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## **A frantic mayfly at the turn of the century: The positivist movement and Portuguese criminal law\***

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For Professor António Hespanha, *in memoriam*

### **Abstract**

This chapter seeks to provide a general overview of the evolution of Portuguese criminal law over a century (1822-1936), from the perspective of the reception of positivism. For this purpose, the authors present the state of play around 1880 and the influence of liberalism and correctionalism on the paradigm in force. Then, the influence of positivism on criminal law is examined on three levels: through the research and practice of scientists (in particular, doctors and alienists); through the theory and teaching of criminal law (in particular, at the University); and through legislative and institutional action in the field of criminal justice (in particular, in the enforcement of sanctions). The authors use various documents and writings on alienism, prisons and criminal matters from Portuguese scholars and stakeholders of the 19th-century. The text concludes with an assessment of the impact of positivism on Portuguese criminal law.

### **Keywords**

Legal history – Liberalism – Krausism – Abolitionism – Classical School – Special prevention – Positivism – Scuola Positiva – Modern School – Socialist School – Lombroso – Principle of legality – Presumption of innocence – Dangerous offenders – Insane offenders – Anarchists – Penitentiary system – Prisons – Alienists – Experts in the criminal procedure – Security measures – Prisons – Monism and dualism

**Summary:** 1. The century before the surge of positivism: 1.1. The heritage of the Enlightenment and political instability (1786-1853); 1.1.1. Mello Freire and the transition to liberalism; 1.1.2. The consolidation of liberalism: Basílio Sousa Pinto; 1.1.3. The consolidation of liberalism (cont.): Silvestre Pinheiro Ferreira; 1.2. In the anti-chamber of positivism: the Krausist movement and its reflection on the criminal law; 1.2.1. In between the Schools; 1.2.2. Vicente Ferrer Neto Paiva and the reception of Krausism; 1.2.3. Krausism, organicism and the criminal law: Levy Maria Jordão; 1.2.4. Ayres de Gouveia and the first “symptoms” of positivism; 1.2.5. The meaning of Krausism for the reception of Positivism in the criminal law; 2. Science and the implementation of the positivist program in criminal justice: doctors, alienists and anthropologists. 2.1. The first clashes; 2.2. Crime as an object of study for positive science; 2.3. A few critical voices; 2.4. Science and policy-making in the area of criminal justice; 3. Positivism and the theory of the criminal law: academic, ideological and political clashes. 3.1. Setting the scene; 3.2. The first appearance of positivism in Portuguese criminal law: Manuel Emygdio Garcia; 3.3. Henriques da Silva: the opening to modernity in the framework of the Classical School; 3.4. The original (and underestimated) work of Affonso Costa: in the intersection between schools and socialism; 3.5. Full-fledged positivism: António Castello Branco and Caeiro da Matta; 3.6. The beginning of the end: the damning critique of positivism by Paulo Merêa; 3.7.

A brief assessment; 4. Positivism and criminal justice (esp. the enforcement of sanctions). 4.1. The liberal revolution and the claims for prison reform; 4.2. The “New Penal Reform” (1884-86) and its disregard of positivism; 4.3. Prisons: the tension between traditional correctionalism and the modern approach; 4.4. Social defense in Portuguese criminal law; 5. Conclusion. Bibliographical References

## 1. The century before the surge of positivism

The 19th century, in Portugal as elsewhere, was a time of both *consolidation* and *innovation*. The first half of the century was, in part, a period of restatement and development of the achievements of the Enlightenment, albeit conditioned by political vicissitudes: the French invasions (1807-1811) and the displacement of the King and the Royal Court to Brazil (1807), followed by the liberal revolution (1820) and the ensuing civil war for dynastic succession (1832-1834). The latter was caused by the difficult birth of the liberal program, which brought by the first Constitution (1822) and the Constitutional Charter (1826)<sup>1</sup>. The second half of the 19th century shows some lines of continuity with the past, within a framework of economic and industrial development, but was also marked by important legal reforms (namely, the Penal Code of 1852<sup>2</sup>, the Civil Code of 1867, the draft penal code of 1861-64, the abolition of the death penalty (1867) and life imprisonment (1884), the New Penal Reform of 1884-86) – and the surge of the positivist movement, in several domains.

### 1.1. The heritage of the Enlightenment and political instability (1786-1853)

#### 1.1.1. Mello Freire and the transition to liberalism

In the realm of the criminal law, a significant part of the first half of the 19th century was under the authoritative influence of Pascoal de Mello Freire (1738-1798), whose discourse was unique, due to the clarity and accuracy of his opinions, together with how he has successfully reorganised the multiplicity of sources in the penal system of the *Ancien Régime*. His invaluable contribution to the development of Portuguese

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<sup>1</sup> For a general overview of this historical period, see Carvalho, A. M. “Conspecto histórico-social”, *Jurisconsultos Portugueses do século XIX*, (J. P. Loureiro, dir.), vol. I, Lisboa: Edição do Conselho Geral da Ordem dos Advogados, 1947, pp. 117-149. Specifically on the University in the same period, see Merêa, P., “O ensino do Direito”, *ibid.*, pp. 149 ff.; and, on the judicial system, Loureiro, J. P. “Defeituosa organização judiciária”, *ibid.*, pp. 191 ff., and Marques, T. P., *Crime e Castigo no Liberalismo em Portugal*, Lisboa: Livros Horizonte, 2005, pp. 19 ff., pp. 41 ff. and pp. 75 ff.

<sup>2</sup> See Pinto, F. L. C. / Caeiro, P., “The influence of the French Penal Code of 1810 over the ‘general part’ of the Portuguese Penal Code of 1852: the visible and the invisible”, *The Western Codification of Criminal Law. A Revision of the Myth of its Predominant French Influence* (A. Masferrer, ed.), Springer, 2018, pp. 115-130.

criminal law included the drafting of a Penal Code presented early to Queen D. Maria I, in 1786<sup>3</sup>, which however was never passed<sup>4</sup>.

Mello Freire's theory established a synthesis between French, English and Italian contractualism and the methodological developments of German, Dutch and Italian jurationalism. The former led to a utilitarian and preventative concept of punishment: penalties are established not so much to chastise, but to prevent crimes, which allowed, among other aspects, to challenge the legitimacy of useless penalties. The second led to a renewed reading of the sources and the rationalization of criminalisation, i.e., the revision of the content of the *facti-species* contained in the Ordinances in the light of clear and reliable methodological guidelines, thus countering the practitioners' casuistry and limiting the scope of judicial discretion<sup>5</sup>.

Mello Freire's concept of crime was composed of two elements: the 'spontaneity' of the perpetration (which is crucial for the imputation of the offence) and a material element, consisting of the damage caused by the offence: the criminal nature of the act depends on it being 'harmful to society or the individuals'. The former reflected an (unconfessed) continuity with the principle of "precedent guilt" (*propter peccatum praeteritum*) fine-tuned by the Iberian neo-scholastic<sup>6</sup>, while the latter assumed a critical vocation over the legislative decision, because where no harm is done to society or individuals, no act should be deemed of a criminal nature. This allowed Mello Freire to consider many of the existing ordinances abrogated, even in the absence of explicit intervention by the legislator<sup>7</sup>.

### 1.1.2. The consolidation of liberalism: Basílio Sousa Pinto

The extraordinary work of Mello Freire will enjoy some apparent continuity through the teaching of Basílio Alberto de Sousa Pinto (1793-1881), liberal partisan and professor at the Faculty of Law of the University of Coimbra, during a significant part of the 19th century. In the three sets of lectures he has published<sup>8</sup>, Sousa Pinto quotes and follows Mello Freire's '*Compendium*' in several instances. However, in substance, he actually distances himself from the latter's doctrine, and even praises one of Mello Freire's most ferocious critics (António Ribeiro dos Santos). Sousa Pinto deals separately with the theory of crime and the theory of punishment. In the former, he develops the elements of Mello Freire's definition of the offence, presenting in more

<sup>3</sup> For an introduction to Mello Freire and his relevance for the Portuguese Enlightenment, see Hespanha, A. M., «Da «Justitia» à «Disciplina». Textos, poder e política penal no Antigo Regime», *Estudos em Homenagem ao Prof. Doutor Eduardo Correia*, Volume II, Coimbra, número especial do Boletim da Faculdade de Direito, 1984, pp. 138 ff.

<sup>4</sup> See Pinto / Caeiro, "The influence of the French Penal Code...", pp. 116 ff.

<sup>5</sup> In detail, Hespanha, A. M., *A Evolução da Doutrina e do Ensino do Direito Penal em Portugal*, c. 1800-c.1910, off-print from *Quaderni Fiorentini* (Milano, Giuffrè) 36 (2007), pp. 431 ff.; Palma, M. F., "Do sentido histórico do ensino do Direito Penal na Universidade Portuguesa à actual questão metodológica", *Revista Portuguesa de Ciência Criminal* 9 (1999), pp. 355 ff.; and Pinto, F. L. C., *A Categoria da Punibilidade na Teoria do Crime*, vol. I, Coimbra: Almedina, 2013, pp. 224 ff.

<sup>6</sup> Pinto, *A Categoria da Punibilidade*, pp. 88 ff.

<sup>7</sup> *Ibid.*, pp. 231 ff.

<sup>8</sup> Pinto, B. A. S., *Lições de Direito Criminal*, 1844-1845, drafted by Francisco d'Albuquerque e Couto and Lopo José Dias de Carvalho, Coimbra: Imprensa da Universidade, 1845; *Lições de Direito Criminal*, drafted by an unidentified graduate, Lisboa: Imprensa União-Typographica, 1857; *Lições de Direito Criminal Portuguez*, drafted by A. M. Seabra de Albuquerque, Coimbra: Imprensa da Universidade, 1861; the last version is also the most complete.

depth the various grounds for exclusion from liability ('justifications and excuses'). In the latter, the counterparts of the dialogue are mainly Bentham and Rossi – not Mello Freire<sup>9</sup>. Sousa Pinto puts forward a mixed (eclectic) conception of the purpose of penalties, within an ethical-retributive framework ('the intrinsic justice of punishment'), sparsely articulated with marginal utilitarianism<sup>10</sup>. He pronounces against relegation, which he describes as 'anti-correctional' (in the sense that it 'does not allow for waiting for the criminal to be amended') and empty of any exemplary value, and elects imprisonment (fair, legal, proportionate to guilt, applied in the proceedings) as 'the penalty *par excellence* in civilized societies' (quoting Rossi)<sup>11</sup>.

The sole *purpose* of the penalty is, according to Sousa Pinto, the preservation of society, which differs from the possible *effects* of the penalty (amendment of the offender, the security of the victim and example for others). In short, the fundamental matrix of his thought is: moral imputation of the act (to the author's free will), the legitimation of punishment by the purpose of preservation of the community and the respect for legality. Topics such as the necessity or usefulness of sanctions are only relevant in specific cases, when it is necessary to limit legislative action.

### 1.1.3. The consolidation of liberalism (cont.): Silvestre Pinheiro Ferreira

A different approach to the theory of punishment is taken by Silvestre Pinheiro Ferreira (1769-1846), who may have been the first Portuguese correctionalist. In his works<sup>12</sup>, already in 1841, he emphasises special prevention and the social usefulness of moral regeneration. Intimidation would be a mere collateral effect of the sanction. According to his theory, the duties and prohibitions should be drawn from the legal order in general (civil law, administrative law...) and the penal code should be reduced to the regulation of the admissible penalties and the forms of the procedure<sup>13</sup>. The law should not set limits, either minimum or maximum, to prison sentences, which should be determined in their duration by the 'inspection jury', who would visit the inmates and evaluate the process of their regeneration<sup>14</sup>. Effective prevention required a true penitentiary system, which the author described in great detail, building on the coetaneous experience in France and the United States of America.

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<sup>9</sup> For an assessment of the sources and works of Sousa Pinto, see Hünerfeld, P., *Strafrechtsgeschichte in Deutschland und Portugal*, Baden-Baden: Nomos, 1981, pp. 71 ff.; and Pinto, F., *A categoria da punibilidade*, vol. I, pp. 272 ff.

<sup>10</sup> The literature agrees that Sousa Pinto rejected utilitarianism as the fundament of punishment: see Palma, "Do sentido histórico do ensino...", pp. 371-372, who considers that '...under Rossi's influence and through Basílio de Sousa Pinto, Portuguese criminal law theory gave the first step towards the rejection of utilitarianism and the tradition of the Enlightenment that had been represented by Mello Freire. But Basílio de Sousa Pinto seems to have seasoned the thought that has inspired him with a moderate utilitarian perspective'. See also Hespanha, *A Evolução da Doutrina*, pp. 459 ff., who concludes that 'Basílio Alberto (...) rejected the types of utilitarianism that led to a stronger instrumentalisation of the individual; but he also kept his distance from Rossi's moral doctrinarism, because he was wary of its subjectivism. He was a conservative indoctrinator: he preferred to refer to the law established in the public conscience, a law which, progressively, was embedding itself in the new institutions of the liberal criminal law...' (*op. cit.*, p. 460).

<sup>11</sup> Pinto, *Lições*, 1861, p. 120, p. 122.

<sup>12</sup> Ferreira, S. P., *Memoria sobre a Reforma da Justiça Criminal, segundo os Princípios do Direito Constitucional*, Lisboa: Typ. Lusitana, 1841; Idem, *Questões de Direito Público e Administrativo: Philosophia e Litteratura*, Parte II, Lisboa: Typ. Lusitana, 1844.

<sup>13</sup> See Ferreira, *Memoria*, pp. 15 ff.

<sup>14</sup> *Infra*, 4.1.

Pinheiro Ferreira's apparent contempt for the principle of legality (regarding the description of both crimes and penalties) did not bode well with the liberal worldview that otherwise characterized his thought and political action. He probably pushed too far the parallel between the offender and the sick person, between the illness that affects the soul and the illness that affects the body, between the judge and the doctor, and became a victim of his fascination. It should be noted, however, that such parallel is clearly intended as a... parallel: it is not an instance of actual "medicalization" of the offender in general, which would rise later, in 1860, with Ayres de Gouveia<sup>15</sup>.

## **1.2. In the anti-chamber of positivism: the Krausist movement and its reflection on the criminal law**

### **1.2.1. In between the Schools**

In Portugal, differently from what may have happened in other countries, positivism did not rise in immediate opposition to the neoclassical school, for two main reasons. In the first place, because Kantism and, more generally, idealism never really 'took hold' of the Portuguese legal culture<sup>16</sup>, which was split, in the first half of the 19th century, between traditional jusnaturalism and scholasticism, on the one hand, and sensualist utilitarianism, on the other<sup>17</sup>. Secondly, because the dominant cultural trend at the time of the emergence of positivism was not neoclassicism, but Krausism<sup>18</sup> – which may have paved the way, it is submitted, for a different, albeit not necessarily peaceful, reception of positivism.

### **1.2.2. Vicente Ferrer Neto Paiva and the reception of Krausism**

The philosophy of Karl Krause, which aspired to be, more than a philosophy, 'a spiritual power'<sup>19</sup>, was introduced in Portugal by the professor of Natural Law Vicente Ferrer Neto Paiva (1798-1886), of the University of Coimbra, in his handbook *Elementos de direito natural, ou de Filosofia do direito (Elements of natural law, or Philosophy of Law)*, published in 1844. With this publication, Martini's *Positiones de lege naturali in usum auditorum* (Vienna, 1764), which had served for 72 years as the basis of the course<sup>20</sup>, were finally abandoned. Vicente Ferrer, who could not read German, took contact with Krause via Heinrich Ahrens's (1808-1874) *Cours de droit*

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<sup>15</sup> *Infra*, 1.2.4.

<sup>16</sup> Moncada, L. C., "Vicente Ferrer Neto Paiva", *Jurisconsultos Portugueses do século XIX* (J. P. Loureiro, dir.), vol. II, Lisboa: Edição do Conselho Geral da Ordem dos Advogados, 1960, p. 140.

<sup>17</sup> Two of the most important authors affiliated to the utilitarian doctrines are Joaquim Rodrigues de Brito (1753-1831) and Silvestre Pinheiro Ferreira (already mentioned in the text), who explicitly followed Locke, Condillac and Bentham.

