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## Ascension and decline of positivism in Argentina\*

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### Abstract

The criminological positivism reached the Argentinean coasts after Lombroso, Ferri and Garofalo exposed to the world the need to end the classic criminal law. At first, the new Italian trend was received with joy by a good part of the Argentinean penalists, but in reality, the practical application of its postulates was conspicuous by its absence. Throughout this article, we will study how criminological positivism became a reference doctrine in the Argentine legal world, and at the same time, we will explain the reasons that caused it to become nothing more than a memory around the 1930s.

### Keywords

Criminological positivism, Argentina, penal legislation, Lombroso, Moyano Gacitúa, Sebastián Soler

**Summary:** 1. Introduction: Criminal legislation as a disciplinary instrument. 2. Reception and metamorphosis of criminological positivism. 3. The impact of positivism on Argentine legislation. 4. The decline of a doctrine: positivism comes to an end in Argentina. 5. Final reflexions. Bibliographical References

### 1. Introduction: Criminal legislation as a disciplinary instrument

After the revolution of May 1810, some provinces of the former Viceroyalty of the Río de la Plata (1776-1810) fought for their independence from Spain. Seeking a new political organization, in 1816, they declared the independence of the "United Provinces of South America". However, various attempts to establish a general government based on a common written constitution (1813, 1819, and 1826) failed.<sup>1</sup> Attempts were resumed once the disputes between "unitarians" and "federalists" had expired. Thus, in 1853 the first

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<sup>1</sup> Agüero, A., & Rosso, M., "Codifying the Criminal Law in Argentina: Provincial and National Codification in the Genesis of the First Penal Code", *The Western Codification of Criminal Law*, Springer, 2018, pp. 297-322, particularly p. 299.

National Constitution was dictated, although without the participation of the province of Buenos Aires, without a doubt the most powerful of the 14 that conformed the Confederation.<sup>2</sup> This scenario produced a heated political and warlike conflict between Buenos Aires and the rest of the Confederate provinces. This conflict came to an end in 1860 with the incorporation of Buenos Aires to the Confederation and with a constitutional reform that started a strong dynamic of consolidation of the national and provincial state institutions.<sup>3</sup>

During the last decades of the 19th century, in the context of the second industrial revolution, Argentina integrated the international market as a producer of primary goods for export and as a consumer of manufactures produced in industrialized countries. The agricultural activity grew significantly, while the commercial activity intensified and the industry had an incipient development. As a result, the urban population increased significantly, providing both labour and consumption. The main local industries were linked to the food sector, mainly milk processing, wine making and baking.<sup>4</sup>

All these changes, together with the official development policies, produced a strong migratory movement. Spaniards, Italians and, to a lesser extent, English, French, Germans, Dutch, Armenians and Syrian-Lebanese settled in the country in order to give shape to the main element of the political and cultural project of the Argentinean elites. This was summarized in the phrase of Juan B. Alberdi: *Gobernar es poblar* (Ruling is populating).<sup>5</sup> However, the migratory flow did not develop as thought by the intellectuals and politicians of the Generation of 37. The migratory movement from the Old World was concentrated, much more than desired, in the main cities, especially in Buenos Aires.<sup>6</sup> These processes made the work structure more complex and heterogeneous. In a short time, the number of industrial workers, employees in commerce and services and public administration grew significantly. Also, since rural activities required labour mainly during the spring and summer, the number of seasonal workers increased significantly.<sup>7</sup> This problem also occurred in the cities, since public works, manufacturing production and personal services demanded occasional labour, which depended on the general conditions of the economy or political decisions. This scenario produced a labour market marked by the mobility of labour, which was forced to move to different points in the country with the intention of being employed throughout the year.<sup>8</sup>

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<sup>2</sup> For an overview, see Goldman, N. (dir.), *Revolución, República, Confederación. Nueva Historia Argentina*, (vol. III, 2 ed. Buenos Aires. 2005).

<sup>3</sup> Sozzo, M., “Los exóticos del crimen: inmigración, delito y criminología positivista en la Argentina (1887-1914)”, *Delito y sociedad* 20(32), 2011, pp. 19-51.

<sup>4</sup> Ortiz Bergia M. J... [et al.], *Procesos amplios, miradas locales: una historia de Córdoba entre 1880 y 1955*, 1ª Ed. Centro de Estudios históricos “Prof. Carlos S. A. Segreti”, 2015, p. 15.

<sup>5</sup> Alberdi, J. B., *Bases y puntos de partida para la organización política de la República Argentina*. Buenos Aires, “La Nueva Cultura Argentina”, 1915, Capítulo XXXI. *Continuación del mismo asunto. En América gobernar es poblar*, pp. 115-116.

<sup>6</sup> Sozzo, *Los exóticos del crimen: inmigración...*, p. 21.

<sup>7</sup> Viel Moreira L., *Las experiencias de vida en el mundo del trabajo. Los sectores populares del interior argentino (Córdoba, 1861-1914)*, Córdoba, 2005, p. 157.

<sup>8</sup> *Ibid.*, p. 159.

