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## Pedro Dorado Montero: A Transitioning Figure\*

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### Abstract

The current article focuses in one of Spain's most neglected authors: Pedro Dorado Montero. It explores his professional, scholarly career with a special emphasis on the various national and international influences he received when designing his unique theory of Criminal law, the so-called 'Protective Law of the Criminals'. The expression 'transitioning figure' is not a simple frill; it helps to describe two key aspects. The first one is that he acts as a clamp between the two centuries (19<sup>th</sup> and 20<sup>th</sup>). Usually, scientific literature overlooks the fact that it is far complex to carry out a functioning transition of two very different momentums in the history of ideas. The second one points out his cryptic ability to give the illusion of equidistance in a two-faced debate while, in reality, he changes the grounding conditions of both postures, leaving them exactly in the same base arguments (as much as they might differ in the shallow aspects). Thanks to him, absolute theories were impaired and they would never hold the same meaning they had back in the 16<sup>th</sup>, 17<sup>th</sup> and 18<sup>th</sup> centuries.

### Keywords

Positivism, Correctionalism, Penal law, Neoclassical School, Criminology, Eclecticism

**Summary:** 1. Contextualising Dorado Montero 2. A textbook Christian from cradle to University 3. Relativism vs. religious convictions 4. A brief romance with positivism 5. Krausism: the relevance of instruction and education 6. Socialist in spirit, rather than militant 7. The purest form of Anarchism 8. Sociology, a struggle for its unification. Bibliographical References

### 1. Contextualising Dorado Montero<sup>1</sup>

Pedro Dorado Montero<sup>2</sup> was a transitioning figure. He lived between the years 1861 and 1919. Thus, he was stranded between two centuries. Prominent events such as

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<sup>1</sup> For the biographical dates and objective bio-data I have heavily relied upon three sources. The first one is the *Diccionario de Catedráticos Españoles de Derecho (1847-1943)*, elaborated by the University Carlos III de Madrid, which can be found at the following link: [http://portal.uc3m.es/portal/page/portal/instituto\\_figuerola/programas/phu/diccionariodecatedraticos](http://portal.uc3m.es/portal/page/portal/instituto_figuerola/programas/phu/diccionariodecatedraticos). The second one is a work published fifteen years ago: Peláez, M. J. (Ed. y Coord.), *Diccionario crítico de juristas españoles, portugueses y latinoamericanos*; Martínez Dhier, Alejandro, "Dorado Montero, Pedro", *Cátedra de Historia del Derecho y de las Instituciones et al.*, Zaragoza-Barcelona, 2005, vol. I. The third one is the following one: Sánchez-Granjel, G., *Pedro Dorado Montero, un penalista salmantino*, Valladolid: Junta de Castilla y León, 1990, ISBN 84-7846-025-X.

<sup>2</sup> His actual name was Pedro Francisco García Dorado Martín Montero. Yet, there is an open controversy on this matter. *Videre*: Barbero Santos, M., "Pedro Dorado Montero, aportación a su biografía", *Revista de Estudios Penitenciarios*, 22, 1996, pp. 257-317, p. 261. In it, the author offers a very detailed scheme which leads the reader to an almost completely different surname.

the loss of the Spanish Empire in 1898, the establishment of the Spanish Protectorate in Northern Morocco in 1912 and its posterior conflict (the Rif War), and the First World War (1914-1918) would be decisive. The previous developments possess, however, not only a symbolic value. Living in the aforementioned period of time made for him both possible and attainable the ideal of change. He knew all the prevailing trends within the old century, as well as the currents of the new, coming one. It was precisely this detailed knowledge of both worlds what would allow him to become one of the greatest masters of ‘legal switch’ in Europe, and particularly, in Spain.

Nowadays, the meaning of “transition” is in the doldrums. The concept is currently used to depict a soft change allowing us to go from one reality to another; from the past scenario to the one ahead of us. If one wants to lay emphasis on the fact that a certain event constituted a ground-breaking transition, he has to ineluctably use “transition” jointly with the adjectives “hard” or “violent”. Even though its official definition is “the process or a period of changing from one state or condition to another”<sup>3</sup>, the connotation is far from being so aseptic. In its broad conception, the noun has been stripped of its revolutionary flavour, if any. Through the lens of the common man, “revolution” is change; but “transition” is just a timid, mild, half-hearted word leading us to a third via between two extremes (usually deemed undesirable due to their destructive potential).

Therefore, let us propose Dorado Montero as the guarantor of the right meaning of transition. He forced Spanish old-fashioned standards to dive into the new era of legal dogmatics (which were at their initial stage).<sup>4</sup> Naturally, one could think that eclectics already did so in a soft manner. Not quite: eclectics sought to elaborate a middle-term conception between neoclassicism and positivism<sup>5</sup>. Nevertheless, thanks to him no relevant neoclassical penalist was completely defending the neoclassical posture. A neoclassical in neoclassical times would do so; yet, a neoclassical in positivist times would not be a truly pure neoclassical anymore. To this, contributed positivism in general, and Dorado Montero in Spain. Even if the assertion may sound categorical at first, one will later on check the veracity of such statement.

It has been said that, as regards to the introduction of the positivist mentality in the Spanish society, “Dorado Montero altogether with Sales y Ferré contribute[d] decisively to such phenomenon”<sup>6</sup>, and so academics have identified four major stages which he underwent as regards his scholarly evolution: 1) Krausoinstitutionalism; 2) Italian Positivism; 3) Sociology (“The organicist and evolutionist trends are

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<sup>3</sup> The Oxford English Dictionary, the Collins Dictionary and the Merriam-Webster Dictionary are unanimous to this respect.

<sup>4</sup> Perhaps, the sole relevant contribution to criminal dogmatics dating back from the Early Modern Age is that of Decianus, T., *Tractatus Criminalis*, Torino: eredi Niccolò Bevilacqua, 1593, v.1 and v.2. Similarly, in the contemporary scenario Mario Sbriccoli also develops such topic. Vid. Pifferi, M., “A proposito di Storia del diritto penale e della giustizia. Scritti editi e inediti (1972-2007), di Mario Sbriccoli”, *Rivista di storia del diritto italiano*, ISSN 0390-6744, Anno 84, vol. 84, 2011, pp. 480-487.

<sup>5</sup> Iñesta-Pastor, E., “Influencias extranjeras en la configuración de la pena en los códigos penales españoles decimonónicos”, Masferrer, A., *La codificación española. Tradición e influencias extranjeras: su contribución al proceso codificador (Parte general)*, Pamplona: Thomson Reuters. Aranzadi, 2017, pp. 401-499, p. 444.

<sup>6</sup> Blanco Rodríguez, J. A., *El pensamiento sociopolítico de Dorado Montero*, Salamanca: Centro de Estudios Salmantinos, 1982, p. 11: “La introducción de la mentalidad positiva -fenómeno al que contribuye decisivamente Dorado Montero junto a Sales y Ferré-”.

predominant on the first stage of the sociological Spanish thought”<sup>7</sup>), and 4) Radical criticism and Pessimism<sup>8</sup>. As regards the first element, when one deals with this historical period, it is common to talk about krausoinstitutionalism<sup>9</sup> (or even other possible combinations like krausofröbelism<sup>10</sup> or krausopositivism<sup>11</sup>), thus, merging the two trends. Curiously enough, Ferrater Mora stressed the difference between krausists and institutionists. That being said, we have decided to opt for a different structure in this biographical article. The layout of sections reads as follows: 1) Christian background; 2) Relativism; 3) Positivism; 4) Krausism; 5) Socialism; 6) Anarchism; and 7) Sociology.

Several authors have closely followed and described Dorado Montero’s personality. Among them, we find Manuel López-Rey, Juan Andrés Blanco Rodríguez, Constancio Bernaldo de Quirós, Francisco José Valls, Jesús Lima Torrado, Fernando de los Ríos Urruti, and Barbero Santos. Especially, the first one described Dorado Montero’s genius as “reserved, austere and not very sociable”<sup>12</sup>. Indeed, he was said to be Miguel de Unamuno’s nemesis: “They contrasted strongly in their characteristics and it is no wonder that what at the beginning was a promising friendship ended in a rather distant and cold academic relationship. The varied activities of Unamuno, with his wit and his philosophy, were probably not the best means to impress Dorado, with his somewhat introverted personality and his devotion to a single question: Criminology”<sup>13</sup>. In the same article, he would point out the substantial paradox lying in Dorado Montero: his rough, difficult past did not reflect the humanitarian goals within his “Protective Law of the Criminals”<sup>14</sup>. Yet, Unamuno did not doubt in making a truthful accomplishment where it should be made. In one of the letters he wrote to Leopoldo Alas Clarín, the following aspect was raised:

“Those of us who know him [Dorado Montero], we have a very different concept of him than those who judge him in the distance. I do not read him, and given that he barely says anything, always limiting himself to just listening, I cannot judge him. He seems to me to be a man that knows his things and when he gets his pen, he does expose them; yet, about the things he knows, one rapidly gets to learn them as regards the substance. He is, on the other hand, a

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<sup>7</sup> Ibid., p. 35.

<sup>8</sup> As to such structure, *vid.* Blanco Rodríguez, J. A., *El pensamiento sociopolítico de Dorado Montero*, Salamanca: Centro de Estudios Salmantinos: 1982.

<sup>9</sup> Francisco Giner de los Ríos, José Canalejas, Gumersindo de Azcárate or Blanco Rodríguez himself.

<sup>10</sup> Ureña, Enrique M., “Orígenes del Krausofröbelismo y masonería”, *Historia de la educación: Revista interuniversitaria*, No. 9, Madrid, ISSN 0212-0267/1990, pp. 43-62.

<sup>11</sup> Blanco Rodríguez, J. A., *Op. Cit.*, p. 18.

<sup>12</sup> López-Rey, M., “X. Pedro Dorado Montero (1861-1919)”, Mannheim, H., *Pioneers in Criminology*, London: Stevens and Sons, 1960 (I use López-Rey, M., “Pioneers in Criminology. X. Pedro Dorado Montero (1861-1919)”, *The Journal of Criminal Law, Criminology, and Police Science*, Vol. 46, No. 5, Northwestern University Pritzker School of Law, Jan. - Feb., 1956, pp. 605-612.), p. 606.

<sup>13</sup> Ibid., p. 607.

<sup>14</sup> In Spanish, the “Derecho protector de los criminales”. It was the name Dorado Montero granted to his theory of Criminal law. The name is very descriptive per se, since it aimed at the criminal’s protection. Dorado Montero considered the criminal not as an evil individual who acted selfishly, but as nothing more than a sick person; an individual who acted moved by a mixture of instincts and social incapacity, and who was so morally degenerate that the single thing that one could expect from the State in response was mercy and compassion, more specifically a treatment to take them out of such state of “moral inferiority”. Although he also named his most important work like that (*El Derecho protector de los criminales*), I will refer to it generically, since I am interested in meaning his theory in a wider level. Every time I wish to make a reference to the book, I will indicate so at the corresponding footnote.

perfect Castilian man; blind as to the nuances, and deaf to ineffable. In any case, a very useful man and truly serious”<sup>15</sup>.

On the one hand, we observe this perspective of him: positivist, practical, earth-bound, efficient, with a good scholar technique but with no broad vision. Yet, on the other hand, his “transcendental doubt”<sup>16</sup> makes him a far more open-minded individual than what steams from Unamuno’s words. The assertion “blind to nuances” is certainly more intended to describe his practical character, rather than his theory and his doctrinal position, which are far more elaborated than that. As stated thereof, as much as he is to be described as “deaf to ineffable”, he was always a quiet listener, precisely because he always took into account an endless amount of points of view, thus, avoiding to take sides by one of them and highlighting that the human reality is more convoluted and (biologically) not as knowable as we might think. In this respect, though Unamuno was his reverse, Dorado Montero might not be an open-minded bohemian but he was a shy, over-reflective and open-minded scholar. One should never commit the mistake of thinking he was a cold, slow-witted positivist.

Hereby, Dorado Montero exemplifies the relevance of transition. Just like a silent yet corrosive water drop deforms the shape of a rock, the Spaniard quietly introduces new trends and alters the reigning conceptions of Penal law. Neoclassicals would never be the same again after his death. And Spain’s Penal law would never look the same after his teachings influenced his pupils: especially Jiménez de Asúa and Cuello Calón, who would complete this change in an arguably far more notorious, popular manner. Change is transition; transition is change.

## 2. A textbook Christian from cradle to University

Pedro Dorado Montero is born in 1861 in Navacarros<sup>17</sup>. According to an official publication, back in the 16<sup>th</sup> century the population only amounted to 77 inhabitants<sup>18</sup>. Yet, the actual number of citizens was much lower since the calculation was made altogether with another two municipalities<sup>19</sup>. At the time he lived, the size of the village alone grew significantly bigger, and it would reach 482 inhabitants<sup>20</sup> in 1860, probably triggered by the textile industry’s economic boom of its judicial district: Béjar.

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<sup>15</sup> *Epistolario a Clarín*, Editora Nacional: Madrid, 1941, pp. 82-83: “Los que le conocemos de cerca y le tratamos, tenemos de él un concepto muy distinto de los que de lejos le juzgan. Yo no le leo, y como hablando apenas dice cosa, limitándose a oír, no puedo juzgarle. Me parece un hombre que sabe sus cosas y cuando coge la pluma las expone: pero de esas cosas que sabe, se entera uno pronto en cuanto a la sustancia. Es, por lo demás, un perfecto castellano, ciego para el matiz y el nimbo, y sordo a lo inefable. Un hombre utilísimo de todos modos y serio de verdad”.

<sup>16</sup> This idea will be explained later on.

<sup>17</sup> It is a very small municipality within the province of Salamanca which is, at its turn, located in the self-governing community of “Castile and León” (Spain).

<sup>18</sup> González, T., *Censo de Población de las provincias y partidos de la Corona de Castilla en el siglo XVI*, Madrid: Imprenta Real, 1829, p. 100. The originals find themselves at the *Biblioteca de Castilla y León* (in Valladolid) under the signature G 47449.

<sup>19</sup> Namely, *La Casa del Frayle* and *El Palomar*.

<sup>20</sup> Figure as provided by the Official Census of Spain at the *Instituto Nacional de Estadística* (National Institute of Statistics). The document looks after all municipalities’ population within the province of Salamanca in the year 1860. Link: <https://www.ine.es/inebaseweb/treeNavigation.do?tn=192209&tns=192478#192478>. Seen on the 25.03.2020.

Nowadays, the figure is small and it barely exceeds 100 householders<sup>21</sup>. Be as it may, whether we talk of it as in the 16<sup>th</sup>, 19<sup>th</sup> or 21<sup>st</sup> century, we must conclude that his hometown was located in a very small village in one of the inner regions of Spain.

Back then, Navacarros was barely a hamlet, whose closest relevant city was Béjar<sup>22</sup>. Traditionally, the areas located in the interior of the country tend to be very conservative, communitarian in the strong sense, and very religious<sup>23</sup>. Consequently, since a very young age he received a very strict, traditional, Christian education. His idea of good and evil is very clear and invariable. In his mind, it is taking place a proto-formation of what one understands by justice. His perception of legal wrongdoing and licit actions is limpid, primary, and invariable in time and place. It is enhanced by a Christian moral universalism heavily attacking relativism. Sin and delict are synonyms. Despite being a starting, primitive myriad, it constitutes the first identification between what is morally right and legal, on the one hand; and between what is morally reprobable and illegal, on the other hand. The identification with the Christian parameter of “what is good and what is wrong” has its roots on religion. The formation of the “wrong order” is constructed in opposition to the “desirable order”, i.e. the punishable order only exists in as much as we compare it to the idea of how we conceive an ideal society. Besides, such a Manichaeon conception was very useful in his childhood: it gave him both constancy and a sense of persistency that would allow him to keep on studying despite the terrible, unfavourable conditions in which he lived. His home was very far away from school. He went every day to school from Navacarros to Béjar. Thus, he nearly had to cover 10 kilometres daily<sup>24</sup>. Nevertheless, he continued to go to school.

He used to play in a yard with his friends every day. Regrettably, in one of those days, a rock holding a parked cart was displaced. As a result, the cart moved and ran over Dorado Montero, thus, leaving him lame and with a crippled right arm<sup>25</sup>. His parents, too, were very Catholic and very methodical. Despite being poor, uneducated farmers, they insistently pursued one objective: their son should keep on studying. Yet, there is a discrepancy on the causes lying behind this reason. Some authors such as López-Rey maintain that it was a common aspiration among Spanish peasants to send their children to the academic world, usually deemed with fewer precarious conditions, and with higher salaries<sup>26</sup>. Another line of interpretation suggests that, since farming or manually working in the textile industry were the main means of livelihood in the region, “his parents became aware that he had been deprived from the only tool which poor people had to subsist: a healthy body. Therefore, they decided he should devote his life to study”<sup>27</sup>. Nonetheless, this insistence of the idea that there was only one

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<sup>21</sup> According to the census of 2019, the population of Navacarros amounts to 112 inhabitants.

<sup>22</sup> Hernández Díaz, J. M., “Pedro Dorado Montero y la educación”, *Historia de la educación: Revista interuniversitaria*, No. 2, 1983, ISSN 0212-0267, 217-228, p. 218.

<sup>23</sup> Leaving aside the case of Madrid due to be the capital of Spain, i.e. a melting pot of ideas.

<sup>24</sup> There is a straight distance of 4,31 km between the two points, which hits 7 kilometres if one takes the current road.

<sup>25</sup> López-Rey, M., “Pioneers in Criminology. X. Pedro Dorado Montero (1861-1919)”, *The Journal of Criminal Law, Criminology, and Police Science*, Vol. 46, No. 5, Northwestern University Pritzker School of Law, Jan. - Feb., 1956, pp. 605-612, p. 606.