<sup>18</sup> Apparently, Karl F. C. Krause's studies – namely, *Grundlage des Naturrechts oder philosophischer Grundriss des Ideals des Rechts* (Jena, 1803), *Entwurf des Systems der Philosophie* (Jena / Leipzig, 1804), *Das Urbild der Menschheit: ein Versuch* (Dresden, 1811), *Abriss des Systems der Rechtsphilosophie* (Göttingen, 1828) – had little impact in Germany (Moncada, "Vicente Ferrer...", p. 139, fn. 1), and were much more influential in Spain and South America than in Portugal (Moncada, L. C., *Subsídios para a História da Filosofia do Direito em Portugal*, 3rd. ed. (1st ed. 1937-38), Lisboa: Imprensa Nacional Casa da Moeda, 2003, pp. 172 ff. On the 'Portuguese Krausism', see the dissertation by Calheiros, M. C., *A Filosofia Jurídico-Política do Krausismo Português*, Lisboa: Imprensa Nacional Casa da Moeda, 2006.

<sup>19</sup> Moncada, "Vicente Ferrer...", p. 140.

<sup>20</sup> Moncada, *Subsídios*, p. 63, fn. 8.

*naturel ou de Philosophie du droit* (Brussels, 1st ed. 1838). However, his imperfect and incomplete knowledge of Krausism prevented him from being a faithful disciple. As Cabral de Moncada notes, his theory ended up in trying to combine, in an eclectic approach, elements of the old jusnaturalism in the context of which he had been educated (Ferrer still saw human nature as the ultimate fundament of the law), together with the Kantian notion of conditionality of law and the Krausian commitment to put the law at the service of the positive fulfilment of all the faculties and rational purposes of mankind. This combination aimed at providing a theoretical framework that would support political liberalism and some state intervention on the social fabric in the years to come, without however recanting the ultimate postulate of individual freedom and private property.

### 1.2.3. Krausism, organicism and the criminal law: Levy Maria Jordão

Notwithstanding its imperfections and even contradictions, Ferrer's import of Krause had a significant impact on the legal literature of the mid-19th century. A decade later, his disciple Levy Maria Jordão (1831-1875), then aged 22, published his inaugural dissertation on the fundament of the *ius puniendi*<sup>21</sup>, which was the first application of Krause's system to the criminal law in Portugal<sup>22</sup>, and also the first competent reading of his works (in the original German) by a Portuguese scholar.

Jordão's starting point, quoting Saisset, is that the moral problem supposes two necessary conditions: on the one hand, human freedom, and, on the other hand, the existence of absolute order and a moral law by which his / her actions shall abide. Therefore, he harshly criticises the phrenological school, which is 'manifestly false': it 'shakes down all the principles in the name of a chimera, degrades the individual by reducing him / her to a machine and it is an outrage against Providence, placing upon it the responsibility borne by the criminals'. However, it should be noted that Jordão understood human freedom as a *fact*, not as a belief or an idea.

From there, Jordão builds a system where he combines Krause's theory with Karl Roeder's correctionalism<sup>23</sup>. The criminal offence contradicts the essentially harmonic principle of justice and produces a state of disruption, which affects the victim, the society (both directly and indirectly) and the offender him/herself – in sum,

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<sup>21</sup> Jordão, L. M., *O Fundamento do Direito de Punir*, Coimbra: Imprensa da Universidade, 1853; it was translated to French and published as *Cours de Droit Pénal*, Lisbonne: Typ. de Lallemand & C.<sup>a</sup>, 1858.

<sup>22</sup> Levy Maria Jordão was already an exceptional scholar, who had written, at 19 and as a student, the most complete handbook on the history of Roman Law ever published in Portugal (*Ensaio sobre a História do Direito Romano*, Coimbra, 1850, 296 p.), which would be 'unrivalled for almost 50 years' (Merêa, P., "Esboço de uma história da Faculdade de Direito de Coimbra. 2.º período: 1865/1902", *Boletim da Faculdade de Direito da Universidade de Coimbra* 29 (1953), p. 102). A bio-bibliography of Jordão is provided by Caeiro, P., "Levy Maria Jordão, Visconde de Paiva Manso. Notas bio-bibliográficas", *Boletim da Faculdade de Direito*, 71 (1995), pp. 347-371.

<sup>23</sup> In the last footnote of his dissertation, Jordão acknowledges that the system he puts forward is, in essence, 'the same' as Roeder's, which he had known via Ahrens. He suggests he has had access to the book '*Zur Begründung der Besserungs theorie* (Heidelberg, 1847)' (sic) only at a late stage of the writing of his dissertation. However, as far as these authors could establish, the correct title and date of Roeder's book are *Zur Rechtsbegründung der Besserungsstrafe*, Heidelberg, 1846, and one wonders why the indications provided by Jordão in this respect match exactly the incorrect information given by Ahrens in the 3rd edition of the *Cours de Droit Naturel*, Bruxelles: 1848, p. 280 (fn. 1).

it affects the ‘state-of-law’ (*estado-de-direito*<sup>24</sup>) in all those dimensions. The direct effect upon the victim and society is called ‘damage’ (*dano*) and is to be dealt with under private law; the indirect effect upon society is social alarm; the effect of the offence on the offender, who has prevented with his misdeeds the fulfilment of his rational destiny, is that it disrupts his / her state of harmony as a member of the social ‘organism’<sup>25</sup>. The latter two consequences are to be dealt with through punishment, which is seen as a *means* to re-establish the rule of law, in order to ‘allow for the society to progress, as it should’. Such double disruption of the rule of law is produced by the *will* of the offender, who has ignored the law and abided by principles other than reason, moral sentiment and true freedom. Individual will and those false principles are seen as the ‘electric poles’ (sic) between which a relationship of affinity sparks and generates the offence. Therefore, penalties must focus on that defective will and are seen as a good thing (a ‘balm’, would Ayres de Gouveia write some years later), not as an evil.

The primary purpose of punishment is the moral improvement of the offender (special prevention), because the persistence of the ill will may lead to reoffending. The secondary purpose is the rational intimidation of other potential offenders (general prevention), to counter the social alarm raised by the offence<sup>26</sup>. According to Jordão, an effective combination of the two purposes is possible, ‘without harming the personality of the offender’<sup>27</sup>, if an appropriate *penitentiary system* (the ‘new conquest of human intelligence’, quoting Leyser) is put in place. In sum, the young Jordão believes that the law and the political praxis can contribute to the ‘indefinite progress of modern civilization’ (mentioning G. Vico in that respect). The author finalises his dissertation with a sentence that encapsulates his combination between idealism and social intervention through criminal law: ‘the fundament of the *ius puniendi* is the rational nature and purpose of the State; the goal of punishment is the reinstatement of the rule of law disturbed by the offence’, which is to be achieved through rational design of the penalties and appropriate organisation of the penitentiary system.

Some years later, Jordão would have the opportunity to put his doctrine into practice: in 1857, he was appointed rapporteur of the committee charged with the reform of the Penal Code (which had been established already in 1853, barely one year after the publication of the new Code, but had not delivered any work in the meantime)<sup>28</sup>. He authored the whole draft himself, which has two versions (1861 and 1864). The draft code is preceded by an explanatory Report with around 180 pages, together with annexes where the rapporteur has compiled several highly laudatory letters on the draft written by foreign politicians, scholars and practitioners<sup>29</sup>. Alongside some significant innovations in the general and special parts, the main feature of the

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<sup>24</sup> Although the correct translation of *estado-de-direito* into English is *rule of law*, the expression *state-of-law* emphasizes the state of harmony and the balance between the several elements (including the offender) disturbed by the offence, which underlie the whole argument.

<sup>25</sup> On Krause’s concept of ‘organism’, see Windelband, W., *Lehrbuch der Geschichte der Philosophie*, Jazybee Vlg, s/d, pp. 633 ff.

<sup>26</sup> In the Report of the draft code 1864 (see *infra*), the primary role of special prevention becomes even clearer, as general prevention is seen as a natural ‘consequence’ of the moral improvement (“*correção*”) of the offender.

<sup>27</sup> In the Report of the draft code 1864 (see *infra*), the expression was changed to the more Kantian ‘personal dignity of the individual’.

<sup>28</sup> For an overview of the legal reform in Portugal in the 19th century, see Pinto / Caeiro, “The influence...”, pp. 115 ff.

<sup>29</sup> E. g., Napoleon III, Bonneville de Marsangy, Ortolan, Mittermaier, Haus, Roeder, Bosellini, Levita, Carrara and Nypels.

draft is the detailed regulation of the penalties and their enforcement, the explanation of which accounts for almost half of the Report.

One should highlight the justification provided for the incrimination of ‘adherence’ in the second version of the report (the third degree of participation, which encompasses the accessories after the fact). This new form of imputation (?) was meant to – correctly – do away with the wrongful notion of complicity after the fact (which is a contradiction from a theoretical point of view) and relied on the principle of ‘defensive solidarity of society’. Such principle, coined by Bonneville de Marsangy in 1855, was explained by Jordão in the following terms:

‘Every citizen has the duty to cooperate with the State to prevent, discover and prosecute crime. (...) Such obligation stems from the general principle of duty, which is to the moral beings the same as the principle of attraction to the physical beings; the latter expresses the catenation of the multiple existences in the same way as the duty binds all men to the same principle, as integrating molecules, as members of a superior whole, subjected to common bonds, so that, with the work of all towards the kingdom of the absolute principle of order, one gets to the empire of good, which is a consequence of the said principle and the ultimate goal of the individual and society’<sup>30</sup>.

This *organicist* view would still be present, probably in a more intense fashion, in one of Jordão’s last works:

‘Everything is bound in the universe by a harmonic principle, everything is in reciprocal dependence; no species can live and develop in isolation. The universe is a perfect organism; its parts are all equally essential; all of them are in an intimate relationship; all concur to the same goal, the preservation of order and harmony, where each particular being has his sphere in the communion and solidarity of universal life’<sup>31</sup>.

To the purpose of this chapter, it may suffice to highlight Jordão’s main ideas, most of them found in (or inspired by) the works of Krause/Roeder: the society is seen as a concrete – not ideal or metaphysical – organism, which needs to be harmonic to progress ‘as it should’. Crime disrupts such a state of harmony and the State has to restore it by using effective tools (punishment) aimed at correcting the offenders and reinserting them into the social communion. To that purpose, the State must take pragmatic action and build appropriate prison facilities, where the enforcement of penalties follows a precise plan, pursuing the rehabilitation of the offender.

#### 1.2.4. Ayres de Gouveia and the first “symptoms” of positivism

Simultaneously with the discussion of the draft code 1861-64, the application of Krause/Roeder’s system to the theory of punishment has been furthered by Ayres de Gouveia (1828-1916), who would become a professor at the University<sup>32</sup>.

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<sup>30</sup> *Código Penal Português. Tomo I – Relatório da Comissão*, Lisboa: Imprensa Nacional, 1864, pp. 38 ff.

<sup>31</sup> Jordão, L. M., *Memória sobre Lourenço Marques (Delagoa Bay)*, Lisboa: Imprensa Nacional, p. IX.

<sup>32</sup> Gouveia later entered the Catholic Church and was appointed Bishop of Bethsaida (1884) and Archbishop of Chalcedon (1904).

Ayres de Gouveia was also a disciple of Vicente Ferrer and was about the same age as Jordão. Probably less knowledgeable than the latter, he had unquestionable rhetorical resources and a strong political drive. In his inaugural dissertation, published in 1860<sup>33</sup>, he claims that

‘the offender has not been studied. As soon as the offence takes place, he is immediately banned from social communion. To probe, day by day, the motives that led him to plan and perpetrate his misdeed, investigate his nature, and provide an accurate account of the social circumstances that surrounded him, is something that nobody has ever done, or even thought of doing. The offender endures an impossible metamorphosis: at the social level, he leaves the human kingdom and is filed in the animal one. He is not a man, he is a tiger. However, the jail is not a pen, nor is the public square a butchery. The offender is a human and should be seen as such, and a sick person who, as a consequence, seeks our assistance; furthermore, he is an alienated, which binds us to compassionate solicitude’<sup>34</sup>. (...) ‘[T]he same illness, in different individuals, usually requires different treatments’<sup>35</sup>.

Gouveia does not completely deny individual freedom. Concerning the explanation of the causes of crime, the author criticises both the ‘spiritualist’ and the ‘materialist’ schools and adopts the Krausist perspective:

‘the origin of crime is to be found in human nature, in the ensemble of its elements and the disharmony between them. (...) The offence is never born from an appropriately enlightened will; it cannot be. It generates from the peculiar complex nature of the offender and its disharmony, congenital or acquired. The offence is a necessity, the offender is a sick individual’<sup>36</sup>. (...) The criminal is an abnormal being, who has the right to be cured of his disease (...) through a well-balanced physical and moral regime that may transfigure him into a different being’<sup>37</sup>.

Hence, despite some theoretical inconsistencies, namely concerning individual freedom and determinism, Ayres de Gouveia presents already a “medicalised” view of the offender as a ‘sick person’ who needs ‘to be studied’ and ‘treated’ in an effective penitentiary system. Arguably, this is already a development to the antecedent approach, which emphasised the *moral* illness and the *defective will* of the offender.

### **1.2.5. The meaning of Krausism for the reception of Positivism in the criminal law**

All three scholars mentioned in this section coincided as members of the masonic lodge “*Liberdade*”, in Coimbra, in the early 1860s – the master Ferrer and both his disciples. Clearly, there was much common ground among them, namely in the fight for political liberalism and civil liberties against the old jusnaturalism, absolutism and traditional politics.

It is also clear that neither Jordão nor Gouveia can be deemed positivists *avant la lettre*, or even “proto-positivists”. Nevertheless, their perspective on crime, offenders

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<sup>33</sup> Gouveia, A. A., *A Reforma das Cadeias em Portugal. Resposta ao ponto proposto pela Faculdade de Direito da Universidade de Coimbra: «Como devam ser entre nós reformadas as cadeias?»*, Coimbra: Imprensa da Universidade, 1860.

<sup>34</sup> *Ibid.*, p. 23.

<sup>35</sup> *Ibid.*, p. 26.

<sup>36</sup> *Ibid.*, p. 28.

<sup>37</sup> *Ibid.*, p. 31.

and punishment cannot be seen, it is submitted, as a merely renewed jusnaturalism<sup>38</sup>. On the contrary, despite the mysticism that sometimes enfolds the Krausist “system” and rhetoric, their proposals embody already some of the lineaments that will emerge fully with the positivist scholars<sup>39</sup>. The focus shifts from the offence to the offender, who causes the malfunction of a larger organism which he forms part of, thereby harming also his very self. This disruption legitimises the intervention of the State through the application of penal sanctions, which do not aim at serving justice or retribution, or pursuing other abstracts ideas such as the putative intimidation of third parties. Rather, they aim at the progressive and measurable improvement of the mental state of the offender, through positive tools applied per rational and duly tested programs during the enforcement of the sentence, in the context of an optimistic stance vis-à-vis mankind and science.

## 2. Science and the implementation of the positivist program in criminal justice: doctors, alienists and anthropologists

### 2.1. The first clashes

The dissemination of positivism in Portugal, inside and outside academic circles, was facilitated by the number of magazines, leaflets and pamphlets that were being published in different domains: from aesthetics to sociology, from education to teaching, from politics to law. Titles like, for example, *A Evolução* (The Evolution), *O Positivismo* (Positivism), *Era Nova* (New Age), *O Século* (The Century), *O Partido do Povo* (The People's Party), *Revista de Estudos Livres* (Review of Free Studies), appeared during the ‘70s and ‘80s of the 19th century, covering the most diverse areas of knowledge, arts and politics<sup>40</sup>.

But, from a historical point of view, ‘the positivist discourse, built around references such as Comte, Littré, Letourneau or Spencer, among others, had its main vehicles of dissemination in the medical-surgical and polytechnic schools of Lisbon and Porto’, as Tiago Pires Marques rightly points out<sup>41</sup>. As we will see, this was probably the domain in which positivism was most consistent in Portugal, both in the written works produced and the institutional medical practice regarding mental and behavioural disorders.

The affirmation of positivism in the medical field started with a fierce struggle in the ‘70s and gained space and momentum during the ‘80s.

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<sup>38</sup> Moncada, *Subsídios*, pp. 173 ff., makes a final assessment of Krausism as an updated form of jusnaturalism. Nevertheless, it is submitted in the text that the adaptation of Krausism to criminal law by the mentioned scholars seems to produce a theoretical framework quite different from jusnaturalism.

<sup>39</sup> Only to this limited extent can it be said that, by shifting the focus to special prevention, ‘correctionalism has anticipated the Positive School in some decades’ (Dias, J. F., *Direito Penal. Parte Geral. T. I. Questões Fundamentais. A Doutrina Geral do Crime*, Coimbra: Gestlegal, 2019, pp. 80 ff.).