Thus, at the end of the 19th century, the country witnessed a process of disciplining a growing portion of workers. In order to achieve such an order, a series of regulations were issued that attempted to restrict the mobility of people and to integrate them into the labour circuit. Among the most important of these was undoubtedly the so-called "Ley de Vagos" (Vagrancy Law)<sup>9</sup> from 1883, whereby any individual over the age of 16 who did not have sufficient assets to live on would be forced to move to agricultural and livestock establishments.<sup>10</sup> The figure of vagrancy was configured in the first half of the 19th century in different provisions as a very lax and ambiguous legal figure in which a growing number of people and social practices considered harmful were added.

During this period the country experienced a great economic expansion, but the social benefits of the goods were not spread equitably, since access to them was strongly mediated by the purchasing power. This resulted in the emergence of a wide range of unsatisfied needs and multiple situations of precariousness, vulnerability and exclusion in vast sectors of society. In this way, the so-called "social issue" emerged strongly during this period, an expression that defined a vast set of social problems, of diverse gender and intensity, resulting from the processes of modernization and economic growth. The social question was a fundamental contradiction of modernisation, which revealed its limits and the risk that economic progress would lead to a complete fracture of society. Poverty became a reality for a significant portion of society and an almost permanent threat for those vulnerable to economic fluctuations because of their situation of job insecurity. More than a fixed state, it was a mobile or changing condition, into which one could fall repeatedly, combining temporary, occasional and precarious permanence in the labour market with prolonged periods of unemployment.<sup>11</sup>

The first manifestations of the social issue were not long in coming and were mainly linked to the imbalances caused by the population explosion. Many problems quickly became visible: poor housing, limited water supply and waste disposal systems, the spread of diseases and epidemics (bronchitis, pneumonia, smallpox, influenza, typhoid and tuberculosis) and an increase in so-called "social evils" such as urban crime, prostitution

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<sup>9</sup> Sedeillán, G., "Las leyes sobre vagancia: control policial y práctica judicial en el ocaso de la frontera (Tandil 1872-1881)", [On line] *Trabajos y Comunicaciones*, 2007 (32-33) (available at [http://www.fuentesmemoria.fahce.unlp.edu.ar/art\\_revistas/pr.3337/pr.3337.pdf](http://www.fuentesmemoria.fahce.unlp.edu.ar/art_revistas/pr.3337/pr.3337.pdf)); Read also, Alonso, F., Barral, M.E., Fradkin, R.O. & Perri, G., "Los vagos de la campaña bonaerense. La construcción histórica de una figura delictiva (1730-1830)", *Prohistoria: historia, políticas de la historia* 5 (2001), pp. 171-202; Casagrande, A., *Vagos, Jueces y Policías: Una Historia de la disciplina en Buenos Aires (1785-1829)*. Tesis Doctoral. Universidad de La Plata. Facultad de Humanidades y Ciencias de la Educación, 2014.

<sup>10</sup> The *conchabo* was a system of employment used in rural areas through which the owners of estancias granted the pawns a document of obligatory use –the *conchabo* card– to prove that they were under their orders. Ortiz Bergia, [et al.] (2015), *Procesos amplios...*, p. 21. Ver también González, M., *Control social en Córdoba: la papeleta de conchabo, 1772-1892: documentos para su estudio*. Centro de Estudios Históricos, Córdoba, 1994; González Alvo, L., *El tiempo de la prisión. La reforma penitenciaria en Córdoba, Santa Fe y Tucumán (1853-1946)*. Tesis Doctoral. Universidad de La Plata. Facultad de Humanidades y Ciencias de la Educación, 2019; Zamora, R., "De la 'servidumbre y clausura' al 'trabajo asalariado para la felicidad pública'. Las normativas sobre el *conchabo* en el Río de la Plata y en San Miguel de Tucumán en el siglo XVIII", *Prólogos, revista de historia, política y sociedad*, (vol. 6), Luján, 2013, pp. 15-40.

<sup>11</sup> Ortiz Bergia. [et al.], *Procesos amplios...*, p. 21.

and alcoholism, among others. Likewise, these problems were not exclusive to the city and also multiplied in rural areas.<sup>12</sup>

In such a complex society, special legislation, such as the Vagrancy law or the *conchabo*, lost ground and effectiveness. The need to have a new body of law that could contain a new heterogeneous society was quickly felt. For this reason, from the 1980s onwards, certain haste began to appear in the form of a national criminal code.

## 2. Reception and metamorphosis of criminological positivism

Since the mid-1880s some glimpses of the reception of the discourse "in the name of science" on the criminal issue can be observed from theoretical developments by Cesare Lombroso and his disciples.<sup>13</sup> Positivism began to permeate the Argentine intelligentsia during this particular period was no coincidence. From the 1880s onwards Argentina experienced one of the most notable periods of economic growth, which meant the opening up of the young country. A new world was opening for the Argentine nation, and with it came new ideas from all corners of the globe.<sup>14</sup> Thus, by 1885, Lucio Melendez<sup>15</sup> and Emilio Coni<sup>16</sup> had begun their studies of "criminal anthropology" at the insane asylum in the city of Buenos Aires.<sup>17</sup> As regards the field of law, in 1887 the chair of Criminal and Commercial Law -created in 1856- at the School of Law and Social Sciences of the University of Buenos Aires was divided, thus emancipating criminal law within the curricular space. Norberto Piñero was appointed as professor of the same subject and immediately adopted a program of the subject strongly influenced by the teachings of the *Escuela Positiva*.<sup>18</sup> In this way, the Faculty of Law of the University of Buenos Aires became the main centre for the dissemination of positivism within Argentina. Insanity and criminality emerged as two focal points of special concern from medical, legal, political and academic circles<sup>19</sup> and, in the words of Abelardo Levaggi, the Buenos Aires chair "created the intellectual climate for positivist ideas to become reality".<sup>20</sup>