<sup>26</sup> López-Rey, M., “Pioneers in Criminology. X. Pedro Dorado Montero (1861-1919)”, *The Journal of Criminal Law, Criminology, and Police Science*, Vol. 46, No. 5, Northwestern University Pritzker School of Law, Jan. - Feb., 1956, pp. 605-612, p. 606.

<sup>27</sup> Pascual Matellán, L., “Pedro Dorado Montero. Un pensador heterodoxo”, *Azafea. Revista de Filosofía*, No. 20, Salamanca, 2018, ISSN: 0213-3563S, pp. 111-128, p. 112: “sus padres fueron

absolutely right way to go, of a clear doubtless objective to achieve, was crucial for him to thrive in life.

Unsurprisingly, the *Philosophia Christi* is to be a central core in his religious and philosophical intellectual substratum<sup>28</sup>. The Christian Philosophy has very deep roots in both the Dutch philosopher Erasmus of Rotterdam and the Spanish humanist and philosopher Joan Lluís Vives. Indeed, this latter may appear less quoted, which is something he himself reproached to Erasmus after the publication of the *Ciceronianus*<sup>29</sup>: “the appearance of the *Ciceronianus* would arise both the protests of those who saw themselves criticised and satirised, and the reproaches of those who were not quoted at all or not quoted enough”<sup>30</sup>.

Such Catholic thought was also reinforced by Enrique Gil Robles. He is better known for being the father of José María Gil-Robles, a Spanish politician playing a definitive role in the period previous to the Spanish Civil War, as well as afterwards. Gil-Robles was the leader of the CEDA<sup>31</sup>, an extremist right-wing association supporting the dictator Franco, and all the fascist ideology involving him. Then, the enormous influence that Enrique Gil Robles exerted over Dorado Montero had a very conservative, strongly religious character. Back then, he was one of the leading intellectual authorities in Salamanca and he inspired several religious fundamentalist publications (such as *La Información* diary)<sup>32</sup>. This period is characterised by the intellectual domination of Gil Robles over Dorado Montero. Time would, nevertheless, change such a situation.

When Dorado Montero reached his youth, before moving to Bologna, he had created and managed a political party with tendency towards ultramontanism. This clerical-political conception within the Catholic Church places strong emphasis on the prerogatives and powers of the Pope. Besides, some Catholic influence can be hinted when, at the first stages of thought, he shares the division of natural law and positive law. Also, while he was studying at secondary education, he drank indirectly from the doctrine of Nicomedes Martín Mateos<sup>33</sup>. Two of his pupils (namely, Juan García Nieto and Eloy Bejarano) would end up directing the high school where Dorado Montero would study. If Martín Mateos would influence them both, they would have an impact in Dorado Montero as well. One may say that the very early academic influences start

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conscientes de que había sido privado de la única herramienta que tenían los pobres para garantizar su subsistencia: un cuerpo sano, y por ello tomaron la decisión de que se dedicara al estudio”.

<sup>28</sup> Lima Torrado, J., “Las claves de la recepción del pensamiento anarquista en la filosofía política de Pedro Dorado Montero”, Elósegui Itxaso, M. (Ed.); Galindo Ayuda, F., *El Pensamiento jurídico: pasado, presente y perspectiva. Libro homenaje al prof. Juan José Gil Cremades*, Zaragoza: El Justicia de Aragón, 2008.

<sup>29</sup> Von Rotterdam, E., *Ciceronianus*, 1528. I use: De Rotterdam, E., *El Ciceroniano o Del mejor estilo de oratoria*, Madrid: Cátedra, 2011, ISBN 9788437627595.

<sup>30</sup> Bomartí Sánchez, V., *Humanistas europeos (siglos XIV y XVI)*, Madrid: Editorial Complutense, 1º ed., 2006, ISBN 978-84-7491-824-3, p. 70: “La aparición del *Ciceronianus* va a suscitar, aparte de las protestas de quienes se vieron criticados y satirizados los reproches de aquellos que no se vieron citados o de los que se consideran insuficientemente reseñados”.

<sup>31</sup> The acronym stands for Spanish Confederation of Autonomous Rights (*Confederación Española de Derechas Autónomas*).

<sup>32</sup> The newspaper *La información* defended Enrique Gil Robles and his ideals, and so did the diary *El Criterio* and *El Lábaro* with Father Cámara, and the diary *La Democracia* with Dorado Montero. Balcazar y Sabariego, J., *Memorias de un estudiante de Salamanca*, Madrid: Librería de Enrique Prieto, 1935, p. 49.

<sup>33</sup> He was a Spanish philosopher born in Béjar (1806-1890). The most defining terms for his doctrine were spiritualism and neo-cartesian thought.

here with both Kant and Martín Mateos: “The Kantian imperative as received by García Nieto and the spiritual sense as infused by Martín Mateos permeate the thought of a Dorado Montero who approaches the University of Salamanca”<sup>34</sup>.

Despite that after some time most of the undisputed Catholic positioning will disappear (as we will see in his personal evolution), the Christian background in his political philosophy remained. This background laid at his subconscious even in less religious stages of his life. Sometimes a Christian concept was renamed after a socialist idea he liked. For example: the idea of no oppressors nor subjugated individuals (arising from the socialist theories) came actually given by the Christian ideal of fraternity among all humankind<sup>35</sup>. Another example would be the defence of the human race as maintained by Christianity, somehow very related towards the “third dimension of Tolstoy’s Christian anarchism”<sup>36</sup>. Indeed, López-Rey sums up Dorado Montero’s proposal asserting that the philosophical construction behind his criminal theory is grounded on a special mixture: it goes further beyond a plain positivism or a mild correctionalism. It seeks to reconcile Comte’s philosophy with the principles of the Old Spanish School aiming at the moral ‘enmienda’<sup>37</sup>. Bear in mind that he is not referring to ‘correction’, but to ‘moral emendation’, so that all previous mistakes must be completely erased from the criminal’s record, and he should be protected against new faults<sup>38</sup>. Besides, the remainders of his faith shall not be understood in a particular religious confession, but it shall rather be ascribed within a wider, Christian spirituality:

“His theory, therefore, is not the expression of a particular faith, but the expression of a Christian spiritualism in which other elements than those strictly orthodox from a Catholic point of view play a rôle”<sup>39</sup>.

Briefly, Dorado is a reformer and a pioneer “firmly rooted in the Christian ideas so prevalent among the Spanish penologists”<sup>40</sup>. Indeed, the first stage of his academic production is still characterised by strong closed convictions. But, as soon as he gets more mature, his all-mighty security in most ideas and conceptions tend to evaporate, and he is sieged by the transcendental doubt. In a more general view, he adduced the frequent references to the relevant role that religion should play as regards the treatment of offenders, as well as the parallelism religion-law that can be observed when counterposing the concepts of sin, confession, and penitential sanction, one the one hand; and the concepts of offence, confession, and criminal procedure, on the other hand.<sup>41</sup> Also, he does not very much care about the results of the crime and the solutions of the damages caused thereof. Here it comes a clear religious parallelism: “For whom

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<sup>34</sup> Blanco Rodríguez, J. A., *El pensamiento...*, p. 15: “El imperativo kantiano recibido a través de García Nieto y el sentido espiritualista inculcado por Martí Mateos impregnan el pensamiento del Dorado que se acerca a la universidad salmantina”.

<sup>35</sup> Lima Torrado, J., “Las claves de la recepción del pensamiento socialista en la filosofía política de Pedro Dorado Montero”, AA.VV., *Estudios en homenaje al profesor Gregorio Peces-Barba*, Madrid: Dykinson, vol. 4, 2008, pp. 537-550, p. 540.

<sup>36</sup> Lima Torrado, J., “Las claves de la recepción del pensamiento anarquista...”, p. 431.

<sup>37</sup> López-Rey, M., “X. Pedro Dorado Montero (1861-1919)”, p. 608.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

<sup>41</sup> Though such reality has been observed at the European level; it was not solely focused in Spain. *Vid.* Masferrer, A., „Der Beitrag der Theologie und der kanonistischen Wissenschaft zum modernen europäischen Strafrecht“, *Zeitschrift für die gesamte Strafrechtswissenschaft*, Berlin/Boston: De Gruyter, Band 131, Heft 1, Seiten 219–238, eISSN 1612-703X, ISSN 0084-5310, DOI: <https://doi.org/10.1515/zstw-2019-0008>.



takes care of souls, the most important thing is not the determination of the acts carried out and its remedies, but rather the status and the tendencies of such souls. What matters is the sinner, *in lieu* of the sin<sup>42</sup>. That is the core argument of why when he is designing the new penal system, he shifts the focus of attention away from the action itself to the agent, thus, establishing an indirect analogy of what the Christian religion tends to focus on. To this respect, he asserts that “if on the sphere of penitence, confessions tend to be more habitual and more honest than in the field of State criminal justice, it is because redemption is sought by the sinner himself. In penitence, he sees nothing but benefits while, at the same time, he flees from justice (which deems to be a great enemy which is going to inflict him pointless suffering –not just like penitence, which has regenerating aims for him-)”. And so, he foresees that “such a difference in treatment shall only last until the criminal justice turns into a psychological treatment, i.e. a soul healing science<sup>43</sup>”.

Additionally, three long paragraphs of his main work are of a particular relevance. One can easily identify Christian ideas based on the expressions used thereof. On the first exhortation, he establishes a parallelism between ‘good behaviour’ and admission to society, and ‘good behaviour’ and admission to heaven.

“The penalty has never been but a mechanism for heaven to gain souls. Though it has been so, mainly, for the ‘terrenal’ heaven (as to refer to the social order). It could even be deemed as a way to send to hell the social detritus, as a last resort [...] This must not be forgotten: both terrenal heaven (*civitas diaboli*) as well as celestial heaven (*civitas Dei*), cannot tolerate rebelliousness in their midst. They only want righteous, not sinners. They must be just on the outside and on the inside<sup>44</sup>”.

For him, the aspect that needs intervention and amendment is the internal fact. Whereas our traditional conception of justice did focus more into tackling the external aspect of justice, “justice needs in the first place to be so at the will”. Taking nature as an example, “out of the internal justice (tree), external justice will come soon after (fruits)”. He strongly asks the new penal conception to shift the focus of attention from the tree, in order to focus on the fruits, “whose recollection is the only thing that matters”. Dorado Montero knows that “the one who controls the will, will count on the whole man; whereas, the man who does just count on the body (by means of a criminal threat) will never reassure himself”. Even though if he might sometimes acknowledge certain elements of the old Criminal law system as necessary<sup>45</sup>, because “they all made

<sup>42</sup> Dorado Montero, P., *El Derecho protector de los criminales*, Madrid : Ed. Jiménez Gil, Tomo 1, 1915, p. 181: “Para quien cuida de las almas, no es lo principal la determinación de los actos efectuados y el remedio de los mismos; lo es el estado y las inclinaciones de aquéllas [...] es el pecador, más que el pecado ya cometido, propiamente, lo que le importa”.

<sup>43</sup> *Ibid.*, p.183: “esta diferencia no puede durar sino el tiempo que tarde en convertirse la justicia penal en un tratamiento psicológico, en una cura de almas”.

<sup>44</sup> *Ibid.*, pp. 164-165: “La pena no ha sido jamás, me parece á mí, sino un medio de «ganar almas para el cielo», principalmente para el cielo terrestre (si es permitida la unión de ambas palabras), para el paraíso á que damos el nombre de orden social—destinado á nuestra bienandanza—, ó un medio de arrojar al infierno, á la desesperada, á los detritus sociales. sto no debe ser olvidado. El cielo terrestre (la *civitas diaboli*), lo mismo que el paraíso celestial (*civitas Dei*), no puede consentir rebeldías en su seno. Sólo quiere justos, no pecadores. Justos por fuera y justos por dentro”.

<sup>45</sup> Schackles, prisons and chains are only resorted to, simply, because “one does not know how to use other means of punishment”, *Ibid.*, pp. 166-167. ‘Necessary’ here is not used as “something which is needed”, but rather as “something that cannot be avoided”. In Spanish, the word also possesses this second sense which has this ‘fate’ or ‘unavoidable’ flavour. Given that society was configured that way, those undesirable means were, sometimes, ‘necessary’; their usage could not have possibly being avoided since society did not have (or had not yet implemented in a practical way) other alternatives.

it materially impossible for the criminals to commit more crimes”, he points out that the system is somehow a ‘failure’ and that the mechanism is far too simple to produce the deep, more complex changes that a society needs (because “his will of committing a crime is, simply, hindered”)<sup>46</sup>. On the second exhortation, he advocates for the changing of the penal system so as to ‘cure souls’, in a long dissertation:

“And so, Criminal law has either been outlawed or at least radically changed as regards juvenile criminality. It has been outlawed, if by criminal law we mean the retributive and atoning Criminal law which resorts to real penalties and sacrifices. It has been radically changed, whether we also consider the correctionalist function as to be Criminal law, which does not use penalties as such, but only educative, will-transforming means [...]. Childhood and juvenile correctionalism has stopped being just sentimentalist and it added scientific character to it. [...] Nowadays, institutes of correction are much more than mere charity establishments run by philanthropists and altruistic individuals (friars or nuns, as it was before); they are ‘soul hospitals’ run by people in the technical position of making that heal possible (i.e. pedagogues, physicians, psychiatrists, psychologists,...)”<sup>47</sup>.

On the third exhortation, he addresses the need of individualisation of the penalty, especially when the penalty seeks for the prevention or preservation against future crimes by means of the amendment of the criminals. He develops this idea as follows: “it could be said that it consists on a personal, psychological work; no soul can be influenced otherwise than penetrating it. No will can be changed, but investigating its roots and, hence, trying to modify them. Souls, just like any other thing, cannot be known but through observation and concrete analysis. Precedents have an outstanding relevance here. Every individual behaves as what he is, and this can only be found out figuring out what he does. The story of one person is the most reliable hint to foresee his future behaviour [...]. When people look forward to the moral regeneration of the convicted, they obviously seek his healing. They wish he would change his behaviour and also that, if until now he was inclined to evil, he would reverse this path and so he will tend to good. They want to renew his will, or even better, his entire soul by both spiritual and body means. And so, they ask for a greater educative character of the penalty, so that the outcome brings effective social benefits and not harms (as it has been happening)”<sup>48</sup>.

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<sup>46</sup> Ibid., pp. 166-168.

<sup>47</sup> Ibid., p. 224: “De este modo, el derecho penal ha quedado proscrito ó radicalmente cambiado—como se quiera—con relación á la delincuencia juvenil: proscrito, si sólo se da tal nombre al derecho penal retributivo y expiatorio, al que hace uso de verdaderas penas ó castigos; radicalmente cambiado, si también se llama derecho penal á la función correccionalista, donde no tienen lugar alguno las penas, en cuanto tales, y sí tan sólo los medios educadores y trasformadores de la voluntad [...] El correccionalismo infantil y juvenil ha dejado de ser meramente sentimentalista, y, sin perder este carácter, ha reunido al mismo el que podemos denominar científico [...] Los institutos de corrección son hoy algo más que establecimientos de beneficencia, á cargo de filántropos y de individuos altruistas y compasivos, v. gr., frailes ó hermanas de la caridad, según ha pasado antes; son, juntamente con esto, hospitales de almas para la curación de las mismas—aun mediante el cuerpo—y dirigidos al efecto precisamente por personas que estén en condiciones de realizar tal curación; es decir, por pedagogos, por médicos, por psiquiatras, por psicólogos”.

<sup>48</sup> Ibid., pp. 479-480: “Aquí puede decirse que consiste todo en obra psicológica personal. No se puede influir sobre un alma sino penetrando en ella. No se puede cambiar una voluntad sino indagando sus raíces, al intento de poder así modificarlas. Y las almas, al igual de otra cosa cualquiera, no se conocen más que por medio de la observación y el análisis concretos. Los antecedentes tienen aquí una importancia de primer orden. Cada uno se porta según es, y sólo sabemos cómo se porta y cómo es averiguando lo que hace. La historia de un sujeto es el indicio más fiable de su comportamiento futuro [...] Cuando las gentes desean que por la pena se busque la regeneración moral del reo, es claro que persiguen una obra curativa de éste. Apetecen que cambie de conducta, y que si hasta ahora se hallaba

Furthermore, Dorado Montero sums up the function which he thinks that the penal science should fulfil: “the so-called function of criminal justice administration is a true soul healing”<sup>49</sup>. He goes in the line of whatever doctrine sits closest to positivism, by arguing that the important aspect of this comes not from the responsibility of a single deed, but rather that a soul would be evil because of its disposition to exercising a certain kind of actions. For a soul can be well-oriented or naturally good despite it having committed several unlawful deeds. Whereas a truly evil, twisted soul can develop good actions with a perverse rationale or a malicious intention. Let us remember his most relevant motto: it is precisely the sinner, instead of the committed sin, that actually matters. Also, the reparation of damages (a constant in civil law) is also mentioned.

In other significant writings, Dorado Montero will oppose the soul to the State itself. He would try to best depict how this man-made structure of public law is a clear obstacle since it contradicts the inner simplicity of souls. The State “is simply the major hindrance for humanity’s moral progress; it is an artifice largely relying upon violence, a construction whose object is to avoid the men’s set of energies and inherent qualities. It is necessary to suppress that or humankind will be ‘condemned’ to perpetual slavery”<sup>50</sup>. Immediately after, he resorted to man’s natural kindness as described by Rousseau, not without showing a deep criticism towards its simplistic misinterpretation, in order to point out the numerous conventionalisms and synthetic bonds that link individuals together.

As observed, the religious analogies keep on repeating through the whole text. There are souls which are naturally predisposed to commit sins, and so, there are men naturally predisposed to commit crimes.

“Certain souls are prone to a determined genre of behaviour in such manner that, under the slightest provocation or stimulus, they wreak their sinful power. They are, so to speak, born sinners”<sup>51</sup>.

If one thinks of confession, one will realise that its main objective is that men are ‘cured’, and so they do not commit sins anymore. Similarly, he would suggest, judges should look after turning men into right-acting citizens. Religions are undeniably linked towards our conception of Criminal law.

