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Insane and dangerous offenders, positivism, and social defence in Portuguese law between 1852 and 1936

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Abstract
This study delves into the influence of positivism on Portuguese criminal law between 1852 and 1936, particularly concerning the treatment of dangerous offenders, specifically those who are insane. The positivist doctrine challenged the classical notion of criminal justice based on free will, asserting that offenders are abnormal individuals, influenced by physical, anthropological, and social factors. The text examines the evolution of medical-psychiatric research and the positivist understanding of criminal justice, highlighting the shift towards treating dangerous offenders through security measures. The legal response to insane offenders, criminal responsibility, serving prison sentences, and the treatment of other classes of offenders is explored within this positivist framework, emphasizing the interplay between mental abnormality, criminal acts, and social defence strategies.

Keywords: insanity; unaccountability; criminal dangerousness; positivism; security measures; social defence; alienists

1. Introduction

As from the end of the 19th century, Portugal was not immune to the influence of positivism regarding the treatment of dangerous offenders, especially insane offenders. The positivist doctrine reacted against the "classical school", which understood criminal justice as based on free will: offenders are normal people, whose decision (not) to commit a crime is contingent on individual whim and might be influenced by the threat of punishment. In contrast, positivism denied free will, saw the delinquent as an abnormality of human nature, and explained crime as a natural and indeed necessary phenomenon, determined by physical, anthropological, and social causes.[1] The evolution of medical-psychiatric research (e.g., Gall's phrenological school and Morel's studies on heredity and degeneration), Comtean positivism, and Lamarck and Darwin's evolutionism, opened the way for the positivist understanding of criminal justice to assert

[1] See Antunes, M. J., *Medida de Segurança de Internamento e Facto de Inimputável em Razão de Anomalia Psíquica*, Coimbra: Coimbra Editora, 2002, pp. 59 ff.

itself on the basis of the *dangerousness* of the offender and the consequent need for qualitatively different criminal sanctions – security measures.[2] In the legal field, such works as those authored by Henriques da Silva and Caeiro da Matta and, later, Palma Carlos unequivocally show the positivist influence in Portugal regarding insane ('alienated') criminals and offenders who raise a special need for social defence ('dangerous offenders').[3] The same can be said of the coetaneous research led by alienists such as Júlio de Matos, António Maria de Senna, and Miguel Bombarda, as well as Basilio Freire and his work on 'degenerates'.[4]

2. Insane offenders

The criminal law idealised by the Enlightenment was addressed to the free citizen, master of his acts, portrayed in the Declaration of the Rights of Man and of the Citizen of 1789. The alienated or insane citizen became a stranger to criminal justice since he/she did not enjoy the light of reason while committing the offence. At the legislative level, the turning point in this evolution was article 64 of the French Penal Code of 1810 (*Code Napoléon*), which established that '*il n'y a ni crime ni délit, lorsque le prévenu était en état de démence au temps de l'action ou lorsqu'il a été contraint par une force à laquelle il n'a pu resister*'.

Portuguese law and legal literature were no strangers to this change. The draft laws that preceded the Penal Code of 1852 established a clear distinction between those who are criminally liable and those who are not due to insanity. As a matter of fact, the draft Penal Code authored by Mello Freire in 1789 and offered to Queen Mary I[5]

[2] On the Positivist School and its evolution, see Tarde, G., *La philosophie pénale*[4], Paris: A. Maloine, 1894, pp. 45 ff.; Ferri, E., *Principii di diritto criminale. Delinquente e delito nella scienza, legislazione, giurisprudenza in ordine al Codice Penale vigente-Progetto 1921- Progetto 1927*, Torino: Editrice Torinese, 1928, pp. 41 ff.; Id., *La scuola criminale positiva. Conferenza del Prof. Enrico Ferri nella Università di Napoli*, Napoli: Enrico Dekten, 1885, pp. 13 ff.; and Grispigni, F., *Corso di diritto penale secondo il nuovo codice* I, Padova: Cedam, 1932, pp. 97 f. In the Portuguese literature, see Silva, H., *Elementos de Sociologia Criminal e Direito Penal*, Coimbra: Imprensa da Universidade, 1905-06, pp. 6 ff.; Correia, E., *Criminologia. Segundo as Lições do Prof. Doutor Eduardo Correia ao Curso do 6º ano de Ciências Histórico-Jurídicas*, 1955-1956, pp. 19 ff.

