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## **THE RECEPTION OF POSITIVISM IN SPAIN: PEDRO DORADO MONTERO**

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*“The moral and medical foundations of this story are even more relevant today. Medicine is in the midst of a vast re-organisation of fundamental principles. Most of our models of illness are hybrid models; past knowledge is mishmashed with present knowledge.*

*These hybrid models produce the illusion of a systematic understanding of a disease -but the understanding is, in fact, incomplete. Everything seems to work spectacularly, until one planet begins to move backward on the horizon. We have invented many rules to understand normalcy -but we still lack a deeper, more unified understanding of physiology and pathology”*,

**SIDDHARTHA MUKHERJEE**



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# STATEMENT OF PURPOSE

In the first place, the current analysis focuses on legal thought. In some sections, history's timeline appears more or less ordered, yet it is not my objective to present a narrative describing a conventional biography. Outstanding comments and descriptive analysis of Dorado Montero have been made by remarkable scholars.<sup>1</sup>

In the second place, I will explore ius-philosophical ideas of the author by interconnecting them among each other, respecting inasmuch as possible a legal history approach. Both legal history and legal philosophy are merged in this work. Therefore, no outline of phases which Dorado Montero went through should be expected along those lines. Such decision is based on two grounds: (a) as described before, many other biographs, sociologists, pedagogists and criminologists have produced a significant amount of high-quality literature on the matter; (b) to assert he went throughout a certain number of phases is swallow and certainly something that Dorado Montero himself would have rejected. Considering he defended the ever-changing nature of man, a classification like that does not look like the best way to introduce the topic of this

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<sup>1</sup> Blanco Rodríguez, J. A., "El socialismo reformista de Dorado Montero", *Revista de Estudios*, Salamanca, No. 11-12, 1984, pp. 235-242; Blanco Rodríguez, J. A., "Evolución de un intelectual crítico", *Revista de Estudios*, Salamanca, No. 33-34, 1994, pp. 141-168; Blanco Rodríguez, J. A., *El pensamiento político-social de Dorado Montero en el marco de las ideologías sociales de su época (1880-1917)*, Salamanca: Facultad de Geografía e Historia de la Universidad de Salamanca, 1979 (inédita); Blanco Rodríguez, J. A., *El pensamiento sociopolítico de Dorado Montero*, Salamanca: Centro de Estudios Salmantinos, 1982. Lima Torrado, J.: "Las claves de la recepción del pensamiento anarquista en la filosofía política de Pedro Dorado Montero", Elósegui Itxaso, M. (Ed.); Galindo Ayuda, F., *El Pensamiento jurídico: pasado, presente y perspectiva. Libro homenaje al prof. Juan José Gil Cremades*, Zaragoza: El Justicia de Aragón, 2008, pp. 417-443; Lima Torrado, J. "Las claves de la recepción del pensamiento socialista en la filosofía política de Pedro Dorado Montero", AA.VV., *Estudios en homenaje al profesor Gregorio Peces-Barba*, Madrid: Dykinson, vol. 4, 2008, pp. 537-550; Lima Torrado, J., *La Filosofía Jurídica de Pedro Dorado Montero*, Madrid, Tesis doctoral (inédita), 1976. López-Rey, M., "X. Pedro Dorado Montero (1861-1919)", Mannheim, H., *Pioneers in Criminology*, London: Stevens and Sons, 1960, *The Journal of Criminal Law, Criminology, and Police Science*, Vol. 46, No. 5, Northwestern University Pritzker School of Law, Jan. - Feb., 1956, pp. 605-612.). Ramos Pascua, J. A., "El positivismo jurídico en España: D. Pedro Dorado Montero", *Anuario de Filosofía del Derecho*, No. XII, 1995, pp. 503-546. Rivacoba y Rivacoba, M.: "Evocación y vigencia de Dorado Montero", *Revista de Ciencias Penales*, Santiago de Chile, T. 29, No. 1, 1970, pp. 15-28; Rivacoba y Rivacoba, M. "Viejas Remembranzas de Dorado Montero", *Revista de Estudios Penitenciarios. Homenaje a Dorado Montero*, No. 195, 1971, Santiago de Chile, T. 29, No. 1, 1970, pp. 1631-1643; Rivacoba y Rivacoba, M. *El centenario del nacimiento de Dorado Montero*, Universidad del Litoral, Santa Fé, 1962; Rivacoba y Rivacoba, M. "Recordación de Dorado Montero", *Cenit*, Toulouse, No. 152, 1963. Rodríguez Hernández, V., *La insumisión en Dorado Montero. El tema iusnaturalista en la encrucijada ideológica de la Restauración*, Salamanca: Hespérides, 1993. Valls, F. J., *La filosofía del Derecho de Dorado Montero*, Salamanca: Universidad de Salamanca, 1971.

thesis. *Grosso modo* generalisations might somehow be useful for the researcher to make up his mind at an initial stage. Thus, I will aim at structuring Dorado Montero's personal evolution into 'interrelated blocks' rather than just 'independent blocks', yet this does not solve the paradox of trying to dissect something that cannot be dissected: the human thought. Before such a creative theory and such an unconventional author, I opted for this approach to present both his penal thought and the role it played as to the introduction of positivism in Spain.

That being said, still a potential risk remains. The objective of this thesis might inaccurately be thought to be an analysis of Dorado Montero's philosophy or legal philosophy. It is definitely not. Again, many monographies and even previous PhD thesis have already tackled this topic. The goal of this thesis is defined in a much broader field of study.<sup>2</sup> After my lucky collaboration with a group of academics, to whom I owe a lot, I was able to see and understand the scenario concerning 19<sup>th</sup> and 20<sup>th</sup> century criminal law in Spain and in the rest of Europe. Particularly detailed studies conducted by them dealt with many technical issues: Criminal codes, laws enacted in the different parliaments, ordinances, police regulations, legal philosophy arguments behind each great penalist, criminalist and sociologist, etc.<sup>3</sup> At this point in time, it is only logical to assert that the Spanish doctrine came at a certain point to accept the influence of positivist premises concerning the "determination of the penalty". Nonetheless, it did not accept its "justification". All in all, Spain was a jurisdiction more suited to eclectic positions. It was evidenced by the overwhelming prevalence and development of eclectic schools in Spain: Joaquín Francisco Pacheco (the counterpart of Pellegrino Rossi in Italy), Alejandro Groizard y Gómez de la Serna

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<sup>2</sup> Note that the most recent and complete work which has been published on the reception of positivism within Europe and Latin America can be found in *GLOSSAE. European Journal of Legal History*, No. 17, 2020.

<sup>3</sup> Masferrer, A., (ed.), *La Codificación española. Una aproximación doctrinal e historiográfica a sus influencias extranjeras, y a la francesa en particular*, Cizur Menor (Navarra): Thomson Reuters Aranzadi, 2014; *La Codificación penal española. Tradición e influencias extranjeras: su contribución al proceso codificador. Parte General*, Cizur Menor (Navarra): Thomson Reuters Aranzadi, 2017; *La Codificación penal española. Tradición e influencias extranjeras: su contribución al proceso codificador. Parte Especial*, Cizur Menor (Navarra): Thomson Reuters Aranzadi, 2020.

and Luis Silvela y de Le Vielleuze, among others. Dorado Montero was successful in his objective to introduce positivism in Spain through the back door.

If one observes the impact that positivism had into the Public law sphere of different European states it is rather conspicuous. However, in Spain, it did not happen to have a translation into legislation. Under the flag of eclecticism and a purported moderation spirit, Spain was often viewed as some sort of 'positivist-free' country. No positivist Codes were enacted, no positivist laws were passed, and no positivist regulations were approved. Yet, I have the impression that positivism did indeed cross our borders and reached our country, but it remained dormant until it got its chance to slightly spread to general substratum of national scholars: from penalists to criminologists, from pedagogists to psychologists, from sociologists to politicians. It could have either remained dormant or have been silently spreading; it does not entail much of a difference.

This was, plainly, my hypothesis. How was this 'silent' spreading possible? I focused on doctrine. Theory, manuals, teaching, congresses, articles are sometimes even more powerful than mere legislation itself, which usually lacks this bedrock. Legislation is sometimes imposed at any cost from high echelons, but lacks this doctrinal power which performs a similar function than that of the fascia in the human body. If the different kinds of legislation are to be considered the different body structures (muscles, blood vessels, organs and viscera), then the doctrine is what attaches, stabilises, encloses, separates and connects - simultaneously- the different units between them (fascia).

In order to do so, I decided to exclusively focus on Dorado Montero. To tackle more than one author for a deep analysis like this seemed simply unmanageable from the very beginning. After concluding it, though, I realised that such endeavour should have been even more conservative. The aim was too wide and I plan to keep on working on this topic in a future since the extent of a PhD cannot contain every aspect I would have liked to further explore. I decided to close the thesis at this stage, not to turn the page but rather to keep on working in a much profound and vast way than what the boundaries of a PhD have to offer.

Once clarified this, little else left to say. As much as I look after an intelligible format and an orderly arrangement, the style might sometimes look loosely. It is entirely intended.

**CHAPTER I:  
CONTEXTUALISING  
DORADO MONTERO**



Pedro Dorado Montero<sup>4</sup> was a transitioning figure. He lived between the years 1861 and 1919.<sup>5</sup> Thus, he was stranded between two centuries. Prominent events such as the loss of the Spanish Empire in 1898, the establishment of the Spanish Protectorate in Northern Morocco in 1912 and its posterior conflict (the Rif War), and the First World War (1914-1918) would be decisive. The previous developments possess, however, not only a symbolic value. Living in the aforementioned period of time made for him both possible and attainable the ideal of change. He knew all the prevailing trends within the old century, as well as the currents of the new, coming one. It was precisely this detailed knowledge of both worlds what would allow him to become one of the greatest masters of 'legal switch' in Europe, and particularly, in Spain.

Nowadays, the meaning of "transition" is in the doldrums. The concept is currently used to depict a soft change allowing us to go from one reality to another; from the past scenario to the one ahead of us. If one wants to lay emphasis on the fact that a certain event constituted a ground-breaking transition, he has to ineluctably use "transition" jointly with the adjectives "hard" or "violent". Even though its official definition is "the process or a period of changing from one state or condition to another",<sup>6</sup> the connotation is far from being so aseptic. In its broad conception, the noun has been stripped of its revolutionary flavour, if any. Through the lens of the common man, "revolution" is change; but "transition" is just a timid, mild, half-hearted word leading us to a third via between two extremes (usually deemed undesirable due to their destructive potential).

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<sup>4</sup> His actual name was Pedro Francisco García Dorado Martín Montero. Yet, there is an open controversy on this matter. *Videre*: Barbero Santos, M., "Pedro Dorado Montero, aportación a su biografía", *Revista de Estudios Penitenciarios*, 22, 1996, pp. 257-317, p. 261. In it, the author offers a very detailed scheme which leads the reader to an almost completely different surname.

<sup>5</sup> For the biographical dates and objective bio-data I have heavily relied upon the Dictionary of Spanish Full Law Professors elaborated by the University Carlos III de Madrid. This *Diccionario de Catedráticos Españoles de Derecho (1847-1943)* can be found at the following link:

[http://portal.uc3m.es/portal/page/portal/instituto\\_figuerola/programas/phu/diccionariodecatedraticos](http://portal.uc3m.es/portal/page/portal/instituto_figuerola/programas/phu/diccionariodecatedraticos).

<sup>6</sup> The Oxford English Dictionary, the Collins Dictionary and the Merriam-Webster Dictionary are unanimous to this respect.

Therefore, let us propose Dorado Montero as the guarantor of the right meaning of transition. He forced Spanish old-fashioned standards to dive into the new era of legal dogmatics (which were at their initial stage).<sup>7</sup> Naturally, one could think that eclectics already did so in a soft manner. Not quite: eclectics sought to elaborate a middle-term conception between neoclassicism and positivism.<sup>8</sup> Nevertheless, thanks to him no relevant neoclassical penalist was completely defending the neoclassical posture. A neoclassical in neoclassical times would do so; yet, a neoclassical in positivist times would not be a truly pure neoclassical anymore. To this, contributed positivism in general, and Dorado Montero in Spain. Even if the assertion may sound categorical at first, one will later on check the veracity of such statement.

It has been said that, as regards to the introduction of the positivist mentality in the Spanish society, “Dorado Montero altogether with Sales y Ferré contribute[d] decisively to such phenomenon”,<sup>9</sup> and so academics have identified four major stages which he underwent as regards his scholarly evolution: 1) Krausoinstitutionalism; 2) Italian Positivism; 3) Sociology (“The organicist and evolutionist trends are predominant on the first stage of the sociological Spanish thought”),<sup>10</sup> and 4) Radical criticism and Pesimism.<sup>11</sup> As regards the first element, when one deals with this historical period, it is common to talk about krausoinstitutionalism<sup>12</sup> (or even other possible combinations like

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<sup>7</sup> Perhaps, the sole relevant contribution to criminal dogmatics dating back from the Early Modern Age is that of Decianus, T., *Tractatus Criminalis*, Torino: eredi Niccolò Bevilacqua, 1593, v.1 and v.2. Similarly, in the contemporary scenario Mario Sbriccoli also develops such topic. Vid. Pifferi, M., “A proposito di Storia del diritto penale e della giustizia. Scritti editi e inediti (1972-2007), di Mario Sbriccoli”, *Rivista di storia del diritto italiano*, Anno 84, vol. 84, 2011, pp. 480-487.

<sup>8</sup> Iñesta-Pastor, E., “Influencias extranjeras en la configuración de la pena en los códigos penales españoles decimonónicos”, Masferrer, A., *La codificación española. Tradición e influencias extranjeras: su contribución al proceso codificador (Parte general)*, Pamplona: Thomson Reuters. Aranzadi, 2017, pp. 401-499, p. 444.

<sup>9</sup> Blanco Rodríguez, J. A., *El pensamiento sociopolítico de Dorado Montero*, Salamanca: Centro de Estudios Salmantinos, 1982, p. 11: “La introducción de la mentalidad positiva - fenómeno al que contribuye decisivamente Dorado Montero junto a Sales y Ferré-”.

<sup>10</sup> Blanco Rodríguez, J. A., *El pensamiento sociopolítico...*, p. 35.

<sup>11</sup> As to such structure, *vid.* Blanco Rodríguez, J. A., *El pensamiento sociopolítico de Dorado Montero*, Salamanca: Centro de Estudios Salmantinos: 1982.

<sup>12</sup> Francisco Giner de los Ríos, José Canalejas, Gumersindo de Azcárate or Blanco Rodríguez himself.

krausofröbelism<sup>13</sup> or krausopositivism<sup>14</sup>), thus, merging the two trends. Curiously enough, Ferrater Mora stressed the difference between krausists and institutionists. That being said, I have decided to opt for a different structure in this biographical chapter. The layout of sections reads as follows: 1) Christian background; 2) Relativism; 3) Positivism; 4) Krausism; 5) Socialism; 6) Anarchism; and 7) Sociology.

Several authors have closely followed and described Dorado Montero's personality. Among them, we find Manuel López-Rey, Juan Andrés Blanco Rodríguez, Constancio Bernaldo de Quirós, Francisco José Valls, Jesús Lima Torrado, Fernando de los Ríos Urruti, and Barbero Santos. Especially, the first one described Dorado Montero's genius as "reserved, austere and not very sociable".<sup>15</sup> Indeed, he was said to be Miguel de Unamuno's nemesis: "They contrasted strongly in their characteristics and it is no wonder that what at the beginning was a promising friendship ended in a rather distant and cold academic relationship. The varied activities of Unamuno, with his wit and his philosophy, were probably not the best means to impress Dorado, with his somewhat introverted personality and his devotion to a single question: Criminology".<sup>16</sup> In the same article, he would point out the substantial paradox lying in Dorado Montero: his rough, difficult past did not reflect the humanitarian goals within his "Protective Law of the Criminals".<sup>17</sup> Yet, Unamuno did not doubt in making a

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<sup>13</sup> Ureña, Enrique M., "Orígenes del Krausofröbelismo y masonería", *Historia de la educación: Revista interuniversitaria*, No. 9, Madrid, pp. 43-62.

<sup>14</sup> Blanco Rodríguez, J. A., *El pensamiento sociopolítico...*, p. 18.

<sup>15</sup> López-Rey, M., "X. Pedro Dorado Montero (1861-1919)", Mannheim, H., *Pioneers in Criminology*, London: Stevens and Sons, 1960 (I use López-Rey, M., "Pioneers in Criminology. X. Pedro Dorado Montero (1861-1919)", *The Journal of Criminal Law, Criminology, and Police Science*, Vol. 46, No. 5, Northwestern University Pritzker School of Law, Jan. - Feb., 1956, pp. 605-612.), p. 606.

<sup>16</sup> *Ibid.*, p. 607.

<sup>17</sup> In Spanish, the "Derecho protector de los criminales". It was the name Dorado Montero granted to his theory of Criminal law. The name is very descriptive per se, since it aimed at the criminal's protection. Dorado Montero considered the criminal not as an evil individual who acted selfishly, but as nothing more than a sick person; an individual who acted moved by a mixture of instincts and social incapacity, and who was so morally degenerate that the single thing that one could expect from the State in response was mercy and compassion, more specifically a treatment to take them out of such state of "moral inferiority". Although he also named his most important work like that (*El Derecho protector de los criminales*), I will refer to it generically, since I am interested in meaning his theory in a wider level. Every time I wish to make a reference to the book, I will indicate so at the corresponding footnote.

truthful accomplishment where it should be made. In one of the letters he wrote to Leopoldo Alas Clarín, the following aspect was raised:

“Those of us who know him [Dorado Montero], we have a very different concept of him than those who judge him in the distance. I do not read him, and given that he barely says anything, always limiting himself to just listening, I cannot judge him. He seems to me to be a man that knows his things and when he gets his pen, he does expose them; yet, about the things he knows, one rapidly gets to learn them as regards the substance. He is, on the other hand, a perfect Castilian man; blind as to the nuances, and deaf to ineffable. In any case, a very useful man and truly serious”.<sup>18</sup>

On the one hand, we observe this perspective of him: positivist, practical, earth-bound, efficient, with a good scholar technique but with no broad vision. Yet, on the other hand, his “transcendental doubt”<sup>19</sup> makes him a far more open-minded individual than what steams from Unamuno’s words. The assertion “blind to nuances” is certainly more intended to describe his practical character, rather than his theory and his doctrinal position, which are far more elaborated than that. As stated thereof, as much as he is to be described as “deaf to ineffable”, he was always a quiet listener, precisely because he always took into account an endless amount of points of view, thus, avoiding to take sides by one of them and highlighting that the human reality is more convoluted and (biologically) not as knowable as we might think. In this respect, though Unamuno was his reverse, Dorado Montero might not be an open-minded bohemian but he was a shy, over-reflective and open-minded scholar. One should never commit the mistake of thinking he was a cold, slow-witted positivist.

Hereby, Dorado Montero exemplifies the relevance of transition. Just like a silent yet corrosive water drop deforms the shape of a rock, the Spaniard quietly introduces new trends and alters the reigning conceptions of Penal law. Neoclassicals would never be the same again after his death. And Spain’s Penal

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<sup>18</sup> *Epistolario a Clarín*, Editora Nacional: Madrid, 1941, pp. 82-83: “Los que le conocemos de cerca y le tratamos, tenemos de él un concepto muy distinto de los que de lejos le juzgan. Yo no le leo, y como hablando apenas dice cosa, limitándose a oír, no puedo juzgarle. Me parece un hombre que sabe sus cosas y cuando coge la pluma las expone: pero de esas cosas que sabe, se entera uno pronto en cuanto a la sustancia. Es, por lo demás, un perfecto castellano, ciego para el matiz y el nimbo, y sordo a lo inefable. Un hombre utilísimo de todos modos y serio de verdad”.

<sup>19</sup> This idea will be explained later on.

law would never look the same after his teachings influenced his pupils: especially Jiménez de Asúa and Cuello Calón, who would complete this change in an arguably far more notorious, popular manner. Change is transition; transition is change.

### **1. A textbook Christian from cradle to university**

Pedro Dorado Montero is born in 1861 in Navacarros.<sup>20</sup> According to an official publication, back in the 16<sup>th</sup> century the population only amounted to 77 inhabitants.<sup>21</sup> Yet, the actual number of citizens was much lower since the calculation was made altogether with another two municipalities.<sup>22</sup> At the time he was born, the size of the village alone had grown significantly bigger, and it had reached 482 inhabitants in 1860,<sup>23</sup> probably triggered by the textile industry's economic boom of its judicial district: Béjar. Nowadays, the figure is small and it barely exceeds 100 householders.<sup>24</sup> Be as it may, whether we talk of it as in the sixteenth, nineteenth or 19<sup>th</sup> or twenty-first century, we must conclude that it was a very small village in one of the inner regions of Spain.

Back then, Navacarros was barely a hamlet, very close to the relevant city of Béjar.<sup>25</sup> Traditionally, the areas located in the interior of the country tend to be very conservative, communitarian in the strong sense, and very religious.<sup>26</sup> Consequently, since a very young age he received a very strict, traditional, Christian education. His idea of good and evil is very clear and invariable. In his

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<sup>20</sup> It is a very small municipality within the province of Salamanca which is, at its turn, located in the self-governing community of "Castile and León" (Spain).

<sup>21</sup> González, T., *Censo de Población de las provincias y partidos de la Corona de Castilla en el siglo XVI*, Madrid: Imprenta Real, 1829, p. 100. The originals find themselves at the *Biblioteca de Castilla y León* (in Valladolid) under the signature G 47449.

<sup>22</sup> Namely, *La Casa del Frayle* and *El Palomar*.

<sup>23</sup> Figure as provided by the Official Census of Spain at the *Instituto Nacional de Estadística* (National Institute of Statistics). The document looks after all municipalities' population within the province of Salamanca in the year 1860. Link: <https://www.ine.es/inebaseweb/treeNavigation.do?tn=192209&tns=192478#192478>. Seen on the 25.03.2020.

<sup>24</sup> According to the census of 2019, the population of Navacarros amounts to 112 inhabitants.

<sup>25</sup> Hernández Díaz, J. M., "Pedro Dorado Montero y la educación", *Historia de la educación: Revista interuniversitaria*, No. 2, 1983, pp. 217-228, p. 218.

<sup>26</sup> Leaving aside the case of Madrid due to be the capital of Spain, i.e. a melting pot of ideas.

mind, it is taking place a proto-formation of what one understands by justice. His perception of legal wrongdoing and licit actions is limpid, primary, and invariable in time and place. It is enhanced by a Christian moral universalism heavily attacking relativism. As stated by Tomás y Valiente, sin and delict were synonyms.<sup>27</sup> However, such assertion was recently debunked by Masferrer, who held that punishing act solely on the grounds that it was a sin constituted an oversimplification which did not adjust to reality.<sup>28</sup> Thus, the basis for it was not theological but philosophical. Be as it may, despite being a starting, primitive myriad, it constitutes the first identification between what is morally right and legal, on the one hand; and between what is morally reprobable and illegal, on the other hand. The identification with the Christian parameter of “what is good and what is wrong” has its roots on religion. The formation of the “wrong order” is constructed in opposition to the “desirable order”, i.e. the punishable order only exists in as much as we compare it to the idea of how we conceive an ideal society. Besides, such a Manichaeic conception was very useful in his childhood: it gave him both constancy and a sense of persistency that would allow him to keep on studying despite the terrible, unfavourable conditions in which he lived. His

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<sup>27</sup> Tomás y Valiente, F., *El Derecho penal de la monarquía absoluta. Siglos XVI, XVII y XVIII*, Madrid: Tecnos, 1969, 570 pp., p. 331: “crime and sin were far from just being parallel realities, for they were converging ones”.

<sup>28</sup> Masferrer, A., “La distinción entre delito y pecado en la tradición penal bajomedieval y moderna. Una propuesta revisionista de la historiografía española, europea y anglosajona”, *Anuario de Historia del Derecho Español*, No. 87, 2017, pp. 693-756. According to Masferrer, even during the Middle Ages, the distinction between crime and sin was in force. Eventually, there was a brief moment of confusion in the Modern Age, yet at the most part of history, there was a common philosophical substratum on morals which allowed scholars to make the differentiation between morality and religion. From the 19<sup>th</sup> century on, such theory was confirmed, and man was entitled to reach a moral philosophy and moral conclusions completely independent from religion, based on reason and on natural law. Of the same author, “Criminal Law and Morality Revisited: Interdisciplinary Perspectives”, Masferrer, A., *Criminal Law and Morality in the Age of Consent*, Cham: Springer, p. 2: “There is no doubt that not all immoral behaviour—or sins—should be criminalized: sins and crimes are not the same, as the moral and legal orders differ. It follows that Human law should never attempt to forbid all vices. The relation between criminal law and morality derives from the relation between politics, law and morality, whose provinces are different. Moral laws and civil laws have different limits and practical purposes. The sphere of moral law is much broader than civil law, which means, for example, civil laws should never concern themselves with the criminal thoughts a person may have inasmuch as they do not go beyond that, i.e. any kind of external act. As to practical purposes, civil laws have their own ethical-practical rationality, which affects not only the reasoning process but also the realm to which it applies”. Indeed, in another work, he came to the conclusion that “every ‘legally protected interest’ has a moral substratum”, vid. Masferrer, A., *De la honestidad a la integridad sexual. La formación del Derecho penal sexual español en el marco de la cultura occidental*, Cizur Menor: Thomson Reuters Aranzadi, 2020, 1<sup>o</sup> ed., p. 289.

home was very far away from school. He went every day to school from Navacarros to Béjar. Thus, he nearly had to cover 10 kilometres daily.<sup>29</sup> Nevertheless, he continued to go to school.

He used to play in a yard with his friends every day. Regrettably, in one of those days, a rock holding a parked cart was displaced. As a result, the cart moved and ran over Dorado Montero, thus, leaving him lame and with a crippled right arm.<sup>30</sup> His parents, too, were very Catholic and very methodical. Despite being poor, uneducated farmers, they insistently pursued one objective: their son should keep on studying. Yet, there is a discrepancy on the causes lying behind this reason. Some authors such as López-Rey maintain that it was a common aspiration among Spanish peasants to send their children to the academic world, usually deemed with fewer precarious conditions, and with higher salaries.<sup>31</sup> Another line of interpretation suggests that, since farming or manually working in the textile industry were the main means of livelihood in the region, “his parents became aware that he had been deprived from the only tool which poor people had to subsist: a healthy body. Therefore, they decided he should devote his life to study”.<sup>32</sup> Nonetheless, this insistence of the idea that there was only one absolutely right way to go, of a clear doubtless objective to achieve, was crucial for him to thrive in life.

Unsurprisingly, the *Philosophia Christi* is to be a central core in his religious and philosophical intellectual substratum.<sup>33</sup> The Christian Philosophy

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<sup>29</sup> There is a straight distance of 4,31 km between the two points, which hits 7 kilometres if one takes the current road.

<sup>30</sup> López-Rey, M., “Pioneers in Criminology. X. Pedro Dorado Montero (1861-1919)”, *The Journal of Criminal Law, Criminology, and Police Science*, Vol. 46, No. 5, Northwestern University Pritzker School of Law, Jan. - Feb., 1956, pp. 605-612, p. 606.

<sup>31</sup> López-Rey, M., “Pioneers in Criminology. X. Pedro Dorado Montero (1861-1919)”, *The Journal of Criminal Law, Criminology, and Police Science*, Vol. 46, No. 5, Northwestern University Pritzker School of Law, Jan. - Feb., 1956, pp. 605-612, p. 606.

<sup>32</sup> Pascual Matellán, L., “Pedro Dorado Montero. Un pensador heterodoxo”, *Azafea. Revista de Filosofía*, No. 20, Salamanca, 2018, pp. 111-128, p. 112: “sus padres fueron conscientes de que había sido privado de la única herramienta que tenían los pobres para garantizar su subsistencia: un cuerpo sano, y por ello tomaron la decisión de que se dedicara al estudio”. Also, vid. last work: Pascual Matellán, L., *Pedro Dorado Montero y el correccionalismo español. El difícil desafío de humanizar el Derecho Penal*, València: Tirant Lo Blanch, 1<sup>o</sup> Ed., 2021, 522 p.

<sup>33</sup> Lima Torrado, J., “Las claves de la recepción del pensamiento anarquista en la filosofía política de Pedro Dorado Montero”, Elósegui Itxaso, M. (Ed.); Galindo Ayuda, F., *El Pensamiento jurídico: pasado, presente y perspectiva. Libro homenaje al prof. Juan José Gil Cremades*, Zaragoza: El Justicia de Aragón, 2008.

has very deep roots in both the Dutch philosopher Erasmus of Rotterdam and the Spanish humanist and philosopher Joan Lluís Vives. This latter reproached to Erasmus for having him underquoted:<sup>34</sup> “the appearance of the *Ciceronianus* would arise both the protests of those who saw themselves criticised and satirised, and the reproaches of those who were not quoted at all or not quoted enough”.<sup>35</sup>

Such Catholic thought was also reinforced by Enrique Gil Robles. He is better known for being the father of José María Gil-Robles, a Spanish politician playing a definitive role in the period previous to the Spanish Civil War, as well as afterwards. José María Gil-Robles was the leader of the CEDA,<sup>36</sup> an extremist right-wing association supporting the dictator Franco, and all the fascist ideology involving him. Then, the enormous influence that Enrique Gil Robles exerted over Dorado Montero had a very conservative, strongly religious character. Back then, he was one of the leading intellectual authorities in Salamanca and he inspired several religious fundamentalist publications (such as *La Información* diary).<sup>37</sup> This period is characterised by the intellectual domination of Gil Robles over Dorado Montero. Time would, nevertheless, change such a situation.

When Dorado Montero reached his youth, before moving to Bologna, he had created and managed a political party with tendency towards ultramontanism. This clerical-political conception within the Catholic Church places strong emphasis on the prerogatives and powers of the Pope. Besides, some Catholic influence can be hinted when, at the first stages of thought, he shares the division of natural law and positive law. Also, while he was studying at secondary education, he drank indirectly from the doctrine of Nicomedes Martín

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<sup>34</sup> Von Rotterdam, E., *Ciceronianus*, 1528. I use: De Rotterdam, E., *El Ciceroniano o Del mejor estilo de oratoria*, Madrid: Cátedra, 2011.

<sup>35</sup> Bomartí Sánchez, V., *Humanistas europeos (siglos XIV y XVI)*, Madrid: Editorial Complutense, 1<sup>o</sup> ed., 2006, p. 70: “La aparición del *Ciceronianus* va a suscitar, aparte de las protestas de quienes se vieron criticados y satirizados los reproches de aquellos que no se vieron citados o de los que se consideran insuficientemente reseñados”.

<sup>36</sup> The acronym stands for Spanish Confederation of Autonomous Rights (*Confederación Española de Derechas Autónomas*).

<sup>37</sup> The newspaper *La información* defended Enrique Gil Robles and his ideals, and so did the diary *El Criterio* and *El Lábaro* with Father Cámara, and the diary *La Democracia* with Dorado Montero. Balcazar y Sabariegos, J., *Memorias de un estudiante de Salamanca*, Madrid: Librería de Enrique Prieto, 1935, p. 49.