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mal inclinado, deje de estarlo en lo sucesivo y propenda al bien. Quieren renovar su voluntad, ó mejor dicho su alma entera, sea como sea, ya por medios puramente espirituales, ya también por intermedio del cuerpo. Hablan por eso de educación y exigen de día en día con mayor imperio carácter educativo á la pena, para que los resultados obtenidos de su aplicación produzcan beneficios sociales efectivos, y no, como ahora, casi siempre daños”.

<sup>49</sup> Ibid., p. 180: “La función llamada administración de justicia penal es una verdadera cura de almas”.

<sup>50</sup> Dorado Montero, P., “Concepciones sociales y penales de Tolstoy, según su última novela, Resurrección”, Calvo González, J. (Ed.), *El alma y la ley. Tolstói entre juristas. España (1890-1928)*; Sevilla-Zamora: Comunicación Social, Colección “Historia y presente”, 1º ed., 2010, ISBN 978-84-92860-33-3, pp. , 138-159, p. 139: “es el estorbo mayor con el que tropieza el progreso moral de la humanidad; es un artificio apoyado en la violencia y hecho para ejercitar la violencia, una construcción cuyo objeto no es otro que impedir el despliegamiento de energías y cualidades nativas de los hombres, y que por lo mismo es necesario suprimir, so pena de hallarse la humanidad condenada a servidumbre perpetua”.

<sup>51</sup> Dorado Montero, P., *El Derecho protector...*, Tomo 1, p. 182: “Ciertas almas están de tal modo propensas á un género determinado de conducta, que á la menor provocación ó al más pequeño estímulo descargan su potencia pecadora. Son, podría decirse, pecadoras natas”.

All those very religious influences took over in his childhood and youth, but things started to change with his arrival at the University. After obtaining his General Certificate of Education (GCE), around 17 years old, he received a scholarship for 4 years. It allowed him to move to Salamanca and to study in a university residence<sup>52</sup> called San Bartolomé. Within the walls of the University of Salamanca, he was a very successful student, just as he had been during his entire life<sup>53</sup>. He studied the Degree in Humanities (from 1878 to 1882) and graduated with distinction. In 1882, he was appointed as the Knight of the Order *Isabel la Católica* due to his academic merits. One year after, he obtained his Law degree, and he specialised himself at the section of Civil and Canon Law, also with distinction. In 7 February 1883, he started teaching at the University of Salamanca. Specifically, he worked at the Faculty of Philosophy and Humanities, since he was proposed by the Dean thereof<sup>54</sup>. The Dean had created a scholarship which Dorado Montero obtained<sup>55</sup>. After that, “once he concluded the two degrees”, he moved to Madrid with the goal of “obtaining his PhD in Jurisprudence”<sup>56</sup>. Finally, he defended his thesis<sup>57</sup> before a university tribunal<sup>58</sup>. He obtained the maximum qualification as usual. A new phase in his life was about to start.

### 3. Relativism vs. religious convictions

At the age of 24 years old, the Board of *Colegios de Salamanca* granted him a postdoctoral scholarship in order to carry out a research stay at the University of Bologna in Italy. The total amount of the stipend was 2000 pesetas. The memo he worked on in those two years bore the following title: “Organisation and state-of-the-art of the legal studies in Italy in a comparative perspective with Spain”<sup>59</sup>.

Right after his trip to Italy, the transcendental doubt<sup>60</sup> appears. For Dorado Montero every single topic, reasoning or even lecture is open to further discussion.

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<sup>52</sup> In Spanish it is referred as a “Colegio Mayor”. In this case, the exact name was “Colegio Mayor de San Bartolomé”.

<sup>53</sup> The academic records faithfully prove it. They are accessible in the online repository of the University of Salamanca: *GREDOS*, specifically in the section “Expediente personal de Pedro García Dorado Montero”, within the Collection “AUSA. Expedientes personales de profesores de la USAL”. Link: <https://gredos.usal.es/handle/10366/19333>.

<sup>54</sup> The Dean was Mariano Arés y Sanz, a very relevant figure in the Academia who shared very strong republican, and lay ideals. Besides being a remarkable professor (Full Professor at the Chair of Metaphysics of the University of Salamanca), he encouraged the creation of the special library of Philosophy and Humanities, and managed the Board *Colegios Universitarios de Salamanca*.

<sup>55</sup> Valentí i Camp, S., *Ideólogos, videntes y teorizantes*, Barcelona: Minerva, 1922, p. 102: “In the fourth year, through a public contest, he was granted one of the scholarships created on behalf of the initiative of Metaphysics Professor Mr Mariano Arés”.

<sup>56</sup> *Ibid.*, p. 102.

<sup>57</sup> The title of his dissertation was “Municipal regime. Subordination of the municipality to the State. The autonomy of the municipality. Administrative Tutelage”. Original title: “Régimen municipal. Subordinación del municipio al Estado. La autonomía del municipio. Tutela administrativa”. Vid. On the Spanish Ministry of Culture and Sports *PARES. Portal de Archivos Españoles*, “García-Dorado Montero, Pedro”, 1883-1885, Signature UNIVERSIDADES,4104,Exp.8, Reference Code ES.28079.AHN//UNIVERSIDADES,4104,Exp.8.

<sup>58</sup> It was composed of Francisco de la Pisa Pajares (as the president), Felipe Sánchez Román (as the secretary), and Augusto Comas, Gumersindo de Azcárate and José M<sup>o</sup> Piernas Hurtado (as members).

<sup>59</sup> Original title: “*Organización y estado de los estudios jurídicos en Italia, comparativamente a España*”. Vid., *Diccionario de Catedráticos Españoles de Derecho (1847-1943)*, “Pedro Dorado Montero”.

<sup>60</sup> “La duda transcendental”.

Dorado Montero's reasonings are a building in permanent danger of crumbling, given the extent of the doubts he admitted. After he comes back home, he is a much more realistic person. Absolute truths vanish away from his mind and he starts to conceive reality in a much more complex way<sup>61</sup>. He acknowledges the absolutely imperfect nature of human beings. Since he was also acquainted with Tolstoy's point of view, this statement on the fallibility of man was nothing but reinforced. His thought goes in line if Tolstoy's central conception of the essence of individuals, i.e. the only trustable, truly meaningful core of religion is based on love and what he understands by love: a state of benevolence for all men which is the one to be found on children and their tender, deeply honest wish to love everyone<sup>62</sup>. Therefore, divine perfection finds itself as opposed to a very weak human nature: "Real love is an ideal of perfection which is complete, infinite, and divine. Divine perfection is the asymptote of man's life; he tends to it in a relentless manner; he gets closer to it every time, but he can never reach it entirely"<sup>63</sup>. Tolstoy's influence on his Christian humanism is, at this point, undeniable. The transcendental doubt was to be a constant in his scholarly life. New steps appeared in his life<sup>64</sup>. In certain cases, while lecturing at the university, he could be explaining one aspect of the criminal code and then turned on his own thought and ended up questioning the very basic concept of liberty. Such is the extent of his broad-mindedness. As might have already been inferred from the preceding paragraphs, this concept of transcendental doubt is not easy to identify in his doctrine. It is not something that specifically worries him neither an issue he identifies with such name. The concept appears abstractly formulated and will never be addressed directly.

At the same time, due to this change in his positioning, he was to face many administrative and religious struggles. Everything would start in 20 May 1887. Still from the city of Bologna, in 20 May 1887, he asked to the Board of *Colegios Universitarios de Salamanca* to defray his doctor title. He was simply asking for what he had already been formally granted: a reimbursement of 2000 pesetas for having presented the required final memo. As according to protocol, he applied for it. The controversy would be solved after four concrete developments. Firstly, in 3 June 1887, the Dean of the Faculty of Philosophy and Humanities, Santiago Martínez, asked for the temporary suspension of the favourable vote of the Board. Even though the evaluation board had produced a favourable report before, he alleged that there was needed a further, substantial analysis on the presented memo. Whereas the analysis was intended to evaluate the scientific nature of the work, it was also intended to check out its

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<sup>61</sup> Dorado Montero, P., *El Derecho protector ...*, Tomo 1, p. 22: "Let us change a man's condition and we will witness how he changes his criterion: let us think of him as rich, instead of poor; catholic, instead of Muslim; producer, instead of consumer; manufacturer; employer, instead of worker; republican, instead of royalist; French, instead of Spaniard; trader, instead of peasant or philosopher, and we will be astonished of how much did his criterion variate, sometimes with the speed and the ease with which an actor changes his roles, his clothes and his physiognomy".

<sup>62</sup> Eltzbacher, P., *Der Anarchismus*, p. 202.

<sup>63</sup> Tolstoj, L., *Das Reich Gottes ist in Euch*, pp. 139-140: "Die wahre Liebe ist „ein Ideal völliger, unendlicher, göttlicher Vollkommenheit. Die göttliche Vollkommenheit ist die Asymptote des menschlichen Lebens, zu der es beständig hinstrebt, der es sich immer mehr nähert, die aber nur in der Unendlichkeit erreicht werden kann". Such is the original quotation which I took from the aforementioned Paul, E., *Der Anarchismus...*, p. 202.

<sup>64</sup> Barbero Santos, M., "Remembranzas del profesor salmantino Pedro García Dorado Montero en el 50 aniversario de su muerte", VV.AA.; *Problemas actuales de las ciencias penales y de la Filosofía del Derecho Homenaje al profesor Luis Jiménez de Asúa*, Buenos Aires: Ediciones Pannedille, 1970, p. 357; Barbero Santos, M., "Pedro Dorado Montero, aportación a su biografía", *Revista de Estudios Penitenciarios*, No. 22, Madrid, 1966, pp. 270 ff.

catholicity. It should be noted that one of the required conditions in the call for applications was such catholicity character:

“*Colegios de Salamanca* have a double nature. They possess both a scientific and a Catholic character. Therefore, they must require their pupils, on the one hand, their scientific performance. On the other hand, they must ensure that the science which they acquire is in consonance with the Catholic principles”<sup>65</sup>.

After some struggles, in 16 July 1887, the Board of *Colegios Universitarios de Salamanca* raised a query to the State on this question. The Ministry resolved the matter asserting that there were no grounds to deny Dorado Montero’s petition simply alleging that the work should be Catholic in addition to ‘scientific’. In 27 July 1887, there was a final, conclusive resolution over the controversy:

“Mr Pedro García Dorado Montero has a perfect right to be paid out his title’s sum as a Doctor in Civil and Canon law. It cannot longer be held the cancellation of the payment thereof, not even on the ground that one needs to wait for the result of his work to reimburse the two thousand pesetas. This latter aspect was neither previously established nor configured as a requisite the merit or quality of the work, but only its execution and presentation”<sup>66</sup>. Finally, in 24 August 1887, Dorado Montero would be granted it. It was not the first setback he would have to face, yet it was definitively not the last one in his life.

Addressing back his relativism, an idea was taking over his main thought. He was slowly becoming aware of the fact that no earthly creature was entitled to hold all the truth (not even close to what is true)<sup>67</sup>. This reality in which humankind finds itself immersed in becomes a central aspect of his renewed scepticism: “human history, as well as Nature, is very similar to Penelope’s fabric, besides the eternal and useless work of Sisyphus. What today is done, tomorrow will come undone again”<sup>68</sup>. The very same idea is observed in Kant’s *The Contest of Faculties*<sup>69</sup>. His position turns progressively less dogmatic.

In this respect, the influence of Gumplowicz to this respect is undeniable. Around 1898, he translated his work *Philosophisches Staatsrecht*. The starting point for his Protective Law of the Criminals can be found here:

“The world is infinite and, consequently, it will never be understandable by the human spirit as a whole”<sup>70</sup>.

Dorado will, therefore, inherit such ground-idea by means of which the human spirit is incapable of understanding the whole world because one can only get to know

<sup>65</sup> *Diccionario de Catedráticos Españoles de Derecho (1847-1943)*, “Pedro Dorado Montero”.

<sup>66</sup> *Diccionario de Catedráticos Españoles de Derecho (1847-1943)*, “Pedro Dorado Montero”.

<sup>67</sup> “It is all about stressing out the transitional and provisional nature of our judgements, our representations and our constructions [...]”, Dorado Montero, P., *El Derecho protector de los criminales*, v. 1, p. 518.

<sup>68</sup> Dorado Montero, P., *El Derecho protector ...*, v. 1, p. 517: “La historia humana, como también, por su parte, de un modo análogo, la de la Naturaleza, se parece mucho á la consabida tela de Penélope, cuando no al eterno y eternamente inútil trabajo de Sísifo. Lo que hoy se hace, se deshace mañana”.

<sup>69</sup> Kant, I., *Der Streit der Fakultäten*, Königsberg: Friedrich Nicolovius, 1798. (I use Kant, I., *El conflicto de las facultades*, Madrid: Alianza, 2003, p. 156): “An absurd dynamism by means of which the good keeps on alternating with the evil through an advance and setback game; therefore, this seesaw movement of our own species with itself should be considered as nothing but a carnival farce”.

<sup>70</sup> Gumplowicz, L., *Philosophisches Staatsrecht*, Wien: Manz, 1877, p. 11: “Die Welt [ist] Unendliches und daher vom menschlichen Geiste als Ganzes nie faßbar ist”.

fragments thereof. The penalist will then onwards reject the idea of creating a comprehensive, definitive, philosophical system of knowledge. Not only that, but if one handles the Spanish edition of such work, a very illustrative footnote of our author needs to be mentioned<sup>71</sup>. In it, Dorado Montero brings our attention to the fact that Professor Gumplowicz would write his work in 1877, hence, in a time when it was still burgeoning the theory of the so-called absolute, invariable natural law. This theory was basically stating that law was something above all times and places with an immutable validity. It refers, of course, to the neoclassical conception of law, bound to Kant's approach to law. Yet, from the time he wrote it (1877) to the time Dorado Montero translated it (1898), the opposite trend has gained weight over time. Consequently, Dorado Montero would refer to such natural law as a mere fantasy: it is just an idealisation of the existing legal institutions in society and in the time in which Gumplowicz writes it. By the end of the 19<sup>th</sup> century, there is nobody holding the aforementioned conception of an absolute, invariable legal order. Nevertheless, society was not yet in a pure positivist society, since most of the matters are dealt with the old criterion. Idealist (neoclassical) trend creates the reality of norms a priori, whereas positivism needs observance (thus, works of anthropology, sociology, historians, ethnographers, etc).

Hence, his conceptions regarding the nature of punishment and Criminal law turned wider and more open. He considered the possibility that both law and human capacity cannot understand and control everything. According to this point of view, the traditional approach of law turns arrogant. The legal science tries to rule, define and delimit everything. Dorado Montero will be outraged because the model of liberal penal law would merely consist in a mixture of senseless aims: the defence of society, and/or utilitarian ends. Even though the penal sphere in which Dorado Montero found himself immersed in could seem close to him, the old penalist is not exactly a positivist in the traditional sense, because his aim was just focused on the well-being of the criminal (Protective Law of the Criminals). So, liberal criminal law did never convince him due to two main concerns. The first one has already been said: a disagreement in the goals of the penalty. The second, nevertheless, is that it completely disregarded the dogmatic part (where all the abstract positions, theoretical developments, and conceptual constructs took place). Dorado Montero urged to develop the dogmatics of Criminal law, though it would only start to be a reality a couple of decades after<sup>72</sup>.

In any case, it might sometimes still be seen in his academic writings that he gets mixed up and there is established an indirect identification of God with freedom. It is just from this moment onwards when the Dorado Montero we know starts as a such: denying the existence of freedom leads him to doubt of everything. This state of permanent doubt might be judged as counterproductive, but it was essentially needed in a time when: (1) society needed to be changed and (2) the dogmatics of penal law were not yet introduced as a such (it will start to take place with one of his pupils: Luis Jiménez de Asúa).

The situation of the Spanish University was far from being perfect and continued to present problems despite the efforts to make it look more modern:

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<sup>71</sup> Gumplowicz, L., *Derecho político filosófico*, Madrid: La España Moderna, 1892, p. 84.

<sup>72</sup> There is quite a consensus among legal historians and penalists to assert that the initial development of criminal dogmatics is to take place at the beginning of the 20<sup>th</sup> century, mainly introduced by Luis Jiménez de Asúa.

“Unamuno, Maldonado and others [tried] to endow the University of Salamanca of the appearance of a great cultural centre, yet this is far from being the reality, as we have checked those of us who have visited it”<sup>73</sup>.

Paradoxically, the more relativism he was to accept and to integrate in his doctrine, the less relativism he had in his life. Step by step he was becoming more entrenched at the University, and the levels of uncertainty that characterise the academic world did so progressively shrink that, at a certain point, he obtained his first, stable job. In 25 August 1887, he took office, as he succeeded in a public tender as auxiliary at the Faculty of Law (also at the University of Salamanca). That being said, although he had achieved in a short period of time much more than average, Dorado Montero would undergo in the next two coming years a very hard process in order to become a Full Professor. It can be easily checked out by having a glance at the several petitions which the Dean processed in the coming years: public tender at the University of Granada in the chair “Elements of Political and Administrative Spanish Law” (12 March 1890), public tender at the University of Santiago in the Chair “Institutions of Roman Law” (22 May 1890), public tender for an auxiliary vacancy at the *Universidad Central* in Madrid (29 September 1890), public tender at the University of Barcelona in the Chair “Political and Administrative Law” (9 January 1891), public tender at the University of La Habana to teach the subject of Natural Law (2 June 1891) and public tender at the University of Santiago in the Chair “Natural Law” (15 January 1892).

