Como Causa Del Desprestigio Actual de Los Derechos Humanos' [2006] Jus Gentium.
[172] Lacey (n 14).
[173] Hannah Arendt, *The Promise of Politics* (Jerome Kohn ed, 1st ed., Schocken Books 2005).

PART II

Local Insights for the Global Context

Chapter 5
Penal Inflation and State Authority: Global Enquiries

Penal inflation and the deterioration of conditions of imprisonment seem to be increasingly globalised trends. In the Colombian case, these issues have been addressed through declarations of *USoA*, which have not only proved to be largely ineffective, but have confronted the Court with the ideological and empirical shortcomings of the State's claims of authority: though punishment is meant to embody the sovereign's legitimate authority, prisons are shown as an unconstitutional site at the heart of these claims. In this chapter, I explore how these contradictions manifest in other geopolitical contexts, as well as how the perspective of political authority may offer additional theoretical tools for the analysis of penal inflation and its consequences. Because punishment is deeply embedded into specific social and political structures, I do not aim to offer universal or exhaustive conclusions about the complex relationship between punishment and authority. Instead, I offer an initial exploration of the insights and questions that may spring from the perspective of political authority, opening rich avenues for future research.

In the first section, I explore how the perspective of political authority may inform our understanding of penal inflation and punitivism both in contexts in which the authority of the State seems fragmented (like the post-colonial contexts of Latin American countries) and those in which relations of authority are taken to be more fixed, 'complete', or established. The concept of authority has been largely absent from the literature on mass incarceration (mostly produced in and for Anglo-American contexts),[1] appearing briefly as a 'negative' notion in Garland's influential account of the 'myth of the sovereign state'.[2] While the concepts of sovereignty and authority have reappeared more recently in political accounts of punishment,[3] the findings of these 'Northern' enquiries are not directly applicable to 'Southern' contexts. Historical and empirical research in the 'South' has shown that 'Northern' theories are not always generally applicable to other contexts, calling for a more nuanced, plural, and historical approach to the study of punishment.[4] However,

[1] Marie Gottschalk, *The Prison and the Gallows: The Politics of Mass Incarceration in America* (CUP 2006); Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New Press 2010); David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Clarendon 2001); Loïc Wacquant, *Punishing the Poor: The Neoliberal Government of Social Insecurity* (English language edition, Durham North Carolina : Duke University Press 2009); Mona Lynch, 'Mass Incarceration, Legal Change, and Locale: Understanding and Remediating American Penal Overindulgence' (2011) 10 Criminology & Public Policy 671; Jonathan Simon, *Governing through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (OUP 2007); Bert Useem, *Prison State: The Challenge of Mass Incarceration* (CUP 2008).

[2] Garland (n 1).

[3] Peter Ramsay, *The Insecurity State: Vulnerable Autonomy and the Right to Security in the Criminal Law* (OUP 2012); Henrique Carvalho, *The Preventive Turn in Criminal Law* (OUP 2017); Rocio Lorca, 'Punishing the Poor and the Limits of Legality' (2022) 18 Law, Culture and The Humanities 424.

[4] Máximo Sozzo, 'Reading Penalty from the Periphery' (2023) 27 Theoretical criminology 660; Máximo Sozzo, 'Inequality, Welfare and Punishment. Comparative Notes between the Global North and South' (2022) 19 European Journal of Criminology 368; Manuel Iturralde, 'The Political Economy of Punishment and the Penal State in Latin America' in Nicola Lacey and David Soskice (eds), *Tracing the Relationship between Inequality, Crime and Punishment* (OUP 2021).

I argue that the notion of political authority —a concept that is central to the grammar and ideological claims of States both in the North and the South— may allow us to account for commonalities produced in the context of globalisation, without losing sight of the particular ways in which tensions and contradictions unfold in each specific context. Penal inflation and expansion are examples of the weakness of the State's claims of authority —in both an ideological and an empirical sense—, but the particular reasons why the relations constitutive of authority have become so undermined is a field that requires a more localised, microscopic approach.

The second section turns towards the relationship between 'democracy' and penal inflation, focusing on the punitive turn in Latin America. Recent research has shown that the relationship between factors like income inequality, social spending, social inclusion, and incarceration in the region is somewhat random, questioning the categories and models developed to make sense of penal patterns in the North.[5] Though the punitive turn remains a puzzling phenomenon in the region, the perspective of political authority allows us to situate punishment within a broader history of State-building and projects of modernisation, of which the recent 'wave of democratisation' in the region is a striking example. Processes of 'democratisation' (whether neoliberal or post-neoliberal), despite attempting to consolidate the rule of law and strengthen the State, have brought with them a 'crisis' of democracy in the region. Recent surveys in the continent exemplify this 'crisis', demonstrating a generalised 'preference' for 'authoritarian' and punitive regimes (which are considered more capable of ensuring order and security) over democratic, rights-respecting regimes (seen as permissive and soft on crime).[6] I argue that, rather than being truly reflective of a 'democratic crisis', the punitive turn and generalised 'punitive preferences' in the region are symptomatic of how limited our democratic practices have been hitherto —in other words, rather than proving that majoritarian rule necessarily calls for penal populism, they demonstrate how undemocratic our governments actually are.

The third section delves into a deeper discussion of the idea that penality in Latin America is largely driven by majoritarian punitive inclinations and preferences. The case of El Salvador seems to confirm that authoritarian regimes in the region can garner massive popular support, legitimating the governments' resort to punishment as the main mechanism to generate obedience and order. However, the perspective of political authority allows us to question this narrative, exposing not only the shortcomings of the assumptions on which it is based, but also the unsustainability of this large-scale punitive project. The case of El Salvador, rather than confirming assumptions about popular demands for authoritarianism, invites us to take the question of political authority seriously.

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[5] Sozzo, 'Reading Penalty from the Periphery' (n 4); Iturralde, 'The Political Economy of Punishment and the Penal State in Latin America' (n 4).

[6] Iturralde, 'The Political Economy of Punishment and the Penal State in Latin America' (n 4); Ian Loader, 'Fall of the "Platonic Guardians": Liberalism, Criminology and Political Responses to Crime in England and Wales' (2006) 46 The British Journal of Criminology 561; Tim Newburn, '"Tough on Crime": Penal Policy in England and Wales' (2007) 36 Crime and Justice 425; Jock Young, *The Exclusive Society: Social Exclusion, Crime and Difference in Late Modernity* (Sage 1999).

The last section moves on to an analysis of another consequence of the punitive turn in Latin America, which may illuminate similar dynamics of social ordering in prisons in other regions. It focuses on the ways in which the emergence and strengthening of mechanisms of inmate governance in prisons has increased the porousness of the walls of prison. Though conceived as a physically secluded and isolated space for offenders who challenge to the sovereign's authority, the State's symbolic and material incapacity to sustain this separation shows the extent to which, inside and outside of prisons, the basic claims that justify the existence of punishment cannot be credibly upheld.

1. Penal inflation and undermined claims of authority

Crime and penal policy have occupied a central place in social life and public debate for nearly half a century.[7] The rise of penal policy as a mechanism for social control, as well as the role of crime as a key part of the contemporary collective experience, have received widespread scholarly attention.[8] While political authority has remained absent in most of these accounts, which focus on broader shifts in governance,[9] Garland's highly influential analysis of the complex social transformations that have led to the emergence of a 'culture of control'[10] (and, with it, of mass incarceration in the United States) brought attention to the question of authority —even though presented only negatively in the form of the 'myth of the sovereign state'.[11] These insights have expanded to other 'comparable' contexts, often in the 'developed world',[12] and have exerted considerable influence in research carried out in the Global South, particularly resonating with countries where the United States has strongly influenced local penal policy.[13]

[7] Newburn (n 6); Garland (n 1); Simon (n 1); Wacquant (n 1); Loader (n 6).
[8] Garland (n 1); Simon (n 1); Wacquant (n 1).
[9] Simon (n 1); Wacquant (n 1); Nicola Lacey, *The Prisoners' Dilemma: Political Economy and Punishment in Contemporary Democracies* (CUP 2008); Robert Reiner, *Law and Order: An Honest Citizen's Guide to Crime and Control* (Polity Press 2007).
[10] Though not presented as a universal formula of 'epochal' penal change, Garland's account has been highly influential in Latin America, where similar macroscopic shifts have been detected. However, more recently, scholars have pointed out significant differences in the Latin American context. The examination of deep changes should therefore be combined with more 'proximate' accounts of the region's penal dynamics. See Sozzo, 'Inequality, Welfare and Punishment. Comparative Notes between the Global North and South' (n 4); Manuel Iturralde, 'Emergency Penality and Authoritarian Liberalism. Recent Trends in Colombian Criminal Policy' (2008) 12 Theoretical Criminology 377; ibid.
[11] Garland (n 1) 169–170.
[12] Nils Christie, *Crime Control As Industry: Towards Gulags, Western Style* (1st edn, Routledge 2000); Thomas Mathiesen, *On Globalisation of Control: Towards an Integrated Surveillance System in Europe* (Statewatch 1999); Wacquant (n 1); Loïc Wacquant, 'Crafting the Neoliberal State: Workfare, Prisonfare and Social Insecurity' in David Gordon Scott, *Why Prison?* (CUP 2013); Richard Sparks, 'States of Insecurity: Punishment, Populism and Contemporary Political Culture Richard Sparks' in Sean McConville, *The Use of Punishment* (Willan 2003); ibid.
[13] Javier Wilenmann, 'Neoliberal Politics and State Modernization in Chilean Penal Evolution' (2020) 22 Punishment & society 259; Iturralde, 'Emergency Penality' (n 10); Manuel Iturralde, 'Neoliberalism and Its Impact on Latin American Crime Control Fields' (2018) 23 Theoretical Criminology 471. On the limitations of these accounts in the Latin American context, see Sozzo, 'Inequality, Welfare and Punishment. Comparative Notes between the Global North and South' (n 4).

According to Garland, the abandonment of the public philosophy of welfarism and rehabilitation, and their replacement with retributivism as an overarching ethos,[14] led to fundamental transformations in social practices and cultural sensibilities. In this cultural climate, deviant and dangerous 'others' have become a generalised internal threat to society, producing a sensation of constant exposure to risk and insecurity that has given rise to a broad shift towards punitive policies. Fear of crime emerged as a central public problem, feeding demands for strong measures of protection and harsh punishment as the main mechanisms to manage risks, contain danger, and maintain security.[15] High crime rates became, in the political imagination, 'a normal social fact',[16] while victims gained centre stage as 'a righteous figure whose suffering must be expressed and security guaranteed'.[17] Together, victims' interests and the normalised experience of crime contributed to the generalised sense that imprisonment works: prisons incapacitate offenders, giving them their 'just deserts' for harming victims, while allowing the State to 'effectively' exercise social control by deterring individuals from engaging in self-serving, anti-social, and criminal conducts.[18]

In Garland's view, these developments have undermined the 'myth' of a sovereign State capable of controlling crime and delivering law and order to the citizens.[19] Despite remaining inscribed in the collective imagination and retaining some persuasive power, the myth of sovereignty has become 'problematic —a source of ambivalence rather than reassurance'.[20] The criminal law plays the function of providing 'retaliatory gestures intended to reassure a worried public', while repressing 'any acknowledgment of the state's inability to control crime to acceptable levels'.[21] Harsh punishment 'magically compensates a failure to deliver security to the population at large' through policies that hysterically act out the public's anxiety about insecurity.[22] This is particularly relevant for processes of State-formation that have resulted in the 'incomplete pacification' of the territory, producing generally higher levels of violence that tend to affect 'sizeable portions' of the population.[23] But harsh penal policies are presented as justified even in cases where rates of criminality are not necessarily high, or where crime rates have substantially dropped —as has been the case in England and Wales, where, despite drops in overall levels of crime, incarceration rates remain amongst the highest in Europe.[24]

The simultaneous affirmation and denial of the 'myth' of sovereignty, however, may be understood as a paradox inherent to the State's attempts to reassert its authority through the

[14] Garland (n 1).
[15] ibid. See also Simon (n 1). In the British context, see Ramsay, *The Insecurity State* (n 3).
[16] Garland (n 1) 109.
[17] ibid 11–12.
[18] Garland (n 1).
[19] Garland (n 60) 109.
[20] Garland (n 1).
[21] ibid 134.
[22] ibid.
[23] David Garland, *Peculiar Institution: America's Death Penalty in an Age of Abolition* (Harvard University Press 2010) 173.
[24] Newburn (n 6); Thomas Guiney and Henry Yeomans, 'Explaining Penal Momentum: Path Dependence, Prison Population Forecasting and the Persistence of High Incarceration Rates in England and Wales' (2023) 62 The Howard Journal of Crime and Justice 29.

criminal law, rather than the mere outcome of 'hysterical' policies and rising crime rates.[25] Analysing the content of recent criminal legislation in England and Wales, Ramsay argues that, through the normative articulation of a 'right to security', the criminal law both tacitly concedes and ignores the limits of its claims of authority. In his view, recent developments such as the enactment of a growing number of pre-inchoate offences and the regime of Civil Preventive Orders are plainly inconsistent with 'the authority of a state that recognizes individual freedom as the raison d'être of the political community'.[26] Under the sovereign's rule, disorder and coercion are constructed as an abnormal state of affairs. However, enacted as ordinary legislation, these laws rest on a normative commitment to insecurity and vulnerability to criminal victimisation as normal conditions. In other words, in this preventive rationale, insecurity and vulnerability, rather than being constructed as exceptional, appear as the norm,[27] implying an official admission of the defeat of sovereign authority.[28] In that sense, the contemporary political ideology behind these developments is that of the mutual vulnerability of citizens, with criminal responsibility appearing as a result of the citizens' failure to reassure one another, whether because of 'hostility or indifference'.[29] The 'myth of sovereignty' is not undermined because of contradictions amongst policies, nor merely due to high criminality, but rather because of the State's own ideological affirmation of generalised vulnerability as a source of legitimation. In the context of attenuated relations of representation, the deployment of the criminal law exposes 'the actual loss of political sovereignty'.[30]

Garland and Ramsay's insights, however, do not necessarily apply beyond the specific contexts that they analyse, and their accounts should not be taken as macroscopic descriptions of universal phenomena. But, in terms of the question of punishment and its relationship with political authority, they point towards the historical, ideological, and empirical questions that are crucial to understanding this relationship, particularly in a geopolitical context in which States' fates are increasingly interdependent due to globalisation. At first sight, it may seem like the notion of political authority has little to offer in contexts in which those claims have been broadly and violently challenged, such as those of most Latin American countries.[31] However, the modern understanding of authority constitutes a fundamental aspect of the grammar and histories of these States, deeply inscribed within existing political practices and institutions. Though it would be inadequate to speak of a 'loss' of sovereignty in the sense that Ramsay does for the British case, or

[25] Ramsay, *The Insecurity State* (n 3).
[26] ibid.
[27] ibid.
[28] ibid 144.
[29] ibid 110–111.
[30] ibid 229. A different analysis of the ways in which exclusion may undermine relations of representation, and how this has fed into the recent preventive turn of the English criminal law, may be found in Carvalho (n 3). Carvalho has shown how the preventive turn of the criminal law, as well as its recent emphasis on insecurity and dangerousness, are symptomatic of ambivalent dynamics of exclusion and inclusion in liberal societies. In Britain, the historical expansion of the spheres of citizenship in Britain appeared to progress towards universal inclusivity, but it concealed an inherent tension between 'emancipatory aspirations' and maintenance of exclusion and inequality.
[31] Sozzo, 'Inequality, Welfare and Punishment. Comparative Notes between the Global North and South' (n 4); Massimo Sozzo, *Prisons, Inmates and Governance in Latin America* (Palgrave Macmillan 2022).

to simply replicate the ideological and political transformations that he has identified, taking political authority seriously may lead to productive interrogations of the punitive turn that Latin America has experienced since the 1990s, while remaining flexible enough to account for the specific conditions in which deficits of authority have occurred.

For instance, the Colombian case may, at first glance, be interpreted as an example of the 'mythical' character of sovereignty, and how, despite being less credible, this myth is affirmed through the criminal law. In Iturralde's view, while 'early modernity' in Northern countries produced significant levels of pacification that allowed the State to easily sustain the 'myth' of sovereign power, Colombia —like other Latin American countries— faced conditions of violence and disorder in which only a 'weak' version of the 'myth' could be sustained.[32] Penal powers have been used, historically, to 'affirm, under very difficult conditions of violence and social turmoil, the embattled sovereignty of the Colombian state'.[33] The 'weak' myth of sovereignty has justified the exertion of penal violence not only against 'outlaws, but also the most vulnerable sectors of society',[34] in the State's failed attempts to deliver law and order within the whole of the national territory, while concealing the State's own role in the reproduction and maintenance of conditions which constitute 'breeding grounds for discontent, anger, and criminality'.[35] But this reading risks losing sight of the paradox highlighted by Ramsay: the reassertion of the (weak) 'myth' of sovereignty through the deployment of the criminal law is, in fact, premised on an official denial of the effectiveness of public power. Put differently, the excessive deployment of penal power implies, in itself, a tacit recognition of the extent to which relations of authority (on which punishment is premised) are already significantly undermined. The penal 'crisis' is not merely the outcome of contradictory attempts to affirm the 'myth' of sovereignty'. Instead, it is symptomatic of the fragility of the relations through which claims of sovereignty may be constituted and maintained.

As has been the case in Colombia, generalised challenges to State authority are characteristic in most countries in Latin America. However, incarceration has not always been the primary strategy used by these States to manage insecurity, violence, or marginality —or at least not to the extent that it has in the last 40 years. For instance, in Brazil, though there have been long-standing historical challenges to the State's political authority, incarceration has only become a key mechanism of social control since the 1990s, with judges playing a key role in driving penal inflation.[36] The penal apparatus considerably expanded during the dictatorship, but its punitive infrastructure was not dismantled during the process of democratisation that followed. Instead, the democratic transition coincided with the consolidation of unprecedented trends of penal inflation. Although the growth of incarceration rates started with the neo-liberal reforms of the 1990s, the tendency towards mass incarceration became even stronger, paradoxically, during the

[32] Manuel Iturralde, *Castigo, liberalismo autoritario y justicia penal de excepción* (Siglo del Hombre Editores 2010).
[33] Iturralde, 'Emergency Penality' (n 10) 388.
[34] ibid.
[35] ibid; Iturralde, *Castigo, liberalismo autoritario y justicia penal de excepción* (n 32).
[36] Luiz Dal Santo, 'Mass Incarceration in Times of Economic Growth and Inclusion? Three Steps to Understand Contemporary Imprisonment in Brazil' (2023) 27 Theoretical Criminology 597.

'post-neoliberal'[37] government of Lula da Silva —a period of 'social inclusion' and economic growth, characterised by the reduction of poverty, inequality, and unemployment, as well as legislative reforms that attempted to reduce incarceration rates.[38]

Dal Santo highlights the role of the judiciary in maintaining penal inflation throughout different governments. In the last decades, Brazilian judges seem to have 'assumed a role of resistance against decarceration, promoting its very opposite'.[39] Dal Santo's empirical investigation of the attitudes and normative commitments of the Brazilian judiciary is still ongoing, but an interrogation of broader ideological and political trends that have driven these processes may provide rich avenues for inquiry. As discussed in relation to the Colombian case,[40] the fact that judges have played such a crucial role in driving penal inflation, as well as the *unconstitutional state of affairs* that has resulted from it, is significant. On the one hand, attention to these dynamics may confirm that the association between penal populism and democracy is misleading, bringing to light the judiciary's attitudes towards punishment and their effects on the consolidation of penal 'crises' in the region. On the other, further explorations of the role of judges in the production of penal inflation may contribute to a more nuanced understanding of the extent to which judges, as official actors—from the lowest levels of the ordinary criminal justice system to the highest levels of constitutional tribunals—, have embraced the abrogation of the State's ideological claims of authority. This involves, for instance, engaging in context-based, socio-legal analyses of how the judiciary's attitudes towards punishment have changed throughout various historical periods, whether such changes respond to changes in violence or criminality rates, and the extent to which they respond to the judges' subjective perceptions of security.

The perspective of political authority, as Ramsay's analysis of the British case shows, also has a lot to offer for the analysis of contexts in which authority tends to be taken for granted as a natural outcome of modernity. For instance, while the United States is often compared to 'advanced' and 'consolidated' democracies of the West, the perspective of authority may contribute to the demystification American 'exceptionality' in the penal sphere. Though a complete analysis of this matter is outside the scope of this project, the perspective of political authority may produce valuable insights about how specific forms of exclusion have contributed to the emergence of mass incarceration;[41] about the political, ideological, and institutional arrangements that have made

[37] This term refers, as Iturralde defines it, to political regimes that opposed 'the neo-liberal regimes of the 1980s and 1980s' from a 'leftist or socialist perspective'. These include, for instance, Venezuela, Ecuador, Brazil, and Bolivia. Manuel Iturralde, 'Punishment and the Penal State in Latin America' in Nicola Lacey and others (eds), *Tracing the Relationship between Inequality, Crime and Punishment. Space, Time and Politics* (OUP 2020) 184.
[38] Dal Santo (n 36).
[39] ibid 611.
[40] *T-762/15* (CCC) ¶159; Libardo Ariza, 'Reformando El Infierno: Los Tribunales y La Transformación Del Campo Penitenciario En América Latina' in Libardo Ariza and Manuel Iturralde (eds), *Los muros de la infamia: Prisiones en Colombia y en América Latina* (Universidad de los Andes, CIJUS 2011) 94; Libardo José Ariza, *Tres décadas de encierro. El constitucionalismo liminal y la prisión en la era del populismo punitivo* (Siglo Editorial 2023) 89.
[41] See Introduction, footnote 22. Broadly defined, mass incarceration involves a quantitative dimension (historically unprecedented rates of imprisonment), as well as more qualitative ones (inhumane conditions of imprisonment which tend to target particularly vulnerable groups of the population).

mass incarceration possible; and about the implications of this phenomenon on the claims of authority of a State that identifies itself as a liberal democracy.

Incarceration rates in the United States were, until recently, the highest in the continent (only surpassed in 2019 by Bukele's government in El Salvador).[42] While its incarceration rates are still extraordinarily high by regional standards, the United States fits more closely with its Latin American neighbours than with its European counterparts, particularly regarding elements such as its heterogeneity, internal fragmentation, and high rates of violence.[43] In this regard, key historical trajectories in Latin America and the United States are broadly comparable —though not identical, relevant commonalities may be traced. First, substantial portions of the population have long been excluded, as a matter of fact or law, from full membership of the polity.[44] Second, a fragmented history of nation-building in the United has resulted,[45] among others, in low levels of trust among citizens and low institutional legitimacy, the consolidation of 'suspect' social and political hierarchies, and high rates of violence (in particular, homicide).[46] Various forms of racial, ethnic, sectarian, economic, and regional cleavages, which have not been sufficiently resolved or overridden,[47] have not only affected those 'oppressed and brutalised' by dominant elites, but also 'dominant' groups that have been 'pushed to the edge through uncertainty and mistrust'.[48]

In addition to this, the penal sphere in the United States is characterised both by a historical overreliance on State coercion as a mechanism to enforce and reproduce inequalities and exclusion,[49] as well as historically high rates of violence, that have not received sufficient attention from the literature.[50] The independence of the United States was followed by a period of turmoil in which political power was broadly unsettled. The criminal justice system, for a long time, existed in conditions in which there was 'all too often neither state nor law'.[51] From the very foundation of the State, crime and punishment became 'central concerns not just at the local and state levels, but at the national level as well'.[52] The early centrality of punishment, though often overlooked,

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[42] World Prison Brief, reports on El Salvador and the United States of America, available at: https://www.prisonstudies.org/country/. See section 3 of this Chapter.

[43] Lisa Miller, 'American Exceptionalism or Exceptionalism of the Americas? The Politics of Lethal Violence, Punishment, and Inequality' in Nicola Lacey and others (eds), *Tracing the Relationship between Crime, Punishment and Inequality: Space, Time, and Politics* (OUP); Randolph Roth, *American Homicide* (Harvard University Press 2012); Angelica Duran-Martinez, *The Politics of Drug Violence: Criminals, Cops and Politicians in Colombia and Mexico* (OUP 2017); Nicola Lacey and David Soskice, 'American Exceptionalism in Inequality and Poverty: A (Tentative) Historical Explanation' in Nicola Lacey and others (eds), *Tracing the Relationship between Crime, Punishment and Inequality: Space, Time, and Politics* (OUP 2020).

[44] The cases of *Brown* and *Brown II* discussed in the following Chapter are two of many examples of these forms of exclusion.

[45] See Roth (n 43); Lacey and Soskice (n 43); Miller (n 43); Garland (n 23); Tom R Tyler, 'Psychological Perspectives on Legitimacy and Legitimation' (2006) 57 Annual Review of Psychology 375.