Mateos.<sup>38</sup> Two of Mateos' pupils (namely, Juan García Nieto and Eloy Bejarano) would end up directing the high school where Dorado Montero had studied. If Martín Mateos would influence them both, they would have an impact in Dorado Montero as well. One may say that the very early academic influences start here with both Kant and Martín Mateos: "The Kantian imperative as received by García Nieto and the spiritual sense as infused by Martín Mateos permeate the thought of a Dorado Montero who approaches the University of Salamanca".<sup>39</sup>

Despite that after some time most of the undisputed Catholic positioning will disappear (as we will see in his personal evolution), the Christian background in his political philosophy remained. This background laid at his subconscious even in less religious stages of his life. Sometimes a Christian concept was renamed after a socialist idea he liked. For example: the idea of no oppressors nor subjugated individuals (arising from the socialist theories) came actually given by the Christian ideal of fraternity among all humankind.<sup>40</sup> Another example would be the defence of the human race as maintained by Christianity, somehow very related towards the "third dimension of Tolstoy's Christian anarchism".<sup>41</sup> Indeed, López-Rey sums up Dorado Montero's proposal asserting that the philosophical construction behind his criminal theory is grounded on a special mixture: it goes further beyond a plain positivism or a mild correctionalism. It seeks to reconcile Comte's philosophy with the principles of the Old Spanish School aiming at the moral 'enmienda'.<sup>42</sup> Bear in mind that he is not referring to 'correction', but to 'moral emendation', so that all previous mistakes must be completely erased from the criminal's record, and he should be protected against new faults.<sup>43</sup> Besides, the remainders of his faith shall not be

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<sup>38</sup> He was a Spanish philosopher born in Béjar (1806-1890). The most defining terms for his doctrine were spiritualism and neo-cartesian thought.

<sup>39</sup> Blanco Rodríguez, J. A., *El pensamiento...*, p. 15: "El imperativo kantiano recibido a través de García Nieto y el sentido espiritualista inculcado por Martí Mateos impregnan el pensamiento del Dorado que se acerca a la universidad salmantina".

<sup>40</sup> Lima Torrado, J., "Las claves de la recepción del pensamiento socialista en la filosofía política de Pedro Dorado Montero", AA.VV., *Estudios en homenaje al profesor Gregorio Peces-Barba*, Madrid: Dykinson, vol. 4, 2008, pp. 537-550, p. 540.

<sup>41</sup> Lima Torrado, J., "Las claves de la recepción del pensamiento anarquista en la filosofía política de Pedro Dorado Montero", Elósegui Itxaso, M. (Ed.); Galindo Ayuda, F., *El Pensamiento jurídico: pasado, presente y perspectiva. Libro homenaje al prof. Juan José Gil Cremades*, Zaragoza: El Justicia de Aragón, 2008, pp. 417-443, p. 431.

<sup>42</sup> López-Rey, M., "X. Pedro Dorado Montero (1861-1919)", p. 608.

<sup>43</sup> *Ibid*, p. 608.

understood in a particular religious confession, but it shall rather be ascribed within a wider, Christian spirituality:

“His theory, therefore, is not the expression of a particular faith, but the expression of a Christian spiritualism in which other elements than those strictly orthodox from a Catholic point of view play a rôle”.<sup>44</sup>

Briefly, Dorado is a reformer and a pioneer “firmly rooted in the Christian ideas so prevalent among the Spanish penologists”.<sup>45</sup> Indeed, the first stage of his academic production is still characterised by strong closed convictions. But, as soon as he gets more mature, his all-mighty security in most ideas and conceptions tend to evaporate, and he is sieged by the transcendental doubt. In a more general view, he adduced the frequent references to the relevant role that religion should play as regarded the treatment of offenders, as well as the dichotomy religion-law that can be observed when counterposing the concepts of sin, confession, and penitential sanction, on the one hand; and the concepts of offence, confession, and criminal punishment, on the other hand.<sup>46</sup> Also, he does not very much care about the results of the crime and the solutions of the damage caused thereof. He performed a religious metaphor: “For whom takes care of souls, the most important thing is not the determination of the acts carried out and its remedies, but rather the status and the tendencies of such souls. What matters is the sinner, *in lieu* of the sin”.<sup>47</sup> When he is designing the new penal system, he shifts the focus of attention away from the action itself to the agent, thus, establishing an indirect analogy of what the Christian religion tends to focus on. To this respect, he asserts that “if on the sphere of penitence, confessions tend to be more habitual and more honest than in the field of State criminal justice, it is because redemption is sought by the sinner himself. In penitence, he sees

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<sup>44</sup> López-Rey, M., “X. Pedro Dorado Montero (1861-1919)”, p. 608.

<sup>45</sup> *Ibid.*

<sup>46</sup> Though such reality has been observed at the European level; it was not solely focused in Spain. *Vid.* Masferrer, A., “Der Beitrag der Theologie und der kanonistischen Wissenschaft zum modernen europäischen Strafrecht“, *Zeitschrift für die gesamte Strafrechtswissenschaft*, Berlin/Boston: De Gruyter, Band 131, Heft 1, Seiten 219–238, DOI: <https://doi.org/10.1515/zstw-2019-0008>.

<sup>47</sup> Dorado Montero, P., *El Derecho protector de los criminales*, Madrid : Ed. Jiménez Gil, Tomo 1, 1915, p. 181: “Para quien cuida de las almas, no es lo principal la determinación de los actos efectuados y el remedio de los mismos; lo es el estado y las inclinaciones de aquéllas [...] es el pecador, más que el pecado ya cometido, propiamente, lo que le importa”.

nothing but benefits while, at the same time, he flees from justice (which deems to be a great enemy which is going to inflict him pointless suffering –not just like penitence, which has regenerating aims for him-)”. And so, he foresees that “such a difference in treatment shall only last until the criminal justice turns into a psychological treatment, i.e. a soul healing science”.<sup>48</sup>

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

“The penalty has never been but a mechanism for heaven to gain souls. Though it has been so, mainly, for the ‘terrenal’ heaven (as to refer to the social order). It could even be deemed as a way to send to hell the social detritus, as a last resort [...] This must not be forgotten: both terrenal heaven (*civitas diaboli*) as well as celestial heaven (*civitas Dei*), cannot tolerate rebelliousness in their midst. They only want righteous, not sinners. They must be just on the outside and on the inside”.<sup>49</sup>

For him, the aspect that needs intervention and amendment is the internal fact. Whereas our traditional conception of justice did focus more into tackling the external aspect of justice, “justice needs in the first place to be so at the will”. Taking nature as an example, he stated that “out of the internal justice (tree), external justice will come soon after (fruits)”. Only once we have focused on the tree, soon one might get the fruits, “whose recollection is the only thing that matters”. Dorado Montero knows that “the one who controls the will, will count on the whole man; whereas, the man who does just count on the body (by means of a criminal threat) will never reassure himself”. Even though if he might sometimes acknowledge certain elements of the old Criminal law system as

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<sup>48</sup> Ibid., p.183: “esta diferencia no puede durar sino el tiempo que tarde en convertirse la justicia penal en un tratamiento psicológico, en una cura de almas”.

<sup>49</sup> Ibid., pp. 164-165: “La pena no ha sido jamás, me parece á mí, sino un medio de «ganar almas para el cielo», principalmente para el cielo terrestre (si es permitida la unión de ambas palabras), para el paraíso á que damos el nombre de orden social—destinado á nuestra bienandanza—, ó un medio de arrojar al infierno, á la desesperada, á los detritus sociales. sto no debe ser olvidado. El cielo terrestre (la *civitas diaboli*), lo mismo que el paraíso celestial (*civitas Dei*), no puede consentir rebeldías en su seno. Sólo quiere justos, no pecadores. Justos por fuera y justos por dentro”.

necessary,<sup>50</sup> because “they all made it materially impossible for the criminals to commit more crimes”, he points out that the system is somehow a ‘failure’ and that the mechanism is far too simple to produce the deep, more complex changes that a society needs (because “his will of committing a crime is, simply, hindered”).<sup>51</sup> On the second exhortation, he advocates for the changing of the penal system so as to ‘cure souls’, in a long dissertation:

“And so, Criminal law has either been outlawed or at least radically changed as regards juvenile criminality. It has been outlawed, if by criminal law we mean the retributive and atoning Criminal law which resorts to real penalties and sacrifices. It has been radically changed, whether we also consider the correctionalist function as to be Criminal law, which does not use penalties as such, but only educative, will-transforming means [...]. Childhood and juvenile correctionalism has stopped being just sentimentalist and it added scientific character to it. [...] Nowadays, institutes of correction are much more than mere charity establishments run by philanthropists and altruistic individuals (friars or nuns, as it was before); they are ‘soul hospitals’ run by people in the technical position of making that heal possible (i.e. pedagogues, physicians, psychiatrists, psychologists...)”.<sup>52</sup>

On the third exhortation, he addresses the need of individualisation of the penalty, especially when the penalty seeks for the prevention or preservation against future crimes by means of the amendment of the criminals. He develops

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<sup>50</sup> Schackles, prisons and chains are only resorted to, simply, because “one does not know how to use other means of punishment”, *Cnfr.* Dorado Montero, P., *El Derecho protector...*, pp. 166-167. ‘Necessary’ here is not used as “something which is needed”, but rather as “something that cannot be avoided”. In Spanish, the word also possesses this second sense which has this ‘fate’ or ‘unavoidable’ flavour. Given that society was configured that way, those undesirable means were, sometimes, ‘necessary’; their usage could not have possibly being avoided since society did not have (or had not yet implemented in a practical way) other alternatives.

<sup>51</sup> *Ibid.*, pp. 166-168.

<sup>52</sup> *Ibid.*, p. 224: “De este modo, el derecho penal ha quedado proscrito ó radicalmente cambiado—como se quiera—con relación á la delincuencia juvenil: proscrito, si sólo se da tal nombre al derecho penal retributivo y expiatorio, al que hace uso de verdaderas penas ó castigos; radicalmente cambiado, si también se llama derecho penal á la función correccionalista, donde no tienen lugar alguno las penas, en cuanto tales, y sí tan sólo los medios educadores y trasformadores de la voluntad [...] El correccionalismo infantil y juvenil ha dejado de ser meramente sentimentalista, y, sin perder este carácter, ha reunido al mismo el que podemos denominar científico [...] Los institutos de corrección son hoy algo más que establecimientos de beneficencia, á cargo de filántropos y de individuos altruistas y compasivos, v. gr., frailes ó hermanas de la caridad, según ha pasado antes; son, juntamente con esto, hospitales de almas para la curación de las mismas—aun mediante el cuerpo—y dirigidos al efecto precisamente por personas que estén en condiciones de realizar tal curación; es decir, por pedagogos, por médicos, por psiquiatras, por psicólogos”.

this idea as follows: “it could be said that it consists on a personal, psychological work; no soul can be influenced otherwise than penetrating it. No will can be changed, but investigating its roots and, hence, trying to modify them. Souls, just like any other thing, cannot be known but through observation and concrete analysis. Precedents have an outstanding relevance here. Every individual behaves as what he is, and this can only be found out figuring out what he does. The story of one person is the most reliable hint to foresee his future behaviour [...]. When people look forward to the moral regeneration of the convicted, they obviously seek his healing. They wish he would change his behaviour and also that, if until now he was inclined to evil, he would reverse this path and so he will tend to good. They want to renew his will, or even better, his entire soul by both spiritual and body means. And so, they ask for a greater educative character of the penalty, so that the outcome brings effective social benefits and not harms (as it has been happening)”.<sup>53</sup>

Furthermore, Dorado Montero sums up the function which he thinks that the penal science should fulfil: “the so-called function of criminal justice administration is a true soul healing”.<sup>54</sup> He goes in the line of whatever doctrine sits closest to positivism, by arguing that the important aspect of this comes not from the responsibility of a single deed, but rather that a soul would be evil because of its disposition to exercising a certain kind of actions. For a soul can be well-oriented or naturally good despite it having committed several unlawful deeds. Whereas a truly evil, twisted soul can develop good actions with a perverse

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<sup>53</sup> Ibid., pp. 479-480: “Aquí puede decirse que consiste todo en obra psicológica personal. No se puede influir sobre un alma sino penetrando en ella. No se puede cambiar una voluntad sino indagando sus raíces, al intento de poder así modificarlas. Y las almas, al igual de otra cosa cualquiera, no se conocen más que por medio de la observación y el análisis concretos. Los antecedentes tienen aquí una importancia de primer orden. Cada uno se porta según es, y sólo sabemos cómo se porta y cómo es averiguando lo que hace. La historia de un sujeto es el indicio más fiable de su comportamiento futuro [...] Cuando las gentes desean que por la pena se busque la regeneración moral del reo, es claro que persiguen una obra curativa de éste. Apetecen que cambie de conducta, y que si hasta ahora se hallaba mal inclinado, deje de estarlo en lo sucesivo y propenda al bien. Quieren renovar su voluntad, ó mejor dicho su alma entera, sea como sea, ya por medios puramente espirituales, ya también por intermedio del cuerpo. Hablan por eso de educación y exigen de día en día con mayor imperio carácter educativo á la pena, para que los resultados obtenidos de su aplicación produzcan beneficios sociales efectivos, y no, como ahora, casi siempre daños”.

<sup>54</sup> Dorado Montero, P., p. 180: “La función llamada administración de justicia penal es una verdadera cura de almas”.

rationale or a malicious intention.<sup>55</sup> Let us remember his most relevant motto: it is precisely the sinner, instead of the committed sin, that actually matters. Also, the reparation of damage (a constant in civil law) is also mentioned.<sup>56</sup>

In other significant writings, Dorado Montero will oppose the soul to the State itself. He would try to best depict how this man-made structure of public law is a clear obstacle since it contradicts the inner simplicity of souls. The State “is simply the major hindrance for humanity’s moral progress; it is an artifice largely relying upon violence, a construction whose object is to avoid the men’s set of energies and inherent qualities. It is necessary to suppress that or humankind will be ‘condemned’ to perpetual slavery”.<sup>57</sup> Immediately after, he resorted to man’s natural kindness as described by Rousseau, not without showing a deep criticism towards its simplistic misinterpretation, in order to point out the numerous conventionalisms and synthetic bonds that link individuals together.

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

“Certain souls are prone to a determined genre of behaviour in such manner that, under the slightest provocation or stimulus, they wreak their sinful power. They are, so to speak, born sinners”.<sup>58</sup>

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<sup>55</sup> Dorado Montero, P., *La psicología criminal en nuestro Derecho legislado*, Madrid: Hijos de Reus, 1911, pp. 195-216.

<sup>56</sup> On this matter, Dr Matthew Dyson at Oxford University is specialised on compensation for harm, the role of injunctions and negligence among other topics. He shedded some light on this issue at the time in which Dorado Montero lived, vid. Dyson, M.; Masferrer, A., “The Lawyers’ Reality: Wrongdoing in Spain in the Era of Codification”; Samuel Llano and Alison Sinclair (eds.), *Writing Wrongdoing: Spain 1800-1936*, London: Tamesis, 2017, pp. 19-33.

<sup>57</sup> Dorado Montero, P., “Concepciones sociales y penales de Tolstoy, según su última novela, *Resurrección*”, Calvo González, J. (Ed.), *El alma y la ley. Tolstói entre juristas. España (1890-1928)*; Sevilla-Zamora: Comunicación Social, Colección “Historia y presente”, 1<sup>o</sup> ed., 2010, pp. 138-159, p. 139: “es el estorbo mayor con el que tropieza el progreso moral de la humanidad; es un artificio apoyado en la violencia y hecho para ejercitar la violencia, una construcción cuyo objeto no es otro que impedir el despliegamiento de energías y cualidades nativas de los hombres, y que por lo mismo es necesario suprimir, so pena de hallarse la humanidad condenada a servidumbre perpetua”.

<sup>58</sup> Dorado Montero, P., *El Derecho protector de los criminales*, Tomo 1, p. 182: “Ciertas almas están de tal modo propensas á un género determinado de conducta, que á la menor provocación ó al más pequeño estímulo descargan su potencia pecadora. Son, podría decirse, pecadoras natas”.

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

All those very religious influences took over in his childhood and youth, but things started to change with his arrival at the University. After obtaining his General Certificate of Education (GCE), around 17 years old, he received a scholarship for 4 years. It allowed him to move to Salamanca and to study in a university residence<sup>59</sup> called San Bartolomé. Within the walls of the University of Salamanca, he was a very successful student, just as he had been during his entire life.<sup>60</sup> He studied the Degree in Humanities (from 1878 to 1882) and graduated with distinction. In 1882, he was appointed as the Knight of the Order *Isabel la Católica* due to his academic merits. One year after, he obtained his Law degree, and he specialised himself at the section of Civil and Canon Law, also with distinction. In 7 February 1883, he started teaching at the University of Salamanca. Specifically, he worked at the Faculty of Philosophy and Humanities, since he was proposed by the Dean thereof.<sup>61</sup> The Dean had created a scholarship which Dorado Montero obtained.<sup>62</sup> After that, “once he concluded the two degrees”, he moved to Madrid with the goal of “obtaining his PhD in Jurisprudence”.<sup>63</sup> Finally, he defended his thesis before a university tribunal.<sup>64</sup>

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<sup>59</sup> In Spanish it is referred as a “Colegio Mayor”. In this case, the exact name was “Colegio Mayor de San Bartolomé”.

<sup>60</sup> The academic records faithfully prove it. They are accesible in the online repository of the University of Salamanca: *GREDOS*, specifically in the section “Expediente personal de Pedro García Dorado Montero”, within the Collection “AUSA. Expedientes personales de profesores de la USAL”. Link: <https://<.usal.es/handle/10366/19333>.

<sup>61</sup> The Dean was Mariano Arés y Sanz, a very relevant figure in the Academia who shared very strong republican, and lay ideals. Besides being a remarkable professor (Full Professor at the Chair of Metaphysics of the University of Salamanca), he encouraged the creation of the special library of Philosophy and Humanities, and managed the Board *Colegios Universitarios de Salamanca*.

<sup>62</sup> Valentí i Camp, S., *Ideólogos, videntes y teorizantes*, Barcelona: Minerva, 1922, p. 102: “In the fourth year, through a public contest, he was granted one of the scholarships created on behalf of the initiative of Methaphysics Professor Mr Mariano Arés”.

<sup>63</sup> Valentí i Camp, S., *Ideólogos, videntes y teorizantes*, Barcelona: Minerva, 1922, p. 102.

<sup>64</sup> The title of his dissertation was “Municipal regime. Subordination of the municipality to the State. The autonomy of the municipality. Administrative Tutelage”. Original title: “Régimen municipal. Subordinación del municipio al Estado. La autonomía del municipio. Tutela administrativa”. Vid. On the Spanish Ministry of Culture and Sports *PARES. Portal de Archivos Españoles*, “García-Dorado Montero, Pedro”, 1883-1885, Signature

He obtained the maximum qualification as usual. A new phase in his life was about to start.

## 2. Relativism vs. religious convictions

At the age of 24 years old, the Board of *Colegios de Salamanca* granted him a postdoctoral scholarship in order to carry out a research stay at the University of Bologna in Italy. The total amount of the stipend was 2000 pesetas. The book he worked on in those two years bore the following title: “Organisation and state-of-the-art of the legal studies in Italy in a comparative perspective with Spain”.<sup>65</sup>

Right after his trip to Italy, the ‘transcendental problem’ appeared to him.<sup>66</sup> For Dorado Montero, every single topic, reasoning or even lecture was open to further discussion. Dorado Montero’s reasonings were a building in permanent danger of crumbling, given the extent of doubts he admitted. After he came back home, he was a much more realistic person. Absolute truths vanished away from his mind and he started to conceive reality in a much more complex way.<sup>67</sup> He acknowledged the absolutely imperfect nature of human beings. Since he was also acquainted with Tolstoy’s point of view on the nature of men, this statement on the fallibility of man was nothing but reinforced in Dorado Montero. His thought went in line of Tolstoy’s central conception of the essence of individuals, i.e. the only trustable, truly meaningful core of religion was based on

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<sup>65</sup> Original title: “*Organización y estado de los estudios jurídicos en Italia, comparativamente á España*”. Vid., *Diccionario de Catedráticos Españoles de Derecho (1847-1943)*, “Pedro Dorado Montero”.

<sup>66</sup> Dorado Montero, P., *Nuevos derroteros penales*, Barcelona: Imprenta de Heinrich & Comp., 1905, p. 11: “Which guarantee do we have that our thought effectively matches what the things really are, that our representations of the world reach an indisputable accuracy? The world, altogether with as many beings and relationships integrating it, will be as it wants to be. We do not know how it is. What we do know, each one of us, is how we conceive it and imagine it”.

<sup>67</sup> Dorado Montero, P., *El Derecho protector de los criminales*, Tomo 1, p. 22: “Let us change a man’s condition and we will witness how he changes his criterion: let us think of him as rich, instead of poor; catholic, instead of Muslim; producer, instead of consumer; manufacturer; employer, instead of worker; republican, instead of royalist; French, instead of Spaniard; trader, instead of peasant or philosopher, and we will be astonished of how much did his criterion variate, sometimes with the speed and the ease with which an actor changes his roles, his clothes and his physiognomy”.



love and what he understood by love: a state of benevolence for all men which as the one to be found on children and their tender, deeply honest wish to love everyone.<sup>68</sup> Therefore, divine perfection found itself as opposed to a very weak human nature: “Real love is an ideal of perfection which is complete, infinite, and divine. Divine perfection is the asymptote of man’s life; he tends to it in a relentless manner; he gets closer to it every time, but he can never reach it entirely”.<sup>69</sup> Tolstoy’s influence on his Christian humanism was, at this point, undeniable. The transcendental doubt was to be a constant in his scholarly life. New steps appeared in his life.<sup>70</sup> In certain cases, while lecturing at the university, he could be explaining one aspect of the criminal code and then turned on his own thought and ended up questioning the very basic concept of liberty. Such is the extent of his broad-mindedness. As it might have already been inferred from the preceding paragraphs, this concept of transcendental doubt was not easy to identify in his doctrine. It was not something that specifically worried him neither an issue he identified with such name. The concept appeared abstractly formulated and was never directly addressed.

At the same time, due to this change in his positioning, he was to face many administrative and religious struggles. Everything would start in 20 May 1887. Still from the city of Bologna, in 20 May 1887, he asked to the Board of *Colegios Universitarios de Salamanca* to defray his doctor title. He was simply asking for what he had already been formally granted: a reimbursement of 2000 pesetas for having presented the required final book. As according to protocol, he applied for it. The controversy would be solved after four concrete developments. Firstly, in 3 June 1887, the Dean of the Faculty of Philosophy and Humanities, Santiago

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<sup>68</sup> Eltzbacher, P., *Der Anarchismus: Eine ideengeschichtliche Darstellung seiner klassischen Strömungen*, Berlin: J. Guttentag, 1900, p. 202.

<sup>69</sup> Tolstoj, L., *Das Reich Gottes ist in Euch*, pp. 139-140: “Die wahre Liebe ist „ein Ideal völliger, unendlicher, göttlicher Vollkommenheit. Die göttliche Vollkommenheit ist die Asymptote des menschlichen Lebens, zu der es beständig hinstrebt, der es sich immer mehr nähert, die aber nur in der Unendlichkeit erreicht werden kann”. Such is the original quotation which I took from the aforementioned Paul, E., *Der Anarchismus...*, p. 202.

<sup>70</sup> Barbero Santos, M., “Remembranzas del profesor salmantino Pedro García Dorado Montero en el 50 aniversario de su muerte”, VV.AA.; *Problemas actuales de las ciencias penales y de la Filosofía del Derecho Homenaje al profesor Luis Jiménez de Asúa*, Buenos Aires: Ediciones Pannedille, 1970, p. 357; Barbero Santos, M., “Pedro Dorado Montero, aportación a su biografía”, *Revista de Estudios Penitenciarios*, No. 22, Madrid, 1966, pp. 270 ff.

Martínez, asked for the temporary suspension of the favourable vote of the Board. Even though the evaluation board had produced a favourable report before, he alleged that there was needed a further, substantial analysis on the presented memo. Whereas the analysis was intended to evaluate the scientific nature of the work, it was also intended to check out its catholicity. It should be noted that one of the required conditions in the call for applications was such catholicity character:

“*Colegios de Salamanca* have a double nature. They possess both a scientific and a Catholic character. Therefore, they must require their pupils, on the one hand, their scientific performance. On the other hand, they must ensure that the science which they acquire is in consonance with the Catholic principles”.<sup>71</sup>

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

“Mr Pedro García Dorado Montero has a perfect right to be paid out his title’s sum as a Doctor in Civil and Canon law. It cannot longer be held the cancellation of the payment thereof, not even on the ground that one needs to wait for the result of his work to reimburse the two thousand pesetas. This latter aspect was neither previously established nor configured as a requisite the merit or quality of the work, but only its execution and presentation”.<sup>72</sup>

Finally, in 24 August 1887, Dorado Montero would be granted it. It was not the first setback he would have to face, yet it was definitively not the last one in his life.

Addressing back his relativism, an idea was taking over his main thought. He was slowly becoming aware of the fact that no earthly creature was entitled to

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<sup>71</sup> *Diccionario de Catedráticos Españoles de Derecho (1847-1943)*, “Pedro Dorado Montero”.

<sup>72</sup> *Diccionario de Catedráticos Españoles de Derecho (1847-1943)*, “Pedro Dorado Montero”.

hold all the truth (not even close to what is true).<sup>73</sup> This reality in which humankind finds itself immersed in becomes a central aspect of his renewed scepticism: “human history, as well as Nature, is very similar to Penelope’s fabric, besides the eternal and useless work of Sisyphus. What today is done, tomorrow will come undone again”.<sup>74</sup> The very same idea is observed in Kant’s *The Contest of Faculties*.<sup>75</sup> His position turns progressively less dogmatic.

In this respect, the influence of Gumplowicz to this respect is undeniable. In 1892, Dorado Montero translated his work *Philosophisches Staatsrecht* into Spanish. Gumplowicz’s starting point, in which Dorado Montero will base his theory later on, can be found here:

“The world is infinite and, consequently, it will never be understandable by the human spirit as a whole”.<sup>76</sup>

Dorado will, therefore, inherit such basic concept by means of which the human spirit is incapable of understanding the whole world because one can only get to know fragments thereof. The penalist will then onwards reject the idea of creating a comprehensive, definitive, philosophical system of knowledge. Not only that, but if one handles the Spanish edition of Gumplowicz’s work, Dorado Montero introduces a personal remark in a very illustrative footnote.<sup>77</sup> In it, Dorado Montero brings our attention to the fact that Gumplowicz had written his work in 1877, hence, in a time in Spain in which mostly thanks to eclectic postulates,<sup>78</sup> the theory of the so-called absolute, invariable natural law still played a very relevant role. This theory was basically stating that law was

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<sup>73</sup> “It is all about stressing out the transitional and provisional nature of our judgements, our representations and our constructions [...]”, Dorado Montero, P., *El Derecho protector de los criminales*, v. 1, p. 518.

<sup>74</sup> Dorado Montero, P., *El Derecho protector de los criminales*, v. 1, p. 517: “La historia humana, como también, por su parte, de un modo análogo, la de la Naturaleza, se parece mucho á la consabida tela de Penélope, cuando no al eterno y eternamente inútil trabajo de Sísifo. Lo que hoy se hace, se deshace mañana”.

<sup>75</sup> Kant, I., *Der Streit der Fakultäten*, Königsberg: Friedrich Nicolovius, 1798. (I use Kant, I., *El conflicto de las facultades*, Madrid: Alianza, 2003, p. 156): “An absurd dynamism by means of which the good keeps on alternating with the evil through an advance and setback game; therefore, this seesaw movement of our own species with itself should be considered as nothing but a carnival farce”.

<sup>76</sup> Gumplowicz, L., *Philosophisches Staatsrecht*, Wien: Manz, 1877, p. 11: “Die Welt [ist] Unendliches und daher vom menschlichen Geiste als Ganzes nie faßbar ist”.

<sup>77</sup> Gumplowicz, L., *Derecho político filosófico*, Madrid: La España Moderna, 1892, p. 84.

<sup>78</sup> Mainly, thanks to Joaquín Francisco Pacheco.

something above all times and places with an immutable validity. It refers, of course, to the neoclassical conception of law, bound to Kant's approach to law. Yet, from the time Gumplowicz wrote it (1877) to the time Dorado Montero translated it (1898), the opposite trend has gained weight. Consequently, Dorado Montero would refer to such natural law as a mere fantasy: it is just an idealisation of the existing legal institutions in society and in the time in which Gumplowicz writes it. By the end of the nineteenth century, there is nobody holding the aforementioned conception of an absolute, invariable natural law. Nevertheless, society was not yet in a pure positivist society, since most of the matters are dealt with the old criterion. Idealist (neoclassical) trend creates the reality of norms a priori, whereas positivism needs scientific observation and checks.

Hence, his conceptions regarding the nature of punishment and Criminal law turned wider and more open. He considered the possibility that both law and human capacity cannot understand and control everything. According to this point of view, the traditional approach of law turns arrogant. The legal science tries to rule, define and delimit everything. Dorado Montero will be outraged because the model of liberal penal law would merely consist in a mixture of senseless aims: the defence of society, and/or utilitarian ends. Even though the penal sphere in which Dorado Montero found himself immersed in could seem close to him, the old penalist is not exactly a positivist in the traditional sense, because his aim was just focused on the recovery of the criminal (Protective Law of the Criminals). So, liberal criminal law did never convince him due to two main concerns. The first one has already been said: a disagreement in the goals of the penalty. The second, nevertheless, is that it completely disregarded the dogmatic part (where all the abstract positions, theoretical developments, and conceptual constructs took place). Dorado Montero urged to develop the dogmatics of Criminal law, though it would only start to be a reality a couple of decades after.<sup>79</sup>

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<sup>79</sup> There is quite a consensus among legal historians and penalists to assert that the initial development of criminal dogmatics is to take place at the beginning of the 20<sup>th</sup> century, mainly introduced by Luis Jiménez de Asúa.

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

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

“Unamuno, Maldonado and others [tried] to endow the University of Salamanca of the appearance of a great cultural centre, yet this is far from being the reality, as we have checked those of us who have visited it”.<sup>80</sup>

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

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<sup>80</sup> Ibid., p. 103: “Unamuno, Maldonado y otros [...] para dar a la Universidad de Salamanca apariencias de gran centro cultural, que está muy lejos de ser una realidad, como hemos podido advertir cuantos la hemos visitado”.

Habana to teach the subject of Natural Law (2 June 1891) and public tender at the University of Santiago in the Chair Natural Law (15 January 1892).<sup>81</sup>

In the middle of such race for a position, he kept his means of living due to a vacant position,<sup>82</sup> in 11 June 1891, he was awarded two thirds of the salary for his work at the Chair of Civil Law. As regards the Chair of Civil Law, in 6 May 1892, he became fully in charge of the Chair of Civil Law (first course). Finally, in 3 July 1892, he was appointed as Full Professor in the Chair of Political and Administrative Law at the University of Granada with an annual wage of 3500 pesetas. In less than three months, he switched places with Jerónimo Vida. Therefore, Dorado Montero stood at the University of Salamanca, while Vida occupied his position at the University of Granada. Thus, he held the Chair of Criminal Law, starting an unprecedented scholarly career in Salamanca. In practice, his teaching would initiate in the term 1892-1893.<sup>83</sup> Four years after, he participated in a chair-changing tender and won it. The new place of destiny was the Chair of Criminal Law at University of Valencia. Nevertheless, in 6 March 1896, less than one month after, Dorado Montero would file a waiver application, due to certain circumstances which he could not foresee when he applied for the Chair. After those events took place, the overcoming of his Catholic phase is self-evident at the university:

“Scholarly life was intense. At the University, Mr Enrique Gil Robles (Chair of Political Law) and Pedro Dorado Montero (Chair of Criminal Law) were shining as two first order stars. The former was a fundamentalist; the latter was a republican, and around them revolved most part of professors, though Father Cámara (Bishop of the diocese) did not get on well with any of them”.<sup>84</sup>

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<sup>81</sup> *Diccionario de Catedráticos Españoles de Derecho (1847-1943)*, “Pedro Dorado Montero”, UCIIM. Link: [https://portal.uc3m.es/portal/page/portal/instituto\\_figuerola/programas/phu/diccionariodecatedraticos/lcatedraticos/gdorado](https://portal.uc3m.es/portal/page/portal/instituto_figuerola/programas/phu/diccionariodecatedraticos/lcatedraticos/gdorado). Seen on 23.11.2020.