[3] See Silva, H., *Elementos de Sociologia Criminal e Direito Penal*; Matta, C., *Direito Criminal Português,* vols I-II, Coimbra: França Amado, 1911; Carlos, P., *Os Novos Aspectos do Direito Penal (ensaio sobre a organização dum Código de Defesa Social)*, Lisboa: s.n., 1934; Id., "Medidas de segurança", *Jornal do Foro*, 1962, p. 265-290. On the influence of positivism on Portuguese criminal law, see Caeiro, P. / Pinto, F. L. C., "A frantic mayfly at the turn of the century: The positivist movement and Portuguese criminal law", *GLOSSAE. European Journal of Legal History* 17 (2020) (Special issue ed. by Aniceto Masferrer / Yves Cartuyvels), pp. 396-439.

[4] See Mattos, J., *A paranoia. Ensaio pathogenico sobre os delírios sistematisados*, Lisboa: Tavares Cardoso & Irmão, 1898; Id., *Elementos de psychiatria*, Porto: Lello & Irmão, 1911; Senna, A. M., *Delirio nas Molestias Agudas*, Coimbra: Imprensa da Universidade, 1876; Bombarda, M. *Lições sobre a Epilepsia e as Pseudo-Epilepsias*, Lisboa: António Maria Pereira,1896; Id., *A Consciência e o Livre Arbítrio*, Lisboa: António Maria Pereira, 1896*;* Freire, B., *Estudos de anthropologia pathologica. Os degenerados*, Coimbra: Imprensa da Universidade, 1886: Id., *Estudos de anthropologia pathologica. Os criminosos*, Coimbra: Imprensa da Universidade, 1889.

[5] On this draft penal code, see Pinto, F. L. C. / Caeiro, P., "The influence of the French Penal Code of 1810 over the 'general part' of the Portuguese Penal Code of 1852: the visible and the invisible", in Aniceto Masferrer (ed.), *The Western Codification of Criminal Law. A Revision of the Myth of its Predominant French Influence*, Springer, 2018, pp. 115 ff.; and Caeiro / Pinto, "A frantic mayfly…", pp. 389 ff.

provided already that only those who commit the crime of their own free will, and who know and are aware of the evil they have done, are called delinquents. Insane individuals are not capable of crime or punishment (Title II, § 1). In 1803, Pereira e Sousa pointed out that individuals who are not guilty are not criminally responsible, because they lack the necessary free will. Hence the insane, fools, and demented cannot be punished, because they do not understand what they are doing.[6] In turn, the draft *Penal Code of the Portuguese Nation*, authored by José Manuel da Veiga in 1833 and adopted in 1837[7], provided that, as a rule, penalties are not imposed on individuals who were deprived of the use of their moral faculties at the time of the offence, if they bore no responsibility for such deprivation (Articles LXXXIV and LXXXV).

The Portuguese Penal Code of 1852 established that the insane ('*os loucos*') of any kind 'cannot be criminals', except if they act during lucid intervals (article 23), because only individuals who are endowed with the necessary intelligence and freedom can be criminals (article 22), and no act is criminal when the perpetrator 'was completely deprived of the understanding of the evil he was doing' when he acted (article 14-1). Subsequently, the Penal Code of 1886 ruled that insane individuals who do not have lucid intervals are not criminally liable (article 42-2) and neither are those who, in spite of having lucid intervals, commit the offence in a state of madness (article 43-2). The underlying reason was that only individuals who have the necessary intelligence and freedom can be criminals (article 26), because those requirements are essential for the act to be imputed to them and therefore be seen as a crime.[8]

Finally, the draft Penal Code of 1861 (which did not enter into force), provided that acts are not criminal, for lack of accountability, when the perpetrator commits them 'without intelligence or freedom' (article 69). Individuals who, as a result of any mental, congenital or acquired disorder, are completely deprived of the free exercise of their intellectual faculties at the time of committing the offence, are not liable, except if they are responsible for such condition (article 70).

The turn in the law opened space for the influence of positivist theories regarding (i) the lack of liability based on the madness of the perpetrator; (ii) the legal consequences of the act committed in a state of madness; (iii) the regulation of cases in which insanity occurs before or during the execution of the prison sentence; and (iv) cases in which insanity existed at the time of the offence but not in a way that excluded the offender's liability.