[46] Roth (n 43). See also Miller (n 43) 141–142; Garland (n 23).

[47] Miller (n 43) 142.

[48] ibid 144.

[49] Alexander (n 1); Young (n 6); Miller (n 43).

[50] Miller (n 43).

[51] Elizabeth Dale, 'Criminal Justice in the United States, 1790–1920: A Government of Laws or Men?' in Michael Grossberg and Christopher Tomlins (eds), *The Cambridge history of law in America, vol. 2: The long nineteenth-century, 1789–1920* (CUP 2008) 140.

[52] Gottschalk (n 1) 4.

may be a powerful factor in explaining 'how institutional capacity, especially state capacity to pursue mass imprisonment as public policy' was produced.[53] Furthermore, despite 'disproportionately high rates of serious violent crime victimisation in the country',[54] scholars have been mostly critical of the link between incarceration rates and rising violent crime, neglecting the implications of violence for the understanding of the development of mass incarceration and its connection with the American political project. Such neglect 'conceals the way in which state-building, state-capacity, and state legitimacy (or illegitimacy) can underpin' our understanding of the politics of punishment,[55] including the emergence of mass incarceration and its consequences.

From the point of view of political authority, mass incarceration in the United States may be seen as the result of a combination of different factors, all of which are linked to a complex and unfinished process of state-building. These include the perpetuation of the various forms of exclusion mentioned above,[56] which have significantly impacted the consolidation of political unity and cohesion; the historical centrality of punishment as an institutional response to internal fragmentation and violence, as well as the availability of resources to push for the expansion of the penal apparatus; and the existence of high rates of violence which drive State actors to support and promote punitive responses to demonstrate the State's coercive might. Such appearance of power, however, contradicts the premises upon which the State's authority to punish is based. Cases like *Brown v Plata,* which will be examined in the following Chapter, are a crude example of the extent to which these claims of authority have been undermined.

As Miller argues, there seem to be 'remarkable correlations between levels of state and street violence, heterogeneity, and the fragmented nature of countries in the Americas'.[57] Though more research is necessary to identify commonalities, explain outliers, and understand the relationship between marginalisation and violent crime, the perspective of political authority may allow us to take the issue of fragmentation seriously, complementing existing socio-legal and economic explorations of the relationship between penal inflation and inequality. It could do so by pointing towards the ways in which existing economic arrangements facilitate 'uneven human development and high levels of inequality';[58] contribute to maintaining social and political fragmentation; and produce comparatively high rates of violence which, in turn, undermine the credibility and plausibility of the State's claims of universal representation on which authority is founded.

The perspective of political authority can be fruitful both in contexts where sovereignty appears 'fragmented' or incomplete, as well as contexts in which the establishment of authority is taken for granted as an outcome of modernity. Situating penal trends within the broader context of authority-building (understood as a relational and dialectic process, as explained in Chapter 4) may illuminate the extent to which these claims can be credibly sustained and the dynamics through

[53] ibid.
[54] Miller (n 43) 133.
[55] ibid 136.
[56] Alexander (n 1); Wacquant (n 1).
[57] Miller (n 43) 155.
[58] ibid.

which they may be undermined. Rather than a finished outcome, political authority may appear, at different points of history and to varying degrees, stronger or weaker; more fragmented or more unitary; complete or incomplete. Failures to uphold authority, therefore, are not an inherent characteristic of a certain 'type' of state (as, for instance, theories of failed states would posit),[59] but rather a condition in which any state, Northern or Southern, may find itself. Exactly how and why these failures occur requires specification, and enquiries about the particular ideological and material conditions in which these processes unfold may offer a rich avenue for future research in a variety of contexts. By turning attention towards these processes, authority may lose its 'mythical' character as a historical milestone achieved by modernity, revealing its character as a continuous and contingent political relationship.

2. Inequality, 'democratic deficit' and punishment in Latin America

Latin America offers a complex and plural landscape for an analysis centred around political authority. Because of its diversity, this region may also offer valuable insights to interrogate other contexts across the globe. The region is characterised by generally high levels of inequality and violent crime,[60] accompanied by an overall punitive turn that has resulted in a dramatic increase of incarceration rates in the last 30 years.[61] Though reasons for these variations in the region are still an understudied field —partly due to the unavailability of reliable data—, it has become clear that, with the sole exception of Guatemala, all Latin American countries saw a drastic increase of incarceration rates between the 1980s and 2000s, a trend that has lasted until at least 2020 according to the most recent data available.[62] As Sozzo has shown, between 1990 and 2020, incarceration rates in El Salvador and Brazil grew by more than 500%, while Argentina, Uruguay, Peru, Panama, Bolivia and Ecuador had a growth of more than 300%. In Colombia, Honduras, and Ecuador, growth has remained at 200%. Meanwhile, Mexico, Chile, the Dominican Republic and Venezuela remained under 100%.[63] Despite these variations, there is a clear trend towards penal inflation in the region, 'from 22% in Chile to 511% in El Salvador'.[64]

This trend is not limited to the region and has been considered symptomatic of what the literature has recognised as a 'global' punitive turn, despite certain outliers.[65] However, dominant explanations of this phenomenon have focused mostly on 'Northern' contexts, which offer a

[59] A critique of these theories may be found in Chapter 3.
[60] Libardo José Ariza and Manuel Iturralde, 'Del Giro Punitivo al Giro Decolonial. La Distancia Entre El Derecho Penal, La Criminología y Las Prácticas Del Control Del Crimen En Colombia y América Latina' in Libardo José Ariza, Manuel Iturralde and Fernando León Tamayo Arboleda (eds), *Perspectivas socios jurídicas sobre el control del crimen* (Ediciones Uniandes 2022) 24–25.
[61] As Iturralde and Ariza highlight, between 1995 and 2019, incarceration rates have increased by 199%. ibid 28–29.
[62] Sozzo, *Prisons, Inmates and Governance in Latin America* (n 31) 4.
[63] ibid 5.
[64] ibid 6.
[65] Iturralde, 'Neoliberalism and Its Impact' (n 13); Garland (n 1).

limited and often ill-fitting account of Latin American developments. For instance, while the 'Northern' literature has found a direct relationship between income inequality and incarceration rates, this relationship seems more tenuous, and even somewhat random, in certain Latin American countries.[66] More 'egalitarian' countries (in terms of income distribution), which have embraced relatively 'inclusive' socio-economic policies, like Brazil, have some of the highest incarceration rates in the region,[67] being no less punitive than the most 'exclusionary' ones.[68] Others, like Argentina, rank high in terms of social spending and welfare, as well as low in terms of incarceration rates (though still displaying a tendency towards inflation).[69] While income inequality, social expenditure, and economic 'inclusion' show us little about the workings of punishment in the region, it may be worth examining these factors in the light of ideological aspects that have driven various projects of modernisation and consolidation of authority in these countries,[70] and exploring the function of punishment in relation to those projects—from the initial function of this institution in the post-independence period, to more recent periods of democratisation and 'development', often driven by the ideology of constitutionalism.

Analysing the factors that may have influenced such regional trends is outside the scope of this project, but the point of view of State authority may bring a refreshing perspective for a deeper understanding of domestic and transnational trends. As Iturralde argues, Latin American countries 'despite their important differences, do share a past and have similar historical trajectories that must be considered to make sense of their current situation'.[71] The role of punishment in shaping these States' claims of authority, as well as the ways in which it has mediated, sustained, and undermined the relations through which these claims are constituted, should not be ignored. Whether in long-lasting 'formal' democracies, like that of Colombia, or in States that have 'transitioned' from dictatorships to democracy, like Brazil or Argentina, the last 50 years have coincided with an increasing resort to the penal system to confront forms of social and political opposition that have been conceived as 'significant' challenges to State authority, with the coercive apparatus frequently deployed against peasants, workers, trade unions, and students.[72] Though the use of the criminal law to deal with these forms of opposition did not produce immediate penal inflation, it contributed to an expansion of the penal apparatus that would later facilitate the consolidation of the tendency towards mass incarceration from the 1980s onwards. Processes of democratisation and consolidation of the rule of law not only failed to dismantle resort to penal coercion as a mechanism of social and political control, but rather enabled and

[66] Iturralde, 'Punishment and the Penal State in Latin America' (n 37) 169. See also Sozzo, 'Reading Penalty from the Periphery' (n 4); Sozzo, 'Inequality, Welfare and Punishment. Comparative Notes between the Global North and South' (n 4); Dal Santo (n 36).
[67] Dal Santo (n 36).
[68] Iturralde, 'Neoliberalism and Its Impact' (n 13); Sozzo, 'Inequality, Welfare and Punishment. Comparative Notes between the Global North and South' (n 4).
[69] Iturralde, 'Punishment and the Penal State in Latin America' (n 37) 173.
[70] For a similar approach in the Italian context, see Zelia A Gallo, 'Punishment, Authority and Political Economy: Italian Challenges to Western Punitiveness' (2015) 17 Punishment & Society 598.
[71] Iturralde, 'Punishment and the Penal State in Latin America' (n 37).
[72] In the Colombian context, see Chapter 1. See also Dal Santo (n 36); Iturralde, 'Neoliberalism and Its Impact' (n 13).

justified the further expansion and inflation of the penal sphere, within the context of a more 'humanitarian' framework of human rights.[73]

A reinterpretation of the punitive turn through the lens of political authority may be helpful in making sense of these historical tensions and struggles during periods of 'democratisation', even where they appear to be more 'inclusive', as is the case of Brazil or Argentina. In addition to this, as suggested in the previous section, this perspective may contribute to understanding the existence of comparatively high rates of violence in the region as a result of the State's incapacity to produce the types of relations through which generalised obedience and security may be maintained —that is, relations of authorisation and allegiance between the State and the citizens.[74] On the one hand, the perspective of political authority allows for more nuance in relation to the specific forms of crime that each State faces, and the ways in which they relate to conditions of political, social, and economic exclusion. On the other hand, it may illuminate and specify the ways in which each State has failed to generate the relationships required for the consolidation and maintenance of political authority, as well as the ways in which those basic relations have been undermined by the State itself —both through the exercise of violence against marginalised groups of the population and through the excessive deployment of penal powers. While penal powers appear as 'the state's most immediate and visible apparatus in response to criminal violence [and] one of the few ways that such states can try to increase legitimacy',[75] overuse of punishment risks undermining the State's claims of political authority, as well as the general perception of its legitimacy.[76]

This may be particularly productive in conditions that have been interpreted as a 'legitimacy crisis' of democratic governments in the region.[77] In the last 15 years, various surveys have provided evidence of the widespread existence of low levels of State legitimacy and trust among citizens, as well as a preference for political orders that effectively 'guarantee security', even at the expense of basic freedoms. The 'people', these surveys claim, are inclined towards accepting 'authoritarian regimes' (understood, broadly, as regimes with a 'proclivity towards punishment')[78] as long as they are capable of dealing effectively with disorder and crime. According to Iturralde, in an analysis of surveys that measure the level of acceptance of 'authoritarian' regimes in the region,[79]

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[73] See Chapter 4. On the relationship between human rights and penal expansion at the regional level, and particularly in the case law of the Interamerican Court of Human Rights, see Karen Engle, 'Anti-Impunity and the Turn to Criminal Law in Human Rights' (2015) 100 Cornell Law Review 1069. See also Daniel Pastor, 'La Deriva Neopunitivista de Organismos y Activistas Como Causa Del Desprestigio Actual de Los Derechos Humanos' [2006] Jus Gentium; Alberto Nanzer, 'La Satisfacción de La Víctima y El Derecho al Castigo' in Daniel Pastor (ed), *El sistema penal en las sentencias de los órganos interamericanos de protección de los derechos humanos* (AD-HOC 2013).

[74] Miller (n 43); Manuel Iturralde, 'Democracies without Citizenship: Crime and Punishment in Latin America' (2010) 13 New Criminal Law Review 309.

[75] Miller (n 43) 144.

[76] David Beetham, *The Legitimation of Power* (2nd edition., Palgrave Macmillan 2013).

[77] Iturralde, 'Punishment and the Penal State in Latin America' (n 37) 188.

[78] ibid 179.

[79] See the reports produced by *Latinobarómetro* surveys, available at https://www.latinobarometro.org/latContents.jsp

> a striking factor about Latin American countries is the high percentage of citizens that state that they are afraid of violent crime all the time or most of the time […]. Among Latin American countries there seems to be a positive correlation between a proclivity towards authoritarianism, and it may be said to punitiveness, and imprisonment rates. The greater the authoritarian drive is, the higher the rates of imprisonment are […]. This suggests interesting points of analysis […] regarding social expectations towards the role of the state and the kind of pressure that society and public opinion may put on governments to solve the crime problem —as well as how governments react to this kind of pressure.[80]

Paradoxically, he argues, the wave of democratisation of the 80s and 90s also brought with it a 'democratic' crisis. But, as I have suggested in the previous chapters, this 'crisis' of democracy (as well as its counterpart, the 'crisis' in prisons) arose precisely because of the absence of relations of democratic representation.[81] The results of these surveys, therefore, may be expressive of the lack of substantive and meaningful political representation, and the weak credibility of the sovereign's claims of universal representation. Iturralde has explored the implications of this democratic deficit in relation to the penal sphere in Colombia, describing the Colombian regime as one of 'authoritarian liberalism' —understood, in his terms, as a 'conservative model of limited democracy'[82] which 'encourages the hypertrophy of the penal state and the reduction of the social state'.[83] Because of extremely high levels of socio-economic exclusion, these regimes are characterised as 'democracies without citizenship'.[84] In the context of a democratic 'crisis', where the notion of citizenship itself seems to be significantly diluted, the idea that these surveys are an accurate representation of the views of the 'people' should be challenged. The surveys may, at best, express a general interest in self-preservation and security —conditions which Latin American States have failed to maintain, despite the deployment of the penal apparatus. As Miller argues, 'one need not embrace Hobbes' Leviathan to accept his most critical assumption about the state of nature: that, whatever else may link all humanity, a universal fear of violent death is surely among the most fundamental'.[85]

Democratic deficits are not exclusive to Latin America. In fact, in the European context, Wilkinson has also resorted to the concept of 'authoritarian liberalism' to encapsulate the tensions and contradictions that European democracies have faced since the post-war period. In his contribution to an undoubtedly contested debate, Wilkinson has defined 'authoritarian liberalism' as the 'phenomenon of a liberalism that is pursued by authoritarian means, in ways that avoid robust democratic accountability. It is liberal in the sense that it depoliticizes the economy, naturalizes inequalities, and values markets, competition and private ownership'.[86] Though the

[80] Iturralde, 'Punishment and the Penal State in Latin America' (n 37) 179–180.
[81] Chapters 3 and 4.
[82] Iturralde, 'Emergency Penality' (n 10) 389.
[83] Iturralde, 'Emergency Penality and Authoritarian Liberalism. Recent Trends in Colombian Criminal Policy' (n 155) 380.
[84] Iturralde, 'Democracies without Citizenship: Crime and Punishment in Latin America' (n 74).
[85] Miller (n 43) 136.
[86] Michael A Wilkinson, *Authoritarian Liberalism and the Transformation of Modern Europe* (First edition, OUP 2021) 3.

European post-war period is often characterized as one in which democracy was consolidated,[87] this claim is 'often qualified so much that democracy itself is barely distinguishable from liberalism'.[88] Understanding 'authoritarianism' not as the opposite of liberalism, but rather 'in opposition and contrast to democratic government and particularly to democratic change',[89] as Wilkinson suggests, may be productive in the characterisation of Latin American regimes and the challenges they face, particularly in the context of an increase of 'authoritarian' penal measures despite recent waves of 'democratisation'. It may be the case that these democracies have faced such significant limits and constraints that some form of authoritarianism, particularly in the penal sphere, remains. 'Penal populism', as well as the results of the surveys mentioned above, may then be understood as a reflection and reproduction of the assumptions on which these forms of authoritarianism rest, rather than a pure depiction of what the 'people' desire. In other words, in a world in which democracy appears to be 'hollowed out',[90] it is worth asking whether these surveys say anything meaningful about a generalised preference for 'authoritarian governments', rather than being reflective of widespread dissatisfaction with our current political practices.[91]

For instance, waves of neoliberal and post-neoliberal 'democratisation' in the Americas (even where they have improved general economic indicators or increased social expenditure) have significantly restricted the materialisation of substantive democratic practices for large groups of the population, deepening both political and economic exclusion,[92] and seemingly contributing to comparatively high rates of violence.[93] Even in those countries of the region that seem more 'inclusionary' (due to the decrease of income inequality or the increase of social spending), imprisonment rates have remained high due to the continued marginalisation of historically excluded groups, that is, of 'highly vulnerable groups at the lower end of the income distribution, which have a higher risk of contact with the criminal justice system'.[94] Though more research on this complex matter is required, Sozzo has highlighted that redistributive policies and the decline of inequality tend to reach certain disadvantaged groups more strongly, improving their life conditions significantly, while worsening the conditions of exclusion of the most 'marginal poles' of society, making them even more vulnerable to penal coercion.[95] Integrating existing research on crime, inequality, and the punitive turn with the perspective of political authority may produce key insights to interrogate and understand the relationship between democracy and penal inflation.

The perspective of political authority, to which the ideas of representation and political equality are crucial, may offer a critical lens through which this relationship may be analysed. Penal

[87] ibid 5.
[88] ibid.
[89] ibid.
[90] Peter Ramsay, 'A Democratic Theory of Imprisonment' in Albert Dzur, Ian Loader and Richard Sparks (eds), *Democratic Theory and Mass Incarceration* (OUP 2016).
[91] Ian Loader, 'Review Symposium: The Anti-Politics of Crime' (2008) 12 Theoretical Criminology.
[92] Sozzo, 'Inequality, Welfare and Punishment. Comparative Notes between the Global North and South' (n 4).
[93] Miller (n 43).
[94] Susanne Karstedt, 'Inequality and Punishment: The Idiosyncrasies of the Political Economy of Punishment' in Nicola Lacey and others (eds), *Tracing the Relationship between Crime, Punishment and Inequality: Space, Time, and Politics* (OUP 2020) 27.
[95] Sozzo, 'Inequality, Welfare and Punishment. Comparative Notes between the Global North and South' (n 4) 388.

inflation may be understood as a reflection of existing material constraints to substantive democratic practices, including socioeconomic exclusion and a lack of meaningful participation in collective life, rather than the result of a simple 'excess' of majoritarian politics. Like authority, democracy should not be understood as an 'ideal-type of government but as a dynamic historical process through which actual living human individuals are more or less engaged in their own government'.[96] Our current practices may be interrogated from the point of view of a substantive notion of democracy, centred around the ideas of political equality[97] and meaningful participation in collective life as fundamental conditions for the consolidation and maintenance of relations of authority and, therefore, to the institution of punishment. While there seems to be a generalised assumption that the public *demands* harsh punishment and 'authoritarianism', the framework of political authority allows for a profound interrogation not only of whether those preferences and interests actually exist, but, more importantly, of why and how they arise, as well as the extent to which such 'punitive demands' have resulted from the ways in which elites and other social groups, have 'produced –with varying degrees of intensity– decisions and actions aimed at increasing punitiveness'.[98]

3. The case of El Salvador

Mass incarceration in El Salvador presents a challenging case unfolding before our eyes. Recently, under Bukele's government, there has been massive popular support for extremely harsh punitive policies.[99] Most of these policies have been enacted under declarations of states of emergency that have resulted in the highest incarceration rate in the world,[100] as well as an elevated number of deaths and other violations of human rights in custody. At first glance, the case of El Salvador seems to confirm the assumption that there tends to be strong support for 'authoritarian', punitive regimes in the region. In addition to this, extremely high incarceration rates have apparently produced a significant decrease of homicide rates, almost halving murders in comparison to previous years, potentially indicating that the State has been effective in establishing order and securing obedience through the exercise of force. However, it is unclear whether imprisonment has actually been the cause of this decrease of violence: scholars and journalists have attributed the

[96] Ramsay, 'A Democratic Theory of Imprisonment' (n 90) 89.
[97] ibid.
[98] Sozzo, 'Inequality, Welfare and Punishment. Comparative Notes between the Global North and South' (n 4) 388.
[99] By February 2023, around 92% of the population claimed to support the state of emergency, which included measures such as arrests without warrants, unfettered government access to private communications, restrictions to detainee's rights, and, more recently, mass trials and lack of guarantees to the presumption of innocence. See Nelson Rentería and Sarah Kinosian, 'El Salvador Vows Gang Crackdown Will Go on as Citizens Cheer Safer Streets | Reuters' *Reuters* (15 February 2023) <https://www.reuters.com/world/americas/el-salvador-vows-gang-crackdown-will-go-citizens-cheer-safer-streets-2023-02-15/> accessed 24 February 2024; Luke Taylor, 'El Salvador Clears Way for Mass Trials as Crackdown on Gangs Ramps Up' *The Guardian* (27 July 2023) <https://www.theguardian.com/world/2023/jul/27/el-salvador-nayib-bukele-gangs-mass-trials> accessed 24 May 2024.
[100] El Salvador's incarceration rate in May 2022 was estimated at 1.086 per 100,000 of national population, more than double the rate of the United States of America in the same year. See World Prison Brief data at https://www.prisonstudies.org/country/el-salvador.

decrease of the rates of violence to 'secret agreements' with gangs,[101] as well as 'government restrictions on accessing homicide and other data and changes in the way killings are counted', which make it harder to 'estimate the true extent of the reduction' of homicides and other violent crimes.[102]

But mass incarceration has a much longer history in the Salvadoran context. After the Salvadoran civil war of 1992, local gangs (such as MS-13, Barrio 18-Sureños, and Barrio 198-Revolucionarios, as well as other minor gangs) connected to larger Salvadoran gang networks in the United States (such as *La Mara Salvatrucha*) rapidly gained power and control over various territories. Since then, El Salvador has had one of the highest rates of violence in the region, largely caused by conflicts between gangs that control marginalised areas, both in rural and urban zones.[103] When the left came to power in 2009, the *Frente Farabundo Martí para la Liberación Nacional* (FMLN) implemented coercive 'citizen security' measures, which included 'widespread discretionary arrests and extensive use of lethal force by law enforcement officers', mostly targeting gangs and largely 'driven by well-documented moral panics that cast gang members as folk devils'.[104] The FMLN then turned to 'militarization and engaging in the kinds of "performance of security" that the party believed could translate into electoral gains'.[105]

These measures, carried out by FMLN until 2019 (when it was defeated by Bukele's right-wing *Nuevas Ideas*), included discretionary arrests, the dilution of guarantees to the right to due process, increased arrests and searches, increased criminalization, and harsher sentences.[106] By the time Bukele took power, the tendency towards mass incarceration had already solidified.[107] Though formally presented as measures directed against gangs, aiming to weaken and destabilize them, by 2019 64.5% of the prison population had no gang affiliation.[108] Instead, imprisonment functioned, primarily, as a tool for the control of social marginality. As has been the case in other Latin American countries, in the State's inflationary response to gang violence, 'the criminal law [has turned] into a tool for the control and subjection of social groups that are considered dangerous

[101] Chris van der Borgh, 'Government Responses to Gang Power: From Truce to War on Gangs in El Salvador' [2019] European Review of Latin American and Caribbean studies 1; Mary Speck, 'Cerrando El Ciclo de Violencia de Pandillas En El Salvador' [2022] *United States Institute of Peace* <https://www.usip.org/publications/2022/10/cerrando-el-ciclo-de-violencia-de-pandillas-en-el-salvador> accessed 13 February 2024; Mary Speck, 'As El Salvador's Gang Crackdown Continues, Citizens Wonder What's Next?' <https://www.usip.org/publications/2023/05/el-salvadors-gang-crackdown-continues-citizens-wonder-whats-next> accessed 13 February 2024.

[102] Juan Pappier, '"We Can Arrest Anyone We Want"' [2022] Human Rights Watch <https://www.hrw.org/report/2022/12/07/we-can-arrest-anyone-we-want/widespread-human-rights-violations-under-el> accessed 24 May 2024.

[103] van der Borgh (n 101).

[104] Adrian Bergmann and Rafael Gude, 'Set up to Fail: The Politics, Mechanisms, and Effects of Mass Incarceration' [2021] Latin American Law Review 43, 47.

[105] ibid.

[106] ibid 48.

[107] Pamela Ruiz and Danielle Mackey, 'El Salvador's Security Smoke Screens' (2020) 52 NACLA Report on the Americas 410.