<sup>82</sup> Produced by the death of its owner: Mr Hilario Beato.

<sup>83</sup> In this period, his work *Problemas jurídicos contemporáneos* (1893) saw the light.

<sup>84</sup> Balcazar y Sabariegos, J., *Memorias de un estudiante de Salamanca*, Madrid: Librería de Enrique Prieto, 1935, p. 12: “Hacíase intensa la vida escolar. En la Universidad lucían como astros de primera magnitud D. Enrique Gil Robles de derecho político, y D. Pedro Dorado Montero, de derecho penal; el primero, integrista; el segundo, republicano y, alrededor de ellos, giraban la mayoría de los profesores, aunque los amigos del Padre Cámara, Obispo de la Diócesis, no se llevaban bien ni con unos ni con otros”.

With Nicasio Sánchez Mata, Full Professor at the Chair of Natural Law, there were the ultramontans.<sup>85</sup> Dorado Montero had once supported their ideals when creating the political ultramontanist party back in his youth. Notwithstanding, his positioning did not just confront him with the ultramontans, but also with Father Cámara. The latter did not like the fundamentalists nor progressists, . DDorado Montero would also suffer the constant, hard criticism from Cámara.<sup>86</sup> He was aware that Dorado Montero had experienced a decay in his religious feeling and he had a personal crisis as regards the existence of God.<sup>87</sup> Juan Andrés Blanco Rodríguez, Professor of History of the University of Salamanca, deemed this criticism after Dorado Montero's trip to Bologna just as 'light'. Besides, for him, the Christian influences would be maintained throughout his complex, intellectual evolution and they would constitute a quasi-definitive mental state.<sup>88</sup> Definitively, all traits of Christian education are not so easily-erased after his term in Italy. This deep, inner struggle will continue for the rest of his life.

This relativism as concerns his religious convictions can be deemed as a consequence of internalising Comte's philosophical scheme.<sup>89</sup> Indeed, it has been asserted that the philosophical system of Auguste Comte had a major influence on him: “[his extreme *correccionalismo*] was influenced by the philosophical system of Comte, rather than by the ideas and principles of Lombroso, Ferri, and Garofalo”.<sup>90</sup> However, I have not been able to see any longer, fully-based explanation of this assertion.

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<sup>85</sup> Ibid.

<sup>86</sup> Berdugo Gómez de la Torre, I.; Hernández Montes, B., *Enfrentamiento del Padre Cámara con Dorado Montero*, Salamanca: Diputación Provincial, 46, 1894, p. 85.

<sup>87</sup> López-Rey, M., “X. Pedro Dorado Montero ...”, p. 607: “At a certain moment, –when he was in Italy and was about twenty-five years old– after a deep spiritual struggle he decided to abandon Catholicism”.

<sup>88</sup> Blanco Rodríguez, J.A., *El pensamiento...*, p. 15.

<sup>89</sup> One of Comte's aphorisms upon which Dorado Montero will heavily rely on is the following one: “Here is the only absolute maxim: There is no absolute maxim!”. Link: <https://psicologiyamente.com/reflexiones/frases-auguste-compte>. Seen on 02.01.2021.

<sup>90</sup> López-Rey, Manuel, “X. Pedro Dorado Montero ...”, p. 607.

### 3. A brief romance with positivism

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

Italians have been said to reinvent the Criminal law four times. The first time with the Roman Empire, when they carried out their first great legal work; the second time, with Beccaria and his command to comply with the law; the third time, with Lombroso, Ferri, and Garofalo, focusing on the study of the man; and the fourth time, when the previous schools were somehow conciliated and the Terza Scuola of criminal law was established<sup>91</sup> Dorado Montero is usually placed between the third and the fourth stage. Not by accident, he is often catalogued as a component of the eclectics from the *Terza Scuola*. I do, however, have my own reservations as to such view, but this is not the appropriate place to develop this idea.

The legal theory of Dorado Montero has been deeply studied.<sup>92</sup> In it, positivism clearly played a major role.<sup>93</sup> The inclusion of Lombroso's main doctrine in the European legal thinking was produced gradually. Yet, his thinking would coin legislation only in the interwar period the official establishment in the legislation would not be implemented and consolidated until the interwar period between WWI and WWII.

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<sup>91</sup> Rodríguez Manzanera, L., *Criminología*, Ciudad de México: Porrúa, 2<sup>a</sup> ed., 1981, pp. 245-246.

<sup>92</sup> Bernaldo de Quirós, C., "Prólogo"; Dorado Montero, P., *Naturaleza y función del Derecho*, Reus, Madrid, 1927, p. 49; Bernaldo de Quirós, C., "Dorado Montero y sus libros", *Revista de Derecho Privado*, 1919; Ríos Urruti, F., "Don Pedro Dorado Montero, Filósofo del Derecho", *Boletín de la Institución Libre de Enseñanza*, T. 43, Madrid, 1919; Valls, F. J., *La filosofía del Derecho de Dorado Montero*, Salamanca: Universidad de Salamanca, 1971; Lima Torrado, J., *La Filosofía Jurídica de Pedro Dorado Montero*, Madrid, Tesis doctoral (inédita), 1976; and Rodríguez Hernández, V., *La insumisión en Dorado Montero. El tema iusnaturalista en la encrucijada ideológica de la Restauración*, Salamanca: Hespérides, 1993. Yet there are many authors left whose written contributions must be highlighted such as Sánchez-Granjel, Cuello Calón, Bernaldo de Quirós, Rivacoba or Jiménez de Asúa.

<sup>93</sup> Ramos Pascua, J., "El positivismo jurídico en España: Don Pedro Dorado Montero", *Anuario de Filosofía del Derecho*, no. 12, 1995, pp. 503-546.



During Dorado Montero's stay in Italy, his perspective changed enormously. He would become a great enthusiast of Roberto Ardigò and Pedro Siciliani, exponents of Italian positivism. Their direct influence allowed to him to nurture a Spanish society pre-eminently neoclassical, iusnaturalist, and Catholic. Even if Lombroso's *L'Uomo delinquente*<sup>94</sup> was already ten years old, and the main works of Ferri and Garofalo were in circulation for more than seven years, positivism in Spain remained largely unstudied.<sup>95</sup> Dorado Montero, as captivated as he was for the experimental method and the freshness of a system so different from Catholic scholastics, realised about several incoherencies and poured a quite open criticism against Lombroso's key points. Indeed, at the time Lombroso published *Los últimos progresos de la Antropología criminal*, Dorado Montero published his *Problemas de Derecho penal* (both in 1895). Among other aspects, he never got to accept the criminal's classification.<sup>96</sup> Every time he had to explain Lombroso's theories in his lectures, he would overwhelm his exposition with a myriad of critics towards the born criminal. Ferri offered a much kinder theory of the criminal; and also a theory much closer to our times, since his catalogue was based on factors influencing the crime, not just holding the idea that criminality is inherent.<sup>97</sup> Ferri's most popular theory is based upon anthropological factors

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<sup>94</sup> Lombroso, C., *L'uomo delinquente*, Torino: Fratelli Bocca, 3<sup>a</sup> ed., 1884. Also, some of his outstanding works are: Lombroso, C., *Los últimos progresos de la antropología criminal*, Madrid: La España Moderna, 1895; Lombroso, C., *Medicina legal*, Madrid: La España Moderna, 1890; Lombroso, C., *El hipnotismo*, Madrid: La España Moderna, 1890; Lombroso, C., *Grafología*, Milano: Ulrico Hoepli, 1895; Lombroso, C., *Los fenómenos de hipnotismo y espiritismo*, Madrid: M. Aguilar, 1910; Lombroso, C., *gas prostituta e la donna normale*, Torino: Fratelli Bocca, 5<sup>a</sup> ed., 1927; Lombroso, C., *El delito: sus causas y remedios*, Madrid: Librería General de Victoriano Suárez, 1902; Lombroso, C., *Los criminales*, Barcelona: Atlante, 1911; Lombroso, C., *El antisemitismo*, Madrid: Viuda de Rodríguez Serra, 1904; Lombroso, C., *Los anarquistas*, Madrid: Tip. Sucesores de Rivadeneyra, 1894.

<sup>95</sup> Masferrer, Aniceto, "The Reception of the Positivist School in the Spanish Criminal Doctrine (1885-1899)", *GLOSSAE. European Journal of Legal History*, No. 17, 2020, pp. 303-352, p. 345: "Until that moment, the positivist school had not constituted 'a compact and definite nucleus'. It never did. As we have seen, not many jurists carried out rigorous studies defending the Italian positivist school".

<sup>96</sup> Dorado Montero, P., *El Derecho protector de los criminales*, Madrid : Ed. Jiménez Gil, Tomo 1, 1915, p. 71: "Trends, inclinations, instincts or appetites are known, like everything else, by their effects, and not otherwise. Tendencies are simply powers, potentialities or properties, and no power or property can ever be known or ascertained except by their actions or manifestations".

<sup>97</sup> Ferri, E., *Ciencia positiva*, Barcelona: Atlante, 1900; Ferri, E., *Defensas penales*, Santa Fe de Bogotá: Temis, 6<sup>a</sup> ed., 1991; Ferri, E., *Los Delincuentes en el arte*, Madrid: Librería de Victoriano Suárez, 1899; Ferri, E., *Estudios de antropología criminal*, Madrid: La España Moderna, 1892; Ferri, E., *Los hombres y las cárceles*, Barcelona: Centro Editorial Presa, 1900; Ferri, E., *Homicidio-suicidio*, Madrid: Reus, 1934; Ferri, E., *La justicia penal: su evolución, sus*

(race, sex, physical constitution, psyche, age, etc.), physical factors (temperature, climate, etc.), and social factors (religion, education, family circle, etc.). Grispigni supported such theory, and he simply added a further differentiation between biological and ideological reasons inside the ‘anthropological factors’. Garofalo,<sup>98</sup> in turn, defended that there were four types of born criminals: the murderer, the violent criminal, the thief, and the lascivious criminal.<sup>99</sup>

For positivism the person committing the crime is considered as abnormal. There is an anomaly as a biological being, in as much as the person is exclusively considered in his material or biological facet, not anymore as a moral subject as he is in the classical one. The treatment of the penalty is of biological order, not moral. The individual, according to the most orthodox branch of positivism, will never stop being a delinquent, as supposedly ‘backed’ by phrenology and probabilistic sciences. One of the main obstacles was -and still is nowadays- a non-moral responsibility. The previous neoclassical penal law relied upon a moral conception of crime: when the moral responsibility of the perpetrator was exhausted, then he would be free from penal consequences and he would be set free from the State’s restrictive measures (whatever they were -fine, imprisonment, death penalty, etc.-). Yet, in the new approach, there is no moral conception of crime, but a social one. Whereas the moral responsibility can be exhausted, social responsibility is inexhaustible. Thus, the control of the State over the citizen,<sup>100</sup> which was relatively easy to ground on the neoclassical theory,

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*defectos, su porvenir*, Madrid: B. Rodríguez Serra, 1900; Ferri, E., *Il magistrato: dal reclutamento alla formazione professionale: esperienze in Italia e nel mondo*, Roma: Arti Grafiche Jasillo, 1982; Ferri, E., *Nuevos estudios de antropología criminal*, Madrid: La España Moderna, 1893; Ferri, E., *Los nuevos horizontes del derecho y del procedimiento penal*, Madrid: Centro Editorial de Góngora, 2<sup>a</sup> ed., 1887; Ferri, E., *Principii di diritto criminale : delinquente e delitto*, Torino: Unione Tipografico-Editrice Torinese, 1928; Ferri, E., *Proyecto preliminar de código penal para Italia*, Madrid: Centro Editorial de Góngora, 1925; Ferri, E., *Sociología criminal*, Madrid: Centro Editorial de Góngora, 1907.

<sup>98</sup> Garofalo, R., *La criminología : estudio sobre el delito y sobre la teoría de la represión*, Madrid: La España Moderna, 1890; Garofalo, R., *Indemnización a las víctimas del delito*, Pamplona: Analecta, 2002; Garofalo, R., *Justicia y civilización*, Madrid: La España Moderna; Garofalo, R., *La superstition socialiste*, Paris: Félix Alcan, 1895; Garofalo, R., *Polémica en defensa de la Escuela Criminal Positiva* (en colaboración con Cesare Lombroso, Enrico Ferri y Giulio Fioretti), Bolonia, 1886; Garofalo, R., *Criterio positivo de la penalidad*, Napoles, 1880.

<sup>99</sup> The classification was taken from <http://itercriminis.com/raffaele-garofalo-creador-del-termino-criminologia/>. Seen on 26.05.2018.

<sup>100</sup> As regarded the limitless power of the State, Professor Masferrer identified the origin of such problem in Masferrer, A., *Spanish Legal Traditions*, Madrid: Dykinson, 2<sup>o</sup>ed., 2012, pp. 292-293: “Whereas the main stream of the natural law theory (Francisco Suárez, Hugo Grotius,

turns in my opinion into a legal nightmare almost impossible to justify.<sup>101</sup> Such control might be perfectly perpetual over individuals and a potential risk arose: the rise of totalitarian legal systems.

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

"If Primo de Rivera's dictatorship made him realise of the relevance of maintaining the legality principle and, consequently, the liberal criminal law, the WWII made nothing but to assert this idea".<sup>102</sup>

As to Dorado Montero, the problem was not that he was not able to foresee this; rather, he had to postpone his new proposal of criminal law due to the fact he thought that society was not evolved enough for it to be properly applied. The emergence of socialism had not even taken place. He carried out a comparison of legal systems, which highly differed depending on time. At the early stages of the development of legal science, law was conceived as a subjective application of a theory of justice imposed-by-force, which was usually the one held by the chief of the tribe, the king, the strongest man of the group or the primitive judge (usually,

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Samuel Pufendorf, Christian Thomasius, etc.) defended that the law was based upon a reason, a -relatively new- line of thought, influenced by 'nominalism' and 'voluntarism'- adopted by, and disseminated among Protestants-, maintained that the law was based upon will. Authors like John Austin, Hegel and Rousseau, among others, shared this view, regarding the law as a 'command' (of the State)". For a complete opposite approach on the same issue, vid. Martín Martín, S., "Estado punitivo y derechos constitucionales: pasado y presente", *Ayer. Revista de Historia Contemporánea*, Madrid: Marcial Pons, Vol. 105, 2017, pp. 259-273.

<sup>101</sup> Cartuyvels, Y., Masferrer, A., "An introduction to the birth of criminal positivism in Europe and Latin America at the end of the 19th century: rise and resistance", *GLOSSAE. European Journal of Legal History*, No. 17, 2020, pp. 1-21: "The liberal constitutional state or 'Police State' is in a crisis, incapable of responding effectively to the real inequalities, which the abstract principles of individual responsibility and formal equality of the liberal constitutional state do little to conceal".

<sup>102</sup> Roldán Cañizares, E., *Luis Jiménez de Asúa: un jurista en el exilio*, Sevilla: Universidad de Sevilla, 2017-2018, p. 270: "Si la dictadura de Primo de Rivera le hizo ver que era fundamental mantener el principio de legalidad, y en consecuencia, el derecho penal liberal, la II Guerra Mundial terminó de confirmar esta idea".

this is highly linked to religious institutions). While it is often deemed as unfair as regards the procedural aspects,<sup>103</sup> this conception links to the idea that man is a transcendental being, rather than just flesh. Sometime after the French Revolution, law switched to the opposite site. The legal securities aroused and the number and extent of basic legal principles<sup>104</sup> increased, hence, protecting the individual from the degree of uncertainty of past times. Nevertheless, law turned more rigid and lost vitality since every focus shifted to formal aspects. Form over content. While acknowledging that the first one was frequently interspersed by injustice, Dorado Montero happened to like it better than the second option. Due to this new thinking of his, Dorado Montero would be a firm defender of the ‘content-over-form’ conception of law. The pendulum movement of history performed here as well. He came back to the first stage again and this is what he attempted to reflect in his *Protective law of the criminals*, despite that this presented a potential risk: its proximity to fascist and Nazi conceptions of law that would soon take over.

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

“Should we take for granted that the existence of mitigating circumstances, or the system of relative freewill were admissible, it would be necessary to establish infinite grades of criminal capacity. Since the strength of such circumstances can be infinitely diverse depending on situations, it would be greatly unfair to equate and to treat the same way the very different situations in which subjects found themselves in when committing the crime under such circumstance”.<sup>105</sup>

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<sup>103</sup> Legal guarantees were virtually inexistent in primitive times.

<sup>104</sup> Namely, legality principle, actus reus, and softening of penalties.

<sup>105</sup> Dorado Montero, P., *El Derecho protector...*, Tomo 1, p. 429: “Dando por supuesto que la existencia de las circunstancias atenuantes, ó el sistema del libre albedrío relativo, fuera admisible, sería preciso establecer grados infinitos de imputabilidad; puesto caso que la fuerza de tales circunstancias puede ser infinitamente varia, según las ocasiones, y sería grandemente injusto «equiparar, cual sucede al presente, y tratar de la misma manera, las diferentísimas situaciones en que los sujetos se hubieren encontrado al cometer los delitos bajo el influjo de circunstancias limitadoras de su libre albedrío”.

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

Despite the temptation of saying Pedro Dorado Montero was a positivist, one could not consider him as a such (or, at least, not as a Lombrosian positivist) at all. Out of this undeniably positivist influence, Dorado Montero split from this trend of thought, and vehemently criticised Italian positivism many times. Yet, any attempt of diminishing his positivism in favour of an eclectic position is falling into inaccuracy. From Italy, he wrote *El positivismo en la ciencia jurídica y social italiana* which is his baptism of fire in the new trend.<sup>106</sup> In here, one may observe his opposition to using the mild, undetermined concept of 'eclecticism' (as we indicated some paragraphs ago). Indeed, in such work, we may easily observe his rejection against not coherent positions. In his opinion, there are those who have not been able to get used to the new conditions and, thus, "sway in uncertainty" and they choose sides "depending on the circumstances".<sup>107</sup> Under such heading, he includes: "Pessina, Gabba, Del Giudice, Filomusi-Guelfi, Miraglia and even, to a certain extent, Carle himself".<sup>108</sup> Under his point of view, they keep on "paying a tribute to idealism" especially to the "hegelian one", at the same time they acknowledge the need of Legal Philosophy to "have in mind much of the acquisitions" by the "so-called experimental sciences". He concluded with a very illustrative quotation: "Actually, they do nor belong to the critical direction

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<sup>106</sup> Though his first work had been published a year before in 1890 under the title *La Antropología criminal en Italia*.

<sup>107</sup> Dorado Montero, Pedro, *El positivismo en la ciencia jurídica y social italiana*, Madrid: Imprenta de la Revista de Legislación, 1891, p. 249.

<sup>108</sup> Dorado Montero, Pedro, *El positivismo en la ciencia jurídica y social italiana*, Madrid: Imprenta de la Revista de Legislación, 1891, Footnote (2), p. 249.

which we are examining [...], neither can they be exactly included within the purely idealist direction”.<sup>109</sup>

Leaving aside the purely legal technical aspects, Dorado Montero somehow concludes to this question by reasserting the fact that the grounds of both positions are united whatsoever: “Hence, the harmonisation between the two opposed schools (idealist and positivist) far from being impossible, as it might look like *prima facie*, is a need required by the inner exigency which they both represent: the theory of the social contract, reduced to its just limits, purged from its exaggerations as regards liberty, restricted to its own circle of action (that of the ‘rational liberty’), unites itself in a loving consortium, and forms one single [theory] altogether with the theory of determinism, at its turn corrected from its mistakes, especially that of the mechanic determinism”.<sup>110</sup>

Notwithstanding that, there were many things that were incomprehensible for him: mostly of human nature. For instance, if the criminal is born this way and he cannot help his tendencies and criminal acts, how could somebody as Lombroso treat him with such hatred and contempt? In this sense, Dorado Montero bit the hand that fed him and endured discrimination on both sides. On the one hand, neoclassicals and eclectics showed their absolute rejection towards his arguments. Positivists, on the other hand, could never possibly understand why he went against the basic principles of positivism and why he questioned the originality of their movement:

“Let us determine to which extent can be considered as legitimate the claim of ‘novelty’ of the anthropological school, and so also, to which extent is accurate the

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<sup>109</sup> Dorado Montero, Pedro, *El positivismo en la ciencia jurídica y social italiana*, Madrid: Imprenta de la Revista de Legislación, 1891, Footnote (2), p. 249: “En realidad no pertenecen á la dirección crítica que examinamos, entendida del modo que queda dicho, pero tampoco pueden incluirse exactamente en la dirección puramente idealista”.

<sup>110</sup> Dorado Montero, P., *El positivismo en la ciencia jurídica y social italiana*, p. 248: “Por donde se ve cómo la armonía entre las dos escuelas contrarias, idealista y positivista, lejos de ser, como á primera vista aparece, imposible, es una necesidad reclamada por la interna exigencia que ambas representan: la teoría del contrato social, reducida á sus justos límites, purgada de sus exageraciones en orden á la libertad, y contraída al círculo propio de su acción, el de la libertad racional, se une en amoroso consorcio y forma, por así decirlo, una misma con la teoría del determinismo, corregida, á su vez, de sus yerros, sobre todo del determinismo mecánico”.

accusation of ‘destructive’ and ‘dissolving’ of the social order poured by many of his contradictors”.<sup>111</sup>

Even if he praised certain aspects to be an outstanding contribution of positivism,<sup>112</sup> he acknowledged that “its sense in general was far inferior than that of the former schools, particularly that of the correctionalist school”.<sup>113</sup>

Also, as a result of his approach and adherence to positivism, he suffered a number of setbacks which he finally overcame, although not without suffering. The political struggle began in 5 February 1897, when Salamanca’s Bishop, Father Cámara, raised a concern in the aftermath of a collective complain of certain pupils around “the explanations of Professor Dr Pedro Dorado Montero” which were deemed “as contrary to the Catholic truth and grounded on the reprobated systems of positivism, materialism, and determinism”.<sup>114</sup> And so, he asked the Chancellor of the University of Salamanca to exempt students from attending Dorado Montero’s lessons, as well as to replace him for another professor. Two days after, the Chancellor argued before the Directorate-General of Public Instruction that the law did not allow him to appoint another professor who explained the subject of Criminal law with a Catholic approach. In 19 February, the Dean of the Law Faculty, Teodoro Peña Fernández, filed an appeal against the decision of the Chancellor re-establishing Dorado Montero in duty. After some months, the Chancellor of the University of Salamanca wrote a report on the complaints of students and the performance of the Dean of Law. According to the Chancellor, the action taken by the Dean of Law against Dorado Montero was blatantly illegal since the appeal he lodged was not foreseen in the Regulation. Besides, he quoted a section of the University Council (16 June 1897) in which a

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<sup>111</sup> Garofalo, R., *Indemnización á las víctimas del delito*, Madrid: La España Moderna, 1890, p. 8: “indiquemos siquiera dentro de qué límites puede considerarse como legítima la pretensión de novedad que caracteriza á la escuela penal antropológica, y dentro de qué límites, por tanto, es exacta la acusación de disolvente y destructora del orden social que lanzan contra ella muchos de sus contradictores”.

<sup>112</sup> Namely, the “study of the criminal (criminal anthropology) and the analysis of some external -mostly social- causes of the crime (criminal sociology)”. *Vid.*, Garofalo, R., *Indemnización á las víctimas del delito*, Madrid: La España Moderna, 1890, p. 30.

<sup>113</sup> Garofalo, R., *Indemnización á las víctimas del delito*, Madrid: La España Moderna, 1890, p. 30.

<sup>114</sup> *Diccionario de Catedráticos Españoles de Derecho (1847-1943)*, “Pedro Dorado Montero”.

third part to the dispute, the Dean of Sciences, considered that actions against Dorado Montero had exceeded the legal boundaries. As a result, the Dean of Law, driven by his need of fighting Dorado Montero back, changed his tactics. He decided to switch the attention to the fact that both the Faculty of Sciences and the Faculty of Medicine were recently created, in an attempt to invalidate the relevance of their opinions. However, he did not succeed this time. Finally, in 23 June 1897, the Chancellor's decision was decisive and he communicated it to the State: Dorado Montero's suspension was void. Dorado Montero had won the battle.

#### **4. Krausism: the relevance of instruction and education**

Krausism did enormously differ from the postulates defended in the first stages of Dorado Montero's intellectual activity. He happened to change from one idea of education and religion to the very opposite of it. Without ever being deemed as a radical, he went from one extreme to another.<sup>115</sup>

The German philosopher Friedrich Krause fiercely opposed to dogmatic models of teaching and abrogated for academic freedom, laicism,<sup>116</sup> and freedom of conscience among others.<sup>117</sup> His Spanish counterpart was Julián Sanz del Río, a great Castilian jurist responsible of the introduction of the movement in Spain. His pupil, more known than he himself, was Francisco Giner de los Ríos. He created the *Institución Libre de Enseñanza*.<sup>118</sup> It subscribed the ideals of Krausism. In practice, this meant to start the reform of the Spanish educative system.<sup>119</sup> The debate was often held as a dichotomy: religion vs. science.

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<sup>115</sup> Sánchez Rojas, J., "Pedro Dorado Montero", *Boletín de la Institución Libre de Enseñanza*, XLIII, 1919; Blanco Rodríguez, J. A., "Evolución de un intelectual crítico", *Revista de Estudios*, Salamanca, No. 33-34, 1994, pp. 141-168; Ledesma, Á., "El maestro Dorado Montero", *BILE*, 43, 1919.

<sup>116</sup> In the "Preliminary Ideas" of his *Urbild der Menschheit*, he insisted nevertheless, on the fact that man "must live in religion united with God and subordinated to Him". I am using the Spanish translation of Julián Sanz del Río: Krause, K. Ch. F., *Ideal de la humanidad*, Madrid: Imprenta de F. Martínez García, 2<sup>o</sup> Ed., 1871, p. 33.

<sup>117</sup> Krause, K. Ch. F., *Grundlage des Naturrechtes*, Leipzig: Göpfert, 1803; Krause, K. Ch. F.: *Ausgewählte Schriften*, Stuttgart: Frommann-Holzboog.

<sup>118</sup> It was a private centre founded in 1876 that was conceived as an alternative to official education and which was known for its lay spirit.

<sup>119</sup> Giner de los Ríos, F., *Educación y enseñanza*, Madrid: Espasa-Calpe, 1933.



Marcelino Menéndez Pelayo openly rejected evolutionist trends. He confronted both liberalism and laicism. The existing tension could be illustrated with the story of the Spanish naturalist Marcelino Sanz de Sautuola y Pedrueca, who discovered the prehistoric paintings of Altamira.<sup>120</sup> The finding did clash with the lines of thought back then.

It was when Dorado Montero was in Madrid to conduct his PhD studies when he got to know Francisco Giner de los Ríos. From that moment onwards, law and pedagogy were always related in his theory.<sup>121</sup> It was very plausible that Dorado Montero was inside a masonic lodge. His most outstanding pupil, Jiménez de Asúa, was reported to be in one.<sup>122</sup> The idea of a masonic lodge was not understood in a formal way by referring to any sort of membership, but in a way akin to J. G. Fichte's conception. For him, lodges were nothing else than a way of completing a fragmentary education of one individual. This over-parcelled education is a product of 'big societies': being born in a certain country, in a certain social estate, and with a certain fragmented education.<sup>123</sup> Though not very sociable,<sup>124</sup> Dorado Montero shared this organisational concept in philanthropic, reformist societies. He borrowed directly from Krause when he insisted on the fact that their masonic associations had no hidden political aim, but they were just brotherhoods with educational purposes:

“The art of educating human beings as human beings, and to humanity as humanity, purely and universally, is waking them up from their lives”.<sup>125</sup>

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<sup>120</sup> Actually, the paintings were discovered by Modesto Cubillas, a farmer from Asturias.

<sup>121</sup> On this question, *vid.* Gil Cremades, J. J., *El reformismo español*, Barcelona: Ariel, 1969, p. 273; Hernández Díaz, J. M., “Pedro Dorado Montero y la educación”, *Historia de la Educación*, No. 2, 1983, pp. 217-228.

<sup>122</sup> Roldán Cañizares, E., *Luis Jiménez de Asúa. Derecho penal, república, exilio*, Madrid: Dykinson, 2019, p. 35.

<sup>123</sup> Ureña, Enrique M., “Orígenes del Krausofröbelismo y masonería”, *Historia de la educación: Revista interuniversitaria*, No. 9, Madrid: Universidad de Comillas, 1990, pp. 43-62, p. 47.

<sup>124</sup> Ríos Urruti, F., “Don Pedro Dorado Montero, Filósofo del Derecho”, *Boletín de la Institución Libre de Enseñanza*, Madrid, T. 43, 1919, pp. 93-95, p. 93.

<sup>125</sup> Krause, K.C.F., *Die drei ältesten Kunsturkunden der Freimaurer Bruderschaft*, Zweite Ausgabe, Dresden: Arnoldischer Buchhandlung, Erster Band, 1820, p. 17: “Sie ist also die Kunst, den Menschen als Menschen, und die Menschheit als Menschheit, rein und allseitig zu erziehen, das ist, ihr Leben zu wekken”.

Krause would not be the sole influence. Fröbel would play a role as well, but it is not that relevant for legal history, since in practice, Krausism refers to Krausefröbelism in a more inclusive way: “Krausefröbelism attempted to unify the philosophical impulse of the Krausist circle with the pedagogic power or the Fröbelian circle”.<sup>126</sup>

Time passed, nevertheless, and one of Spain’s most international scholars would feel the call for conducting research abroad again. This time, France was the elected place after having applied in 15 May 1909 to the Board of Extension of Studies for the concession of an allowance to develop certain topics.<sup>127</sup> One option was “Proceeding for teaching Law at the French, German, English, Swiss or American Universities”. Failing that, the other option was “The study in France, Belgium, Germany, Switzerland and Austria of the exercise of criminal justice and of the penitentiary administration”. The grounds for the latter proposal would lay on his command of French, German, English, and Italian. He benefited from the stipend in Paris. Notwithstanding that, he barely remained there for four months, since a neurasthenia he had been suffering from for many years did not allow him to work properly. Such event did not prevent him from having a prolific period as well.<sup>128</sup>

## **5. Socialist in spirit, rather than militant**

Even though Dorado Montero never got to be a member of the Spanish Socialist Party, socialism had a very relevant weight on his life and he had respect and sympathy for it. He was a member of the Republican Party of Salamanca. No wonder, too, that even if he was a full-time devoted scholar, “he had assumed

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<sup>126</sup> Ureña, Enrique M., “Orígenes del Krausofröbelismo y masonería”, *Historia de la educación: Revista interuniversitaria*, No. 9, Madrid: Universidad de Comillas, 1990, pp. 43-62, p. 61: “El krausofröbelismo pretendió unir el impulso filosófico del círculo krausista con el impulso pedagógico del círculo fröbeliano”.

<sup>127</sup> *Diccionario de Catedráticos Españoles de Derecho (1847-1943)*, “Pedro Dorado Montero”.

<sup>128</sup> Dorado Montero, P., *El Derecho y sus sacerdotes* (1909 – 1911); Dorado Montero, P., *La Psicología criminal en nuestro derecho legislativo* (1910-1911); Dorado Montero, P., *El Derecho y sus sacerdotes* (1911).

citizen responsibilities of public nature as well”.<sup>129</sup> The most relevant of such public duties was the time he performed as a town councillor in the City Hall of Salamanca. Even if in politics he only exerted at the lowest administrative level, his dedicated work did not remain unnoticed. The day of his funeral, not only the City Council honoured his memory, but also a moving Miguel de Unamuno addressed a very emotional speech to the professor’s remembrance:

“The municipal session of that day was cancelled on the occasion of the death of Dorado Montero. The Corporation appointed a Commission to represent the City Hall during the burial. Clairac and Riesco voted against, grounding such decision on their religious beliefs. His burial was a citizen event. During the march, the University clock’s bells rang. There were many representations from the University, the Municipal Council, workers, and political parties. It was raining and people crowded around the mud on the near streets. Students and workers carried the coffin. [...] The corpse was surrounded by twenty flags of workers’ unions [...] Around five-hundred people assisted at the civil cemetery. Unamuno addressed the bishop’s refusal of letting the corpse in the Catholic cemetery: ‘... we bury in this sacred and blessed land, blessed by those who rest here, under the same heaven which shelters everyone, under its light, whose shine equally illuminates us all’”.<sup>130</sup>

Interestingly enough, that civic, socialist, and republican character which predominated in his burial would not be the only one. His very good friend,

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<sup>129</sup> Hernández Díaz, J. M., “Pedro Dorado Montero y la educación”, *Historia de la educación: Revista interuniversitaria*, No. 2, 1983, pp. 217-228, p. 218: “también asume responsabilidades ciudadanas públicas”.