Imbued with the new doctrine, the University of Buenos Aires took another step forward, creating the Society of Legal Anthropology in 1888, an institution that became a new and powerful speaker of the positivist current.<sup>21</sup> Within this society, the first works under the influence of the positivist teachings in Argentina began to see the light. Among

<sup>12</sup> *Ibid.*

<sup>13</sup> Sozzo, *Los exóticos del crimen: inmigración...*, p. 25.

<sup>14</sup> Táu Anzoátegui, V., *Las ideas jurídicas en la Argentina (siglos XIX-XX)*, Buenos Aires, Editorial Perrot, 1987, p. 96.

<sup>15</sup> Argentine physician and scientist, forerunner of forensic medicine and first professor of mental pathology at the Academy of Medicine.

<sup>16</sup> Doctor and prestigious Argentinean hygienist.

<sup>17</sup> Sozzo, *Los exóticos del crimen: inmigración...*, p. 25.

<sup>18</sup> *Ibid.*, p. 26.

<sup>19</sup> Dovio, M., "Conductas desviadas socialmente o de 'mala vida' desde el positivismo criminológico en Argentina (1902-1923)", *Historia y Perspectivas*, 2016, p. 140.

<sup>20</sup> Levaggi, A., *Historia del derecho penal argentino*, Buenos Aires, Editorial Perrot, 1978, pp. 209-210.

<sup>21</sup> *Ibid.*, p. 209.

them, it is worth mentioning texts by Norberto Piñero such as *Problemas de Criminalidad*, where he pointed out the elements that were necessary to avoid crime.<sup>22</sup> It was also important Luis Maria Drago's contribution with his text *Los hombres de presa*, where he proposed the corrective treatment of offenders, the partial elimination of professional criminals, and the absolute and perpetual elimination of incorrigible criminals.<sup>23</sup> Antonio Dellepiane contributed, from his perspective, with his work *The Causes of Crime*, where he made an identification between criminality and immigration.<sup>24</sup>

The work of all of them was clearly influenced by the thoughts of Lombroso, Ferri and Spencer and the French school,<sup>25</sup> while Spanish positivists were not even taken in consideration.<sup>26</sup> In the meantime, Argentine authors and thinkers were recognized and valued in international academic circles. Juan Vucetich, for example, revolutionized identification techniques with his contribution to the creation of dactyloscopic records.<sup>27</sup> However, the pioneer in terms of scientific work of criminological positivism in Argentina was José María Ramos Mejía with his text *Las neurosis de los hombres celebres en la historia argentina*, published between 1878 and 1882.<sup>28</sup>

The arduous task of discussing the theories of positivist criminology in Argentina led to the appearance of two new focal points of dissemination. The first was the creation of the legal journal *Modern Criminology*, which focused on the publication of positivist works between 1898 and 1902, founded by the Italian Pietro Gori, exiled in Argentina for political reasons. The second focus of dissemination was in the academic field. Thus, the Universities of La Plata, Buenos Aires and Córdoba were the main centres for the dissemination of the new criminological guidelines. In La Plata, the positivist José Peco created the Institute of Criminology, where the works of many positivist authors were elaborated and published and where many students were trained under these teachings.<sup>29</sup> At the University of Cordoba, the "modernization" of the curriculum began in 1886 with the arrival of Professor Cornelio Moyano Gacitúa to the Chair of Criminal Law. He began,

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<sup>22</sup> Piñero, N., *Problemas de criminalidad*. Sobre las causas de las criminalidad, Compañía Sudamericana de Billetes de Banco, Buenos Aires, 1888.

<sup>23</sup> Drago, L.M., *Los hombres de presa*, La cultura argentina, Buenos Aires, 1888.

<sup>24</sup> Dellepiane, A. *Las causas del delito*, Buenos Aires, Imprenta de Pablo Coni. 1892.

<sup>25</sup> Caimari, L. *Apenas un delincuente. Crimen, castigo y cultura en la Argentina, 1880-1955*, Buenos Aires, Editorial Siglo XXI, 2004, p. 91.

<sup>26</sup> It is true that in the early stages of positivism we can only think of a Spanish jurist who was close enough to the Italian trend to be considered positivist. This is Pedro Dorado Montero, who was never taken into consideration by the Argentinean penologists. In fact, over the years the situation remained unchanged, as can be deduced from the study of the criminal law program studied at the University of La Plata in 1939. If the trace the contributions of Spanish positivists studied in Argentine classrooms wants to be student, the researcher will only find some texts written by Luis Jiménez de Asúa (published in the first two decades of the 20th century), but no trace of works developed by Pedro Dorado Montero or other Spanish criminalists can be found. See Frías Caballero, J. *Apuntes de derecho penal. Parte general*, La Plata, Centro de Estudiantes de derecho, 1939, p. 3.