[108] Bergmann and Gude (n 104) 52.

due to the situation of marginalisation to which the state itself has subjected them, whether through oblivion or indifference'.[109]

Throughout this period, mass incarceration had the effect of 'strengthening gangs organizationally, stimulating greater complexity and sophistication in their criminal activities'.[110] Rather than weakening them, incarceration brought them together in ways that had not been seen before, and which they would not have been able to achieve on their own.[111] In addition to this, conditions of incarceration have become key in the gangs' status as political actors, increasing their leverage and capacity to set the public agenda both through protests against 'appalling' conditions of incarceration and, as will be discussed below, because of their control over the truces that may have produced the reduction of homicide rates outside prisons. In fact, as researchers have recently noted, 'the number of homicides has remained a currency of power in the relationship between Salvadoran gangs and governments',[112] because the 'gang's ability to either unleash or rein in the organizational capacity for homicides remains their main form of applying pressure and brokering deals with politicians'.[113] The State's ability to maintain security (inside and outside prisons) depends heavily on the government's capacity to sustain successful and lasting negotiations with gangs.

In 2016, overcrowding in prisons had reached an extraordinary peak, and the situation of human rights had deteriorated so much that the Supreme Court of El Salvador made a declaration of an *USoA*.[114] The situation since then not only deteriorated significantly, but the Court's more recent insistence on the need to take urgent measures to guarantee the rights of inmates seems to be reduced to pure rhetoric in light of recent developments under Bukele's government.[115] Soon after Bukele took office in 2019, the already fragile negotiations with gangs seemed to fail (according to some, due to internal fragmentation in the gangs, as well as government collusions with sectors of the *MS-13*),[116] which led the *MS-13* gang to carry out nearly 92 murders between the 24th and the 27th of March of 2022. As a response to this wave of homicides, the highest in recent years, Bukele declared a state of exception that has been periodically renewed since, producing an even starker increase in incarceration rates —from 572 per 100000 inhabitants in 2020 to 1086 in May 2022.

Since then, Bukele has implemented a combination of military interventions (mostly carried out in marginalised communities) and emergency penal measures.[117] These include arbitrary

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[109] Ariza and Iturralde (n 60).
[110] Bergmann and Gude (n 104) 53.
[111] Benjamin Lessing, 'Counterproductive Punishment: How Prison Gangs Undermine State Authority' (2017) 29 Rationality and Society 257, 258.
[112] Bergmann and Gude (n 104) 54.
[113] ibid.
[114] *119-2014ac (2016)* (Supreme Court of El Salvador), citing The Colombian Court's *T-388/13* (CCC).
[115] *146-2020 (2021)* (Supreme Court of El Salvador).
[116] Seth Robbins, 'Mano Dura 2.0: el precio de las detenciones masivas de pandilleros en El Salvador' *InSight Crime* (15 June 2022) <http://insightcrime.org/es/noticias/mano-dura-20-precio-detenciones-masivas-pandilleros-elsalvador/> accessed 24 May 2024.
[117] Pappier (n 102). 'Bukele's Pact with the Gangs Lasted Three Massacres' *Bukele's Pact with the Gangs Lasted Three Massacres* (1 March 2023) <https://elfaro.net/en/202303/opinion/26745/Bukele> accessed 24 May 2024.

arrests and detentions,[118] surveillance of journalists and embargoes of publicly available information,[119] the expansion of mandatory pretrial detention, unrestricted access to private communications, restrictions to detainee's rights, the reduction of the age of criminal responsibility to 12 years old, and, more recently, the creation of mass trials of hundreds of defendants at a time (up to 900 persons from the same region, or accused of belonging to the same groups).[120] The *Police Workers' Movement* (the police's main trade union) has reported that they are under strong pressure to make numerous arrests, even of individuals who are known not to have any connections to the gangs.[121] Emergency legislation has produced a *halo* that is quickly expanding onto ordinary laws: in 2022, Congress approved a reform to the Criminal Code which establishes an offence of 'promoting, helping, facilitating, or favouring the formation or permanence' of 'Maras, gangs, groups, associations and organizations of a criminal nature', with sentences ranging between 20 and 30 years.[122]

The Salvadoran case may be interpreted as an example of massive popular support to an authoritarian regime at the expense of the rights and lives of already marginalised minorities. But, from the perspective of political authority, this situation may be understood as symptomatic of the Salvadoran State's ideological and empirical incapacity to sustain its claims of authority. As explained in Chapter 4 in relation to the Colombian case, at an empirical level, mass incarceration reveals the extent to which the sovereign's law is, in reality, exceptional: a combination of an institutional incapacity to maintain the monopoly of force (allowing gangs to establish *de facto* control), coupled with conditions of marginalisation, political inequality, and exclusion, have produced circumstances in which 'minimum' levels of obedience have long been absent. Increased incarceration reflects significant levels of disobedience which, on their own, are expressive of the extent to which the sovereign's authority is undermined.[123] At an ideological level, mass incarceration and the declaration of an *USoA* in Salvadoran prisons reveal an official abrogation of the State's claims of political authority, despite Bukele's rhetorical insistence on the State's 'power' over gangs.[124] As discussed in Chapters 3 and 4, where relations of authority exist, imprisonment appears as an *ultima ratio* occurrence —the exception, rather than the rule. The excessive deployment of punishment, on the contrary, and its use as a tool to generate rather than

[118] Characteristics that are used as grounds for arrest include physical appearance and tattoos (associated with gang membership), previous arrests, nervous behaviours, allegations of gang-membership or affiliation (on social media or through anonymous tips), and familial relationships or personal ties with detainees. See Sarah Bishop, Thomas J Boerman and Tommie Sue Montgomery, 'Behind the Glowing Headlines: Social Science Analysis of the State of Exception in El Salvador' [2023] Center for Mexico and Central America Regional Expert Paper Series 5.
[119] ibid 4.
[120] Taylor (n 99).
[121] Bishop, Boerman and Montgomery (n 118) 2.
[122] 'Diputados Aprueban Seis Reformas a Códigos y Leyes Relacionadas a La Protección de La Población, Tras Crímenes de Pandillas | Asamblea Legislativa de El Salvador' *Asamblea Legislativa* (31 March 2022) <https://www.asamblea.gob.sv/node/12072> accessed 24 May 2024.
[123] See Chapter 3. See also Peter Ramsay, 'The Sovereign's Presumption of Authority (Also Known As the Presumption of Innocence)' [2020] LSE Legal Studies Working Paper No. 15/2020 <https://papers.ssrn.com/abstract=3743730> accessed 26 February 2023.
[124] Carlos S Maldonado, 'Bukele exhibe a miles de presos como una demostración de poder sobre las maras' (*El País*, 28 February 2023) <https://elpais.com/internacional/2023-02-28/nayib-bukele-exhibe-a-miles-de-pandilleros-en-un-traslado-espectacular-a-su-enorme-carcel-contra-el-terrorismo.html> accessed 24 May 2024.

reaffirm authority, is premised on the assumption that challenges to the sovereign's rule have become normalised.

The consequences and future development of Bukele's efforts of pacification are still to be seen, with scholars pointing out that this punitive experiment is simply unsustainable and has been 'set up to fail', as there has been little consideration of the impact of these measures on already marginalised and stigmatised communities, of massive re-entries to prison, or of programmes for the large-scale social and economic reintegration of inmates.[125] But this striking display of coercive power may be interpreted, as hinted above, as expressive of the paradox of mass incarceration: the more a State imprisons its population, the more it concedes that it is unable to uphold its claims of authority and universal representation. Like the Colombian case, the Salvadoran example exposes both an empirical incapacity to achieve minimum levels of obedience (both inside and outside prisons),[126] and indicates the extremely weakened character of the relations of authorisation and obligation at the core of the sovereign's claim of authority.

Punishment, then, appears more as an exercise of pure force, rather than as the expression of normative claims of authority. As explained in Chapter 4, the institution of punishment, though involving the exercise of coercive power, cannot be reduced to mere force. Instead, it is conditioned by a sense of right, and therefore embodies not only coercive might, but also ideological claims of universal representation that legitimate this power. Put differently, as the embodiment of the sovereign's claims of rightful authority, punishment has a fundamental normative dimension that distinguishes it from mere force. Although force may produce domination and significant levels of obedience, and power asymmetries may be reproduced and sustained through the sole use of force, authority requires a normative dimension that goes beyond the deployment of instrumental power. The more punishment is deployed, the more the sovereign concedes the weakness of its claims of authority, relying only on the provisional effects of force. In that sense, while Bukele's punitive experiment may achieve, at least temporarily, a significant degree of obedience through force and domination (though this remains to be seen and has been attributed mostly to fragile agreements with gangs),[127] the generation and sustenance of authority must be premised on a normative dimension that goes beyond this instrumental use of force.

Whether the Salvadoran government will be able to create these relationships remains an open question, but, with a large part of the population at risk of being targeted by these punitive measures (even where they may express support towards them), the possibility of credibly claiming universal representation seems unsustainable, and securing long-term obedience from citizens seems highly unlikely. Furthermore, patterns of states of exception followed by massive arrests and imprisonment are not new in El Salvador. On previous occasions, mass arrests and other measures taken under states of exception have led to collapses in the already under-staffed prison

[125] Bergmann and Gude (n 104).
[126] During the first year of Bukele's state of exception, around 5802 inmates reported they had been victims of violence inside prisons. See Voz de América-Associated Press, 'El Salvador: 66.417 presos, 5.802 víctimas de abuso en un año de estado de excepción' (*Voz de América*, 27 March 2023) https://www.vozdeamerica.com/a/el-salvador-66417-presos-5-802-v%C3%ADctimas-de-abuso/7024835.html accessed 19 July 2024.
[127] Bergmann and Gude (n 104).

system, allowing for the creation of more sophisticated forms of gang organization and activities, as well as 'overwhelming spikes in retaliatory violence by the gangs'.[128] Recent research has shown that reductions of visible gang activity 'are not uniform across El Salvador':[129] though 'visible' in areas that were previously 'ravaged by [the gangs'] criminality and violence',[130] many of these areas remain subjected to more 'clandestine' forms of gang control, as well as forms of 'life-threatening violence' inflicted by agents of the Salvadoran government.[131] In addition to this, as mentioned above, the maintenance of relatively low rates of violence is highly dependent on delicate agreements and negotiations with gangs, which has increased their leverage and power over the government. Meanwhile, conditions that make it likely for young, unemployed men to join gangs remain intact.[132] As journalists and researchers have pointed out, 'over the past twenty years, the gangs have indisputably proven that they are resilient. They have adapted to every repressive measure that the Salvadoran government has implemented, have leveraged those strategies to their benefit, and have grown stronger'.[133] In the absence of serious attempts to 'address the historical, political, social, cultural, and economic causes of the gang problem' gangs are likely to 'reconstitute, albeit in a different and as of yet unknowable form'.[134]

Political authority, understood in a relational sense, may offer a refreshing perspective in relation to the 'widespread popular support' that Bukele's government has received. The idea that 'the people' demand 'order' over 'liberty', or 'authority' over 'democracy', deforms the meaning of these terms, naturalising misleading assumptions in contexts where democracy (even where its definition is narrowed down) is already extremely restricted. This, in turn, supports a commonplace, yet not necessarily empirically correct, view of the people as a vengeful, angry, and anxious mass. At a very basic level, it is unsurprising that citizens generally prefer 'security' over being victims of crime, and peaceful coexistence over extreme conditions of violence. But even if the public was generally vengeful, anxious, and fearful, the interesting question is why these feelings have become so determining in the political sphere. We must tease out the ways in which States have failed to uphold their own claims of authority so much that freedom is not understood as a product of relations of authority, but rather as their opposite. Similarly, we must tease out the tensions that have naturalised the idea of 'authoritarianism' as the opposite of our existing regimes, rather than a reflection of the hollowed-out democracies we live in. Preference for candidates who promise a 'firm hand against crime' may then be understood as symptomatic of the overall undermining of relations of authority, rather than a mechanism for the reaffirmation of authority.

[128] Bishop, Boerman and Montgomery (n 118) 6.
[129] Anonymous Salvadoran expert cited in ibid 4.
[130] ibid 5.
[131] ibid.
[132] Ruiz and Mackey (n 107) 415.
[133] Bishop, Boerman and Montgomery (n 118) 6.
[134] ibid 7.

4. The porousness of prisons and State authority

In addition to a generalised punitive turn, Latin American countries have seen a widespread deterioration of life in prison. Conditions like precarity, overcrowding, extremely poor hygiene and sanitation, lack of healthcare, difficulties accessing food and water, and widespread violence have become increasingly common. This phenomenon has not only been recognised in recent literature,[135] but also by constitutional courts in the region.[136] Another element that seems to be common in these circumstances is the existence of mechanisms of inmate governance within prisons —that is, of inmates' active participation in the consolidation of order in prisons, including the provision of security, goods, and services; the protection of property; the control of internal (and sometimes external) markets; and the administration of various affairs.[137] Though not historically uncommon in the region,[138] from the moment that the punitive turn started, 'these schemes of inmate governance have multiplied in their forms and have expanded in scope in the region, becoming "endemic"'. [139] Expansion of inmate governance has 'clearly taken place hand in hand with the growth of incarceration', [140] as well as a 'marked decline in the state's capacity to effectively control incarcerated life'.[141]

Conditions of 'inmate governance' are not exclusive to Latin America. Syke's exploration of forms of 'semi-official self-government' is a good example of the extent to which inmate participation has long been a key aspect of life in prisons,[142] as opposed to the notion of 'total' forms of control implicit in Foucauldian theories.[143] As Skarbek has noted, organised groups of inmates ant their 'decentralized mechanisms of governance' play a central role in the structuring of prison ordering and governance.[144] Self-governance is presumably becoming more common and 'endemic' in contexts where penal inflation, overcrowding, and institutional failures are a feature of the penal system, both in the North and the South. Though there is no universalised or single model of 'inmate governance', and each country presents its own particularities, it is telling

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[135] Libardo José Ariza and Fernando León Tamayo Arboleda, 'El cuerpo de los condenados. Cárcel y violencia en América Latina' [2020] Revista de estudios sociales (Bogotá, Colombia) 83; Sacha Darke and Maria Lucia Karam, 'Latin American Prisons' in Yvonne Jewkes, Ben Crewe and Jamie Bennett, *Handbook on Prisons* (Taylor & Francis Group 2016); Fiona Macaulay, 'Prisoner Capture: Welfare, Lawfare, and Warfare in Latin America's Overcrowded Prisons', *Routledge Handbook of Law and Society in Latin America*, vol 1 (1st edn, Routledge 2019); David Skarbek, *The Puzzle of Prison Order: Why Life Behind Bars Varies Around the World* (OUP 2020); Marcelo Bergman and Gustavo Fondevila, *Prisons and Crime in Latin America* (CUP 2021); Sozzo, *Prisons, Inmates and Governance in Latin America* (n 31).
[136] See Chapter 6. Conditions of life in prison have been addressed through declarations of *USoA* in various Latin American countries (Colombia, Peru, Brazil, El Salvador, and Bolivia). In other countries, constitutional tribunals have ordered systemic measures without making explicit declarations (Argentina and Costa Rica).
[137] Skarbek (n 135); Sozzo, *Prisons, Inmates and Governance in Latin America* (n 31).
[138] Sozzo, *Prisons, Inmates and Governance in Latin America* (n 31).
[139] ibid 9.
[140] Sozzo, *Prisons, Inmates and Governance in Latin America* (n 31).
[141] ibid. See also Skarbek (n 135).
[142] Gresham M Sykes, *Crime and Society* (Random House 1967); Gresham M Sykes, *The Society of Captives: A Study of a Maximum Security Prison.* (OUP 1958).
[143] Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Alan Sheridan tr, Penguin Books 1979); Erving Goffman, *Asylums: Essays on the Social Situation of Mental Patients and Other Inmates* (First edition, Anchor Books 1961).
[144] Skarbek (n 135).

that inmate governance (whether through self-governance[145] or co-governance[146]) is becoming a normalised form of ordering in prisons. In other words, rather than reflecting an 'exotic' reality, inmate governance seems to have become the 'normal' form of existence in prisons in different regions,[147] with officials increasingly delegating or renouncing their role as the main suppliers of resources, security, administration, and governance.[148]

As explained in Chapter 3 in relation to the Colombian case, alternative forms of social ordering may be reflective of the extent to which the State is unable to generate and sustain the type of social relations that are required to credibly uphold its claims of authority. States are, in practice, playing a key role in the production of conditions in which alternative forms of social ordering become normalised, undermining their own claims of exclusive authority. As Lessing has shown, the State's own policy decisions have produced the establishment and diffusion of mechanisms of inmate governance.[149] Put differently, rather than passively creating a vacuum of authority, States actively enable organised groups of inmates to strengthen their coercive power both inside and outside the prison walls.[150] In conditions of widespread precarity and overcrowding, organised groups of inmates easily amass power and gain capacity to exert influence both inside and outside prisons.[151]

The case of El Salvador, discussed in the previous section, demonstrates the ways in which the government's actions, despite being presented as a 'crackdown' against gangs, may have the opposite effect, enabling and bolstering their power inside and outside of prisons. Despite the appearance of coercive might deployed by the Salvadoran State through its tough-on-crime policies (both before and during Bukele's government), Salvadoran prisons are almost entirely controlled by inmates. Mass incarceration has not only produced an extremely overcrowded and under-staffed prison system, but also one in which gangs have managed to resort to ever more sophisticated strategies to sustain and augment their power inside and outside of prisons,[152] while the government relies on the maintenance of fragile negotiations and informal pacts to maintain

[145] Skarbek defines self-governance as regimes in which 'prisoners create important governance institutions that are distinct and autonomous from official institutions', and in which 'there is a clear separation between prisoners and officials in terms of authority, legitimacy, operation, and organization'. This includes, for instance, prisoner governance over the underground economy. ibid 10.

[146] Co-governance may be defined as a regime in which 'prisoners play an important role working with officials to govern the facility', facilitating daily operations, conducting security-related tasks, and working hand in hand with officials to 'administer the daily life of the prison'. ibid 9.

[147] Hathazy and Muller 2016

[148] An example of contexts in which official governance seems to remain the rule is that of the Nordic prison system, which tend to have more material resources, more staff in relation to the number of prisons, smaller prison populations, and decentralized systems of norms about acceptable behaviour. See Chapter 3 in Skarbek (n 135).

[149] Lessing (n 111); Sozzo, *Prisons, Inmates and Governance in Latin America* (n 31).

[150] Lessing (n 111) 259.

[151] According to Lessing, this entails 'a paradox of state punitive power'. State responses to crime, particularly measures like mass arrests and harsher sentences, lead to an increase of overcrowding and other conditions in which prison gangs can flourish. This, in turn, leads to increased leverage on the streets, as 'the harsher, longer, and more likely a prison sentence, the stronger outside affiliates' incentives to stay on good terms with imprisoned gang leaders, and hence the greater prison gangs' coercive power over those who anticipate incarceration'. ibid.

[152] Bishop, Boerman and Montgomery (n 118) 6; Ruiz and Mackey (n 107); van der Borgh (n 101).

the illusion of increased security on the outside.[153] For instance, there have been reports of agreements regarding not only the maintenance of lower homicide rates, but also in relation to political campaigns and electoral matters. According to *El Faro*, in exchange for various favours, gangs agreed to grant Bukele's party exclusive access to gang-controlled areas before the legislative and municipal elections of 2021.[154] Similar agreements were also made with the previous left-wing government, gradually increasing both the gangs' control of prisons (which now seem to serve as the gangs' meeting point and headquarters),[155] as well as their strength and political leverage on the outside.

In El Salvador, the fact that prisons are almost entirely run by gangs means that, in some ways, there is more 'order' in these facilities, while, in others, inmates seem to have been thrown entirely outside of the legal order —despite the fact that the very existence of prisons is premised on an alleged vindication of that order. For instance, levels of officially reported violence between inmates appear low because gangs 'exer(t) hierarchical control over both criminal activity and the use of violence among prisoners'.[156] At the same time, however, 'some of the most visible and brutal cases of violence have occurred in these prisons',[157] such as killings and decapitations carried out by gangs.[158] Human rights groups and other organizations have reported a high number of deaths in custody since the start of Bukele's government, but official data on the matter is unavailable. Between March 2022 and April 2024, approximately 241 persons have been reported dead in custody.[159] These deaths seem to be caused both by violence (in view of mortuary reports of asphyxiation, fractures, bruising, lacerations, and perforations) as well as malnutrition and 'lack of medical care, medicine, and food'.[160]

Similarly, the permeability of prisons to the influence of *narcos* and illegal armed groups in Colombia, as well as the State's fading capacity to control these spaces, reveal the porousness of the walls of prison: though these walls are meant to physically and symbolically separate those who disobey the sovereign's commands, and despite existing as secluded spaces, the State's lack of control over prisons speaks of the instability and fragmentation of its claims of authority —the claims on which the very existence of the institution of punishment is founded. Though the prison's physical distinctiveness is maintained, the sovereigns' claims of exclusive authority (already

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153 van der Borgh (n 101); Chris van der Borgh, 'Understanding the Dynamics and Functions of Gang Violence. The Case of El Salvador.' in David Brotherton and Rafael Gude (eds), *Routledge International Handbook of Critical Gang Studies* (Routledge 2021); Bishop, Boerman and Montgomery (n 118).

154 Steven Dudley, 'Is There an Informal Pact between Bukele and the Gangs in El Salvador?' (OpenDemocracy 2020).

155 van der Borgh (n 153).

156 Jennifer Peirce and Gustavo Fondevila, 'Concentrated Violence: The Influence of Criminal Activity and Governance on Prison Violence in Latin America' (2020) 30 International Criminal Justice Review 99, 100.

157 ibid 116.

158 ibid.

159 'SJH Registra al Menos 241 Muertes En Cárceles de El Salvador' *DW* (4 April 2024) <https://www.dw.com/es/sjh-registra-al-menos-241-muertes-en-c%C3%A1rceles-de-el-salvador/a-68735553#:~:text=Al%20menos%20241%20personas%20%2Dentre,Escobar%2C%20directora%20de%20la%20organizaci%C3%B3n>.

160 Bryan Avelar and Tom Phillips, 'At Least 153 Died in Custody in El Salvador's Gang Crackdown' *The Guardian* (29 May 2023) <https://www.theguardian.com/world/2023/may/29/el-salvador-security-gangs-crackdown-cristosal-report-bukele> accessed 12 July 2024.

significantly challenged by generalised acts of disobedience that justify the extensive imposition of punishment) are further undermined by the State's incapacity to maintain a significant degree of order within prisons. Thus, paradoxically, the punitive policies that are meant to reaffirm the State's claims of authority end up revealing not only the State's own incapacity to sustain these claims, but also the ways in which the State itself may enable the groups that represent the most significant challenges to its authority to amass power and control inside and outside of prisons.[161]

Because of the plurality of experiences in the region, the phenomenon of inmate governance offers a rich field for study under the perspective of political authority. In Brazil, for example, there is great historical and regional variation. While governance in some Brazilian prisons resembles the circumstances of the Salvadoran and Colombian cases, other prisons display conditions in which official authorities have managed to create relatively formalised or institutionalised strategies of co-governance which may, to some extent, reinforce official claims of authority. However, because these experiments only lasted a few years, it is unclear whether they had any significant impact in this regard. For instance, certain groups of prisoners in Sao Paulo, such as the *Solidarity Committees* of the 80s, were briefly recognised by official authorities, producing a sense of formal legitimate representation for inmates through which they could 'defend their rights and interests in disputes over prison policies'.[162] However, due to internal fragmentation and because of penal inflation in the 90s, these Committees had a short-lived existence. As overcrowding intensified and prison conditions deteriorated, different groups took over Brazilian prisons —such as the *Primero Comando da Capital* in Sao Paulo— defining themselves in strict opposition to the State and strengthening their power through the imposition of the 'codes and logic of the criminal world'.[163] These recent configurations of prison order resemble those of Colombia and El Salvador more closely, constructing a fragile order that is 'sustained through agreements and accommodations involving various state and non-state actors, almost always informal and obscure, and oftentimes illegal'.[164]

An exhaustive examination of the relationship between the State's claims of authority and the production of inmate governance in the whole region is not possible in the scope of this thesis. Nonetheless, the perspective of political authority provides illuminating insights for the understanding of these contexts. The large-scale imposition of punishment (an exceptional, last resort measure under the sovereign's rule) reflects the extent to which challenges to the legal order have become ideologically and empirically normalised. Through the massive use of punishment, the sovereign abrogates its own claims of political authority, asserting, instead, the widespread character of vulnerability and insecurity. Inside prisons —that is, within the differentiated space that is meant to reaffirm the sovereign's authority— the expansion of inmate governance in the region may be reflective of the extent to which the very act of separation through imprisonment

[161] Sozzo, *Prisons, Inmates and Governance in Latin America* (n 31); Lessing (n 111); Skarbek (n 135).
[162] Camila Nunes Dias, Fernando Salla and Marcos Cesar Alvares, 'Governance and Legitimacy in Brazilian Prison: From Solidarity Committees to the Primeiro Comando Da Capital (PCC) in São Paulo' in Maximo Sozzo (ed), *Prisons, Inmates and Governance in Latin America* (Springer 2022) 57.
[163] ibid 36.
[164] ibid 57.

has lost its potential to reaffirm the state's authority. The State, despite its capacity to use coercive force, is left struggling to vindicate its authority precisely in the institution that it has designed for this purpose, sometimes contributing, through the very act of imprisonment, to the strengthening and consolidation of the actors that represent significant challenges to its authority.