In the middle of such race for a position, he kept his means of living due to a vacant position<sup>74</sup>, in 11 June 1891, he was awarded two thirds of the salary for his work at the Chair of Civil Law. As regards the Chair of Civil Law, in 6 May 1892, he became fully in charge of the Chair of Civil Law (first course). Finally, in 3 July 1892, he was appointed as Full Professor in the Chair of Political and Administrative Law at the University of Granada with an annual wage of 3500 pesetas. In less than three months, switched places with Jerónimo Vida. Therefore, Dorado Montero stood at the University of Salamanca, while Vida occupied his position at the University of Granada. Thus, he held the Chair of Criminal Law, starting an unprecedented scholarly career in Salamanca. In practice, his teaching would initiate in the course 1892-1893 in an almost uninterrupted path.<sup>75</sup> The only moment in which he would do so would be four years after, when he would participate in a chair-changing tender and won it. The new place of destiny was the Chair of Criminal Law at University of Valencia. Nevertheless, in 6 March 1896, less than one month after, Dorado Montero would file a waiver application, due to certain circumstances which he could not foresee when he applied for the Chair. After those events took place, the overcoming of his Catholic phase is self-evident at the university:

“Scholarly life was intense. At the University, Mr Enrique Gil Robles (Chair of Political Law) and Pedro Dorado Montero (Chair of Criminal Law) were shining as two first order stars. The former was a fundamentalist; the latter was a republican, and around them revolved most part of professors, though Father Cámara (Bishop of the diocese) did not get on well with any of them”<sup>76</sup>.

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<sup>73</sup> Málaga Guerrero, J., *La vida cotidiana...*, p. 103: “Unamuno, Maldonado y otros [...] para dar a la Universidad de Salamanca apariencias de gran centro cultural, que está muy lejos de ser una realidad, como hemos podido advertir cuantos la hemos visitado”.

<sup>74</sup> Produced by the death of its owner: Mr Hilario Beato.

<sup>75</sup> In this period, his work *Problemas jurídicos contemporáneos* (1893) saw the light.

<sup>76</sup> Balcazar y Sabariego, J., *Memorias de un estudiante de Salamanca*, Madrid: Librería de Enrique Prieto, 1935, p. 12: “Hacíase intensa la vida escolar. En la Universidad lucían como astros de



With Mr Nicasio Sánchez Mata, Full Professor at the Chair of Natural Law, there were the ultramontans<sup>77</sup>. It was certainly ironic, since Dorado Montero had once supported their ideals when creating the political ultramontanist party back in his youth. Notwithstanding, his positioning did not just confront him with the ultramontans, but also with Father Cámara. The latter did not like nor the fundamentalists, but neither the progressists, and so Dorado Montero would also suffer the constant, hard criticism from Cámara<sup>78</sup>. He was aware that Dorado Montero had experienced a decay in his religious feeling and he had a personal crisis as regards the existence of God<sup>79</sup>. Notwithstanding that, Juan Andrés Blanco would deem this criticism after his trip to Bologna just as ‘light’. Besides, for him, the Christian influences would be maintained throughout his complex, intellectual evolution and they would constitute a quasi-definitive mental state<sup>80</sup>. Definitively, all traits of Christian education are not so easily-erased after his term in Italy. This deep, inner struggle will continue for the rest of his life.

This relativism as concerns his religious convictions can be deemed as a consequence of internalising Comte’s philosophical scheme<sup>81</sup>. Indeed, it has been asserted that the philosophical system of Auguste Comte had a major influence on him: “[his extreme *correccionalismo*] was influenced by the philosophical system of Comte, rather than by the ideas and principles of Lombroso, Ferri, and Garofalo”<sup>82</sup>. However, I have not been able to see any longer, fully-based explanation of this assertion. This question will be explored in another article.

#### 4. A brief romance with positivism

His acquaintance with positivism came after his travel to Italy. Let us remember that, back then, he was granted a scholarship to study at Bologna. After such experience, he got familiarised with the positivist ideas of Lombroso, Ferri, and Garofalo.

Italians have been said to reinvent the Criminal law four times: the first one with the Roman Empire, when they carried out their first great legal work; the second, with Beccaria, when saying to man: “Go and comply with the law”; the third one, with Lombroso, Ferri, and Garofalo, when saying to Law: “Go and study the man”; and the fourth one, when trying to meet and conciliate the previous concepts in order to establish the *Terza Scuola* of Criminal law<sup>83</sup>. Dorado Montero is usually placed between the third and the fourth stage. Not by accident, he is often catalogued as a component of the eclectics from the *Terza Scuola*. I do, however, have my own reservations as to such view, but this is not the appropriate place to develop this idea.

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primera magnitud D. Enrique Gil Robles de derecho político, y D. Pedro Dorado Montero, de derecho penal; el primero, integrista; el segundo, republicano y, alrededor de ellos, giraban la mayoría de los profesores, aunque los amigos del Padre Cámara, Obispo de la Diócesis, no se llevaban bien ni con unos ni con otros”.

<sup>77</sup> Ibid.

<sup>78</sup> Berdugo Gómez de la Torre, I.; Hernández Montes, B., *Enfrentamiento del Padre Cámara con Dorado Montero*, Salamanca: Diputación Provincial, 46, 1894, p. 85.

<sup>79</sup> López-Rey, Manuel, Op. Cit., p. 607: “At a certain moment, –when he was in Italy and was about twenty-five years old– after a deep spiritual struggle he decided to abandon Catholicism”.

<sup>80</sup> Blanco Rodríguez, J.A., *El pensamiento...*, p. 15.

<sup>81</sup> One of Comte’s aphorisms upon which Dorado Montero will heavily rely on is the following one: “Here is the only absolute maxim: There is no absolute maxim!”.

<sup>82</sup> López-Rey, Manuel, Op. Cit., p. 607.

<sup>83</sup> Rodríguez Manzanera, L., *Criminología*, Ciudad de México: Porrúa, 2ª ed., 1981, pp. 245-246.

The legal theory of Dorado Montero has been deeply studied<sup>84</sup>. In it, positivism clearly played a major role. The inclusion of Lombroso's main doctrine in the European legal orders was produced as a leakage. One of the first indicators of such phenomenon is to be found at the draft of the Swiss Penal code. His main author, Carl Stooss, knew how to effectively structure measures to deal with the dangerousness of individuals (abnormal individuals, non-imputable people, youngsters...). Yet, the official establishment in the legislation would not be implemented and consolidated until the interwar period between WWI and WWII.

During his stay in Italy, his perspective changed enormously. He would become a great enthusiast of Roberto Ardigò and Pedro Siciliani, exponents of Italian positivism. Their direct influence allowed to him to nurture a Spanish society pre-eminently neoclassical, iusnaturalist, and Catholic. Even if Lombroso's *L'Uomo delinquente*<sup>85</sup> was already ten years old, and the main works of Ferri and Garofalo were in circulation for more than seven years, positivism in Spain remained largely unstudied<sup>86</sup>. Dorado Montero, as captivated as he was for the experimental method and the freshness of a system so different from Catholic scholastics, realised about several incoherencies and poured a quite open criticism against Lombroso's key points. Indeed, at the time Lombroso published *Los últimos progresos de la Antropología criminal*, Dorado Montero published his *Problemas de Derecho penal* (both in 1895). Such perspective deserves a comparative article on its own. Among other aspects, he never got to accept the criminal's type<sup>87</sup>. Every time he had to explain Lombroso's theories in his lectures, he would overwhelm his exposition with a myriad of critics towards the born criminal. Ferri<sup>88</sup> offered a much kinder theory of the criminal; and also a theory

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<sup>84</sup> Bernaldo de Quirós, C., "Prólogo"; Dorado Montero, P., *Naturaleza y función del Derecho*, Reus, Madrid, 1927, p. 49; Bernaldo de Quirós, C., "Dorado Montero y sus libros", *Revista de Derecho Privado*, 1919; Ríos Urruti, F., "Don Pedro Dorado Montero, Filósofo del Derecho", *Boletín de la Institución Libre de Enseñanza*, T. 43, Madrid, 1919; Valls, F. J., *La filosofía del Derecho de Dorado Montero*, Salamanca: Universidad de Salamanca, 1971; Lima Torrado, J., *La Filosofía Jurídica de Pedro Dorado Montero*, Madrid, Tesis doctoral (inédita), 1976.

<sup>85</sup> Lombroso, C., *L'uomo delinquente*, Torino: Fratelli Bocca, 3ª ed., 1884. Also, some of his outstanding works are: Lombroso, C., *Los últimos progresos de la antropología criminal*, Madrid: La España Moderna, 1895; Lombroso, C., *Medicina legal*, Madrid: La España Moderna, 1890; Lombroso, C., *El hipnotismo*, Madrid: La España Moderna, 1890; Lombroso, C., *Grafología*, Milano: Ulrico Hoepli, 1895; Lombroso, C., *Los fenómenos de hipnotismo y espiritismo*, Madrid: M. Aguilar, 1910; Lombroso, C., *gas prostituta e la donna normale*, Torino: Fratelli Bocca, 5ª ed., 1927; Lombroso, C., *El delito: sus causas y remedios*, Madrid: Librería General de Victoriano Suárez, 1902; Lombroso, C., *Los criminales*, Barcelona: Atlante, 1911; Lombroso, C., *El antisemitismo*, Madrid: Viuda de Rodríguez Serra, 1904; Lombroso, C., *Los anarquistas*, Madrid: Tip. Sucesores de Rivadeneyra, 1894.

<sup>86</sup> Masferrer, A., "The Reception of the Positivist School in the Spanish Criminal Doctrine (1885-1899)", *GLOSSAE. European Journal of Legal History* 17 (2020), pp. 303-352, p. 345: "Until that moment, the positivist school had not constituted 'a compact and definite nucleus'. It never did. As we have seen, not many jurists carried out rigorous studies defending the Italian positivist school".

<sup>87</sup> Dorado Montero, P., *El Derecho protector...*, Madrid: Ed. Jiménez Gil, Tomo 1, 1915, p. 71: "Trends, inclinations, instincts or appetites are known, like everything else, by their effects, and not otherwise. Tendencies are simply powers, potentialities or properties, and no power or property can ever be known or ascertained except by their actions or manifestations".

<sup>88</sup> Ferri, E., *Ciencia positiva*, Barcelona: Atlante, 1900; Ferri, E., *Defensas penales*, Santa Fe de Bogotá: Temis, 6ª ed., 1991; Ferri, E., *Los Delincuentes en el arte*, Madrid: Librería de Victoriano Suárez, 1899; Ferri, E., *Estudios de antropología criminal*, Madrid: La España Moderna, 1892; Ferri, E., *Los hombres y las cárceles*, Barcelona: Centro Editorial Presa, 1900; Ferri, E., *Homicidio-suicidio*, Madrid: Reus, 1934; Ferri, E., *La justicia penal: su evolución, sus defectos, su porvenir*, Madrid: B. Rodríguez Serra, 1900; Ferri, E., *Il magistrato: dal reclutamento alla formazione professionale: esperienze in Italia e nel mondo*, Roma: Arti Grafiche Jasillo, 1982; Ferri, E., *Nuevos estudios de antropología criminal*, Madrid: La España Moderna, 1893; Ferri, E., *Los nuevos horizontes del derecho y*

much closer to our times, since his catalogue was based on factors influencing the crime, not just holding the idea that criminality is inherent. Ferri's most popular theory is based upon anthropological factors (race, sex, physical constitution, psyche, age, etc.), physical factors (temperature, climate, etc.), and social factors (religion, education, family circle, etc.). Grispigni supported such theory, and he simply added a further differentiation between biological and ideological reasons inside the 'anthropological factors'. Garofalo<sup>89</sup>, in turn, defended that there were four types of born criminals: the murderer, the violent criminal, the thief, and the lascivious criminal<sup>90</sup>.

For positivism the person committing the crime is considered as abnormal. There is an anomaly as a biological being, in as much as the person is exclusively considered in his material or biological facet, not anymore as a moral subject as he is in the classical one. The treatment of the penalty is of biological order, not moral. The individual, according to the most orthodox branch of positivism, will never stop being a delinquent, as supposedly 'backed' by phrenology and probabilistic sciences. One of the main obstacles was -and still is nowadays- a non-moral responsibility. The previous neoclassical Penal law relied upon a moral conception of crime: when the moral responsibility of the perpetrator was exhausted, then he would be free from penal consequences and he would be set free from the State's restrictive measures (whatever they were -economic fine, imprisonment, death penalty, etc.-). Yet, in the new approach, there is no moral conception of crime, but a social one. Whereas the moral responsibility can be exhausted, social responsibility is inexhaustible. Thus, the control of the State over the citizen, which was relatively easy to ground on the neoclassical theory, turns in my opinion into a legal nightmare almost impossible to justify. Such control might be perfectly perpetual over individuals and a potential risk arose: the rise of totalitarian legal systems.

Yet close, Dorado Montero's epoch (1861-1919) remains distant from the early development of both Nazism and fascism. That is why he was not as concerned as other authors about the obvious risks that such a free system entailed. Other posterior authors like, for instance, Jiménez de Asúa, were very self-aware of the danger that such approach enclosed. That being said, Asúa did not realise of it until a very close moment to the uprising of the Nazi regime in Germany and the fascist regime in Italy.

"If Primo de Rivera's dictatorship made him realise of the relevance of maintaining the legality principle and, consequently, the liberal criminal law, the WWII made nothing but to assert this idea"<sup>91</sup>.

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*del procedimiento penal*, Madrid: Centro Editorial de Góngora, 2ª ed., 1887; Ferri, E., *Principii di diritto criminale : delinquente e delitto*, Torino: Unione Tipografico-Editrice Torinese, 1928; Ferri, E., *Proyecto preliminar de código penal para Italia*, Madrid: Centro Editorial de Góngora, 1925; Ferri, E., *Sociología criminal*, Madrid: Centro Editorial de Góngora, 1907.

<sup>89</sup> Garofalo, R., *La criminología : estudio sobre el delito y sobre la teoría de la represión*, Madrid: La España Moderna, 1890; Garofalo, R., *Indemnización a las víctimas del delito*, Pamplona: Analecta, 2002; Garofalo, R., *Justicia y civilización*, Madrid: La España Moderna; Garofalo, R., *La superstition socialiste*, Paris: Félix Alcan, 1895; Garofalo, R., *Polémica en defensa de la Escuela Criminal Positiva* (en colaboración con Cesare Lombroso, Enrico Ferri y Giulio Fioretti), Bolonia, 1886; Garofalo, R., *Criterio positivo de la penalidad*, Napoles, 1880.

<sup>90</sup> The classification is took from <http://itercriminis.com/raffaele-garofalo-creador-del-termino-criminologia/>. Seen on 26.05.2018.

<sup>91</sup> Roldán Cañizares, E., *Luis Jiménez de Asúa: un jurista en el exilio*, Sevilla: Universidad de Sevilla, 2017-2018, p. 270: "Si la dictadura de Primo de Rivera le hizo ver que era fundamental mantener el principio de legalidad, y en consecuencia, el derecho penal liberal, la II Guerra Mundial terminó de confirmar esta idea".

As to Dorado Montero, the problem was not that he was not able to foresee this; rather, he had to postpone his new proposal of Criminal law due to the fact he thought that society was not evolved enough for it to be properly applied. The emergence of socialism had not even taken place. He carried out a comparison of legal systems, which highly differed depending on time. At the early stages of the development of legal science, law was conceived as a subjective application of a theory of justice imposed-by-force, which was usually the one held by the chief of the tribe, the king, the strongest man of the group or the primitive judge (usually, this is highly linked to religious institutions). While it is often deemed as unfair as regards the procedural aspects<sup>92</sup>, this conception links to the idea that man is a transcendental being, rather than just flesh. Sometime after the French Revolution, law balanced to the opposite site. The legal securities aroused and the number and extent of basic legal principles<sup>93</sup> increased, hence, protecting the individual from the degree of uncertainty of past times. Nevertheless, law turned more rigid and lost vitality since every focus shifted to formal aspects. Form over content. While acknowledging that the first one was frequently interspersed by injustice, he happened to like it better than the second option. Due to this new thinking of his, Dorado Montero would be a firm defender of the ‘content-over-form’ conception of law. We can observe here that pendulum movement of history performed here as well; he came back to the first stage again and this is what he attempted to reflect in his *Protective law of the criminals*, despite that this presented a great inconvenient: its proximity to fascist and Nazi conceptions of law that would soon take over.

In short, Dorado’s main criticism towards the new school can be summed up in a few lines. Positivists, after all, insist in seeking the reasons for the action as well as trying to elaborate a catalogue of different degrees of responsibility. This is contradictory, since this assertion implies that the individual controls his actions.

“Should we take for granted that the existence of mitigating circumstances, or the system of relative freewill were admissible, it would be necessary to establish infinite grades of criminal capacity. Since the strength of such circumstances can be infinitely diverse depending on situations, it would be greatly unfair to equate and to treat the same way the very different situations in which subjects found themselves in when committing the crime under such circumstance”<sup>94</sup>.

Besides, for Dorado, they are committing the same mistakes as the Classical School (or Neoclassical): responsibility -even if mitigated- has no place at all in the new system. Furthermore, what is the point in punishing if the criminal does not control his own actions? They are not masters of their own destiny. He also recriminated Garofalo for talking of a ‘natural crime’, given that this is typically found in absolutist theories, more suited to the postulates of the Classical School and its religious, deductive concepts.

Despite the temptation of saying Pedro Dorado Montero was a positivist, one could not consider him as a such (or, at least, not as a Lombrosian positivist) at all. Out of this undeniably positivist influence, Dorado Montero split from this trend of thought,

<sup>92</sup> Legal guarantees were virtually inexistent in primitive times.

<sup>93</sup> Namely, legality principle, actus reus, and softening of penalties.