2.1. Insane offenders and criminal responsibility

In the first phase of modern Portuguese criminal law, criminal responsibility was a characteristic of those who had *the necessary intelligence and freedom*. The act committed by unaccountable individuals was in itself irrelevant, insofar as the reference to it had the exclusive (and to some extent inconsequential) purpose of subsuming the criminal conduct to the *facti-species* of the offence contained in the legal norm. Their

[6] Sousa, P., *Classes dos crimes, por ordem systematica, com as penas correspondentes, segundo a legislação actual*, Lisboa: Regia Officina Typografica, MDCCCIII, p. 5, footnote 8.

[7] This draft code was passed but never entered into force due to the political turmoil of those years: see Pinto / Caeiro, "The influence of the French…", p. 117.

[8] See Pinto, S., *Lições de Direito Criminal*, Coimbra: Imprensa da Universidade, 1861, p. 57.

"madness" sufficed to exclude them from the field of criminal justice. This is quite clear in the Act of 3 April 1896, which provided that, when there is a report of an act which the law qualifies as an offence, committed by an alienated individual or allegedly alienated, the court must shortly order an *ex officio* medical examination to ascertain and rule whether or not the agent can be criminally responsible according to the provisions of criminal law (article 1).

The "scientific certainty" brought by biological and positivist psychiatry, largely based on the writings of Benedict-Augustin Morel and Emil Kraepelin, who were well-known to the most reputed alienists of the time[9], shed new light on the association between insanity and crime, establishing that the insane are criminally unaccountable. The sheer state of madness, contemporaneous with the criminal act, led the judges to exempt the perpetrator from criminal responsibility, in line with the 'bio-psychological paradigm of criminal accountability'.[10] Unaccountability was based on a 'somatic ground – a "disease" in the strict sense, permanent or intermittent –, still and always ascertainable in bio-psychological terms'.[11] The 'disease' prevents the freedom presupposed by penalties to operating their effects. In 1861, Sousa Pinto wrote that 'if we punish a furious person, neither does he regenerate, nor do the others stop fearing he reoffends, because he did not know what he was doing, nor was he free to stop doing it.'[12] Criminal responsibility was thus seen as a *quality* of the individual, which made the *act* committed less important. Positivist scholars pointed out that the protagonist of criminal justice is inevitably always the offender and that the judge does not have to judge murder or theft, but rather the murderer and the thief.[13]

The clash between the courts and alienists[14] was epitomized by the case of the ensign *Marinho da Cruz*, who killed a soldier in 1886. He was acquitted in the first instance by the Military Court of Lisbon because he had acted during an epileptic delirium, which implied absolute irresponsibility for the acts. However, possibly due to the popular outrage that followed, the first trial was annulled; in the second trial, the defendant was convicted of murder and sentenced to the maximum penalty provided for by the law (1888). The court decided to convict the defendant despite the medical report of the most reputed alienists of the time (António Maria Senna and Júlio de Mattos[15]), who considered him a hereditary degenerate, within the category of larval epileptics, and unaccountable. The case file included a letter from Cesare Lombroso, who wrote he was fully convinced that Marinho da Cruz was one of the most marked types of larval

[9] See Quintais, L., "Torrent of madmen: the language of degeneration in Portuguese psychiatry at the close of the 19th century", *História, Ciências, Saúde – Manguinhos*, 15-2 (2008), pp. 353 ff.

[10] See Dias, J. F., *Direito Penal. Parte Geral. Questões Fundamentais. A Doutrina Geral do Crime*, Coimbra: Gestlegal, 2019, pp. 658 ff.

[11] See Pinto, S., *Lições de Direito Criminal Portuguez*, Coimbra: Imprensa da Universidade, 1861, pp. 62 ff.

[12] *Ibid*, p. 57.

[13] See Ferri, E., *Principii di diritto criminale...* , pp. 69 and 132 ff., and Lombroso, C., *L'uomo delinquente in rapporto all'antropologia, alla giurisprudenza e d alla discipline carcerarie*, Torino: Fratelli Bocca, 1924, p. 314.