<sup>130</sup> Málaga Guerrero, J., *La vida cotidiana en la Salamanca del siglo XX: 1898-1923*, Salamanca: Fundación Salamanca Ciudad de Cultura y Saberes, 2018, p. 598: “Se suspendió la sesión municipal por la muerte de Pedro Dorado Montero que fue concejal del Ayuntamiento. Se nombró una comisión para que representase a la Corporación en el entierro. Clairac y Riesco votaron en contra amparándose en sus sentimientos religiosos. El sepelio de Dorado Montero fue un acontecimiento ciudadano. Durante el recorrido, las campanas del reloj de la Universidad no dejaron de doblar. Asistieron representaciones de la Universidad, del Concejo, obreros y partidos políticos. Llovía y la gente se agolpaba pese al barro en las calles de las inmediaciones. Estudiantes y trabajadores cargaron el féretro. Abrieron la marcha del cortejo fúnebre los maceros de la Universidad con sus mazas enlutadas. Rodeaban el cadáver las veinte banderas de las sociedades obreras. Al pasar el entierro por la plaza Mayor dobló la campana del Consistorio. Con el féretro a hombros, dieron la vuelta al ágora. Asistieron 500 personas al cementerio civil. Unamuno dijo refiriéndose a la negativa del obispo a dejar enterrar el cadáver en el cementerio católico: ‘...enterramos en esta tierra sagrada y bendita, tierra bendecida y sagrada por los que aquí reposan, bajo el mismo cielo que a todos cobija, bajo su luz, que a todos ilumina por igual”.

Mariano Arés y Sanz,<sup>131</sup> also addressed some words at Dorado Montero's burial implying a progressist spirit:

“His burial was a resounding event due to the civil character laid off by Arés himself, and arouse controversy and condemnation reactions in the conservative University of Salamanca and City of Salamanca”.<sup>132</sup>

Dorado Montero showed a deep concern on the social question. The aforementioned concept did not go unnoticed in the academia and in the intellectual circles of his time. Aspects such as inequality, advances on the labour law relations, variations of poverty and illiteracy figures, changes within the Spanish society, empowering of the working class, redefinition of the educative system or the irruption of anarchism were a constant among the scholars. As documented,<sup>133</sup> socialism has a definitive impact on him. Two major aspects were decisive to this respect. Firstly, new disciplines would originate and develop. Secondly, most of the social sciences would adopt a scientific method. Resulting from such confluence of events it follows that:

- 1) Some misunderstandings and illogical incoherencies arouse;
- 2) many sciences crashed, related to or even converged among themselves: sociology, criminology, psychology, pedagogy, penal law or anthropology;<sup>134</sup>

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<sup>131</sup> Back in 1901, when Dorado Montero published his *Contribución al estudio de la historia primitiva de España*, he devoted the whole work to him: “Profesor que fué de la Universidad de Salamanca, a quien tanto debe esta Escuela, y cuya falta se advierte en la misma de manera bien ostensible”.

<sup>132</sup> Hernández Díaz, J. M., “Del Decreto Pidal al primer Rectorado de Unamuno”; Rodríguez-San Pedro Bezares, L. E., (Coord.), *Historia de la Universidad de Salamanca*, Salamanca: Universidad de Salamanca, Vol. I, 1<sup>o</sup>ed., 2002, pp. 239-262, p. 256: “Su entierro fue sonado por el carácter civil que dispuso el propio Arés y suscitó viva polémica y reacciones de denuncia en la conservadora Universidad y ciudad de Salamanca”.

<sup>133</sup> Blanco Rodríguez, J. A., *El pensamiento sociopolítico de Dorado Montero*, Salamanca: Centro de Estudios Salmantinos, 1982, p. 133; Blanco Rodríguez, J. A., *El pensamiento político-social de Dorado Montero en el marco de las ideologías sociales de su época (1880-1917)*, Salamanca: Facultad de Geografía e Historia de la Universidad de Salamanca, 1979 (inédita), pp. 252-278; Blanco Rodríguez, J. A., “El socialismo reformista de Dorado Montero”, *Revista de Estudios*, Salamanca, No. 11-12, 1984, pp. 235-242; Lima Torrado, J., “Las claves de la recepción del pensamiento socialista en la filosofía política de Pedro Dorado Montero”, AA.VV., *Estudios en homenaje al profesor Gregorio Peces-Barba*, Madrid: Dykinson, vol. 4, 2008.

<sup>134</sup> In practice, it led to a great confusion between those related disciplines: “it is easy to set out the boundaries between the new theories, such as, for example, between correctionalism and the positivist school (or Criminal Anthropology), as Bernaldo de Quirós acknowledged”, cnfr. Masferrer, A., “The Reception of the Positivist School in the Spanish Criminal Doctrine (1885-

3) a vast reorganisation of disciplines and their respective role took place.

Nonetheless, there was an inherent risk within this multiaxial, comparative and often interdependent environment. Many theories or trends would lack a clear, technical response to the problems they aimed to solve. Seduced by the appearance of fullness and completion as provided by the many different approaches of the old and the new disciplines, most of the proposals were not able to address certain issues. Specially in the *cuestión social*,<sup>135</sup> we often see that the responses to the problem are generic (too disperse in science) and, usually, relying on pseudoscientific knowledge and unproved ideas. In this period, the shy, not very well-grounded proposals constitute the most common way in which authors dealt with such issues. People with a basic knowledge of anthropology or with vague notions of sociology would, then, write into many reviews, flyers, and pamphlets. Middle-class literates would discuss those topics on an amateur level.

This was not the case as to Dorado Montero's theory, though. It ought not be forgotten that he was a penalist. His Protective Law of the Criminals heavily relies on legal knowledge (even if he dares to mix more disciplines in the aftermath). Thus, every assertion he made was consciously conducted. It is not surprising that the central core of the development of penal dogma took place many years after his death (with the works of his disciples). By means of the neutralisation of the several existing cultural and economic inequalities, Dorado Montero attempted to obtain a transformation of the ethical and mental structures of individuals. Materialism was a key element in Dorado Montero's iusphilosophical thought. In a brief article he published in *La Lucha de Clases*, he evidenced such positioning.<sup>136</sup> Out of a superficial reading of this contribution, it could seem that Dorado Montero was against materialism: he was not. Yet, he coincided with the critics of materialism on the fact the economic aspect is not

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1899)", *GLOSSAE. European Journal of Legal History*, No. 17, 2020, p. 4. Also, Fernández Ruiz-Gálvez sheds some light in Fernández Ruiz-Gálvez, E., "Ciencia del Derecho, Ciencias Jurídicas, Sociología del Derecho, Filosofía del Derecho", Javier de Lucas Martín, F., *Introducción a la teoría del derecho*, València: Tirant lo Blanch, 1992, pp. 407-427.

<sup>135</sup> López Castellano, F., "Pauperismo y cuestión obrera en la España del siglo XIX: entre la 'economía de la Salvación' y el riesgo de fractura social", *Iberian Journal of the History of Economic Thought* 5 (1), Ediciones Complutense, 2018, pp. 57-70, p. 63.

<sup>136</sup> Dorado Montero, P., "Sobre el materialismo histórico", *La Lucha de Clases*, año VII, No. 290, Bilbao, 1 de mayo de 1900.

what triggers human conduct.<sup>137</sup> That is because he thought it was hunger and love what did so, instead of the economic forces: “Isn’t it possible that the animal existence is the economic element, i.e. the indispensable physical basis of everything else?”<sup>138</sup> And so, he pointed out that the engine that directs human acting is made up by his nutrition and reproduction needs, whereas one could essentially reduce it to the first one.

This *cuestión social*<sup>139</sup> was not exclusively developed in academic circles, though. Indeed, there were plenty of social reforms and changes within the Spanish State between the 19<sup>th</sup> and 20<sup>th</sup> centuries. Certain organs such as the *Comisión de Reformas Sociales*<sup>140</sup> (Social Reforms Commission) and the *Instituto de Reformas Sociales* (Institute of Social Reforms) were created ad hoc.<sup>141</sup> Notwithstanding that, society in Salamanca met a different fate:

“In 1898, the relations between the State and the Church were very close. The public powers had to authorise some religious services, among which there were those referred to the undeclared war. The Ministry of Justice and Grace gave its agreement to the celebration of a Te-Deum asking for peace in the Philippines at the Cathedral”.<sup>142</sup>

Besides, the city and its surroundings were lacking all sort of hygienic infrastructures. In *El Adelanto* still predominated the advertisements of

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<sup>137</sup> Dorado Montero, P., “Sobre el materialismo histórico”, *La Lucha de Clases*, año VII, No. 290, Bilbao, 1 de mayo de 1900, p. 2: “The observation is exact, but not appropriate, in my opinion”.

<sup>138</sup> Dorado Montero, P., “Sobre el materialismo histórico”, *La Lucha de Clases*, año VII, No. 290, Bilbao, 1 de mayo de 1900, p. 3: “¿No será la existencia animal, el elemento económico de la base física indispensable de todo lo demás?”.

<sup>139</sup> Dorado Montero, P., *Estudios de Derecho penal preventivo* (1901); Dorado Montero, P., *Contribución al estudio de la historia primitiva de España. El Derecho penal en Iberia* (1901); and especially Dorado Montero, P., *Del problema obrero* (1901).

<sup>140</sup> Álvarez Junco, José, “La Comisión de Reformas Sociales: intentos y realizaciones”, *De la beneficencia al bienestar social: cuatro siglos de acción social*, 1986, pp. 147-154; Pérez Ledesma, M., “La Comisión de Reformas Sociales y la cuestión social durante la Restauración”, *De la beneficencia al bienestar social: cuatro siglos de acción social*, 1986, pp. 155-166.

<sup>141</sup> Bear in mind that they constitute the same organ. The Commission started working in 1883. In 1903, the Commission turned into the Institute, and it worked until 1924. *Vid.* La Biblioteca Nacional de España. Link: <http://datos.bne.es/>. Seen on 21.08.2020.

<sup>142</sup> Málaga Guerrero, J., *La vida cotidiana en la Salamanca del siglo XX: 1898-1923*, Salamanca: Fundación Salamanca Ciudad de Cultura y Saberes, 2018, p. 33: “En 1898 las relaciones Iglesia-Estado eran muy estrechas. Los poderes públicos tenían que autorizar algunos cultos, entre ellos aquellos que se referían a la guerra no declarada. Desde el Ministerio de Gracia y Justicia dieron su visto bueno a la celebración de un Te-Deum en la Catedral pidiendo la pacificación de Filipinas”.

medicines to fight against fevers produced by malaria, a disease which was endemic in Spain back then. The fact that there were terrible economic circumstances involuntarily triggered informal economy activities. Many of such activities dealing with nourishment were performed in an undeclared way with virtually no quality controls at all:

“the consumption of untreated milk produced endemic diseases, tuberculosis, and brucellosis, this latter known as the Malta Fever”.<sup>143</sup>

Miguel de Unamuno, former friend and intellectual nemesis of Dorado Montero, went on public appearances: “El Adelanto placed record at the front page with great typographic boast of Unamuno’s speech made on 25 August 1904 in Gijón” and “the endeavours of Unamuno over the cities and towns of Spain were acknowledged and followed by the people of Salamanca. The newspapers were in charge of elaborating reports on his interventions”.<sup>144</sup> Similarly, the very rough and open dispute with the Father Cámara and with the conservative Government also partially originated from this fear towards socialism. That was not the only threat, though. The conservative Government of that time wanted to withdraw Dorado Montero from the academic world. It was particularly painful since his reputation all over the region was enormous:

“Dorado Montero acquired fame at the end of the last century, reaching the great public, after having lived in the dark for many years after the excommunication that Father Cámara (Bishop of Salamanca) had applied on the distinguished professor. Then, the conservative Government was very close to enact an arbitrary measure similar to that of Mr Manuel Orovio, when it separated from their position to Salmerón, Giner, and other relevant full professors. Nevertheless, Cánovas did not dare to do so with Dorado Montero, who firmly maintained his point of view defending academic freedom”.<sup>145</sup>

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<sup>143</sup> Málaga Guerrero, J., *La vida cotidiana en la Salamanca del siglo XX: 1898-1923*, Salamanca: Fundación Salamanca Ciudad de Cultura y Saberes, 2018, p. 35: “El consumo de leche no tratada producía enfermedades endémicas, tuberculosis y brucelosis, esta última conocida como fiebre de Malta”.

<sup>144</sup> *Ibid.*, p. 217: “El Adelanto se hizo eco en primera, con gran alarde tipográfico, del discurso de Unamuno pronunciado el 25 de agosto de 1904 en Gijón [...]. Las andanzas de Unamuno por las ciudades y pueblos de España eran conocidas y seguidas por los salmantinos. Los periódicos se encargaban de hacer largas crónicas sobre sus intervenciones”.

<sup>145</sup> Valentí i Camp, S., *Ideólogos, videntes y teorizantes*, Barcelona: Minerva, 1922, p. 104: “Dorado Montero adquirió cierta notoriedad a fines de la centuria pasada, llegando al gran público, después de haber vivido obscurecido durante muchos años, con motivo de la excomunió

After a careful study of the documents of the Foundation Pablo Iglesias, the anarchist personality of the Spanish professor can be denied: the evidences linked him more to socialism due to his relation with the PSOE.<sup>146</sup>

“He entered into contact with anarchist reviews and also collaborated with them, but since 1894 he appears linked to the PSOE, as well as to its expression organ *El Socialista*, where he collaborated uninterruptedly during his whole life”.<sup>147</sup>

However, even if he appeared more socialist than anarchist, his socialism is not an orthodox one: it is full of Marxist connotations: “Dorado Montero’s socialism, similarly as to that from other intellectuals from his time as Unamuno and Álvarez Buylla, shows many ambiguities, and his ideology, which finds itself in constant change, mix certain Marxist ideals with other trends arising from social thought. He partially knows the work of Marx, but through Italian intellectuals, particularly Aquiles Loria, from whom he will obtain a great part of his vision”.<sup>148</sup> A supporter of this conception (mixture of socialism and anarchism) is Manuel de Rivacoba y Rivacoba,<sup>149</sup> who in this sense equates this half-in-two reality to Bertrand Russell’s thought.

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que el P. Cámara, a la sazón obispo de Salamanca, lanzó contra el insigne profesor. Entonces, el Gobierno conservador estuvo muy cerca de dictar una medida arbitraria semejante a la de don Manuel Orovio, cuando separó del profesorado a Salmerón, Giner y otros eminentes catedráticos. Pero Cánovas no se atrevió con Dorado Montero que sostuvo en aquella ocasión, con bravura, su punto de vista, defendiendo la libertad de cátedra”.

<sup>146</sup> The acronym stands for “Spanish Socialist Worker Party” in Spanish.

<sup>147</sup> *Fundación Pablo Iglesias*, “Pedro Dorado Montero”: “Tuvo contacto y colaboró en revistas anarquistas, pero desde 1894 aparece ligado al PSOE y a su órgano de expresión *El Socialista*, donde no dejó de colaborar a lo largo de su vida”. Link: [https://www.fpabloiglesias.es/archivo-y-biblioteca/diccionario-biografico/biografias/4883\\_dorado-montero-pedro](https://www.fpabloiglesias.es/archivo-y-biblioteca/diccionario-biografico/biografias/4883_dorado-montero-pedro). Seen on 30.05.2020.

<sup>148</sup> Blanco Rodríguez, J. A., “Evolución de un intelectual crítico: Pedro Dorado Montero”, *Salamanca. Revista de Estudios*, 1994, pp. 141-168, p. 165: “El ‘socialismo’ de Dorado, al igual que el de otros intelectuales de su época como Unamuno y Alvarez Buylla, presenta numerosas ambigüedades, y en su ideología, en constante evolución, conviven algunas ideas marxistas con otras procedentes de diversas corrientes de pensamiento social. Conoce parcialmente la obra de Marx pero básicamente a través intelectuales italianos, particularmente Aquiles Loria, de quien procederá buena parte de su ideario económico y social cercano al socialismo”.

<sup>149</sup> Rivacoba y Rivacoba, M., *Recensión, Russell, Bertrand*, “*Los caminos de la libertad. El socialismo, el anarquismo y el sindicalismo*”, Buenos Aires: Universidad Aguilar, 196, No. 48, 1961; Rivacoba y Rivacoba, M., “Evocación y vigencia de Dorado Montero”, *Revista de Ciencias Penales*, Santiago de Chile, T. 29, No. 1, 1970, pp. 15-28.; Rivacoba y Rivacoba, M., “Viejas Remembranzas de Dorado Montero”, *Revista de Estudios Penitenciarios. Homenaje a Dorado Montero*, No. 195, 1971, Santiago de Chile, T. 29, No. 1, 1970, pp. 1631-1643; Rivacoba y Rivacoba, M., *El centenario del nacimiento de Dorado Montero*, Universidad del Litoral, Santa Fé, 1962; Rivacoba y Rivacoba, M., “Recordación de Dorado Montero”, *Cenit*, Toulouse, No. 152, 1963.



## 6. The interspersion of anarchism

Positively, one of the works by means of which he analysed and spread anarchists' ideals was Paul Eltzbacher's work *Der Anarchismus*.<sup>150</sup> Dorado Montero translated this work into Spanish.<sup>151</sup> After translating the chapter devoted to Leo Tolstoy, the most important aspect for him author was the defence of the law of love, the most supreme law Christ gave, as the one that will rule the current, existing order. Even so, Dorado Montero described himself as an atheist, and the whole of his thought is purely existentialist. Anarchism is undeniable in his life,<sup>152</sup> yet it is far from being a early anarchist. He is mainly deemed as such due to the relevance of anarchist doctrines on his legal thought, the degree of reception of libertarian doctrines, or the major or minor affinity towards a certain variety of anarchism. As might the latter case be the familiarisation with the so-called *Freirechtsbewegung*.<sup>153</sup>

Although Dorado Montero publishes more often in socialist reviews,<sup>154</sup> rather than anarchist reviews,<sup>155</sup> Jesús Lima Torrado does not consider him as a supporter of none of those trends. He holds that, back in that time, it was a common practice for authors not professing this ideology to contribute to those reviews. For Lima Torrado, there are six reasons behind the wish to publish in

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<sup>150</sup> Eltzbacher, P., *Der Anarchismus*, Berlin: J. Guttentag Verlagsbuchhandlung, 1900.

<sup>151</sup> Eltzbacher, P., *El Anarquismo según sus más ilustres representantes: Godwin, Proudhon, Stirner, Bakunin, Kropotkin, Tucker, Tolstoy, etc*, Madrid: La España Moderna, 1901.

<sup>152</sup> Lima Torrado, J., "Las claves de la recepción del pensamiento anarquista en la filosofía política de Pedro Dorado Montero", Elósegui Itxaso, M.; Galindo Ayuda, F., *El Pensamiento jurídico: pasado, presente y perspectiva. Libro homenaje al prof. Juan José Gil Cremades*, El Justicia de Aragón, Zaragoza, 2008, pp. 417-443.

<sup>153</sup> As pointed out by Blanco Rodríguez in many occasions.

<sup>154</sup> On the socialist behalf, Lima Torrado is very clear about it: *La Revista Socialista*, *La España Moderna*, *Sozialistische Monatshefte*, *La Lectura*, *Estudio* and the *BILE (Boletín de la Institución Libre de Enseñanza)*. He points out some newspapers as well, such as *La Lucha de Clases* or *El Socialista*. Furthermore, it is worthy to highlight the fact that when Blanco Rodríguez analysed the works of his personal library, he found that the quantity of socialist works exceeded very much in number those addressing anarchism. *Vid.*, Blanco Rodríguez, J. A., *El pensamiento sociopolítico de Dorado Montero*, Salamanca: Centro de Estudios Salmantinos, Salamanca, 1982, p. 133. In this latter, the author attempts a non-exhaustive listing of all the socialist influences received.

<sup>155</sup> As regarded the anarchist contributions, two are the main reviews which he contributes to. The first review is *La Revista Blanca* (Dorado Montero, P., "Patria", *La Revista Blanca*, No. 17, Vol. I, Madrid, 1899, pp. 471-474; Dorado Montero, P., "¿Quién vigila a los vigilantes?", *La Revista Blanca*, No. 30, Madrid, 1899, pp. 141-144) and, the second one is the review *Ciencia Social* (Dorado Montero, P., "La Patria", *Ciencia Social*, No. 8, Barcelona, 1898, pp. 225-233).

these journals.<sup>156</sup> Those reasons were the following ones, namely: a) he considered them to be an instrument for regeneration to fight Spanish society's decadence in the 19<sup>th</sup>-20<sup>th</sup> century, thanks to an accessible language; b) it matched his greater interest for social problems over the 'official' ones. Instead of focusing on legal, bureaucratic issues, he advocated for addressing abuses of power, poverty, and lack of education; c) the countless bonds of friendship he maintained with relevant personalities of anarchism (like Federico Urales)<sup>157</sup> as well as with intellectuals collaborating with the anarchist press (Miguel de Unamuno and Francisco Giner de los Ríos); d) a matter of simple strategy. The 1896 Act against Anarchist Propaganda made it impossible for reviews to have a connection with the anarchist movement only. Thus, those reviews that accepted contributions from anarchists (Anselmo Lorenzo, Tarrida del Mármol, Ricardo Mella, Malatesta, or Malato) mixed them with contributions of known intellectuals (Francisco Giner, Manuel Cossío, Gumersindo de Azcárate, González Serran, Unamuno, or Dorado himself); and e) it allowed them to deal with a 19<sup>th</sup> century problem: the legitimacy of laws and social dominant powers.

It is important to note that in Germany, where Krause himself was born, Krausism did not have a relevant impact.<sup>158</sup> His influx in Portugal and in Spain remains uncontested.<sup>159</sup> So does Antón Oneca acknowledge when he said that the "*Besserungstheorie* did not have any adepts in his country" where it seemed to

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<sup>156</sup> Lima Torrado, J., "Las claves de la recepción del pensamiento anarquista en la filosofía política de Pedro Dorado Montero", Elósegui Itxaso, M.; Galindo Ayuda, F., *El Pensamiento jurídico: pasado, presente y perspectiva. Libro homenaje al prof. Juan José Gil Cremades*, Zaragoza: El Justicia de Aragón, 2008, pp. 417-443, 420-422.

<sup>157</sup> His real name was Juan Montseny Carret (in Spanish) or Joan Montseny i Carret (in Catalan). Back then, it was a common practice for anarchists to use a pseudonym to protect themselves.

<sup>158</sup> Dierksmeier, C., „Die Geschichtlichkeit des Rechts in der Methodologie der Rechtsphilosophie K.C.F. Krauses“, *Forum historiae iuris*, 2002, p. 4: „Rechtsphilosophen Karl Christian Friedrich Krause (1781-1832), dessen Philosophie sich in Spanien, Portugal und Lateinamerika seit 150 Jahren großer Aufmerksamkeit erfreut“. Also vid. Dierksmeier, C., "Karl Christian Friedrich Krause und das 'gute' Recht", *Archiv für Rechts- und Sozialphilosophie (ARSP)*, Sonderheft: Deutscher Idealismus, Vol. 85 (1/1999), pp. 75-94. Besides, in the three-year period I have been employed at *Universität Augsburg*, every German scholar I met or talked to about my research topic was very surprised to hear of Krause, which is considered as a figure with virtually not relevance in the Teutonic country. Also, either in formal discussions (such as the *Doktorand Seminars*) or in informal conversations, no colleague was aware of the relevance which Krause possessed in Spain.

<sup>159</sup> Giner de los Ríos, F., *Principios de Derecho natural*, Madrid: Espasa-Calpe, 1916, p. XIII.

“have been forgotten or hardly mentioned in the works dealing with penal theories”.<sup>160</sup> This is why I consider it necessary to mention that Krausism was inextricably connected with anarchism: it acted as a catalyst which allowed certain anarchist ideals to penetrate the old Iberia. Those postulates, even if disliked or combatted, were not certainly unknown in the rest of Europe. When Lima Torrado is identifying the key aspects making up Krausism,<sup>161</sup> he was indirectly defining the degree of Spain’s acceptance of anarchist ideals:

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

Lastly, he also outstood five main dominating points of imprint<sup>162</sup> which are deemed to be particularly helpful to outline Dorado Montero’s influences: the sociological thesis from Alfred Fouillée, the evolutionist thesis from Herbert Spencer, the Kantorowicz conception, Max Stirner’s thought (he translated his main work),<sup>163</sup> and certain punctual influences like Wargha. I remain, however, slightly sceptical as when it comes to the comparison of his thought towards the critic positivism of Vaccaro’s *Terza Scuola*. Within such work,<sup>164</sup> he refused to name the *Terza Scuola* “eclectical”. Indeed, he showed himself very clear to this respect. He did not believe this school to be eclectic but conciliatory:

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<sup>160</sup> Antón Oneca, J., “La teoría de la pena en los correccionalistas españoles”, *Estudios Jurídico-Sociales*, Homenaje al Profesor Legaz y Lacambra, tomo II, Santiago, 1960, p. 1016.

<sup>161</sup> *Ibid.*, pp. 427-428.

<sup>162</sup> *Ibid.*, p. 429.

<sup>163</sup> Stirner, M., *Der Einzige und sein Eigentum*, Reclams Universalbibliothek, 1 Auflage, 1893.

<sup>164</sup> Dorado Montero, P., *El positivismo en la ciencia jurídica y social italiana*, Madrid: Imprenta de la Revista de Legislación, 1891, p. 249: “no es ecléctica, sino crítica y conciliadora, y que tiene, por consiguiente, un entero valor científico que no tienen las teorías eclécticas; que abraza y funde en un solo término los dos que eran antitéticos, tomando como base las doctrinas naturalistas y levantándose sobre ellas á la concepción del ideal”

“There are those who, still sticking to the old ideas, seek after their maintenance with the new ones, thus uniting them in an impossible connubium, which we do not even dare to name eclecticism, as we cannot betray the etymology of such word”.<sup>165</sup>

Not to mention “many positivists who, as shown before, are determined to correct positivism”, and who could be included “within the fledgling positivists (the so-called critic positivists)”.<sup>166</sup> Dorado Montero identified and listed them: mainly “Puglia, Cogliolo, and Vanni”, but he also specifically mentions three other authors accepting the conception of the contractual organism of Fouillée, namely Gustavo Bonelli (with “certain differences”), Colajanni (“revindicating its priority with regards to De Greef”), and Icilio Vanni (“but with certain reservations in the *Programma critico di Sociologia*”).<sup>167</sup>

Leo Tolstoy was Dorado Montero’s guide in anarchism. Dorado Montero professes towards him nothing but a deep feeling of admiration. He described him as “a generous soul, full of love for one’s neighbour, and enemy of all kinds of oppression”.<sup>168</sup> Yet, he was eager to point out this author’s main difficulty. It was not the fact that his positionings will vary to such extent that he would overcome and even contradict a prior statement he made. That happens constantly with most authors. The main issue for Tolstoy’s comprehension lays on the fact that he did never systematise a treaty of legal philosophy, religious philosophy, or social philosophy. Dorado Montero offered a solution:<sup>169</sup> either one goes throughout his whole academic production and forges his personal analysis, or one takes over the secondary sources. Regarding the latter option, he provided us with the main systematic schemes existing on the matter, mainly

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<sup>165</sup> Dorado Montero, P., *El positivismo en la ciencia jurídica y social italiana*, Madrid: Imprenta de la Revista de Legislación, 1891, p. 249: “aquellos que, apegados todavía á las ideas antiguas, pretenden mantenerlas al lado de las nuevas, uniéndolas en imposible connubio, que ni eclecticismo nos atrevemos á llamar, siquiera por no hacer traición á la etimología de la palabra”.

<sup>166</sup> Dorado Montero, P., *El positivismo en la ciencia jurídica y social italiana*, Madrid: Imprenta de la Revista de Legislación, 1891, p. 249: “Sin hablar de muchos positivistas que, como hemos mostrado, se proponen corregir el positivismo y que muy bien podrían incluirse en el grupo de los positivistas de nuevo cuño, esto es de los positivistas críticos”.

<sup>167</sup> Dorado Montero, Pedro, *El positivismo en la ciencia jurídica y social italiana*, Madrid: Imprenta de la Revista de Legislación, 1891, p. 249.

<sup>168</sup> Calvo González, J., *El alma y la ley. Tolstói entre juristas. España (1890-1928)*, Sevilla-Zamora: Comunicación Social, Colección “Historia y presente”, 1º ed., 2010, p. 139: “El conde León Tolstoy, alma generosa, saturada de amor al prójimo, enemiga de toda opresión”.

<sup>169</sup> *Ibid.*, p. 141.

revolving around two authors: Ossip-Lourié and Paul Eltzbacher. It is precisely here where one realises that the relations between Dorado Montero, Tolstoy, and Eltzbacher are intertwined. Dorado Montero dedicated to the latter a very discreet article in a Spanish popular review.<sup>170</sup> In it, Dorado Montero qualifies Eltzbacher's work as "purely descriptive",<sup>171</sup> but very "clear" and "exact".<sup>172</sup> Even so, it is not the most relevant aspect steaming from the book review. What is more relevant is that there is plenty of evidence he never committed the same mistakes that their future colleagues would make. He wisely pointed out that the State itself was grounded on violence:

"Currently, they abhor from the State, since it is a coercive organisation, and everything it entails (laws, authorities, Courts, public force, etc.). 'They' are those who abhor violence as a common bond among men. Spirits enjoying a great moral cannot conceive an order in which such common base is an unjust social order. That is the reason why in the world exists an army of thinkers -not small at all- who attack what one might call the grounds of social life".<sup>173</sup>

Anarchists, and to some extent the liberals as well, are being reflected in such statement. There is a coincidence in Dorado Montero's theoretical bedrock with them. Eltzbacher, at his turn, was profoundly influenced by Tolstoy and he devoted an article in a yearbook.<sup>174</sup> Eltzbacher's most relevant work<sup>175</sup> was, as aforementioned, translated into Spanish by Dorado Montero. Though, the new name of the Spanish version would be slightly different.<sup>176</sup> In addition, the

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<sup>170</sup> Dorado Montero, P., "Der Anarchismus, von Dr. Paul Eltzbacher", *La España Moderna*, Madrid, Año 12, núm. 139, 1900, pp. 192-193.

<sup>171</sup> At the front page, Eltzbacher sums up the main objective of his work: "Je ne propose rien, je ne suppose rien, j'expose".

<sup>172</sup> Dorado Montero, P., "Der Anarchismus, von Dr. Paul ...", p. 193.

<sup>173</sup> *Ibid.*, p. 193: "En el día de hoy abominan del Estado, en cuanto organización coercitiva, y de lo que tal organización supone (leyes, autoridades, Tribunales, fuerza pública, etc.) todos cuantos aborrecen la violencia como lazo de unión entre los hombres. Los espíritus de gran delicadeza moral no pueden concebir que un orden que en tal base estriba pueda ser un orden social justo. Tal es la causa por la que actualmente existe en el mundo una falange, no pequeña, de pensadores que atacan lo que puede llamarse los «fundamentos» de la vida social".