<sup>94</sup> Dorado Montero, P., *El Derecho protector...*, Tomo 1, p. 429: “Dando por supuesto que la existencia de las circunstancias atenuantes, ó ei sistema del libre albedrío relativo, fuera admisible, sería preciso establecer grados infinitos de imputabilidad; puesto caso que la fuerza de tales circunstancias puede ser infinitamente varia, según las ocasiones, y sería grandemente injusto «equiparar, cual sucede al presente, y tratar de la misma manera, las diferentísimas situaciones en que los sujetos se hubieren encontrado al cometer los delitos bajo el influjo de circunstancias limitadoras de su libre albedrío”.

and vehemently criticised Italian positivism many times. Yet, any attempt of diminishing his positivism in favour of an eclectic position is falling into inaccuracy. From Italy, he wrote *El positivismo en la ciencia jurídica y social italiana* which is his baptism of fire in the new trend<sup>95</sup>. In here, one may observe his opposition to using the mild, undetermined concept of ‘eclecticism’ (as we indicated some paragraphs ago). Indeed, in such work, we may easily observe his rejection against not coherent positions. In his opinion, there are those who have not been able to get used to the new conditions and, thus, “sway in uncertainty” and they choose sides “depending on the circumstances”.<sup>96</sup> Under such heading, he includes: “Pessina, Gabba, Del Giudice, Filomusi-Guelfi, Miraglia and even, to a certain extent, Carle himself”.<sup>97</sup> Under his point of view, they keep on “paying a tribute to idealism” especially to the “hegelian one”, at the same time they acknowledge the need of Legal Philosophy to “have in mind much of the acquisitions” by the “so-called experimental sciences”. He concluded with a very illustrative quotation: “Actually, they do not belong to the critical direction which we are examining [...], neither can they be exactly included within the purely idealist direction”<sup>98</sup>.

Leaving aside the purely legal technical aspects, Dorado Montero somehow concludes to this question by reasserting the fact that the grounds of both positions are united whatsoever: “Hence, the harmonisation between the two opposed schools (idealist and positivist) far from being impossible, as it might look like *prima facie*, is a need required by the inner exigency which they both represent: the theory of the social contract, reduced to its just limits, purged from its exaggerations as regards liberty, restricted to its own circle of action (that of the ‘rational liberty’), unites itself in a loving consortium, and forms one single [theory] altogether with the theory of determinism, at its turn corrected from its mistakes, especially that of the mechanic determinism”.<sup>99</sup>

Notwithstanding that, there were many things that were incomprehensible for him: mostly of human nature. For instance, if the criminal is born this way and he cannot help his tendencies and criminal acts, how could somebody as Lombroso treat him with such hatred and contempt? In this sense, Dorado Montero bit the hand that fed him and he endured discrimination on both sides. On the one hand, neoclassicals and eclectics showed their absolute rejection towards his arguments. Positivists, on the other hand, could never possibly understand why he went against the basic principles of positivism. Also, as a result of his approach and adherence to positivism, he suffered a number of setbacks which he finally overcame, although not without suffering. The political struggle began in 5 February 1897, when Salamanca’s Bishop, Father Cámara,

<sup>95</sup> Though his first work had been published a year before in 1890 under the title *La Antropología criminal en Italia*.

<sup>96</sup> Dorado Montero, Pedro, *El positivismo en la ciencia jurídica y social italiana*, Madrid: Imprenta de la Revista de Legislación, 1891, p. 249.

<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid.* p. 249: “En realidad no pertenecen á la dirección crítica que examinamos, entendida del modo que queda dicho, pero tampoco pueden incluirse exactamente en la dirección puramente idealista”.

<sup>99</sup> *Ibid.*, p. 248: “Por donde se ve cómo la armonía entre las dos escuelas contrarias, idealista y positivista, lejos de ser, como á primera vista aparece, imposible, es una necesidad reclamada por la interna exigencia que ambas representan: la teoría del contrato social, reducida á sus justos límites, purgada de sus exageraciones en orden á la libertad, y contraída al círculo propio de su acción, el de la libertad racional, se une en amoroso consorcio y forma, por así decirlo, una misma con la teoría del determinismo, corregida, á su vez, de sus yerros, sobre todo del del determinismo mecánico”.

raised a concern in the aftermath of a collective complain of certain pupils around “the explanations of Professor Dr Pedro Dorado Montero” which were deemed “as contrary to the Catholic truth and grounded on the reprobated systems of positivism, materialism, and determinism”<sup>100</sup>. And so, he asked the Chancellor of the University of Salamanca to exempt students from assisting his lessons, as well as to replace him for another professor. Two days after, the Rector argued before the Directorate-General of Public Instruction that the law did not allow him to appoint another professor who explained the subject of Criminal law with a Catholic approach. In 19 February, the Dean of the Law Faculty, Teodoro Peña Fernández, filed an appeal against the decision of the Rector re-establishing Dorado Montero in duty. The Dean had already suspended Dorado Montero. After some months, the Chancellor of the University of Salamanca wrote a report on the complaints of students and the performance of the Dean. According to him, the production of this latter was blatantly illegal since the appeal he lodged was not foreseen in the Regulation. Besides, he quoted a section of the University Council (16 June 1897) in which the Dean of Sciences considered that Law had overstepped in its functions. As a result, the Dean, driven by his need of fighting Dorado Montero back, decided to switch the attention to the fact that both the Faculty of Sciences and the Faculty of Medicine were recently created, in an attempt to invalidate the relevance of their opinions. Finally, in 23 June 1897, the Rector’s decision was decisive and he communicated it to the State: Dorado Montero’s suspension was void. Our jurist had won the battle.

## 5. Krausism: the relevance of instruction and education

Krausism did enormously differ from the postulates defended in the first stages of Dorado Montero’s intellectual activity. He happened to change from one idea of education and religion to the very opposite of it. Without ever being deemed as a radical, he went from one extreme to another<sup>101</sup>.

At least at the theoretical framework, there was a favourable context to the reception of the Social Defence. Arising from the aforementioned conditions, openness and criticism allowed it to access the country. Among the main points permitting that was regenerationism<sup>102</sup>, understood as the “ideological movement starting in Spain at the end of the 19<sup>th</sup> century, product of the sense of decline that led to a complete regeneration of the Spanish situation”<sup>103</sup>. Scholars defended this position as the unique, single opportunity that was to correct the defects which Spain had traditionally suffered from. According to them, a golden chance was lost when the Glorious Revolution (1868) had not obtained success. Every cultural proposal contained a sharp criticism

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<sup>100</sup> *Diccionario de Catedráticos Españoles de Derecho (1847-1943)*, “Pedro Dorado Montero”.

<sup>101</sup> Sánchez Rojas, J., “Pedro Dorado Montero”, *Boletín de la Institución Libre de Enseñanza*, XLIII, 1919; Blanco Rodríguez, J. A., “Evolución de un intelectual crítico”, *Revista de Estudios*, Salamanca, No. 33-34, 1994, ISBN 0212-7105, pp. 141-168; Ledesma, Á., “El maestro Dorado Montero”, *BILE*, 43, 1919.

<sup>102</sup> Andrés-Gallego, J., *Regeneracionismo y política confesional en España, 1889-1899*, Sevilla: Diputación Provincial de Sevilla, 1971.

<sup>103</sup> Definition took from the Spanish Language Dictionary (RAE webpage). Link: <https://dle.rae.es/>. Seen on 13.03.2020.

against the mainstream Spanish culture. According to Costa<sup>104</sup>, “the Cid’s sepulchre should be locked out forever”<sup>105</sup>. This clearly referred the need to avoid all kinds of attitudes based on self-delighting and self-indulgence. Past glories of the nation should simply be buried. Costa’s second most famous aphorism, “school and pantry”, clearly enclosed the spirit one could easily identify in the coming times. The new politics should focus on the well-being of the population.

Then, Krausism came into Spain. This system of thought was conceived by the German philosopher Friedrich Krause<sup>106</sup>, who fiercely opposed to dogmatic models of teaching and abrogated for academic freedom, laicism<sup>107</sup>, and freedom of conscience among others. His Spanish counterpart was Julián Sanz del Río, a great Castilian jurist responsible of the introduction of such movement in Spain. His pupil, more known than he himself, was Francisco Giner de los Ríos. He created the *Institución Libre de Enseñanza*<sup>108</sup>. It subscribed the ideals of Krausism. In practice, this meant to start the reform of the Spanish educative system<sup>109</sup>. The debate was often held as a dichotomy: religion vs. science. Marcelino Menéndez Pelayo openly rejected evolutionist trends. He confronted both liberalism and laicism. The existing tension could be illustrated with the story of the Spanish naturalist Marcelino Sanz de Sautuola y Pedruca, who discovered the prehistoric paintings of Altamira. The finding did clash with the lines of thought back then.

Soon it was verified that the reformist policy did not have a great impact. There took place one-time, shy reforms that did not manage to tackle the structural problem. Indeed, the Restoration system of 1898 -i.e. the political system in force back then- went on up until the third part of the 20<sup>th</sup> century. Nevertheless, the cultural reform was more noticeable. It led to the making up of a very consistent group of intellectuals, writers and thinkers, commonly referred as to the 98 Generation. Ramiro de Maetzu, Azorín, Valle-Inclán, Machado, Unamuno, Pío Baroja or Marañón were prolific writers that devoted all their energies to think of the nature of Spain or the “*Ser de España*”, as was commonly referred to. Despite being a modern, intellectual movement, they highly rejected the European culture. They focused on the Spanish traditional culture. The 98 Generation evidenced a period of cultural renewal. This change did not just operate in the literary realm, but in the scientific one as well:

“An unprecedented renewal of the Spanish science took place with the introduction of positivism and with new discoveries in medicine, experimental sciences, and sociology”<sup>110</sup>.

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<sup>104</sup> Joaquín Costa Martínez was a Spanish historian, economist, and politician. He was the main representative of regenerationism in the country.

<sup>105</sup> Costa, J., *Crisis política de España: doble llave al sepulcro del Cid*, Madrid: Biblioteca Costa, 3<sup>a</sup> ed., 1914.

<sup>106</sup> Krause, K. Ch. F., *Grundlage des Naturrechtes*, Leipzig: Göpfert, 1803; Krause, K. Ch. F.: *Ausgewählte Schriften*, Stuttgart: Frommann-Holzboog, ISBN 978-3-7728-2340-4.

<sup>107</sup> In the “Preliminary Ideas” of his *Urbild der Menschheit* he insisted, nevertheless, on the fact that man “must live in religion united with God and subordinated to Him”. I am using the Spanish translation of Julián Sanz del Río: Krause, K. Ch. F., *Ideal de la humanidad*, Madrid: Imprenta de F. Martínez García, 2<sup>o</sup> Ed., 1871, p. 33.

<sup>108</sup> It was a private centre founded in 1876 that was conceived as an alternative to official education and which was known for its lay spirit.

<sup>109</sup> Giner de los Ríos, F., *Educación y enseñanza*, Madrid: Espasa-Calpe, 1933.

<sup>110</sup> Aróstegui Sánchez, J., *Historia de España*, Barcelona: Vicens Vives, 2011, p. 215: “se produjo una renovación en la ciencia española con la introducción del positivismo, los adelantos de la medicina, la ciencia experimental y la sociología”.

The coming of the new Criminal law and surrounding sciences in 19<sup>th</sup> century Spain is, therefore, documented. Santiago Ramón y Cajal, Gregorio Marañón, and other great scientists proliferated in the scientific scenario. Indeed, this historical period of cultural revival was known as the “Spanish Silver Age”. Such moment also leads us to the 14 Generation. It was understood as well as a cultural and literary trend, yet it was characterised, as opposed to the 98 Generation, by the opening to a European culture and a disposition to absorb the new ideals known at the rest of the continent. Ayala, Eugeni d’Ors (main representative of the *Noucentisme*)<sup>111</sup>, Gasset (and his *Revista de Occidente*), de la Serna, Miró, and others erected themselves as the main personalities. They witnessed how the illiteracy levels dropped among Spaniards and how the new media made its way in the State.

In the meantime, a new antimilitary social conscience was developed. It matched the spirit of a movement that planned to focus on its population’s wellbeing. Critics took place more openly and several acid works saw the light. Let us just mention *Oligarquía y caciquismo sobre la forma actual de gobierno en España* of Joaquín Costa. Nevertheless, the military, aware of the crisis experienced by the country, was looking for an accountable of such chaos. They were subjected to the Government and so they blamed it on it. The 98 Disaster<sup>112</sup> and other significant problems had a common origin: political corruption and inefficient leaders. Therefore, the gap among politics and the military did not stop growing. Antimilitary positions denied the need for the military body and they contested the role they should play in society. On its way, the military turned to a harder form of authoritarianism. With the increase of intransigence of those latter ones, the crevice among the two positions only grew deeper. Finally, the abyss was so big that they reached the point of no-return. Tension translated into violence, military outbreaks, revolts as well as undesirable outcomes of all sorts like the *coup d’État* of Primo de Rivera in 1923, the Spanish Civil War or Franco’s Regime some years later. Though this degeneration of army’s ideals had already materialised when the Old Continent marched towards the First World War, a list of concatenated facts as the uprising of fascism, the consolidation of Nazism and the Second World War would only be the confirmation of this stage decaying politics.

It was when Dorado Montero was in Madrid to conduct his PhD studies when he got to know Francisco Giner de los Ríos. From that moment onwards, law and pedagogy were always related in his project<sup>113</sup>. Some, even got to think it was very plausible that Dorado Montero was inside a Masonic lodge. Though I could not find evidence of a formal membership, it could be true if understood as J. G. Fichte (1792-1814) did back in his time. For him, lodges were nothing else than a way of completing a fragmentary education of one individual. This over-parcelled education is a product of ‘big societies’: being born in a certain country, in a certain social estate, and with a certain fragmented education<sup>114</sup>. Though not very sociable<sup>115</sup>, Dorado Montero shared this organisational concept in philanthropic, reformist societies. He borrowed directly

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<sup>111</sup> The Catalan equivalent to Spanish *Novecentismo*.

<sup>112</sup> Also known after the Spanish-American War, it entailed the loss of the remaining possessions of the Spanish Empire, mainly the Philippines and Cuba.

<sup>113</sup> On this question, *vid.* Gil Cremades, J. J., *El reformismo español*, Barcelona: Ariel, 1969, p. 273; Hernández Díaz, J. M., “Pedro Dorado Montero y la educación”, *Historia de la Educación*, No. 2, 1983, pp. 217-228.

<sup>114</sup> Ureña, Enrique M., “Orígenes del Krausofröbelismo ...”, p. 47.

<sup>115</sup> Ríos Urruti, F., “Don Pedro Dorado Montero, Filósofo del Derecho”, *Boletín de la Institución Libre de Enseñanza*, Madrid, T. 43, 1919, pp. 93-95, p. 93.



from Krause when he insisted on the fact that their masonic associations had no other hidden political aim, but they were just brotherhoods with educational purposes:

“The art of educating human beings as human beings, and to humanity as humanity, purely and universally, is waking them up from their lives”<sup>116</sup>.

Krause would not be the sole influence. Fröbel would play a role as well, but it is not that relevant for legal history, since in practice, Krausism refers to Krausefröbelism in a more inclusive way: “Krausefröbelism attempted to unify the philosophical impulse of the Krausist circle with the pedagogic power or the Fröbelian circle”<sup>117</sup>.

Time passed, nevertheless, and one of Spain’s most international scholars would feel the call for conducting research abroad again. This time, France was the elected place after having applied in 15 May 1909 to the Board of Extension of Studies for the concession of an allowance to develop certain topics<sup>118</sup>. One option was “Proceeding for teaching Law at the French, German, English, Swiss or American Universities”. Failing that, the other option was “The study in France, Belgium, Germany, Switzerland and Austria of the exercise of criminal justice and of the penitentiary administration”. The grounds for the latter proposal would lay on his command of French, German, English, and Italian. He benefited from the stipend in Paris. Notwithstanding that, he barely remained there for four months, since a neurasthenia he had been suffering from for many years did not allow him to work properly. Such event did not prevent him from having a prolific period as well.<sup>119</sup>

## 6. Socialist in spirit, rather than militant

Even though Dorado Montero never got to be a member of the Spanish Socialist Party, socialism had a very relevant weight on his life and he had respect and sympathy for it. He was a member of the Republican Party of Salamanca. No wonder, too, that even if he was a full-time devoted scholar, “he had assumed citizen responsibilities of public nature as well”<sup>120</sup>. The most relevant of such public duties was the time he performed as a town councillor in the City Hall of Salamanca. Even if in politics he only exerted at the lowest administrative level, his dedicated work did not remain unnoticed. The day of his funeral, not only the City Council honoured his memory, but also a moving Miguel de Unamuno addressed a very emotive speech to the professor’s remembrance:

“The municipal session of that day was cancelled on the occasion of the death of Dorado Montero. The Corporation appointed a Commission to represent the City Hall during

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<sup>116</sup> Krause, K.C.F., *Die drei ältesten Kunstkurden der Freimaurer-brüderschaft*, Zweite Ausgabe, Dresden: Arnoldischer Buchhandlung, Erster Band, 1820, p. 17: “Sie ist also die Kunst, den Menschen als Menschen, und die Menschheit als Menschheit, rein und allseitig zu erziehen, das ist, ihr Leben zu wekken”.

<sup>117</sup> Ureña, Enrique M., “Orígenes del Krausofröbelismo ...”, p. 61: “El krausofröbelismo pretendió unir el impulso filosófico del círculo krausista con el impulso pedagógico del círculo fröbeliano”.

<sup>118</sup> *Diccionario de Catedráticos Españoles de Derecho (1847-1943)*, “Pedro Dorado Montero”.

<sup>119</sup> Dorado Montero, P., *El Derecho y sus sacerdotes* (1909 – 1911); Dorado Montero, P., *La Psicología criminal en nuestro derecho legislativo* (1910-1911); Dorado Montero, P., *El Derecho y sus sacerdotes* (1911).

<sup>120</sup> Hernández Díaz, J. M., Op. Cit., p. 218: “también asume responsabilidades ciudadanas públicas”.

the burial. Clairac and Riesco voted against, grounding such decision on their religious beliefs. His burial was a citizen event. During the march, the University clock's bells rang. There were many representations from the University, the Municipal Council, workers, and political parties. It was raining and people crowded around the mud on the near streets. Students and workers carried the coffin. [...] The corpse was surrounded by twenty flags of workers' unions [...] Around five-hundred people assisted at the civil cemetery. Unamuno addressed the bishop's refusal of letting the corpse in the Catholic cemetery: '... we bury in this sacred and blessed land, blessed by those who rest here, under the same heaven which shelters everyone, under its light, whose shine equally illuminates us all'<sup>121</sup>.