[14] In further detail on this clash, see Caeiro / Pinto, "A frantic mayfly…", pp. 406-407, p. 412 ff.

[15] The latter has authored very important work about insane people before the courts: see Mattos, J., *Os alienados nos tribunais*, vol. I, Lisboa: Tavares Cardoso & Irmão, 1902; vol. II, Lisboa: Tavares Cardoso & Irmão,1903; and vol. III, Lisboa: Livraria Clássica Editora, 1907. See also Mattos, J., *A loucura. Estudos clinicos e médico-legais*, Lisboa: Livraria Clássica Editora, 1914.

epilepsy, as was *Misdea* (a soldier observed by Lombroso who, in 1884, had shot 52 shots, wounding 13 soldiers and killing 7).[16]

2.2. Criminal unaccountability and its consequences

At an early stage, providing offenders unaccountable by reason of insanity with an autonomous status aimed only to exclude them from the scope of criminal justice. The Penal Code of 1852 was completely silent as to the fate of those who committed the act in a state of madness. It was only in 1886 that the Penal Code established that 'the insane who are exempt from criminal responsibility will be handed over to their families for safekeeping, or taken to a hospital for the insane, if the mania is criminal, or if their state requires it for greater security' (article 47), thereby recovering, in essence, the provisions of article 71 of the draft Penal Code of 1861.[17] The decision over which course of action should be taken belonged to the court, after having heard the medical experts' opinion.

There is some positivist influence in the final part of that provision when it associates the hospitalization of the insane with *criminal mania* and *greater security*. However, the deprivation of liberty did not correspond to the application of a *penal* sanction. At the time, the prevailing understanding was that, since there is neither responsibility nor culpability, 'society has no right to intervene through criminal law. It certainly can adopt precautionary measures vis-à-vis the offender, if he is alienated or dangerous, because of the morbid impulses that draw him to certain acts of violence, improbity, or immorality, but those measures cannot be considered as penalties, because they affect an irresponsible, sick being, and aim, not to punish him, but to put him in a situation where he can do no harm and cure him.'[18] In fact, 'no matter how serious the attack against the legal order of the society, no matter how horrendous and harmful the effects of this attack, if the perpetrator is a madman, he cannot fall under the inexorable power of the avenger Nemesis. He is not a criminal, but a sick person, whom society, instead of submitting to an expiatory punishment, has to cure and defend against the dangerous accidents of his own illness and to reduce, without unjustified and inhuman abuses, to the impossibility of harming others.'[19]

Internment in an establishment for the insane was thus viewed as bearing a pure social/therapeutical nature, also a result of the Law of 4 July 1889, known as the first Portuguese mental health law.[20] This law restructured the health service for alienated individuals with specific concerns in the field of criminal offenders. Article 5, § 2, no. 1, followed by article 13 of Law of 3 April 1896, established that the insane who committed

[16] For a description of the case Marinho da Cruz in more detail, see Antunes, *Medida de Segurança de Internamento*, pp. 11 ff.

[17] 'Individuals exempt from liability as a result of mental illness shall be handed over to their families to keep them or put in a hospital for the insane if the mania is criminal or their condition requires it for more security'.

[18] Matta, C., *Direito Criminal*, II, p. 283.

[19] "Relatório do Decreto de 10 de Janeiro de 1895", in Augusto, F., *Annotações á Legislação Penal mais Importante e que não está Codificada* I, Coimbra: Livraria Académica, 1905, pp. 254 f., and Sousa, P., *Classes dos Crimes…*, p. 5, footnote 8.

[20] Candeias, A. *et al*, "Legislate to protect: Lei Sena, the first mental health law in Portugal (1889*)", Revista de Enfermagem Referência*, 5-5 (2021), p. 1 ff. (DOI: 10.12707/RV20103).

acts punishable with any of the "major penalties" (*pena maior*[21]) and were not convicted due to madness, as well as those who were acquitted on the grounds of having broken the law in a state of mental alienation, were placed in special wards of the hospital in Lisbon.[22] The dangerousness of the offender was assessed from the perspective of the seriousness of the crime, which in turn was derived from the applicability of a "major penalty". According to article 15 of the Law of 3 April 1896, internment would cease only 'upon ascertainment of their complete cure, or when, due to aging or loss of strength, they can be considered harmless'. In contrast, if the penalty corresponding to the act committed by the alienated person was not a "major penalty", he/she was handed over to the family (article 14 of the Law of 3 April 1896).