<sup>174</sup> Eltzbacher, P., "Die Rechtsphilosophie Tolstojs", *Preußische Jahrbücher*, Bd. 100, Hft. 2, 1900, pp. 266-282.

<sup>175</sup> Eltzbacher, P., *Der Anarchismus: Eine ideengeschichtliche Darstellung seiner klassischen Strömungen*, Berlin: J. Guttentag, 1900.

<sup>176</sup> Eltzbacher, P., *El Anarquismo según sus más ilustres representantes: Godwin, Proudhon, Stirner, Bakunin, Kropotkin, Tucker, Tolstoy, etc.*, Madrid: La España Moderna, 1901.

chapter of this work devoted to Tolstoy's doctrine was separately published in the *Boletín de la Institución Libre de Enseñanza*.

On the other hand, Dorado Montero also forged his own personal analysis on the Russian author. To do so, he focused on Tolstoy's novel *Resurrection*.<sup>177</sup> Dorado Montero showed a particularly marked enthusiasm about the manner Tolstoy spread his criminal doctrine and penal thought. The Russian did so in an indirect, yet efficient fashion: he disseminated the most essential aspects of his doctrine in an enjoyable and entertaining way, and consequently more efficient, so he would reach a larger number of people.<sup>178</sup> Tolstoy was known for his Christian version of anarchism. In doing so, after having analysed the time he lived, he concluded that "the current life is irrational, inhuman, unfair, and anti-Christian. That is why it should be replaced with another, out of which the real order will emerge: an order in which Christ's supreme law will reign, i.e. the rule of love".<sup>179</sup> A further area of concern is explored when analysing the use of violence: "the key of all teachings of Jesus Christ lays on the precept of never applying violence, not even to resist evil".<sup>180</sup>

The novel explored those questions throughout the perspective of Nekhlyudov. After his visit to the prison, he had observed "people of a very simple nature, nor good neither bad, vested on the traditional moral notions of the peasant and the Christian, yet they had been detached from them little by little in order to acquire some others consisting in admitting the legitimacy of all sorts of violence".<sup>181</sup> The main character also felt the social concerns around many related topics, namely: whether freewill exists or not; whether out of the cranial capacity of individuals one may deduce their guiltiness; the possibility of crime being an inheritable trait; whether there exist an innate crime and an innate immorality;

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<sup>177</sup> Tolstoy, L., "Воскресение", *Niva*, 1899.

<sup>178</sup> Calvo González, J., *El alma y la ley. Tolstói ...*, p. 141.

<sup>179</sup> *Ibid.*, p. 142.

<sup>180</sup> *Ibid.*, p. 143: "La clave de todas las enseñanzas de Cristo se halla en el precepto que manda no aplicar nunca la violencia, ni siquiera para resistir al mal".

<sup>181</sup> Calvo González, J., *El alma y la ley. Tolstói entre juristas. España (1890-1928)*, Sevilla-Zamora: Comunicación Social, Colección "Historia y presente", 1º ed., 2010, p. 145: "En la prisión había visto Nekhlyudov naturalezas sencillas, ni buenas ni malas, penetradas de las tradicionales nociones morales del aldeano y del cristiano, que poco a poco se habían despojado de esas nociones para adquirir otras que consistían en admitir la legitimidad de toda violencia".

what are exactly things such as morality, insanity, degeneration, or character; what influx may climate, ignorance, imitation spirit, or hypnotism have over the crime, etc.<sup>182</sup> Anyway, his conviction against the use of penalties was a firm one: “nobody can or should impose penalties to his equals, and when he does so, he is producing truly and countless social damages, leaving aside injustices”.<sup>183</sup>

Given the sphere of Tolstoy’s true concerns, Nekhlyudov would never focus on the most far-reaching question: what should be done about criminals? The matter would only be important for him if the punishments did produce a decrease on crime and if they would correct the criminals.<sup>184</sup> At this point, one of Tolstoy’s central issues steps in: the so-called automorphism. This phenomenon consists in the auto-reassertion of a certain lifestyle due to only relating to social groups in which one’s own way of acting is legitimised and supported. Thus, in those groups positive reinforcement takes place. Such effect might be provided in both directions: either in lower class groups (poor people and criminals) or in upper class groups (wealthy individuals and religious factions).

“According to common understanding, the thief, the murderer, and the prostitute should be ashamed of their lifestyle. Indeed, they should not. People who, by chance or by their own mistakes, happen to get to a wrong position become so habituated with it that there is nobody to get out of their minds the idea that their profession is good, and to further reassert themselves in such position, they keep themselves inside the circles made up by their equals, where their options are highly approved”.<sup>185</sup>

Conceived as an almost identical reproduction of Tolstoy’s thought, Dorado Montero’s conception of crime tried to seek their primordial causes out of the boundaries of the conventional crime. For both authors, it was necessary to go beyond it. For Tolstoy himself, “out of the facts that laws label as crimes, it is not

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<sup>182</sup> Ibid., p. 147.

<sup>183</sup> Ibid., p. 146: “Nadie puede ni debe, según él, imponer penas a sus semejantes, y el imponerlas produce, además de injusticias, verdaderos e innumerables daños sociales”.

<sup>184</sup> Tolstoy, L., *Resurrección*, tomo III, p. 156-157.

<sup>185</sup> Tolstoy, L., *Resurrección*, tomo I, p. 182: “Comúnmente se cree que el ladrón, el asesino y la prostituta deben avergonzarse de su género de vida. No es así. Las personas que por azares de la suerte o por errores propios llegan a una falsa posición se connaturalizan de tal modo con ella, que no hay quien les quite de la cabeza que su oficio es bueno, y para confirmarse en tal opinión, se mantienen dentro de los círculos que están formados por sus iguales y donde se aprueban altamente sus opciones”.

possible to blame guiltiness on those who commit them, but to other causes laying out of themselves”.<sup>186</sup> For the main character of the novel *Resurrection*, Nekhlyudov, the circumstances of the time were deplorable.

If the novel’s main concerns were the cruelty and the hypocrisy, there is also a significant part devoted to the long time that judicial processes took. Criticisms against endlessly delays on judicial processes are nothing new, though. Such topic is a recurrent, dating back from the Middle Ages, and it was often tackled by Cerdán de Tallada.<sup>187</sup>

Tolstoy’s final solution for the criminals might seem a bit utopian: they need not to be punished, but they need to be forgiven up to seventy-seven times.<sup>188</sup> It forms part of his Christian anarchism. In the novel, Nekhlyudov is told by an old man that God is the only one who knows how to punish and to reward; humans do not. Consequently, in his coinciding line of thought, Dorado Montero points out at the following quote:

“All evil comes from the fact that men have attempted something impossible: while being themselves evil, they want to correct the others”.<sup>189</sup>

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

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<sup>186</sup> Calvo González, J., *El alma y la ley. Tolstói ...*, p. 151: “Para Tolstói, de los hechos que las leyes califican de delitos y como tales castigan no es posible considerar culpables a quienes los cometen, sino a otras causas que residen fuera de ellos”.

<sup>187</sup> On this matter see the study carried out by Regina María Pérez Marcos: “Tomás Cerdán de Tallada, el primer tratadista de derecho penitenciario”, *Anuario de Historia de Derecho Español*, LXXV, 2005, pp. 755-802. On the same author, but shifting the focus towards its Civil law implications vid. Obarrio Moreno, J.A., “La preterición en los Commentaria del jurista Cerdán de Tallada”, *Revista General de Derecho Romano*, No. 11, 2008.

<sup>188</sup> *The Holy Bible*, Mt. 18, 21-22.

<sup>189</sup> Dorado Montero, P., *El Derecho protector de los criminales*, Ed. Jiménez Gil, Tomo 2, Madrid, 1915 pp. 604-605: “Todo el mal proviene de que los hombres han emprendido una cosa imposible: siendo malos ellos mismos, quieren corregir a los demás. Hombres viciosos intentan corregir a hombres viciosos”.



“that the scholars of every kind take good care of the reasonings and warnings from our author, think about them, and do not reject them because they are reckless or utopian. All innovations started with such character but, nonetheless, they turned into common sense, widely accepted truths after some time; just as all the words from one language started being mere barbarisms and neologisms, yet they ended up constituting a catalogue of pure, traditional terms of a language”.<sup>190</sup>

Another aspect should be addressed. Eltzbacher, the author Dorado Montero drank from, was German. Thus, the analysis of Tolstoy’s works were done by means of the German translations thereof, despite the fact that Tolstoy wrote in Russian. A crucial aspect on terminology needs to be stressed:

“Tolstoy does not name his doctrine on law, State, and property after ‘anarchism’. As anarchism he describes the theory abrogating for a life without government, whose way of achieving it is the use of violence”.<sup>191</sup>

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

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<sup>190</sup> Ibid., pp. 609: “que los estudiosos de todo género [...] se hagan cargo de los razonamientos y advertencias de nuestro autor, se paren ante ellos y los mediten, en lugar de rechazarlos de plano y sin más por descabellados o por utópicos. Todas las innovaciones han empezado por tener este carácter, y, sin embargo, han venido con el tiempo a pasar a la categoría de verdades de sentido común y aceptación general; de la propia suerte que todas las palabras de una lengua han comenzado por ser barbarismos y neologismos, y han acabado por formar el catálogo de las voces puras y castizas”.

<sup>191</sup> Eltzbacher, P., *Der Anarchismus...*, p. 197: “Tolstoj nennt seine Lehre über Recht, Staat und Eigentum nicht Anarchismus. Als Anarchismus bezeichnet er die Lehre, welche ein Leben ohne Regierung als Ziel aufstellt und dieses durch Anwendung von Gewalt verwirklicht sehen möchte”.

Christian Churches,<sup>192</sup> instead he drew his attention towards what he called Christ's pure doctrine.<sup>193</sup>

“Churches have not only remained alien to Christ's doctrine, but they have been enemies to it”.<sup>194</sup>

Tolstoy was convinced that the Churches had ended up adjusting itself to the demands of the modern world and so they had modified the pure doctrine of Christianity. The world would, thus, only accept this doctrine after the Churches had adapted Christ's version. It is particularly interesting when it comes to humbleness and the vow of poverty. The greed was specially criticised by him. However, it resulted much harder accepting and implementing Christ's doctrine, rather than cleverly altering it. So, “Churches invent subtleties to show that men live in harmony with the law of Christ, when they actually live against it”.<sup>195</sup>

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

“If a man has gotten to know the Islam, yet he keeps on being a Buddhist, what came to happen is that the old blind belief has been replaced by the rational conviction”.<sup>196</sup>

Eltzbacher identified that, steaming from the ‘supreme rule of love’, Tolstoy established the precept of non-violent resistance: “Never resisting evil means never exerting violence over another, i.e. do not ever perpetrate any act

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<sup>192</sup> His dissidence went far beyond a strict reliance on the argument that atheism and anticlericalism were the new, ground-breaking trends on his time.

<sup>193</sup> Eltzbacher, P., *Der Anarchismus...*, p. 197.

<sup>194</sup> Ibid.: “die Kirchen sind stets der Lehre Christi nicht bloß fremd, sondern ihr gradezu feindlich gewesen”.

<sup>195</sup> Eltzbacher, P., *Der Anarchismus...*, p. 198: “Die Kirche erdachte Spitzfindigkeiten, um darzuthun, dass die Menschen, indem sie dem Gesetze Christi entgegen lebten, mit ihm im Einklang lebten”.

<sup>196</sup> Eltzbacher, P., *Der Anarchismus...*, p. 201: “Hat er den Islam kennen gelernt und ist dennoch Buddhist geblieben, so ist an die Stelle des froheren blinden Glaubens an Buddha die vernünftige Oberzeugung getreten”.

contradicting love”.<sup>197</sup> And so, Tolstoy himself, in his Christian belief, referred to specific biblical verses:

“Ye have heard that it hath been said, an eye for an eye, and a tooth for a tooth: but I say unto you, That ye resist not evil: but whosoever shall smite thee on thy right cheek, turn to him the other also”.<sup>198</sup>

Eltzbacher was very systematic. He carried out a study on each major anarchist thinker: Godwin, Proudhon, Stirner, Bakunin, Kropotkin, Tolstoy and Tucker. The scheme he followed through on each of these authors focused on three aspects: law, state and property.

In the first place, he happened to hold a vision of the legal order very much grounded on natural law: “he rejects, as a matter of principle, every norm that depends on man’s will; every norm whose maintenance is entrusted to man’s power, especially to courts; which deviates from the moral law, which is different within the different territories; and which can be arbitrarily changed at any moment”.<sup>199</sup> Rather than this aspect, Dorado Montero fairly related more towards the ultra-personalised conception of moral enunciated by Tolstoy: “The kingdom of God is not outside in the world, but in man’s own soul”.<sup>200</sup>

Be as it may, the relation of Tolstoy towards the Law was per se a conflictive one. Law, by its very nature, went against his precept of non-violent resistance. Since man’s law required coercive, restrictive, and violent measures to be implemented, he concluded that Law was always violent.<sup>201</sup> Notwithstanding that, the idea of non-violence in Law has also been bearded by scholars holding very differing positions from anarchism, such as the Professor Jesús Ballesteros

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<sup>197</sup> Tolstoj, L., *Worin besteht mein Glaube?*, p. 17: “Widerstrebe nicht dem Übel bedeutet: widerstrebe niemals dem Bösen, dass heisst: thu nie einem anderen Gewalt an, das heisst: begehe nie eine Handlung» die der Liebe zuwiderläuft”.

<sup>198</sup> *The Holy Bible*, Mt. 5, 38-39.

<sup>199</sup> Eltzbacher, P., *Der Anarchismus...*, p. 210: “denn er verwirft grundsätzlich jede Norm, die auf dem Willen von Menschen beruht, durch Menschengewalt, insonderheit durch Gerichte, aufrechterhalten wird, vom Sittengesetz abweichen, in verschiedenen Gebieten verschieden sein und jederzeit will kürzlich geändert werden kann”.

<sup>200</sup> Tolstoj, L., *Darlegung des Evangeliums*, p. 50: “Das Reich Gottes ist nicht draussen in der Welt sondern in der Seele des Menschen”.

<sup>201</sup> Tolstoj, L., *Worin besteht mein Glaube?*, p. 29.

and his school of thought.<sup>202</sup> Furthermore, Tolstoy pointed out something that the studies in criminology and prison reports would expose in the following years: that human criminal laws do nothing but worsen the number of criminals. Criminality seemed to skyrocket after the passing and implementation of criminal laws.

“Christ says: you believe that your laws reduce and fight back the crime, yet they do not do other thing than increasing it; there is just one way to prevent evil, and it consists on returning good for evil, and to do good to all”.<sup>203</sup>

Such aspect would soften and improve the situation after the aforementioned complaints and critics poured by many scholars such as Concepción Arenal (past)<sup>204</sup> and Dorado Montero himself in his *El reformatorio de Elmira*<sup>205</sup> (future).

In the second place, Tolstoy analysed the State. Similarly, as what happened to the Law, the State was something that went frontally against the Christian thought due to analogous reasons: it removed the State because Christianity denied every form of government. In the years to follow, his thought evolved and the *cuestión social* left room for other more technical books.<sup>206</sup>

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<sup>202</sup> His idea of non-violent resistance grounds its roots in a very particular view of the Christian humanism, being its main representative work: Ballesteros, J., *Repensar la paz*, Madrid: Ediciones Internacionales Universitarias, 2006. Other relevant works are quoted: Ballesteros, J., *Postmodernidad: decadencia o resistencia*, Madrid: Tecnos, 1989; Ballesteros, J., *Sobre el sentido del derecho: introducción a la filosofía jurídica*, Madrid: Tecnos, 1984; Ballesteros, J., *Ecologismo personalista: cuidar la naturaleza, cuidar al hombre*, Tecnos, 1995. A very detailed description of his prolific literature can be found on his personal website: <https://jesusballesteros.es/>.

<sup>203</sup> Tolstoj, L., *Worin besteht mein Glaube?*, p. 45-46: “Ihr glaubt, dass Eure Gesetze das Übel verbessern, sie vergrößern es aber nur; es giebt nur einen Weg, dem Übel zu steuern, er besteht darin, Böses mit Gutem zu vergelten, allen ohne Unterschied Gutes zu thun”.

<sup>204</sup> Arenal, C., “Lettre à M. Le Directeur General de L’Administration Pénitentiaire D’Espagne”, *Bulletin de la Société Générale des Prisons*, 1883, pp. 468-475. From the same author, vid. *Estudios penitenciarios*, Madrid: Imprenta de T. Fortanet, 1877.

<sup>205</sup> Dorado Montero, P., *El Reformatorio de Elmira*, Madrid: La España Moderna, 1898. Such work fundamentally aimed at providing a ground-breaking model of preventive Criminal law.

<sup>206</sup> Dorado Montero, P., *Bases para un nuevo Derecho penal* (1902); Dorado Montero, P., *Valor social de leyes y autoridades* (1903); Dorado Montero, P., *Nuevos derroteros penales* (1905); Dorado Montero, P., *Los peritos médicos y la justicia criminal* (1905); and Dorado Montero, P., *De penología y criminología* (1906).

## 7. Sociology, a struggle for its unification

Years after, Dorado Montero retired to a lonely countryside house in order to meditate on his last years of life. As regards law, he thought that the most important part was, precisely, the substantive part of it, rather than the formal one. This open-mindedness was, usually, associated with a more abstract conception of reality, trying to see much further than what one may observe by empirical reasoning and even rationalism. That is why he was much more inclined to sociology and, to the field of criminal dogmatics (given he would prepare a primitive terrain for the posterior development thereof).

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

“The initiators of Sociology in Spain are very concerned as regards to the determination of the relations of the new science, especially with the Philosophy of History. Giner and Azcárate attribute to it different objectives. Dorado will, nevertheless, include the field of Philosophy of History within Sociology”.<sup>207</sup>

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

On the one hand, Vaccaro<sup>208</sup> reasserted the empiricist spirit in Dorado Montero. Though utilitarianism did not lay on the central part of his theory, the grounds for it flew from empiricism. In this sense, he agreed with his Italian counterpart: “a great number of objections have been made against the utilitarian

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<sup>207</sup> Blanco Rodríguez, J. A., *El pensamiento sociopolítico de Dorado Montero*, Salamanca: Centro de Estudios Salmantinos, Salamanca, 1982, p. 30: “A los iniciadores de la Sociología en España les preocupa extraordinariamente determinar las relaciones de la nueva ciencia, principalmente con la Filosofía de la Historia. Giner y Azcárate le reconocen objetivos distintos. Dorado, sin embargo, englobará el campo de la Filosofía de la Historia dentro del espacio propio de la Sociología”. At the footnote of the page the author, however, clarifies the differences between the two sciences; Philosophy of History would focus on ‘the laws by means of which History developed itself’, whereas Sociology would rather focus on ‘everything relating to the essence, nature and structure, in sum, to the comprehensive total of the social organism’.

<sup>208</sup> Vaccaro, M. A., *Saggi critici di sociologia e di criminologia*, Torino: Fratelli Bocca, 1903; Vaccaro, M. A., *Genesi e funzione delle leggi penali*, Torino: Fratelli Bocca, 1908; Vaccaro, M. A., *Les bases sociologiques du droit et de l'état*, Paris: Giard & E. Brière, 1898.

school of Bentham, which I do not respect, since they look unfounded and unfair”.<sup>209</sup>

On the other hand, Colajanni<sup>210</sup> was also relevant. Nevertheless, our author did not yearn to acknowledge the sphere of exception which the Italian admits:

“As much as we want to restrict the bond of liberty, it certainly remains uncontested [the fact that] we can infuse a certain direction to our mind”.<sup>211</sup>

Within a rampant determinism, it is tacitly accepted the existence of a small room for freewill. Dorado Montero actively opposed to such admission. He deeply criticised the supporters of the so-called eclectic Criminal law school, since when within a freewill theory one accepted a glimpse of determinism, the whole theory crumbled and fell apart. Such hatred for inconsistency on him is not new. In fact, it very much reminds of Spinoza’s ‘Empire within another Empire’. According to Spinoza, due to Europe’s Judaeo-Christian background, one might try to rebuke this asserting the following: we can admit that God rules everything and, hence, nothing escapes to his control, but we humans are endowed of a small parcel of freewill or capacity to decide. For him, the same, aforementioned mistake again was being committed since we do not know what determines our conscience and, consequently, we think that it flows from ourselves. Spinoza entirely defied such possibility: man cannot be in nature as a State within another State.

Be as it may, Dorado Montero showed himself particularly enthusiastic about the new role that Sociology was to play in society, and he was striving to highlight its relevance, as much as to assert that “the legal norms should be established not on the basis of the ‘principles of absolute justice’, but on the observance of the social reality”<sup>212</sup>. And so, he finally came to the conclusion of a

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<sup>209</sup> Vaccaro, M. A., *L'utilità nel Diritto penale classico*, Trani: V. Vecchi, 1891, p. 23: “Contro la scuola utilitaria del Bentham sono state fatte un gran numero di obiezioni, che non ripeto, perchè la maggior parte di esse mi sembrano infondate e ingiuste”.

<sup>210</sup> Colajanni, N., *Il Socialismo*, Catania: Filippo Tropea Editore, 1884; Colajanni, N., *La delinquenza della Sicilia e le sue cause*, Palermo: Tipografia del Giornale di Sicilia, 1885. There are more works, yet we decided not to mention them since they are not that related to the topic.

<sup>211</sup> Colajanni, N., *La Sociologia criminale*, Catania: Filippo Tropea Editore, 1899, p. 25: “Per quanto si vogliono restringere i vincoli, della libertà, rimane però indubitato, che noi possiamo imprimere una certa direzione alla nostra mente”.

<sup>212</sup> Blanco Rodríguez, J. A., *El pensamiento sociopolítico de Dorado Montero*, Salamanca: Centro de Estudios Salmantinos, Salamanca, 1982, p. 31: “Observa que las normas jurídicas han

very well-known statement, which would later on be expressed by one of his most standing pupils: “In a distant future, Criminology will end up swallowing Criminal law”.<sup>213</sup>

Dorado Montero died in 1919 after a long and painful disease. It was intestine cancer. As it seems, the cancer sieged the last three years of his life in a very harrowing manner.<sup>214</sup>

“I am ill. Soon, it will be one year unable to carry work of any kind. I have not been able to leave home (not even the bed), for this nor have I been able to give lectures this term. Besides, [there are] other diseases, worries and disorders in the house”.<sup>215</sup>

His ideas would, however, survive.<sup>216</sup> Immediately after, Jiménez de Asúa himself, showing devotion for his mentor, proved his faith in Criminology and in a future where the ideas of Dorado Montero, and consequently of socialism, will be the guiding norms. It was especially meritorious, despite having witnessed the fall of the Second Spanish Republic which ruined -or at least paralysed- the transition towards the Protective Law of the Criminals.<sup>217</sup>

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de establecerse no a partir de los ‘principios de justicia absoluta’ sino a partir de la observación de la realidad social”.

<sup>213</sup> Jiménez de Asúa, L., “El derecho penal del futuro”; José Mora Guarnido (dir.), *El mundo de la posguerra*, p. 13: “En el remoto mañana la Criminología se tragaría al Derecho penal”.

<sup>214</sup> “Una polémica y una generación, razón histórica del 1898”, *Actas del Congreso "1898, Pensamiento Político, Jurídico y Filosófico: balance de un Centenario"*, León, 10-13 de noviembre de 1998, León: Universidad de León, 1999, p. 246.

<sup>215</sup> Draft of a letter dated 16 August 1918. Cited on Boderó Cali, Edmundo René, “Pedro Dorado Montero, el desmitificador de Salamanca”, *Revista Jurídica Online*, pp. 21-42, p. 40. I was not able to find it in Gredos: *FPDM. Correspondencia de Pedro Dorado Montero. General: “Estoy enfermo, pronto va a ser un año, imposibilitado para todo trabajo. No he podido salir de la casa (de la cama, apenas), ni por lo mismo, ir a clase este curso. Otras enfermedades, preocupaciones y trastornos en la casa, además”*.

<sup>216</sup> Indeed, two of his most representative works were written in the last period of his life: Dorado Montero, P., *El Derecho protector de los criminales* (1916). Furthermore, there has been discovered a posthumous work worthy to mention: Dorado Montero, P., *Naturaleza y función del derecho*.

<sup>217</sup> Roldán Cañizares, E., *Luis Jiménez de Asúa: un jurista en el exilio*, Sevilla: Universidad de Sevilla, 2018, p. 330.

# CHAPTER II: HISTORICAL BACKGROUND



## 1. Spain and the two centuries

Positivism cannot be understood without the framework of 19<sup>th</sup> century Spain. This turmoil century was characterised by a series of events which are fully vital to understand how the Iberian country dealt with regards to the new penal trends.

In particular, one of them marked this timeline: the Spanish 1898 Disaster.<sup>218</sup> It was the guiding thread of the historical context. Such event fell within two different centuries: the 19<sup>th</sup> century and the 20<sup>th</sup> century. Back in the middle of the 19<sup>th</sup> century, the independence processes of the Spanish American colonies around 1820 entailed a great national trauma.<sup>219</sup> Nevertheless, Spain did still rule over the Philippines, Puerto Rico and Cuba. All of this changed after the Spanish-American war,<sup>220</sup> in which those possessions were lost and the dominions of the Spanish Empire definitively came to an end. Far from being just a military conflict, it entailed a multifaceted crisis.

Firstly, the economy was seriously affected. The war took many lives away.<sup>221</sup> The material losses were colossal.<sup>222</sup> The debt incurred in by the Spanish Monarchy was unmanageable, and therefore, a drastic raise of taxes was needed:

“After the loss of the last colonies, Villaverde’s stabilisation plan obtained a budget balance for the State arising from both a tax increase and a rationalisation of the public expenditure”.<sup>223</sup>

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<sup>218</sup> Formally known as the Spanish-American War or *Guerra hispano-estadounidense*.

<sup>219</sup> As opposed to what happened with the British colonies, the Spanish colonies did not obtain their independence in a clear, single date. Whereas the USA got its independence in 1776, Latin America has no symbolic date for its liberation as a whole. It was a process focused on each State, with minor variations according to the degree of self-government reached and the stability achieved within their borders: Paraguay, 1811; Venezuela, 1815; Argentina, 1816; Chile, 1818; Uruguay, 1820; Colombia, 1819; Peru and Mexico, 1821; Ecuador, 1822; United Provinces of Central America, 1823-1838; Bolivia, 1825; Cuba and Puerto Rico, 1898.

<sup>220</sup> From 25 April 1898 to 12 August 1898.

<sup>221</sup> A quick calculus from the previous years of the conflict (1895) to one year after the end of the war (1899) show that there was a total of 32247 dead soldiers. Vid. Maluquer de Motes i Bernet, J., *España en la crisis de 1898: de la gran depresión a la modernización económica del siglo XX*, Barcelona: Península, 1999.

<sup>222</sup> Cnfr. a careful study on dead soldiers and Spaniards returned to the island in Moreno Friginals, M., *Cuba/España. España/Cuba*, Barcelona: Crítica, 1<sup>o</sup> ed., 1995, p. 296.

<sup>223</sup> Tejada Bergado, C., *La Banca extranjera en España, 1898-1921. Su incidencia en la consolidación de la banca actual española*, Madrid: Universidad Complutense de Madrid, 2007, p. 117.

However, the economic impact of the Disaster was much softer in Spain than it was for the Caribbean excolony.<sup>224</sup> Spain had learned from their previous experiences in America. Spain's non-recognition of the de facto long-independent states of the Americas "had led to drastic slumps on its trading activity" and threatened to "paralyse its entire trading system".<sup>225</sup> The case of Mexico was very illustrative, since even if they intended to sign "trading treaties for no longer than ten years", those arrangements "were premature".<sup>226</sup> Yet, fifteen years after its political independence, both parties urged to find a common economic agreement: "The Parties agree on reaching and concluding a trade and navigation agreement grounded on the principles of reciprocal advantages for each country".<sup>227</sup> Rebus sic stantibus, this time it was different. The war drove "a great deal of Spanish capital out of Cuba", but many "peninsulars" [Spaniards living in the island] were forced to remain in Cuba. Despite the "scarce and confusing statistics" of the time, it was documented "a flight of Spanish capital from 1895 onwards", which "reached its peak in 1899". But as early as 1900, a "return thereof" took place and so it happened that the "the Spanish capital that flowed back into Cuba" exceeded by far "that which fled because of the war".<sup>228</sup> Leaving aside that legal certainty was recovered, a decisive factor was the "North American intervention" which curbed the "way to the economic collapse".<sup>229</sup> As concerned the labour force developments, that period was characterised by three junctures: the beginning of syndicalism (1830-1869), the diffusion of internationalism (1870) and emergence of anarchism and socialism (1871-

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<sup>224</sup> Vid. Anes y Álvarez de Castrillón, "La economía española de 1868 a 1898", Girón Garrote, J. (ed.), *Un cambio de siglo 1898: España, Cuba, Puerto Rico, Filipinas y Estados Unidos* Anes y Álvarez de Castrillón, Oviedo: Universidad de Oviedo, 2009.

<sup>225</sup> Bernecker, W. L., "Die Unabhängigkeit Lateinamerikas: europäische Interessen und ambivalente Reaktionen", *Ibero-Amerikanisches Institut Preußischer Kulturbesitz*, Berlin, 1. Auflage, 2010, p. 51.

<sup>226</sup> Bosch García, C., "Preliminares políticos al primer tratado de comercio entre México y España", *El trimestre económico*, Vol. 13, No. 4, Ciudad de México: Fondo de Cultura Económica, pp. 712-754, p. 735.

<sup>227</sup> "Artículo IV", *Tratado definitivo de paz y amistad entre la República de México y su Majestad Católica*, 1836: "Las Altas Partes contratantes se convienen asimismo en proceder con la brevedad posible a ajustar y concluir un tratado de comercio y navegación fundado sobre principios de recíprocas ventajas para uno y otro país".

<sup>228</sup> Moreno Fragnals, M., *Cuba/España. España/Cuba*, Barcelona: Crítica, 1st ed., 1995, p. 292.

<sup>229</sup> Moreno Fragnals, M., *Cuba/España. España/Cuba*, Barcelona: Crítica, 1st ed., 1995, p. 297.

1900).<sup>230</sup> Spain underwent a moment of change and transformation of its economic fabric. The main constituting events of this time could be outlined as follows: the fire at the Bonaplata factory (1835), the creation of the first trade union “Sociedad de Tejedores de Barcelona” (1840), the first general strike in Spain (1855), the arrival of the Working People’s Association (1868), the foundation of the Spanish Regional WPA Federation (1870), the passing of the first labour laws (1878), the creation of the anarchist-alike Worker’s Federation of the WPA Regional Spanish Federation (1881), and the foundation of the UGT (1888).

Secondly, the political realm was also in a period of upheaval.<sup>231</sup> Up to the current date, the State had had up to six different constitutions in less than seventy years (leaving aside the new born Constitution of 1931).<sup>232</sup> Some years prior to the Disaster, the tumultuous political path walked by Spain was not exempted from numerous ups and downs: María Cristina’s Regency (1833-1840),<sup>233</sup> Espartero’s Regency, O’Donell’s uprising and Barcelona’s bombing (1841-1842), the Reign of Isabel II (1843-1868), the Provisional Government (1868-1870), Amadeo de Saboya’s ruling (1871-1872) and the First Spanish Republic (1873-1874).<sup>234</sup> Not to mention some regional conflict like the Carlist wars. Institutional normality in 19<sup>th</sup> century Spain was far from being the general rule. Nevertheless, the system laid down by the Bourbon Restoration (1875-1931)<sup>235</sup> optimally managed the political instability: “the constitutional basis of the Restoration system was the Constitution of 1876, which remained in force

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<sup>230</sup> Aróstegui Sánchez, J. (ed.), *Historia de España*, Barcelona: Vicens Vives, 2011, p. 172.