Interestingly enough, that civic, socialist, and republican character which predominated in his burial would not be the only one. His very good friend, Mariano Arés y Sanz, also held his own burial with that progressist spirit:

“His burial was a resounding event due to the civil character laid off by Arés himself, and arouse controversy and condemnation reactions in the conservative University and City of Salamanca at the end of the 19<sup>th</sup> century”<sup>122</sup>.

Dorado Montero showed a deep concern on the social question. The aforementioned concept did not go unnoticed in the academia and in the intellectual circles of his time. Aspects such as inequality, advances on the labour law relations, variations of poverty and illiteracy figures, changes within the Spanish society, empowering of the working class, redefinition of the educative system or the irruption of anarchism were a constant among the scholars. As documented<sup>123</sup>, socialism has a definitive impact on him. Two major aspects were decisive to this respect. Firstly, new disciplines would originate and develop. Secondly, most of the social sciences would adopt the scientific method. Resulting from such confluence of events it follows that:

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<sup>121</sup> Málaga Guerrero, J., *La vida cotidiana en la Salamanca del siglo XX: 1898-1923*, Salamanca: Fundación Salamanca Ciudad de Cultura y Saberes, 2018, ISBN 978-84-948483-1-5, p. 598: “Se suspendió la sesión municipal por la muerte de Pedro Dorado Montero que fue concejal del Ayuntamiento. Se nombró una comisión para que representase a la Corporación en el entierro. Clairac y Riesco votaron en contra amparándose en sus sentimientos religiosos. El sepelio de Dorado Montero fue un acontecimiento ciudadano. Durante el recorrido, las campanas del reloj de la Universidad no dejaron de doblar. Asistieron representaciones de la Universidad, del Concejo, obreros y partidos políticos. Llovía y la gente se agolpaba pese al barro en las calles de las inmediaciones. Estudiantes y trabajadores cargaron el féretro. Abrieron la marcha del cortejo fúnebre los maceros de la Universidad con sus mazas enlutadas. Rodeaban el cadáver las veinte banderas de las sociedades obreras. Al pasar el entierro por la plaza Mayor dobló la campana del Consistorio. Con el féretro a hombros, dieron la vuelta al ágora. Asistieron 500 personas al cementerio civil. Unamuno dijo refiriéndose a la negativa del obispo a dejar enterrar el cadáver en el cementerio católico: ‘...enterramos en esta tierra sagrada y bendita, tierra bendecida y sagrada por los que aquí reposan, bajo el mismo cielo que a todos cobija, bajo su luz, que a todos ilumina por igual’.

<sup>122</sup> Hernández Díaz, J. M., “Del Decreto Pidal al primer Rectorado de Unamuno”; Rodríguez-San Pedro Bezares, L. E., (Coord.), *Historia de la Universidad de Salamanca*, Salamanca: Universidad de Salamanca, Vol. I, 1<sup>o</sup>ed., 2002, ISBN 84-7800-116-6, pp. 239-262, p. 256: “Su entierro fue sonado por el carácter civil que dispuso el propio Arés y suscitó viva polémica y reacciones de denuncia en la conservadora Universidad y ciudad de Salamanca de fines del XIX”.

<sup>123</sup> Blanco Rodríguez, J. A., *Op. Cit.*, p. 133; Blanco Rodríguez, J. A., *El pensamiento político-social de Dorado Montero en el marco de las ideologías sociales de su época (1880-1917)*, Salamanca: Facultad de Geografía e Historia de la Universidad de Salamanca, 1979 (inédita), pp. 252-278; Blanco Rodríguez, J. A., “El socialismo reformista de Dorado Montero”, *Revista de Estudios*, Salamanca, No. 11-12, 1984, ISBN 0212-7105, pp. 235-242; Lima Torrado, J., “Las claves de la recepción del pensamiento socialista en la filosofía política de Pedro Dorado Montero”, AA.VV., *Estudios en homenaje al profesor Gregorio Peces-Barba*, Madrid: Dykinson, vol. 4, 2008.

- 1) Some misunderstandings and illogical incoherencies arouse;
- 2) Many sciences crashed, related to or even converged among themselves: sociology, criminology, psychology, pedagogy, penal law or anthropology<sup>124</sup>;
- 3) A vast reorganisation of disciplines and their respective role took place.

Nonetheless, there was an inherent risk within this multiaxial, comparative and often interdependent environment. Many theories or trends would lack a clear, technical response to the problems they aimed to solve. Seduced by the appearance of fullness and completion as provided by the many different approaches of the old and the new disciplines, most of the proposals were not able to address certain issues. Specially in the *cuestión social*, we often see that the responses to the problem are generic (too disperse in science) and, usually, relying on pseudoscientific knowledge and unproved ideas. In this period, the shy, not very well-grounded proposals constitute the most common way in which authors dealt with such issues. People with a basic knowledge of anthropology or with vague notions of sociology would, then, write into many reviews, flyers, and pamphlets. Middle-class literates would discuss those topics on an amateur level.

This was not the case as to Dorado Montero's theory, though. It ought not be forgotten that he was a penalist. His Protective Law of the Criminals heavily relies on legal knowledge (even if he dares to mix more disciplines in the aftermath). Thus, every assertion he made was consciously conducted. It is not surprising that the central core of the development of penal dogma took place many years after his death (with the works of his disciples). By means of the neutralisation of the several existing cultural and economic inequalities, Dorado Montero attempted to obtain a transformation of the ethical and mental structures of individuals. Hence, it is once more evidenced his materialist, iusphilosophical point of view. In a brief article he published in *La Lucha de Clases*, he evidenced such positioning<sup>125</sup>. Out of a superficial reading of this contribution, it could seem that Dorado Montero was against materialism: he was not. Yet, he coincided with the critics of materialism on the fact the economic aspect is not what triggers human conduct<sup>126</sup>. That is because he thought it was hunger and love what did so, instead of the economic forces: "Isn't it possible that the animal existence is the economic element, i.e. the indispensable physical basis of everything else?"<sup>127</sup>. And so, he pointed out that the engine that directs human acting is made up by his nutrition and reproduction needs, whereas one could essentially reduce it to the first one.

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<sup>124</sup> In practice, it led to a great confusion between those related disciplines: "it is easy to set out the boundaries between the new theories, such as, for example, between correctionalism and the positivist school (or Criminal Anthropology), as Bernaldo de Quirós acknowledged", cfr. Masferrer, "The Reception of the Positivist School in the Spanish Criminal Doctrine (1885-1899)", pp. 303-352, pp. 307-308. Also, Fernández Ruiz-Gálvez sheds some light in Fernández Ruiz-Gálvez, E., "Ciencia del Derecho, Ciencias Jurídicas, Sociología del Derecho, Filosofía del Derecho", Javier de Lucas Martín, F., *Introducción a la teoría del derecho*, València: Tirant lo Blanch, 1992, ISBN 84-8002-042-3, pp. 407-427.

<sup>125</sup> Dorado Montero, P., "Sobre el materialismo...", *La Lucha de Clases*, año VII, No. 290, Bilbao, 1 de mayo de 1900.

<sup>126</sup> *Ibid.*, p. 2: "The observation is exact, but not appropriate, in my opinion".

<sup>127</sup> *Ibid.*, p. 3: "¿No será la existencia animal, el elemento económico de la base física indispensable de todo lo demás?".

This *cuestión social*<sup>128</sup> was not exclusively developed in academic circles, though. Indeed, there were plenty of social reforms and changes within the Spanish State between the 19<sup>th</sup> and 20<sup>th</sup> centuries. Certain organs such as the *Comisión de Reformas Sociales*<sup>129</sup> (Social Reforms Commission) and the *Instituto de Reformas Sociales* (Institute of Social Reforms) were created ad hoc<sup>130</sup>. Notwithstanding that, society in Salamanca met a different fate:

“In 1898, the relations between the State and the Church were very close. The public powers had to authorise some religious services, among which there were those referred to the undeclared war. The Ministry of Justice and Grace gave its agreement to the celebration of a Te-Deum asking for peace in the Philippines at the Cathedral”<sup>131</sup>.

Besides, the city and its surroundings were lacking all sort of hygienic infrastructures. In *El Adelanto* still predominated the advertisements of medicines to fight against fevers produced by malaria, a disease which was endemic in Spain back then. The fact that there were terrible economic circumstances involuntarily triggered informal economy activities. Many of such activities dealing with nourishment were performed in an undeclared way with virtually no quality controls at all:

“the consumption of untreated milk produced endemic diseases, tuberculosis, and brucellosis, this latter known as the Malta Fever”<sup>132</sup>.

Miguel de Unamuno, former friend and intellectual nemesis of Dorado Montero, went on public appearances: “El Adelanto placed record at the front page with great typographic boast of Unamuno’s speech made on 25 August 1904 in Gijón” and “the endeavours of Unamuno over the cities and towns of Spain were acknowledged and followed by the people of Salamanca. The newspapers were in charge of elaborating reports on his interventions”<sup>133</sup>. Similarly, the very rough and open dispute with the Father Cámara and with the conservative Government also partially originated from this fear towards socialism. That was not the only threat, though. The conservative Government of that time wanted to withdraw the our penalist from the academic world. It was particularly painful since his reputation all over the shire was enormous:

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<sup>128</sup> Dorado Montero, P., *Estudios de Derecho penal preventivo* (1901); Dorado Montero, P., *Contribución al estudio de la historia primitiva de España. El Derecho penal en Iberia* (1901); and especially Dorado Montero, P., *Del problema obrero* (1901).

<sup>129</sup> Álvarez Junco, José, “La Comisión de Reformas Sociales: intentos y realizaciones”, *De la beneficencia al bienestar social: cuatro siglos de acción social*, 1986, ISBN 84-323-0566-9, pp. 147-154; Pérez Ledesma, Manuel, “La Comisión de Reformas Sociales y la cuestión social durante la Restauración”, *De la beneficencia al bienestar social: cuatro siglos de acción social*, 1986, ISBN 84-323-0566-9, pp. 155-166.

<sup>130</sup> Bear in mind that they constitute the same organ. The Commission started working in 1883. In 1903, the Commission turned into the Institute, and it worked until 1924. *Vid.* La Biblioteca Nacional de España. Link: <http://datos.bne.es/>. Seen on 21.08.2020.

<sup>131</sup> Málaga Guerrero, J., *Op. Cit.*, p. 33: “En 1898 las relaciones Iglesia-Estado eran muy estrechas. Los poderes públicos tenían que autorizar algunos cultos, entre ellos aquellos que se referían a la guerra no declarada. Desde el Ministerio de Gracia y Justicia dieron su visto bueno a la celebración de un Te-Deum en la Catedral pidiendo la pacificación de Filipinas”.

<sup>132</sup> *Ibid.*, p. 35: “El consumo de leche no tratada producía enfermedades endémicas, tuberculosis y brucelosis, esta última conocida como fiebre de Malta”.

<sup>133</sup> *Ibid.*, p. 217: “El Adelanto se hizo eco en primera, con gran alarde tipográfico, del discurso de Unamuno pronunciado el 25 de agosto de 1904 en Gijón [...]. Las andanzas de Unamuno por las ciudades y pueblos de España eran conocidas y seguidas por los salmantinos. Los periódicos se encargaban de hacer largas crónicas sobre sus intervenciones”.

“Dorado Montero acquired fame at the end of the last century, reaching the great public, after having lived in the dark for many years after the excommunication that Father Cámara (Bishop of Salamanca) had applied on the distinguished professor. Then, the conservative Government was very close to enact an arbitrary measure similar to that of Mr Manuel Orovio, when it separated from their position to Salmerón, Giner, and other relevant full professors. Nevertheless, Cánovas did not dare to do so with Dorado Montero, who firmly maintained his point of view defending academic freedom”<sup>134</sup>.

One of the closest sources of information on those matters (i.e. the Foundation Pablo Iglesias), concludes denying the anarchist personality of the Spanish professor. They link him more to socialism due to his relation with the PSOE<sup>135</sup>.

“He entered into contact with anarchist reviews and also collaborated with them, but since 1894 he appears linked to the PSOE, as well as to its expression organ *El Socialista*, where collaborated uninterruptedly during his whole life”<sup>136</sup>.

However, even if he appeared more socialist than anarchist, his socialism is not an orthodox one: it is full of Marxist connotations: “Dorado Montero’s socialism, similarly as to that from other intellectuals from his time as Unamuno and Álvarez Buylla, shows many ambiguities, and his ideology, which finds itself in constant change, mix certain Marxist ideals with other trends arising from social thought. He partially knows the work of Marx, but through Italian intellectuals, particularly Aquiles Loria, from whom he will obtain a great part of his vision”<sup>137</sup>. A supporter of this conception (mixture of socialism and anarchism) is Manuel de Rivacoba y Rivacoba<sup>138</sup>, who in this sense equates this half-in-two reality to Bertrand Russell’s thought.

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<sup>134</sup> Valentí i Camp, S., *Ideólogos...*, p. 104: “Dorado Montero adquirió cierta notoriedad a fines de la centuria pasada, llegando al gran público, después de haber vivido obscurecido durante muchos años, con motivo de la excomunión que el P. Cámara, a la sazón obispo de Salamanca, lanzó contra el insigne profesor. Entonces, el Gobierno conservador estuvo muy cerca de dictar una medida arbitraria semejante a la de don Manuel Orovio, cuando separó del profesorado a Salmerón, Giner y otros eminentes catedráticos. Pero Cánovas no se atrevió con Dorado Montero que sostuvo en aquella ocasión, con bravura, su punto de vista, defendiendo la libertad de cátedra”.

<sup>135</sup> The acronym stands for “Spanish Socialist Worker Party” in Spanish.

<sup>136</sup> *Fundación Pablo Iglesias*, “Pedro Dorado Montero”: “Tuvo contacto y colaboró en revistas anarquistas, pero desde 1894 aparece ligado al PSOE y a su órgano de expresión *El Socialista*, donde no dejó de colaborar a lo largo de su vida”. Link: [https://www.fpabloiglesias.es/archivo-y-biblioteca/diccionario-biografico/biografias/4883\\_dorado-montero-pedro](https://www.fpabloiglesias.es/archivo-y-biblioteca/diccionario-biografico/biografias/4883_dorado-montero-pedro). Seen on 30.05.2020.

<sup>137</sup> Blanco Rodríguez, J. A., “Evolución de un intelectual crítico: Pedro Dorado Montero”, *Salamanca. Revista de Estudios*, 1994, ISSN: 021 1-9730, pp. 141-168, p. 165: “El ‘socialismo’ de Dorado, al igual que el de otros intelectuales de su época como Unamuno y Alvarez Buylla, presenta numerosas ambigüedades, y en su ideología, en constante evolución, conviven algunas ideas marxistas con otras procedentes de diversas corrientes de pensamiento social. Conoce parcialmente la obra de Marx pero básicamente a través intelectuales italianos, particularmente Aquiles Loria, de quien procederá buena parte de su ideario económico y social cercano al socialismo”.

<sup>138</sup> Rivacoba y Rivacoba, M., *Recensión, Russell, Bertrand*, “Los caminos de la libertad. El socialismo, el anarquismo y el sindicalismo”, Buenos Aires: Universidad, Aguilar, 196, No. 48, 1961; Rivacoba y Rivacoba, M., “Evocación y vigencia de Dorado Montero”, *Revista de Ciencias Penales*, Santiago de Chile, T. 29, No. 1, 1970, pp. 15-28.; Rivacoba y Rivacoba, M., “Viejas Remembranzas de Dorado Montero”, *Revista de Estudios Penitenciarios. Homenaje a Dorado Montero*, No. 195, 1971, Santiago de Chile, T. 29, No. 1, 1970, pp. 1631-1643; Rivacoba y Rivacoba, M., *El centenario del nacimiento de Dorado Montero*, Universidad del Litoral, Santa Fé, 1962; Rivacoba y Rivacoba, M., “Recordación de Dorado Montero”, *Cenit*, Toulouse, No. 152, 1963.

## 7. The purest form of anarchism

Positively, one of the works by means of which he analysed and spread anarchists' ideals was Tolstoi's work *Der Anarchismus*<sup>139</sup>. The most important, coinciding aspect for our author was the defence of the law of love, the most supreme law Christ gave, as the one that will rule the current, existing order. Even so, Dorado Montero described himself as an atheist, and the whole of his thought is purely existentialist. Anarchism is undeniable in his life<sup>140</sup>, yet it is far from being a primer anarchist. He is mainly deemed as such due to the relevance of anarchist doctrines on his legal thought, the degree of reception of libertarian doctrines, or the major or minor affinity towards a certain variety of anarchism. As might the latter case be the familiarisation with the so-called *Freirechtsliche Bewegung*<sup>141</sup>.

Although Dorado Montero publishes more often in socialist reviews<sup>142</sup>, rather than anarchist reviews<sup>143</sup>, Jesús Lima Torrado does not consider him as a supporter of none of those trends. He holds that, back in that time, it was a common practice for authors not professing this ideology to contribute to those reviews. For him, the reasons behind a wish to publish in there are six<sup>144</sup>, namely: a) He considered them to be an instrument for regeneration to fight Spanish society's decadence in the 19<sup>th</sup>-20<sup>th</sup> century, thanks to an accessible language; b) It matched his greater interest for social problems over the 'official' ones. Instead of focusing on legal, bureaucratic issues, he advocated for addressing abuses of power, poverty, and lack of education; c) The countless bounds of friendship he maintained with relevant personalities of anarchism (like Federico Urales<sup>145</sup>) as well as with intellectuals collaborating with the anarchist press (Miguel de Unamuno and Franciso Giner de los Ríos); d) Strategy. The 1896 Act against Anarchist Propaganda made it impossible for reviews to have a specific significance with the anarchist movement. Thus, those reviews accepted collaborations from anarchists (Anselmo Lorenzo, Tarrida del Mármol, Ricardo Mella, Malatesta, or Malato) and mixed them with collaborations of known intellectuals (Francisco Giner, Manuel Cossío, Gumersindo de Azcárate, González Serran, Unamuno, or Dorado himself); and e) It allowed him to deal with a 19<sup>th</sup> century problem: the legitimacy of laws and social dominant powers.