2.3. Insanity and serving a prison sentence

The Penal Code drafted by Mello Freire (1789) established that those who became insane after committing the crime would not be punished, because punishment would not be useful: it would be more a moment of horror than of amendment or example (Title II, paragraph 3). However, once an offender was tried and sentenced, no further provisions dealt with the case where he/she got insane: for the classical school, criminal justice ended with the conviction of the defendant.

In contrast, for the positivist school, it is also important to look at the individual who is going to serve (or is already serving) a sentence.[23] The positivist approach has influenced the regulation of cases in which madness occurs after the offence, but before the trial, or during the enforcement of a prison sentence.

The Portuguese Penal Codes of 1852 and 1886 established that the insane who committed an offence during lucid intervals would serve their sentence when they enjoyed such periods of lucidity. If the offender became insane after committing the crime, the execution of the sentence would be suspended until they recovered their intellectual faculties (articles 93 and 114).

In turn, Law of 4 July 1889 provided for the rules applicable to individuals sentenced to a "major penalty" who became alienated or epileptic during the enforcement of the sentence. On the one hand, wards were created in the central penitentiaries with specific conditions for treating them, and where they were placed (articles 2, n. 5, and 5, § 1, n. 1); on the other hand, it was provided that they were to be placed in special wards of the Lisbon psychiatric hospital if, upon expiry of the prison term, it was not

[21] The contents and the regime of "major penalties" (art. 55 of the Penal Code of 1886) have been subject to several modifications between the Penal Code of 1852 and the Decree-Law no. 38.688 of 5 June 1954. As opposed to the lighter "correctional penalties" (art. 56 of the Penal Code of 1886), "major penalties" consisted, in general, of the most severe penalties: long prison sentences, which could be combined with subsequent relegation of the offender to overseas possessions, as well as suspension of political rights for long periods. The distinction between the two classes of penalties was eventually abandoned with the Penal Code of 1982.

[22] On the Law of 3 April 1896, see Augusto, F., *Assistência Judiciaria. Serviços Medico Legaes. Alienados Criminosos. Notariado. Annotações aos Diplomas que Criaram estes Serviços*, Porto: Imprensa Commercial, 1900, pp. 278 ff.

[23] See Antunes, M. J., *O internamento de imputáveis em estabelecimentos destinados a inimputáveis (os arts. 103º, 104º e 105º do Código Penal de 1982)*, Coimbra: Coimbra Editora, 1993, pp. 17 ff.

convenient, due to the *dangerous* alienation, to transfer them to the hospitals next to where they lived or hand them over to their families (article 5, § 2, n. 2). They were released when they were cured or could be considered harmless.

Hence, Portuguese law of the 19th century regulated the State's response to cases where madness bore no relationship with the perpetration of the offence, namely when it arose during the serving of the prison sentence. The attention paid to such a special situation rested upon three grounds.[24] In the first place, the prison environment is not appropriate for someone who needs psychiatric care, nor is his/her presence beneficial for the other inmates: the regime of ordinary prisons was harmful to the insane and the insane could harm other inmates. In the second place, an insane convict is not able to understand his/her prison sentence as he/she should in order to be influenced by it. In the third place, Portuguese criminal law also paid attention to social defence, since the convict was placed in an infirmary until the end of the prison term, after which moment he/she could still be confined in a special ward of the psychiatric hospital in Lisbon if he/she was dangerous.

2.4. Later repercussions of positivism on criminal justice

The Decree of 11 May 1911 created criminal asylums in Portugal, intended exclusively for criminals (article 1, § 1, 3rd category).[25] However, the social/therapeutical nature of the internment did not change: internment in such facilities was not (yet) a security measure.[26]

According to article 38, the morally insane, epileptics, persecuted-persecutors or impulsive who committed a criminal act, as well as those who got such condition while serving a prison sentence, were interned in a criminal asylum for an indefinite term. They remained there until they were cured, or until they became demented because of advancing age or of the evolution of the disease itself, or until they could be considered harmless due to some pathological reason (article 42).