<sup>231</sup> Vid. Ortega y Gasset, J., *La educación política española*, 1909.

<sup>232</sup> Namely the Constitution of 1812, the Royal Statute of 1834, the Constitution of 1837, the Constitution of 1845, the Constitution of 1869 and the Constitution of 1876.

<sup>233</sup> Dorado Montero, P., *De Criminología y Penología*, Madrid: Viuda de Rodríguez Serra, 1906, pp. 141-184. Also, vid., Pacheco, J. F., *Historia de la Regencia de la reina Cristina*, Madrid: Imprenta de Fernando Suárez, 1841.

<sup>234</sup> Vid. the scheme depicted at Aróstegui Sánchez, J. (ed.), *Historia de España*, Barcelona: Vicens Vives, 2011, p. 82.

<sup>235</sup> Bernaldo de Quirós pointed out a relevant “study by Dorado on *Criminality in Spain during the period of Regency (1885-1902)* which was inserted later on in his *Criminology and Penology*”. Vid. Bernaldo de Quirós, C., *Las nuevas teorías de la criminalidad*, Madrid: Imp. Revista de Legislación, Madrid, 1898, p. 102. Vid. Dorado Montero, P., *De Criminología y penología*, Madrid: Viuda de Rodríguez Serra, 1905, pp. 141-184.

until 1931”.<sup>236</sup> Surprisingly enough, the technique known as ‘dynastic turn’ kept on working. By means of this system, the two dynastic parties (conservatives and liberals) were alternating at the power. In 1907, an act was passed in order to eradicate despotism (referred as to *caciquismo*<sup>237</sup> in Spain).<sup>238</sup> However, this problem subsisted for a long time.

Furthermore, the loss of prestige experienced by Spain arising from the Disaster set the conditions for the rise of sub-State nationalist movements. They constituted a feasible alternative for the fatally wounded Spanish proud. Their roots have been said to be two: “the dissatisfaction of small landowners” and the “emergence of a middle and low-middle class in many countries, whose representatives almost always happened to be intellectuals”.<sup>239</sup> Catalonia was in the middle of the *Renaixença*: the “cultural movement of linguistic and literary recovery carried out in Catalonia, Valencia and the Balearic Islands from the second half of the 19<sup>th</sup> century”.<sup>240</sup> Far from being a trend solely focused on cultural or literary features, it acquired a strong political character with Valentí Almirall, one of the ideologists of catalanism in its political dimension. It solidified as such with the so-called *Bases de Manresa*, which was essentially a project for a regional Catalan constitution (often regarded as the birth of political catalanism).<sup>241</sup> Valencia was also boosted by this movement. Its classical icons are Teodor Llorente and Constantí Llombart. In the 20<sup>th</sup> century, valencianism evolved into a political movement as proved by the creation of *València Nova*.<sup>242</sup>

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<sup>236</sup> Bernecker, W. L., *Geschichte Spaniens im 20. Jahrhundert*, München: C. H. Beck, 2010, p. 34: “Konstitutionelle Grundlage des Restaurationssystems war die Verfassung von 1876, die bis 1931 in Kraft blieb”.

<sup>237</sup> The Spanish Royal Academy of Language (R.A.E.) defines it as follows: “Political system based on the domination or influence of the CHIEF”. Link: <https://dle.rae.es/?w=caciquismo>. Seen on 24.01.2020.

<sup>238</sup> Commonly referred to as ‘Ley Maura’, in homage to his creator.

<sup>239</sup> Hobsbawn, E. J., *Las revoluciones burguesas*, Madrid: Guadarrama, 2<sup>a</sup> ed., 1971, p. 241: “el descontento de los pequeños terratenientes y campesinos y la aparición en muchos países de una clase media y hasta de una baja clase media nacional, cuyos portavoces eran casi siempre los intelectuales”.

<sup>240</sup> Oficial definition extracted out of the *Diccionari Normatiu Valencià* (DNV) from the *Acadèmia Valenciana de la Llengua* (AVL). Original text: “*moviment cultural de recuperació lingüística i literària dut a terme a Catalunya, València i les Illes Balears a partir de la segona meitat del segle XIX*”.

<sup>241</sup> De la Granja, José Luis; Beramendi, Justo; Anguera, Pere, *La España de los nacionalismos y las autonomías*, Síntesis, Madrid, 2001, p. 71.

<sup>242</sup> Split of *Lo Rat-Penat* that struggled to maintain the valencianist trend headed by Constantí Llombart. It encouraged all political parties to create a valencianist project.

The Basque Country walked a different path than that of catalanism. Whereas the latter was grounded on its pactist and autonomist tradition, nationalism in the Basque Country emerged as a radical reaction against the suppression of the foral regime.<sup>243</sup> In 1876, the Spanish Government had unilaterally applied the Law of Confirmation of Fueros in the Basque Country. It did subordinate the *fueros* of the three Basque provinces and Navarre to the Spanish Constitution of 1837.<sup>244</sup> Juan Iturralde y Suit, Serafín Olave and Hermilio de Oloriz among others were the highest representatives of the reactionary movement. They created the Basque Association in 1878.<sup>245</sup> In 1895, the Basque Nationalist Party (PNV) was founded and it remained until current times, where it is deemed nowadays as the main nationalist movement on the region. Galician regionalism was almost reduced to a mere folkloric expression. Just after the so-called *Rexurdimento* in the 20<sup>th</sup> century, it managed to timidly acquire political character.

Thirdly, at the psychological sphere the country was acutely struck by the war. The outcome of the conflict entailed the definitive loss of the Spanish Empire.<sup>246</sup> Consequently, the national pride inherent to it vanished away as well: “the rapid collapse of Spanish forces in just 112 days, jointly with the loss of Cuba, Puerto Rico and the Philippines, was a long-open wound to national honour”.<sup>247</sup> Spain virtually lost all its weight in the international political context. There was just no way “to adjust to reality” those “patriotic and jingoistic sentiments” which were steaming from Spain; such conflict acquired a dimension more bound to pride and honour, rather than just military, and the “ideological discourse” ended up supplanting “political rationality” if any or plainly “generating another

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<sup>243</sup> Masferrer, A., *Spanish Legal Traditions*, Madrid: Dykinson, 2012, p. 260.

<sup>244</sup> Some legal historians consider that it was unnecessary for the case of Navarre given that this region had already accepted their subordination in 1841 thanks to the *Ley Paccionada*.

<sup>245</sup> It is popularly known as *Euskal Elkargoa*.

<sup>246</sup> After the signing of the Treaty of Paris in 1898, Spain undertook to leave not only Cuba, but also two other Spanish territories: Puerto Rico and the Philippines. The United States established a protectorate instead. Spain's attempts to rebuild its Empire will take place once more in Africa, but after some years of African colonialism, Spain would officially decolonise in 1975. Vid. Griffin, C. C., *The United States and the Disruption of the Spanish Empire 1810-1822. A study of the Relations of the United States with Spain and the Rebel Spanish Colonies*, New York: Columbia University Press.

<sup>247</sup> Moreno Fraguas, M., *Cuba/España. España/Cuba*, Barcelona: Crítica, 1<sup>o</sup> ed., 1995, p. 295.

rationality”.<sup>248</sup> The international press depicted Spain as a decadent nation with an unskilled, old-fashioned army grounded on a fully corrupted political system.<sup>249</sup>

“Whereas newspapers, political meetings, and hundreds of broadsheets with popular patriotic poetry were increasingly raising the tone of the historical greatness of an invincible Spain, in the theatre of events the American landing in eastern Cuba was taking place [...]. Disastrous news were coming from the Philippines. The great voices in Spain that pointed out the reality of the situation were drowned out. On 12 August, Spain and the United States signed the armistice, while Manila was still resisting”.<sup>250</sup>

Frustration did not just hit the political ruling class: disappointment and dissatisfaction were very widespread feelings in the whole society.

## **2. Scenario for the reception of positivism**

After the military, hegemonic role of Spain in the world had crumbled,<sup>251</sup> a new interesting panorama was emerging. Traditionally, Spain had devoted all its resources to the governance of the colonies, its economic exploitation and the military defence thereof from other European powers.<sup>252</sup> Spain had unavoidably neglected some aspects of its inner-border politics. Remaining fields such as education, science and literature, as well as the traditional vertebrating elements of any modern thriving country (railway, transportation and general communications) fell far behind the average European and American standards. Therefore, Spain managed to focus its efforts on commerce, alphabetisation of the population and technology. Thus, at least theoretically, there was a favourable

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<sup>248</sup> Moreno Friginals, M., *Cuba/España. España/Cuba*, Barcelona: Crítica, 1<sup>o</sup> ed., 1995, p. 294.

<sup>249</sup> Aróstegui Sánchez, J. (ed.), *Historia de España*, Barcelona: Vicens Vives, 2011, p. 214.

<sup>250</sup> Moreno Friginals, M., *Cuba/España. España/Cuba*, Barcelona: Crítica, 1<sup>o</sup> ed., 1995, pp. 286-287: “Mientras los diarios, las reuniones políticas, y centenares de hojas sueltas con poesías populares patrioterías elevaban cada vez más el tono de la grandeza histórica de la España invencible, en el teatro de los hechos se producía el desembarco norteamericano en el oriente de Cuba [...]. De Filipinas se recibían noticias desastrosas. Las grandes voces que en España señalaban la realidad eran ahogadas. El 12 de agosto España y Estados Unidos firmaban el armisticio, cuando todavía Manila resistía”.

<sup>251</sup> In a previous Cuban war, Cánovas del Castillo (President of the Spanish Government) had stated that they would defend Cuba “to the last man and the last peseta”, meaning that they would use every soldier and every quantity of money available in Spain, respectively. It somehow depicted the desperation of Spain to defend the remnants of its dying empire.

<sup>252</sup> Buisson, Inge et al. (Ed.), *Problemas de la formación del Estado y de la Nación en Hispanoamérica*, Köln: Böhlau, 1984, p. 249.

context for the reception of positivism: according to the regeneration spirit, old theories and iusphilosophical postulates gave way to the new ones, and therefore, positivist theories had an easier path to get in rather than in the preceding decades. The new conditions of openness and criticism allowed positivism to permeate and to influence the Spanish doctrine (not necessarily over legislation though). Some of the following aspects proved this idea.

A movement known as Regenerationism emerged.<sup>253</sup> It was understood as the “ideological movement which started in Spain at the end of the 19<sup>th</sup> century, product of the decadence feeling that led to a complete regeneration of the Spanish situation”.<sup>254</sup> Scholars defended this position as the unique, single opportunity that was to correct the defects Spain had traditionally suffered from. According to them, a golden chance was lost when the project of the Glorious Revolution of 1868 did not succeed in the coming years (Sexenio Democrático).<sup>255</sup> It was the time for a real change. Every cultural proposal enclosed a sharp criticism against the mainstream Spanish culture. Costa held that “the Cid’s sepulchre should be locked out forever”.<sup>256</sup> This clearly referred to the need to avoid any attitude based on self-indulgence. Former glories of the nation should be buried forever. Costa’s second most famous aphorism, “school and larder”,<sup>257</sup> contained the spirit of the new era. New politics should focus on the well-being of the population: science, education and culture.

Then, Krausism came into Spain. The system of thought conceived by the German philosopher Friedrich Krause and their reformist implications have already been explained in the first chapter. Notwithstanding that, the reformist policy did not have a great impact on real life. There took place one-time, shy

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<sup>253</sup> Andrés-Gallego, J., *Regeneracionismo y política confesional en España, 1889-1899*, Diputación Provincial de Sevilla, Sevilla, 1971.

<sup>254</sup> Spanish Language Dictionary (RAE): “Movimiento ideológico iniciado en España a fines del siglo XIX que, motivado principalmente por el sentimiento de decadencia, propugna una regeneración completa de la vida española”. Link: <https://dle.rae.es/regeneracionismo>. Seen on 09.12.2020.

<sup>255</sup> Such period lasted from 1868 until 1874, and it attempted to establish a democratic regime (Amadeo de Saboya’s Parliamentary Monarchy) and the First Spanish Republic.

<sup>256</sup> Costa, J., *Crisis política de España: doble llave al sepulcro del Cid*, Biblioteca Costa, 3<sup>a</sup> ed., Madrid, 1914.

<sup>257</sup> Costa, J., *Oligarquía y caciquismo como la forma actual de gobierno en España: urgencia y modo de cambiarla*, Madrid: Imprenta de los hijos de M.G. Hernández, 1902, pp. 65 ff.

reforms that did not manage to tackle the structural problem. Indeed, the Restoration system of 1898 went on until the first third of the 20<sup>th</sup> century. Dorado Montero himself did not show virtually any faith on this process of renewal. After the loss of the colonies, he commented the following:

“Once concluded our last colonial wars and after the Treaty of Paris was signed; when we Spaniards had to convince ourselves [...] that blusters are useless and that strength is not improvised in a day, but it must be created painstakingly and gradually. When we felt that spirit of regeneration and after it seemed we were all actually very decided to undertake it, I showed skepticism and I asserted that such ‘awakening’ was nothing but appearance, and after the momentum were gone, everything would be left as before, just as it happened”.<sup>258</sup>

The cultural reform was more noticeable though. It led to the composition of a very consistent group of intellectuals, writers and thinkers, commonly referred to as the 98 Generation. Ramiro de Maetzu, Azorín, Valle-Inclán, Machado, Unamuno, Pío Baroja or Marañón were prolific writers who devoted all their energies to think of the nature of Spain or the “*Ser de España*”. Despite being a modern intellectual movement, they highly rejected the European culture. For their mission of cultural renewal, they defended the Spanish traditional culture. This change did not just operate in the literary realm but in the scientific one as well:

“An unprecedented renewal of the Spanish science took place with the introduction of positivism and with new discoveries in medicine, experimental sciences and sociology”.<sup>259</sup>

The coming of the new Criminal law and its related sciences in 19<sup>th</sup> century Spain was a timid reality. Santiago Ramón y Cajal, Gregorio Marañón and other

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<sup>258</sup> Dorado Montero, P., “D. Pedro Dorado”, *Oligarquía y caciquismo como la forma actual de gobierno en España: urgencia y modo de cambiarla*, Madrid: Imprenta de los hijos de M.G. Hernández, 1902, p. 361: “Al concluir nuestras últimas guerras coloniales y firmarse el tratado de París; cuando los españoles tuvimos que convencernos, luego de tener la cabeza rota, de que no sirve echar bravatas y de que la fortaleza no se improvisa en nada, sino que hay que ir la creando trabajosa y paulatinamente; cuando nos entró aquella calentura de regeneración, pareciendo que todos estábamos decididos de verdad á emprenderla, yo me manifesté desde el primer momento incrédulo y afirmé que aquel ‘despertamiento’, según lo llamaban algunos, de las energías latentes era todo espuma, simple apariencia, y que pasado el instante de la fiebre volvería todo á quedar lo mismo que antes, como en efecto ha quedado”.

<sup>259</sup> Aróstegui Sánchez, J. (ed.), *Historia de España*, Barcelona: Vicens Vives, 2011, p. 215.



great scientists populated the cultural scenario. This historical period was known as the Spanish Silver Age. In 1914, the 14 Generation replaced the aforementioned movement. Understood as well as a cultural and a literary trend, it was characterised, as opposed to the 98 Generation, by the opening to the European cultures and a disposition to absorb the new ideals known at the rest of the continent. Ayala, Eugeni d'Ors (main representative of the *Noucentisme*),<sup>260</sup> Gasset (and his *Revista de Occidente*), de la Serna, Miró and others erected themselves as the main personalities. They witnessed how the illiteracy figures dropped among the Spanish population and how the new media continued to expand.<sup>261</sup> Notwithstanding that “schooling became compulsory in Spain in 1857”, child labour “continued to be a very widespread reality”.<sup>262</sup>

In the meanwhile, a new antimilitary social conscience was developed. Critics took place more openly and several trenchant works against the establishment saw the light, among which one should outstand *Oligarquía y caciquismo sobre la forma actual de gobierno en España*.<sup>263</sup> The military was aware of the current crisis and they looked after an accountable of such chaos. Since they were subjected to the Government, they blamed it on it. And given the fact that the 98 Disaster and other significant problems had a common origin (political corruption and inefficient leaders), the gap between politics and the military did not stop growing. Antimilitary positions contested the role that they should play in society. At its turn, the military progressively turned into a hard authoritarianism in an attempt to suffocate political corruption. The crevice among the two positions went deeper. Finally, a point of no-return was reached: tension translated into violence, military outbreaks and revolts, as well as undesirable outcomes of all sorts like the Primo de Rivera's takeover in 1923 or Franco's coup d'état some years later. The escalating degeneration of army's

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<sup>260</sup> The Catalan equivalent to Spanish *Novecentismo*.

<sup>261</sup> Tiana Ferrer, A., “The Workers' Movement and Popular Education in Contemporary Spain (1868-1939)”, *Paedagogica Historica*, 32:3, pp. 647-684, p. 653.

<sup>262</sup> Tiana Ferrer, A., “The Workers' Movement and Popular Education in Contemporary Spain (1868-1939)”, *Paedagogica Historica*, 32:3, pp. 647-684, p. 653.

<sup>263</sup> Costa, J., *Oligarquía y caciquismo como la forma actual de gobierno en España: urgencia y modo de cambiarla*, Madrid: Imprenta de los hijos de M.G. Hernández, 1902.

ideals led the Old Continent to the First World War, the uprising of fascism, the consolidation of nazism and the Second World War.

The access of positivist theories into European legal orders took place steadily. One of the first manifestations one might find was the draft of the Swiss Penal Code. Its main author, Carl Stooss,<sup>264</sup> found out how to structure in a methodical way several measures to deal with dangerousness of individuals (retarded, non-chargeable or minors).<sup>265</sup> Nevertheless, their official implementation in criminal legislation did not happen and consolidate in the most part of European countries up until the end of the inter-war period (between WWI and WWII).<sup>266</sup>

There were more-pioneer countries as concerned the reception (like the Italy of Lombroso or Switzerland) and others that were more of latecomers. Two main waves of positivism should be distinguished: the early positivism (also referred to as Social Defence) and the social defence (*Défense Sociale Nouvelle - DSN*).<sup>267</sup> What at first glance seemed to be a savage, inconceivable doctrine for many European States (early positivism), it got progressively accepted thanks to the face washing operated by the *DSN*. It brought to an end the big controversy on security measures, given that their conception was loosened a bit: “it will go from a penal intervention previous to the commission of the crime, to a

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<sup>264</sup> For an outline on Stooss’ doctrinal criminal environment, vid. Germann, U., “Toward New Horizons: Penal Positivism and Swiss Criminal Law Reform in the late 19<sup>th</sup> and early 20<sup>th</sup> Centuries”, *GLOSSAE. European Journal of Legal History*, No. 17, 2020, pp. 259-276.

<sup>265</sup> Stooss, C., *Die grundzüge des schweizerischen strafrechts im auftrage des Bundesrathes vergleichend*, Basel – Genf: Verlag von H. Georg, Ester Band, 1892, p. 215: “Denn die Strafbarkeit des Versuches beruht auf seiner Gefährlichkeit, und diese nimmt zu, je mehr sich der Versuch der Vollendung nähert, sie nimmt ab, je mehr er sich davon entfernt”.

<sup>266</sup> Masferrer, A., “The reception of the positivist school in the Spanish criminal doctrine (1885-1899)”, *GLOSSAE. European Journal of Legal History*, No. 17, 2020, pp. 303-352, p. 312: “Although it [the International Union of Criminal Law] was dissolved after the First World War – to be re-founded as the current International Association of Criminal Law (A.I.D.P.) in Paris on 14 March 1924–, it was an institution that also served as a means of reception or understanding of the New School in Europe in general and in Spain in particular”.

<sup>267</sup> De la Rasilla, I., *International Criminal Justice as Universal Social Defence – Quintiliano Saldaña (1878-1938)*, F. Megret and I. Tallgren (Eds.) *The Dawn of a Discipline – International Criminal Justice and Its Early Exponents* (Cambridge University Press, 2020 Forthcoming). Available at SSRN: <https://ssrn.com/abstract=3331622Cambridge>, p. 5: “We know nowadays that the doctrine of social defence by Marc Ancel developed into different schools of thought. That being said, a common trait with the school of Saldaña was the pursue of “tailoring the penalty to the personal characteristics of the criminal so as to facilitate his reintegration and to better protect society”.

conception of the security measure as subsidiary to the penalty”.<sup>268</sup> This second perception, which started in the 20<sup>th</sup> century, was the one currently in force in the overall majority of the democratic, criminal codes in Europe.

Furthermore, Spain, as other European states, accepted positivism too, yet with a relevant nuance. Positivist ideas on the determination of the penalty were found by the Spanish doctrine as something positive. Nonetheless, the rationale (*i.e.* the justification) of the penalty faced a critical opposition. Even if the rationale of the penalty was accepted in other neighbour countries (Italy, for instance), the rationale did not seem to convince Spanish scholars.<sup>269</sup> The reception thereof was solely produced on the technical domain, therefore leaving in a second place the legal philosophy along with the positivist rationale.<sup>270</sup> Material conditions for its acceptance (and even for its mere introduction) were rather few and lacking quality. Problems as evidenced by the Spanish scholar system were broadly known: “the effort of scholars back then at the end of the 19<sup>th</sup> century had to be titanic: with unskilled professors, with a lack of languages at medium and superior teaching and with poorly equipped libraries”.<sup>271</sup>

Liberalism had a hard time entering the Iberian state too.<sup>272</sup> Though this ideology was to a certain extent known within the intellectual elites and other literary circles in the 18<sup>th</sup> century, its shy approximation in practical terms was not seen until the 19<sup>th</sup> century.<sup>273</sup> The year 1812 brought one of the most popular demonstrations of liberalism: the Constitution of 1812. Popularly known as “La Pepa”, it was the clearest examples of how liberalism was not something exclusive for our British counterparts.<sup>274</sup> In front of a headless Government due to the

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<sup>268</sup> Sierra López, M.V., *Las medidas de seguridad en el nuevo Código penal*, València: Tirant Lo Blanch, 1997, p. 66.

<sup>269</sup> Not only the neoclassical side did so, but also all the eclecticals were contrary to it.

<sup>270</sup> This ought not to be confused with a parallel idea: the repercussion of positivism was translated doctrine and scholarly influence, rather than laws and codes.

<sup>271</sup> Antón Oneca, J., *La utopía penal de Dorado Montero*, León, 1997, p. 7.

<sup>272</sup> Fontana i Lázaro, J., “La época del liberalismo”; Fontana i Lázaro, J., Villares, R. (Dir.), *Historia de España*, Barcelona: Planeta, 1<sup>o</sup> Ed, 2007, pp. 9-10.

<sup>273</sup> Masferrer, A., *Spanish Legal Traditions*, Madrid: Dykinson, 2<sup>o</sup>ed., 2012, p. 268: “a period in which both the liberalism and the bourgeois revolution were consummated, with the exception of two periods that witnessed a return to absolute monarchy (1814-1820 and 1823-1833)”.

<sup>274</sup> Varela Suanzes, J., “El debate sobre el sistema británico de gobierno en España durante el primer tercio del Siglo XIX”; Alvarado, J. (coord.), *Poder, Economía y Clientelismo*, Madrid: Marcial Pons, 1997, pp. 97-124.

kidnapping of its king, the people altogether with leading classes organised themselves and developed a fit legal system. It had, of course, all sorts of lacks and deficiencies yet it constituted a deep impact in the democratic history of the country. To modernise the State, to revitalise its legal culture and to offer institutional resistance (not just *guerrillas*) were not petty matters at all and they were achieved. Spain reached the legal age on this date. Afterwards, the authoritarian reaction of the “desired one”<sup>275</sup> establishing Absolutism back entailed an enormous setback. Modern legal culture and liberalism were locked. Both of them briefly returned for a short period of time (the Liberal Triennium: 1820-1823) just to see their postulates once again repressed.<sup>276</sup> The State entered a period of conservadurism which set the conditions of a political trend known as Doctrinarism.

The definition of Doctrinarism was the political doctrine that hybridised the Monarchy with the ideals of the French Revolution.<sup>277</sup> It defended a centric positioning that abrogated for the ruling of the middle class (mesocracy). Its natural tendency was towards a discreet moderantism. It was named after “conservadurism” on the British Islands.<sup>278</sup> It was particularly relevant both in Spain and France, who witnessed a strengthening of their links during the 18<sup>th</sup> and 19<sup>th</sup> century. This trend avoided extreme positions. Indeed, it conjugated many of the aspects that had been considered as antagonist: liberty and authority,

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<sup>275</sup> Popular expression of affection used to refer Fernando VII. Ironically, this devotion to his figure did not pay off to their loyal people.

<sup>276</sup> For a general overview of Spanish Legal History, vid. Escudero Antonio, J. A., *Curso de Historia del Derecho. Fuentes e instituciones político-administrativas*, Madrid: J. A. Escudero, 1985.

<sup>277</sup> If we look at its meaning at the Spanish Royal Academy of Language, we see that its French influence was stated: “during the Restoration, it combined both liberal and conservative ideas, and subordinated them to a set of doctrines”. Seen on 12.01.2020. Link: <https://dle.rae.es/doctrinario?m=form>.

<sup>278</sup> “Conservatism in the 19th century”, Britannica, 31.03.2021: “The 19th century was in many ways antithetical to conservatism, both as a political philosophy and as a program of particular parties identified with conservative interests. The Enlightenment had engendered widespread belief in the possibility of improving the human condition—a belief, that is, in the idea of progress—and a rationalist disposition to tamper with or discard existing institutions or practices in pursuit of that goal. The French Revolution gave powerful expression to this belief, and the early Industrial Revolution and advances in science reinforced it. The resulting rationalist politics embraced a broad segment of the political spectrum, including liberal reformism, trade-union socialism (or social democracy), and ultimately Marxism. In the face of this constant rationalist innovation, conservatives often found themselves forced to adopt a merely defensive role, so that the political initiative lay always in the other camp”. Link: <https://www.britannica.com/topic/conservatism/Conservatism-in-the-19th-century>.

elite's government and the people's power, revolution and conservation, and inflexible *autoritas* and its limitation by organs, autonomy and order. Specifically, in Spain there was defended a mixture between a hereditary system (arising from monarchy) and representative government structures (like the *juntas*). This allowed for positivist traits to access the country in a way that would not have been possible otherwise. Some countries underwent a radical transformation from the Classical School to pure positivism (like Italy). However, in Spain, due to cultural and philosophical reasons, such possibility did not exist: either positivism entered through a bit of eclecticism or either it did not enter at all. The role of nature and of natural law in the criminal doctrine of the 19<sup>th</sup> century was stressed. There was a common basis, i.e. a shared philosophical culture on things suiting all human beings. When Pufendorf revisited and criticised Grotius and Hobbes, a contundent outcome was reached: a common culture can be defended without the need of God.<sup>279</sup> Doctrinarism allowed to better understand the reception of positivism since this trend that led to moderation at the political realm did also lead to a criminal eclecticism in the legal sphere.<sup>280</sup> Some of the most well-known figures are Joaquín Francisco Pacheco,<sup>281</sup> Cánovas del Castillo<sup>282</sup> and Donoso Cortés.<sup>283</sup> The last one came to assert that “Doctrinarism and Eclecticism are often considered as political synonyms”.<sup>284</sup>

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<sup>279</sup> Masferrer, A., “Criminal Law and Morality Revisited: Interdisciplinary Perspectives”, Masferrer, A., *Criminal Law and Morality in the Age of Consent*, Cham: Springer, pp. 2-3: “Moral law—or natural law—is the light of the intellect, or practical reason—that directs the acts of everyone in accordance with the purpose—or telos—of human life, namely, happiness. Moral laws are supposed to distinguish good from evil and provide the principles that enlighten human behaviour and lead humans to their perfection and to a life of virtue. Moral laws or natural laws affects the whole moral order, as far as it is naturally knowable to unaided human reason. Natural law is simply moral law as far as it is knowable by natural human reason and it refers to all moral virtues, regulating their rational structure, and also forbids all vices”.

<sup>280</sup> Ramos Vázquez, I., *La reforma penitenciaria en la historia contemporánea española*, Madrid: Dykinson, 2013, pp. 261-273.

<sup>281</sup> Pacheco, J. F., *El Código penal concordado y comentado*, Madrid: Imprenta y fundición de Manuel Tello, 5<sup>o</sup> ed., 1881.

<sup>282</sup> Cánovas del Castillo, A., *Problemas contemporáneos*, Madrid: Tello, 1800; *Historia de la decadencia de España desde el advenimiento de Felipe III al Trono hasta la muerte de Carlos III*, Madrid: Gutenberg, 2<sup>o</sup> ed., 1910; *Historia general de España*, Madrid: El Progreso Editorial, 1892.

<sup>283</sup> Donoso Cortés, J., *Ensayo sobre el catolicismo, el liberalismo y el socialismo, considerados en sus principios fundamentales*, Barcelona: Rivadeneyra, 1851.

<sup>284</sup> Donoso Cortés, J., *Lecciones de Derecho Político*, Madrid, 1984, p. 8 ff.

Therefore, penal eclecticism ended up by constituting the legal character of 19<sup>th</sup> century Spain. Once accepted that Spain was more suited to eclectic positioning, this success of eclecticism and of the new ‘positivist’ trends was self-explanatory. Criminal eclecticism mostly came into Spain between the years 1844 and 1855 (the Moderate Decade). It laid the conditions for the reception of positivism and it determined the degree of acceptance of Lombroso’s theories thirty years later. Eclecticism occupied the place that positivism did in other countries.<sup>285</sup> Positivism did not have a great reception in Spain and its influence could be considered as both anecdotic and isolated.<sup>286</sup> Most of the law manuals indicate so: Spain had little relevant authors within this sphere. Besides, after an analysis of the legislation of the moment, it could be clearly deduced that Lombroso’s doctrine did not settle. The Criminal Code of 1822 already described some eclectic elements and provided a hint on the future criminal code.<sup>287</sup> Masferrer and Iñesta already evidenced this lack of rooting in the Spanish doctrine.<sup>288</sup> It was doubtful that such code came to be effectively applied due to the difficulties that arose afterwards.<sup>289</sup> The Criminal Code of 1848 was more important, though.<sup>290</sup> It combined Rossi’s eclectic spirit with the utilitarianism from the previous ages.<sup>291</sup> The main representative was Joaquín Francisco

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<sup>285</sup> Iñesta-Pastor, E., “La Comisión General de Codificación (1843-1997): De la codificación moderna a la descodificación contemporánea”, *Anuario de Historia del Derecho español*, 83 (2013), pp. 65-103.

<sup>286</sup> Masferrer, A., “The reception of the positivist school in the Spanish criminal doctrine (1885-1899)”, *GLOSSAE. European Journal of Legal History*, No. 17, 2020, pp. 303-352, p. 337.

<sup>287</sup> Vid. Casabó Ruiz, J. R., *El Código penal de 1822*, València: Universitat de València, 1968.

<sup>288</sup> Masferrer, A., “The reception of the positivist school in the Spanish criminal doctrine (1885-1899)”, *GLOSSAE. European Journal of Legal History*, No. 17, 2020, pp. 303-352, p. 337; and Iñesta-Pastor, E., «La proyección Hispanoamericana del Código penal español de 1848», *Actas y Estudios, XIII Congreso del Instituto Internacional de Historia del Derecho Indiano*, San Juan de Puerto Rico, ed. Library of Congress, 2003, vol. II, pp. 493-521; Iñesta Pastor, E., *Spanish parliament and woman's penal condition during the legislative period of 1847-1849*, Maria Helena de Cruz Coelho and Maria Manuela Tavares Ribeiro (eds.), *Parliaments: The Law, the Practice and the Representations. From the Middle Ages to the Present Day*, Assembleia da República, Lisboa, 2010, pp. 151-160; Iñesta Pastor, E., *Història del Dret de l'Ibèria primitiva, la Hispània romana i visigoda*, Alicante: Universitat d'Alacant, 2010; Iñesta Pastor, E., *El Código Penal Español de 1848*, València: Tirant Lo Blanch, 2011.