5. Conclusion

Political authority implies ideological claims of universal representation and legitimate monopoly over the use of force. These claims are embodied by the institution of punishment, which appears as the exercise of legitimate coercion through which the sovereign's commands may be vindicated. Overreliance on punishment implies an incapacity to sustain the fundamental conditions on which those claims of authority are founded. The punitive turn seems to indicate the generalised character of overreliance on punishment, pointing towards the existence of global commonalities in relation to the weakness and fragmentation of claims of authority in various contexts. The ways in which authority is undermined, however, are particular to each national socio-economic and political context, and further research on the relationship between violence, inequality, penal inflation, and 'democracy' may illuminate how specific failures to uphold these claims are produced. Attention to authority as a relational concept reveals its character as a contingent and dynamic political process, rather than a fixed, self-generated attribute of States. This perspective, therefore, is equally valuable for post-colonial contexts (in which authority tends to appear as 'fragmented') and for 'Northern' ones (in which authority tends to be taken for granted as a static feature of States, even in the face of penal inflation and expansion).

Furthermore, the perspective of political authority offers critical tools to question the relationship between the tendency towards mass incarceration, penal populism, and democracy. In the Americas, for instance, where different forms of political, social, and economic exclusion have been violently reproduced throughout history, special attention must be paid to existing material limitations to the State's claims of universal representation, in the sense that these forms of exclusion have resulted in significant constraints for the citizens' participation in collective government. These limitations, in turn, seem to have an impact both on the emergence of comparatively high rates of violence, as well as the ways in which punishment is deployed in the State's attempts to manage crime. In addition to this, the perspective of political authority may allow us to interrogate the commonplace assumption that recent trends of penal inflation across the world are largely a response to the public's punitive demands. It does so by taking the concept of democracy seriously, and asking whether those demands truly exist. Where they do, this conceptual framework allows us to interrogate why that is the case, questioning the State's own role in the production of the conditions in which such demands arise. Punitive preferences or inclinations may then be understood as symptomatic of undermined character of relations of authority, rather than expressive of a 'natural' majoritarian disposition towards 'authoritarianism' and the hard treatment of offenders.

The proliferation of 'inmate governance' in various regions of the world may also be analysed as expressive of the State's struggles to sustain its claims of authority. Prisons, though designed to reaffirm authority through the factual and normative separation of those who violate the sovereign's commands from those who obey them, have become a porous site in which official authority is strongly challenged. These spaces, rather than being characterised by an outright absence or retreat of the State, are constituted by the State's own policy decisions, including those that have produced conditions of penal inflation in which alternative actors have managed to proliferate, increasingly strengthening their *de facto* power inside and outside prisons. The punitive turn and the porousness of prisons therefore reveal two contradictions that I have identified in the analysis of declarations of *USoA* in Colombian prisons. First, penal inflation and the turn towards the penal apparatus as a tool for the consolidation of authority reveal the extent to which disobedience has become normalised and, therefore, the extent to which the State's claims of authority have become exceptional. Second, the porousness of prisons shows that the differentiated space that is meant to vindicate the sovereign's claims of authority has become a new site of struggles and challenges to those claims. Rather than upholding the basic conditions that authority is premised on, the 'endemic' existence of these conditions in prisons undermines the authority of the legal system as a whole, revealing the self-contradiction of the State's claims of authority.

Penal inflation and the porousness of prisons may be understood as reflective of the extent to which the 'normal' conditions of sovereignty have become exceptional: the sovereign's order is not only disobeyed and violently challenged, but the mechanisms designed to reaffirm its authority have lost their meaning, resembling an exercise pure force rather than embodying relations of political authority. This is precisely the paradox at the core of declarations of *USoA* in Colombian prisons —a strategy of systemic intervention which, as will be discussed in the next chapter, has become increasingly common in the region. The perspective of political authority invites us to take this paradox seriously, unmasking the large-scale deployment of punishment as a form of coercion that undermines the premises on which it is constructed.

Chapter 6
Systemic Remedies:
A Failure of the Constitution?

Resorting to constitutional courts to deal with a variety of 'failures' (whether resulting from specific policies, institutional shortcomings, structural injustices and inequalities, or even public health emergencies) has become increasingly frequent across the globe.[1] Though an 'understudied field' in constitutional theory, judges in various jurisdictions 'continue to make remedial decisions with brief and sometimes no reasoning'.[2] In this chapter, I will focus on the recent emergence of systemic remedies to address what courts construct as breaches or threats to fundamental constitutional rights and principles. Because of the generalised character of these violations, individual remedies are either insufficient, unavailable, or simply impossible without resort to 'structural' transformations, justifying a turn from adjudication to the determination of the changes, reforms, and governmental actions required to 'preserve' the constitution.

These interventions go beyond declarations that seek to ensure that legislation is compatible with human rights (such as declarations of incompatibility in the United Kingdom,[3] or declarations of the unconstitutionality of statutory provisions in Canada),[4] which tend to avoid encroaching on the competences of other branches. Instead, systemic remedies of the kind described in this Chapter usually imply the definition, with varying levels of detail and specificity, of the measures that other branches of power must undertake to overcome generalised violations, safeguard 'basic principles' of liberal democracy,[5] counterbalance legislative blind spots,[6] provide adequate individual protection,[7] or a combination of all four. In the articulation of these remedies, legislatures and governments are often described as 'intransigent', 'incompetent', or 'inattentive',[8]

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[1] On the different types of failures that courts address, as well as how these abstract justifications are constructed in international and domestic law, see Michaela Hailbronner's forthcoming book 'Acting When Others Aren't: Arguments From Failure In Comparative Public Law And International Law' (provisional title). See also Po Jen Yap, 'New Democracies and Novel Remedies' (2017) 1 Public law 30; Kent Roach, *Remedies for Human Rights Violations: A Two-Track Approach to Supra-National and National Law* (CUP 2021); Kent Roach, 'Dialogic Remedies' (2019) 17 International journal of constitutional law 860; Paola Andrea Acosta Alvarado, *Tribunal Europeo y Corte Interamericana de Derechos Humanos: ¿escenarios idóneos para la garantía del derecho de acceso a la justicia internacional?* (Universidad Externado 2008).

[2] Roach, *Remedies for Human Rights Violations* (n 1) 516.

[3] Human Rights Act 1998 s. 3 (1)

[4] Similar examples include declarations of invalidity in Germany. See Roach, *Remedies for Human Rights Violations* (n 1).

[5] See, for instance, the Colombian Constitutional Court's declarations of *USoA*. A similar logic may also be found in the US Supreme Court's *Brown v. Board of Education of Topeka (2)* 349 US 294 (1955). See ibid Chapter 7.

[6] Rosalind Dixon, *Responsive Judicial Review: Democracy and Dysfunction in the Modern Age* (OUP 2023); Rosalind Dixon, 'Creating Dialogue about Socioeconomic Rights: Strong-Form versus Weak-Form Judicial Review Revisited' (2007) 5 International journal of constitutional law 391.

[7] Po Jen Yap, 'New Democracies and Novel Remedies' [2017] Public Law, University of Hong Kong Faculty of Law; Roach, *Remedies for Human Rights Violations* (n 1); Roach, 'Dialogic Remedies' (n 1).

[8] Katharine G Young, *Constituting Economic and Social Rights* (University Press 2012) 189; Kent Roach and Geoff Budlender, 'Mandatory Relief and Supervisory Jurisdiction: When Is It Appropriate, Just And Equitable?' (2005) 5 The South African Law Journal 325.

justifying the judiciary's turn towards 'creative' remedies to mitigate the effects of their 'failures', particularly in the context of social, economic, and cultural rights.[9] These forms of judicial intervention do not merely invite legislative or governmental responses, but rather establish complex processes of 'inter-institutional collaboration', with courts retaining discretion to determine how that 'collaboration' shall take place, the extent to which each institution is complying with its part, and the moment when violations have been definitively overcome.

This chapter analyses recent developments of systemic remedies in various jurisdictions, exploring their limitations, questioning their justifications, and bringing out underlying tensions behind these strategies. Beyond traditional objections regarding the detrimental effects of these forms of judicial intervention on the separation of powers or the popular 'democratic legitimacy objection',[10] I focus on the tensions between these remedies, constitutional normality, and the State's claims of political authority, drawing on insights from previous chapters. In the first section, I explore the emergence of systemic remedies in the American context, which set the scene for the more recent and 'innovative' developments of constitutional courts in the global South. In the second, I draw distinctions between the American remedies and the more 'creative' strategy of the Colombian Court's declarations of *USoA*, examining the implications of these differences in the framework of political authority. I argue that, though the American remedies remain a predecessor of more recent developments elsewhere, systemic remedies of the kind developed by the Colombian Constitutional Court have taken a direction of their own, encompassing more general declarations about the constitutional project rather than being restricted to specific constitutional provisions, as has been the case in the American interventions.

Because of their 'innovative' and 'dialogical' character, the Colombian Court's interventions have been highly influential in contexts where, due to a variety of institutional and historical features, judges have envisioned a more active and dynamic role for themselves in the 'realisation' of the constitution.[11] In the third section, I analyse the emergence of different systemic remedies in what scholars consider two of the most 'innovative' jurisdictions, India and South Africa, exploring distinctions between their traditions of systemic remedies and those of the Colombian Constitutional Court. While institutional, political, and cultural factors have resulted in a relatively more 'limited' form of judicial activism in those two jurisdictions, the Colombian doctrine remains a model of more 'successful' activism, with scholars often citing it as an example of how these courts could make their own interventions more transformative and effective — despite the fact that these decisions have had little impact in the local context.

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[9] Roach, *Remedies for Human Rights Violations* (n 1) 519; Brian Ray, *Engaging with Social Rights. Procedure, Participation and Democracy in South Africa's Second Wave* (CUP 2016).

[10] See, among others, Aileen Kavanagh, 'Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication' in Grant Huscroft (ed), *Expounding the Constitution: Essays in Constitutional Theory* (CUP 2008); Jeremy Waldron, *Political Political Theory: Essays on Institutions* (Harvard University Press 2016); Jeremy Waldron, 'The Core of the Case against Judicial Review' (2006) 115 The Yale Law Journal 1346.

[11] Daniel Bonilla Maldonado, *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia* (CUP 2013); David Landau, 'A Dynamic Theory of Judicial Role' (2014) 55 Boston College law review 1501; Yap (n 7).

Although the activist tribunals of the South are often described as being part of a shared (neo)constitutionalist tradition (which features, among others, ambitious constitutions with strong mechanisms for the protection of social, economic, and cultural rights), declarations of *USoA* stand out amongst the remedies created by other tribunals. In the fourth section, I grapple with the question of why these unique declarations emerged with such strength in the Colombian context, offering potential explanations that touch on cultural, institutional, and political factors. However, through a closer look at these factors, I argue that, despite being symbolically potent, these declarations confront the Court with tensions and contradictions underlying the broader tradition of constitutionalism in which the doctrine is embedded.[12] Notwithstanding these tensions, declarations of *USoA* have become increasingly popular in Latin America, with a number of tribunals in the region importing this doctrine to their domestic systems (particularly in their attempts to deal with the 'crises' of prisons in each jurisdiction). In section 5, I look at some of these cases in detail, highlighting their particularities and explaining how they display similar tensions as those found in the Colombian case. Lastly, in the sixth section, I discuss the limitations of 'dialogic' systemic remedies of the kind developed by the Colombian Court.

1. The emergence of systemic remedies

Systemic remedies imply a significant shift in relation to the traditional conception of legal remedies as 'proper redress' to the injuries caused by specific, normally individual, forms of harm.[13] With recent innovations of tribunals in various latitudes, the understanding of remedies has been extended to include measures that aim to adjust the future behaviour of different branches of power in order to 'prevent future and repetitive violations',[14] as well as to balance out competing interests, rather than exclusively awarding compensation or redress for past injuries.[15] This shift, which emerged with *Brown v Board of Education*[16] and the cases that followed,[17] set the scene for further developments in other jurisdictions, which have taken their own 'contingent, dialogic, iterative, and even experimental' paths.[18]

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[12] See Chapter 2.
[13] William Blackstone, *Commentaries on the Laws of England* (8th ed., Clarendon Press, printed for W Strahan, T Cadell, and D Prince 1778) bk III, Chap. VII, pp.100–101. This common law concept has also been influential in international law (See Case Concerning the Factory at Chorzów (Germany v Poland) (Merits) PCIJ Rep Series A No 17).
[14] Roach, *Remedies for Human Rights Violations* (n 1) 74.
[15] Roach, 'Dialogic Remedies' (n 1).
[16] Brown v Board of Education of Topeka (1), 347 US 483 (1954) ['Brown I']; Brown v Board of Education of Topeka (2), 349 US 294 (1955) ['Brown II'].
[17] Roach, *Remedies for Human Rights Violations* (n 1); Roach, 'Dialogic Remedies' (n 1). See, for instance, the US Supreme Court's Green v Country School Board of New Kent County, 391 US 430 (1968); Raney v Board of Education of the Gould School District, 391 US 443 (1968); Monroe v Board of Commissioners of the City of Jackson, 391 US 450 (1968); Alexander v Holmes County (Virginia) Board of Education, 396 US 19 (1969); Swann v Charlotte-Mecklenburg (North Carolina) Board of Education, 402 US 1 (1971); Hutto v Finney, 437 US 678 (1978). See also, more recently and in the context of access to healthcare in prisons, Coleman v Wilson 912 F Supp 1282 (ED Cal 1995); Plata v Davis 329 F3d 1101 (9th Cir 2003); Brown v Plata, 563 US 493 (2011).
[18] Roach, 'Dialogic Remedies' (n 1) 861.

In *Brown* I and II*,* rather than responding to specific damages caused to individuals, the Supreme Court focused on the structural character of rights violations produced by racial segregation, attempting to find mechanisms to ignite systemic reform.[19] In *Brown I*, the Court declared that segregation in public schools violated the 14th Amendment and was, therefore, unconstitutional. However, immediate desegregation was not ordered, and the Court established no fixed date for the end of segregation, stating that further arguments were necessary to properly consider the issue of relief. Later, in *Brown II,* the Court urged local authorities to 'make a prompt and reasonable start toward full compliance', ordering them to end segregation 'with all deliberate speed'.[20] To achieve this, the Court offered general guidance to lower courts in relation to possible obstacles, advising them to 'take into account the public interest' while not allowing the 'vitality of these constitutional principles […] to yield simply because of disagreement with them'.[21] In this way, the court shifted from individual remedies as a response to past rights violations, replacing them with 'weaker', more experimental remedies that were expected to lead to 'more robust rights' in the long term.[22]

As the Court itself had anticipated,[23] *Brown* was met with great resistance, while 'remedies for Black children and parents who suffered discrimination and exclusion were effectively postponed indefinitely'.[24] Progress towards equality remained slow until the enactment of the Civil Rights Act of 1964. Legislative inaction triggered a series of intensive litigation against segregation in public facilities,[25] as well as 'planned litigation' in other fields of public policy,[26] as part of attempts to speed an otherwise slow process of social change. These factors, among others, contributed to the consolidation of a culture of what Kagan calls adversarial legalism —that is, in broad terms, the idea that 'law and courts are or should be instruments for effectively protecting individual rights, improving governance, and controlling the exercise of political and economic power'.[27] Because of this, strategic litigation remained at the core of the question of desegregation, while Supreme Court justices were celebrated by scholars for feeling 'obligated to "do justice" when the other bodies of government have failed to take action against social problems'.[28] The 1970s were marked by a period of enthusiasm about structural remedies, with the Court extending

[19] Roach, 'Dialogic Remedies' (n 1).
[20] *Brown II* (n 17) 349.
[21] ibid., p. 300.
[22] Roach, *Remedies for Human Rights Violations* (n 1) 84.
[23] See Cooper v Aaron, 358 US 1 (1958). The Supreme Court ruled that, regardless of widespread opposition to *Brown,* this case represented the 'law of the land', and the rights of minority students were not to be 'sacrificed or yielded to the violence and disorder which have followed', p. 358.
[24] Roach, *Remedies for Human Rights Violations* (n 1) 84.
[25] After Brown, a series of rulings on desegregation followed: *Cooper v. Aaron, 358 U.S. 1 (1958)* (n 23); *Goss v Board of Education of the City of Knoxville 373 US 683 (1963)*; *McNeese v Board of Ed for Community Unit School Dist 187, 373 US 668 (1963)*; *Griffin v County School Board of Prince Edward County, 377 US 218 (1964)*.
[26] For instance, in the case of prisons, the American Civil Liberties Union created a litigation campaign aimed at eliminating 'dreadful' conditions in prisons through judicial intervention. See ACLU, 'ACLU National Prison Project' <https://www.aclu.org/documents/aclu-national-prison-project> accessed 2 February 2024.
[27] Robert A Kagan, *Adversarial Legalism: The American Way of Law, Second Edition* (Harvard University Press 2019) 264.
[28] ibid 68.

its interventions to facilities like prisons.[29] Nevertheless, it was only until 'president and Congress bolstered the ruling with a series of momentous statues' that the promise of desegregation became more feasible.[30] Though *Brown* has been described as a 'weak, ineffective, and powerless' judgement',[31] it remained a significant legal milestone, often praised for its symbolic contributions to the transformation of national discourse, particularly in terms of the interpretation of core values of the Constitution.[32]

Despite initial enthusiasm, the use of structural remedies declined significantly throughout the 1980s and 90s, with most 'planned litigation campaigns peter[ing] out' by the end of the 20th century,[33] although it has remained relevant in the penal sphere (particularly regarding the right to adequate healthcare in prisons).[34] The general decline of systemic judicial intervention in the U.S.A. was possibly motivated by different factors: the arrival of Reagan's republican government[35] —as well as the conservative appropriation of adversarial legalism to advance the party's values—,[36] the need to put temporal limits to judicial intervention in public policy, the idea that the 'vital national tradition' of local autonomy should be preserved,[37] and decreased funding towards litigation campaigns —funding which, in many cases, had come from the government of states themselves.[38] In addition to this, the Court placed stronger limits to the availability of structural remedies,[39] particularly where other judicial remedies were available to the respondents.

Notwithstanding their decline since the 90s, strategic litigation and judicial activism have remained a key aspect of American legal culture (being particularly relevant in relation to the effects of mass incarceration),[40] and have been greatly influential beyond the domestic sphere. Though the most 'experimental' and 'innovative' aspects of judicial activism and systemic remedies have

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[29] *Hutto v. Finney* (n 18). In this case, the Court analysed practices of 'punitive isolation' in prisons in Arkansas, which were carried out for indiscriminate periods of time in crowded, windowless cells. Conditions of imprisonment in Arkansas were described as a 'dark and evil world completely alien to the free world'. Although isolation itself was found not to be unconstitutional, the Court held that punitive isolation for longer than thirty days in those particular conditions of imprisonment constituted cruel and unusual punishment.

[30] Martin Loughlin, *Against Constitutionalism* (Harvard University Press 2022) 147.

[31] Gerald N Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change? Second Edition* (University of Chicago Press 2008) 3.

[32] On these 'symbolic' and cultural effects, see Mark Tushnet, 'Some Legacies of "Brown v. Board of Education"' (2004) 90 Virginia Law Review 1693; Mark Tushnet, 'The New Constitutional Order and the Chastening of Constitutional Aspiration' (1999) 113 Harvard Law Review 29; Michael J Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (OUP 2008).

[33] Tushnet, 'Some Legacies of "Brown v. Board of Education"' (n 32) 1696.

[34] Jonathan Simon, 'Knowing What We Want: A Decent Society, A Civilized System of Justice & A Condition of Dignity' (2022) 151 Daedalus 170.

[35] Tushnet, 'The New Constitutional Order', (n 32).

[36] Kagan (n 27).

[37] Jenkins (1995)

[38] Charles R Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Chicago University Press 1998) 58. For instance, the Prison Litigation Reform Act of 1996 states that fees for prevailing parties were determined by the rate paid to lawyers appointed to represent criminal defendants, rather than a market-rate fee, as had been the case under the previous 1976 Statute. Further limitations to funding were introduced by Congress in the 90s and 2000s. See also Tushnet, 'Some Legacies of "Brown v. Board of Education"' (n 32).

[39] See *O'Shea v Littleton, 414 US 488 (1974).*

[40] *Brown v. Plata* (n 18).

unfolded in the global South,[41] decisions like *Brown v Board of Education* and *Brown v Plata*[42] have been key references in the context of broader transformations in the understanding of the role and competences of constitutional courts, opening up the possibility for them to take part in what they conceive as broader processes of structural reform and social transformation through the 'interpretation' of foundational constitutional values. [43]

2. From unconstitutional violations of rights to states of unconstitutionality

Brown II and the cases that followed transformed the role and responsibilities of the American Supreme Court,[44] introducing functions that go beyond legal adjudication, and setting the 'basic procedural stance for public law litigation where courts retain jurisdiction and look primarily to the government to comply in good faith and to develop specific remedial plans'.[45] While the American precedent is rarely recognised explicitly, it remains in the background of the more 'innovative' and 'experimental' strategies created by constitutional courts in the South, particularly in India, South Africa, and Colombia —courts that are often portrayed by the literature as being at the forefront of these developments,[46] with the Colombian case frequently referenced as one of the most advanced models of judicial activism and 'dialogic' intervention.[47]

Brown II was kept at the 'backstage' of the Colombian Court's reasoning in early declarations of *USoA*. In these early judgments, the Court made no explicit references to the American precedent.[48] Later on, in 2003,[49] the Court made an explicit recognition of the value and significance of *Brown* —citing it as a referent rather than a direct source for the declarations, though potentially legitimating its own innovations by showing that other courts, which it saw as peers,

[41] Bonilla Maldonado (n 11); Roach, *Remedies for Human Rights Violations* (n 1).
[42] *Brown v. Plata* (n 18). In this case, the Supreme Court analysed the issue of prison overcrowding and violations to prisoners' Eighth Amendment rights (ban on cruel and unusual punishment) due to the effects of inadequate medical and mental health care. The issue had been previously decided by a Three-Judge District Court in accordance with the Prison Litigation Reform Act, which had ordered the state of California to reduce its prison population to 137.5% of design capacity within two years. The Supreme Court upheld this order, stating that conditions of overcrowding had produced an unconstitutional violation of the Eighth Amendment. This case will be discussed in more detail in section 2 below.
[43] Tushnet, 'Some Legacies of "Brown v. Board of Education"' (n 32); Tushnet, 'Foreword' (n 32); Klarman (n 32).
[44] Brown has also remained culturally significant and symbolically powerful, according to scholars who see this judgment as one transformed national discourse around the core values of the Constitution. On these 'symbolic' effects, see Tushnet, 'Some Legacies of "Brown v. Board of Education"' (n 32); Tushnet, 'Foreword' (n 32); Klarman (n 32).
[45] Roach, *Remedies for Human Rights Violations* (n 1) 359.
[46] Bonilla Maldonado (n 11); Yap (n 7); Roach, *Remedies for Human Rights Violations* (n 1); Roach, 'Dialogic Remedies' (n 1).
[47] Sandra Liebenberg, 'The Art of the (Im)Possible? Justice Froneman's Contribution to Designing Remedies for Structural Human Rights Violations' (2022) 12 Constitutional Court Review 137; Roach, *Remedies for Human Rights Violations* (n 1); Bonilla Maldonado (n 11); César Rodríguez-Garavito and Diana Rodríguez Franco, *Radical Deprivation on Trial. The Impact of Judicial Activism on Socioeconomic Rights in the Global South.* (CUP 2015).
[48] David Mendieta and Juan Fernando Gómez Gómez, 'Estado de cosas inconstitucional y sistema penitenciario y carcelario de Colombia' (2022) 14 Revista de Estudos Constitucionais, Hermenêutica e Teoria do Direito 329.
[49] *T-1030/03* (CCC) ¶4.

had also resorted to structural remedies. Although at this point the Court had not fully developed the criteria to decide whether an unconstitutional state of affairs existed,[50] the Court identified elements that justified taking additional, non-traditional, systemic remedies on the basis of what it calls the 'objective dimension' of fundamental rights,[51] that is, the idea that fundamental rights make up a sphere of objective principles and values that articulate the constitutional system, creating duties and establishing 'criteria for the regulation of the State's activity and ultimate aims which explain and make sense of the organisation of public power as a whole'.[52] In the words of the Court, 'guarantees to the *objective dimension* of fundamental rights may be found in *structural remedies,* the doctrinal background of which may be found in the famous case of *Brown II*'.[53] The elements of protection found in *Brown*, according to the Court, are:

> […] the existence of a systematic violation of the fundamental rights of a group of people and therefore a judicial order which aims to modify an unjust *status quo.;* 2) a judicial process that involves a considerable set of public authorities; 3) facts that are related to public policies; 4) a judgment that does not have exclusively *inter-partes* effects; 5) Supreme Court justices retain competence to monitor compliance with the judgment; 6) constitutional judges are not neutral or passive towards the situation; and 7) the aim of the judgment is to guarantee the effectiveness of constitutional principles.[54]

Taking inspiration from *Brown,* the Colombian Court has developed its own systemic remedies, establishing mechanisms of dialogical 'inter-institutional' collaboration aimed at realisation of the Constitution. More importantly, however, while the American remedies are restricted to finding 'unconstitutional' violations of rights tied to more specific circumstances (including institutional and policy failures),[55] the Colombian declarations involve a much broader judgment about the state of the constitutional project.