<sup>40</sup> In detail, see Ferrão, A., *Teófilo Braga e o Positivismo em Portugal*, Lisboa: Academia de Ciências de Lisboa, 1935; and, afterwards, the fundamental study by Catroga, F., “Os inícios do positivismo em Portugal. Seu significado político-social”, *Revista de História das Ideias*, 1977, pp. 38 ff. More recently, adding further elements, Manuel Gama, “Teófilo Braga e os periódicos na difusão do positivismo em Portugal”, *O Pensamento e a Obra de Teófilo Braga*, Porto: Universidade Católica Editora, 2019, pp. 205 ff.

<sup>41</sup> Marques, *Crime e Castigo*, p. 115.

The environment at the Porto Medical-Surgical School in the '70s is expressively portrayed by Júlio de Mattos (1856-1922). In 1877, in a letter addressed to Teófilo Braga<sup>42</sup>, he gives an account of the difficulty of affirming new ideas and expresses his desire to look at other horizons, with other references:

‘We lacked a representative of the modern philosophical direction; you took the trouble to be him<sup>43</sup>, and I, who am one of the most ardent admirers of A. Comte and Littré, salute you for that; (...) But – it is necessary to say this – at the Porto School of Medicine, except for 3 students and one teacher, no one has the slightest interest in the progress of positive philosophy. Metaphysics still enjoy absolute dominance. For you to assess the mental state of these people, suffice it to say that I got 5 black balls [ie, 5 votes against] in the vote for the physiology awards, among other reasons because I defended Luys' doctrine in a lecture (...). According to the official programme, such an approach involved an attack on the old doctrine of free will and therefore an outrage on human dignity. Furthermore – it was said – I have reinforced my arguments with the authority of Littré, Robin, Spencer, Bain, and other atheists. The same fate met a fellow member of mine who said, among other *impieties*, that the theory of final causes had been an obstacle to the progress of physiology, and dared to speak of adaptation by citing the names of Darwin and Lamark. So, you can reckon how your publication will be received and the formal refusal I would have to endure if I tried to promote it. It is the reign of what Stuart Mill and Comte called pedantocracy’.

## 2.2. Crime as an object of study for positive science

In just over a decade, everything changed. The great positivist revolution in Portugal burst roughly between 1880 and 1900, carried out by scholars who studied psychic disorders from a medical point of view, several of whom had actual clinical experience, such as Júlio de Mattos, Roberto Frias, Basílio Freire, Miguel Bombarda and Francisco Ferraz de Macedo. They also paved the way and influenced anthropologists, politicians and jurists<sup>44</sup>, as they did not refrain from pronouncing – profusely and categorically – on crime, responsibility and criminal justice; and, in particular, on *criminals* and their identifying features, their classification and degrees of dangerousness. In fact, during the 1880s, undergraduate and doctoral theses, and studies on mental pathologies and criminality were published one after the other:

- In 1880, Roberto Frias presented his dissertation *O Crime* (The Offence)<sup>45</sup> to the Medical-Surgical School of Porto, where, starting from the theses of Thompson and Lombroso, whose proposals he quotes and welcomes in various passages, he organizes the general causes and the individual causes of crime, establishing a statistical relationship with certain individual characteristics (age, gender, marital status, lifestyle,

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<sup>42</sup> Published in Ferrão, “Teófilo Braga...”, p. 45, together with an important collection of the correspondence between Júlio de Mattos and Teófilo Braga, regarding the magazine *O Positivismo*, where the latter has been a collaborator and, later, editor-in-chief.

<sup>43</sup> This is a reference to Teófilo Braga's book *Traços Geraes da Philosophia Positiva* (General Lineaments of Positive Philosophy), published in 1877.

<sup>44</sup> The influence of criminal anthropology on several Portuguese jurists was acknowledged early in time, for instance, by Deusdado, M. F., *Estudos sobre Criminalidade e Educação*, Lisboa: Imprensa de Lucas Evangelista Torres, 1889, pp. 5-8.

<sup>45</sup> Frias, R. B. R., *O Crime (apontamentos para a systematização da criminalidade)*, Porto: Typographia de Alexandre da Fonseca Vasconcellos, 1880. An overview of this book is provided by Vaz, M. J., *O crime em Lisboa, 1850-1910*, Lisboa: Tinta da China, 2014, pp. 39-41.

food) and some professions. Those factors allow identifying hereditary and social causes that explain crime. However, he rejects the current doctrinal and legal definitions of crime, conceiving of it generically as ‘any attempt against the conservation and progress of the individual or society’. The work materialises a significant change in the research object, which shifts from the offence to the offender (as Ayres Gouveia had hinted at, 20 years earlier, from a legal perspective). The predominance of one or the other of those causes allows, in particular, to classify criminals as habitual, professional or occasional offenders.

- Basílio Freire presented his doctoral thesis *Os Degenerados* (The Degenerate) to the Faculty of Medicine of the University of Coimbra; it was published in 1886, followed by the book *Os Criminosos* (The Criminals), in 1889<sup>46</sup>. In the former, he analyses and exposes, from the perspective of pathological anthropology, a series of hereditary psychopathologies and their association with physical defects and mental features. He seeks to relate them to inbreeding and to issues that occur during pregnancy, and establishes a relationship between pathologies and alcoholism and malnutrition. His work has significant empirical and experimental value, as it results from the direct observation of hospitalised patients, as well as individuals living in the poor neighbourhoods of large cities. The second book, *Os Criminosos*, is a specification of the first, because the criminal (together with the madman) *is* a degenerate. Basílio Freire associates crime with paralyzed stages of brain development: psycho-social degeneration and atavism would explain the biological and social phenomena of criminality, which jeopardizes the possibility of rehabilitation<sup>47</sup>.

- Júlio de Mattos, who had a vast number of publications and performed important clinical work, publishes his book *A Loucura* (Insanity) in 1889, where he organizes data resulting from direct clinical observation of patients with mental pathologies<sup>48</sup>. He also associates them with hereditary causes and social habits, separating the alienated into two major groups: a first group, in which crime is occasional and does not overlap with a pathology; a second group, with more profound forms of degeneration, with continuous and permanent perversions, incapable of being recovered and in which the criminal and the mental pathologies overlap. The classification is, therefore, of a clinical *and* legal nature, which bears important consequences that will be mentioned below.

- One should mention also Miguel Bombarda's studies on the various forms of epilepsy that lead him to relate brain degeneration to criminality<sup>49</sup>. Crime could, in his opinion, be associated with several factors – physical, social and biological –but the latter would always be the predominant ones. As degenerations, the different pathologies could be organized by their severity. However, criminals should not face confinement in a prison – an institution that would be on the verge of disappearing in the depths of history – but the internment in penal colonies: ‘only then will we defend

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<sup>46</sup> Freire, B. A. S. C., *Os degenerados*, Coimbra: Imprensa da Universidade, 1886; and Idem, *Os Criminosos. Estudos de Antropologia Patológica*, Coimbra: Imprensa da Universidade, 1889.

<sup>47</sup> Further information in Maldonado, M., “Alguns aspectos da história da criminologia em Portugal”, *Boletim da Administração Penitenciária e dos Institutos de Criminologia*, 22 (1968), pp. 30-40.

<sup>48</sup> Mattos, J., *A Loucura, Estudos Clínicos e Médico-Legais*, S. Paulo: Teixeira & Irmão Editores, 1889. An excellent résumé is provided by Maldonado, “Alguns aspectos...”, pp. 42-51. On the life and works of Júlio de Mattos, see Ferreira, T. S., *Júlio de Mattos e o Alienismo em Portugal*, Master’s diss., Porto University (*Repositório*), 2017.

<sup>49</sup> Bombarda, M., *Lições sobre a Epilepsia e as Pseudo-Epilepsias*, Lisboa: Livraria de António Maria Pereira, 1896.

the village from the beasts who assault it; only in this way will we be able to put an end to their noxious race'. In a nutshell, Miguel Bombarda considers 'the offender's regeneration the most flabbergasting utopia, in the face of thousands of years of experience without results'<sup>50</sup>.

- The approach taken by those doctors and alienists would culminate, some years later, in the works of António Mendes Corrêa, who graduated as a doctor and followed an academic career in criminal anthropology. In *Os Criminosos Portugueses* (The Portuguese Criminals)<sup>51</sup>, Corrêa develops an extensive study, involving hundreds of inmates detained in the prison of Porto, where he analyses the prisoners according to several factors – individual elements (eg., morphological, biological and psychological), mesological context (eg., climate, seasons, population density, etc.) and socio-economic conditions (poverty, imitation, etc.). He concludes that there is no such thing as a single type of Portuguese criminal, different from common people; nevertheless, it is possible to establish several types who share some features among them. Correia also adopts an eclectic approach regarding the causes of crime:

'In the etiology of crime, individual conditions (physical and psychological degeneration, constitutional or transitory psychopathic states) arise simultaneously with the influence of the physical and social environment in which the offender lives (land relief, lethality, imitation, misery, alcoholism, education, etc.)'<sup>52</sup>.

### 2.3. A few critical voices

There were not many voices that dared oppose, at the same level, the arguments contained in the overwhelming wave of medical publications of this period. One of the few critics was Manuel A. Ferreira Deusdado, a professor of applied psychology, who responded in a clear manner to the thesis on the need to adapt criminal laws to the results of medical studies on degenerative mental illnesses<sup>53</sup>, which was debated at the Lisbon Legal Congress of 1889<sup>54</sup>. He starts by criticizing the ease with which unprepared young people adhere to new ideas because they prevail at a certain moment, in the supposition that this makes them 'modern spirits and daring revolutionaries', or that it is a great novelty to state that they are 'Comtean positivists' when such system is already outdated. Then he puts forward the idea that only personal freedom guarantees human dignity and develops an intense criticism of Lombroso's theory, exposing its contradictions and, even worse, how it converts mere hypotheses into science, without a systematic and coherent organization of the elements collected, which are not always consistent with each other. Accordingly, Deusdado submits that criminal anthropology is still in a purely descriptive phase of the data it gathers, because it does not process them in a clear and safe scientific fashion. In the criminal law field, he accepts the idea

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<sup>50</sup> Maldonado, "Alguns aspectos...", p. 69, to be read together with the instructive analysis of pp. 67-73, where the author presents another essential book by Bombarda, M., *A Consciência e o Livro Arbítrio*, Lisboa: Livraria de António Maria Pereira, 1898. In this manifesto, Bombarda has upheld biological determinism and argued that conscience and freedom are two human illusions, dependent on a biological causal relationship of cellular origin.

<sup>51</sup> Corrêa, A. M., *Os Criminosos Portugueses (Estudos de Anthropologia Criminal)*, 2nd ed., Coimbra: F. França Amado Editores, 1914; on this book, see Maldonado, M., "Alguns aspectos...", pp. 117 ff.

<sup>52</sup> *Ibid.*, p. 330.

<sup>53</sup> Deusdado, *Estudos sobre Criminalidade*, pp. 8 ff., *passim*.

<sup>54</sup> See *infra*.

of social defense only concerning dangerous criminals who cannot be held responsible for their acts (unaccountable offenders). For the remaining, common criminals, the principle of moral responsibility based on free will must be respected, and it cannot be replaced by the mere indication of external signs of criminality (tattoos, physical deformities, squinting, prognathism or other somatic anomalies).

Deusdado's dense criticism towards the “appearance of science” of the Positive School seems, in short, to aim at three basic goals: upholding a penal system founded on freedom and responsibility; defending the possibility of correction and regeneration (namely through education); and avoiding the very serious consequences that positivist scientism can cause to the individuals, with its unsafe criteria for the detection and classification of mental illnesses<sup>55</sup>.

In the medical-clinical field, a few voices also rose against the Positive School – at least, in its lombrosian version. One of them was Manuel José d'Oliveira, who defended a Ph.D. dissertation, at the Medical-Surgical School of Porto, where he criticised Lombroso's concept of atavism, which was in his opinion based on a confusion (already pointed out by Tarde) between a biological and a pathological state. Such construction of the concept was contradicted by medical science, which distinguishes between degeneracy and atavism, the latter being much rarer; in that context, the signs of atavism with which Lombroso classifies criminals are ‘medical degenerations’ and not characteristic of criminal offenders. Lombroso's theory would, therefore, be ‘a mere hypothesis devoid of any scientific basis’<sup>56</sup>. More generally, Oliveira addresses the dominant cultural background as follows:

‘It is now commonplace, in contemporary pseudo-science, that shallow spirits be content more with the brilliance of words, which have the irresistible temptation of simple and elegant novelty, than with the study of the sciences of which they are the synthetic and true expression’<sup>57</sup>.

One of his main conclusions is that ‘the pathological anatomy of the criminal does not allow for establishing a specific type, nor accepting an atavistic morphology of the offender’<sup>58</sup>. The only solution for the criminal issue would be to address the social factors of degeneracy:

‘The genesis of the criminal must be sought in the current social organization, and its prophylaxis can only be realized by profoundly modifying this old and battered organic system of societies, the cause of so many miseries and so many pains’<sup>59</sup>.

#### **2.4. Science and policy-making in the area of criminal justice**

Which relevance would all these elements issued from natural and human sciences have for criminal justice in the last quarter of the 19th century? Although their influence on the teaching of the criminal law was not as clear and consistent as in the scientific field<sup>60</sup>, the fact is that, at such point in time, the subject was notoriously

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<sup>55</sup> See also Maldonado, “Alguns aspectos...”, pp. 76-85.

<sup>56</sup> d'Oliveira, M. J., *O Problema de Lombroso. Estudo Crítico de Bio-Sociologia sobre a Teoria Atávica do Crime*, Porto: Typ. A. F. de Vasconcellos, Sucessores, 1904, pp. 9 ff., pp. 19 ff., and p. 68.

<sup>57</sup> *Ibid.*, p. 21.

<sup>58</sup> *Ibid.*, p. 72.

<sup>59</sup> *Ibid.*, p. 122.

<sup>60</sup> *Infra*, 3.

dominated by medical research and explicitly associated by scientists to the topic of the penal response – and the pragmatic need for change. At stake were complex issues of the criminal law theory, such as the problem of whether or not people with mental illnesses could be norm addressees and targeted by a sanction, and, in the affirmative, of which nature and under which circumstances<sup>61</sup>.

At that time, the matter was particularly relevant, because it raised the question of whether the existing legislation provided appropriate answers, and the ongoing debate reflected its importance. Thus, in April and May 1889, the Lisbon Legal Congress was held and one of the subjects scheduled (session of April 30) was the need to reform penal codes and the adequacy of the rules of criminal responsibility to the progress achieved in the fields of psychology, criminal anthropology and alienist pathology, given the need for security against crime<sup>62</sup>. And, at the end of the century, the 7th Session of the International Union of Criminal Law was held in Lisbon, chaired by von Liszt, where the struggle between the opposing schools was still very vivid<sup>63</sup>.

Hence, to a large extent, it was the doctors who assumed the full defense of the positivist program in the criminal field. They carried out empirical research, organized and directed mental health institutions, classified illnesses, insane individuals and criminals according to a scientific method, developed diagnostic and therapy tools that were made available to those in charge of prison policies, and created statistical tables that purported to measure the dangerousness of the offenders and to determine the probabilities and the ‘geography of crime’<sup>64</sup>. It was only natural that they also felt entitled to call for the penal reform that they considered appropriate to the scientific results they obtained: it is the ‘rise of doctors in the penal field’<sup>65</sup>.

Take, for instance, Júlio de Mattos, who raises high the positivist banner in several texts where he presents books by other authors. Perhaps his preface (written in April 1893) to Garofalo's *Criminology* (which he himself translates) is the most unequivocal and affirmative manifesto of the *Scuola Positiva* in Portugal: he equates crime to a disease, criticizes the response of criminal law based on metaphysics and mere conjectures, decrees the absolute ineffectiveness of penalties for these cases, binds punishment to social defense, upholds indeterminate penalties, criticizes the jury system (the jury is utterly incompetent to understand clinical cases) and abhors the rule *in dubio*

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<sup>61</sup> On the historical background of the issue, see the crucial study by Antunes, M. J., *Medida de Segurança de Internamento e Facto de Inimputável em Razão de Anomalia Psíquica*, Coimbra: Coimbra Editora, 2002, esp. pp. 140 ff. The author also provides a thorough description of the notorious and controversial case of the ensign *Marinho da Cruz* (*ibid.*, pp. 11 ff.), where the defendant was charged with the murder of a comrade and acquitted by the Military Court of Lisbon on grounds of insanity, based on the convergent expertise of two doctors. The decision caused great alarm and unrest in the public opinion and the judgment was quashed. In the second trial, despite having been diagnosed as ‘hereditary degenerate’ and ‘larval epileptic’ – and consequently irresponsible – by two famous alienists (one of them being Júlio de Mattos; there was also an opinion by Lombroso in the casefile, who established an analogy with the case *Misdea*), the defendant was ultimately convicted by the same Court and punished with the maximum penalty.