<sup>289</sup> Alonso y Alonso, J. M., “De la vigencia y aplicación del Código Penal de 1822”, *Revista de la Escuela de Estudios Penitenciarios*, 1946, p. 15.

<sup>290</sup> It came to establish the structure that all the coming criminal codes would follow onwards.

<sup>291</sup> Cañizares Navarro, J. B., “El Código penal de 1822: sus fuentes inspiradoras. Balance historiográfico (desde el s. XX)”, *Glossae. European Journal of Legal History*, 10 (2013), pp. 109-136, p. 133.

Pacheco. Furthermore, virtually all members of the Codifying Commission were influenced by Rossi. Tomás María de Vizmanos and Cirilo Álvarez depicted the Code as a golden mean:

“we will stumble with both individualism and socialism at the same time; with utility (if not considered as a principle, as a due to the legislative); with the duty as a measure against the crime; with the individual’s freedom as a general rule; with its exculpation based on the limits of intelligence; with the encumbered personality; with the proclaimed equality and with the ruins of the former State”.<sup>292</sup>

The predominant eclectic character of the Code was evidenced as well: “Teruel Carralero places on the 1848 Code the influence of the criminal reform of Beccaria, the penitentiary advances of Howard as well as the French encyclopaedism altogether adapted to the Spanish circumstances thanks to Pacheco”.<sup>293</sup> It was not until 1903 that the eclectic spirit was strongly contested by Silvela. This was due, partially, to the fact that the 1848 Code was still predominantly retributive. One of its main features was that it tried to determine the penalty in a very systematic way (almost mathematically),<sup>294</sup> so that this latter suited the most to its nature and proportion. The so-called principle of material accumulation was maintained: “you do the crime; you do the time”. Thus, very close to the *Lex Talionis* perspective,<sup>295</sup> which was heavily present in the primitive Criminal law of Iberia, as Dorado Montero described.<sup>296</sup> Mitigating circumstances did not exist.<sup>297</sup> Unsurprisingly, we found perpetual penalties,

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<sup>292</sup> De Vizmanos, T. M. y Álvarez, C., *Introducción*, Vol. I, LIII-LIV, 1848.

<sup>293</sup> Iñesta Pastor, E., *El Código Penal Español de 1848*, València: Tirant Lo Blanch, 2011, p. 277.

<sup>294</sup> Even such basic rights as association were restricted. According to Isabel Ramos Vázquez, in its article 8, the Criminal Code of 1848 formally acknowledged the right of association, yet afterwards there would be laws restricting it again. Vid. Ramos Vázquez, I., “Los delitos de asociación ilícita, coalición o coligación en Francia y España a lo largo del siglo XIX”, Masferrer, A., *Tradición e influencias extranjeras en la codificación penal española: parte especial*, 2020, pp. 393-439.

<sup>295</sup> For the relationship between Criminal law and the *Lex Talionis*, vid. May, L., “Crime and *Lex Talionis*”, *Ancient Legal Thought: Equity, Justice, and Humaneness From Hammurabi and the Pharaohs to Justinian and the Talmud*, Cambridge: Cambridge University Press, 2019, pp. 150-168. For the specific changes as operated within Criminal law depending on the weight of such principle, vid. Van Den Haag, E., (1992) Commentary: The *lex talionis* before and after criminal law, *Criminal Justice Ethics*, 11:1, 2-62, DOI: [10.1080/0731129X.1992.9991905](https://doi.org/10.1080/0731129X.1992.9991905).

<sup>296</sup> Dorado Montero, P., *Contribución al estudio de la historia primitiva España*, Madrid: Imprenta de la Revista de Legislación, 1901, pp. 20-37.

<sup>297</sup> However, mitigating circumstances did not take much longer to appear since their origin was already traced back to the Middle Ages. Vid., Masferrer, A., *Spanish Legal Traditions*,

long-term penalties as well as afflictive ones. In the context of this Code, the execution of the penalty did neglect the corrective objective of the penalty. A predominance of the retributive end was observed when it came to punish certain crimes, *e.g.*, article 238 which imposed the very same penalty to the plaintiff if it was proved that the experts did render fake testimony. Then, both the defendant and the plaintiff would receive the same sanction. On the other hand, intimidation kept on being one of the main guiding principles of this Code. Let us remember that Doctrinarism described a hierarchy of the goals of the penalty: retribution (expiation), intimidation, impossibility to harm and the reform of the criminal.

“Among all them, the legislature could not disregard the first two ones, especially retribution since it grounds the legitimacy of the punishment and it is the fundamental one around which other accessory, accidental and variable goals settle themselves”.<sup>298</sup>

The predominant role of the first one was clear. The second one was very relevant too and its presence was conspicuously: the execution of the death penalty, being chained to a post for public humiliation, degradation penalties, severe penalties as set on for political crimes, public order disturbance crimes, etc. Also, there were several conducts that were not qualified as punishable. The analysis went on with the lack of the amendment principle. Concerning the latter, what we understand today in terms of reinsertion and re-education was unimaginable back then. The purpose of reforming the criminal was difficult to achieve since reclusion penalties were very long at that time. Cadalso would acknowledge the hardness of such penalties and their incompatibility with the pursued goal.<sup>299</sup> Nevertheless, he stood up for this Code when asserting it would set a precedent and that it would set the basis upon which the amendment principle was to be developed in a future. That principle was improved in

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Madrid: Dykinson, 2<sup>o</sup>ed., 2012, pp. 353-354: “The circumstances of the criminal act, which in the codification period were known as aggravating, mitigating or exculpatory and nowadays are still valid, were discussed in earlier normative and doctrinal sources prior to the nineteenth century. Specifically, medieval and modern legal doctrines had pointed to the important role of some circumstances”.

<sup>298</sup> Iñesta Pastor, E., “La interpretación del eclecticismo en la doctrina y en la legislación de la España penal del siglo XIX”, *Ivs Fvgit*, 2016, p. 218.

<sup>299</sup> Núñez, J. A., *Fernando Cadalso y Manzano: Medio siglo de reforma penitenciaria en España (1859-1939)*, Valladolid: Universidad de Valladolid, p. 105 and 151.



posterior codes. This did not take place until the 20<sup>th</sup> century. The Code of 1848 entailed an enormous setback. In a figurative sense, it was temporary annihilation of the special prevention.

As a last remark to the Spanish pre-positivist scenario, let us briefly mention the Criminal Code of 1870. Its greatest exponent was Alejandro Groizard.<sup>300</sup> The Code was still anchored in eclecticism, but with some minor modifications carried out by Ortolan and Tissot.<sup>301</sup>

The technique used did not evidence a great advance yet it brought to public attention to certain topics such as public liberties, suppression of proposition and conspiracy acts as punishable crimes, and the crimes of worship and print were sent to the common regime of the Code.<sup>302</sup> Unfortunately, it did not change much more. As a consequence, the very core of this Code was still based on retribution and intimidation.<sup>303</sup>

Finally, Dorado Montero got to see the Proyecto Montilla (1902), elaborated by Bernaldo de Quirós, which “would accept the anthropological and social trends of the time”, but he would not make it until the Proyecto Pinilla (1922).<sup>304</sup>

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<sup>300</sup> Groizard, A., *El Código penal de 1870, concordado y comentado*, Burgos: Esteban hermanos impresores, 1870.

<sup>301</sup> Those were the main representatives of the Classical School in France, just as they were Romagnosi, Carrara or Carmignani in Italy; Binding, Feuerbach or Berner in Germany; and Francisco Pacheco in Spain.

<sup>302</sup> Iñesta Pastor, E., “La interpretación del eclecticismo en la doctrina y en la legislación de la España penal del siglo XIX”, *Ivs Fvgit*, 2016, p. 226.

<sup>303</sup> Vid. Masferrer, A., *Tradición y reformismo en la Codificación penal española. Hacia el ocaso de un mito. Materiales, apuntes y reflexiones para un nuevo enfoque metodológico e historiográfico del movimiento codificador penal europeo*, Prólogo de J. Sainz Guerra, Universidad de Jaén, 2003, 241 pp.

<sup>304</sup> Castejón, F., “El proyecto Pinies de profilaxis social (maleantes) de 1922 y la ley relativa a vagos y maleantes de 4 de agosto de 1933”, *Revista General de Legislación y Jurisprudencia*, 163, 1933.

### 3. Development of positivism: status quaestionis

History of ideas described a pendular movement. From Ancient Greece and Rome to the Middle Ages; from the Middle Ages to the Renaissance; from the Renaissance to Absolutism; from Absolutism to the Enlightenment; from the Enlightenment to Romanticism, etc. The figured pendulum moved relentless from one extreme to another. Such process was already identified by Emmanuel Kant in *Der Streit der Fakultäten*. Probably influenced by Christoph Wieland,<sup>305</sup> Kant believed that both the progress of history and humanity was not carried out in a linear way, but it was a rather dynamic set of ups and downs. Indeed, he deeply criticised what he used to call “human foolishness” given that if man ever decided to take the right path, he would, at a certain point, invert the direction and ruin everything.<sup>306</sup> Afterwards, he would build it again just before tearing everything down once again. Kant compared humankind with Sisyphus’ task. After he struggled to pull up a rock at the top of the hill (*e.g.*, achieving a goal, getting social peace, crystallisation of a fair political system, or whatsoever other purpose), he let the rock roll down (demolish everything, contribute to its decadence or, simply, letting it go), in order to start everything from the beginning. This was meant to be eternal. Kant’s depiction to this respect was clear: “an absurd dynamism thanks to which the good keeps alternating with the evil by means of advance and setback so that this game of swinging of our species should be considered as nothing more than a carnival masquerade. This does not possess, though, a major value from the one found in other species playing this same game. They [animals] practice this game with less costs and without the waste of knowledge”.<sup>307</sup> Similarly, the situation of Criminal law was affected by the aforementioned reality.

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<sup>305</sup> German philosopher that dealt with this topic in *Die Geschichte der Abderiten* (1774).

<sup>306</sup> It was not our intention to address the abderitism, though.

<sup>307</sup> Kant, E., *El conflicto de las Facultades*, Alianza, Madrid, 2003, p. 156: “un absurdo dinamismo merced al cual el bien va alternándose con el mal mediante avance y retroceso, de suerte que todo este juego de vaivén de nuestra especie consigo misma sobre este globo terráqueo habría de ser considerado como una farsa carnavalesca, lo cual no puede proporcionarle ante los ojos de la razón un valor mayor al ostentado por otras especies animales que practican ese juego con menos gastos y sin el derroche del entendimiento”.

A clash of two trends was produced. It confronted two groups of schools: the Neoclassical Schools and the Positivist Schools. With its minor variations and logical evolutions, the structure of modern criminal law in Europe remained more or less uniform from its birth on the second half of the 18<sup>th</sup> century to the 19<sup>th</sup> century.<sup>308</sup> In this period, the Neoclassical Schools ruled the scene. Nevertheless, at the end of the 19<sup>th</sup> century and beginning of the 20<sup>th</sup> century, they faced a new competitor: the so-called Positivist Schools.<sup>309</sup> As a result, the hegemony of the old school will be contested.

### 3.1. The Neoclassical Schools

Legal literature on the matter often interchangeably referred to this group of schools as “Classical” or “Neoclassical”. Both expressions are, thus, used and valid. Yet, the second one was more related to liberal Criminal law. The maximum representative of this movement was Cesare Beccaria and his well-known work *Dei delitti e delle pene*<sup>310</sup> published back in 1764. Leaving aside him, other authors<sup>311</sup> could be mentioned as well: John Howard,<sup>312</sup> the Count of Mirabeau,<sup>313</sup>

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<sup>308</sup> The most complete work covering the evolution of Criminal law within the centuries was outlined by Sainz Guerra. Vid, Sainz Guerra, J., *La evolución del Derecho penal en España*, Jaén: Universidad de Jaén, 2004, 867 pp.

<sup>309</sup> Even though within this chapter three principal positions are analysed, we have opted for stating them in plural: Neoclassical Schools, Positivist Schools and Eclectic Schools. It is intended entirely intended in order to point out the enormous degree of difference that lays in, even among branches of the same block.

<sup>310</sup> Beccaria, C., *De los delitos y las penas*, Alianza, Madrid, 3<sup>a</sup>ed., 2014; Beccaria, C., *Atti di Governo*, Mediobanca, 1<sup>o</sup>ed., Milano, 1987; Beccaria, C., *Sobre el desorden monetario y su remedio en los estados milaneses*, 1762; Beccaria C., *Investigación sobre la naturaleza del estilo*, 1770; Beccaria, C., *Elementos de economía pública*, 1804 (posthumous).

<sup>311</sup> For a longer, optimally detailed catalogue of authors within the neoclassical school vid. Sánchez González, M. D., *La Codificación penal en España. Los Códigos de 1848 y 1850*, Madrid: Centro de Estudios Políticos y Constitucionales, 2004, 484 pp.

<sup>313</sup> Mirabeau, H. R., *Le rideau levé ou l'éducation de Laure*, Arles : Actes Sud, Paris, 1994 ; Mirabeau, H. R., *Essai sur le despotisme*, 1775 ; Mirabeau, H. R., *Cartas Selladas y Cárceles de Estado*, 1782 ; Mirabeau, H. R., *Moses Mendelssohn y sobre la reforma política de los Judíos* ; Mirabeau, H. R., *Histoire secrète de la cour de Berlín*, 1786–1787 ; Mirabeau, H. R., *De la monarchie prussienne sous Frédéric le Grand*, 1788 ; Mirabeau, H. R., *Lettres de Sophie* ; Mirabeau, H. R., *Lettres de cachet* ; Mirabeau, H. R., *Le rideau levé*, 1786 ; Mirabeau, H. R., *Histoire secrète de la cour de Berlín*, 1787 ; Mirabeau, H. R., *Dénonciation de l'agiotage*, 1787 ; and Mirabeau, H. R., *Hic-et-Haec*, 1798.

Jean-Paul Marat,<sup>314</sup> Karl Ludwig Wilhelm von Grolman,<sup>315</sup> Muyart de Vouglans,<sup>316</sup> Scipion Bexon,<sup>317</sup> Giovanni Carmignani,<sup>318</sup> Montesquieu,<sup>319</sup> Gaetano Filangieri,<sup>320</sup> Gian Domenico Romagnosi,<sup>321</sup> Jeremy Bentham,<sup>322</sup> Ludwig

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<sup>314</sup> Marat, J. P., *A Philosophical Essay on Man*, London: J. Ridley, 1773; *Les chaînes de l'esclavage*, 1774; *Plan de législation criminelle*, Neuchâtel, 1780.

<sup>315</sup> Grolman, K. L. W., *Ausführliches Handbuch über den Code Napoleon : zum Gebrauche wissenschaftlich gebildeter deutschen Geschäftsmänner entworfen*, Darmstadt : G.F. Heyer, 1810; *Theorie des gerichtlichen Verfahrens in bürgerlichen Rechtsstreitigkeiten*, Giessen : Georg Friedrich Heyer, 1826; *Grundsätze der criminalrechts-wissenschaft*, Giessen: G.F. Heyer, 1825.

<sup>316</sup> Muyart de Vouglans, J. P., *Institutes au droit criminel*, 1757; *Institutions criminelles selon les lois et ordonnances du royaume*, 1762; *Les loix criminelles du Royaume : dans leur ordre naturel*, Mérigot, 1780.

<sup>317</sup> Bexon, S., *Développement de la Théorie des Loix Criminelles par la comparaison de plusieurs législations anciennes et modernes, notamment de Rome, de l'Angleterre et de la France ; suivi de l'application de cette théorie, dans un Projet de Code Criminel, Correctionnel et de Police*, Garnery, Paris, 1802 ; Bexon, S., *Application de la théorie de la législation pénale, ou Code de la sureté publique et particulière, fondé sur les règles de la morale universelle, sur le droit des gens ou primitive des sociétés et sur leur droit particulier, dans l'état actuel de la civilisation ; rédigé en projet pour les états de sa majesté le Roi de Bavière ; dédié à sa Majesté et imprimé avec son autorisation*, Courcier, Paris, 1807.

<sup>318</sup> Carmignani, G., *Dissertazione critica sulle tragedie di Vittorio Alfieri da Asti*, 1806 ; Carmignani, G., *Elementa juris criminalis*, 1833 ; Carmignani, G., *Teoria delle leggi della sicurezza sociale*, 1831 ; Carmignani, G., *Storia delle origini e de' progressi della filosofia del diritto*, 1851 ; Carmignani, G., *Bibliografia degli altri paesi d'Italia. Lettera del prof. Carmignani al suo collega Rosini sul vero senso di un verso di Dante*, books.google.it. ; Carmignani, G., *Joannis Carmignani in Pisana Academia antecessoris juris criminalis elementa*, Biblioteca Italiana ossia Giornale di letteratura scienze ed arti, 2<sup>a</sup>ed., Volume 20, 1820) ; Carmignani, G., *Legislazione - Una lezione accademica sulla pena di morte*, Biblioteca Italiana ossia Giornale di letteratura scienze ed arti, Volume 86, 1837 ; Carmignani, G., *Teoria delle leggi della sicurezza sociale*, Biblioteca Italiana ossia Giornale di letteratura scienze ed arti, Volume 67, 1832 ; Carmignani, G., *Teoria delle leggi della sicurezza sociale*, Annali universali di statistica economia pubblica, storia, viaggi e commercio, Volume 30, Fascicolo 89 e 90, 1831.

<sup>319</sup> Montesquieu, *L'esprit des loix*, Genève : Barrillot & Fils, 1750.

<sup>320</sup> Filangieri, G., *La scienza della legislazione*, Milano, 1780 (I was published within seven different volumes. The publication of the first one took place in 1780).

<sup>321</sup> Romagnosi, G. D., *La genesi del diritto penale*, 1791.

<sup>322</sup> Bentham, J., *An Introduction to the Principles of Morals and Legislation*, 1780; *Of Laws in General*, 1782; *Defense of Usury*, 1787; and *The Rationale of Punishment*, 1830.

Andreas Feuerbach,<sup>323</sup> Immanuel Kant,<sup>324</sup> Georg Wilhelm Friedrich Hegel,<sup>325</sup> Voltaire,<sup>326</sup> Manuel de Lardizábal y Uribe,<sup>327</sup> or Marcos Gutiérrez.<sup>328</sup> In turn, some mentioned authors here were considered as ‘eclecticals’ by doctrine, an aspect which ought not to be surprising at all concerning the challenge which entailed categorising iusphilosophical thought in disjointed compartments. Dorado Montero himself acknowledged that during his lifetime “there [were] are many penalists who, despite remaining within the Classical School, admitted the need

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<sup>323</sup> Feuerbach, L., *Das Wesen des Christentums*, Leipzig: Otto Wigand, 1841.

<sup>324</sup> Kant, I., *Pensamientos sobre la verdadera estimación de las fuerzas vivas*, 1747; *Historia general de la naturaleza y teoría del cielo*, Buenos Aires, 1969; *Nueva dilucidación de los primeros principios del conocimiento metafísico*, Caracas: Universidad Central de Venezuela, 1974; *Nuevo concepto del movimiento y el reposo*, 1758; *La falsa sutileza de las cuatro figuras del silogismo*, 1762; *Ensayo para introducir el concepto de magnitudes negativas en la filosofía*, 1763; *El único fundamento posible de una demostración de la existencia de Dios*, Barcelona: PPU, 1989; *Observaciones sobre el sentimiento de lo bello y lo sublime*, Madrid: Alianza, 2008; *Sobre la nitidez de los principios de la teología natural y de la moral*, 1764; *Los sueños de un visionario explicados por los sueños de la metafísica*, Madrid: Alianza, 1987; *Sobre el fundamento primero de la diferencia entre las regiones del espacio*, 1766; *Disertación inaugural*, Madrid: CSIC, 1961; *Aufsätze, das Philantropin betreffend*, Madrid: Akal, 1983; *Crítica de la razón pura*, 1781, 2<sup>a</sup> ed., 1787; *Prolegómenos a toda metafísica futura que pueda presentarse como ciencia*, 1783; *Respuesta a la pregunta: ¿qué es ilustración?*, 1784; *Idea para una historia universal en sentido cosmopolita*, 1784; *Fundamentación de la metafísica de las costumbres*, Madrid: Espasa-Calpe, 1994; Kant, I., *Recensiones de las «Ideas para una filosofía de la historia de la humanidad» de Herder*, 1785; Kant, I., *Principios metafísicos de la ciencia de la naturaleza*, Madrid: Alianza, 1989; *Probable inicio de la historia humana*, 1786; *¿Qué significa orientarse en el pensamiento?*, Buenos Aires: Leviatán, 1982; *Sobre el uso de los principios teleológicos en la filosofía*, 1788; *Crítica de la razón práctica*, Madrid: Espasa-Calpe, 2<sup>a</sup> ed., 1981; *Crítica del juicio*, Madrid: Espasa-Calpe, 8<sup>a</sup> ed., 1999; *Primera introducción a la Crítica del juicio*, Madrid: Balsa de la Medusa–Visor Distr., 1987; *Sobre un descubrimiento según el cual toda nueva crítica de la razón pura resulta superflua frente a otra anterior*, Buenos Aires: Aguilar, 5<sup>a</sup> ed., 1968; *Sobre el fracaso de todos los ensayos filosóficos de Teodicea*, 1791; *Los progresos de la metafísica desde Leibniz y Wolff*, Madrid: Tecnos, 1987; *La religión dentro de los límites de la mera razón*, Madrid: Alianza, 1986; *Sobre el dicho: Esto puede ser correcto en la teoría, pero no vale para la práctica*, 1793; *El fin de todas las cosas*, 1794; *La paz perpetua*, 1795; *Metafísica de las costumbres*, Madrid: Tecnos, 1989; *Revisión de la pregunta: si el género humano progresa continuamente hacia lo mejor*, 1797; *El conflicto de las facultades*, Madrid: Trotta, 1999; *El poder de las facultades afectivas*, 1798; *Antropología en sentido pragmático*, Madrid: Alianza, 1991; *Lógica*, Madrid: Akal, 2000; *Geografía física*, 1802; *Pedagogía*, Madrid: Akal, 1983; *Transición desde los primeros fundamentos metafísicos de la ciencia natural a la Física*, 1888; *Opus postumum (colección de obras inconclusas)*, Barcelona: Anthropos, 1991; *Antropología Práctica (manuscrito inédito de 1785)*, Madrid: Tecnos, 1990.

<sup>325</sup> Hegel, G. W. F., *Phänomenologie des Geistes*, Bamberg, 1807; *Ciencia de la lógica*, Buenos Aires: Solar / Hachette, 2<sup>a</sup> ed., 1968; *Enzyklopaedie der philosophischen Wissenschaften*, Heidelberg, 1817, Erste Ausgabe, 1827; Dritte Ausgabe, 1830; *Grundlinien der Philosophie des Rechts*, 1821.

<sup>326</sup> Voltaire, *Dictionnaire philosophique*, 1764.

<sup>327</sup> Lardizábal y Uribe, M., *Discurso sobre las penas, contrahido á las leyes criminales de España, para facilitar su reforma*, Madrid: J. Ibarra, 1782.

<sup>328</sup> Marcos Gutiérrez, J., *Práctica criminal de España*, Madrid: D. Fermín Villalpando, 1826.

to make more elastic their rigid frameworks”.<sup>329</sup> He was referring to Louis Proal<sup>330</sup> and his work *Le crime et la peine*.<sup>331</sup> The way this was done was by “paying attention to the outcomes of modern scientific research, and even criminal anthropology and criminal sociology”.<sup>332</sup>

The characteristic event within this wide school marking a decisive inflection point with the former mediaeval system was the French Revolution. Doctrine after that was well-known for its absolute respect towards the legality principle, the elimination of tribunals’ arbitrariness, freewill and the retribution principle. Some of them arose from the tight precepts of scholasticism and Early Middle Age supporters of iusnaturalism; whereas, some others did originate in opposition to all sorts of injustices found in the previous, mediaeval system. Concerning this latter one, some of them were very popular: illegitimate ways of obtaining evidences (torture, physical and psychological coaction or blackmailing, among others), discriminatory treatment depending on the estate one belonged to, etc.

It used the deductive method, i.e. an *a priori* method. This methodology was solidly grounded on the thriving rationalism of the epoch according to which one might infer something arising from a general norm. Consequently, the main objective of the law was the re-establishment of the legal order. Besides, the criminal phenomenon affected everybody the same way. They believed that everybody had the same degree of responsibility. The liability of the individual was grounded on two reasons: moral responsibility and freewill.

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<sup>329</sup> Garofalo, R., *Indemnización á las víctimas del delito*, Madrid: La España Moderna, 1890, p. 23.

<sup>330</sup> Proal, L., *La criminalité féminine*, Paris : Impr. de Soye et fils, 1890, pp. 27; *La criminalité politique*, Paris : F. Alcan, 1895, VIII, pp. 309; “L’anthropologie criminelle”, *Le Correspondant*, tome 158, 10 février 1890, pp. 431-455; *Le crime et la peine*, Paris : F. Alcan, 1892, XV, pp. 544; *Le crime et le suicide passionnels*, Paris : F. Alcan, 1900, VI, pp. 683; “Le rôle du pouvoir judiciaire dans la République”, *Revue politique et parlementaire*, 15e année, 1908, tome LVI, juin, n° 168, pp. 558-568; *Les médecins positivistes et les théories modernes de la criminalité*, Extrait du Correspondant, Paris : Impr. de Soye et fils, 1890, pp. 52; “L’expertise médico-légale et la question de la responsabilité”, *Archives de l’anthropologie criminelle*, tome XXVII, 1912, pp. 422-443, pp. 481-502.

<sup>331</sup> Proal, L., *Le crime et la peine*, Paris : F. Alcan, 1892, XV, 544 pp.

<sup>332</sup> Garofalo, R., *Indemnización á las víctimas del delito*, Madrid: La España Moderna, 1890, p. 23.

Notwithstanding this, utility did appear inside this school too. Utilitarianism appeared “chopped” between the Neoclassical Schools and the Positivist Schools. The utilitarian conception emerged at the very end of the Neoclassical School. It also contained negative elements, such as the commercialisation of justice and of Criminal law due to situating utility at the very core of its theoretical postulates. Thus, the movement was heading towards more efficiency-oriented positions. Regarding its positive side, considering that the penalty should be useful was remarkable. The penalty should pursue the achievement of a higher ideal (rehabilitation), instead of forcing one person to serve a penalty (far too long and disproportionate, back then). Criminal and penitentiary studies have repeatedly showed up that, after serving the penalty, the personality of the condemned was destroyed: sometimes prison did nothing but to worsen the convict. At the end of the 18<sup>th</sup> century, the mainstream penal conception changed and progressively evolved to the improvement and sweetening of the penitentiary system;<sup>333</sup> ideals introduced by John Howard. At the end of the 19<sup>th</sup> century, the change to positivist postulates was a reality, even for pure Neoclassical supporters, who also unconsciously implemented positivist elements.

In a nutshell, one of them stood out for their conception of the criminal. A criminal was not conceived as a “criminal” but rather as a “person that has committed a crime”. And this individual was “cured” when he served his penalty, and thus, extinguished his moral responsibility. Regrettably, according to Dorado Montero, this was not always the case:

“Not all the individuals carrying out acts considered as criminal, either by laws, writers or people belonging to a certain social circle, are criminals”.<sup>334</sup>

That was why the criminal phenomenon had a moral entity: the perspective held was not an exclusivist, biological one. Rehabilitation of the

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<sup>333</sup> Ramos Vázquez, I., *La reforma penitenciaria en la historia contemporánea española*, Madrid: Dykinson, 2013, pp. 190-208.

<sup>334</sup> Dorado Montero, P., *Bases para un nuevo Derecho penal*, Barcelona: Manuel Soler, 1902, p. 37: “No todos los individuos que realizan actos de los que se consideran como delitos, ya por las leyes, ya por los escritores, ya por las personas pertenecientes en general á un círculo social determinado, son delincuentes”.

criminal was not one of the objectives of such schools. The pursued goal was the most classical retributionism; although some sub-branches might consider ‘rehabilitation’ as a remotely accessory objective.<sup>335</sup>

Absolute theories were usually the predominant ones within Neoclassical Schools. For them, the punishment was to develop a mere retribution function: an eye for an eye, a tooth for a tooth. The so-called *Lex Talionis* operated here as a forerunner of the absolute theories. Being ‘absolute’ meant that they were not conditioned to anything and that this retribution was a *conditio sine qua non* to bring justice. Nowadays, such conception has been overcome. Yet, some scholars have proposed that, according to Hesiod’s *Theogony*, the assessment of revenge as a type of justice did not necessarily enclose an irrational foundation:

“The duty of revenge emerges in that a universal principle (Θεμις) has been breached – it has been lacked respect (Αιδώς)-. Therefore, in revenge the man rises [...] because he demands retroactively with the other man -he who performed the crime- the admission of his responsibility”.<sup>336</sup>

Dorado Montero often criticised that the ‘purported’ eclectic authors of his time were actually ‘stucked’ at the neoclassical criminal law framework for holding freewill conceptions which took us back to traditional views: “which conception do they have other than the penalty as an evil and as a punishment?”.<sup>337</sup> It was precisely this, as we shall see later on, what caused them countless “troubles” for their theoretical incoherence.<sup>338</sup>

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<sup>335</sup> Moreu, Á. C., “La recepción de las doctrinas correccionalistas en España. Políticas educativas y metodologías psicopedagógicas”, *Revista de Educación*, No. 340, 2006, pp. 755-785.

<sup>336</sup> Ibarra Becerra, V., “La condena de la venganza privada tras la justicia punitiva. Contraste y continuidad entre *La Orestíada de Esquilo*”, *Ideas y valores*, Vol. 65, No. 162, p. 295: “La obligación de venganza aparece por cuanto un principio universal (Θεμις) ha sido quebrantado –se le ha faltado al respeto (Αιδώς)-. En la venganza el hombre se eleva, por lo tanto, a su consideración genérica, porque exige retrospectivamente del otro hombre, del que ha perpetrado el crimen –que en este contexto no puede ser otro que el asesinato– la admisión de su responsabilidad”.

<sup>337</sup> Dorado Montero, P., *El Derecho protector de los criminales*, Ed. Jiménez Gil, Tomo 1, Madrid, 1915, pp. 429-431.

<sup>338</sup> Dorado Montero, P., *El Derecho protector de los criminales*, Ed. Jiménez Gil, Tomo 1, Madrid, 1915, pp. 429-431.



### 3.2. The Positivist Schools

The Positivist Schools originated as a reaction against the Neoclassical Schools. Their main representatives were Cesare Lombroso,<sup>339</sup> Enrico Ferri<sup>340</sup> and Raffaele Garofalo.<sup>341</sup> Their Spanish counterparts were Quintiliano Saldaña,<sup>342</sup> Concepción Arenal,<sup>343</sup> Rafael Salillas<sup>344</sup> (to whom Dorado Montero devoted an article on his own, later on integrated in one of his books)<sup>345</sup> and Federico Castejón y Martínez de Arizala.<sup>346</sup> Many contemporary scholars often

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<sup>339</sup> Lombroso, C., *L'uomo delinquente*, Torino: Fratelli Bocca, 3<sup>a</sup> ed., 1884; Lombroso, Cesare, *Los últimos progresos de la antropología criminal*, Madrid: La España Moderna, 1895; *Medicina legal*, Madrid: La España Moderna, 1890; *El hipnotismo*, Madrid: La España moderna, 1890; *Grafología*, Milano: Ulrico Hoepli, 1895; *Los fenómenos de hipnotismo y espiritismo*, Madrid: M. Aguilar, 1910; *Escritos de polémica*, Madrid: Tip. de Alfredo Alonso, 1893; *La donna delinquente: la prostituta e la donna normale*, Torino: Fratelli Bocca, 5<sup>a</sup> ed., 1927; *El delito: sus causas y remedios*, Madrid: Librería General de Victoriano Suárez, 1902; *Los criminales*, Barcelona: Atlante, 1911; *El antisemitismo*, Madrid: Viuda de Rodríguez Serra, 1904; *Los anarquistas*, Madrid: Estab. Tip. Sucesores de Rivadeneyra, 1894.