On the one hand, *Brown* and subsequent American cases tend to tie widespread rights violations to specific constitutional provisions (for instance, the 14th Amendment in the case of *Brown II;* or the 8th Amendment in relation to the lack of healthcare and medical services in California, in *Brown v Plata*). On that basis, the Supreme Court declares particular circumstances to be 'unconstitutional' (i.e., racial segregation in public schools, in *Brown;* and conditions of 'prolonged illness and unnecessary pain' caused by the lack of healthcare and overcrowding in

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[50] *T-025/04* (CCC).
[51] This concept is originally derived from Alexy's theory of fundamental rights. Though the concept often appears in the Court's judgments (including those on declarations of *USoA*), it has not been defined in much detail. Citing Alexy, the Court has argued that 'fundamental rights, besides their main function of regulating the relationship between individuals and the State, also have a dimension in which, as principles of a supreme level of abstraction in Alexy's terms, influence all areas of the legal order by imposing parameters for the actions of both the state and individuals'. *C-578/92*.
[52] *SU-109/22* (CCC).
[53] *T-1030/03* (n 49) ¶4.
[54] ibid.
[55] Roach, Remedies for Human Rights Violations (n 1) 519; Alexander Mordecai Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics (Bobbs-Merrill 1962).

Brown v Plata).[56] On the other, the Colombian declarations involve the recognition of a daily transgression of the Constitution and the Law'[57] and a 'serious and flagrant violation of the constitutional order'.[58] Furthermore, the justification of extraordinary judicial powers to address 'unconstitutionality' varies. Because declarations of *USoA* identify generalised rights violations as threats to the constitutional order as a whole, the abstract principles from which extraordinary constitutional powers are derived feature much more prominently in the Colombian judgments than the American ones. The American remedies are justified by reference to certain moral values that are essential to the constitutional architecture (equality in *Brown II;* dignity in *Brown v Plata*),[59] relying on these abstract principles as the 'invisible' scaffolding of the Constitution. Meanwhile, the Colombian Court makes more explicit and frequent references to these principles, and, in that sense, the 'scaffolding' is made plainly visible, justifying the Court's intervention.

These distinctions may seem somewhat shallow, in the sense that both courts identify generalised conditions of unconstitutionality with slightly different emphases, allowing courts to actively intervene in public policy. However, both approaches to systemic remedies point towards the unrealised promises of each system's constitutions, indicating, implicitly or explicitly, failures of constitutional authority. In fact, in his dissenting opinion in *Brown v Plata*, Justice Scalia criticises the ruling because, in his view, this decision 'not only affirms the structural injunction but vastly expands its use, by holding that an entire system is unconstitutional because it may produce constitutional violations',[60] a description that is strikingly similar to the declarations made by the Colombian Court. This may be a sign that American systemic remedies are gradually moving towards more general declarations which resemble the Colombian *USoA*. Even though the US Supreme Court does not make any official statements about the broader 'materialisation' of the Constitution, the question of how these structural failures affect the authority of the legal order remains at the background, with the Court willing to go to great lengths to act as a legitimising force. But the fact that the US Supreme Court does not go as far as issuing an official, explicit recognition of the fragility of the constitutional order as a whole, as the Colombian Court does, is a significant difference that may have an impact on each court's justification of the expansion of its powers.

To illustrate this point, it may be useful to compare the cases concerning rights violations in prisons in both jurisdictions. In *Brown v Plata,*[61] the Supreme Court focused on 'unconstitutional prison conditions' caused specifically by the lack of adequate medical healthcare which, in turn, were worsened by conditions of overcrowding. These circumstances resulted in thousands of inmates being subjected to forms of cruel and unusual punishment. The conditions analysed by the Supreme Court, as opposed to the Colombian one, were in this sense much more specific, relating to the provision of healthcare rather than more general conditions of imprisonment. To

[56] *Brown v. Plata* (n 18).
[57] *T-153/98* (CCC).
[58] *T-388/13* (CCC) ¶7.9.1.12.
[59] On the role of dignity in *Brown v Plata,* see Simon (n 34).
[60] *Brown v. Plata* (n 18) 555.
[61] *Brown v. Plata* (n 18).

deal with this 'unconstitutionality', the Court ordered the State of California to reduce the prison population to 137.5% of the prisons' combined capacity in a period of no more than 2 years, aiming to trigger 'changes deep within the state's mass incarceration laws and policies'.[62] The Court granted local authorities autonomy to evaluate how to best comply with said order, extending the remedy 'no further than necessary' and employing the 'least intrusive means' to correct the violations,[63] while giving 'substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief'.[64] Though making a more specific order (as compared, for example, to the guidelines and abstract criteria set by the Colombian Constitutional Court, as explained in Chapters 1 and 3), the Supreme Court left local authorities a broad scope to determine the specificities of the measures to follow, asking 'those responsible for the violation to develop plans to remedy it' while allowing the Supreme Court to retain its jurisdiction where specific plans are challenged.[65]

Because the Supreme Court's analysis was restricted to the situation in Californian prisons, it did not make any official statements about the broader 'materialisation' of the Constitution — although, obscured by the moral question of dignity, the question of the extent to which mass incarceration affects the overall legitimacy of the system remains in the background of this decision. In comparison to the Colombian case, the orders mandated by the US Supreme Court were both more specific—requiring the effective release of inmates—[66] and more limited —in the sense that local authorities, in line with the 'vital national tradition' of local autonomy, had more room to decide how to enforce the Court's orders.[67] Unlike the Colombian Court, the Supreme Court refrained from establishing detailed guidelines for the administration of prisons, or from defining general criteria for the reform and creation of penal policy, making a less intrusive intervention upon penal policy. In comparison to the American remedies, the Colombian 'dialogic' approach entails a more active role for the Constitutional Court, allowing it to establish procedures of strict oversight and supervision of other branches' compliance with its abstract guidelines and criteria. However, at the same time, this intrusion was also more restrained, in the sense that the Colombian Court refused to order the release of inmates. Because the Colombian Court makes an official declaration concerning chronic violations not just of particular constitutional provisions, but of the Constitution as a whole (where those violations represent persistent threats to its existence),[68] the measures that follow are also broader in scope. In addition, precisely because of

[62] Jonathan Simon, *Mass Incarceration on Trial: A Remarkable Court Decision and the Future of Prisons in America* (The New Press 2014) 134.
[63] *Brown v. Plata* (n 18) 494. 4
[64] ibid 512. Though only mentioned briefly by the majority opinion (unlike the Colombian case, in which dangerousness and victims' rights received a lot of attention as justifications for the Court's decision not to order the mass release of prisoners), the problem of the 'dangerousness' of prisoner release is addressed in detail, and in alarming manner, in the dissenting opinions. Justice Alito, for instance, cites the interests of victims as the main cause for concern, stating: 'I fear that today's decision, like prior prisoner release orders, will lead to a grim roster of victims'. (p. 581)
[65] Roach, *Remedies for Human Rights Violations* (n 1) 359.
[66] See Chapter 3.
[67] *Missouri v Jenkins, 515 US 70 (1995).*
[68] *T-388/13* (n 58). See also Chapters 3 and 4.

the more expansive character of these declarations, the question of authority arises more starkly and explicitly than it does in the American case, with the Constitutional Court making a strong if brief recognition of the extent to which the situation of prisons affects the state's claims of legitimate authority.[69]

Notwithstanding these key differences, the transformative potential of both forms of judicial intervention appears to be limited. The scarce effects of the Colombian judgments are discussed in more detail in the previous chapters. In the American case, whether *Brown v Plata* has had a significant impact on the provision of healthcare to inmates (the main issue analysed in the judgment) remains an open question. While there has been a substantial reduction of the imprisoned population in comparison to 2006, in compliance with the capacity cap set by the Supreme Court, plummeting incarceration rates in the United States seem to respond to more general trends, which suggests that *Brown v Plata* was not necessarily a key cause of this reduction.[70] In addition to measures of early release taken in response to the COVID pandemic (which led to a decline of the national incarceration rate of approximately 15% between 2020 and 2021), since 2011 the state of California has engaged in broad-ranging reforms to penal policy which seem to have had a more significant impact on incarceration rates (including more discretion for judges to choose alternatives to imprisonment, restrictions to the return of parolees where technical conditions of supervision are violated, and the designation of less serious offences to short sentences in county jails, among others).[71]

However, California's prison system remains severely overcrowded, at an average of almost 120% its capacity. The population cap set by the Supreme Court (137.5%) constitutes a significant concession to overcrowding, such that overcrowding below this standard seems acceptable and legitimate, with little regard to the impact of these conditions on individuals deprived of liberty. Moreover, because policy reforms involved diverting the custody of nonviolent, nonserious, and nonsexual offenders to county jails or probation rather than state prisons, many of the state's prisons problems have now been transferred to the county level: county jails are receiving large populations for longer periods of time (though designed for smaller populations and shorter periods), and have witnessed a significant spike in violence.[72] More importantly, despite complying with the Supreme Court's orders, overcrowding in prisons and jails still has a very detrimental impact on inmates' life conditions.[73] Though Simon argues that there has been 'significant progress in improving the delivery of medical care in California's prisons',[74] Roach has recently highlighted that, by 2021, around 80% of the positions required for the

[69] ibid ¶8.2.1.4. See Chapter 3.
[70] Katherine Beckett, *Ending Mass Incarceration: Why It Persists and How to Achieve Meaningful Reform* (OUP 2022).
[71] Derek A Neal and Armin Rick, 'The Role of Policy in Prison Growth and Decline' [2023] University of Chicago, Becker Friedman Institute for Economics Working Paper, No. 2023-150.
[72] Hernandez D Stroud, 'Judicial Interventions for Inhumane Prison and Jail Conditions' (Brennan Center for Justice 2023) <https://www.brennancenter.org/our-work/research-reports/judicial-interventions-inhumane-prison-and-jail-conditions#:~:text=A.B.,there%20are%20some%20noteworthy%20developments.> accessed 12 May 2023.
[73] California Department of Corrections and Rehabilitation, 'Three-Judge Court Monthly Update' <https://www.cdcr.ca.gov/3-judge-court-update/> accessed 28 March 2024.
[74] California Correctional Health Care Services, Receiver's Fifty-third Tri-Annual Report, February 2023.

provision of these services remained vacant,[75] implying that the judgment has had little impact on the specific violations of rights that the Court analysed in *Brown v Plata* and, more importantly, on the actual lives of inmates. As Roach has noted, *Brown v Plata* 'has expanded both judicial resources and political capital on achieving a remedy that has not provided better healthcare for prisoners'.[76]

3. Southern developments

The constitutional courts of India, South Africa, and Colombia are often applauded for designing the 'boldest' and most 'innovative' approaches to systemic remedies,[77] going beyond the American framework. Set in post-colonial contexts filled with various types of inequalities, and on the basis of constitutions with transformative aspirations,[78] these courts have developed their own 'neo-constitutionalist' tradition,[79] seeking to guarantee compliance with the State's positive obligations to materialise the constitution and ensure the justiciability and effectiveness of constitutional rights (broadly understood to include social, economic, and cultural rights).[80] The direction taken by each tribunal, notwithstanding these similarities, varies greatly.

The South African Constitutional Court, in exercise of its 'broad constitutional mandate',[81] has developed tools to address the rights violations caused by state failures, although it has not

[75] Roach, *Remedies for Human Rights Violations* (n 1) 381.
[76] Roach, *Remedies for Human Rights Violations* (n 1).
[77] David Bilchitz and David E Landau, The Evolution of the Separation of Powers: Between the Global North and the Global South (Edward Elgar Publishing 2018); Bonilla Maldonado (n 11); Roach, Remedies for Human Rights Violations (n 1). From 2019, the Turkish Constitutional Court has also made similar declarations concerning 'structural problems', calling upon the legislature to take actions to prevent rights violations. However, the Turkish Court 'neither preserved an individual remedy nor initiated a structural one. Instead, the Court, so to say, referred the issue to the government to find a solution'. See Serkan Yolcu, 'Abandonment of Judicial Review by Turkish Constitutional Court: Fall of Individual Complaint Procedure?' (*IACL-IADC Blog*, 28 November 2023) <https://blog-iacl-aidc.org/2023-posts/2023/11/28/abandonment-of-judicial-review-by-turkish-constitutional-court-fall-of-individual-complaint-procedure> accessed 27 May 2024.
[78] See, among others, the preamble of the Constitution of the Republic of South Africa of 1996 (according to which the Constitution seeks to 'heal the divisions of the past' and 'establish a society based on democratic values, social justice, and fundamental human rights'; the preamble of the Constitution of India (1949) which defines the republic as one which must 'secure to all its citizens justice, social economic and political'; and article 1 of the 1991 Colombian Constitution, according to which 'Colombia is an *Estado Social de Derecho* […] founded on human dignity', along with article 2, according to which 'the State's essential aims are: to serve the community, promote general welfare and guarantee the effectiveness of principles, rights, and obligations established in the Constitution; to facilitate the participation of all in decisions which affect them and in the economic, political, administrative and cultural life of the Nation […]'.
[79] Manuel Jose Cepeda-Espinosa, 'Judicial Activism in a Violent Context: The Origin, Role, and Impact of the Colombian Constitutional Court' (2004) 3 Washington University Global Studies Law Review; Jackie Dugard, 'Courts and Structural Poverty in South Africa: To What Extent Has the Constitutional Court Expanded Access and Remedies to the Poor?', *Constitutionalism of the Global South* (CUP 2013); Bonilla Maldonado (n 11); Roberto Gargarella, *Latin American Constitutionalism, 1810-2010: The Engine Room of the Constitution* (OUP, 2013); Felipe Curcó Cobos, 'The New Latin American Constitutionalism: A Critical Review in the Context of Neo-Constitutionalism' (2018) 43 Canadian Journal of Latin American and Caribbean Studies 212.
[80] In the field of socio-economic rights, not all developments have been made through explicitly structural remedies, but leading academics have argued that judicial activism through structural remedies has contributed to wide-ranging transformations in various contexts. See Roberto Gargarella, Pilar Domingo and Theunis Roux, *Courts and Social Transformations in New Democracies: An Institutional Voice for the Poor?* (Ashgate 2006).
[81] Dugard (n 79); Gargarella, Domingo and Roux (n 80).

developed a cohesive, unitary doctrine like that of the Colombian declarations. In a context of low trust in the government, and in which social protest has been deemed ineffective to produce social transformation (as well as dangerous in terms of risks of arrest, imprisonment, or death), constitutional litigation has been presented as a space for the advancement of social justice and contestation of the 'lived realities of poverty'.[82] Although the South African Court has combined individual remedies with participatory processes (particularly in cases relating to housing),[83] it has been less willing to 'utilize structural interdicts or to set itself as an institution with oversight over the enforcement of its socioeconomic rights judgments'.[84] Scholars have insisted on the need to develop mechanisms with more 'meaningful engagement' and supervisory remedies,[85] with the Colombian declarations being cited as an example of the type of innovations that the South African Court should strive for to preserve the political legitimacy of the South African constitutional project as a whole.[86]

The South African Court's reluctance to play a more active role through systemic remedies has been attributed to this Court's comparatively narrow interpretation of socioeconomic rights, as well as institutional features such as existing barriers to 'poor people accessing courts independently'.[87] In addition to this, the limited forms of relief that the Court has provided in its case law have also acted as a deterrent for further litigation, with the Court 'turning away from what claimants say about their lived experiences of poverty in favour of an abstract evaluation of the state's justification for its refusal to respond to them'.[88] Both factors, combined with a 'formalistic and executive minded' legal culture that has made judges 'appear uncomfortable with playing an activist, pro-poor role',[89] have resulted in the Court's 'failure to develop a coherent "substantive vision of law", as required by the new Constitution'.[90] As opposed to these features, as explained in Chapter 2 and section 4 of this chapter, the Colombian Court has not only espoused a more wide-ranging interpretation of the scope and meaning of fundamental rights, but, from its creation, the Court has built its institutional identity in opposition to 'legal formalism', positioning itself as a political actor invested in 'bridging the gap' between reality and the Constitution.[91]

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[82] Dugard (n 79) 304.
[83] See Black Sash Trust v. Minister of Social Development and Others (Freedom under Law NPC Intervening), [2017] ZACC 8; Government of the Republic of South Africa and Others v. Grootboom and Others, 2000 (11) BCLR 1169 (CC).
[84] Dugard (n 79) 319.
[85] Liebenberg (n 47) 154–157.
[86] ibid 143.
[87] Dugard (n 79) 303.
[88] Stuart Wilson and Jackie Dugard, 'Taking Poverty Seriously : The South African Constitutional Court and Socio-Economic Rights' (2011) 22 Stellenbosch Law Review 664.
[89] Dugard (n 79) 326.
[90] ibid 325. See also Alfred Cockrell, 'Rainbow Jurisprudence' (1996) 12 South African Journal on Human Rights 1; Theunis Roux, 'Pro-Poor Court, Anti-Poor Outcomes: Explaining the Performance of the South African Land Claims Court' (2004) 20 South African Journal on Human Rights 511; Gargarella, Domingo and Roux (n 80); Wilson and Dugard (n 88).
[91] Cepeda-Espinosa (n 79); Eduardo Cifuentes Muñoz, 'El Constitucionalismo de la pobreza' (1995) 4 Revista Xurídica da Universidade de Santiago de Compostela; Mauricio García Villegas, 'Law as Hope: Constitution and Social Change in Latin America' (2002) 20 WILJ 353; Rodrigo Uprimny, 'Judicialization of Politics in Colombia: Cases, Merits and Risks.' (2007) 13 Sur -International Journal on Human Rights; Rodrigo Uprimny, 'The Recent Transformation of

Similarly, the Indian Supreme Court, despite being 'the first country to embrace public law litigation on the American model',[92] has not gone as far as the Colombian Court in the design and execution of systemic remedies, leading scholars to claim that the 'the grandiosity of constitutional doctrine is not matched by the strength of remedies'.[93] Initially 'conservative', the Indian Supreme Court limited its mandate significantly, receiving strong critiques from academics and generating 'public discontent' due to the partial enforcement of 'toothless fundamental right[s]'[94] that 'reduce[d] the status and legitimacy of the court to one of an advisory body'.[95] Due to these critiques, in the 80s and 90s, the Indian Court gradually expanded its understanding of fundamental rights to include socioeconomic rights, and moved towards 'the expansion of rights remedies', making mandatory orders to the government and issuing more comprehensive orders to guarantee fundamental rights.[96] However, where the Supreme Court intervened, it only gave 'vague directions to the government to consider a variety of reform proposals prepared by the Law Commission and other bodies'.[97]

More recently, the Indian Supreme Court appears to be inclined to play a more active, dialogical role through the remedy of 'continuing mandamus', a procedure that ensures continuous oversight and periodic reporting over matters concerning social and economic rights.[98] In addition, the Court has focused on remedies addressed at specific sub-groups and violations of rights, primarily ordering individual remedies while also attempting to trigger, though vaguely, some form of systemic transformation.[99] For instance, in a 2018 case concerning inhuman conditions in prisons,[100] the Court ordered, among other measures, the creation of an investigative commission, as well as the creation of committees to limit pre-trial detentions, urging the government to fill vacancies for the provision of security and healthcare in prisons.[101] However, as is the case with the South African Court, these remedies have not evolved into a fully formed doctrine of structural dialogical intervention. This, because the Indian Court remained 'unable to articulate a consistent stance' towards its involvement in different fields of public policy,[102] seeking to establish its own legitimacy by 'walking a fine line between deference to the political system and judicial autonomy,

Constitutional Law in Latin America' in César Rodríguez-Garavito, *Law and Society in Latin America. A New Map.* (Routledge 2014).

92 Roach, *Remedies for Human Rights Violations* (n 1) 370.

93 Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta, 'Locating Indian Constitutionalism', *The Oxford Handbook of the Indian Constitution* (OUP 2016) 9.

94 Mihika Poddar and Bhavya Nahar, '"Continuing Mandamus" -A Judicial Innovation to Bridge the Right-Remedy Gap' (2017) 10 NUJS Law Review 555, 559.

95 Roach, 'Dialogic Remedies' (n 1) 371.

96 Poddar and Nahar (n 94); Shylashri Shankar, 'The Embedded Negotiators: India's Higher Judiciary and Socioeconomic Rights' in Daniel Bonilla Maldonado (ed), *Constitutionalism of the Global South. The Activist Tribunals of India, South Africa, and Colombia* (CUP 2013). See, for example, Hussainara Khatoon & Others v Home Secretary, State of Bihar, (1979) AIR 1360, 1979 SCR (3) 169.

97 Roach, *Remedies for Human Rights Violations* (n 1) 371. See, for example, Shri Rama Murthy v. State of Karnataka, [1996] INSC 1660.

98 Vineet Narain v. Union of India, (1998) 1 SCC 226 : AIR 1998 SC 889.

99 In Re: Inhuman Conditions in 1382 Prisons v. State of Assam (2018), 18545/2013, (10) SCJ

100 ibid.

101 See Roach, *Remedies for Human Rights Violations* (n 1) 372, 398–399.

102 Shankar (n 96) 98.

between populism and activism, between overstating the problem and losing authority because of noncompliance by the executive and the bureaucracy, and between understating the solutions and losing the respect of the public'.[103] Academics have called for the adoption of the 'vocabulary' of the Colombian declarations of *USoA*, establishing a formal doctrine that may better capture the systemic nature of structural rights violations, as well as enabling the Court to create more strict mechanisms for inter-institutional engagement, collaboration, and oversight.[104] However, as will be discussed in Section 6, the limits of these strategies of structural intervention should not be ignored.

In both the South African and the Indian jurisdictions, systemic remedies remain tied to specific rights violations, with courts attempting to 'fill in the gap' left by legislators and the executive through the interpretation of constitutional rights and principles. However, as is the case with the American decisions discussed in the previous section, these courts have not made broader official statements about the implications of these structural failures and violations in terms of the constitutional project, with this question remaining in the background of the decisions. Colombian remedies are presented as a more adequate model, with academics calling upon the courts to follow the doctrine of *USoA* and take more active steps towards the 'realisation' of the constitution.[105] In this view, the Colombian declarations are presented as more appropriate remedies because they accurately identify and address underlying systemic issues. This, in turn, is presented as having a more legitimating effect, consolidating a firm stance in the preservation of constitutional integrity, and allowing for more 'effective' and active interventions —even though, in the last 25 years, the Colombian declarations have proved to be highly ineffective, as will be discussed in section 6. While the virtues of these declarations have been largely overstated, the question of what they reveal about the authority of the State, and about the effectivity of the constitutional order, has received no attention.[106]

4. Colombian exceptionalism?

Tribunals in India, South Africa, and Colombia are often described as members of a broadly similar 'neo-constitutionalist' tradition. But, if these jurisdictions share such close similarities in terms of their constitutional architecture, as well as conditions of high inequality and poverty, what is it about the Colombian setting that made it possible for the Constitutional Court to develop its extraordinarily innovative 'dialogic' doctrine of systemic intervention? A comprehensive answer

[103] ibid 101.

[104] Gautam Bhatia, 'Preventive Detention, State Abuse, and an Unconstitutional State of Affairs: The Madras High Court's Judgment in Sunitha vs Additional Chief Secretary' (*Indian Constitutional Law and Philosophy*, 2 December 2022) <https://indconlawphil.wordpress.com/2022/12/02/preventive-detention-state-abuse-and-an-unconstitutional-state-of-affairs-the-madras-high-courts-judgment-in-sunitha-vs-additional-chief-secretary/> accessed 25 July 2023; Gautam Bhatia, 'Responding to Illegal Home Demolitions: The Doctrine of An Unconstitutional State of Affairs' (*Indian Constitutional Law and Philosophy*, 12 June 2022) <https://indconlawphil.wordpress.com/2022/06/12/responding-to-illegal-home-demolitions-the-doctrine-of-an-unconstitutional-state-of-affairs/>.

[105] ibid. See also Roach, *Remedies for Human Rights Violations* (n 1).

[106] On how these questions emerge in the Colombian case, see Chapter 2.

to this complex question is outside the scope of this project and would require an extensive exploration of the doctrine's intellectual and socio-legal history. However, some historical, institutional, and political aspects of the Colombian context may offer a provisional explanation.