<sup>139</sup> Eltzbacher, P., *Der Anarchismus*, Berlin: J. Guttentag Verlagsbuchhandlung, 1900.

<sup>140</sup> Lima Torrado, J., "Las claves de la recepción del pensamiento anarquista...", pp. 417-443.

<sup>141</sup> As pointed out by Blanco Rodríguez in many occasions.

<sup>142</sup> On the socialist behalf, Lima Torrado is very clear about it: *La Revista Socialista*, *La España Moderna*, *Sozialistische Monatshefte*, *La Lectura*, *Estudio* and the *BILE* (*Boletín de la Institución Libre de Enseñanza*). He points out some newspapers as well, such as *La Lucha de Clases* or *El Socialista*. Furthermore, it is worthy to highlight the fact that when Blanco Rodríguez analysed the works of his personal library, he found that the quantity of socialist works exceeded very much in number those addressing anarchism. *Vid.*, Blanco Rodríguez, J. A., *El pensamiento ...*, p. 133. In this latter, the author attempts a non-exhaustive listing of all the socialist influences received.

<sup>143</sup> As regards the anarchist contributions, two are the main reviews which he contributes to. The first review is *La Revista Blanca* (Dorado Montero, P., "Patria", *La Revista Blanca*, No. 17, Vol. I, Madrid, 1899, pp. 471-474; Dorado Montero, P., "¿Quién vigila a los vigilantes?", *La Revista Blanca*, No. 30, Madrid, 1899, pp. 141-144) and, the second one is the review *Ciencia Social* (Dorado Montero, P., "La Patria", *Ciencia Social*, No. 8, Barcelona, 1898, pp. 225-233).

<sup>144</sup> Lima Torrado, J., "Las claves de la recepción del pensamiento anarquista...", pp. 420-422.

<sup>145</sup> His real name was Juan Montseny Carret (in Spanish) or Joan Montseny i Carret (in Catalan). Back then, it was a common practice for anarchists to use a pseudonym to protect themselves.

It is important to note that in Germany, where Krause himself was born, Krausism did not have a relevant impact<sup>146</sup>. His influx in Portugal and in Spain remains uncontested<sup>147</sup>. This is why I consider interesting to mention that Krausism was inextricably connected towards anarchism: it acted as a catalyst which allowed certain anarchist ideals to penetrate the old Iberia. Those postulates, even if disliked or combatted, were not certainly unknown in the rest of Europe. When Lima Torrado is identifying the key aspects making up Krausism<sup>148</sup>, he was indirectly defining the degree of Spain's acceptance of anarchist ideals (and which ones):

- a) The rejection of Law as a coactive, exterior order and, consequently, the rejection of the official State's law;
- b) A trend towards the spiritualisation of law: the future will consist of an ethic, inner, non-repressive State;
- c) A sense of humanity and solidarity;
- d) Education as a means transforming both man and society; and
- e) A non-super structural way of social organisation.

Lastly, he also outstood five main domination points of imprint<sup>149</sup> which are deemed to be particularly helpful to outline his influences: the sociological thesis from Alfred Fouillée, the evolutionist thesis from Herbert Spencer, the Kantorowicz conception, Max Stirner's thought (he translated his main work),<sup>150</sup> and certain punctual influences like Wargha. I remain, however, slightly sceptical as when it comes to the comparison of his thought towards the critic positivism of Vaccaro's *Terza Scuola*. Within such work<sup>151</sup>, he refused to name the *Terza Scuola* after "eclectical". Indeed, he showed himself very clear to this respect. He did not believe this school to be eclectic but conciliatory:

"There is those who, still sticking to the old ideas, seek after their maintenance with the new ones, thus uniting them in an impossible connubium, which we do not even dare to name after eclecticism, as we cannot betray the ethimology of such word".<sup>152</sup>

Not to mention "many positivists who, as shown before, are determined to correct positivism", and who could be included "within the fledgling positivists (the so-called critic positivists)"<sup>153</sup>. Dorado Montero identified and listed them: mainly "Puglia, Cogliolo, and Vanni", but he also specifically mentions three other authors accepting

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<sup>146</sup> In the two-years period I have been employed at *Universität Augsburg*, every German scholar I met or talked to about my research topic was very surprised to hear of Krause, which is considered as a figure with virtually not relevance in the Teutonic country. Also, either in formal discussions (such as the *Doktorand Seminars*) or in informal conversations, no colleague was aware of the relevance which Krause possessed in Spain.

<sup>147</sup> Giner de los Ríos, F., *Principios de Derecho natural*, Madrid: Espasa-Calpe, 1916, p. XIII.

<sup>148</sup> *Ibid.*, pp. 427-428.

<sup>149</sup> *Ibid.*, p. 429.

<sup>150</sup> Stirner, M., *Der Einzige und sein Eigentum*, Reclams Universalbibliothek, 1 Auflage, 1893.

<sup>151</sup> Dorado Montero, Pedro, *El positivismo en la ciencia...*, p. 249: "no es ecléctica, sino crítica y conciliadora, y que tiene, por consiguiente, un entero valor científico que no tienen las teorías eclécticas; que abraza y funde en un solo término los dos que eran antitéticos, tomando como base las doctrinas naturalistas y levantándose sobre ellas á la concepción del ideal"

<sup>152</sup> *Ibid.*, p. 249: "aquellos que, apegados todavía á las ideas antiguas, pretenden mantenerlas al lado de las nuevas, uniéndolas en imposible connubio, que ni eclecticismo nos atrevemos á llamar, siquiera por no hacer traición á la etimología de la palabra".

<sup>153</sup> *Ibid.*, p. 249: "Sin hablar de muchos positivistas que, como hemos mostrado, se proponen corregir el positivismo y que muy bien podrían incluirse en el grupo de los positivistas de nuevo cuño, esto es de los positivistas críticos".

the conception of the contractual organism of Fouillée, namely Gustavo Bonelli (with “certain differences”), Colajanni (“revindicating its priority with regards to De Greef”), and Icilio Vanni (“but with certain reservations in the *Programma critico di Sociologia*”)<sup>154</sup>.

Leo Tolstoy constituted his pillar in anarchism. Dorado Montero professes towards him nothing but a deep feeling of admiration. He described him as “a generous soul, full of love for one’s neighbour, and enemy of all kinds of oppression”<sup>155</sup>. Yet, he was eager to point out this author’s main difficulty. It was not the fact that his positionings will vary to such extent that he would overcome and even contradict a prior statement he made. That happens constantly in most authors. The main issue for Tolstoy’s comprehension lays on the fact that he did never systematise a treaty of legal philosophy, religious philosophy, or social philosophy. Dorado Montero offered a solution:<sup>156</sup> either one goes throughout his whole academic production and forges his personal analysis, or one takes over the secondary sources. Regarding the latter option, he provided us with the main systematic schemes existing on the matter, mainly revolving around two authors: Ossip-Lourié and Paul Eltzbacher. It is precisely here where one realises that the relations between Dorado Montero, Tolstoy, and Eltzbacher are intertwined. Dorado Montero dedicated to the latter a very discreet article in a Spanish popular review<sup>157</sup>. On it, Dorado Montero qualifies Eltzbacher’s work as “purely descriptive”<sup>158</sup>, but very “clear” and “exact”<sup>159</sup>. Even so, it is not the most relevant aspect steaming from the book review. What is more relevant is that there is plenty of evidence he never committed the same mistakes that their future colleagues would make. As it is broadly proved, the main exponents of positivism would turn into fascists when the movement would head towards the beginning of the 20<sup>th</sup> century. The weaknesses of positivism, i.e. their potentially risky statements, became a real danger when its postulates evolved and met the new political developments. He wisely pointed out that the State itself was grounded on violence:

“Currently, they abominate from the State, since it is a coercive organisation, and everything it entails (laws, authorities, Courts, public force, etc.). ‘They’ are those who abhor violence as a common bond among men. Spirits enjoying a great moral cannot conceive an order in which such common base is an unjust social order. That is the reason why in the world exists an army of thinkers -not small at all- who attack what one might call the grounds of social life”<sup>160</sup>.

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<sup>154</sup> Ibid., p. 249.

<sup>155</sup> Calvo González, J., *El alma y la ley. Tolstói entre juristas. España (1890-1928)*, Sevilla-Zamora: Comunicación Social, Colección “Historia y presente”, 1<sup>o</sup> ed., 2010, ISBN 978-84-92860-33-3, p. 139: “El conde León Tolstoy, alma generosa, saturada de amor al prójimo, enemiga de toda opresión”.

<sup>156</sup> Ibid., p. 141.

<sup>157</sup> Dorado Montero, P., “Der Anarchismus, von Dr. Paul Eltzbacher”, *La España Moderna*, Madrid, Año 12, núm. 139, 1900, pp. 192-193.

<sup>158</sup> At the front page, Eltzbacher sums up the main objective of his work: “Je ne propose rien, je ne suppose rien, j’expose”.

<sup>159</sup> Dorado Montero, P., “Der Anarchismus, von Dr. Paul ...”, p. 193.

<sup>160</sup> Ibid., p. 193: “En el día de hoy abominan del Estado, en cuanto organización coercitiva, y de lo que tal organización supone (leyes, autoridades, Tribunales, fuerza pública, etc.) todos cuantos aborrecen la violencia como lazo de unión entre los hombres. Los espíritus de gran delicadeza moral no pueden concebir que un orden que en tal base estriba pueda ser un orden social justo. Tal es la causa por la que actualmente existe en el mundo una falange, no pequeña, de pensadores que atacan lo que puede llamarse los «fundamentos» de la vida social”.



Anarchists, and to some extent the liberals as well, are being reflected in such statement. There is a coincidence in Dorado Montero's theoretical bedrock with them and, right after, the editor unveils a crucial aspect: Eltzbacher, at his turn, was profoundly influenced by Tolstoy and he devoted an article at a yearbook<sup>161</sup>. Eltzbacher's most relevant work<sup>162</sup> was translated into Spanish by Dorado Montero, as previously dealt in the preceding pages. Though, the new name of the Spanish version would be slightly different<sup>163</sup>. Also, the chapter of such work devoted to Tolstoy's doctrine was published at the *Boletín de la Institución Libre de Enseñanza*.

On the other hand, he also forged his own personal analysis on the Russian author. To do so, he focused on Tolstoy's novel *Resurrection*<sup>164</sup>. Dorado Montero showed a particularly marked enthusiasm about the manner Tolstoy spread his criminal doctrine and penal thought. The Russian did so in an indirect, yet efficient fashion: he disseminated the most essential aspects of his doctrine in an enjoyable and entertaining way, and consequently more efficient, so he would reach a larger number of people<sup>165</sup>. Tolstoy was known for his Christian version of anarchism. In doing so, after having analysed the time he lived, he concluded that "the current life is irrational, inhuman, unfair, and anti-Christian. That is why it should be replaced with another, out of which the real order will emerge: an order in which Christ's supreme law will reign, i.e. the rule of love"<sup>166</sup>. A further area of concern is explored when analysing the use of violence: "the key of all teachings of Jesus Christ lays on the precept of never applying violence, not even to resist evil"<sup>167</sup>.

The novel explored those questions throughout the perspective of Nekhlyudov. After his visit to the prison, he had observed "people of a very simple nature, nor good neither bad, vested on the traditional moral notions of the peasant and the Christian, yet they had been detached from them little by little in order to acquire some others consisting in admitting the legitimacy of all sorts of violence"<sup>168</sup>. The main character also felt the social concerns around many related topics, namely: whether freewill exists or not; if out of the cranial capacity of individuals one may deduce their guiltiness; the relevance of the crime's inheritance; whether there exist an innate crime and an innate immorality; what are exactly things such as morality, insanity, degeneration, or character; what influx may climate, ignorance, imitation spirit, or hypnotism have over the crime, etc<sup>169</sup>. Anyway, his conviction against the use of penalties was a firm one:

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<sup>161</sup> Eltzbacher, P., "Die Rechtsphilosophie Tolstojs", *Preußische Jahrbücher*, Bd. 100, Hft. 2, 1900, pp. 266-282.

<sup>162</sup> Eltzbacher, P., *Der Anarchismus: Eine ideengeschichtliche Darstellung seiner klassischen Strömungen*, Berlin: J. Guttentag, 1900.

<sup>163</sup> Eltzbacher, P., *El Anarquismo según sus más ilustres representantes: Godwin, Proudhon, Stirner, Bakunin, Kropotkin, Tucker, Tolstoy, etc*, Madrid: La España Moderna, 1901.

<sup>164</sup> Tolstoy, L., "Воскресение", *Niva*, 1899.

<sup>165</sup> Calvo González, J., *El alma y la ley. Tolstói ...*, p. 141.

<sup>166</sup> *Ibid.*, p. 142.

<sup>167</sup> *Ibid.*, p. 143: "La clave de todas las enseñanzas de Cristo se halla en el precepto que manda no aplicar nunca la violencia, ni siquiera para resistir al mal".

<sup>168</sup> Calvo González, J., *El alma y la ley. Tolstói...*, p. 145: "En la prisión había visto Nekhlyudoff naturalezas sencillas, ni buenas ni malas, penetradas de las tradicionales nociones morales del aldeano y del cristiano, que poco a poco se habían despojando de esas nociones para adquirir otras que consistían en admitir la legitimidad de toda violencia".

<sup>169</sup> *Ibid.*, p. 147.

“nobody can or should impose penalties to his equals, and when he does so, he is producing truly and countless social damages, leaving aside injustices”<sup>170</sup>.

Given the sphere of Tolstoy’s truly concerns, Nekhlyudov would never focus into the most extended question: what should be done about the criminals. The matter would only be important for him if the punishments did produce a decrease on crime and if they would correct the criminals<sup>171</sup>. At this point, one of Tolstoy’s central issues steps in: the so-called automorphism. This phenomenon consists in the auto-reassertion of a certain lifestyle due to only relating to social groups in which one’s own way of acting is legitimised and supported. Thus, in those groups positive reinforcement takes place. Such effect might be provided in both directions: either in lower class groups (poor people and criminals) or in upper class groups (wealthy individuals and religious factions).

“In common understanding, the thief, the murderer, and the prostitute should be ashamed of their lifestyle. Indeed, it is not. People who, by chance or by their own mistakes, happen to get to a wrong position become so habituated with it that there is nobody to get out of their minds the idea that their profession is good, and to further reassert themselves in such position, they keep themselves inside the circles made up by their equals, where their options are highly approved”<sup>172</sup>.

Conceived as an almost an identic reproduction of Tolstoy’s thought, Dorado Montero’s conception of crime tried to seek their primordial causes out of the boundaries of the conventional crime. For both authors, it was necessary to go beyond it. For Tolstoy himself, “out of the facts that laws label as crimes, it is not possible to blame guiltiness on those who commit them, but to other causes that reside out of them”<sup>173</sup>. For *Resurrection*’s main character, Nekhlyudov, the circumstances of the time were deplorable.

If the novel’s main concerns were the cruelty and the hypocrisy, there is also a significant part devoted to the long time that judicial processes took. Criticisms against endlessly delays on judicial processes are nothing new, though. Such topic is a recurrent, dating back from the Middle Ages, and it was often tackled by Cerdán de Tallada<sup>174</sup>.

Tolstoy’s final solution for the criminals might seem a bit utopian: they need not to be punished, but they need to be forgiven up to seventy-seven times<sup>175</sup>. It forms part

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<sup>170</sup> Ibid., p. 146: “Nadie puede ni debe, según él, imponer penas a sus semejantes, y el imponerlas produce, además de injusticias, verdaderos e innumerables daños sociales”.

<sup>171</sup> Tolstoy, L., *Resurrección*, tomo III, p. 156-157.

<sup>172</sup> Tolstoy, L., *Resurrección*, tomo I, p. 182: “Comúnmente se cree que el ladrón, el asesino y la prostituta deben avergonzarse de su género de vida. No es así. Las personas que por azares de la suerte o por errores propios llegan a una falsa posición se connaturalizan de tal modo con ella, que no hay quien les quite de la cabeza que su oficio es bueno, y para confirmarse en tal opinión, se mantienen dentro de los círculos que están formados por sus iguales y donde se aprueban altamente sus opciones”.

<sup>173</sup> Calvo González, J., *El alma y la ley. Tolstói ...*, p. 151: “Para Tolstói, de los hechos que las leyes califican de delitos y como tales castigan no es posible considerar culpables a quienes los cometen, sino a otras causas que residen fuera de ellos”.

<sup>174</sup> On this matter see the study carried out by Regina María Pérez Marcos: “Tomás Cerdán de Tallada, el primer tratadista de derecho penitenciario”, *Anuario de Historia de Derecho Español*, LXXV, 2005, pp. 755-802. On the same author, but shifting the focus towards its Civil law implications vid. Obarrio Moreno, J.A., “La preterición en los Commentaria del jurista Cerdán de Tallada”, *Revista General de Derecho Romano*, ISSN-e 1697-3046, No. 11, 2008.

<sup>175</sup> *The Holy Bible*, Matthew, 18:21-22 ESV.

of his Christian anarchism. At the novel, Nekhlyudov is told by an old man that God is the only one who knows how to punish and to reward; humans do not. Consequently, in his coinciding line of thought, Dorado Montero points out at the following quote:

“All evil comes from the fact that men have attempted something impossible: while being themselves evil, they want to correct the others”<sup>176</sup>.