Criminal asylums received 'alienated criminals', not the 'criminally alienated'. According to the Report that precedes that Decree, which drew on the writings of both psychiatrists and legal scholars[27], the latter are the insane who accidentally or fortuitously commit an offence – the actual *sick*, in the strict sense of the term. Those offenders fit well in any asylum because nothing in their psychology, customs, or tendencies distinguishes them from their like, who, however, do not offend. In contrast, the 'alienated criminals' are insane individuals whose crimes are an unequivocal manifestation of their constitutionally anomalous organisation. For that reason, the law specified, among the insane, those who are morally insane, epileptic, persecuted-persecutors or impulsive, which meant an association between some types of insanity and crime – the offences that have already been committed and the offences that can be committed by inmates in the future.

[24] See Antunes, M. J., *O internamento de imputáveis em estabelecimentos destinados a inimputáveis (os arts. 103º, 104º e 105º do Código Penal de 1982)*, pp. 17 ff., pp. 37 ff.

[25] The first Portuguese psychiatric hospital (Rilhafoles Hospital) was created in 1848.

[26] See *infra*.

[27] Further details in Caeiro / Pinto, "A frantic mayfly…", p. 408, p. 420.

Alienated criminals are more degenerate than sick, more the product of heredity than of environmental influences, and for this reason, they must be committed to criminal asylums. With the marked distinction between 'alienated criminals' and 'criminally alienated', the law of 1911 also highlights a certain relationship between the state of madness and the perpetration of the criminal act, namely the direct effects of the former on the latter, foreshadowing changes in the criteria for determining criminal liability concerning the 'bio-psychological paradigm of criminal accountability.'[28]

Decree-Law nº 26643, of 28 May 1936 (the so-called 'Prison Reform of 1936') brought important changes to criminal law[29], including in what regarded the alienated, in that it intended to implement the classification of delinquents by applying a special preventive criterion. Internment in a criminal asylum eventually became a security measure applicable to *dangerous unaccountable offenders*, i.e., offenders who suffered from a mental anomaly at the time of perpetration that would exclude their *liability* (articles 3, n. 3, 8, n. 1, and 147, n. 1). Criminal asylums were also used for the internment of *dangerous offenders* who were affected by a *supervening mental anomaly* while serving a prison sentence, which would determine its suspension (article 147, n. 2). According to article 151, this regime aimed at fulfilling the need for treatment of the internees and the defence against the danger they posed.

Positivist concerns with the individualisation of the enforcement of prison sentences also led to place in special prisons (asylum prisons) those whom the law called 'abnormal' and to whom the ordinary prison regime was harmful or who could harm other inmates (articles 3, n. 2, c), 7, n. 4, and 121). Abnormal offenders were accountable individuals affected by mental anomalies that arose after the offence, before or during the enforcement of the sentence, and also those who suffered from a mental anomaly at the time of the offence which did not exclude but could mitigate their responsibility.[30]

According to article 131, all abnormal offenders could have their prison sentences *extended* until they were deemed to be harmless.[31] Hence, although the ground for placing abnormal offenders in asylum prisons was the inappropriateness of the common regime (from the point of view of both the convict and the other inmates), their (possible) criminal dangerousness was not left unattended by the law and could be countered by the prorogation of the sentence – which was, in substance, a security measure.[32]

In a nutshell, *accountable offenders* affected by mental anomalies existing at the time the offence or occurring thereafter would be placed either in a criminal asylum or in an asylum prison, depending on their ability to understand the prison sentence.[33] If, despite their mental anomaly, they could understand the meaning of punishment and

[28] See *supra* 2.1. and *infra*.

[29] See *infra* 3.

[30] See Santos, B., "Delinquentes habituais, vadios e equiparados no direito português", *Revista de Legislação e de Jurisprudência*, 70 (1937-1938), p. 83, footnote 3, and 73 (1940-1941), p. 242. Mitigation of responsibility by virtue of a mental anomaly was an innovation brought by the 1936 Prison Reform and could be understood in the light of the then emerging 'normative paradigm of criminal responsibility', which eventually replaced the 'bio-psychological' one: on this evolution, see Dias, *Direito Penal. Parte Geral. Questões Fundamentais*…, pp. 661 ff., and Antunes, *O internamento de imputáveis…,* pp. 22 ff.

[31] See *infra* 3.

[32] Antunes, *O internamento de imputáveis…*, pp. 23 ff.