On the one hand, traditional political parties in Colombia had lost credibility and capacity to confront the difficult issues faced throughout the 80s and 90s —partly because of the threats posed by various armed actors, and partly due to the abundance of relations of clientelism and corruption.[107] Low levels of political participation, high levels of poverty and inequality, and historical patterns of marginalisation and exclusion contributed to solidifying the idea that it was highly unlikely, if not impossible, for the legislator and the executive to carry out significant social transformations. Furthermore, the fact that the government itself had been involved in the violent repression of political conflict and opposition (including strikes and protests in cities, as well as violent military campaigns in the countryside that greatly affected civilians),[108] had largely undermined belief in its potential to credibly represent various groups of the population. Meanwhile, the Colombian Supreme Court had historically espoused a 'formalist' legal mindset that 'helped broaden the gap between constitutional law and everyday socio-political life'.[109] The creation of the Constitutional Court appeared, from the early discussions of the Constituent Assembly, as a chance to wipe the slate clean and establish an independent and specialised constitutional tribunal that could realise the Constitution's promises.[110]

While traditional political parties seemed to have very little to offer in terms of resolving and addressing the complex issues that the country was facing, the Constitutional Court represented a new hope of wide-ranging social transformation, positioning itself as a key political actor. In addition to this, Colombian legal culture, from the moment of independence, was characterised by a fetishist reliance on the law as a source of social ordering.[111] Therefore, from its birth, the Constitutional Court was shaped by its identification with 'the expansion of the rule of law, and hence with law's mythical powers to order society and control barbarism'.[112] The Court appeared, in the eyes of mainstream academics (including former Justices of the Court), as 'an increasingly legitimate forum that responds to some of the most complex problems that affect Colombian society and institutions'.[113] In addition to the early adoption of this political role, politicians and social movements have contributed to solidifying the Court's institutional identity

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[107] Boaventura de Sousa Santos and Mauricio García Villegas (eds), *El Caleidoscopio de Las Justicias En Colombia* (Siglo del Hombre 2001); Uprimny, 'Judicialization of Politics in Colombia' (n 91).
[108] de Sousa Santos and García Villegas (n 107).
[109] Cepeda-Espinosa (n 79) 543.
[110] See Chapter 2.
[111] Julieta Lemaitre, *El Derecho Como Conjuro. Fetichismo Legal, Violencia y Movimientos Sociales.* (Siglo del Hombre Editores, Universidad de los Andes 2009).
[112] Julieta Lemaitre and Esteban Restrepo-Saldarriaga, 'Law and Violence in the Colombian Post-Conflict: State-Making in the Wake of the Peace Agreement' (2019) 2019 Revista de Estudios Sociales 2, 4.
[113] Cepeda-Espinosa (n 79) 535. Cepeda was a Justice at the Court between 2001 and 2009, delivering the Court's majority opinions in some of its more salient, progressive cases. This view may also be found in Mauricio García Villegas, 'Derecho a Falta de Democracia: La Judicialización Del Régimen Político Colombiano.' (2014) 27 Análisis Político 167; Uprimny, 'The Recent Transformation of Constitutional Law in Latin America' (n 91); César Rodríguez-Garavito, 'Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America' (2011) 89 Texas Law Review 1669.

by 'gradually defer[ing] to the court for the resolution of their most difficult questions',[114] becoming the main 'institutional channel' for the resolution of social conflict and providing a space for the 'representation' of historically excluded minorities.[115]

But the Court's early self-identification as a political actor was not the sole reason behind the invention of declarations of *USoA*. Practical considerations, as well as institutional design, were also determining factors both for the creation of the Constitutional Court and for the articulation of these declarations. During the discussions of the Constituent Assembly, it became clear that the Supreme Court would not be able to handle the extraordinary number of *tutelas* that were expected to arise, as this tribunal was already overburdened by its function as the highest court of appeal.[116] Implicitly, the Assembly anticipated that, because of the existing 'gap' between reality and the Constitution, the judiciary would become overwhelmed by these individual complaints. Therefore, the creation of a 'fundamental rights court with enough time and resources available to supervise the application of this new procedure' was understood as plainly necessary.[117] In fact, as expected, due to widespread institutional failures, the number of *tutelas* quickly grew to the extent that, six years after the enactment of the 1991 Constitution, the Constitutional Court was overwhelmed by the vast number of these writs of protection.[118]

Through the constitutional review of *tutelas*, judges saw themselves as engaging in a complex process of 'interpretation and application of a constitution in conditions of poverty',[119] a process that sought to 'bridge the gap' between 'the norms and social reality'.[120] Influenced by the idea of structural remedies,[121] as well as Alexy's theory of fundamental rights,[122] the Court developed not only a broad interpretation of the meaning and scope of fundamental rights, but also a sophisticated and unique strategy to address thousands of *tutelas* relating to similar matters: declarations of *USoA*.[123] In the words of Cepeda-Espinosa (former Justice of the Court between 2001 and 2009), these declarations emerged as 'a judgment not of a legal act but of a reality, of a factual situation. Conceptually, they constitute a Copernican turn in the understanding of judicial review, because the review of laws, rules, and acts is traditional, but here, what we seek to review or intend to transform is reality, a set of facts, a state of affairs that is contrary to the Constitution'.[124] Through its case law on the meaning and scope of fundamental rights,

[114] Cepeda-Espinosa (n 79) 545–46.
[115] Cepeda-Espinosa (n 79).
[116] Before the 1991 Constitution, the Supreme Court held the power of judicial review (including, as discussed in Chapter 2, the power to review states of exception) and functioned as the ultimate appellate jurisdiction of the ordinary system.
[117] Cepeda-Espinosa (n 79) 529. See also Lemaitre (n 111).
[118] Constitutional Court, Judgment SU-559 of 1997.
[119] Cifuentes Muñoz (n 91). Cifuentes Muñoz was a Justice at the Constitutional Court from 1991 to 1998 and is currently the President of the Special Jurisdiction for Peace.
[120] Cepeda-Espinosa (n 79) 650.
[121] See section 2 of this Chapter. See also Chapter 2.
[122] Carlos Arturo Hernández and Camilo Jiménez Roncancio, *Robert Alexy y la ponderación en la Corte Constitucional* (Universidad Libre 2017).
[123] See Chapter 2.
[124] Interview with Cepeda Espinosa, cited in Unidad para la Atención y Reparación Integral a las Víctimas, 'Capítulo 6. Estado de Cosas Inconstitucional (ECI)-Sentencia T-025', *Participaz. La Ruta de los Derechos.* (2015).

accompanied by declarations of *USoA*, he argues, 'the Constitution has ceased to be an abstract code and has become embedded in social reality'.[125]

Against an undeniably complex background of violence, inequality, and exclusion, the Constitutional Court has developed what many consider a symbolically potent case law,[126] creating a space for the inclusion of groups and minorities that would otherwise remain completely marginalised from the political agenda (including, among others, persons deprived of liberty). As symbolically potent as the Court's case law may be, however, declarations of *USoA* confront the Court with a fundamental paradox behind its attempts to 'materialise' the Constitution: the 'gap' between the Constitution and reality, rather than being the 'cause' of widespread rights violations, is a symptom of the extent to which the political project underlying the Constitution lacks a basis upon which it can be realised. In other words, these declarations reflect the extent to which existing material conditions limit the very possibility of 'realisation' of the Constitution. Though this may seem obvious (particularly because of the Court's explicit recognition that violence, poverty, and inequality are significant obstacles to the 'realisation' of the constitutional promise), it is obscured by the normative language of the declarations: both the Constitution and the declarations made to protect its integrity are presented as definitive steps in social ordering, with the Court's intervention merely accelerating large-scale transformations through peaceful, institutional means. At the same time, slow progress towards the 'realisation' of the Constitution (or lack thereof) is attributed to individual institutional failures, while the Constitution's own role in sustaining the existence of an exclusionary economic and political order is obscured.[127]

These declarations, though aiming to reaffirm the constitutional order, reveal its fragility, in the sense that they entail an official recognition of the extent to which the Constitution cannot be meaningfully sustained in the existing political and socioeconomic conditions. However active and innovative the Court may be, 'the normative constitution in general and the protection of rights through judicial means in particular are not self-sustaining',[128] requiring a dynamic process of ordering that is made nearly impossible due to conditions of poverty, inequality, exclusion, and widespread violence. As explained in Chapter 3, that the Constitution has not been 'realised' is a natural result of a seriously strained process of authority-building and social ordering. As Heller reminds us, in contexts of extreme economic inequality and political exclusion, 'constitutional ordering itself may become difficult'.[129] However, despite the paradoxical character of these

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[125] Cepeda-Espinosa (n 79) 650.

[126] García Villegas (n 91); Cepeda-Espinosa (n 79); Uprimny, 'Judicialization of Politics in Colombia' (n 91); Rodrigo Uprimny and Luz María Sánchez-Duque, 'Constitución de 1991, Justicia Constitucional y Cambio Democrático: Un Balance Dos Décadas Después.' (2013) 71 Cahiers des Amériques Latines 33; Rodríguez-Garavito and Rodríguez Franco (n 47); Bonilla Maldonado (n 11); Roach, *Remedies for Human Rights Violations* (n 1).

[127] See Chapter 2. On the compatibility between the neoliberal economic project and the normative aspects of the Constitution, see Chapter 2. See also Consuelo Ahumada, *El modelo neoliberal y su impacto en la sociedad colombiana* (El Ancora Editores 1996); Manuel Iturralde, 'Democracies without Citizenship: Crime and Punishment in Latin America' (2010) 13 New Criminal Law Review 309; Jorge Andrés Díaz Londoño, 'Estado Social de Derecho y Neoliberalismo en Colombia: Estudio del cambio social a finales del siglo XX' (2009) 11 Revista de Antropología y Sociología: Virajes 205.

[128] Marco Goldoni and Michael A Wilkinson, 'The Material Constitution' (2018) 81 Modern Law Review 567, 568.

[129] Heller, cited in ibid 588.

declarations, as well as their lack of significant practical effects, the normative language and symbolic potential of this judicial strategy seem to be largely convincing to other constitutional tribunals in the region.

5. Following the Colombian lead

Though not an entirely uniform neo-constitutionalist tradition,[130] most countries in Latin America share trends such as the enactment of ambitious catalogues of rights; concerns for social, economic, and cultural rights; and the establishment of abstract constitutional principles that entail hermeneutic duties for constitutional courts.[131] In the context of this broadly shared tradition, an increasing number of tribunals in the region has recently 'imported' Colombian declarations of *USoA*,[132] including those of Brazil,[133] Bolivia,[134] El Salvador,[135] and Peru.[136] While the Bolivian Tribunal only mentioned the figure in passing (in relation to violations relating to unconstitutional delays in the release of inmates),[137] courts in El Salvador, Peru, and Brazil have directly cited the Colombian declarations of *USoA*, modelling their own systemic remedies after the Colombian Court's interventions without much consideration of why or how such a doctrine is imported.

In 2016, in El Salvador, the Supreme Court attempted to deal with the crisis of order and security in prisons through these declarations. According to the Court, conditions of 'overcrowding, unsanitary conditions, lack of healthcare, propensity towards violence and the administration's lack of control over inmates' constituted an *unconstitutional state of affairs.*[138] After briefly citing the first Colombian declaration of an *USoA* in prisons, the Salvadorian Court made general orders to various institutions: monitoring the situation of a number of inmates (those who were claimants before the Court); improving general conditions of imprisonment; and taking part in public hearings to monitor compliance with the judgment, allowing responsible institutions to 'explain and account for the decisions they have adopted, as well as the obstacles they face in this task, the concrete actions that they have carried out and those they will carry out'.[139] Nearly a decade later, and in light of the current situation of the penal system in El Salvador (as discussed in the previous Chapter), the judgment seems to have had a negligible effect.

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[130] Curcó Cobos (n 79).
[131] ibid; Gargarella, Domingo and Roux (n 80); Uprimny, 'The Recent Transformation of Constitutional Law in Latin America' (n 91); Francisca Pou Giménez, 'Judicial Review and Rights Protection in Latin America. The Debate on the Regionalization of Activism.' in César Rodríguez-Garavito (ed), *Law and Society in Latin America. A New Map.* (Routledge 2014).
[132] Similar decisions, though without the label of the *USoA*, have also been reached by the Supreme Courts of Argentina (Judgment V. 856. XXXVIII of 2005) and Costa Rica (Expediente de Amparo No. 11-014915-0007-CO).
[133] *Ação Direta de Descumprimento de Preceito Fundamental 347/2015,* Supreme Federal Court of Brazil (SFCB). The *Ação Direta de Descumprimento de Preceito Fundamental* (Direct Action on the Violation of a Fundamental Norm) is established in article 102.1 of the Brazilian Constitution of 1998.
[134] *0381/2015-S3 (2015)* (Plurinational Constitutional Tribunal of Bolivia); *0859/2015-SE (2015)* (Plurinational Constitutional Tribunal of Bolivia).
[135] *119-2014ac (2016)* (Supreme Court of El Salvador).
[136] *Judgment No 259-2003-HD/TC, 2004* Constitutional Tribunal of Peru (CTP).
[137] *0859/2015-SE (2015).* (n 134).
[138] *119-2014ac (2016)* (n 135) 34.
[139] *ibid.*

A few months before, in 2015, the Supreme Federal Court [SFC] of Brazil adopted declarations of *USoA*, explicitly citing the Colombian Court and adopting the criteria developed by it.[140] Arguing that structural violations of constitutional rights (particularly those resulting from institutional failures) have a detrimental effect on the overall legitimacy of the State, as has the Colombian Court,[141] the SFC briefly justified the need for systemic judicial intervention.[142] Without providing a lengthy justification of the use of this strategy, or of its importation to the domestic system, the Federal Court argued that this form of intervention is mandated by constitutional principles, as well as necessary in those 'exceptional cases' in which there are serious and systematic violations of fundamental rights, making judicial intervention 'indispensable on the grounds of "institutional blockades" by other powers'.[143]

In addition to this, in October 2023, the Federal Court ruled on the *Allegations of Failure to Comply* with ADPF 347 (that is, the 2016 judgment on the *USoA* in prisons), ordering the federal government to prepare, within six months, an intervention plan to be submitted for approval by the Court, with the aim of controlling prison overcrowding, poor conditions inside prisons, and regulations on the entry and exit of prisoners.[144] The SFCB's decisions have been praised due to their symbolic effects and transformative potential, allegedly catalysing wider processes of social change beyond the courtrooms.[145] Recently, however, the decisions have been criticised due to their meagre practical effects, with scholars claiming that monitoring measures have not been adopted, yielding the declarations a mere rhetorical device.[146] Critics have also argued that the Court only ordered 'very limited mechanisms to deal with (the problem)', the most salient of its measures being 'a purely "negative" obligation not to use public resources for ends other than prison reform' —measures which have not been enforced at all.[147] In response to this, scholars, as has been the case in India and South Africa, have called for the implementation of more complex monitoring mechanisms, such as those established by the Colombian Court, citing the measures taken by this court as a model that may lead to more effective transformations,[148] despite little empirical evidence that these mechanisms have made any significant differences in the Colombian context.

Meanwhile, in Peru, the doctrine has been replicated in around sixteen different cases since 2003, including situations produced by the rejection of requests for information to public

[140] *ADPF 347/2015* (n 133) 54–55.
[141] *T-388/13* (n 58) ¶8.2.1.4.
[142] *ADPF 347/2015* (n 133) 54–55.
[143] ibid.
[144] *Arguição de Descumprimento de Preceito Fundamental (ADPF) 347* (SFCB).
[145] Diego Werneck Arguelhes, 'Transformative Constitutionalism: A View from Brazil' in Philipp Dann, Michael Riegner and Maxim Bönnemann (eds), *The Global South and Comparative Constitutional Law* (OUP 2020) 184. Where scholars refer to these aspects of structural judgments (and judgments relating to socio-economic rights more generally), they often cite Rodríguez's analysis in Rodríguez-Garavito (n 113).
[146] Werneck Arguelhes (n 145).
[147] ibid 183.
[148] Werneck Arguelhes (n 145).

entities,[149] violations to the right to pensions of public teachers,[150] immigration policy,[151] and the 'critical situation of prisons'.[152] In these cases, the Constitutional Tribunal has not analysed the criteria established by the Colombian judgments, partly because it started using the doctrine before these criteria were established by the Colombian Court. This entails a significant difference: because the Colombian criteria are not used in the determination of the existence of an *unconstitutional state of affairs*, Peruvian declarations seem much broader than the Colombian ones, requiring simply 'evidence of harmful effects on the rights of an important group of persons or a sector of the population'.[153] Despite not using the criteria, these declarations (and the measures derived from them) are also justified by reference to 'omissions', 'indifference', or other failures from public authorities that have resulted in generalised rights violations, requiring the Tribunal's intervention to guarantee 'the coordinated and collaboration and joint' collaboration of all institutions involved in 'the violation of the Constitution'.[154]

The Peruvian Tribunal provided no justification for the use of the Colombian figure in the domestic context, simply arguing that it was 'urgent [for the Tribunal] to take bolder measures that may contribute to making its pacifying function in constitutional life more effective', and that 'because this Tribunal is competent in the determination of procedural rules that may best protect constitutional principles and rights, it considers it constitutionally necessary to adopt the technique of an "unconstitutional state of affairs" which the Colombian Constitutional Court has implemented since Unifying Judgment 559/1997'.[155] In subsequent judgments, though the Tribunal sometimes mentions the Colombian origin of the doctrine in passing,[156] it more often describes the declarations as 'evidently necessary and indispensable, considering our constitutional and conventional regulations', [157] rapidly moving on to the measures required to 'progressively overcome the unconstitutional state of affairs'.[158] Though at first the Peruvian declarations focused predominantly on individual remedies, the Tribunal has recently moved towards measures inspired by the Colombian Court, as evidenced by the 2020 case concerning the situation in prisons.[159] In this decision, the Tribunal made general orders for State institutions involved in penal policy to create, by 2021, a strategy to overcome unconstitutional conditions and 'progressively overcome this unconstitutional state of affairs'.[160] In addition to this, it established a monitoring system of biannual 'supervisory hearings'.[161] If the situation has not been overcome by 2025, the Tribunal

[149] *Judgment No 02579-2003-HD/TC, 2004* (CTP).
[150] *Judgment No 03149-2004 AC/TC, 2005* (CTP).
[151] *Judgment No 02744-2015-AA/TC, 2016* (CTP).
[152] *Judgment No 05436-2014-PA/TC, 2020* (CTP).. See also *Judgment No 03426/2008-PHC/TC* (CTP).(which focused on violations to the mental health of persons deprived of liberty).
[153] *Judgment No. 03426/2008-PHC/TC* (n 152) ¶30-31.
[154] ibid.
[155] *Judgment No. 02579-2003-HD/TC, 2004* (n 149) ¶19.
[156] *Judgment No. 03149-2004 AC/TC, 2005* (n 150) ¶12; *Judgment No. 05436-2014-PA/TC, 2020* (n 152) ¶87.
[157] *Judgment No. 05436-2014-PA/TC, 2020* (n 152) orders 5-10.
[158] ibid, orders 5-10.
[159] *Judgment No. 05436-2014-PA/TC, 2020* (n 152).
[160] ibid orders 5-10.
[161] ibid order 10.

has established that prisons 'will have to be closed by the competent administrative authorities […] until minimum conditions of imprisonment can be guaranteed'.[162]

The Latin American courts that have 'imported' the doctrine of *USoA* have not made significant efforts to explain or justify this exercise. This may be partly due to the Colombian Court's own lack of justificatory efforts in the creation and introduction of these declarations, as discussed in Chapter 2: tying the declarations to constitutional principles is sufficient for the Court to create the space for its intervention. The neo-constitutionalist commitment to the universal character of fundamental rights, as well as the existence of broadly similar constitutional principles which make up a sphere of super-legality,[163] seem to produce a sphere of self-standing, self-sufficient justification for the courts' resort to exceptional constitutional powers. Legitimacy and authority, in the scheme of constitutionalism, are derived from (progressive) compliance with constitutional principles and human rights, rather than the credibility of claims of representation, as explained in Chapters 3 and 4. Because these principles have a rational force of their own, and because fundamental rights are articulated in light of these principles, constitutional courts are able to construct these powers as naturally derived from their mandate to guarantee the realisation of rights and preserve the integrity of the constitution. In such a normative framework, judicial experiments can easily be imported from one system to another because they acquire an inertia of their own —that of objective reasonableness.

However, by borrowing the figure of the *USoA*, these courts not only engage in what they see as an exercise of practical reasoning. In addition to this, they enter a dimension of mutual engagement that seems to reinforce the justificatory power of structural remedies. Recognising each other as mutually authoritative sources, each court justifies its own reasoning by reference to that of others, particularly when a particular doctrine is perceived as the 'right answer' —as seems to be the case with the 'dialogic' model of declarations of *USoA*, praised by academics at a global scale.[164] Practices of mutual engagement are more common in the European system (particularly within the jurisdiction of the ECtHR),[165] where provisions of the European Convention of Human Rights have anchored 'supra national "self-extraction" within domestic legal systems'.[166] But similar exercises of extraction and recognition are becoming more and more popular amongst Southern courts. Without the mediation of a supra-national structure, these exercises of transfer and borrowing provide an interesting example of the directions that systemic remedies may take, anchoring foreign constitutional practices in domestic systems through an apparently seamless process of principled practical reasoning.

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[162] ibid order 7.
[163] See Chapter 3. Broadly defined, this sphere of super-legality may be understood as a one of objective justification by reference to abstract, ahistorical principles that articulate the values of the social order. See also Loughlin (n 30) 161.
[164] Rodríguez-Garavito (n 113); Roach, *Remedies for Human Rights Violations* (n 1).
[165] Alexander Somek, *The Cosmopolitan Constitution* (OUP 2014).
[166] ibid 180.

6. The limits of systemic remedies

Systemic remedies across various jurisdictions have generally failed to deliver the ambitious transformations that they promise. However, rather than being interpreted as a cautionary tale about the limitations of these remedies, the Colombian model is still cited as an example of successful dialogic intervention and transformative constitutionalism. Roach, for instance, has argued that the 'dialogic' dimension of the Colombian Court's interventions is an example of how to combine individual and structural measures to activate dialogues between the branches of power, prompting effective reforms. Through these experimental 'dialogic' processes, he argues, constitutional courts 'engage with governments and society to produce effective systemic remedies that will minimize rights violations in the future'.[167] Furthermore, the argument goes, the dialogic dimension of these remedies functions as a form of reconciliation between 'authoritarian judicialism and the practice of democracy'[168] through the creation of inter-institutional conversations and negotiations that 'incentivize' the legislative to enact new legislation, mobilise civil society, engage individuals affected by rights violations, and put pressure on other branches of power to be more responsive to systemic failures.[169]

However, there is a tendency to overstate the virtues of 'dialogic' judicial intervention, while understating their shortcomings: *unconstitutional states of affairs* have only been fully overcome in very few cases (those involving public teachers' rights to pensions and the naming of public notaries), with most declarations of *USoA* lasting decades —of which the case of prisons is but one significant example. Moreover, there is a tendency towards the expansion of these declarations to include circumstances that were not initially contemplated when the declarations were first made (for instance, the extension of declarations of *USoA* in prisons to include overcrowded police stations; and the extension of declarations relating to the rights of children in La Guajira to include the situation of mothers).[170] Rather than pointing to their success, the prolongation of these declarations seems to indicate their failure.

It may be said that, because cases of widespread human rights violations are so complex, and involve such deep institutional and policy failures, meaningful transformations sometimes require an 'ongoing and perhaps never-ending iterative process […] (which) involves courts being in continued dialogue with governments and society'.[171] Structural rights violations put constitutional courts (particularly in a neo-constitutionalist tradition such as that of the Latin American and other Southern courts) in a somewhat irresolvable position: courts are tasked with the protection of fundamental rights and must grant individual remedies where violations to these

[167] Roach, *Remedies for Human Rights Violations* (n 1) 396.
[168] Bickel (n 55) 244.
[169] Though this may be, to a certain extent, true about declarations of *USoA* regarding the situation of internally displaced persons, whether it may also be said about individual complainants in the penal system is an open question. Persistence of the declarations and their extension to other institutions (such as police stations where overcrowding and rights-violations are now the norm), as well as recent follow-up documents presented to the Court, seem to indicate that individual remedies have not had a significant effect on the prison population.
[170] *T-302/17* (CCC); *T-359/18* (CCC).
[171] Roach, *Remedies for Human Rights Violations* (n 1) 532.

rights are detected. However, due to the magnitude of these violations, granting individual remedies is simply impossible —whether because the violations are produced by structural failures which cannot be resolved through individualised injunctions, or because individual remedies may be available but are dependent on relief for a wider group. The impossibility or insufficiency of individual remedies then leads to the creation of systemic or structural interventions, which, over time, reveal themselves to be unable to trigger the transformations required to overcome those violations in a meaningful way. But rather than pointing towards the need for more 'effective' interventions, the potentially 'never-ending' character of systemic remedies points to deeper contradictions at the heart of constitutionalism.