<sup>62</sup> Cfr. *Congresso Juridico de Lisboa de 1889. Resumo das suas Actas*, by João Jacinto Tavares de Medeiros, Lisboa: Imprensa Nacional, 1889, Sessão de 30 de Abril, pp. 26-30. A detailed account of the debate, with the supporters of the various opposing theses and the results achieved, is provided by Deusdado, *Estudos sobre Criminalidade*, pp. 5-8. See also Maldonado, “Alguns aspectos...”, p. 51.

<sup>63</sup> See Correia, E., *A Influência de Franz v. Liszt sobre a Reforma Penal Portuguesa*, off-print from *Boletim da Faculdade de Direito da Universidade de Coimbra* 66 (1970), Coimbra, 1971, pp. 8 ff.

<sup>64</sup> On the several initiatives and institutions, more information in Maldonado, “Alguns aspectos...”, pp. 52 ff.; see also Marques, *Crime e Castigo*, pp. 111 ff., pp. 117 ff.

<sup>65</sup> Marques, *Crime e Castigo*, p. 119. In the same direction, Vaz, *O Crime em Lisboa*, p. 37.

*pro reo* (an ‘absurd sentimentality’ stemming from ‘senseless piety’, which only ‘strengthens and grows the parasitical root of criminality’<sup>66</sup>).

In sum: it was in the field of medicine that the positivist program at the end of the 19th century was fully and consistently adopted in Portugal, in all its main propositions: (i) affirmation of psychic and social determinism against free will; (ii) focussing on the criminal to the detriment of the offence; (iii) adoption of an experimental method, through observation, analysis and formulation of explanatory hypotheses, namely with recourse to statistics; (iv) classification of offenders by typologies according to their fearfulness (*temibilidade*) and likeliness of recovery; (v) conception of crime as a psycho-social degeneration; and, as a result, (vi) reformulation of the categories on which criminal responsibility is built; (vii) defense of indeterminate and perpetual penalties; and (viii) legitimation of specific therapeutic measures for social defense against criminal dangerousness.

### 3. Positivism and the theory of the criminal law: academic, ideological and political clashes

#### 3.1. Setting the scene

The development of medical knowledge on crime, mental pathologies and the classification of offenders ends up intersecting with the theory of the criminal law on several levels. As said, medical doctors vindicate the relevance of their studies for criminal justice and they vehemently demand *legal reform* in order to adapt public policies to the results of those studies<sup>67</sup>. Secondly, they seek some protagonism in the judicial sphere, together with the recognition of their specialized knowledge, namely in the clinical diagnosis of unaccountability, through medico-legal assessments and expert reports and opinions, with which they intend to influence the courts’ decisions<sup>68</sup>.

In that context, at the university level, the question arises of whether the program of the *Scuola Positiva* and the new scientific contributions of anthropology, sociology, psychiatry and criminal psychology should be included in the teaching and research developed at the faculty(ies) of law<sup>69</sup>.

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<sup>66</sup> Mattos, J., “Prefácio” (Preface to) Garofalo, R., *Criminologia*, 4th ed., Lisboa:, Livraria Clássica Editora, 1923 (the authors have consulted and quote from the 4th ed., of 1923, although the preface was published already in the 1st. ed., of April 1893). See also “Palavras Prévias” (Foreword to) Bombarda, *Lições sobre a Epilepsia*, pp. VII-XII, and, finally, the “Prefácio” (Preface to) Martins, J. M. *Sociologia Criminal*, Lisboa: Tavares Cardoso & Irmão, 1903, pp. XI-XXVI (see also infra, 3.5.).

<sup>67</sup> See supra, 2.

<sup>68</sup> On the relevance of this topic, see below 3.5.

<sup>69</sup> All Portuguese criminal law handbooks contain a short description of the surge of positivism in the theory of criminal law: Santos, J. B., *Direito Criminal*, Lições recolhidas por Hernani Marques, Coimbra: Coimbra Editora, 1936, pp. 63-77; Correia, E., *Direito Criminal*, com a colaboração de Figueiredo Dias, I, Coimbra: Almedina, 1963, pp. 120-126; Ferreira, M. C., *Direito Penal Português, Parte Geral*, I, Lisboa: Verbo, 1982, pp. 23 ff.; Beleza, T. P., *Direito Penal*, vol. I, 2nd ed., Lisboa: AAFDL, 1984, pp. 256 ff.; Dias, J. F. / Andrade, M., *Criminologia. O Homem Delinvente e a Sociedade Criminógena*, Coimbra: Coimbra Editora, 1984, pp. 15 ff.; Dias, J. F., *Direito Penal Português. As Consequências do Crime*, Lisboa: Aequitas, 1993 (reprint 2009), pp. 58 ff.; Dias, J. F., *Direito Penal. Parte Geral. T. I. Questões Fundamentais. A Doutrina Geral do Crime*, Coimbra: Gestlegal, 2019, pp. 80 ff.; Carvalho, A. A. T., *Direito Penal. Parte Geral. Questões Fundamentais. Teoria Geral do Crime*, 2nd ed., Coimbra: Coimbra Editora, 2008, pp. 37 ff.; Costa, J. F., *Direito Penal*, Lisboa: INCM, 2017, pp. 171 ff.

### 3.2. The first appearance of positivism in Portuguese criminal law: Manuel Emygdio Garcia

The influence of positivism in legal teaching gained special visibility with Manuel Emygdio Garcia (1838-1904), from the 1870s onwards<sup>70</sup>. He taught mainly administrative and public law at the University of Coimbra, but he chaired criminal law temporarily, for two years (1878-79). He deemed criminal law to be only a part of what he called ‘Moralizing Law’, alongside the rules on education, instruction, or public benefaction<sup>71</sup>. In line with Ayres de Gouveia, Emygdio Garcia adopted a radical organicist perspective, distinct from the simple analogy used by Letourneau, through which he saw society as a concrete organism. The knowledge of society should be pursued by resorting to the experimental method, based on sociology; in that context, law was reduced to the ‘science of the conditions that guarantee the human social organism’<sup>72</sup>.

The short period in which Garcia chaired criminal law would elicit, a few years later, the ironic comments of the great legal historian and philosopher Paulo Merêa (‘these lessons are still interesting, inasmuch as they are so out of step with traditional education’), who provides the following expressive synopsis:

‘According to Garcia, all the fundamental problems of the theory of the criminal law «are still lacking a scientific solution». Regarding the origin of criminality, Garcia admits to being deterministic and enthusiastically reproduces Girardin’s paradoxes, which had been brought to light shortly before in the famous book *Le droit de punir*; he stresses, however, that Girardin’s work is only valid for its criticism – the uselessness of penalties, the need to abolish them – because it lacks an organic and truly scientific part. The law of social evolution to which the crime is subject has not yet been scientifically determined, but there is already some data collected by Quetelet. Such data allows us to affirm [according to Garcia] that crime is mainly a product of the environment. Regarding the so-called right to punish, there are a large number of metaphysical theories, which fight each other through a series of innocuous statements. What is needed is, above all, to prevent delinquency, combating its causes and drivers’<sup>73</sup>.

Some basic postulates of the Positive School (determinism, criticism of the classic system of penalties, organicism, prevention of delinquency) were thus conveyed through the teaching of criminal law during this short period.

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<sup>70</sup> Moncada, *Subsídios*, p. 143 fn. 70, who considered that, in the ‘60s, Emygdio Garcia was not yet a positivist, as his writings still boasted a ‘Krausist background’.

<sup>71</sup> Garcia, M. E., *Apontamentos de Algumas Prelecções no Curso de Sciencia Política e Direito Político*, notes collected by the students P. A. Camelo and Abel d’Andrade, Coimbra: Typ. de Luiz Cardoso, 1893, p. 34 (on the concept of Law), and pp. 5 ff. (on the organicist concept of society and the role of law therein, pp. 34-38: ‘There is however a special branch of Moralizing Law, already codified in every nation, which is being carefully studied, the theory of which is now going through a stage of deep and radical transformation: it is the «Criminal Law»’. See also Moncada, *Subsídios*, pp. 147 ff.

<sup>72</sup> Moncada, *Subsídios*, pp. 145 ff.

<sup>73</sup> Merêa, P. *Esboço de uma história da Faculdade de Direito de Coimbra*, Fasc. III (1865-1902), *As várias disciplinas* (offprint from *Boletim da Faculdade de Direito da Universidade de Coimbra*, 29, 30, 31) Coimbra: 1956, pp. 63-64, fn. 3.

The works of Emygdio Garcia (somewhat wordy and often provocative<sup>74</sup>) also associated the academic visibility of 19th-century positivism with the *republican ideal*, given his lively political activity in the organization of and participation in the initiatives of the (small and radical) Republican Party, as well as his vast production of chronicles and opinion articles in newspapers<sup>75</sup>. This political connection and his exuberant personality were certainly not foreign to the way the supporters of the Positive School and their theories on criminals, crime and punishment ended up being seen in the university environment at the beginning of the '80s. However, an important change is on its way, via the teaching and the works (cultured, organized and very well informed) by Henriques da Silva, Dias da Silva, Affonso Costa and Caeiro da Matta.

### 3.3. Henriques da Silva: the opening to modernity in the framework of the Classical School

Henriques da Silva (1850-1906), who was a professor of criminal law at the University of Coimbra, has embraced English utilitarian thinking (Bentham, Mill and Spencer). He assimilated all the information about sociological positivism and the contributions of experimental sciences and was a supporter of a general preventive theory of punishment<sup>76</sup>. In his view, the preventative perspective on punishment was in line with the rationalizing function of the principle of utility, because the law only disapproves of a fact when, in addition to being contrary to equality and the conditions of social life, the means of coercion 'can be useful, either for the restoration of the normal conditions, or ensuring them in the future'<sup>77</sup>. The preventative utility of the penalty was thus a condition for legitimizing criminal justice<sup>78</sup>.

The analysis of the fundament and purpose of punishment is completed by Henriques da Silva with a theory of criminal responsibility, based on two premises: the voluntariness of the fact (required by law) and the theory of coercion. The former connects the fact with the will of the actual offender (possible situations of mistake are considered in this framework), whereas the latter intends to organise the several defences that may disturb or exclude the offender's free will<sup>79</sup>. For this reason, and

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<sup>74</sup> See the vivid description of Emygdio Garcia by the writer Trindade Coelho, who was his student in the Faculty of Law, in Coelho, T., *In illo Tempore, Estudantes, Lentas e Futricas*, Paris-Lisboa: Livraria Aillaud & C<sup>ia</sup>, 1902, pp. 357-359, fn. 1.

<sup>75</sup> In more detail, Catroga, "Os inícios do positivismo em Portugal...", pp. 31 ff., pp. 44 ff.

<sup>76</sup> See the PhD dissertation by Silva, H., *Relações da Justiça com a Utilidade*, Coimbra: Imprensa da Universidade, 1895; Idem, *Lições de Direito Penal* (1898-1899), lectures collected by João Ferreira Gomes, Heitor de Oliveira Martins and Luiz Macedo de Castro, Coimbra: Lithographia Académica, 1889; and Idem, *Elementos de Sociologia Criminal e Direito Penal*, Coimbra: Imprensa da Universidade, 1905.

<sup>77</sup> Silva, H., *Relações da Justiça*, pp. 95-102.

<sup>78</sup> For an overview of the literature on criminal law in this period, see Merêa, P., *Esboço de uma história da Faculdade de Direito de Coimbra. Fasc. III (1865-1902): As várias disciplinas* (offprint from *Boletim da Faculdade de Direito da Universidade de Coimbra* 29, 30, 31), Coimbra: 1956, pp. 62 ff. On the thinking of Henriques da Silva, from a philosophical perspective, especially in the field of legal methodology, see Moncada, *Subsídios*, pp. 152 ff. See also, with further information, Costa, M. J. A., "Apontamento sobre a autonomização do direito criminal no ensino universitário português", *Direito e Justiça* II (1981-1986), pp. 70 ff., and Hünerfeld, *Strafrechtsdogmatik*, pp. 114 ff. Providing an analysis of Silva's theory on crime and punishment, Palma, "Do sentido histórico...", pp. 377 ff. ('[Henriques da Silva] has always defended a preventive program: general security and the amendment of offenders'), and Hespanha, *A Evolução da Doutrina*, pp. 480-483.

<sup>79</sup> In more detail, Pinto, F., *A Categoria da Punibilidade*, pp. 282 ff.

notwithstanding the attention it pays to the sociological elements, Henriques da Silva's construction does not correspond to the simple dilution of criminal law in criminal sociology, in the manner of Ferri, nor to imposing the need for social defense to the detriment of legal guarantees (as upheld by Portuguese alienist clinicians, building on Lombroso and Garofalo<sup>80</sup>)<sup>81</sup>. His theory of criminal responsibility relies on the premise that 'there is no offender without a crime: the legislator must, first of all, make the list of prohibited and punished acts; criminals and delinquents will only be those who are to blame for those acts'<sup>82</sup>. In other words, criminal liability is necessarily based on the offence and the law, and not exclusively on the features of the offender.

Hence, this influential scholar furthers the legacy of the Classical School, updated by French literature and later marked by the influence of Adolphe Prins<sup>83</sup>. This is very clear, for instance, in the field of the relations between criminal policy and the guarantees established in criminal codes: Henriques da Silva clearly states, following Liszt, that criminal law constitutes 'the insurmountable barrier of criminal policy' while stressing at the same time the importance of preserving the balance of guarantees associated with the principle of legality of crime and punishment<sup>84</sup>. The scope of these assertions is all the more impressive if we read them in the light of what was advocated in the studies of psychology and criminal anthropology welcomed by Portuguese doctors and foreign authors in the late 19th century. Perhaps for this reason, Eduardo Correia wrote that it was far-fetched to simply lead back the works of Henriques da Silva to the program of the *Scuola Positiva*<sup>85</sup>.

### 3.4. The original (and underestimated) work of Affonso Costa: in the intersection between schools and socialism

The academic debate on the Positive School in criminal law will be significantly deepened by Affonso Costa (1871-1937), who was a professor at the Universities of Coimbra and Lisbon and one of the most influential and controversial politicians of the beginning of the 20th century. He was a disciple of Henriques da Silva<sup>86</sup> and his contribution to the development of positivism in Portugal consisted of works on forensics in criminal proceedings (1895) and a comprehensive book on the clash of schools and the legitimacy of punishment (1896).

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<sup>80</sup> See supra, 2.

<sup>81</sup> One of his students (a notorious lawyer in Porto) came close to this approach and received a strong influence from Lombroso's 'born criminal' category: cfr. Lucas, B., *A Loucura Perante a Lei Penal, Estudo Médico-Legal dos Delinquentes a propósito do crime de Marinho Cruz*, Porto: Barros & Filha, Editores, 1887; see also Maldonado, "Alguns aspectos...", pp. 30-40; and, on his biography and the significance of his work, Garmel, M. R. L., "Bernardo Lucas: a defesa dos arguidos e a perícia médico-legal", *A Criminologia: um Arquipélago Interdisciplinar* (C. Agra, org.), Porto: UPE, 2012, pp. 137-161.

<sup>82</sup> Silva, *Elementos*, p. 218.

<sup>83</sup> Hünerfeld, *Strafrechtsdogmatik*, pp. 118 e ss; and Pinto, F., *A Categoria da Punibilidade*, pp. 287 ff.

<sup>84</sup> Silva, *Elementos*, pp. 31-32; see also Hünerfeld, *Strafrechtsdogmatik*, pp. 119-120, and Palma, "Do sentido histórico...", *Revista Portuguesa de Ciência Criminal* 9 (1999), p. 379.

<sup>85</sup> Correia, *A influência de von Liszt*, pp. 10-11 and fn. 4.

<sup>86</sup> Not only does Affonso Costa vindicate being a disciple of Henriques da Silva, but he also praises the latter's teaching for the 'renovation of the criminal law science', and deems him to be the source of some fundamental ideas, such as the relevance of the social causes of crime: cfr. Costa, A., *Commentário ao Código Penal Português, I, Introdução, Escolas e Princípios de Criminologia Moderna*, Coimbra: Manuel de Almeida Cabral-Editor, 1896, pp. 146-147 and fn. 3.