<sup>27</sup> Gonzales Alvo, L., La Recepción de las nuevas ideas penales y criminológicas en Tucumán (1880-1916), *Revista de Historia del Derecho*, Sección Investigaciones, N° 43, INHIDE, Buenos Aires, enero-junio, pp. 64-101, 2012. p. 72.

<sup>28</sup> Idem. p. 71

<sup>29</sup> Jiménez de Asúa, L. *Tratado de Derecho penal*, Tomo II, Buenos Aires, Editorial Losada, 1963, pp. 223-224.

from his conviction about positivism, to modernize his chair through the implementation of a study program focused on Italian positivism. However, it took some years to apply these innovations, as he was only able to include positivist studies in 1890, four years after his appointment.

The explanation for this delay is due to the fact that Moyano Gacitúa did not fully embrace criminological positivism, refusing to accept the deterministic presupposition, mainly because of the influence of French positivist authors such as Gabriel Tarde: "In men in general, certain qualities must be assumed: to be aware of their acts, to be voluntary, to be healthy, to have their body and spirit in a normal state, because this is the truth of the facts. For these reasons, criminal laws assume criminal imputability, which means that one has proceeded with will and knowledge, whenever an act classified and punished by law has been executed".<sup>30</sup> Moyano Gacitúa's successor was Julio Rodríguez de la Torre, also a positivist, although he did not hesitate to reduce, without giving up, the intensity of the biological factor.<sup>31</sup> In this way, it can be clearly seen that the teaching of positivist ideas at the University of Córdoba was nuanced from the beginning, putting the focus, in the words of Rodríguez de la Torre, on the conception of criminal science as "the broad study of crime: of the repression of the delinquent and his responsibility: that is, of the individual causes (anthropology) and social causes (sociology) that produce crime and also of those that can diminish or reduce it (prevention). The individual ones will include the biology or criminal anthropology and the social ones all the factors of general order, economic, environmental, etc."<sup>32</sup>

This initial rejection of the deterministic component shown by Moyano Gacitúa opened a fertile path for sociological positivism in Argentina. A new generation of positivists emerged, and a large number of publications, far from atavism and the idea of the born criminal, were written. Professors such as Jorge Coll and Juan P. Ramos (who went so far as to say that he conceived Ferri as a "luminous symbol of Italy's eternal youth")<sup>33</sup> bet on the importance of sociological elements in the commission of the crime and focused their attention on the existence of dangerous states. Eusebio Gómez also stood out within this new generation, when he became the first Argentine criminal lawyer to draft a criminal law treaty based entirely on positivist foundations.<sup>34</sup> Finally, it is also necessary to refer to José Ingenieros, one of the referents of positivism in Argentina, who stood out, from his trench of psychiatry, for adhering to both the method and the matrix ideas of positivism.<sup>35</sup>

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<sup>30</sup> Moyano Gacitúa, C. *Curso de Ciencia Criminal y Derecho Penal Argentino*, Buenos Aires, Félix Lajouane editor, 1899, p. 74

<sup>31</sup> Cesano, J. *Élites, redes intelectuales y recepción en la cultura jurídico penal de Córdoba (1990-1950)*, Córdoba, Ediciones del copista, 2011, p. 30.

<sup>32</sup> Rodríguez de la Torre, J. *Derecho penal. Lecciones del profesor Julio Rodríguez de la Torre*. De acuerdo al programa oficial de la Facultad de Derecho y Ciencias Sociales de la Universidad Nacional de Córdoba (Curso de 1924), *Revista de la Universidad Nacional de Córdoba*, año XI, n° 4-5-6, abril, mayo y junio de 1924, p. 5.

<sup>33</sup> Ramos, J. P. "La defensa social contra el delito" (Conferencia leída en el Instituto Popular de Conferencias el 31 de mayo de 1929), en *Discursos Académicos*, t. III, 2ª parte, Buenos Aires, 1929, pp. 1045-1065.

<sup>34</sup> Gómez, E., *Tratado de derecho penal*, Buenos Aires, Compañía Argentina de Editores, 1939.

<sup>35</sup> González Albo, *La recepción de las nuevas ideas penales...*, p. 8.

As we can see, the ideas of positivist criminology produced in the European context quickly spread and were debated in the field of medicine and law, giving rise to a rapid process of cultural importation of these specific ways of thinking about the criminal issue.<sup>36</sup> Positivist criminology quickly became a discourse of authority, both in academia and in politics. However, the import of these views was not absolute. They were nuanced according to the readings that Argentine intellectuals made of them. Many postulates were accepted without discussion, while others were reformed and even suppressed from both academic and political discourse.