Southern tribunals may seem more aware of the 'material' impact of conditions of poverty, marginalisation, and inequality on the Constitution as opposed, for instance, to the more 'neutral' emphasis on individual liberties of the American Supreme Court. However, the various forms of economic, political, and social exclusion that they recognise at the basis of rights' violations are construed, through constitutional discourse, as social facts —that is, contingent circumstances that result from institutional failures, corruption, and an unfortunate history of marginalisation, which may be resolved by tweaking public policies— rather than structural features of the socioeconomic regimes in which those constitutions exist. The courts' recognition of the 'structural' character of these violations, paradoxically, masks their political character, obscuring underlying issues of political representation and recognition through the symbolic recognition of constitutional rights. Far from constituting mechanisms through which meaningful inclusion may be achieved, structural remedies may have the effect of legitimising the forms of exclusion that they seem to denounce, concealing the political character of those dynamics of exclusion and the extent to which they remain essential components of the project of liberal democracy that underpins these ambitious constitutions. In this sense, constitutional litigation, though claiming to 'represent' minorities whose interests would otherwise not be represented in the political process, can only go as far as its abstract language allows it. Judicial activism cannot work as a substitute for more substantive processes of self-government and participation in the public life,[172] failing to go any further than the recognition of individuals as abstract rights-bearers.

Furthermore, declarations of *USoA*, and perhaps the 'need' for structural remedies more broadly, reveal the fraught character of political authority, exposing the tensions behind the idea of constitutional 'normality' —tensions which become particularly clear when systemic remedies are perpetuated for long periods of time. The notion that these remedies are necessary in a potentially unending process of transformation challenges the very idea that the constitution consolidates a self-sustaining normative order. The practical effect of the apparent permanence of an *unconstitutional state of affairs* is that constitutional 'normality' is shown to be not merely momentarily interrupted, but rather 'exceptional'. Beyond the cost of the prolongation of these

[172] Susan Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (OUP 2003) 2; Peter Ramsay, 'A Democratic Theory of Imprisonment' in Albert Dzur, Ian Loader and Richard Sparks (eds), *Democratic Theory and Mass Incarceration* (OUP 2016) 88.

remedies in terms of the courts' credentials,[173] perpetual resort to them entails an official recognition of the extent to which structural failures undermine the constitutional project. In that sense, systemic remedies question the authority of the States' political projects more broadly: although the constitution is constructed as the ultimate source of authority, its most fundamental conditions are recognised as persistently (and seriously) violated and, therefore, exceptional.

The longer these remedies are 'necessary', the more they amount to an official recognition of the extent to which the normative order of the constitution, and the social relations on which it rests, are undermined. Furthermore, the prolongation of these remedies tends to lead to their expansion, allowing courts to enlarge their powers of intervention and surveillance through the *façade* of inter-institutional collaboration, while institutionalising and normalising what would otherwise be interpreted as 'exceptional' violations of the constitution. In other words, extraordinary powers of structural intervention, once constructed as abstract and necessary developments of a universal scheme of constitutional rights and principles, produce their own sphere of justification and perpetuation, through which the unconstitutional conditions that constitutional courts seek to 'transform' are normalised and legitimised. Constitutional normality, therefore, becomes the true exception.[174]

It may be argued that constitutional principles, though standing at the basis of constitutional authority, are optimisation requirements that must be implemented to the greatest extent as factually and legally possible.[175] Therefore, the fact that they are not fully realised does not necessarily question the political authority of the broader constitutional project —particularly when courts are so committed to the realisation of those principles. However, declarations of *USoA* are an institutional reflection of material conditions under which the very possibility of factual and legal 'optimisation' comes into question. Even if constitutional principles are accepted as a source of authority,[176] they may only be recognised as such to the extent that they remain connected with underlying political agreements. Principles, even in this scheme, are the outcome of complex processes of political participation and collective ordering.[177] Institutionalised through the constitution, they bind acts of government to the moment of political foundation, functioning as parameters which guide collective action. However, the political process does not end with the act of foundation, and the fact that principles lay at the foundation of constitutional ordering does not imply that they acquire transcendent, self-generating, and self-sustaining authority. Where principles are detached from political action and representation, reduced only to optimisation requirements, and where their 'authority' is said to be derived exclusively from internal cogency

[173] César Rodríguez-Garavito, *Más Allá Del Desplazamiento: Políticas, Derechos y Superación Del Desplazamiento Forzado En Colombia* (Universidad de los Andes 2010) 438.
[174] See Chapter 2.
[175] Robert Alexy, *A Theory of Constitutional Rights* (OUP 2002) 57.
[176] Hannah Arendt, *The Promise of Politics* (Jerome Kohn ed, 1st ed., Schocken Books 2005).
[177] Shree Agnihotri, 'Arendtian Constitutional Theory: An Examination of Active Citizenship in Democratic Constitutional Orders' (London School of Economics and Political Science 2024) <http://etheses.lse.ac.uk/id/eprint/4633>.

and rationality, they cease to be sources of political authority with meaningful connections to the political reality.

These limitations of systemic remedies arise precisely from those of the constitutional architecture that courts try to protect. As the 'guardians' and supreme interpreters of the constitution, courts must optimise the implementation of its principles as best as they can —which normally involves making a judgment regarding the extent to which certain reasons may displace others on the basis of factual and normative considerations. However, it quickly becomes apparent that, in conditions of high inequality and violence, a number of those principles, or perhaps the constitution as a whole, are not factually or legally realisable to a significant extent. This, then, justifies the turn towards systemic remedies, pushing other branches of power to carry out actions to create conditions in which those principles may be progressively materialised. As time passes, courts are once again confronted with the tension behind this factual and legal impossibility: as reasonable as constitutional principles may be, their strength and capacity to shape a political project reside not in their internal cogency, but rather in the extent to which they remain reflective of collective political action. Where principles are constantly 'violated', the very existence of shared political agreements, bonds of allegiance, and relations of representation comes into question.

Whether courts are well-placed to interpret these founding principles, as well as the limits and features of such exercise of interpretation, remains an open question which exceeds the scope of this project.[178] Whatever the answer may be, declarations of *USoA* pose significant challenges to the idea that the interpretation of constitutional principles makes systemic remedies necessary. First, they raise the question of the extent to which igniting processes of social change is within those interpretive competences, as well as the extent to which courts may effectively do so. Second, and more importantly, they point towards the question of authority: where constitutional principles have lost all connection to a community's political reality, to the point that the constitutional project is recognised as being persistently 'violated' or under 'serious threat', can there be any credible claims regarding the authority of such a project? Does the official recognition of these conditions not reflect a substantial loss of authority?

7. Conclusion

As constitutional courts in different regions turn towards systemic remedies in their attempts to confront complex institutional failures that result in widespread rights violations, the Colombian declarations of *USoA* stand out, according to mainstream accounts, as an example of innovative 'dialogical' interventions. Inspired by early American decisions on structural issues, systemic remedies in Colombia, as well as other jurisdictions in the global South, have developed in more expansive directions. On the one hand, American decisions on structural rights violations tend to adopt a relatively restrictive approach, focusing on how particular laws or policies produce

[178] See Marco Goldoni and Chris McCorkindale, 'The Role of the Supreme Court in Arendt's Political Constitution' in Marco Goldoni and Chris McCorkindale (eds), *Hannah Arendt and the Law* (Hart).

individual rights violations and leaving a broader scope for local authorities to carry out actions that will resolve these violations —with long processes of litigation, negotiation, and delays in the resolution of individual rights violations following the Supreme Court's interventions. Such decisions, though implicitly recognising generalised conditions of 'unconstitutionality', do not go as far as making an official acknowledgment of the extent to which they affect the State's claims of legitimate authority. On the other, the South African and Indian courts have developed more expansive remedies, based on their broader understanding of social and economic rights as well as a more active commitment to the 'realisation' of the Constitution. However, academics have argued, these measures have not gone far enough, and could take inspiration from the Colombian declarations.

The question of whether *unconstitutional states of affairs* could be identified, for example, in prisons in California, India, or South Africa tends to receive an affirmative answer, followed by a call for broader 'dialogic' interventions to resolve policy failures or omissions. This seems to be the path taken by a growing number of constitutional courts in Latin America through the adoption of the doctrine of the *USoA*. Making brief references to the constitutional principles that make these interventions 'necessary', and without a serious exploration of the reasons why such exercises of borrowing and importation take place, constitutional courts in the region have developed their own declarations of *USoA* based on the Colombian doctrine. Through this process, constitutional principles display a rational inertia of their own, seamlessly integrating foreign doctrines into the domestic sphere, while courts engage in an exercise of mutual recognition as authoritative sources.

More importantly, however, a closer look at these declarations reveals irresolvable tensions behind these remedies —tensions which touch on the weakened authority of the legal order; the conditions that constitutions construct as normal; and the extent to which, due to the material conditions they exist in, those conditions remain exceptional. Although the idea of political authority does not feature prominently in constitutionalism, it is presumed by the very existence of the State and the constitution. The need for systemic remedies confronts constitutional courts with material circumstances in which those claims of authority are revealed as being seriously undermined, a situation that becomes clearer the longer these remedies remain 'necessary'. Despite their differences, the 'need' for systemic remedies in various jurisdictions, particularly in the penal sphere, confronts courts with material conditions that challenge underlying political projects, masking substantive political inequalities and various forms of exclusion through formal normative claims.

The experience of systemic remedies in these jurisdictions casts serious doubts on the capacity and competences of courts to effectively produce social transformations. When attempting to ignite processes of structural social reform, constitutional courts transcend the spheres of adjudication and traditional judicial interpretation, engaging themselves in the difficult task of persuading and compelling other branches of power (and perhaps the polity more broadly) to act in accordance with what they have determined as constitutionally necessary. Meanwhile,

constitutional principles lose political meaning: however strong their rational force, and however internally cogent, their fundamental connection to collective life is significantly dissolved. Widespread violations of fundamental rights, understood as threats to this rational structure of principles, expose the extent to which the constitutional project lacks serious possibilities of realisation. Systemic remedies, through the official recognition of the extent to which the constitution lacks a solid material basis, uncover the extent to which constitutional 'normality' is, in fact, the exception.

Conclusion

The relationship between punishment and authority is an uneasy, contradictory one. Though punishment is meant to embody and reaffirm the sovereign's absolute authority and monopoly over the use of force, its widespread use exposes the extent to which the State's claim to authority is being flouted and therefore undermined. Part I of this thesis explored the emergence of this tension in the Colombian context, analysing the 'penal crisis' and the constitutional tools designed to address it, and interrogating them from the perspective of political authority. The 1991 Constitution, as an expression of the ideology of constitutionalism, is articulated as a utopian project,[1] offering a vision of what Colombian society should look like. Declarations of *USoA* have been one of the main avenues through which its actualisation is sought. I have argued, however, that these declarations are paradoxical: in addition to their lack of effectiveness (that is, their failure to significantly bridge the 'gap' between reality and the Constitution), they reveal the weakness of the State's claims of authority.

In chapters 1 to 4, I have presented a critical interrogation of the self-standing, self-generated notion of authority of constitutionalism, as well as an exploration of the contradictions inherent in the relationship between political authority and punishment. The persistence of the penal 'crisis' in Colombia for nearly thirty years not only highlights the existence of serious obstacles to the realisation of fundamental rights and principles, but also reveals the extent to which underlying claims of authority have become sterile: declarations of *USoA* entail an official recognition that the Constitution's authority (even on its own terms) is severely undermined. This, in turn, reveals the weak character of underlying relations of political authority—that is, the relations of authorisation, representation, obedience, and allegiance on which social and political ordering are founded and through which they are sustained. The declarations, in this sense, are not only an expression of a long-standing fetishist belief in the capacity of the law, on its own, to produce social integration and transformation,[2] but are also reflective of the lack of a solid material and political basis on which the project of the Constitution may be established and realised.

The tensions between authority and punishment are not exclusive to Colombia. Part II of the thesis turned to the manifestation of similar tensions and contradictions around the globe. Putting political authority at the centre of analysis, I argued that this concept may enrich our understanding of said relationship in different contexts, as well as our understanding of the limitations and contradictions of systemic remedies in different jurisdictions. Because this theoretical approach is based on a recognition of the historical and contingent character of the relations through which authority is constituted and sustained, it allows us to take the social

[1] Mauricio García Villegas, 'Law as Hope: Constitution and Social Change in Latin America' (2002) 20 WILJ 353, 26. See also Martin Loughlin, 'The Constitutional Imagination' (2015) 78 Modern Law Review 1, 13.
[2] Julieta Lemaitre, *El Derecho Como Conjuro. Fetichismo Legal, Violencia y Movimientos Sociales.* (Siglo del Hombre Editores, Universidad de los Andes 2009).

embeddedness of punishment seriously, while also acknowledging tendencies and commonalities in an increasingly globalised world.

Political authority as a theoretical framework

Criminal law theory has recently taken a 'political turn'.[3] However, with two exceptions,[4] political authority has not yet been made central to the conceptual toolkit of the theories articulated as part of this broad 'political turn'. Through the analysis of a specific national case study, this thesis constitutes an effort to put this concept at the centre of a political theory of punishment, showing what it may offer to our understanding of this institution and the issues it currently faces in a global context.

Authority is a fundamental component of the grammar of the modern political world. In the framework of the relational perspective adopted in this thesis, political authority rests at the centre of the articulation of collective existence. Rather than presupposing the existence of authority as a natural feature of legal orders, this framework requires engagement with the dialectical processes through which people are drawn together in common undertakings —that is, the interaction between *potentia* ('power over', deployed in the exercise of dominion and embodying the capacity to govern and distribute resources) and *potestas* ('power-to', the capacity of the collective to unite around a common project and the symbolic dimension through which collective existence acquires meaning).[5] Political authority is not identifiable with either of these forms of political power. Instead, it is constituted by the relationship itself. Sovereignty, in turn, is the jural form taken by this relationship. The sovereign's legitimate authority implies the right 'to expect obedience from subordinates', even where they disagree about the content of specific laws, as well as a corresponding obligation for subordinates to obey.[6]

Punishment is an outcome of this dialectical interplay, normatively and physically embodying the jural dimension of sovereignty. In other words, punishment gives institutional form to the sovereign's claims of absolute rule and (ideological) universal representation, by providing the remedies through which authority may be vindicated. It does not do this merely through the exercise of force, but rather by giving expression to the State's normative claims, justifying it as a legitimate form of coercion —that is, asserting its rightful character by reference to beliefs, values, and expectations shared by 'dominant and subordinates'.[7] Because punishment is so closely tied to

[3] See Chapter 4.
[4] Peter Ramsay, *The Insecurity State: Vulnerable Autonomy and the Right to Security in the Criminal Law* (OUP 2012); Peter Ramsay, 'The Sovereign's Presumption of Authority (Also Known As the Presumption of Innocence)' [2020] LSE Legal Studies Working Paper No. 15/2020 <https://papers.ssrn.com/abstract=3743730> accessed 26 February 2023; Peter Ramsay, 'Rights of the Sovereign: Criminal Law as Public Law' [2024] LSE Legal Studies Working Paper No. 5/2024; Malcom Thorburn, 'Punishment and Public Authority' in Antje du Bois-Pedain, Magnus Ulväng and Peter Asp (eds), *Criminal Law and the Authority of the State.* (Hart Publishing 2017); Malcolm Thorburn, 'Criminal Punishment and the Right to Rule' (2020) 70 The University of Toronto Law Journal 44.
[5] Martin Loughlin, *Political Jurisprudence* (OUP 2017); Martin Loughlin, *Foundations of Public Law* (OUP 2010).
[6] David Beetham, *The Legitimation of Power* (2nd edition., Palgrave Macmillan 2013) 26.
[7] Beetham (n 6).

the State's claims of political authority, it is dependent on the continuous regeneration and maintenance of relations of obedience and allegiance —relations that cannot be produced through mere force. Therefore, while punishment is the tool designed to vindicate the sovereign's authority, its imposition is of *ultima ratio* character. Where it is not, that is, where it becomes a mere instrument to produce obedience, the State concedes the failure of its own authority. The greater the State's reliance on punishment, the clearer the undermined character of authority becomes.[8] Along with this, the legitimacy of the power to punish comes into question: it becomes increasingly difficult to distinguish between the rightful exercise of coercion and arbitrary displays of pure force. Obedience may be kept, to some degree, through the mere use of force and other coercive incentives.[9] But this means that coercion becomes omnipresent and extensive, functioning as the primary mechanism to uphold a legal system, and undermining the symbolic dimension through which the collective project acquires shared meaning.

Punishment and political authority across the globe

Rather than a characteristic that States achieve and possess once and for all, political authority should be understood as a contingent product of specific ways of articulating the relationship between governors and governed —one which requires continuous actualization and regeneration. Failures to uphold claims of authority, therefore, are a condition in which any State, for different reasons, can find itself. The perspective of political authority offers a rich theoretical framework for the interrogation and interpretation of recent trends of penal inflation and expansion across the globe, contributing to potential dialogues between Northern and Southern bodies of research. The concept of political authority may allow us to find both commonalities and differences in relation to the processes that lead to the fragmentation of authority in various contexts, allowing room for the recognition of shared trajectories but being sufficiently flexible to account for social, economic, cultural, and historical contingencies particular to each context. Further research on the relationship between inequality, violence, penal inflation, and democracy may illuminate the particular ways in which those failures are produced in different places and at different points of history.

The framework of political authority also provides tools for the critique and dismantling of commonplace assumptions about the public's general 'disposition' towards punitiveness, whether they manifest as a generalised 'preference' of authoritarianism and order at the cost of individual rights and freedoms, or as more concrete forms of 'penal populism' (understood, broadly, as public demands for harsh penal measures). It does so by taking the political world seriously, insisting on the substantive aspects of democracy and putting the notions of representation, political equality, and participation in collective life at the centre of enquiry. In this sense, the concept of political authority allows us to question the extent to which, rather than

[8] Ramsay, 'The Sovereign's Presumption of Authority' (n 4); Ramsay, 'Rights of the Sovereign' (n 4).
[9] Beetham (n 6) 28.

reflecting the 'people's' authoritarian, vengeful, and punitive inclinations, the 'punitive turn' reflects the undemocratic character of our societies. Moreover, where those inclinations are found to exist, a perspective that centres the political allows us to understand them as symptomatic of undermined relations of authority, interrogating the factors that have allowed their emergence, instead of reifying them as a natural disposition of majorities across the world.

Similarly, the proliferation of 'inmate governance' around the world points to the porousness of prisons —another manifestation of weakened relations of authority. The walls of prisons, though designed to vindicate the sovereign's command through the physical separation and incapacitation of those who violate it, have become permeable, with groups of inmates not only gaining *de facto* control on the inside, but also expanding their strength and leverage outside of prisons.[10] Rather than reaffirming the State's authority, prisons appear as a space in which serious challenges unfold —that is, a site of abrogation of authority at the heart of sovereignty. Both the 'punitive turn' and the porousness of prisons are indicative of the extent to which the 'normal' conditions of sovereignty have become exceptional, both empirically and ideologically: the sovereign's commands are not only broadly disobeyed, but the mechanisms designed to reaffirm its authority lose their meaning, putting the rightfulness of the State's coercive power into question.

Punishment, legitimacy, and the constitutionalisation of the unconstitutional

Declarations of *USoA* in Colombian prisons (as well as similar systemic remedies adopted by courts in other jurisdictions) show that punishment may be imposed under chronically illegitimate conditions, and that Courts are willing to make great efforts to sustain the legitimacy of this institution even where they recognise the existence of widespread, blatantly immoral violations of rights. While the impact of unconstitutional conditions of imprisonment on the State's overall claims of legitimacy have been (marginally) recognised by some courts,[11] this matter has not yet received the attention it merits. The perspective of political authority offers valuable insights to address this issue, contributing to the literature on the impact of structural injustices on the legitimacy of punishment,[12] while also offering an interpretation of why constitutional courts have

[10] Massimo Sozzo, *Prisons, Inmates and Governance in Latin America* (Palgrave Macmillan 2022); David Skarbek, *The Puzzle of Prison Order: Why Life Behind Bars Varies Around the World* (OUP 2020); Benjamin Lessing, 'Counterproductive Punishment: How Prison Gangs Undermine State Authority' (2017) 29 Rationality and Society 257.

[11] *Brown v Plata, 563 US 493 (2011)* Dissenting Opinion of Justice Antonin Scalia; *T-388/13* (CCC) ¶ 8.2.1.4.; *Ação Direta de Descumprimento de Preceito Fundamental 347/2015* (SFCB) 54–55.

[12] Nicola Lacey, 'Criminal Justice and Social (In)Justice' (2022) 84 International Inequalities Institute Working Papers; Nicola Lacey and Hanna Pickard, 'Why Standing to Blame May Be Lost but Authority to Hold Accountable Retained: Criminal Law as a Regulative Public Institution' (2021) 104 The Monist 265; Rocio Lorca, 'Punishing the Poor and the Limits of Legality' (2022) 18 Law, Culture and The Humanities 424; RA Duff, 'Moral and Criminal Responsibility: Answering and Refusing to Answer' in D Justin Coates and Neal A Tognazzini (eds), *Oxford Studies in Agency and Responsibility*, vol 5 (OUP 2019); RA Duff, 'Blame, Moral Standing and the Legitimacy of the Criminal Trial' (2010) 23 Ratio 123; James Edwards, 'Standing to Hold Responsible' (2019) 16 Journal of Moral Philosophy 437; Tommie

gone to such lengths in the justification of the imposition of punishment in conditions that contradict basic constitutional principles.

Every society faces deviations from absolute authority,[13] but the ways in which political legitimacy is eroded, contested, or absent (without leading to a total collapse of power) are of great significance. The sphere of punishment, due to its connection to the core of political authority, is one in which these deviations are particularly significant. Declarations of *USoA* are a reflection of multiple underlying shortcomings in the generation and reproduction of relations of authority: at an empirical level, the penal 'crisis' signals the State's incapacity to achieve minimum levels of obedience and maintain the monopoly of the use of force, both inside and outside prisons; at an ideological level, it shows the extent to which the flouting of the sovereign's commands has become normalised, as well as the extent to which underlying relations of political representation, authorisation, allegiance, and obligation are undermined due to a combination of institutional, sociological, and juristic factors.

These declarations, however, also constitute an effort to re-legitimise the imposition of punishment, even under conditions that are recognised as unconstitutional. Through appeals to the self-generated authority of the Constitution's rational system of principles and values, the Colombian Court has consolidated a sphere of *super-legality* and harmonic inter-institutional collaboration through which the Court insists on the legitimacy of punishment, despite the persistence of conditions that systematically contradict the Constitution. Through a combination of the administrative logic of proportionality and the normative language of human rights (and the constitutional principles through which they are interpreted), the Court has justified unconstitutional punishment. Notwithstanding their limited effects in relation to the amelioration of the penal 'crisis', declarations of *USoA* have been successful in the sense that they have allowed the Court to justify the imposition of punishment under unconstitutional conditions.

In this way, unconstitutional punishment is brought into the sphere of constitutionality: unconstitutional punishment will never be in absolute contravention of the Constitution, as long as the State's institutions can show that they are making some effort to 'overcome' the crisis, and as long as the Court retains its powers of periodic review and supervision to ensure that those efforts are being undertaken. Declarations of *USoA*, in this sense, institutionalise the undermined character of the State's claims of political authority, creating a semblance of authority derived from constitutional principles while preserving conditions that systematically violate them. But the apparent success of the declarations hides a deeper failure: the 'crisis' of prisons reveals that the Constitution's notion of self-generated authority rests on unstable foundations.

Shelby, *The Idea of Prison Abolition* (Princeton University Press 2022); Tommie Shelby, 'Justice, Deviance, and the Dark Ghetto' (2007) 35 Philosophy & Public Affairs 126; Libardo José Ariza, *Tres décadas de encierro. El constitucionalismo liminal y la prisión en la era del populismo punitivo* (Siglo Editorial 2023).

[13] Beetham (n 6) 20.

Political authority, constitutionalism, and victimhood

In the framework of the 1991 Constitution, constitutional principles have come to be understood as a source of self-standing, self-generated authority, seemingly displacing a more dynamic and relational notion of political authority and its jural form, sovereignty —transformations which broadly reflect contemporary global trends in constitutionalism. While the notion of political authority was key in the development of modern constitutional thought, which strongly influenced Colombia's post-colonial State project, this notion has been absent in the rhetoric and conceptual structure of the 1991 Constitution. In line with global developments, this Constitution turned towards a strong commitment to promoting and advancing an objective order of values and principles —that is, an autonomous sphere of self-generated, self-standing, and rational authority in the context of which rights and interests are balanced or negotiated.[14] Because of these shifts, the notion of sovereignty no longer appears as central to constitutionalism. Meanwhile, punishment has increasingly become an instrument for the regulation of the relationship between offenders and victims, rather than an institution that embodies the relations of authorisation between the State and the citizens[15].