[33] See *supra* 2.3.

were prone to be influenced by it, the sentence would be served in an asylum prison (article 121). However, if the mental anomaly prevented them from understanding the meaning of the sentence, the enforcement would be suspended and they would be placed in a criminal asylum (article 147, n. 2).

3. Social defence and other classes of offenders

The Penal Code of 1852 already enshrined sanctions that could be viewed as actual security measures, if we look at them through the lenses of current dogmatic and political-criminal categories.[34] It provided for relegation, which consisted of forcibly deporting the offender to overseas possessions (articles 29 and 35); banishment (within the country), which obliged the offender to remain in a certain place (articles 35 and 39); and police surveillance, which created a duty for the convict not to appear in certain places and to declare, after being released, the place where he intended to take up residence (articles 59 and 61).

Notwithstanding, it is the Law of 21 April 1892 that first considers the need for social defence against some accountable dangerous convicts, thus following a dualistic sanctioning model.[35] Under the influence of the French laws on relegation of 1875 and, especially, of 1885 ('*rélégation des récidivistes*'), it provided that criminals with previous convictions could be placed at the government's disposal and then relegated to overseas possessions for a minimum term of three years.

The Law of 1892 was soon followed by Law of 3 April 1896, which extended relegation to vagrants, beggars, and those living at the expense of prostitutes; as an alternative to deportation, it prescribed work in an asylum or a shelter for beggars, for a period of two to five years (article 7).

Eventually, Law of 20 July 1912 put an end to relegation and provided that vagrants and beggars would be punished as such and then interned in a correctional home for work or in an agricultural penal colony, which could also be applied to individuals with a certain number of convictions, who were considered as vagrants to this effect.

The Political Constitution of the Portuguese Republic of 1933 paved the way for new approaches to security measures, by providing in article 124: 'For the prevention and repression of crimes, there will be penalties and security measures that will pursue the defence of society and as much as possible the rehabilitation of the delinquent'. Three years later, with the Prison Reform of 1936, Portuguese law transposed both the 'primitive phase' and the 'organic phase' of the evolution of security measures, and entered the 'development phase'. Security measures earned the status of yet another type of *criminal* sanctions instead of measures of an administrative nature.[36]

[34] But see Caeiro, P. / Pinto, F.L. C., "A frantic mayfly", p. 433, fn. 187.

[35] See Antunes, M. J. / Caeiro, P., "Preventive Custodial Measures in Portugal", *European Criminal Law Review* (2022) 3, pp. 356 f.

[36] See the explanatory memorandum of the law, II, 12.

In addition to being applied to dangerous offenders who were unaccountable due to mental abnormality[37], security measures were applicable to beggars, vagrants, and the like, who were placed in an agricultural colony or a workhouse, depending on their abilities (articles 8, n. 2, and 153-168). Departing from the regime laid down in the Law of 1912, the Prison Reform of 1936 did not punish begging and vagrancy as criminal offences: it rather deemed those individuals to be in a 'state of criminal dangerousness' and subjected them to security measures *only*, which testifies to the legal relevance of pre-delict (*ante-delictum*) dangerousness.[38]

Security measures were also applicable to alcoholics and other intoxicated individuals who perpetrated an offence. After having served the sentence to which they had been convicted for the crime committed they were placed in a special institution for alcoholic offenders (articles 8, n. 3, and 169-171). The fact that they were sentenced to a term of imprisonment together with a security measure for the same offence attests to the legal relevance of dangerousness in the context of a true dualistic sanctioning model.

Similarly, to the convicts whose responsibility was mitigated due to a mental anomaly,[39]offenders who were 'difficult to correct' could also have their sentences extended until they were able to lead an honest life and could be considered harmless, which, strictly speaking, was equivalent to a security measure (articles 7, n. 5, and 108-120).[40] This category included habitual offenders, criminals by tendency, and unruly inmates, who served their sentences in special establishments called 'prisons for hard-to-correct offenders' (articles 1, n. 2, a), 7, n. 5, and 108).