The research on forensics in criminal proceedings was directly related to the claim for scientific recognition of the authority of experts regarding assessments of their competence (eg, establishing and measuring bodily harm, defining death, rendering diagnoses of mental disturbances) and the consequent limitation of judicial powers in that respect<sup>87</sup>. In the more technically developed society of the last quarter of the 19th century, with some industrial growth and notable scientific progress, it was anachronistic that the knowledge of specialists in different areas (from the analysis of forged documents to the diagnosis of mental disorder) was ignored or disregarded by the courts while deciding on such cases<sup>88</sup>. A clear testimony of the relevance of the subject is the attention Affonso Costa paid to it in *The Experts in Criminal Procedure*<sup>89</sup>. The author draws the historical evolution of the experts' role in criminal proceedings, presents a list of crimes that may call for scientific expertise<sup>90</sup> and defines the types of professionals who can carry out examinations and forensics<sup>91</sup>. But the most outstanding argument is probably the defense of the prevalence of medical expertise (from public institutions) over the courts' assessments in the field of mental pathologies<sup>92</sup>, to allow for replacing the application of a criminal penalty for internment in 'hospitals for the alienated'. To that purpose, Costa advocates a 'previous mental examination of any individual in detention'<sup>93</sup>.

Hence, Affonso Costa's proposal amounts to bringing into the criminal procedure the positivist program adopted by the specialists in mental illnesses, by enhancing and empowering the expert.

In the following year, Costa publishes the most complete and interesting work of a legal nature marked by the influence of positivism in Portuguese criminal law. The book bears the somewhat equivocal title "Commentary on the Portuguese Penal Code", but its actual contents are better expressed in the subheading: "Introduction, Schools and Principles of Modern Criminology"<sup>94</sup>. The author discusses, in over 300 pages, the main topics of the second half of the 19th century, working on an excellent collection of historical sources (national and foreign), in a critical conversation with the various

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<sup>87</sup> See supra, 2.

<sup>88</sup> The tension between clinical expertise and judicial assessments of the unaccountability of mentally ill offenders is vividly documented in the case *Marinho da Cruz*: see supra, fn. \*. On the value of clinical expertise in the criminal procedure, exploring several important cases of the end of the 19th century, see Garnel, "Bernardo Lucas...", pp. 137-161, pp. 140 ff.

<sup>89</sup> Costa, A., *Os Peritos no Processo Criminal*, Coimbra, Manuel de Almeida Cabral - Editora, 1895.

<sup>90</sup> *Ibid.*, pp. 55-57.

<sup>91</sup> *Ibid.*, pp. 77 ff.

<sup>92</sup> *Ibid.*, pp. 200 ff., pp. 236 ff. The author relies, among others, on the works of Júlio de Mattos, namely on some excerpts taken from the "positivist program" presented in the preface to Garofalo's *Criminology* (see supra, fn. \*66).

<sup>93</sup> *Ibid.*, pp. 200 ff.

<sup>94</sup> See supra fn. \*86. The book consists of the dissertation submitted as part of the application to the position of substitute professor in the Coimbra Faculty of Law, which he got and kept from 1896 to 1900, when he became a full professor (*catedrático*). Despite the doctrinal and programmatic richness of his work and of his successful academic career, the research did not fully reflect on the teaching of the criminal law, namely because a good part of his time was dedicated to intense political activity. Affonso Costa was a Member of the *Cortes* (Parliament) with the Republican Party (from 1897), participated in the establishment of the Republic (1910) and took on important positions in the government from that date on (Minister of Finance, Minister of Justice and Prime Minister). His political life also prevented him from actually carrying out the role for which he had been elected, in December 1913, as Head of the Faculty of Law of the University of Lisbon, an institution he had helped to establish that very year.

currents of Italian, French, English, German and Dutch positivism. But, more importantly, Costa deliberately distances himself from several central aspects of mainstream positivism, contradicting Lombroso, Ferri and Garofalo in fundamental aspects, which also allowed him to build an alternative and innovative line of thought about the legitimacy of punishment<sup>95</sup>.

The book begins with strong criticism of the Classical School, replicating the usual terms of the Positive School: the metaphysical elaboration of fundamental concepts, the inexistence of free will, the perverse consequences of having the penal codes (including the Portuguese one) grounding the offender's responsibility in his intelligence and freedom, the illegitimacy of the absolute doctrines on punishment (retribution) and of the criteria put forward to ensure its usefulness<sup>96</sup>. In his argument, Affonso Costa relies not only on the Italian and French positivist penal doctrine but also on the manifesto of criminological positivism drafted by the medical doctor Júlio de Mattos<sup>97</sup>.

Costa's criticism of the Classical School does not encompass three of its important historical contributions, which he specifically safeguards: in the first place, the abolition of the system of cruel penalties, torments and mutilations of the *Ancien Régime*, based on humanitarian motives<sup>98</sup>; in the second place, he stages a defense of the correctionalist movement and rehabilitation, arguing that its supporters did not achieve better results only due to the lack of means<sup>99</sup>; finally, he upholds the penitentiary system, in Portugal and abroad, documenting the works that have been dedicated to the subject since the first half of the 19th century and concluding expressively: 'Among us, for a long time, almost all criminal law writers were penitentiaries'<sup>100</sup>.

With such caveats, Affonso Costa is already moving away from some trends and solutions of the *Scuola*. In reality, he advocates for a political-scientific derivative of the 'Mother School', which he names 'Socialist Criminal Law School', a branch of positivism inspired by the works of Fillipe Turati on the social and economic roots of crime. A large part of criminality (theft, extortion, fraud, sexual offenses, abortion, counterfeiting, smuggling, press offences, etc.) can be explained, he argues, by the social and economic problems at its origin, aggravated by bad legislation that aggravates them<sup>101</sup>. The fundamental principles of the 'Socialist school' are, in short, the denial of free will, the rejection of the type of offender ('for the socialist school, the type of criminal does not exist'), the acceptance of the dichotomy alienated / not alienated (instead of the psychosomatic classification of the criminals, which he does not completely disregard but does not recognise as decisive) and the explanation of

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<sup>95</sup> For an overview of the author's work in its cultural context, see Hespanha, *A evolução da doutrina*, pp. 474 ff., pp. 485 ff. Focussing on Costa's most innovative contributions, see Palma, "Do sentido histórico...", pp. 384-387.

<sup>96</sup> Costa, *Commentário*, pp. 21 ff.

<sup>97</sup> See supra fn \*66.

<sup>98</sup> Costa, *Commentário*, pp. 31 ff.

<sup>99</sup> *Ibid.*, pp. 35 ff.

<sup>100</sup> *Ibid.*, pp. 36 ff., p. 37 fn. 1.

<sup>101</sup> *Ibid.*, pp. 126 ff.; the 'erroneous legislation' includes, eg., the laws on political offences and the prohibition of divorce. It is also interesting to note that, in this respect, Affonso Costa defends Turati against Ferri's criticism.

criminality, not by the innate predisposition of some individuals, but by the underlying social and economic conditions<sup>102</sup>.

This perspective will have massive repercussions on his theory of crime and punishment, as it leads to the abandonment of the psychobiological paradigm as a referent of the legal construction of the offence. Therefore, Costa rejects the biophysical criteria and the analysis of anthropometric features for the identification and classification of criminals, in an intense critical dialogue with Lombroso, Ferri and Garofalo<sup>103</sup>: crime is not a psychobiological inevitability, but rather a political and social circumstance.

Those guidelines were fraught with consequences.

First and foremost, they reflected on the legitimacy of criminalisation: the political and legislative decision to criminalise certain conduct should have social references that respect the preservation of the conditions of the existence of the entire society, and not just of the ruling class or of the power instituted in its interest<sup>104</sup>. In contemporary terms, it could be said that Affonso Costa has introduced a democratic referent in the material legitimation of state intervention through criminal law.

Second, penal sanctions draw their legitimacy from preventative goals, which however are not bound to social defense, as interpreted by the positivist school. There is a clear element of general prevention in Costa's theory: penalties would pursue '«moral coercion» [a concept that has perhaps been inspired by the teaching of Henriques da Silva], exerted over all men', which consists of a 'high and intense defense aiming at avoiding future offences, both by reinforcing the moral sense of *possible* criminals and by withdrawing from society those who have already committed crimes, not to cause harm to them, not to avenge the offended society, but to avoid as much as possible that they commit other offences'<sup>105</sup>. The gravity of the penalties needed to ensure moral coercion should be measured against the 'average of the moral sense of all men', not the 'exceptional criminals''<sup>106</sup>.

The legitimacy of the penalty is further conditioned by additional criteria. One should bear in mind not only the offender's fearfulness and the need for defense against him but also the relationship of the penalty with 'the collective conscience':

'The truly human penalty, said Guyan, must combine maximum social defense with minimum individual suffering. It can be inferred from this principle that the penalty must be sufficient and necessary. Sufficient to defend society. Necessary so that individuals are not at the mercy of the whims and arbitrariness of the constituted power, which are justly feared'<sup>107</sup>. [Punishment is sufficient when] 'the conditions of society's existence are assured, thanks to the «psychological coercion» exercised by it on all individuals', [and it is necessary when] 'the «collective conscience» claims it as a consequence for the prohibited conduct'<sup>108</sup>.

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<sup>102</sup> *Ibid.*, pp. 147 ff.

<sup>103</sup> *Ibid.*, pp. 159 ff.

<sup>104</sup> *Ibid.*, pp. 253 and pp. 234 ff.; see also pp. 253 ff., where the author discusses Ferri's construction.

<sup>105</sup> *Ibid.*, p. 285.

<sup>106</sup> *Ibid.*, pp. 283-285.

<sup>107</sup> *Ibid.*, p. 287.

<sup>108</sup> *Ibid.*, pp. 288-289.

The legislator must respect and follow those criteria, and the author gives examples of situations in which they are not met: on the one hand, the law severely punishes journalists for discussing unfavourably the acts of the superior administration of the state, whereas, on the other hand, it does not provide against the exploitation and labour conditions of the workers, especially women and children, who work in the workshops<sup>109</sup>. In light of the aforementioned criteria, the first case does not threaten the integrity of the society's conditions of existence (the 'collective conscience' does not claim penal sanctions), while in the second there are no sufficient criminal reactions.

As Maria Fernanda Palma has summarised it, 'Affonso Costa adopts a preventive perspective of the criminal law, combined with a theory of justice, based on a material concept of crime, as measured by social conscience in a given historical period and completed by a humanitarian approach to penalties'<sup>110</sup>.

Finally, there is a third aspect where Costa moves away from criminological and anthropological positivism: he criticises Lombroso, Ferri, Garofalo and Tarde, refuses the simple social defense based on the fearfulness of the mentally ill offender and argues in favour of limiting the application of criminal penalties to accountable offenders. To that effect, he relies again on the studies of Júlio de Mattos and denies the right to punish those 'who are not able to feel the determinative effect of punishment (the hypnotized, the epileptic and the insane)'<sup>111</sup>.

Consistently with the refusal of the theory of absolute social defense, Affonso Costa ends his book with an articulated argument against the death penalty, which, among other disadvantages, excludes the chance of rehabilitation. As stated earlier, correctionalism not only paved the way for positivism, but it was still very present in the preventive program of Portuguese positivists at the end of the century.

### 3.5. Full-fledged positivism: António Castello Branco and Caeiro da Matta

Notwithstanding, some politicians, practitioners and academics were eager to adopt a true positivistic approach to criminal law.

That was the case of António d'Azevedo Castello Branco, who was a member of Parliament, deputy governor (1884-1889) and governor (1889-1893?) of the recently inaugurated penitentiary of Lisbon, Minister of Justice and mayor of Lisbon. In his capacity as a deputy governor, he visited several prisons abroad and published several works on the *question pénitentiaire*<sup>112</sup>. The theoretical background of his proposals was quite clear<sup>113</sup>: he fully shared the *Scuola Positiva's* claim for social defense to the

<sup>109</sup> *Ibid.*, pp. 288 and 291.

<sup>110</sup> Palma, "Do sentido histórico...", p. 386.

<sup>111</sup> *Ibid.*, pp. 292-318; this led Costa to acknowledge that a distinction should be drawn between insane offenders who can be intimidated and unaccountable offenders who should not be punished.

<sup>112</sup> See *infra*, 4.3.

<sup>113</sup> António Castello Branco succeeded to Jeronymo da Cunha Pimentel as governor of the Lisbon penitentiary upon the latter's passing in 1889. Pimentel had also published a few works on the penitentiary treatment, but their theoretical basis was equivocal and even contradictory, mixing some lineaments of the Positive School with elements drawn from correctionalism and catholicism: see Marques, T. P., "Intervenções médico-legais de militantes católicos (c. 1880 – c. 1920) – Em torno de Jerónimo da Cunha Pimentel e António Lino Neto", *Religião e Cidadania: Protagonistas, Motivações e Dinâmicas Sociais no Contexto Ibérico* (A. M. Ferreira / J. M. Almeida, coord.), Lisboa: Centro de Estudos de História Religiosa – Universidade Católica Portuguesa, 2011, pp. 215 ff.

detriment of the Classical School ‘metaphysics’, he embraced bio-psychic determinism and the need to respond to individual fearfulness/dangerousness, and pointed out the inappropriateness of the penitentiary system to deal with some classes of criminals: born and ‘abnormal’ offenders (in respect of which he quotes Lombroso and praises criminal anthropology), vagrants and multi-recidivists or habitual offenders<sup>114</sup>.

That was also the case of the lawyer José Mendes Martins, who proposed, in his *Sociologia Criminal* (Criminal Sociology)<sup>115</sup>, a radical program of social defense, based on a psycho-physiological perspective of the criminal, where he advocates for indeterminate penalties, restriction of the penitentiary treatment to convicts with prospects of regeneration (especially, occasional offenders) and the establishment of special asylums for some offenders with psychic pathologies (the ‘alienated criminals’, as Júlio de Mattos had named them). He also called for the reinstatement of banishment to agricultural colonies overseas, as a chance for rehabilitation; should it fail, the convict should then be deported to other colonies, of insalubrious and lethal climate, with a view to his / her ‘slow elimination’<sup>116</sup>.

In academia, it is arguably in the works of Caeiro da Matta (1877-1963), a professor at the Faculties of Law of Coimbra (1907-1919) and Lisbon (from 1919 onwards), that the most distinctive influence of positivism over criminal law can be found<sup>117</sup>. His theory combined the fearfulness of the offender, as the foundation of the penal response, with a legal conceptualisation of the offense and the penalty, in an elaborate and tense dialogue, which Maria Fernanda Palma describes as replicating the dualism between the legal and the non-legal objects of the theory of criminal law<sup>118</sup>. According to Palma, the “succession” of Caeiro da Matta to Henriques da Silva in the chair of Criminal Law represents the evolution from a predominantly sociological orientation, tempered by a theory of justice, to a radical criminal anthropologism, served by Garofalo's legal criteria<sup>119</sup>.

Caeiro da Matta takes on the essential postulates of positivism in his doctoral dissertation<sup>120</sup> and then develops them with remarkable depth in the handbook *Direito Criminal Português* (Portuguese Criminal Law)<sup>121</sup>. Its starting point is twofold: on the one hand, he breaks away from the Classical School and its metaphysical conception of

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<sup>114</sup> See Branco, A. A. C., *Estudos Penitenciarios e Criminaes*, Lisboa: Typ. Casa Portuguesa, 1888, pp. 99 ff., pp. 111 ff., pp. 125 ff., pp. 201 ff. The response to those types of criminals should however be differentiated: perpetual or indeterminate segregation (as a defense measure) for born offenders, and banishment/deportation to the colonies, also for an indeterminate time and encompassing a period of parole, for the remaining types.

<sup>115</sup> Martins, J. M., *Sociologia Criminal*, Lisboa: Tavares Cardoso & Irmão – Editores, 1903, who draws the history of the Positive School, puts forward several statistical methods for the organisation of data and the drafting of forecasts of future behaviour, as well as a radical programme of social defense, all based on a psychic differentiation of criminals, where the penitentiary system is limited to occasional offenders who offer prospects of rehabilitation.

<sup>116</sup> *Ibid.*, pp. 95-115.

<sup>117</sup> On the works of Caeiro da Matta, see Hünerfeld, *Strafrechtsdogmatik*, pp. 116 ff.; Palma, “Do sentido histórico...”, pp. 380-384, and Hespanha, *A evolução*, pp. 485-489.

<sup>118</sup> Palma, “Do sentido histórico...”, p. 384.

<sup>119</sup> Palma, “Do sentido histórico...”, p. 382.

<sup>120</sup> Matta, J. C., *Do Furto (Esboço histórico e jurídico)*, Coimbra: Imprensa da Universidade, 1906.