In advance of conclusions we can affirm, following the majority opinion of recent historiography, that the contribution of Argentine criminological positivism was manifested in an expansion of the studies of foreign criminals initiated by the French and Italian schools. The central concern of Argentine criminalistics at the end of the 19th and beginning of the 20th century was the immigrant and his social insertion. One of the transfigurations implemented by positivist criminology in its importation to the Argentine context was the way in which its local translators introduced in their own texts some views about the latent link between immigration and crime, thus introducing a discussion that had not been important at the time of shaping the European discourse, but that, over time, would acquire relevance in this scenario by responding to the political and cultural concerns of local elites in the face of the set of changes that were facing social life and to which we have already referred.<sup>37</sup>

In this sense, it is very common to find in historiographic texts dealing with the criminal issue in Argentina in the period between 1880 and 1915 a generic reference to what positivist criminologists highlighted in their interpretation of the increase in the crime rate, the casual link between crime and immigration.<sup>38</sup> Authors like Piñero or Gomez pointed to immigrants as "a criminal element".<sup>39</sup> In the same vein, Lila Caimari emphasized that "the premise of the foreign origin of urban criminals became a foundation of the criminological common sense of specialists and officials".<sup>40</sup>

On the other hand, we do not want to overlook the presence of positivism in forensic practice, as we understand that it is an important element in judging whether or not the doctrine is implemented. But at this point, we find that we can only count on a few isolated cases, such as that of the Ukrainian anarchist Simon Radowitzky.<sup>41</sup> Radowitzky murdered the Buenos Aires police chief by placing a bomb, an action that earned him the death sentence. However, a relative who travelled from Europe carried documents showing that Radowitzky was a minor, so that the death sentence was replaced by confinement in the Ushuaia prison. What is relevant in this case is that the judge's arguments were heavily

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<sup>36</sup> Sozzo, *Los exóticos del crimen: inmigración...*, p. 27.

<sup>37</sup> Sozzo, *Los exóticos del crimen: inmigración...*, pp. 29-30.

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

<sup>39</sup> Blackwelder, J.K. and Johnson, L.L. "Estadística Criminal y Acción Policial en Buenos Aires, 1887-1914", en *Desarrollo Económico*, 93, Vol. 24, 1984, pp. 109-122.

<sup>40</sup> Caimari, *Apenas un delincuente...*, p. 92.

<sup>41</sup> Transcript of the case of Simon Radowitzky (information obtained from the analysis of the court case), 16 November 1909 Federal Police of Buenos Aires, pp. 1-20.

impregnated by criminological positivism, using phrases such as the following: "Perpetrating murder with the ferocity of homo hominis lupus"; "greater police vigilance towards immigration is needed to be able to identify the dangerous before they disembark"; and "the author has morphological characters that show the stigmata of the criminal".

These judicial cases, in addition to being very scarce, took place mainly in Buenos Aires, La Plata and Córdoba, where there were Universities that encouraged the expansion of positivism, reaching some judges, as in the case we have dealt with, who applied positivist ideas in the trials. This fact overtakes us, in turn, that positivism only expanded among the elites of the big Argentine cities, being its penetration in places such as Tucumán, Salta or Santiago del Estero very complicated. In these places, where there were no Universities at that time, positivism never arrived with force, being impossible to trace positivist traces in laws or institutions that were outside the main cities. Even there, however, we have already seen that the legislative and judicial reflection was also minimal.

But before continuing with the research that we are developing here, we understand that it is necessary to raise some theoretical premises that allow us to understand why positivism suffered this process of metamorphosis when stepping on Argentine soil. And for that, we are going to rely on two theoretical constructions, separated in time, but with some points in common that allow us to better understand the isolated event.

The first of these is the "norms of culture", a construction devised by Max Ernt Mayer, but generalized in its use by Luis Jiménez de Asúa, who first took it on board in the 1920s when he dealt with the legality or illegality of abortion, and which he later did not hesitate to maintain throughout his dogmatic constructions. For the German professor, observing the cultural norms of a given society made it possible to determine which behaviours could be considered anti-legal.<sup>42</sup> Thus, taking the matter to the reception of new legal doctrines, through the respect of cultural norms, an insurmountable wall was raised before any legal novelty, in this case related to criminal law, which could reach the coasts of a country. This happened with criminological positivism, which arrived in Argentina with great force, but did not end up taking root in Argentine society. It is undeniable that certain jurists were attracted by it, but their frontal clash with the cultural norms of that Argentine society prevented the ideas of Ferri, Lombroso and Garófalo from being imposed as such, hence the metamorphosis of criminological positivism that we have mentioned above. A metamorphosis that was nothing more than the adaptation of the new Italian criminal current to the guiding principles of Argentine society, specifically to its cultural norms.

The second of the theoretical or methodological constructions that we propose is that of cultural translation, elaborated by Lena Foljanty in 2015. The German professor, denying the possibility of mere transplantation or legal reception, elaborated the construction of cultural translation, where, just by reading the title, we find strong connections with the idea proposed by Mayer and defended by Jiménez de Asúa. Foljanty's proposal is based on the idea that the Law is not only composed of norms, institutions or

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<sup>42</sup> Roldán Cañizares, E., *Luis Jiménez de Asúa. Derecho penal, República, exilio*, Madrid, Dykinson, 2019, p. 161.

ideas (if this were so, the transplantation of foreign norms or currents of thought would not pose any difficulty), but also takes as its own the structures of legal thought that are rooted in tradition<sup>43</sup> (and consequently, in society itself and its culture). If we take into account what Lena Foljanty recently said, and Max Ernst Mayer about a century ago, we reach the same idea: it is undeniable that positivism arrived in Argentina with a force that seemed unbreakable, but it faced the barriers of cultural norms, and the fact that the Law as an idea went beyond the formality of norms and institutions.<sup>44</sup>

### 3. The impact of positivism on Argentine legislation

So far we have focused on the influence of positivism in the intellectual and university environment, being undeniable the importance that the Italian current acquired soon after setting foot in the Rio de la Plata. However, the expansion of ideas among privileged minds is of no use if they do not find accommodation in legal texts. For this reason we understand that a study of the different penal codes, as well as of the projects of those codes that did not come to light, would allow us to glimpse more clearly the impact that positivism had, not only on the Argentine intelligentsia, but also on its legal system.