As victims take centre stage at a transnational level,[16] punishment is becoming more and more naturalised as a necessary instrument for the protection of victims' rights, while the historical particularities through which this ideological shift has occurred become obscured. The victim is becoming a transnationally institutionalised figure that allows insecurity and vulnerability to crime to be portrayed as a collective, universal, and politically determining experience. International human rights standards and higher-order constitutional principles provide the normative framework for the rationalisation of penal expansion, as well as the ideological justification of the maintenance of the *unconstitutionality* of punishment. The framing of punishment as an essential component of victims' rights has enabled and enhanced penal inflation, producing the very conditions that lead to declarations of *USoA* and to their perpetuation over time —conditions in which the State's claims of authority are undermined. The chronic *unconstitutionality* of punishment appears as a regrettable yet necessary sacrifice that must be made to uphold the rights of victims and ensure 'security'.[17]

By effacing relations of authority, the figure of the victim undermines relations of political authority in practice: it dilutes the *ultima ratio* and exceptional character of punishment, converting it into a normalised, natural, and necessary instrument for the enforcement of inter-personal

[14] Loughlin, 'The Constitutional Imagination' (n 1).
[15] See Chapter 4.
[16] See Karen Engle, 'Anti-Impunity and the Turn to Criminal Law in Human Rights' (2015) 100 Cornell Law Review 1069; Daniel Pastor, 'La Deriva Neopunitivista de Organismos y Activistas Como Causa Del Desprestigio Actual de Los Derechos Humanos' [2006] Jus Gentium; Manuel Iturralde, 'Colombian Transitional Justice and the Political Economy of the Anti-Impunity Transnational Legal Order' in Gregory Shaffer and Ely Aaronson (eds), *Transnational Legal Ordering of Criminal Justice* (1st edn, CUP 2020); Natasa Mavronicola, *Torture, Inhumanity and Degradation under Article 3 of the ECHR: Absolute Rights and Absolute Wrongs* (Hart Publishing 2021); Mattia Pinto, 'Historical Trends of Human Rights Gone Criminal' (2020) 42 Human Rights Quarterly 729; Laurens Lavrysen and Natasa Mavronicola (eds), *Coercive Human Rights: Positive Duties to Mobilise the Criminal Law under the ECHR* (Hart 2020).
[17] Ariza (n 12).

relations. While the deployment of punishment in this form emphasises its function in the assertion of *potentia* (that is, as an instrumental power through which order, dominion, and governance are ensured), its connection to *potestas* (the collective relations which institutionalise it as a rightful power) is degraded. In turn, coherence with international human rights standards appears as the ultimate legitimating element. However, as demonstrated by declarations of *USoA,* international standards as a source of legitimation are undermined by the very conditions of penal inflation that human rights discourse enables and justifies.

Constitutionalism and the normalisation of exceptions

Declarations of *USoA* in Colombian prisons, and similar systemic remedies elsewhere, expose the tension between normality and exception at the heart of modern constitutions —a tension often hidden by constitutionalism's tendency to normalise the exception through its constitutionalisation. Emergencies require the displacement of constitutional norms to protect the constitution of the state itself, and constitutional democracies have attempted to deal with emergencies of various sorts through the adoption of exceptional measures. However, the adoption of exceptional measures always involves a risk of normalisation and, therefore, of 'converting constitutional democracy into an authoritarian regime'.[18] Liberal constitutional thought has attempted to contain this risk through the legal regulation of the suspension of the norm (that is, through a detailed regulation of formal and material aspects of declarations of states of exception). However, as highlighted by Schmitt, the regulation of exceptions obscures a tension that concerns the very authority of the normative order: that the law is able to suspend itself cannot logically be explained other than by appealing to the displacement of the norm by virtue of a political decision of the sovereign —that is, a political decision to suspend the law in concrete cases that cannot be legally determined in a definitive manner.[19] However, with the development of constitutionalism, the space for this form of political decision-making is reduced, and the exception, in turn, is constitutionalised.

The regulation of states of exception in Colombia (first of their formal aspects in the 1886 Constitution, and later through a stricter scrutiny of both formal and material aspects in the 1991 Constitution), is an example of the liberal tendency to manage the tension between exception and normality through its regulation. But declarations of *USoA* have introduced a substantial transformation in the understanding and management of this tension. Conceived as a 'necessary' power derived from constitutional principles (in the sense that the declarations are *required* for their realisation and materialisation), these declarations have produced a new sphere of constitutional intervention in public policy that is never fully exceptional —that is, a dimension of extraordinary intervention that is nonetheless always constitutional, never external to its basic principles, and

[18] Martin Loughlin, *Against Constitutionalism* (Harvard University Press 2022) 154.
[19] Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (University of Chicago Press 2005); Carl Schmitt, *Dictatorship: From the Origin of the Modern Concept of Sovereignty to Proletarian Class Struggle* (1st edition, Polity 2013).

always proportional and necessary for the promotion and realisation of constitutional aims and principles. Through declarations of *USoA* in prisons, the Court attempts to reaffirm constitutional principles as the ultimate source of authority, while explicitly conceding the actual absence of these normative conditions and, therefore, the undermined character of the State's claims of authority, even by the Constitution's standard of self-generated authority. The same process that aims to eliminate *unconstitutionality* allows for its constitutionalisation, revealing constitutional normality as the true exception.

Systemic remedies and the aspirations of constitutionalism

In the last twenty years, systemic remedies have become increasingly common in various jurisdictions, particularly in the penal sphere. Colombian declarations of *USoA* have been hailed as a uniquely innovative form of 'dialogical' intervention that triggers a 'democratic' relationship of collaboration between the branches. Taking inspiration from the American model of systemic remedies,[20] yet transcending it, the Colombian Constitutional Court has gone beyond violations of specific rights or legal provisions, making broad-ranging declarations about the violation of the constitutional order as a whole, justifying more intensive forms of judicial intervention and monitoring mechanisms. Declarations of *USoA* have been especially influential on the Court's 'peers' in Latin America.[21] Propelled by the rational inertia of constitutional principles, constitutional tribunals in this region have integrated the Colombian doctrine into their domestic spheres, without any detailed consideration of why these powers are justified, and without taking into consideration the limited practical effects of the Colombian declarations.

This thesis has presented a critique of these often-celebrated remedies through an exploration of the irresolvable tensions that these declarations obscure. Faced with very serious challenges and the unavoidable reality of generalised violations of fundamental rights, declarations of *USoA* were designed as a tool to bridge the 'gap' between reality and the Constitution, accelerating social transformations required for the materialisation of constitutional aims and principles. But, I argue, the 'gap' that the Court identifies, rather than being the cause of these generalised violations of rights, is symptomatic of lack of a solid material and political basis upon which this political project may be realised, social integration achieved, and political authority be consolidated and reproduced. These material limitations to the constitutional project, however, are obscured by the normative language of human rights on which the declarations are based: underlying tensions are reframed as a matter of institutional capacity and collaboration, and the Court's intervention is justified as a means for the acceleration of peaceful, emancipatory social transformations that will finally lead to the realisation of constitutional aspirations.

Constitutional normality, through these remedies, is revealed to be generally and structurally exceptional. While the notion of political authority does not seem to be a core concept

[20] *Brown v Board of Education of Topeka (2), 349 US 294 (1955) ['Brown II']*; *Brown v. Plata, 563 US 493 (2011)* (n 11).
[21] See Chapter 6.

of constitutionalism, it is presumed by the very existence of the State and the constitution: without it, there would simply be no framework of public power to make the articulation, application, and enforcement of the legal order a real possibility. This is precisely the tension behind growing resort to systemic remedies: the existence of structural failures confronts courts with material circumstances in which the constitution's claims of authority are radically undermined—that is, with how exceptional constitutional normality really is. The longer systemic remedies remain 'necessary', the more the constitution is revealed to be *merely* aspirational. In other words, although systemic remedies seek the actualisation of the constitutional project, their perpetuation exposes underlying issues of constitutional ordering behind the utopian face of constitutionalism, in the sense that attempts to promote the ideals implicit in constitutions become a mere 'flight from political reality'.[22] The perspective of political authority is valuable precisely because it acquaints us with the institutional, relational, and juristic shortcomings that have produced such a flight from the political.

The material aspects of political authority

This thesis has subjected the State's claims of authority to critique by taking them seriously on their own terms. I have argued, on the one hand, that attempts to reaffirm authority through coercive force reveal the extent to which underlying relationships of representation and obedience are undermined. On the other, the use of systemic remedies to reassert the self-generated authority of the Constitution (often as a response to the very conditions that result from excessive resort to punishment) demonstrates the limitations of this normative scheme. These limitations are, to a great extent, the outcome of material relations of inequality and political exclusion, which undermine the formation and maintenance of political unity and of the relationships through which authority is generated and sustained.[23]

The gap between reality and the Constitution plays out in the domain of the political. As declarations of *USoA* show, this tension is made more evident where existing material conditions limit the very possibility of constitutional ordering. Social integration and the production of order, in this sense, are not wholly independent of the material relations on which authority is founded: allegiance, obedience, authorisation, and representation (all essential to the modern notion of authority) are, in practice, significantly undermined and threatened by high levels of inequality. If political equality is understood as an essential component of democratic societies, it is therefore worth asking how violence, poverty, and various other forms of material inequality impact the consolidation of the foundations on which specific political projects rest. By taking the notion of political authority seriously, these conflicts and divisions may be given their due weight as dynamics that are central to political ordering. The material character of these underlying relations, in that sense, may be understood as a dimension with great bearing on both *potentia* (in that it is expressive

[22] Loughlin, 'The Constitutional Imagination' (n 1) 14.
[23] Marco Goldoni and Michael A Wilkinson, 'The Material Constitution' (2018) 81 Modern Law Review 567.

of specific forms of distributing and managing resources) and *potestas* (to the extent that political equality is an essential component of the symbolic relations of representation through which the right to rule is articulated).

A perspective which centres authority reminds us of the inherently political character of punishment and of the constitutional order. It also requires recognising the contingent character of relations of authority, allowing for nuanced considerations of the many ways through which these relations may be strengthened or weakened, enhanced or undermined. Naturalised assumptions about the relationship between the constitution, punishment, human rights, and democracy may thus be subjected to thorough critique, bringing out inherent tensions and paradoxes behind existing articulations of political power.

Systemic remedies may be indicative of the exhaustion of constitutionalism's ideological project, in the sense that the mechanisms through which constitutional courts seek its actualisation not only have failed to advance this aim, but have undermined it by exposing its internal contradictions. Rather than offering a credible vision of an ideal society, these remedies fulfil the function of legitimating government, even where its practices are contrary to the principles on which the system's authority is premised. Insisting on the fundamental character of those rights, while also enabling and justifying their systemic violation, constitutionalism seems to be reduced to a 'culture of bad faith'.[24] The key challenge, then, is to re-imagine structural problems, which have so far been presented as a matter of rights, as inherently political issues. In the case of penal inflation and the situation of prisons, a starting point may be to denaturalise assumptions about punishment as an uncontested sphere for the satisfaction of victims' rights and interests —a logic that implies that, in the negotiation between the interests of victims and offenders, it is only natural (reasonable, proportional) that offenders will 'lose'. Rethinking the limits, scope, and function of punishment as expressive of relations of political authority, and embedding this institution in a robust political theory,[25] may offer a starting point for the renewal of our political imagination.

[24] Martin Koskenniemi, 'The Effects of Rights on Political Culture' in Philip Alston (ed), *The EU and Human Rights* (OUP 1999) 100.

[25] Examples of how this may be done include Ramsay, 'Rights of the Sovereign' (n 4); Thorburn, 'Criminal Punishment and the Right to Rule' (n 4).

Appendix 1
A brief overview of Colombian history

Since its independence, Colombia has gone through a long and violent process of State-building, characterised by high levels of socioeconomic and political inequality,[1] exclusion, and marginalisation,[2] accompanied by frequent civil wars and an enduring armed conflict. As described in more detail in Chapter 1, military powers, exceptional penal powers, and the ordinary criminal law have played a key role in the State's attempts to manage these difficult challenges.[3] On the one hand, in spite of these conditions, Colombia has maintained a relatively stable 'democratic' regime, avoiding long military dictatorships and maintaining a degree of 'modest economic growth'.[4] But, on the other, social fragmentation and inequality have contributed to the explosion and persistence of an internal conflict between the State and various armed actors (*guerrillas,* paramilitaries, narco-trafficking cartels, and organised criminal groups).[5] The origins of the armed conflict may be traced back to inter-party violence between the Liberals and Conservatives,[6] which started soon after the elite-led independence process and reached its peak after the murder of Jorge Eliécer Gaitán, presidential candidate for the Liberal Party, in 1948.

The murder of Gaitán unleashed an extremely violent civil war, followed by a brief military dictatorship (1953-1957). The dictatorship was later followed by a power-sharing agreement between the Liberal and Conservative Parties. Known as the *Frente Nacional* ('National Front', 1958-1974), the agreement was presented as a mechanism to re-establish 'democracy' in Colombia, to pacify the nation, and to legitimise politics. However, in practice, it excluded broad sectors of the population and non-traditional political movements from meaningful participation in politics.[7] Violent opposition to traditional politics intensified, primarily in the countryside, where

[1] Inequality indicators, such as the GINI index, have persistently shown that Colombia has one of the most unequal divisions of wealth in the world. While the index has improved in the last 25 years (going from 58,8 in 2000 to 54,8 in 2022, and reaching a low of 49,7 in 2017), the gap between urban and rural populations, as well as that between the poorer social classes and the elites, is still enormous. See Valentin Lang, 'The Economics of the Democratic Deficit: The Effect of IMF Programs on Inequality' (2021) 16 The Review of International Organizations 599; Francisco Javier Lasso and others, 'Macroeconomía, Ajuste Estructural y Equidad En Colombia: 1978-1996' (CEPAL 1998); Máximo Sozzo, 'Inequality, Welfare and Punishment. Comparative Notes between the Global North and South' (2022) 19 European Journal of Criminology 368.

[2] María Teresa Uribe de Hincapié, 'Órdenes complejos y ciudadanías mestizas: una mirada al caso Colombiano' [1998] Estudios Políticos 25; Mauricio Archila Neira, *Cultura e Identidad Obrera En Colombia: 1910-1945* (CLACSO 2024); David Bushnell, *The Making of Modern Colombia: A Nation in Spite of Itself* (University of California Press 1993); Boaventura de Sousa Santos and Mauricio García Villegas (eds), *El Caleidoscopio de Las Justicias En Colombia* (Siglo del Hombre 2001).

[3] See Chapter 1.

[4] Manuel Iturralde, 'Emergency Penality and Authoritarian Liberalism. Recent Trends in Colombian Criminal Policy' (2008) 12 Theoretical Criminology 377, 378.

[5] For a more detailed description of these actors, see Introduction.

[6] Bushnell (n 2).

[7] Mauricio Archila Neira, 'El Frente Nacional: Una Historia de Enemistad Social' (1997) 24 Anuario Colombiano de Historia Social y de la Cultura 189.

confrontations between left-wing *guerrillas*, right-wing paramilitaries,[8] and the army became increasingly violent, taking a toll on the civil population.

The 1980s and 1990s were marked by the rise of narcotrafficking cartels (including, among others, Pablo Escobar's infamous *Cartel de Medellín*) and the intensification of armed conflict all over the country. Following the murder of Rodrigo Lara Bonilla by Escobar's *Cartel de Medellín*, and with support from the government of the United States, the Colombian government declared the 'war on drugs' in 1984. From 1982 to the early 1990s, the government resorted almost uninterruptedly to declarations of states of exception, which included an extraordinary deployment of military and penal powers.

After a period of intense social mobilisations,[9] which emerged as a reaction to violence and semi-permanent states of exception, a new Constitution was enacted in 1991. The new Constitution symbolised the promise of social integration, democracy, peace, and the rule of law, and included an extensive list of fundamental rights and constitutional principles that were to be advanced and protected by the Constitutional Court. Establishing its identity as a key political actor, the Court developed progressive and extensive interpretations of fundamental rights, and created innovative strategies for their protection in a context of widespread, structural policy failures —including declarations of *USoA*.[10] However, as Iturralde notes, the Constitution ended up intensifying existing social fractures: on the one hand, local and regional elites felt threatened by social movements, new political parties, and by the Constitution's ambitious protections to fundamental rights. On the other, the economic model advanced by the Constitution protected the interests of economic elites and upper classes, while 'excluding the most vulnerable and marginalised social groups, which in Colombia make up almost half of the population'.[11] As inequality intensified, so did the armed conflict —particularly after the demise of the Cali and Medellín Cartels, when paramilitaries (supported by landowners, narcotraffickers, State agents, and regional elites) and *guerrillas* took over a large portion of the drug trafficking business.[12] In this context, and in order to face conditions of overcrowding and violence in prisons, the Constitutional Court made a declaration of an *USoA* in the National Penitentiary System in 1998.[13]

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[8] The growth of left-wing guerrillas led to the creation of the *paramilitaries,* 'self-defence' groups that emerged as part of an official counter-insurgency strategy devised by the government (See Decree 3398 pf 1965, Law 48 pf 1968). The government encouraged rural landowners to take measures to guarantee their own security. These groups quickly turned into 'private armies' that served landowners, narcotraffickers, politicians and other powerful actors, helping them protect their property from attacks by guerrillas. However, these groups also targeted peasants, labour leaders, academics, students, human rights advocates, and left-wing civilians. By the 1980's, these groups had frown uncontrollably and were declared illegal (Decrees 813 of 1989 and 814 of 1989). Later, a negotiated process of demobilization was carried out (2003-2006) to dismantle paramilitary groups, but some remain active to this day. See de Sousa Santos and García Villegas (n 2); Jennifer S Holmes and others, 'Paramilitary Violence in Colombia: A Multilevel Negative Binomial Analysis' (2021) 32 Defence and peace economics 193; Teo Ballvé, *The Frontier Effect: State Formation and Violence in Colombia* (Cornell University Press 2020).

[9] Julieta Lemaitre, *El Derecho Como Conjuro. Fetichismo Legal, Violencia y Movimientos Sociales.* (Siglo del Hombre Editores, Universidad de los Andes 2009).

[10] The first declaration of an *USoA* addressed violations to the right to pensions of teachers in the public sector. See *SU-559/97* (CCC).

[11] Iturralde (n 4) 381.

[12] Iturralde (n 4).

[13] *T-153/98* (CCC).

After failed attempts at peace negotiations with *guerrillas* during the late 1990s (such as President Pastrana's negotiations in El Caguán between 1999 and 2001), Álvaro Uribe Vélez was elected as president in 2002. Combining a neoliberal approach to economic policy with politically conservative rhetoric, Uribe's government concentrated on *Democratic Security* policies:[14] ensuring security (through the pacification and military defeat of armed actors and through negotiations for the dismantlement of paramilitary groups) would produce adequate conditions for the market to flourish. Narcotrafficking and terrorism were then conceived as a single threat, transforming the war on drugs into a broader war on terrorism. In practice, the military and penal apparatus mostly targeted young, unemployed males, most of whom were hardly connected to high-level warlords or drug kingpins.[15] Uribe's two terms of government (2002-2010) were followed by the two-term administration of Juan Manuel Santos (2010-2018), Uribe's former National Defence Minister. During his government, Santos turned from *Democratic Security* to *Democratic Prosperity:* aiming to consolidate Uribe's achievements, the government focused on a more generalised idea of crime prevention and pacification, that encompassed not only the armed conflict but also common criminality, articulating an even broader war on crime.[16] These security-based policies led to an unprecedented growth of imprisonment rates, leading the Court to make new declarations of *USoA*'s in prisons in 2013, 2015, and 2022.[17]

Uribe had refused to engage in a peace process with left-wing guerrillas. In a polarising decision, Santos commenced peace negotiations with the FARC that culminated in the signature of a historic agreement in 2016. Though the agreement was narrowly rejected by a referendum in October 2016, it was ratified by Congress in November 2016, leading to the creation of a special transitional jurisdiction for peace and a series of legal reforms. While the Peace Agreement has arguably produced a significant level of pacification, the State continues to face very high levels of violence (including disappearances, massacres, and internal displacement of millions of people) carried out by FARC dissidents, other guerrillas, and new forms of organised 'non-political' crime (often referred to as BACRIM, or criminal bands). [18]

Santos' government was followed by Iván Duque (candidate for the *Centro Democráctico,* Uribe's political party, which strongly opposed the peace agreements), who held office between 2018 and 2022. Between 2019 and 2021, the country was shaken by a wave of riots, protests, and student strikes known as the *estallido social* ('social explosion'). Protests, which gathered various social groups together (trade unionists, peasants, leaders and members of indigenous communities, and individuals from various social and political sectors), were a manifestation of general

[14] Presidencia de la República, Ministerio de Defensa Nacional, 'Política de Defensa y Seguridad Democrática' (2003). See Chapter 1.
[15] Manuel Iturralde, 'Colombian Prisons as a Core Institution of Authoritarian Liberalism' (2016) 65 Crime, Law, and Social Change 137.
[16] ibid 154. See Chapter 1.
[17] *T-388/13* (CCC); *T-762/15* (CCC).
[18] Human Rights Watch, 'Colombia: Eventos de 2021' (2021) <https://www.hrw.org/es/world-report/2022/country-chapters/colombia> accessed 26 February 2023; Julieta Lemaitre and Esteban Restrepo-Saldarriaga, 'Law and Violence in the Colombian Post-Conflict: State-Making in the Wake of the Peace Agreement' (2019) 2019 Revista de Estudios Sociales 2.

discontent with the government and high levels of poverty, worsened by the effects of the COVID-19 pandemic and the government's tax and education reforms.[19] The government responded to the 'social explosion' with violence,[20] as well as the deployment of the criminal law against protestors. Around 1980 individuals were arrested in this context, but most of these cases were subsequently dropped due to insufficient evidence. In 2022, Congress enacted Law 2197 to 'strengthen citizen security', criminalising conducts that tend to take place during protests, such as the 'obstruction to public roads'.[21]

Duque's government, which finished with very low approval rates and clear displays of public discontent,[22] was followed by the election of Gustavo Petro (2022-2026). A former member of the M-19 guerrilla, Petro's election was received as a historical victory for the Colombian left.[23] However, Petro's administration has faced significant challenges: frequent departures in the cabinet of ministers, as well as internal arguments and disagreements; lack of political support at Congress (which has led to the abandonment of some of Petro's main reforms –including tax, education, health care, the criminal justice system,[24] pensions, and labour law); a number of corruption-related scandals; and strong opposition from traditional politicians, regional elites, various sectors of the population, and even some of his previous supporters.

[19] Juan David Cárdenas-Ruiz, 'Las Nueva(s) Culturas(s) Políticas de Construcción Mediática de La Protesta Social En Colombia. Reflexiones Sobre El Paro Nacional, 2021' [2023] Forum Revista Departamento de Ciencia Política 80.
[20] Human Rights Watch (n 18).
[21] Articles 16 and 20, Law 2197 of 2022.
[22] 'Petro, con 64% de imagen favorable; Duque, con 27% de aprobación' (*Portafolio.co*) <https://www.portafolio.co/economia/finanzas/invamer-petro-con-64-de-imagen-favorable-duque-con-27-de-aprobacion-568174> accessed 6 July 2024.
[23] Joe Parkin Daniels and Edinson Bolaños, 'Former Guerrilla Gustavo Petro Wins Colombian Election to Become First Leftist President' *The Guardian* (20 June 2022) <https://www.theguardian.com/world/2022/jun/20/former-guerrilla-gustavo-petro-wins-colombian-election-to-become-first-leftist-president> accessed 6 July 2024.
[24] Though Petro has announced his intention to transform the penal system (including the decriminalization of certain conducts, the reduction of prison sentences, an expansion of the number of offences eligible for *beneficios* and *subrogados*, and the establishment of alternative forms of punishment for conducts punishable with less than 6 years of imprisonment and house detention for conducts punishable with up to 12 years imprisonment), he has failed to garner sufficient support in Congress, and has claimed that 'exceptional powers' may be 'necessary' to carry out these reforms. See María Isabel Ortiz Fonnegra, 'Facultades al Presidente para "cirugía" de Inpec, entre reformas judiciales que estudiará el Gobierno para llevar al Congreso' (*El Tiempo*, 22 May 2024) <https://www.eltiempo.com/justicia/investigacion/los-ejes-de-las-propuestas-de-reformas-judiciales-que-estudiara-el-gobierno-para-llevar-al-congreso-3345402> accessed 22 June 2024.

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