<sup>121</sup> Matta, J. C., *Direito Criminal Português*, vols. I-II, Coimbra: França Amado, 1911.

free will as the foundation of criminal responsibility<sup>122</sup>, upholding the opposite view, grounded on psycho-social determinism and the fearfulness of criminals. However, he also criticises and distances himself from the *Terza Scuola* (Alimena and Carnevale) and the ‘eclectic doctrines of the International Union of Criminal Law’ (van Hammel, Prins and von Liszt), which he disregards because ‘they represent nothing but a transaction on scientific conscience’; in this context, he was particularly critical of the criminal irresponsibility of the alienated<sup>123</sup>.

In substance, Caeiro da Matta, similarly to Garofalo, bases the legitimacy of social defense on the fearfulness of the offender<sup>124</sup> and embraces a good part of Lombroso's doctrine on the type of the innate criminal. He sets out in detail the features of the latter's criminal man, with the developments provided by Basílio Freire, and he acknowledges that ‘a greater number of anomalies or atavic, degenerative or pathological stigmas’ may constitute a ‘true personal predisposition to criminality’<sup>125</sup>. Moreover, he subjects the lombrosian type of criminal to Ferri's classification, differentiating between habitual criminals [alienated, born criminals (incorrigible) and by acquired habit] and occasional criminals (occasional *stricto sensu* and criminals by passion)<sup>126</sup>.

One of the most consistent associations made by Caeiro da Matta on the types of criminals results from the processing of (extensive and detailed) statistical data on crime in Europe and Portugal, in order to establish a geography of crime and crime patterns by region (different types of crime in different regions)<sup>127</sup>. For that purpose, he processes different ‘crime factors’ (race, heredity, age, gender, marital status, profession, domicile, social class, education), relying on Tarde, Lombroso, Ferri, Garofalo and several Italian, French, Spanish and German surveys, as well as on national data and opinions of Portuguese doctors and anthropologists on the ethnic-geographical distribution of crime in Portugal<sup>128</sup>.

In respect of some essential issues, Caeiro da Matta presents and assumes the consequences of his positivist approach, namely in what concerns (i) the principle of legality (including the retroactive application of the criminal law) and the powers of the

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<sup>122</sup> Matta, *Do Furto*, pp. XI-XII: “The fight against crime does no longer mean the restoration of an abstract legal order; the penalty has become a positive defense weapon, instead of a metaphysical tool for expiation”;- The argument is further developed in Idem, *Direito Criminal*, pp. 25-32. The author then defends sharply the main postulates and principles of the Positive School: physical, psychological and social characterisation of the criminal individual; identification of the causes of crime; fight against the metaphysics of the Classical School (“a pure subjective illusion”): see vol. I, pp. 9-12, p. 33; vol. II, pp. 282 ff.).

<sup>123</sup> Matta, *Direito Criminal*, vol. I, pp. 194-199. According to Hespanha, *A Evolução*, p. 487 and fn. 147, the criticism against eclectic theories targeted also Henriques da Silva's successor, Manuel Dias da Silva, who followed Saleilles and Prins as his master had done.

<sup>124</sup> Matta, *Direito Criminal*, vol. I, p. 42 and vol. II, p. 228, where the author concludes: “the offence is nothing but the moral and material expression, the measure of the criminal temperament, of the noxiousness, of the fearfulness of the offender” (also, in the same direction, vol. II, p. 311). Consistently, he abandons the concept of moral accountability founded on free will and proposes that it be replaced by ‘social responsibility’ (vol. II, pp. 283-286).

<sup>125</sup> *Ibid.*, vol. I, pp. 52-54.

<sup>126</sup> *Ibid.*, vol. I, pp. 55-66.

<sup>127</sup> *Ibid.*, vol. I, pp. 61 ff., esp. pp. 70 ff. and pp. 72 ff.

<sup>128</sup> Eg., Ferraz de Macedo, Alfredo Luiz Lopes, António Arroyo, Júlio de Mattos, Fonseca Cardoso, Basílio Freire, Júlio Dantas.

judge; (ii) the interpretation of the criminal law; and (iv) the procedural scope of the presumption of innocence. It is worth it to take a closer look at these topics:

(i) Caeiro da Matta accepts the principle of legality but considers that it sometimes results in rigid formulae, inappropriate to the individuality of criminals. In this regard, he does not seem comfortable with the circumstance that the criminal codes have become the criminal's Magna Charta, 'a true protective code for the offender', and he tries to compensate such "defect" with the conferral of a broader margin of appreciation to the judge so that the judicial function can play a useful role in the fight against crime. For this reason, he puts forward the possibility of some adaptation in this area: 'a certain freedom must, therefore, be left to him [the judge] as regards the assessment of the fact or facts that reveal the offender's fearfulness'<sup>129</sup>. In the same vein, Caeiro da Matta accepts the prohibition of the retroactive application of the criminal law *in malam partem*, which however should not apply to natural crimes (as opposed to legal crimes, following Ferri's and Garofalo's distinction)<sup>130</sup>.

(ii) Furthermore, the author embeds the classification of offenders into the interpretation of the law: norms should be construed according to the *ratio legis* (ie, restrictively) when dealing with occasional or passionate offenders, but they should apply in their full literal content to the offences perpetrated by natural, alienated or habitual offenders<sup>131</sup>.

(iii) Finally, Caeiro da Matta restricts the presumption of innocence to the investigation stage of the procedure. After the indictment and, especially, at trial, the presumption of innocence should be replaced by a presumption of guilt, given the evidence gathered and the eventual confession by the defendant<sup>132</sup>. The solution is consistent with the relevance he attaches to proving the dangerousness of the offender and the logic of social defense, but it implies a derogation from the guarantees provided for by criminal law, which, in fact, appears to be intentional and programmatic.

Thus, the assessment by Maria Fernanda Palma, according to whom Caeiro da Matta was 'almost absolutely committed to positivism'<sup>133</sup> is fully justified; and, as António Hespanha has aptly noted, his work was 'the last academic synthesis riding the positivist wave'<sup>134</sup>.

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<sup>129</sup> Matta, *Direito Criminal*, vol. II, pp. 8-9, pp. 9-15.

<sup>130</sup> *Ibid.*, p. 43.

<sup>131</sup> *Ibid.*, p. 29.

<sup>132</sup> *Ibid.*, pp. 33-37.

<sup>133</sup> Palma, "Do sentido histórico...", p. 382.

<sup>134</sup> Hespanha, *A Evolução da Doutrina*, p. 480. In any case, there were some late instances of positivist influence already in the 1930s, which had however no significant impact in the following decades: see, eg., Carlos, A. P., *Os Novos Aspectos do Direito Penal (Ensaio sobre a Organização dum Código de Defesa Social)*, Lisboa: Tip. Torres, 1934, where the author advocates for the replacement of the Penal Code with a Code of Social Defense, grounded on the dangerousness of the (accountable as well as unaccountable) offender, which would serve in turn as the criterion for the application of sanctions (administrative measures).

### 3.6. The beginning of the end: the damning critique of positivism by Paulo Merêa

In a conference organised by the *Instituto de Coimbra* in 1910, the then law student Manuel Paulo Merêa (1889-1977) – who would later become a professor at the University of Coimbra and one of the most famous Portuguese legal historians and philosophers – gave a presentation where he engaged in a vivid, sharp and profound criticism against positivism, published later in 1913 with the title *Idealismo e Direito* (Idealism and Law)<sup>135</sup>. It is not possible to summarize, in a few lines, the learned epistemological-legal analysis embedded in this fundamental piece of Portuguese legal thinking, which is still a reference, in many aspects, to legal researchers. To the purposes of this chapter, it may suffice to high-light three crucial aspects:

In his text, Paulo Merêa explicitly takes on an epistemological and methodological rupture with the then-dominant legal positivism, mocking its methods and the empiricist dictatorship, and questioning the legitimacy of its conclusions. In contrast, he upholds the new Idealism, due to its methodological adequacy and its intrinsic humanist view.

The starting point of Positivism deserves him a serious reservation: ‘Individual facts cannot, by themselves, generate a conception of the world; that is why Haeckel claims that a purely empirical doctrine is as vain as a speculative work’<sup>136</sup>. The defense of the new humanist Idealism was necessary, in his opinion, against naturalist scientism:

‘Under the tyrannical influx of natural sciences – he writes, quoting Bergson – life has carried its centre of gravity towards the objective and, meanwhile, everything that happens in the individual's soul is left out, considered as an accessory, his happiness and situation have become increasingly indifferent, «the subject» has become more and more a despicable element, «a drop of water in the ocean». Positivism, in a word, has enslaved man to things, whereas modern idealism «rehabilitates mankind», reviving the anthropocentric ideal in a new form’<sup>137</sup>.

The program of the new idealism is simple: ‘it is an energetic and fatal reaction against the narrow positivism of the last century, against the pernicious abuses of intellectualist logic, against the monist pretensions of science’<sup>138</sup>.

Secondly, Merêa deconstructs Duguit's thesis on the dilution of individual rights in a purely objective system of social relations and alerts against the totalitarian affirmation of society over the individual, which determines his/her subjection to the social whole. In his own words: ‘In either case, the individual is reduced to the condition of a «mere cell of the social body», to use a favourite expression of the positivist Garofalo; and society, which has a monopoly over granting him/her certain

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<sup>135</sup> Merêa, P., *Idealismo e Direito*, Coimbra: França & Arménio, 1913. The text was republished in 1973 as “Idealismo e Direito”, *Boletim da Faculdade de Direito da Universidade de Coimbra* 49 (1973), pp. 285 ff., which is the version used in this chapter. For an overview of the historical-philosophical context in which the lecture was given (in the year the Republic was established) and an analysis of its relevance for the political-ideological clashes in the University, see Moncada, *Subsídios*, pp. 118-119, fn. 10. According to Moncada, Merêa's lecture was a response to two speeches by the new rector of the Coimbra University Manuel d'Arriaga, the ‘old romantic democrat’ who would become the first elected President of the Portuguese Republic the following year (1911).

<sup>136</sup> Merêa, “Idealismo e Direito”, p. 288.

<sup>137</sup> *Ibid.*, pp. 295-296.

<sup>138</sup> *Ibid.*, p. 297.

powers, has the broad competence to divest him, in the name of the same interest, from those powers'<sup>139</sup>.

Finally, the last part of the essay criticises the *Scuola Positiva's* approach to criminal law, which is confronted right from the start with a provocative question: 'Could it not be that what [the *Scuola Positiva*] presents as positivism is but a new kind of metaphysics – «metaphysics in reverse», as Gabba has called it?'<sup>140</sup>. In other words, new metaphysics built upon pure empiricism and naturalistic scientism.

The dilution of law in sociology would have turned out to be a way for Ferri to give positivism a 'new scientific colour', by 'running the veil of forgetfulness over the anthropological fantasies of the patriarch Lombroso'<sup>141</sup>. In its essence, it would be a school founded

'on an ingenious syllogistic system, all based on the hypothesis of determinism, with the most absolute disregard for psychological and social realities. Its criminology is, as Saleilles says, a criminology all in abstractions, all in systems, comparable from that point of view to the political constitutions of Sieyès. Its strength and prestige do not emanate from observation, but from logic, and in the face of such an exciting unfolding of abstract arguments, it can be said that few times the syllogistic spirit found such perfect cultists'<sup>142</sup>.

Such adulteration of sociology itself cannot convert a sociologist 'into a slave to Darwinism', nor pretend, like Garofalo, that society only has to imitate nature'<sup>143</sup>. Merêa concludes: 'O positive method, how much metaphysics is not done in your name! ...', opening a way to reaffirm the importance of moral guilt in the decision to punish, which in essence the *Terza Scuola* will seek to recover after the positivist flood'<sup>144</sup>.

And it was precisely a theoretical paradigm close to the latter's that ended up being successful in the teaching of criminal law in the following decade. In the 1920s, the disciples of the positivists (Beleza dos Santos, in Coimbra<sup>145</sup>, and Abel de Andrade, in Lisbon<sup>146</sup>) presented the Positive School as a *historical event*. Caeiro da Matta himself had acknowledged earlier – in a study published in 1914, where he outlined the state of play, including the contributions of the Positive School to the criminal law theory, the legislation in force and the prison system – that an eclectic orientation was already prevailing<sup>147</sup>.

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<sup>139</sup> *Ibid.*, p. 303.

<sup>140</sup> *Ibid.*, p. 315.

<sup>141</sup> *Ibid.*, p. 317.

<sup>142</sup> *Ibid.*, p. 317.

<sup>143</sup> *Ibid.*, p. 318.

<sup>144</sup> *Ibid.*, pp. 321-322.

<sup>145</sup> Santos, J. B., *Direito Penal* (lessons to the course of 1919-1920, collected by Agostinho Ferevereiro and Augusto Gouveia), Coimbra: Tip. Popular de J. Bizarro, 1920, pp. 32 ff., pp. 37-57; and also Idem, *Elementos de Direito Penal* (lessons to the course of 1925-26, collected by Adelino Marques and Manuel Moutinho), Coimbra: Livraria Neves, 1926, pp. XXXII-LXIV.

<sup>146</sup> Andrade, A., *Lições de Direito Penal, 1924-1925* (lessons collected by V. J. Esteves Cardoso), vol. I, 1925, pp. 85 ff., pp. 91 ff.; and also Idem, *Estudos de Direito Penal* (text organised by Abel de Andrade filho), Lisboa: Tipografia Inglesa, 1925, pp. 67 ff., pp. 69 ff. Further information in Pinto, F., *A Categoria da Punibilidade*, pp. 422-438.

<sup>147</sup> Matta, J. C., "Actuais tendências legislativas em matéria criminal", *Revista da Universidade de Coimbra*, vol. 3 (1914), pp. 428 ff.

### 3.7. A brief assessment

In sum: the positivist movement played a role in the debate and renewal of academic reflection on crime, offenders and punishment, in the late 19th and early 20th centuries. It brought new perspectives, presented new solutions and questioned the regimes in force. At that time, criminal law scholars had no empirical data resulting from their own research. Consequently, the theory and the teaching of criminal law according to the positivist method consisted mainly of the dissemination of principles and ideas built upon empirical material collected and processed by doctors, sociologists and anthropologists<sup>148</sup>, and the deeply questionable tendencies and causal relationships they were eager to establish. This movement may have frantically stirred the academic fora of the time, but it eventually subsided almost as fast as it had emerged.

## 4. Positivism and criminal justice (esp. the enforcement of sanctions)

### 4.1. The liberal revolution and the claims for prison reform

After the liberal revolution, and while the first Constitution (1822) was being discussed in the *Cortes Gerais Extraordinárias e Constituintes da Nação Portuguesa* elected to that purpose, the Government appointed several commissions to assess and report on the prison conditions across the country, which were not deemed to meet the minimum standards regarding hygiene, salubrity, food and separation of inmates (except for gender)<sup>149</sup>.

As Pizarro Beleza points out, the concern with the salubrity of jails (especially with the lack of proper aeration), as an instance of ‘political medicine’ directed at preventing public infection, dates back (at least) to 1756, when the hygienist doctor Ribeiro Sanches published his ‘Treaty on the Preservation of the Health of the Peoples’<sup>150</sup>. However, the guarantees enshrined in the Constitution went far beyond that and stemmed from a new and completely different political context, pursuing goals proper to the rising liberalism: protecting the citizens against state abuse and arbitrariness and endowing prisons with some kind of rational/useful organisation.

In 1822, while the Constitution was being discussed and voted, a crucial text was published, titled ‘Essay on the most convenient plan for the foundation of the prisons,

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<sup>148</sup> According to Correia, E., “Prof. Doutor José Beleza dos Santos. Homenagem por ter atingido o limite de idade”, *Boletim da Faculdade de Direito da Universidade de Coimbra* 31 (1955), pp. 412-413, it was a ‘movement of mere dissemination, since we completely lacked the means for leading proper scientific research’ – which might be an exaggeration.

<sup>149</sup> Under the direct influence of the Cadiz Constitution (Beleza, J. M. M. P., “A pena de prisão, a reforma das cadeias e o *Ensayo sobre o plano mais conveniente para a fundação das cadêas* (notas para a história do direito penal vintista)”, *Liber Discipulorum para Jorge de Figueiredo Dias*, Coimbra: Coimbra Editora, 2003, pp. 394 ff.), Articles 208 and 209 of the Constitution of 23 September 1822 provided that “prisons should be safe, clean and well-aerated so that they serve to secure the inmates and not to their torment”. They also impose the separation of inmates according to their quality and the nature of their offences, and special consideration for those in remand, together with mandatory visits in the terms the law would define. Finally, art. 210 of the Constitution established the criminal responsibility of the judges and jailers for the violation of those rights, probably due to the several reports of abuses committed in the prisons in the preceding years.