When Lombroso's works arrived in Argentina in 1880, there was a draft of Penal Code, known as *Proyecto Tejedor*, and named after its creator. This project had been created in 1867, and after having been sent to the corresponding Parliamentary Commission for study and evaluation, the latter decided to create a completely new project in 1881 (inspired by the Bavarian code of 1812 and the Spanish code of 1850) that did not get anywhere either, so that the work of Tejedor was for the moment suspended.<sup>45</sup>

Some years later, concretely in 1886, a National Criminal Code was drafted inspired by the Tejedor Project, and came into force in 1887. This code did not have any contribution of a positivist nature, despite the fact that many modifications were made to the original project in a period in which positivism already had great strength within the country.<sup>46</sup> It is worthy to remark that, following this idea of absence of positivist ideas, there was another project to reform the Penal Code in 1891,<sup>47</sup> which also did not have any

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<sup>43</sup> Foljanty, L., "Legal transfers as processes of cultural translations: On the consequences of a metaphor", *Max Planck Institute for European Legal History Research Paper*, Series No. 2015-09, p. 6.

<sup>44</sup> In the same line but linked to the French space. See Anitua, G. I., *Historia de los pensamientos criminológicos*, Buenos Aires, 2005, pp. 191 ss. This author highlights the particularities of French criminological positivism (v.gr. Lacassagne), whose authors would criticize "the first Lombroso and his predominant aetiological individualism, more physical than psychic and in any case individual).

<sup>45</sup> Jiménez de Asúa, L. *Tratado de Derecho penal*, Tomo II, Buenos Aires, Editorial Losada, 1963, pp. 1014-1021.

<sup>46</sup> Rosso, M., *Codificación Penal Provincial. La aplicación del Código Penal de la provincia de Córdoba. (1867-1886)*, Tesis doctoral. UNC. Córdoba, 2019. Ver especialmente Capítulo V. "Entre la forma y el fondo. La codificación penal nacional y los códigos de procedimiento". pp. 117-135.

<sup>47</sup> As noted in the body of the text, in the 1891 draft criminal code there was no article or paragraph that drank from positivism. However, in view of the positivist atmosphere that was already in place by then, Abelardo Levaggi has pointed out that positivism had its influence on the codes and projects that were drawn up between 1891 and 1922). See Levaggi, A. *Historia del derecho penal argentino*, Buenos Aires, Editorial Perrot, p. 211.

positivist novelty, and of course, was never approved. Nevertheless, we can see the first change regarding the influence of positivism in 1895. A new project was proposed, in which the influence of positivism could be observed. For the first time the institutions of conditional imprisonment and parole appeared. However, as with the 1891 project, it was not successful either.<sup>48</sup>

A new project was carried out in 1906. This one was elaborated by a commission formed by eminently positivist members, highlighting the figure of Moyano Gacitúa, to whom we already referred previously, or José Ramos Mejía, who was a neurologist. This project included the concept of parole and conditional imprisonment, suppression of the death penalty, substitution of minor penalties by a fine, taking into account personal circumstances when determining the penalty, etc. It is true that the 1906's project was never promulgated, but, between 1916 and 1917 a new project was elaborated based on the previous project of 1906. This one went further than the previous ones, including the creation of special establishments for women and minors, security measures for non-imputable dangers, post-delictual dangerousness, etc. However, this project was not published. The positivist ideas were there, ready to be used, but they never got into the code.<sup>49</sup>

More than fifteen years passed and the Penal Code of 1921, enacted in 1922, came to life. This code, which was expected to be openly positivist, presented such a timid and attenuated positivist tendency that its true character was eclectic. In fact, although it included institutions such as parole and conditional sentence,<sup>50</sup> professors such as Juan P. Ramos or José Peco in Argentina, and Jiménez de Asúa in Spain, harshly criticized the absence of positivism. In this way, Jiménez de Asúa stated that it was “a timid document of the political-criminal tendency bordering on neoclassicism, whose technical construction, despite its many defects, is admirable”. But why do they say it was not a positivist code? There are several reasons that can be used: it didn't accept the dangerous state, there was a shortage of typology of sanctions, so the individualization of the penalty was not allowed, and it did not accept the existence of an indeterminate sentence. Taking into account his last reason, it is necessary to remember that this code had some small references to positivism that are nothing but anecdotal. While the project was being elaborated, Ferri's 1921 project came to light, which, instead of using the term "mitigating or aggravating circumstances", used the term "circumstances of greater or lesser dangerousness". These words were copied by the Argentine commissioners, who included them in the code being the only reference to the dangerousness within the Argentine code of 1921. This Code, by the way, is still in force today. It is also necessary to add that, in the face of criticism, a Commission was established to draft a law on the dangerous state with the aim of adhering it to the code. There were two attempts, in 1924 and 1926, but none came to fruition.<sup>51</sup>

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<sup>48</sup> Jiménez de Asúa, *Tratado de Derecho penal...*, pp. 1021-1032.