As regards the effectiveness, there was an indirect appeal coming from Dorado Montero’s mouth. He asked for his theory to be taken into account, despite its abstract approach. Indeed, while he was asking for Tolstoy’s theory to be accepted, yet indirectly he was also asking for his ideals to be seriously taken into account. It is not a coincidence that this statement was located at the end of his masterpiece. His petition read as follows:

“that the scholars of every kind take good care of the reasonings and warnings from our author, think about them, and do not reject them due to be reckless or utopian. All innovations started with such character but, nonetheless, they turned into common sense, widely accepted truths after some time; just as all the words from one language started being mere barbarisms and neologisms, yet they ended up constituting a catalogue of pure, traditional terms of a language”<sup>177</sup>.

Another aspect should be addressed. Eltzbacher, the author Dorado Montero was related to, was from Cologne, and the analysis of Tolstoy’s works were done by means of the German translations thereof, despite the fact that Tolstoy wrote in Russian. Thus, after having pointed out the room for some possible mistranslations, it needs to be stressed out a crucial aspect on terminology:

“Tolstoy does not name his doctrine on law, State, and property after ‘anarchism’. He calls so to the theory abrogating for a life without government, whose way of achieving it is the use of violence”<sup>178</sup>.

Here we see a crucial difference. The first doctrine (“his doctrine on law, State, and property”) might be referred as Tolstoy’s proposal and labelled as ‘Christian anarchism’. Yet, the second part of the statement is referring to standard anarchism. It is very easy to check the difference, since in the standard conception of anarchism, the use of violence is allowed (especially in revolutions to take over the power), whereas Tolstoy always rejected it in any case. Tolstoy was classed as an anarchist, yet his real classification into anarchism generated many ‘buts’. This different version from anarchism was the one that will inspire Dorado Montero the most. Ironically, Dorado Montero will not become a pure anarchist but a Christian anarchist, despite having rejected the Catholic Church as an institution. Similarly, bordering on the oxymoron, he was a positivist and

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<sup>176</sup> Dorado Montero, P., *El Derecho protector ...*, Ed. Jiménez Gil, Tomo 2, Madrid, 1915, pp. 604-605: “Todo el mal proviene de que los hombres han emprendido una cosa imposible: siendo malos ellos mismos, quieren corregir a los demás. Hombres viciosos intentan corregir a hombres viciosos”.

<sup>177</sup> Ibid., pp. 609: “que los estudiosos de todo género [...] se hagan cargo de los razonamientos y advertencias de nuestro autor, se paren ante ellos y los mediten, en lugar de rechazarlos de plano y sin más por descabellados o por utópicos. Todas las innovaciones han empezado por tener este carácter, y, sin embargo, han venido con el tiempo a pasar a la categoría de verdades de sentido común y aceptación general; de la propia suerte que todas las palabras de una lengua han comenzado por ser barbarismos y neologismos, y han acabado por formar el catálogo de las voces puras y castizas”.

<sup>178</sup> Eltzbacher, P., *Der Anarchismus...*, p. 197: “Tolstoj nennt seine Lehre über Recht, Staat und Eigentum nicht Anarchismus. Als Anarchismus bezeichnet er die Lehre, welche ein Leben ohne Regierung als Ziel aufstellt und dieses durch Anwendung von Gewalt verwirklicht sehen möchte”.

he was not. Tolstoy's thought did not match any of the existing Christian Churches<sup>179</sup>, instead he drew his attention towards what he called Christ's pure doctrine<sup>180</sup>.

“Churches have not only remained alien to Christ's doctrine, but they have been enemies to it”<sup>181</sup>.

Tolstoy was convinced that the Church had ended up adjusting itself to the demands of the modern world and so they had modified the pure doctrine of Christianity. The world would, thus, only accept this doctrine after the Church had adapted Christ's version. It is particularly interesting when it comes to humbleness and the vow of poverty. The greed was specially criticised by him. However, it resulted much harder accepting and implementing Christ's doctrine, rather than cleverly altering it. So, “Churches invent subtleties to show that men live in harmony with the law of Christ, when they actually live against it”<sup>182</sup>.

On the other hand, he rejected the truths of faith. This was another aspect why he influenced Dorado Montero so much. He received this spiritual strand by means of a rational faith, instead of trusting a creed or a blind faith. Tolstoy was specially critic against the latter providing the example of the Buddhist man:

“If a man has gotten to know the Islam, yet he keeps on being a Buddhist, what came to happen is that the old blind belief has been replaced by the rational conviction”<sup>183</sup>.

Eltzbacher identified that, steaming from the ‘supreme rule of love’, Tolstoy established the precept of non-violent resistance: “Never resisting evil means never exerting violence over another, i.e. do not ever perpetrate any act contradicting love”<sup>184</sup>. And so, Tolstoy himself, in his Christian belief, referred to specific biblical verses:

“Ye have heard that it hath been said, an eye for an eye, and a tooth for a tooth: but I say unto you, That ye resist not evil: but whosoever shall smite thee on thy right cheek, turn to him the other also”<sup>185</sup>.

Eltzbacher was very systematic, and once he carried out this set of general ideas on each author, he resumed the analysis focusing on three main aspects: law, state and property.

In the first place, he happened to hold a vision of the legal order very much grounded on natural law: “he rejects, as a matter of principle, every norm that depends on man's will; every norm whose maintenance is entrusted to man's power, especially to courts; which deviates from the moral law, which is different within the different territories; and which can be arbitrarily changed at any moment”<sup>186</sup>. Rather than this

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<sup>179</sup> His dissidence goes far beyond a strict reliance on the argument that atheism and anticlericalism were the new, ground-breaking trends on his time.

<sup>180</sup> Eltzbacher, P., *Der Anarchismus...*, p. 197.

<sup>181</sup> Ibid.: “die Kirchen sind stets der Lehre Christi nicht bloß fremd, sondern ihr gradezu feindlich gewesen”.

<sup>182</sup> Ibid., p. 198: “Die Kirche erdachte Spitzfindigkeiten, um darzuthun, dass die Menschen, indem sie dem Gesetze Christi entgegen lebten, mit ihm im Einklang lebten”.

<sup>183</sup> Ibid., p. 201: “Hat er den Islam kennen gelernt und ist dennoch Buddhist geblieben, so ist an die Stelle des froheren blinden Glaubens an Buddha die vernünftige Oberzeugung getreten”.

<sup>184</sup> Tolstoj, L., *Worin besteht mein Glaube?*, p. 17: “Widerstrebe nicht dem Übel bedeutet: widerstrebe niemals dem Bösen, dass heisst: thu nie einem anderen Gewalt an, das heisst: begeh nie eine Handlung» die der Liebe zuwiderläuft”.

<sup>185</sup> The Holy Bible (KJV), St. Matthew 5: 38-39.

<sup>186</sup> Eltzbacher, P., *Der Anarchismus...*, p. 210: “denn er verwirft grundsätzlich jede Norm, die auf dem Willen von Menschen beruht, durch Menschengewalt, insonderheit durch Gerichte,

aspect, Dorado Montero fairly related more towards the ultra-personalised conception of moral enunciated by Tolstoy: “The kingdom of God is not outside in the world, but in man’s own soul”<sup>187</sup>.

Be as it may, the relation of Tolstoy towards the Law was per se a conflictive one. Law, by its very nature, went against his precept of non-violent resistance. Since man’s law required coercive, restrictive, and violent measures to be implemented, he concluded that Law was always violent<sup>188</sup>. Notwithstanding that, the idea of non-violence in Law has also been bearded by scholars holding very differing positions from anarchism, such as the Professor Jesús Ballesteros and his school of thought<sup>189</sup>. Furthermore, he pointed out something that the studies in criminology and prison reports would expose in the following years: that human criminal laws do nothing but worsen the number of criminals. Criminality seemed to skyrocket after the passing and implementation of criminal laws.

“Christ says: you believe that your laws reduce and fight back the crime, yet they do not do other thing than increasing it; there is just one way to prevent evil, and it consists on returning good for evil, and to do good to all”<sup>190</sup>.

Such aspect would soften and improve the situation after the aforementioned complaints and critics poured by many scholars such as Concepción Arenal (past) and Dorado Montero himself in his *El reformatorio de Elmira*<sup>191</sup> (future).

In the second place, Tolstoy analysed the State. Similarly, as what happened to the Law, the State was something that went frontally against the Christian thought due to analogous reasons: it removed the State because Christianity denied every form of government. In the years to follow, his thought evolved and the *cuestión social* left room for other more technical books<sup>192</sup>.

## 8. Sociology, a struggle for its unification

Years after, Dorado Montero retired to a lonely countryside house in order to meditate on his last years of life. As regards law, he thought that the most important part

aufrechterhalten wird, vom Sittengesetz abweichen, in verschiedenen Gebieten verschieden sein und jederzeit will kürlich geändert werden kann”.

<sup>187</sup> Tolstoj, L., *Darlegung des Evangeliums*, p. 50: “Das Reich Gottes ist nicht draussen in der Welt sondern in der Seele des Menschen”.

<sup>188</sup> Tolstoj, L., *Worin besteht ...*, p. 29.

<sup>189</sup> His idea of non-violent resistance grounds its roots in a very particular view of the Christian humanism, being its main representative work: Ballesteros, J., *Repensar la paz*, Madrid: Ediciones Internacionales Universitarias, 2006. Other relevant works are quoted: Ballesteros, J., *Postmodernidad: decadencia o resistencia*, Madrid: Tecnos, 1989; Ballesteros, J., *Sobre el sentido del derecho: introducción a la filosofía jurídica*, Madrid: Tecnos, 1984; Ballesteros, J., *Ecologismo personalista: cuidar la naturaleza, cuidar al hombre*, Tecnos, 1995. A very detailed description of his prolific literature can be found on his personal website: <https://jesusballesteros.es/>.

<sup>190</sup> Tolstoj, L., *Worin besteht ...*, p. 45-46: “Ihr glaubt, dass Eure Gesetze das Übel verbessern, sie vergrössern es aber nur; es giebt nur einen Weg, dem Übel zu steuern, er besteht darin, Böses mit Gutem zu vergelten, allen ohne Unterschied Gutes zu thun”.

<sup>191</sup> Dorado Montero, P., *El Reformatorio de Elmira*, Madrid: La España Moderna, 1898. Such work fundamentally aimed at providing a ground-breaking model of preventive Criminal law.

<sup>192</sup> Dorado Montero, P., *Bases para un nuevo Derecho penal* (1902); Dorado Montero, P., *Valor social de leyes y autoridades* (1903); Dorado Montero, P., *Nuevos derroteros penales* (1905); Dorado Montero, P., *Los peritos médicos y la justicia criminal* (1905); and Dorado Montero, P., *De penología y criminología* (1906).

was, precisely, the substantive part of it, rather than the formal one. This open-mindedness was, usually, associated with a more abstract conception of reality, trying to see much further than what one may observe by empirical reasoning and even rationalism. That is why he was much more inclined to sociology and, specially, to the field of criminal dogmatics (given he would prepare a primitive terrain for the posterior development thereof).

His late efforts were focused on the sociological aspect of his theory. It seems that he looked forward to the unification of all sciences into sociology. But this topic was already being addressed in the Spanish doctrine, by virtue of which:

“The initiators of Sociology in Spain are very concerned as regards to the determination of the relations of the new science, especially with the Philosophy of History. Giner and Azcárate attribute to it different objectives. Dorado will, nevertheless, include the field of Philosophy of History within Sociology”.<sup>193</sup>

From his Italian experience, he got to know many authorities in the field. Yet, he very much relied on two Italian authors, namely Vaccaro and Colajanni.

On the one hand, Vaccaro<sup>194</sup> reasserted the empiricist spirit in Dorado Montero. Though utilitarianism did not lay on the central part of his theory, the grounds for it flew from empiricism. In this sense, he agreed with his Italian counterpart: “a great number of objections have been made against the utilitarian school of Bentham, which I do not respect, since they look unfounded and unfair”<sup>195</sup>.

On the other hand, Colajanni<sup>196</sup> was also relevant. Nevertheless, our author did not yearn to acknowledge the sphere of exception which the Italian admits:

“As much as we want to restrict the bond of liberty, it certainly remains uncontested [the fact that] we can infuse a certain direction to our mind”<sup>197</sup>.

Within a rampant determinism, it is tacitly accepted the existence of a small room for freewill. Dorado Montero actively opposed to such admission. He deeply criticised the supporters of the so-called eclectic Criminal law school, since when within a freewill theory one accepted a glimpse of determinism, the whole theory crumbled and fell apart. Such hatred for inconsistency on him is not new. In fact, it very much reminds

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<sup>193</sup> Blanco Rodríguez, J. A., *El pensamiento sociopolítico ...*, p. 30: “A los iniciadores de la Sociología en España les preocupa extraordinariamente determinar las relaciones de la nueva ciencia, principalmente con la Filosofía de la Historia. Giner y Azcárate le reconocen objetivos distintos. Dorado, sin embargo, englobará el campo de la Filosofía de la Historia dentro del espacio propio de la Sociología”. At the footnote of the page the author, however, clarifies the differences between the two sciences; Philosophy of History would focus on ‘the laws by means of which History developed itself’, whereas Sociology would rather focus on ‘everything relating to the essence, nature and structure, in sum, to the comprehensive total of the social organism’.

<sup>194</sup> Vaccaro, M. A., *Saggi critici di sociologia e di criminologia*, Torino: Fratelli Bocca, 1903; Vaccaro, M. A., *Genesi e funzione delle leggi penali*, Torino: Fratelli Bocca, 1908; Vaccaro, M. A., *Les bases sociologiques du droit et de l'état*, Paris: Giard & E. Brière, 1898.

<sup>195</sup> Vaccaro, M. A., *L'utilità nel Diritto penale classico*, Trani: V. Vecchi, 1891, p. 23: “Contro la scuola utilitaria del Bentham sono state fatte un gran numero di obiezioni, che non ripeto, perchè la maggior parti di esse mi sembrano infondate e ingiuste”.

<sup>196</sup> Colajanni, N., *Il Socialismo*, Catania: Filippo Tropea Editore, 1884; Colajanni, N., *La delinquenza della Sicilia e le sue cause*, Palermo: Tipografia del Giornale di Sicilia, 1885. There are more works, yet we decided not to mention them since they are not that related to the topic.

<sup>197</sup> Colajanni, N., *La Sociologia criminale*, Catania: Filippo Tropea Editore, 1899, p. 25: “Per quanto si vogliono restringere i vincoli, della libertà, rimane però indubitato, che noi possiamo imprimere una certa direzione alla nostra mente”.

of Spinoza's 'Empire within another Empire'. According to him, due to our Judaeo-Christian background, one might try to rebate this asserting the following: we can admit that God rules everything and, hence, nothing escapes to his control, but we humans are endowed of a small parcel of freewill or capacity to decide. For him, the same, aforementioned mistake again was being committed since we do not know what determines our conscience and, consequently, we think that it flows from ourselves. Spinoza will entirely defied such possibility: man cannot be in nature as a State within another State.

Be as it may, the Spaniard showed himself particularly enthusiastic about the new role that Sociology was to play in society, and he was striving to highlight its relevance, as much as to assert that "the legal norms should be established not on the basis of the 'principles of absolute justice', but on the observance of the social reality"<sup>198</sup>. And so, he finally came to the conclusion of a very well-known statement, which would later on be expressed by one of his most standing pupils: "In a distant future, Criminology will end up swallowing Criminal law"<sup>199</sup>.

Dorado Montero died in 1919 after a long and painful disease. It has often been said to be intestine cancer. As it seems, the cancer was located specifically at the duodenum and sieged the last three years of his life in a very harrowing manner<sup>200</sup>.

"I am ill. Soon, it will be one year unable to carry work of any kind. I have not been able to leave home (not even the bed), for this nor have I been able to give lectures this course. Besides, [there are] other diseases, worries and disorders in the house"<sup>201</sup>.

His ideas would, however, survive<sup>202</sup>. Immediately after, Jiménez de Asúa himself, showing devotion for his mentor, proved his faith in Criminology and in a future where the ideas of Dorado Montero, and consequently of socialism, will be the guiding norms. It was especially meritorious, despite having witnessed the fall of the Second Spanish Republic which ruined -or at least paralysed- the transition towards the Protective Law of the Criminals<sup>203</sup>.

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<sup>198</sup> Blanco Rodríguez, J. A., *El pensamiento sociopolítico ...*, p. 31: "Observa que las normas jurídicas han de establecerse no a partir de los 'principios de justicia absoluta' sino a partir de la observación de la realidad social".

<sup>199</sup> Jiménez de Asúa, L., "El derecho penal del futuro"; José Mora Guarnido (dir.), *El mundo de la posguerra*, p. 13: "En el remoto mañana la Criminología se tragaría al Derecho penal".

<sup>200</sup> Zamora Bonilla, J., Salvador Rus Rufino, S. (coords.), "Una polémica y una generación, razón histórica del 1898", *Actas del Congreso "1898, Pensamiento Político, Jurídico y Filosófico: balance de un Centenario"*, León, 10-13 de noviembre de 1998, León: Universidad de León, 1999, p. 246.

<sup>201</sup> Draft of a letter dated 16 August 1918. Cited on Boderó Cali, Edmundo René, "Pedro Dorado Montero, el desmitificador de Salamanca", *Revista Jurídica Online*, pp. 21-42, p. 40. I was not able to find it in Gredos: *FPDM. Correspondencia de Pedro Dorado Montero. General: "Estoy enfermo, pronto va a ser un año, imposibilitado para todo trabajo. No he podido salir de la casa (de la cama, apenas), ni por lo mismo, ir a clase este curso. Otras enfermedades, preocupaciones y trastornos en la casa, además"*.

<sup>202</sup> Indeed, two of his most representative works were written in the last period of his life: Dorado Montero, P., *El Derecho protector de los criminales* (1916). Furthermore, there has been discovered a posthumous work worthy to mention: Dorado Montero, P., *Naturaleza y función del derecho*.

<sup>203</sup> Roldán Cañizares, E., *Op. Cit.*, p. 330.

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