<sup>150</sup> Sanches, A. N. R., *Tratado da Conservação da Saude dos Povos*, Paris: 1756, chapter XIX.

preceded by some historical ideas in this respect'<sup>151</sup>. Although it was published anonymously, its authorship has been convincingly attributed to MJ Esteves de Campos by Pizarro Beleza, who deserves credit for the first deep and comprehensive analysis of the article<sup>152</sup>. Father Esteves de Campos was a member of the commission responsible for reporting on the prison of Santarém, as well as a member of the masonic lodge who owned the newspaper where the publication took place.

The *Essay* is composed of eight chapters, which encompass all the main relevant issues of the time: '1) On the security in the prisons; 2) On the convenience and salubriousness that prisons should offer; 3) On the moral correction of the inmates; 4) On the regimes that apply to inmates whose offences have not yet been tried [remand], and to convicts; 5) On the inspectors and guards; 6) On the establishment of prisons, according to their nature and the size of the counties; 7) On the means of implementing and facilitating the establishment of prisons according to the plan submitted; 8) Comparison of the influence of the laws and prisons on customs and morals'. According to Pizarro Beleza<sup>153</sup>, one should highlight the three following main aspects of the *Essay*:

a) Being the first truly comprehensive study published in Portugal on the subject, its author had an exceptional knowledge of both classical sources (eg., Plato, Montaigne, Hobbes, Rousseau, Delille, Beccaria) and the most up-to-date research on the prison systems throughout the world (eg., Bentham, Howard, Penn, Elizabeth Fry, La Rochefoucauld-Liancourt, Turnbull, Gurney and Villermé); Esteves de Campos also quotes several reports and travel chronicles on prisons, as well as texts from medical doctors and physicians, especially concerning the 'air corruption' in the prison environment.

b) The *Essay* proposes the construction of two different types of prisons, for inmates on remand and convicts<sup>154</sup>, and adopts different criteria for choosing their location: the former should be established in the counties with higher crime rate, whereas the latter ('correctional prisons') should be established only in Lisbon and Oporto, close to the two economic hubs of the country.

c) The prison regime should respect the dignity and the rights of the inmates, and should aim at their 'moral correction', following the North-American model. Based on the assumption that 'convicts (...) should be seen as corrigible men'<sup>155</sup>, the rules governing the enforcement of the penalty and its actual duration should follow the progression of the individual towards that goal. It should be achieved through the separation of inmates (gender, age, type and severity of the offences), solitary confinement (Philadelphia system), silence and work, which is mandatory only for the convicts and is seen as the driver of many virtues. A last remark on the interesting way in which the author relates the dignity of work to the new political (liberal) system: if in

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<sup>151</sup> "Ensayo sobre o plano mais conveniente para a fundação das cadêas, precedido de algumas ideias historicas a este respeito", *Jornal da Sociedade Literária Patriótica*, 19 de Abril de 1822 (and following issues). It is a long text (around 90 pages), which has been published in several issues of the newspaper, from April to October 1822. The authors were not able to access the original publication and the following considerations are, almost entirely, drawn from the excellent chapter of José Pizarro Beleza.

<sup>152</sup> Beleza, "A pena de prisão...", pp. 410 ff.

<sup>153</sup> *Ibid.*, pp. 416, ff.

<sup>154</sup> This proposal would be agreed upon by other authors, such as D. Francisco de Almeida (see below), but has never become a reality.

<sup>155</sup> Beleza, "A pena de prisão...", p. 429.

the past ‘a thousand thinned to fatten only one’, the new system ‘will prevent abuse and iniquity, the ideas will follow a more reasonable direction, the customs will improve, honest work will be coveted and, soon, fortunes will be better balanced’<sup>156</sup>.

In respect of prison conditions, in general, and the lack of a proper enforcement system, the literature that followed was quite vocal.

According to D. Francisco de Almeida (1796-1870), those responsible for the management of the prisons only invested in ‘means, even unlawful and cruel, to prevent the inmates from escaping’, not in ‘means for rehabilitation (*correção*)’. As a consequence, ‘not only do the prisons not attain their goals’ – ie, ‘1) the security of the community without putting at jeopardy the health and strength of the inmate; 2) the rehabilitation of the offender’<sup>157</sup> – but also ‘they are true schools of crime’<sup>158</sup>. The example of American prisons is mentioned as a progress in terms of disconnecting security from unnecessary suffering and destitution of rights.

Adopting the distinction between prisons for inmates in remand and convicts proposed by Esteves de Campos (which he named, respectively, ‘*custodias*’ and ‘*carceres*’), Francisco de Almeida insisted on the need for rehabilitation programmes, to be implemented in the latter, which should include four kinds of tools: moral (through spiritual and religious assistance, relying on the French example); intellectual (through education); physical (through work and, in certain cases, medical treatment, to be prescribed by the doctors, aiming at ‘modifying an organisation predisposed to offend’ [the author quotes, in this respect, Gall and Spurzheim]); finally, means of a mixed nature, related to the very organisation of the penal facilities (silence and isolation, following the Auburn system, which the author had observed in Genève and which he praised also for having the advantage of ensuring the prohibition of overpopulation<sup>159</sup>).

The purpose of rehabilitation requires a new concept of prison facilities in the overseas possessions, which should be different from the Dutch and English penal colonies that existed by then<sup>160</sup>. They should serve as ‘houses of convalescence’ (*colónias de experiência*) and were meant to host inmates who had served their sentences before they were integrated back into society in the metropole.

A rather unorthodox perspective was put forward by Silvestre Pinheiro Ferreira. He also believed that punishment should aim at the correction (‘*emenda*’) of the offender as well as general deterrence<sup>161</sup>; nevertheless, in the context of his more

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<sup>156</sup> *Ibid.*, p. 431. In the same direction, stressing the link between the prison reform and the new constitutional system, see Romão, M., *Prisão e Ciência Penitenciária em Portugal*, Almedina: Coimbra, 2015, p. 253.

<sup>157</sup> Almeida, F., *Breves Considerações sobre a Necessidade e Meios de Melhorar as Prisões de Portugal*, Paris: Typ. Casimir, 1834, p. 7. The author was one of the most important representative voices of the liberal approach to prisons and imprisonment: on his life and work see the comprehensive analysis by Beleza, J. M. M. P., “O Conde do Lavradio e o seu «Projecto de Melhoramento das Prisões em Portugal» (Paris, 1834)”, *Direito Penal. Fundamentos Dogmáticos e Político-Criminais. Homenagem ao Prof. Peter Hünerfeld* (M. C. Andrade / J. F. Costa / A. M. Rodrigues / H. Moniz / S. Fidalgo, org.), Coimbra: Coimbra Editora, 2013, pp. 15-124.

<sup>158</sup> *Ibid.*, p. 6.

<sup>159</sup> *Ibid.*, pp. 15 ff.

<sup>160</sup> *Ibid.*, pp. 25 ff. Sharing the same criticism vis-à-vis those penal colonies (where he included the Portuguese ones), see also Ferreira, S. P., *Memória*, p. 22: ‘those nations have been aiming at nothing more than shaking off of their criminals’, using the colonies as alternatives to the death penalty.

<sup>161</sup> *Ibid.*, p. 19.

general contempt for the principle of legality<sup>162</sup>, he conferred upon the jury the discretion to evaluate whether the offence being tried was a contravention, a delict or a crime, taking into consideration all the relevant facts, including the past behaviour of the offender<sup>163</sup>. If the jury detected that the offender had ‘vicious inclinations which should be destroyed’, then it should act *as* a specialist doctor to determine the degree of perversity of the offence (delict, crime or atrocity), in a way that ensures proportionality of the penalty.

There should be three types of prisons: the houses of detention (for prisoners in remand), the houses of reclusion (for serious contraventions and light crimes) and the houses of correction (for convicts of graver offences). As for the enforcement of the sentence, he advocated the need for silence, separation of the inmates, isolation, (paid) work (which encourages the ‘endeavour for profit’), moral education and deprivation of everything that does not prove essential to the preservation of life. But, as such, this system does not generate the *hope* that is needed for the moral improvement of the inmate. As a consequence, the inmates should attend classes and conferences (granted as ‘rewards’), because only the intellectual education can bring the enlightenment they need for embracing hope and the inherent benefits in their rehabilitation.

Once the ‘visiting jury’ found that an inmate was repentant, his sentence would cease. As a transition to full reintegration in the community, he should be sent to the penal colonies overseas, which should be divided in three types, with differentiated regimes matching the degree of culpability that had been established by the trial jury<sup>164</sup>.

The basic lineaments regarding prisons and the penitentiary regime set by the *literature* in the first third of the 19th century did not change much in the following decades<sup>165</sup>. The ‘*question pénitentiaire*’ was indeed a crucial issue in the new political setting, as it was one of the fields where the dismantlement of the structures of the *Ancien Régime* made more sense, for obvious reasons. In a nutshell, the two main features of the reform before the irruption of positivism were the humanisation of imprisonment (under the influence of the Enlightenment) and the rational organisation of the enforcement of prison sentences towards the moral correction of the inmate, grounded on its social utility, in line with the proposals and policies being adopted in other countries, especially in France and the USA. The overarching perspective inspiring the whole construction is a stance of anthropological optimism.

The changes introduced by the reception of Krausism in the theory of punishment<sup>166</sup> do not seem to have had a specific and measurable impact on the literature about the enforcement of prison sentences. However, the idea that society is an organism that must defend herself (defensive solidarity) from aggressions perpetrated

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<sup>162</sup> See *supra*, 1.1.3.

<sup>163</sup> It should be noted that the law in force at the time was the old *Ordenações*, which did not establish such distinction; Pinheiro Ferreira seems to take the *Code Pénal* as an inspiration for his construction, based on a material (rather than legal-positive) classification of the offences: in his own words, a contravention (eg., political offences *stricto sensu*) should be punished because it is a violation of the rights of third parties, but it is not perverse, and consequently the perpetrator does not need to undergo a correctional treatment. Therefore, contraventions should be punished only with light penalties (fines, suspension of function or of political/civil rights, mere reclusion, etc.); see *Memoria*, pp. 19 ff., fn. 2.

<sup>164</sup> *Ibid.*, p. 23.

<sup>165</sup> See the comprehensive analysis provided by Romão, *Prisão e Ciência Penitenciária*, pp. 270 ff.

<sup>166</sup> See *supra* 1.2.

by sick persons (the medicalisation of the offender precociously devised by Ayres de Gouveia in 1860) paved the way for the positivist approach *also* regarding the penitentiary system.

#### 4.2. The “New Penal Reform” (1884-86) and its disregard of positivism

At the *legal-political* level, special prevention and the correction of the offender were never adopted as the exclusive or even prevailing goals of punishment, but they bore a significant influence on penal policies. They have certainly contributed to the major innovations regarding the policies on punishment in the second half of the 19th century: the abolition of the death penalty in peacetime (1867) and all perpetual penalties, including life imprisonment (1884)<sup>167</sup>, as well as the reform of the prison regime, with the establishment and actual implementation of the penitentiary system.

Concerning the latter, the report of the draft Penal Code 1861-64 accorded already special attention to imprisonment and its enforcement; the Commission adopted the ‘French system’ of 1844 (*emprisonnement individuel*), supported, among others, by Moreau-Christophe<sup>168</sup> and Bonneville de Marsangy<sup>169</sup>. The draft code was never passed as such, but many of the proposals contained therein – especially those concerning the penalties and their enforcement – were recovered and enacted, first with the Law of 1 July 1867, later with the ‘New Penal Reform’ of 1884-86, which has put the penitentiary system in place.

The ‘New Penal Reform’ consisted of a deep and comprehensive reform of the Penal Code of 1852. It was drafted by the Minister of Justice and Ecclesiastic Affairs Lopo Vaz de Sampaio e Mello, who presented it in Parliament in April 1884, with a long *Relatorio* (Explanatory Report) of exceptional quality<sup>170</sup>. It should be noted that, as said, the positivist movement was already very active in the medical field, pledging for specific policies on crime and criminals<sup>171</sup>. However, the Report shows scarce or no

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<sup>167</sup> As a matter of fact, those political decisions did no more than officialise the *de facto* abolition of such penalties, which had not been enforced for some decades: see Caeiro, P., “«Ut puras servaret manus». Alegações contra a assunção, pelo Estado Português, da obrigação de entrega ao Tribunal Penal Internacional de um cidadão que possa ter de cumprir uma pena de prisão perpétua”, *Revista Portuguesa de Ciência Criminal* 11 (2001), pp. 43 ff.

<sup>168</sup> Moreau-Christophe, L. M., *Défense du projet de loi sur les prisons contre les attaques de ses adversaires*, Paris: E. Marc-Aurel, Libraire-Editeur, 1844.

<sup>169</sup> Marsangy, A. B., *Traité des diverses institutions complémentaires du régime pénitentiaire*, Paris: Joubert, 1847; *De l'amélioration de la loi criminelle: en vue d'une justice plus prompte, plus efficace, plus généreuse et plus moralisante* (Paris, 1855). On the influence of the author's works on the Portuguese penal reform, see Normandeau, A., “Pioneers in Criminology: Arnould Bonneville De Marsangy (1802-1894)”, *J. Crim. L. Criminology & PoliceSci.* 60 (1969), p. 29. In fact, Bonneville was one of the main references of the draft code, namely in what concerns the enforcement of imprisonment and the separation of the inmates (*Código Penal*, 1864, pp. 70 ff.), parole (*ibid.*, pp. 100 ff.) and the establishment of the criminal record, which would play a paramount role in a system oriented by special prevention (compare *Código Penal*, 1861, pp. 48-50 and *Código Penal*, 1864, pp. 52-54: in between the two versions, the criminal record has been created for the overseas possessions in 1863; see also Costa, A. M. A., *O Registo Criminal. História. Direito Comparado. Análise Político-Criminal do Instituto*, Coimbra, 1985, pp. 112 ff.). The relevance attributed to Bonneville's ideas is corroborated by the fact that his letter comes in the first place in the series of letters from foreign scholars included in the annexes to the draft code (see *supra* fn. \*29).

<sup>170</sup> Available at <http://debates.parlamento.pt/catalogo/mc/cd/01/01/01/052/1884-04-04/994> (and following pages).

<sup>171</sup> See *supra*, 2.

influence from the Positive School. It adopts a neo-classical approach, based on guilt and just retribution, the proportionality between the penalties and the offences and humanisation of the criminal law<sup>172</sup>. To the effects of the present chapter, the topics that interest us most are the regulation of insanity, and sanctions and their enforcement.

The Reform addresses insanity and drunkenness (as defences/mitigation) from the perspective of the offender's awareness of his acts (as a pre-requisite for personal freedom) and of the duty not to cause one's unaccountability (namely through the consumption of alcohol). Whereas the Code of 1852 was silent on how to deal with insane offenders, the new version of art. 47.º prescribed that they should be handed to their families for the latter to 'guard them', or 'interned in asylums if they were criminally dangerous or their state so required for greater security'<sup>173</sup>. Such internment was not seen as a security measure, but rather as a medical / welfare policy, as confirmed later by art. 5.º, § 2.º, of the Law of 4 July 1889 and art. 13.º of the Law of 3 April 1896, which have regulated the internment of insane offenders in common psychiatric hospitals<sup>174</sup>. The internment was not primarily grounded on the mental illness of the offender, but rather on his / her lack of responsibility for the offence; only *then* came the possibility of medical treatment into play.

The main concerns of the reform regarding the penalties are the need to smoothen punishment, bringing it in line with the moral conscience and the sense of justice of the time, and the discrepancies between the sanction systems provided for by the Penal Code 1852 and the Law of 1 July 1867. The latter had abolished the death penalty and had replaced it with life imprisonment in solitary confinement. It also had converted several penalties of the Penal Code into different penalties within the penitentiary system (ie., in solitary confinement: '*prisão celular*'), which nonetheless could not be enforced in those terms, for almost two decades, because there were no penitentiary facilities. However, with the inauguration of the Lisbon penitentiary in 1885, the simultaneous application and *actual enforcement* of the two systems led to imbalances and situations of injustice and inequality that had to be addressed.