<sup>49</sup> *Ibid.*, pp. 1037-1050.

<sup>50</sup> Núñez, J., “Algunos comentarios acerca del desarrollo y límites del positivismo criminológico en la Argentina (1903-1927)”, *Horizontes y convergencias. Lecturas Históricas y Antropológicas sobre el Derecho*, 1, 2009, p. 10.

<sup>51</sup> Jiménez de Asúa, L., *El código penal argentino y los recientes proyectos complementarios ante las modernas direcciones del derecho penal*, Madrid, Reus, 1928, pp. 224-225 y 290-297.

We have already said that this Penal Code from 1922 is still in force, but there were two more projects that we think are necessary to highlight due to its relation with positivism. In 1937 there was another positivist project of penal code, elaborated by professors Jorge Coll and Eusebio Gómez. This went beyond what was proposed in the projects of 1906 and 1916, but it was not even discussed. Finally, in 1941, José Peco made a draft of a new penal code, but this was already far from positivism, being clearly a neoclassical text. In a context in which Sebastián Soler had been attacking positivism for years (a context that will be developed in further pages), José Peco, who had been openly positivist, distanced himself from the Italian trend because he understood that positivism could be dangerous for the rights and freedoms of citizens. The positivism was gone, and with it, any possible influence on criminal legislation.<sup>52</sup>

#### 4. The decline of a doctrine: positivism comes to an end in Argentina

Positivism did not purely triumph anywhere in the world, not even in Italy, and therefore, it also lost strength in Argentina, where one of its most important defenders, Eusebio Gómez, had suffered great consternation upon learning of Enrico Ferri's conversion to fascism.<sup>53</sup> It was at this point when the figure of Sebastián Soler, holder of the Criminal Law Chair of Córdoba after Pablo Mariconde, emerged. In 1929 he began to openly criticize the idea of the dangerous State, by means of the second edition of a work that he had presented in 1926 on the occasion of an open competition to cover the chair of Criminal Law at the National University of Córdoba. The text presented in 1926 entitled *The intervention of the state in pre-dangerousness*, had a new edition in 1929 which was entitled *Exposure and criticism of the dangerous state*.<sup>54</sup> A year later, Soler would take up again the criticism to the pre-offense dangerousness on the occasion of a conference given at the Universidad Nacional del Litoral on July 12th 1930. There he would strongly charge against the burden of insecurity that the use of the notion of dangerousness brought with it and the consequent threat to civil liberties.<sup>55</sup> In 1940, with the publication of his work *Argentine Criminal Law*, he openly advocated the end of positivism.<sup>56</sup> The final criticism was based on the consideration that, given the political, cultural and sociological circumstances, it would be impossible to implement positivist measures without diminishing individual rights and guarantees (a position also defended by Luis Jiménez de Asúa in Spain).

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<sup>52</sup> Jiménez de Asúa, *Tratado de Derecho penal...*, pp. 1064-1073.

<sup>53</sup> Jiménez de Asúa, L., "Evolución política y derecho penal. Carta al maestro Enrique Ferri", *La Prensa*, 14 de marzo de 1927, p. 14.

<sup>54</sup> Published in Buenos Aires under the editorial seal *Valerio Abeledo Editor*. Cesano, J. D. "Sebastián Soler, la crítica al positivismo criminológico y el significado de su derecho penal argentino: saberes jurídicos y contextos intelectuales. Una aproximación desde la historia de las ideas." *Cuadernos de historia*, (20), 2010, pp. 89-114. P. 96

<sup>55</sup> Soler, S., *Observaciones crítica al positivismo penal*, Universidad Nacional del Litoral, Santa Fe, 1932.

<sup>56</sup> Jiménez de Asúa, L., "El Derecho penal argentino, por Sebastián Soler", *El Criminalista*, 1947, Tomo VI, p. 395.

Therefore, Sebastián Soler, who emerged as the resistance to the hegemonic conception of criminal law, caused Argentine criminal law to begin to move away from positivism and begin to look at criminal dogmatic, understanding it as the indispensable instrument for guaranteeing rights.<sup>57</sup> In this way, when Soler explained in the prologue to his Argentine criminal law that he intended to carry out the dogmatic reconstruction of the law, he was referring to it in a strict sense, without giving room to supralegal conceptions, making it clear again on several occasions throughout the work. In this way, similarly as how positivism began to expand from the University, it began to expand the current that defended the definitive defenestration of positivism.

In general, among the central ideas that led Soler to move away from positivism we can name the Program of the Course of Criminal Law of Francisco Carrara, and within the logic of the Italian author, the idea of crime as a legal entity. No less important was the incidence of the German jurist Ernst von Beling, whose *Derecho penal* was translated by Soler. The German master was inspired by Soler to build his systematic conception on the elements of the notion of crime. Soler accuses this influence by distinguishing precisely between action as external behaviour, type as a logical-conceptual element, anti-juridicity as an objective evaluation and guilt as the psychological relationship of the author with his act. The importance of Luis Jiménez de Asúa in the formation of Solerian thought cannot be overlooked. In 1925 the Spanish master gave a series of conferences at the National University of Cordoba where he introduced the concepts of the legal theory of crime according to the German elaborations, Soler participated in each of them.<sup>58</sup>