The prorogation of the imprisonment term applicable to offenders with diminished responsibility due to a mental anomaly and to those who were 'hard to correct' was deemed an instance of 'practical monism' (Beleza dos Santos[41]), as opposed to pure monism. It purported to counter criminal dangerousness and secure the goals of social defence without conceding to the cumulative application of a penalty and a security measure as advocated by dualist models. The regime adopted by the Portuguese legislator would allow – so it was argued – for a more effective rehabilitation of the convict, who would continue in the same prison facilities, instead of being removed elsewhere for the enforcement of a security measure. Moreover, it would respect the principle of guilt because the prorogation of the sentence was covered by the graver guilt of those offenders, thus complying with the monist nature of the sanctions system. Nevertheless, one could argue that such prorogation, inasmuch as it exceeded the penalty imposed for

[37] See *supra* 2.4.

[38] Commenting on the Prison Reform of 1936, Jescheck deemed the adoption of such pre-delict security measures as one of the most daring proposals of modern social defense (Jescheck, H.-H., "Principes et solutions de la politique criminelle dans la réforme pénale allemande et portugaise", *Estudos 'in memoriam' do Prof. Doutor Beleza dos Santos, Boletim da Faculdade de Direito*, supl. XVI, 1966, p. 453).

[39] See *supra* 2.4.

[40] On the discussion about the nature of extended sentences, see Antunes, M. J., *O internamento de imputáveis em estabelecimentos destinados a inimputáveis (os arts. 103º, 104º e 105º do Código Penal de 1982)*, pp. 25 ff.

[41] Santos, B., 'Prefácio', in Pinto, R. / Ferreira, A., *Organização prisional (Decreto-Lei nº 26 643, de 28 de Maio de 1936). Actualizada e anotada*, Coimbra: Coimbra Editora, 1955, p. IX.

the offence, was a security measure in substance, even if it appeared formally as a penalty.[42]

4. Conclusion

Between 1852 and 1936, positivism had some impact on Portuguese law concerning dangerous offenders and on the way the courts applied it.

In the first place, it influenced the courts not to hold insane offenders responsible for their criminal acts, in accordance with the 'biopsychological paradigm of criminal responsibility' founded on positivist psychiatry, which establishes a deterministic relationship between insanity and crime.

Secondly, positivism inspired the legal framework of state response to criminal acts committed in a state of insanity: dangerous unaccountable individuals should be placed in special institutions. In the early days, this measure had a social/therapeutical nature, but it evolved over time into a criminal security measure.[43]

Positivist theories have also influenced the regulation of insane offenders beyond the issue of unaccountability, in the sense that insanity can affect not only the nature of the criminal *act*, but also the *individual* who will be subject to a particular kind of public power. The Portuguese legislator drafted specific provisions for the cases where insanity was already present when the offence was perpetrated but did not exclude criminal liability, as well as the cases where it set in between the offence and the trial, or even during the enforcement of the sentence.[44]

Aiming to ensure social defence, the legislator eventually adopted measures to address the dangerousness of offenders other than the insane: beggars, vagrants and the like, alcoholics and other intoxicated individuals, and habitual offenders, tendency offenders, and unruly inmates.[45] Some measures were applied together with the prison sentence, others were applied even if no crime had been committed and still others consisted of the extension of the prison term.

Finally, the concern with the individualisation of the execution of imprisonment, typical of positivist thinking, led to the establishment of a variety of special institutions tailored to fit the several types of offenders and deviant individuals, such as special wards, criminal asylums, asylum prisons, asylums or shelters for beggars, correctional homes for work, agricultural penal colonies, special institutions for alcoholics and prisons for 'hard-to-correct offenders.'[46]

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[42] A similar argument concerning current Portuguese law and the 'relatively indeterminate sentence (RIS)' is developed in Antunes/Caeiro, "Preventive custodial measures…", pp. 360 ff.

[43] Article 47 of the Penal Code of 1886, Law of 4 July 1889, Law of 3 Abril 1896, Decree of 11 May 1911, and Prison Reform of 1936.

[44] Articles 93 of the Penal Code of 1852 and 114 of the Penal Code of 1886, Law of 4 July 1889, Law of 21 April 1892, Decree of 11 May 1911, Law of 20 July 1912 and Prison Reform 1936.

[45] Penal Code of 1852, Law of 4 July 1889, Law of 21 April 1892, Law of 20 July 1912 and Prison Reform 1936.

[46] Law of 4 July 1889, Law of 3 April 1896, Decree of 11 May 1911, and Prison Reform 1936.

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