It was thus an opportunity for a comprehensive redrafting of the Portuguese sanctioning system, which called for a theoretical guideline regarding the purpose and legitimacy of punishment. In this respect, the Report is very clear in its rejection of special prevention as the exclusive or even main fundament/purpose of punishment:

'Those who take the amendment of the offenders as the sole purpose of the sentence, forgetting that it always constitutes punishment and necessarily involves suffering, transform the criminal into a collegiate, increasing or decreasing the sanction in the name of the victim's moral state. This deplorable exaggeration goes so far that some of them even find it legitimate to apply penalties of indeterminate or perpetual duration when the rehabilitation of the offender is dubious or impossible'.<sup>175</sup>

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<sup>172</sup> 'If society punishes in the name of the right to effect the reparation of the damage that the offence has caused to its moral order, it is clear that punishment should not go beyond what is necessary for such reparation. Punishment is equivalent to reparation, which cannot, by its very nature, fail to equate damage; consequently, the severity of punishment correlates with the gravity of damage' (*Relatorio*, p. 1021).

<sup>173</sup> In fact, this regime had already been proposed in art. 71.º of the draft Penal Code 1861-64: see Antunes, *Medida de Segurança*, p. 151.

<sup>174</sup> *Ibid.*, pp. 145 ff.

<sup>175</sup> *Relatorio*, p. 1021

The report even referred to correctionalism with a hint of irony:

‘[Retribution], as a seemingly retrograde theory in confrontation with the poetic and sentimental systems which began to invade the domains of the criminal law some years ago, is manifestly contrary to the penalties being of indefinite duration, perpetual or of an irreparable nature’<sup>176</sup>.

And any sympathy for the Positive School was summarily dismissed:

‘The public opinion must be warned against the easy statements made in congresses and books by some of the fanatic defenders of the penitentiary system regarding its benefits, even for the enforcement of life sentences in solitary confinement. The prejudice that has seized their spirit and the profound idolatry of that system sometimes mislead their reasoning, leading them in good faith to a wrong assessment of the facts’<sup>177</sup>.

In such a context, the penitentiary system implemented in the new prison of Lisbon the following year was but a *technical convenience*.

It should also be highlighted how the Reform bluntly refused the idea of having indeterminate or perpetual penalties that might respond and control the dangerousness of accountable offenders; they were seen as disproportionate and unfair, because the moral damage caused by the offence is always repairable and temporary. In fact, they were not applied by the courts and it is striking how the Minister of Justice stresses that the *de facto* absence of the death penalty and life imprisonment for almost two decades did not lead to a surge in crime. The Minister goes even further and admits in Parliament, with candour, that the legal provisions on life imprisonment in solitary confinement passed in 1867 had been but a cunning way of having the death penalty abolished:

‘If, in 1867, someone said to those who fought the abolition of the death penalty that for seventeen years the penalty of life imprisonment in solitary confinement would be but a legal fiction, created *ad hoc* to calm their troubled minds and to raise the general acquiescence in favour of that great work of modern civilization, capital punishment would still be in force as state law in the name of public order and beneficial intimidation’<sup>178</sup>.

### **4.3. Prisons: the tension between traditional correctionalism and the modern approach**

In a study published in 1888, the then vice-governor of the Lisbon prison António Castello Branco<sup>179</sup> describes, in general terms, the regime in force in the new penitentiary<sup>180</sup>. On admission, inmates are subjected to a medical exam, they are weighed and measured, and they are inquired about their education and knowledge of moral duties; all data is recorded<sup>181</sup>. They can attend religious services if they wish;

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<sup>176</sup> *Ibid.*, p. 1022.

<sup>177</sup> *Ibid.*, p. 1022.

<sup>178</sup> *Ibid.*, p. 1023.

<sup>179</sup> António Azevedo Castello Branco was later appointed governor of the Lisbon penitentiary and, in 1893, Minister of Justice. In the latter capacity, he was responsible for the promotion of several laws regarding insanity, vagrants, multi-recidivists, etc.: see *infra*, 4.4.

<sup>180</sup> Branco, A. A. C., *Notice sur l'Evolution du Droit Pénal Portugais*, Lisbonne: Imprimerie Nationale, 1888, pp. 19 ff.

<sup>181</sup> *Ibid.*, p. 21.

however, the classes on “moral education” on Sundays are mandatory, and so are the classes during the week, where inmates are split into three groups, according to their cognitive skills. Work is also mandatory (except on Sundays and holidays, where it is optional), for at least 10 hours per day, because, after the Law of 1867, it is no longer a form of aggravated imprisonment, but rather an element at the core of the prison sentence<sup>182</sup>. A penitentiary board is established, who has three main powers: submitting to the government any proposals for the modification of the regime; promoting the creation of associations for the protection of released convicts; and proposing the pardon or reduction of the sentences to be granted by the King. Concerning the latter, it is seen as the greatest reward accorded to inmates and it depends on the fulfilment of four conditions: having served 2/3 of the sentence; exemplary behaviour; repentance; and a resolute endeavour to lead an honest life.

When we consider the outlook of the new Portuguese penitentiary regime, it seems clear that it corresponded broadly to the correctionalist program, possibly common to other European systems. There was little or no trace of social defense or neutralisation of criminals, in general, as sick persons. Even the penalty of banishment to the colonies overseas was justified with economic and political goals (sparing the money that would otherwise have to be spent on building new prisons and the need to effectively populate those territories<sup>183</sup>).

Arguably, the punitive system put in place by the New Penal Reform in the 1880s honoured the classic paradigm by establishing a strict relationship of proportionality between the offense, personal responsibility (guilt) and the applicable penalties<sup>184</sup> and, consequently, leaving mentally ill perpetrators outside of the criminal law. Notwithstanding, such an approach was complemented by a marked element of special prevention, relevant for the enforcement of the sanctions, which aimed at the rehabilitation of the offender. However, the “classical purity” of this system did not last long: it was as if the Reform had brought to its “perfection” a construction that was already raising criticism from various quarters. In 1888, barely two years after the reformed Penal Code entered into force and three years after the inauguration of the Lisbon penitentiary, Castello Branco was already quite critical of the Reform:

‘From those principles [the Classical School’s] he [the Minister responsible for the Reform] has derived the abolition of lifelong sanctions. According to the guidance and the method of modern penal studies, such conclusions would not dodge severe criticism; but they are truly logical and orthodox in the context of the metaphysical school of the criminal law’<sup>185</sup>.

And he finishes his study with the promise of a new era:

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<sup>182</sup> *Ibid.*, p. 22.

<sup>183</sup> *Ibid.*, pp. 11 ff.

<sup>184</sup> The Reform abolished police surveillance, a security measure that followed the enforcement of certain penalties in the Penal Code of 1852: see Pinto / Caeiro, “The influence of the French Penal Code...”, p. 127. The Reform also subjected the sanctions of expulsion and banishment from the Kingdom to a mandatory term, but such sanctions were arguably (at least from then on) accessory penalties (but see, in a different direction, Dias, *Direito Penal Português*, pp. 415 ff., and Antunes, *Medida de Segurança*, pp. 150 ff., who deem them to be security measures).

<sup>185</sup> ‘De ces principes il a déduit l’extinction des peines perpétuelles. Selon l’orientation et la méthode des études pénales modernes, ces conclusions n’esquiveraient pas une critique sévère; mais devant l’école métaphysique du droit pénal, elles sont vraiment logiques et orthodoxes’: Branco, *Notice*, p. 19.

'Penal matters are beginning to attract public attention. There have been recent conferences on psychiatry, articles on criminal anthropology, which no one was talking about in this country until recently. The main reason for the appearance in Portugal of some publications on the subjection of criminality to the examination and the criteria of the positive school is the Italian fertile rejuvenation in the study of criminal matters.

This the dawn heralding the day when criminal law must undergo a profound transformation'<sup>186</sup>.

#### 4.4. Social defense in Portuguese criminal law

Law of 21 April 1892 ruled that some recidivist offenders, as well as vagrants and beggars<sup>187</sup>, could be made available to the Government after having served their sentences and be transported overseas, where they should stay for a minimum period of 3 years, with no maximum limit (*relegation*). A few years later – already under the mandate of Castello Branco as Minister of Justice – two other laws clearly inspired by social defense were passed: Law of 3 April 1896, which has extended relegation to panders, whereas providing, in the alternative, for their coercive internment (as well as of vagrants, beggars and the like) in asylums for beggars (the French *dépôts de mendicité*), for 2 to 5 years<sup>188</sup>; and Law of 13 February 1896, which has criminalised and punished with correctional imprisonment up to 6 months, followed by indeterminate relegation, those who publicly applaud, support, praise or incite subversive acts, or profess anarchist doctrines; relegation could cease by an act of the Government, preceded by judicial authorisation. Later on, after the proclamation of the Republic, Law of 20 July 1912 kept the punishment of vagrants, beggars and the like as such and ordered that they be interned, after having served the sentence, in correctional workhouses or penal agricultural facilities<sup>189</sup>. Over this 20-year temporal arc, the law changed to respond to *individual dangerousness*. Death penalty and life imprisonment never got reintroduced in the Portuguese legal order, but multi-recidivists, vagrants, beggars, panders and anarchists were unified for their dangerousness and excluded from the metropole for an indeterminate time.

In sum: at the turn of the 19th century, Portuguese law embodied some of the mechanisms and solutions put forward by the Positive School regarding the control of dangerous individuals, even if such response could not be seen, in every instance, as

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<sup>186</sup> 'Les sujets touchant la pénalité commencent à éveiller l'attention publique. Il y a eu récemment des conférences sur la psychiatrie, on a publié des articles sur l'anthropologie criminelle, dont personne ne parlait encore dans ce pays, il y a peu de temps. On doit principalement l'apparition en Portugal de quelques publications sur la criminalité soumise à l'examen et au criterium de l'école positive au rajeunissement fécond de l'Italie dans l'étude des questions pénales. C'est l'aube qui annonce le jour où la législation pénale doit passer par une transformation profonde': *ibid.*, p. 31.

<sup>187</sup> Vagrant and beggars were punished as such by arts. 256.º and 260.º of the Penal Code, which ruled that they should be made available to the Government, after having served their sentence, for the latter to provide them with work for as long as appropriate. Arguably, this measure was more of a social/administrative/welfare nature than a security measure; but see, in a different direction, Antunes, *Medida de Segurança*, p. 157, fn. 245.

<sup>188</sup> For an analysis of this legislation, see Antunes, *Medida de Segurança*, pp. 150 ff. See also Gomes, A. L., *Ociosidade, Vagabundagem e Mendicidade. Estudo Social e Jurídico*, Coimbra: 1892, and Bastos, S. P., *O Estado Novo e os seus Vadios. Contribuição para o Estudo das Identidades Marginais e da sua Repressão*, Lisboa: Publicações Dom Quixote, pp. 53 ff.

<sup>189</sup> Antunes, *ult. loc. cit.*

bearing a penal nature. Preventative measures were put in place to counter: (i) the presumed dangerousness inherent to the social status of vagrants, beggars, etc. and anarchists (states of pre-delinquency); (ii) the probable dangerousness of unaccountable offenders, caused by bio-psychic factors, established by doctors and scientists in the penal procedure; and (iii) the verified dangerousness boasted by multi-recidivists, habitual offenders and criminals by tendency, proved in court in legal terms.

One would have to wait for the broad Reform of 1936 – which pursued an eclectic and holistic view of crime and criminal justice and is inextricably linked to its drafter Beleza dos Santos<sup>190</sup> – to have those measures explicitly brought into the realm of the criminal law, under the sign of criminal dangerousness, which should be countered through the application of *security measures in the penal procedure*. At the same time, in according those cases a *special regime* grounded on the dangerousness of the offender within the criminal justice system, the Reform of 1936 also made clear that, *as a rule*, the punishment was meted out as a proportional reaction to the acts perpetrated by responsible (guilty) offenders, thus abiding by the principles of the neo-classical school<sup>191</sup>. Notwithstanding, the rehabilitation of the offender as the main purpose of the *enforcement* of the penalties remained one of the most relevant features of Portuguese criminal law theory, from the early 1800s to this day<sup>192</sup>.

## 5. Conclusion

The discourse of the Portuguese criminal lawyers and scholars of the first half of the 19th century was primarily concerned with the implementation of the ideals of the Enlightenment, namely in the dimension that was more relevant for the political program of the rising liberalism. The fight against judicial discretion and arbitrariness, together with the removal of infamous and cruel penalties, were an important part of the dismantlement of the *Ancien Régime* and ranked high among their priorities.

Notwithstanding, at least since the liberal revolution of 1822, there is a consistent profile of Portuguese criminal law focussed on the *offender* and *special prevention*. It may have started as a simple humanitarian concern regarding prison conditions, but it

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<sup>190</sup> José Beleza dos Santos (1885-1962) was a professor of criminal law at the University of Coimbra. Not only did he author the draft law that was eventually passed as Decree-Law n.º 26.643, of 28 May 1936 (Prison Organisation), but also chaired the Commission for the Construction of Prison Facilities and the Institute of Criminology, thereby connecting the theory of the criminal law with the *pragmata* to which the former relates.

<sup>191</sup> The concessions to the Positive School, even if limited, were almost immediately subjected to criticism by the literature of the mid-20th century, especially to the extent in which they might entail a ‘criminal law of the perpetrator’ (*Täterstrafrecht*), focused on individual dangerousness instead of harmful or dangerous acts. For instance, Eduardo Correia rejected that ‘certain parasitic lifestyles’ (vagrants, etc.) should be dealt with through criminal law, and tried to perfect a ‘monistic system’ of punishment that aimed at avoiding the application of security measures to accountable (especially dangerous) offenders: see Correia, *Direito Criminal*, p. 75 (for a description of this system in English, see Caeiro, P. / Costa, M. J., “Country Report Portugal”, *Harmonisierung strafrechtlicher Sanktionen in der Europäischen Union, Harmonisation of Criminal Sanctions in the European Union*, Schriften zum Internationalen und Europäischen Strafrecht (H. Satzger, Hrsg.), Bd. 41, Nomos Vlg., 2020, pp. 388 ff.). Notwithstanding, Salazar’s dictatorship has extended the application of security measures to political offenders, based on their dangerousness to society: see Caeiro, P., “Nótula antes do art. 325.º”, *Comentário Conimbricense do Código Penal* (J. F. Dias, dir.), vol. III, Coimbra: Coimbra Editora, 2001, pp. 178 ff.

<sup>192</sup> See Caeiro, P., “Ut puras...”, pp. 40 ff., and, in more detail, Rodrigues, A. M., *Novo Olhar sobre a Questão Penitenciária*, 2nd. ed., Coimbra: Coimbra Editora, 2002, pp. 11 ff., *passim*.

caused a very significant volume of research and political action with a much wider scope, regarding the means and goals of imprisonment. Under the influence of correctionalism, that profile evolved quickly into a more elaborate theoretical approach to the general purpose of punishment (Levy Maria Jordão, Ayres de Gouveia), clearly centred on moral rehabilitation or medical intervention (respectively), in the context of “progressive action” within the “social organism”. Around 1880, the time was ripe for a perspective that aimed at replacing the harmful and blameworthy act for the fearful and dangerous criminal as the central category of the offence.

Criminal law and criminal justice were a small part of the scope of the positivist program, which was very broad, as it addressed society at large: academia, the legislator, the courts, prisons, doctors and schools. It sought to influence and even change all of those institutions. Through intense dissemination of ideas in periodicals and other publications, positivism conquered the medical field from 1880 onwards and, at the political level, it cannot be dissociated from the overthrow of the monarchy and the establishment of the Republic in 1910, which involved directly some of its most important supporters (eg., Teófilo Braga, Affonso Costa, Miguel Bombarda). Consequently, at the turn of the century, positivism gained extraordinary momentum through the research and action of doctors and alienists.

In the realm of the criminal law and criminal justice, the positivist program was quite appealing: it was modern, it was fostered by the owners of the new truth (scientists and doctors), it was progressive and hence politically palatable to the rising republicanism. In a moment when urban crime was increasing (or perceived as such), the Positive School promised pragmatic security, to be effected through scientific methods, instead of metaphysic justice.

Positivism certainly contributed to the legal framework applicable to insane offenders and multi-recidivists, including the measures to which they should be subjected, based on individual dangerousness. It has also influenced the regulation of the role of medical experts in the criminal procedure and the value of their reports and opinions.

In contrast, the main postulates of the Positive School regarding the theoretical construction of the criminal offence (namely, strict biological determinism and the overriding relevance of the notion of individual fearfulness) did not really take hold in the prevailing Portuguese scholarship, who remained faithful to the fundamental principles of the Classical School. Despite some ephemeral acceptance by a few academics, politicians and practitioners, the Positive School’s influence in the field of the criminal law ebbed quickly, in the context of a more general criticism against positivism in the legal area, leaving a rather modest trace.

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