This break with the basic assumptions of criminological positivism did not crystallize immediately, but took some time to take hold. In fact, during the years following the appearance of *The State's Intervention in Pre-Delict Danger* (1926), positivist ideas remained.<sup>59</sup> Finally, the postulates of criminological positivism ended up collapsing due to the prevalence of a renewal that became a natural consequence of the absence of philosophical and methodical postulates by the local positivists, which allowed them to face their defence against the scientific hurricane of the new German criminal science coming from Córdoba.<sup>60</sup>

## 5. Final reflexions

Positivism ended up disappearing in Argentina. The passing of the years and the impossibility of applying a truly positivist system caused a decrease in the support of the Italian doctrine in Argentina, until it practically disappeared. Therefore, can it be said that

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<sup>57</sup> Soler, S., *Derecho penal Argentino* (1940), Tomo I, Buenos Aires, Tipográfica Editora Argentina, 1922, pp. IX, 183-186, 405-407 y 462-463.

<sup>58</sup> Cesano, "Sebastián Soler, la crítica al positivismo criminológico...", pp. 104-105.

<sup>59</sup> Even after 1955, within the scope of the University of Buenos Aires, there were some chairs that responded to that old scientific orientation, such as Riestra or Laplaza. Bacigalupo, E. "Welzel y la generación argentina del finalismo", in Hirsch H., Mir J., Donna E., (directores), *Hans Welzel en el pensamiento penal de la modernidad*, Rubinzal-Culzoni Editores. Santa Fe, 2005, p. 20.

<sup>60</sup> Confr. Bacigalupo, "Welzel y la generación...", p. 20. Citado por Cesano, "Sebastián Soler, la crítica al positivismo criminológico... cit, p. 112.

positivism had no real impact in Argentina during the period in which it had its greatest radiance? The truth is that, as we have already explained, the legislative impact was practically nil, although we can find some contributions in the scope of the prison reform.<sup>61</sup> But following the line that we commented previously regarding the difficulty of the expansion of positivist ideas to other cities besides Buenos Aires, Cordoba or La Plata, the few positivist penitentiary reforms that took place in Argentina took place in the National Penitentiary of Buenos Aires. There, an Institute of Criminology, annexed to the Penitentiary and directed by José Ingenieros, sought rehabilitation based on individualized treatment, education and moral recovery of the delinquent. But, anyway, we cannot say that that the penitentiary reforms applied under the light of positivism were applied in the whole country.

Considering what has been presented so far, it is clear that positivism spread throughout Argentina thanks to the role of the University, but we must ask ourselves the following question: Did positivism in Argentina triumph to the point of transforming criminal law and Argentine society itself? The truth is that it did not. This obeyed to varied reasons.

In many cases the reception of the positivist ideas was far from pleasant, being critical in most of the cases. This fact even took place in the early days of positivism, when adherence was more enthusiastic. For example, Luis María Drago asserted the difficulty of abandoning the idea of free will. Dellepiane said that the theory of crime as atavistic regression was dead and buried. And of course, as we mentioned before, later positivists such as Moyano Gacitúa or Eusebio Gómez rejected the whole biological concept of positivism.

What is important to highlight here is that this crack opened by these professors, who rather than adhering to positivism, adhered to critical positivism, opened the way for new penologists to begin to oppose, for the first time in many years, the positivist current.

We are talking about a context in which positivism has lost strength in the world and in which Argentine authors such as Eusebio Gómez had suffered great consternation upon learning of Enrico Ferri's conversion to fascism. Besides, it is necessary to point out that the mainstream of the criminal doctrine rejected with some forcefulness the positivist current, so that it never had real options to be implemented legislatively. It was at this point when the figure of Sebastián Soler, holder of the Criminal Law Chair of Córdoba after Pablo Mariconde, emerged. In 1929 he began to openly criticize the idea of the dangerous State, and in 1940, with the publication of his work *Derecho penal argentino*, he openly advocated the end of positivism. The definitive criticism was based on the consideration that, taking into account the political, cultural and sociological circumstances, it would be impossible to apply positivist measures without diminishing individual rights and guarantees (a position also defended by Luis Jiménez de Asúa in Spain). Therefore,

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<sup>61</sup> On this matter, see Salvatore, R., "On the emergence of the medical legal status in Argentina (1890-1940)", *Estudios sociales*, 11(20), 2001, pp. 81-114. On the same idea, Levaggi, "Impacto que produjo en la ciencia penal argentina la presencia de Enrico Ferri", *El Derecho en red*, 2006.

Sebastián Soler, who emerged as the resistance to the hegemonic conception of criminal law, caused Argentine criminal law to begin to move away from positivism and begin to look at criminal dogmatic, understanding it as the indispensable instrument for guaranteeing rights. In this way, similarly as how positivism began to expand from the University, it began to expand the current that defended the definitive defenestration of positivism.

If we try to trace the reasons that led to the failure of positivism in Argentina, beyond the rejection of some authors and the critical reception expressed by others, there is a third obvious reason: the absence of a reflection of positivist outlooks in Argentine legislation. The key lies in the fact that positivism developed within the limits of the Argentine academic world, but never left the classes and libraries, so that it was unable to penetrate the Argentine parliament. In a country where the main penologists were positivists, one would expect a reflection of positivist ideas in legislation, but nothing could be further from the truth.

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