<sup>340</sup> Ferri, E., *Principii di diritto criminale : delinquente e delitto*, Torino: Unione Tipografico-Editrice Torinese, 1928; Ferri, E., *Proyecto preliminar de código penal para Italia*, Madrid: Centro Editorial de Góngora, 1925; Ferri, E., *Sociología criminal*, Madrid: Centro Editorial de Góngora, 1907.

<sup>341</sup> Garofalo, R., *Indemnización á las víctimas del delito*, Madrid: La España Moderna, 1890; Garofalo, R., *Criminología: studio sul delitto e sulla teoria della repressione*, Torino: Fratelli Bocca, 1885; Garofalo, R., *La superstizione socialista*, Torino: Roux Frassati e Co., 1895; Garofalo, R., *Riforma della procedura penale in Italia. Progetto di un nuovo codice*, Torino: Fratelli Bocca, 1889; Garofalo, R., *I congressi giuridici in Italia*, Napoli: Tip. della R. Università, 1907; Garofalo, R., *Alcune osservazioni sul progetto del codice penale con relazione di Zanardelli presentato alla camera dei deputati da Savelli il 26 novembre 1883*, Torino: Fratelli Bocca, 1884; Garofalo, R., *Contro la corrente! Pensieri sulla proposta abolizione della pena di morte nel progetto del nuovo codice penale italiano*, Napoli: Ernesto Anfossi, 1888; Garofalo, R., *Commentario del Nuovo codice di procedura penale*, Milano: F. Vallardi, 1914

<sup>342</sup> Saldaña, Q., *El momento de España (ensayos de sociología política)*, Madrid: Mundo Latino, 1929; Saldaña, Q., *El futuro código penal: la reforma del código penal*, Madrid: Editorial Reus, 1923; Saldaña, Q., *Die pragmatische Gerechtigkeit*, Berlin-Grunewald : Verlag für Staatswissenschaften und Geschichte, 1935; Saldaña, Q., *Comentarios científico-prácticos al Código penal de 1870*, Madrid: Editorial Reus, 1920; Saldaña, Q., *La criminologie nouvelle*, Paris : Presses universitaires, 1929.

<sup>343</sup> Arenal, C., *Estudios penitenciarios*, Madrid: Imprenta de T. Fortanet, 1877; Arenal, C., "Lettre à M. Le Directeur General de L'Administration Pénitentiaire D'Espagne", *Bulletin de la Société Générale des Prisons*, 1883, pp. 468-475.

<sup>344</sup> Salillas, R., *La vida penal en España*, Madrid: Imprenta de la Revista de la Legislación, 1888; Salillas, R., *El delincuente español. El lenguaje (estudio filológico, psicológico y sociológico) con dos vocabularios jergales*, Madrid: Librería de Victoriano Suárez, 1896 (available at <http://www.cervantesvirtual.com/obra/el-delincuente-espanol-el-lenguaje-estudio-filologico-psicologico-y-sociologico-con-dos-vocabularios-jergales--0/>); Salillas, R., "Los locos delincuentes en España", *RGLJ*, T. LXIV, 1899, pp. 117-142.

<sup>345</sup> Dorado Montero, P., "Sobre el libro Hampa del Dr. Salillas", *Derecho protector de los criminales*, Madrid: Lib. de Victoriano Suárez, 1915.

<sup>346</sup> Castejón, F., *Legislación penitenciaria española*, 1914; Castejón, F., *Tratado de la responsabilidad*, 1926; Castejón, F., *Datos para una reforma penal*, 1934; Castejón, F., *Unificación de estadísticas criminales*, 1936; Castejón, F., *Anteproyecto de código penal subjetivo*, 1944; Castejón, F., *Memoria sobre proyecto de Código penal Internacional*, 1952;

show discrepancies on how to classify them. That is why it is important to stress the several sub-schools within this movement: the technical-legal school (von Beling<sup>347</sup> and Arturo Rocco<sup>348</sup>), critical positivism (Adolphe Prins,<sup>349</sup> Anton Gerard van Hamel<sup>350</sup> and Franz von Liszt,<sup>351</sup> who created the International Union

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Castejón, F., *Unificación legislativa iberoamericana*, 1947; Castejón, F., *Legislación penitenciaria española*, 1914.

<sup>347</sup> Beling, E., *Die Beweisverbote als Grenzen der Wahrheitserforschung im Strafprozess*, Darmstadt: Wissenschaftliche Buchgesellschaft, zweite Ausgabe, 1968; *Derecho procesal penal*, Barcelona: Barcelona, 1943; *Esquema del Derecho penal: la doctrina del delito-tipo*, Buenos Aires: El Foro, 2002; *Deutsches Reichsstrafprozessrecht mit Einschluss des Straferichtsverfassungsrechts*, Berlin: Walter de Gruyter, Berlin, 1928; *Die geschichtliche Entwicklung der Retorsion und Kompensation von Beleidigungen und Körperverletzungen*, Breslau: Schletter'sche Buchhandlung, 1894; *Die Lehre vom Verbrechen*, Tübingen: Mohr, 1906; *Münchener Festgabe für Karl von Birkmeyer*, Aalen: Scientia Verlag, 1992; *Las prohibiciones probatorias*, Bogotá: Temis, 2009; *El rector de los tipos de delito*, Madrid: Reus, 1936; *Unschuld, Schuld und Schuldstufen : im Vorentwurf zu einem deutschen Strafgesetzbuch*, Aalen: Scientia, 1971.

<sup>348</sup> Rocco, A., *Opere giuridiche*, Roma: Foro Italiano, 1932; *El Problema y el método de la ciencia del derecho penal*, Bogotá: Temis, 3<sup>a</sup> ed., 2009; *Cinco estudios de Derecho penal*, Montevideo: B de F, 2003; *El objeto del delito y de la tutela jurídica penal: contribución a las teorías generales del delito y de la pena*, Buenos Aires: B de F, 2001.

<sup>349</sup> Prins, A., *Des droits de souveraineté de l'état sur l'église en Belgique*, 1874 ; *De l'appel dans l'organisation judiciaire répressive. Étude historique et critique*, 1875 ; *Discours sur le développement politique de l'ancien droit national*, 1875 ; *Le jury moderne et l'organisation judiciaire*, 1877 ; *La philosophie du droit et l'école historique*, 1882 ; *La démocratie et le régime parlementaire*, 1884 ; *Criminalité et répression. Essai de science pénale*, 1886 ; *La loi sur la libération conditionnelle et les condamnations conditionnelles*, 1888 ; *L'organisation de la liberté et le devoir social*, 1895 ; *Science pénale et droit positif*, 1899 ; *De l'esprit du gouvernement démocratique. Essai de science politique*, 1906 ; *La défense sociale et les transformations du droit pénal*, 1910.

<sup>350</sup> Van Hamel, A. G., « L'Album de Louise de Coligny », *Extrait de la Revue d'histoire littéraire de la France*, Paris : A. Colin, 1903 ; *Bijdrage tot de vergelijking van « Cligès » en « Tristan »*, Leiden : J. M. N. Kapteijn, Congress on 06.06.1904; *La Chaire de français dans une Université néerlandaise*, Groningue : J. B. Wolters, Speech on 29.09.1884; *Conrad Busken Huet, door Prof. Dr. A. G. Van Hamel*, Haarlem : H. D. Tjeenk Willink, 1886 ; *Feestrede ter opening der reunie van oud-studenten der Groningsche Hoogeschool den 11en juli 1904 in de Martinikerk, uitgesproken door A. G. Van Hamel*, gedrukt bij gebroeders Hoitsema, Groningen ; « Fransche spraakkunst », *De Gids*, no. 4, 1901 ; « Gesproken en geschreven Fransch », *De Gids*, no. 11, 1890 ; « Cd Busken Huet en Prof. Dr. A. G. Van Hamel », *De Portefeuille*, Amsterdam : M. M. Olivier, 1886 ; *Het Letterkundig leven van Frankrijk*, Amsterdam, 1902 ; *A. G. Van Hamel. Het Letterkundig leven van Frankrijk*, P. N. Van Kampen en zoon, Amsterdam, 1898-1902 ; « Het Poëzie-Album van Louise de Coligny », *De Gids*, no. 9, Amsterdam, 1898 ; *Proeve eener kritiek van de leer der goddelijke voorzienigheid*, Groningen : P. Noordhoff, 1879 ; « Les Récits médiévaux de Tristan et Iseut », Conférence faite à l'Université de Bordeaux, 15 janvier 1904 », *Revue philomathique de Bordeaux et du Sud-Ouest*, no. 6, Bordeaux : Impr. de G. Gounouilhou, 1904 ; *Zeventiende-eeuwsche opvattingen in theorieën over litteratuur in Nederland*, Utrecht : Hes publishers, 2<sup>nd</sup> ed., 1973 ; *Het Zoeken van "l'âme française" in de letterkunde en de taal van Frankrijk*, Groningen : J. B. Wolters, 1897.

<sup>351</sup> Von Liszt, F., *La idea de fin en el derecho penal*, Valparaíso: Edeval, 1984; *Die Deliktobligationen im System des Bürgerlichen Gesetzbuch. Kritische und dogmatische Randbemerkungen*, Berlin: J. Guttentag, 1898; *Le droit international : exposé systématique*, Paris : Pedone, 1927; "La legislación penal comparada", *Revista de Medicina y Cirugía Prácticas*, Madrid, 1896; *Lo que hará Alemania si vence : una Confederación centro-europea*, Madrid: Establecimiento Tipográfico de Fortanet, 1915; *Strafrechtliche Aufsätze und Vorträge*, Berlin:

of Penal Law), and also the so-called *Terza Scuola* (Emanuele Carnevale<sup>352</sup> and Bernardino Alimena<sup>353</sup>). Unsurprisingly, it had been said that “Italians invented four times Criminal law: the first time with the Roman Empire and all its legal work; the second time with Beccaria who commanded the man ‘Go and accomplish the Law’; the third one with Lombroso, Ferri and Garofalo and their command ‘Go and study the man’; and finally, the fourth one when trying to reunite and harmonise previous concepts in order to set up the *Terza Scuola* of Criminal law”.<sup>354</sup> Besides, one may find the humanist school (Vicente Lanza<sup>355</sup>), neopositivism (Filippo Grispigni<sup>356</sup>, Ferdinando Puglia<sup>357</sup> and Eugenio Florián<sup>358</sup>), and correctionalism. Correctionalism, in its turn, is divided into pure correctionalism (Karl David August Röder),<sup>359</sup> judicial protection (Francisco

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Walter de Gruyter & Co., 1970; *Strafrechtsfaelle zum akademischen Gebrauch*, Jena: Gustav Fischer, 8th ed., 1906.

<sup>352</sup> Carnevale, Emanuele, *Diritto criminale*, Roma: Società Editrice del Foro Italiano, 1932.

<sup>353</sup> Alimena, B., *El delito en el arte*, Santa Fe de Bogotá: Temis, 1990; *Delitos contra la persona*, Santa Fe de Bogotá: Temis, 1975; *I limiti e i modificatori dell'imputabilità*, Torino: Fratelli Bocca, 1894-1899; *Notas filosóficas de un criminalista*, Madrid: Hijos de Reus, 1913; *La premeditazione: in rapporto alla psicologia, al diritto, alla legislazione comparata*, Roma: Fratelli Bocca, 1887; *Principios de derecho penal*, Madrid: Libr. General de Victoriano Suárez, 1915; *Studi di procedura penale*, Torino: Fratelli Bocca, 1906.

<sup>354</sup> Rodríguez Manzanera, L., *Criminología*, Ciudad de México: Porrúa, 2ª ed., 1981, pp. 245 y 246. Original text: “se dice que los italianos han inventado cuatro veces el Derecho Penal: La primera con el imperio de Roma, al realizar la gran obra jurídica; la segunda con Beccaria, al decir al hombre: “Ve y cumple el Derecho”; la tercera con Lombroso, Ferri y Garófalo, al decir al Derecho: “Ve y estudia al hombre”; y la cuarta al tratar de reunir y conciliar los conceptos anteriores para fundar la “Tercera Escuela” de Derecho Penal”.

<sup>355</sup> Lanza, V., «L'Umanesimo nel Diritto penale», *La Scuola penale umanista*, Catania, 1906. Of the same author, *Instituzioni di diritto penale*, Catania, 1924.

<sup>356</sup> Grispigni, F., *Diritto penale italiano*, Milano: Dott. A. Giuffrè, 1952; *Diritto processuale penale, con l'indicazio di tutte le modificazioni legislative posteriori all 8-9-1943 fino al 28-2-1945*, Roma: Edizioni Italiane, 1945; *Introduzione alla sociologia criminale: oggetto e natura della sociologia criminale il metodo, il concetto sociologico della criminalità*, Torino: Unione Tipografico-Editrice Torinese, 1928; *La reforma penal nacional-socialista*, Buenos Aires: Ediar, 2009.

<sup>357</sup> Puglia, F., *Prolegomini allo Studio del Diritto repressivo*, Napoli, 1883. Of the same author, *Tratatto di Diritto Penale*, Napoli, 1902.

<sup>358</sup> Florián, E., *Il metodo positivo nella scienza del diritto penale*, Modena: L'Università degli Studi, 1925; *Parte generale del diritto penale*, Milano: Francesco Vallardi, 4ª ed., Milano, 1934; *La teoria psicologica della diffamazione: studio sociologico-giuridico*, Torino: Fratelli Bocca, 2ª ed., 1927; *De las pruebas penales*, Santa Fe de Bogotá: Temis, 1995; *Delitti contro il sentimento religioso e la pietà dei defundi: titolo IV e titolo XII del libro II del codice penale*, Milano: Francesco Vallardi, 4ª ed., 1936; *Dizionario di criminologia*, Milano: Francesco Vallardi, 1943; *Elementos de derecho procesal penal*, Barcelona: Librería Bosch, 1934.

<sup>359</sup> Röder, K. D. A., *Estudios sobre Derecho penal y sistemas penitenciarios: fundamento jurídico de la pena correccional*, Madrid: Imprenta de T. Fortanet, 1875.

Giner de los Ríos),<sup>360</sup> and the *Derecho Protector de los Criminales* (Pedro Dorado Montero). To this latter, one should add his most famous supporters: Constancio Bernaldo de Quirós<sup>361</sup> and Jiménez de Asúa.<sup>362</sup>

In his *Problemas jurídicos contemporáneos*, Dorado Montero briefly outstood the main changes experienced by the criminal law when it transitioned from neoclassical postulates to positivist postulates, namely: the principle “*nullem crimen sine lege*” was substituted for the discretionality of the judiciary; the abstract principle of equality of every person before the law was replaced by the individualisation of the penalty; establishing the time in prison beforehand lost terrain in favour of the undeterminate sentence; and the conception of the crime as a punishment acquired the acception of crime as a treatment.<sup>363</sup>

In this time, the boundaries between the different manifestations of the Positivist Schools were blurred. To clarify this aspect, I left aside those sciences

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<sup>360</sup> Giner de los Ríos, F., Vid., in Espasa-Calpe, Madrid, 1933; *Principios de Derecho natural* (1875); *La Universidad española*; *Estudios de Literatura y Arte* (1876); *Lecciones sumarias de Psicología* (1874); *Estudios jurídicos y políticos* (1875); *Estudios filosóficos y religiosos* (1876); *Estudios sobre educación* (1886); *La persona social. Estudios y fragmentos I* (1899); *La persona social. Estudios y fragmentos II* (1899); *Pedagogía universitaria* (1905); *Filosofía y Sociología: Estudios de exposición y de crítica* (1904); *Educación y enseñanza* (1889); *Resumen de Filosofía del Derecho I* (1898); *Resumen de Filosofía del Derecho II* (1898); *Estudios sobre Artes industriales y cartas literarias*; *Ensayos menores sobre educación y enseñanza I*; *Ensayos menores sobre educación y enseñanza II*; *Ensayos menores sobre educación y enseñanza III*; *Informes del Comisario de Educación de los Estados Unidos*; *Arqueología artística de la Península*; *Notas a la Enciclopedia jurídica de Ahrens, de Gumersindo de Azcárate y Francisco Giner*.

<sup>361</sup> Bernaldo de Quirós, C., *Las nuevas teorías de la criminalidad*, Madrid: Hijos de Reus, 1898; *Alrededor del delito y de la pena*, Madrid: Viuda de Rodríguez Serra, 1904; *Derecho Penal*, Madrid: Instituto Reus, 1931; *Cursillo de criminología y Derecho penal*, Santo Domingo: Montalvo, 1940; *Lecciones de legislación penal comparada*, Santo Domingo: Montalvo, 1944; *El bandolerismo en España y en México*, México: Jurídica Mexicana, 1959.

<sup>362</sup> Jiménez de Asúa, L., *La sentencia indeterminada. El sistema de penas determinadas “a posteriori”*, Madrid: Reus, 1913; “La pena previamente indeterminada y las penas retenidas”, *Actas del Segundo Congreso penitenciario español*, A Coruña: Garcybarra, 1915; *La recompensa como prevención general. El derecho premial*, Madrid: Reus, 1915; *Rapport sur le principe de la sentence indéterminée. Troisième question. Première section. Congrès Pénitentiaire international de Londres 1925*, Buenos Aires: Talleres gráficos de la Penitenciaría Nacional, 1925; “Evolución política y derecho penal. Carta al maestro Enrique Ferri”, *La Prensa*, 1927; *El código penal argentino y los recientes proyectos complementarios ante las modernas direcciones del Derecho penal*, Madrid: Reus, 1928; *La sentencia indeterminada*, 2ª ed., Buenos Aires: Tea, 1947; “Algunas consideraciones sobre los delitos preterintencionales”, *Revista jurídica de Buenos Aires*, Buenos Aires, 1959; *Tratado de Derecho penal*, Tomo II, Buenos Aires: Losada, 1963; *Estudios de derecho penal y criminología*, Tomo I, Buenos Aires: Omeba, 1961; *Estudios de derecho penal y criminología*, Tomo II, Buenos Aires: Omeba, 1963.

<sup>363</sup> Dorado Montero, P., *Problemas jurídicos contemporáneos*, Madrid: La España Moderna, 1893, p. 6.

'less directly related' such as social economy,<sup>364</sup> social philosophy or political economy. That being said, the core ones (Criminal law, Sociology and Criminal anthropology) were deeply intertwined and often confused. Even for most outstanding scholars, the issue found a practical difficulty: "sometimes it is not easy to set out the boundaries between the new theories, such as, for example, between correctionalism and the positivist school (or Criminal Anthropology), as Bernaldo de Quirós acknowledged when dealing with this issue".<sup>365</sup> Notwithstanding the degree of struggle, Dorado Montero pointed out the need of establishing a clear delimitation:

"Criminal law and criminal anthropology are not the same thing, yet they are two things which cannot be separate. Criminal sociology and criminal law are not the same thing either, but they are two things intimately related as well, just as the whole and the part are. We believe that the relationship between those sciences is as follows: just as sociology is not the law, but it is inside it; the law is inside the criminal sociology [...]"<sup>366</sup>

Besides, Dorado Montero clearly stated that "Italian authors writing on positivist legal philosophy and sociology" had never achieved to accurately determine "the concept of both disciplines" neither "their relationship" nor whether "they should retain their independence or they should merge into one".<sup>367</sup> Both of them "ought not to get mixed", but neither get "separated", given that "sociology must wholly assist legal philosophy".<sup>368</sup> To sociology corresponded human relationships "with a social character"; and to legal philosophy corresponded the "individual character" of those human relationships.<sup>369</sup> Such should be the complementary nature of those disciplines' relation of interdependence.

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<sup>364</sup> Dorado Montero, P., *El positivismo en la ciencia jurídica y social italiana*, Madrid: Imprenta de la Revista de Legislación, 1891, p. 17: "with works like those of Roscher, Hildebrand, Knies, Cliffe, Leslie, Scheel, Roesler, Schäffle, etc."

<sup>365</sup> Masferrer, A., "The Reception of the Positivist School in the Spanish Criminal Doctrine (1885-1899)", *GLOSSAE. European Journal of Legal History*, no. 17, 2020, p. 4.

<sup>366</sup> Dorado Montero, P., *El Derecho protector de los...*, v.1, p. 174.

<sup>367</sup> Dorado Montero, P., "Reseña al libro de Anziolotti: 'La Filosofia del Diritto e la Sociologia'", *RGLJ*, Vol. 41, No. 82, 1893, pp. 427-429, p. 427.

<sup>368</sup> Dorado Montero, P., "Reseña al libro de Anziolotti: 'La Filosofia del Diritto e la Sociologia'", *RGLJ*, Vol. 41, No. 82, 1893, pp. 427-429, p. 429.

<sup>369</sup> Dorado Montero, P., "Reseña al libro de Anziolotti: 'La Filosofia del Diritto e la Sociologia'", *RGLJ*, Vol. 41, No. 82, 1893, pp. 427-429, p. 429.

*Grosso modo*, the main features of the Positivist Schools read as follows. They used an inductive method, more commonly referred to as the scientific method. Rationalism that preceded it led some room for the eclosion of the scientific spirit as well as for an unprecedented development of science and a renewed faith on biological sciences, engineering and mathematics. This system was therefore based in *a posteriori* experience. Criminal conclusions were extracted from observation, study and the classification of facts. Its main objective is to fight criminality, rather than a mere distributive principle (as held by the Neoclassical Schools). Positivist Schools deemed that the criminal phenomenon did not affect every individual the same. Thus, consequences could not be the same for all neither at the same degree. Positivists based criminal responsibility on social responsibility.<sup>370</sup> Moral responsibility was substituted by social responsibility. Many positive advances took place thanks to it: mitigating or exculpatory circumstances as regarding the determination of the penalty, security measures and individualisation of the penalty, among others.<sup>371</sup>

If the Neoclassical Schools did speak of penalty, the Positivist Schools would talk of sanction. The latter had no determined duration, as opposed to the previous one. It was linked to the criminal's dangerousness. This entailed a great difference between the two groups: the penalty was exhaustible (Neoclassical Schools), whereas the sanction (Positivist Schools) was not *stricto sensu*. Besides, the 'penalty' should be useful. They were at the peak of the utilitarian period and conceptions coming from Jeremy Bentham,<sup>372</sup> John Stuart Mill,<sup>373</sup> William

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<sup>370</sup> De Aramburu y Zuloaga, F., *La nueva ciencia penal. Exposición y crítica*, Madrid: Librería de Fernando Fé, 1887, p. 230.

<sup>371</sup> A very detailed study on the subject can be found in Pifferi, M., "Exporting criminology: the individualization of punishment in Europe and America", Beck Varela, L., (Coord.), Gutiérrez Vega, P., (Coord.), Spinosa, A., (Coord.), *Crossing legal cultures*, München: Martin Meidenbauer, 2009, pp. 441-459.

<sup>372</sup> Bentham, J., *The Rationale of Punishment*, London : R. Heward, 1830.

<sup>373</sup> Mill, J. S., *Two letters on the measure of value*, Baltimore: Johns Hopkins University, 1936; *Questions of Population*, 1823; *War Expenditure*, 1824; *Quarterly Review – Political Economy*, 1825; *Review of Miss Martineau's Tales*, 1830; *The Spirit of the Age*, 1831; *Use and Abuse of Political Terms*, 1832; *What is Poetry?*, 1833; *Rationale of Representation*, 1835; *De Tocqueville on Democracy in America, part 1*, 1835; *State of Society In America*, 1836; *Civilization*, 1836; *Essay on Bentham*, 1838; *Essay on Coleridge*, 1840; *Essay On Government*, 1840; *De Tocqueville on Democracy in America, part 2*, 1840; *A System of Logic*, 1843; *Essays on Some Unsettled Questions of Political Economy*, 1844; *Claims of Labour*, 1845; *The Principles of Political Economy: with some of their applications to social philosophy*, 1848; *The Negro Question*, 1850; *Reform of the Civil Service*, 1854; *Dissertations and Discussions*, 1859; *A Few*

Godwin,<sup>374</sup> John Austin<sup>375</sup> or Henry Sidgwick<sup>376</sup> were burgeoning. Despite utilitarianism was deeply criticised, it resulted useful due to its remarkably role on the humanisation of penalties. A report conducted by Robert Martinson proved that incarceration penalties (even the most humanitarian, re-educative and reintegrating ones) fell when it came to avoid future recidivism:

“For young males as a whole, the degree of success achieved in the regular prison academic education program, as measured by changes in grade achievement levels, made no significant difference in recidivism rates”.<sup>377</sup>

Certain trends abrogated for a different approach than that of the traditional Criminal law towards a biologist analysis, neurological sciences<sup>378</sup> and psychiatric disciplines.

A conception of penalty dating from previous times was over. In pre-French Revolution’s criminal law, there were incarceration penalties with abuses, torture and arbitrariness, whereas in the Neoclassical’s Criminal law period, humanised incarceration saw the light. However, it was the Positivist Schools the ones operating a major shift: they opted instead for the so-called “penal

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*Words on Non-intervention, 1859; On Liberty, 1859; Thoughts on Parliamentary Reform, 1859; Considerations on Representative Government, 1861; Centralisation, 1862; The Contest in America, 1862; Utilitarianism, 1863; An Examination of Sir William Hamilton's Philosophy, 1865; Auguste and Positivism, 1865; Inaugural Address at St. Andrews Concerning the value of culture, 1867; Speech In Favor of Capital Punishment, 1868; England and Ireland, 1868; Thornton on Labor and its Claims, 1869; The Subjection of Women, 1869; Chapters and Speeches on the Irish Land Question, 1870; Nature, the Utility of Religion, and Theism, 1874; and Three Essays on Religion, 1874.*

<sup>374</sup> Godwin, W., *Enquiry concerning political justice and its influence on morals and happiness*, Toronto: University of Toronto Press, 3<sup>rd</sup> ed., 1946. Of the same author, *Of population: an enquiry concerning the power of increase in the numbers of mankind being an answer to Mr. Malthus's essays on that subject*, New York: Augustus M. Kelley, 1964.

<sup>375</sup> Austin, J., *Lectures on jurisprudence*, Bristol: Thoemmes Press, 1996; *El objeto de la jurisprudencia*, Madrid: Centro de Estudios Políticos y Constitucionales, 2003; *The province of jurisprudence determined*, Cambridge: Cambridge University Press, 1995; *Sobre la utilidad del estudio de la jurisprudencia*, Madrid: Instituto de Estudios Políticos, 1951.

<sup>376</sup> Sidgwick, H., *The methods of ethics*, London: Macmillan and co., 3<sup>rd</sup> ed., 1884; *The principles of political economy*, New York: MacMillan Company, 2<sup>nd</sup> ed., 1887; *Outlines of the history of ethics for English readers*, London: MacMillan, 1967; *The methods of ethics*, Indianapolis: Hackett Publishing Company, 7<sup>th</sup> ed., 1981; *Essays on ethics and method*, Oxford: Clarendon Press, 2000.

<sup>377</sup> Martinson, R., «What Works? Questions and Answers about Prisons Reform», *The Public Interest*, T. 35, New York: Spring, 1974, p. 25: “For young males as a whole, the degree of success achieved in the regular prison academic education program, as measured by changes in grade achievement levels, made no significant difference in recidivism rates”.

<sup>378</sup> Dorado Montero, P., *Los peritos médicos y la justicia criminal*, Madrid: Hijos de Reus, 1906, p. 160.

substitutes”.<sup>379</sup> The term was coined by Enrico Ferri and it referred to a set of measures offering a suitable alternative to penalties involving deprivation of liberty, which were considered to be inefficient.<sup>380</sup> Nevertheless, it was not due to the demolishing impact that liberty-deprivation penalties had in the long term. Their repercussion in the short term was very negative as well. Adolphe Prins held those were “onerous to the Public Treasure”, they had “no deterrence effect over the toughened [criminals]” and they were “hazardous to individuals that still preserve[d] some feelings of dignity”.<sup>381</sup> Ferri’s penal substitutes, however, were entirely different to those contained in contemporary Criminal law. The first ones defended a set of measures not strictly falling the realm of Criminal law, but within educative, social, civil and administrative spheres. The second ones had a more “penal” perspective. A good example was the current Spanish Criminal Code. It was subjected to the Spanish Constitution (CE) and, therefore, it should accomplish with the resocialisation mandate as set in the first part of article 25.2 of the CE: “Punishments entailing imprisonment and security measures shall be aimed at reeducation and social rehabilitation and may not involve forced labour”.<sup>382</sup> The legislature justified on this ground the suspension and the substitution of penalties involving deprivation of liberty. Additionally, one should check the Spanish Criminal Code (“On substitute forms of execution of sentences depriving of freedom and on probation”).<sup>383</sup> In its content (articles 80-97), the sense of the changes that substitutes underwent can be grasped.

All things considered, positivism heavily relied on proportionality. Neoclassical Schools defended the equality principle, and they generally

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<sup>379</sup> Seen on 17.06.2018. <https://www.infoderechopenal.es/2013/05/sustitutivos-penales.html>.

<sup>380</sup> Vid. Ferri, E., *Dei sostitutivi penali*, Torino: Roux e Favale, 1880.

<sup>381</sup> Prins, A., *Science pénale et droit positif*, Brussels, 1899, p. 467.

<sup>382</sup> “Article 25”, *La Constitución Española*. For an official version in English of the Spanish Constitution, vid. the Spanish translation by the Spanish Ministry of Justice: <https://www.mjusticia.gob.es/es/areas-tematicas/documentacion-publicaciones/publicaciones/traduccion-derecho-espanol>. Seen on 05.03.2021.

<sup>383</sup> *Código Penal español*, articles 80-91. For an official version in English of the Spanish Criminal Code, vid. the Spanish translation by the Spanish Ministry of Justice: <https://www.mjusticia.gob.es/es/areas-tematicas/documentacion-publicaciones/publicaciones/traduccion-derecho-espanol>. Seen on 05.03.2021.



distrusted a different treatment for different circumstances.<sup>384</sup> Neoclassical Schools focused more on the formal equality principle, whereas the Positivist Schools did so on the material equality principle. Criminal legislation was not passed exclusively by the legislative power. For positivism, the legislative power was divided, fractioned and democratised between the legislator and the technical bodies, i.e. criminologists, physicians, sociologists, neurologists, psychiatrics and other professional agents. Science was extolled in excess. Neoclassicals blamed on positivism that science could never possibly foresee all future actions of man; for them, men possessed freewill that should always be respected and positivists deliberately overlooked that fact. Yves Cartuyvels identified two main elements that explained this phenomenon:

“The absolute trust (if not completely blind) in both axiological truth and neutrality of its own constructions, as well as the adrift of a scientific project that used itself for the purpose of achieving certain social goals”.<sup>385</sup>

Furthermore, Positivist Schools established “criminal profiles”. They were a set of categories of sociological nature systematising a sort of criminal’s catalogue. Lombroso erected as the great exponent of Criminal Anthropology. Current data showed that his theory could no longer be subscribed, and it has been labelled as ‘pseudoscientific’ ideas.<sup>386</sup> Many concepts, debates and arguments were “rarely based on comprehensive empirical research on crime”, but rather it drew from “existing law, international comparison, judicial

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<sup>384</sup> However, one should not fall into an oversimplification mistake since modifying circumstances of the penalty already existed in the Middle Ages. Vid., Vid., Masferrer, A., *Spanish Legal Traditions*, Madrid: Dykinson, 2<sup>o</sup>ed., 2012, pp. 353-354.

<sup>385</sup> Cartuyvels, Y., « La biologisation du crime à la fin du XIXe siècle : quelques enjeux et limites », *Jurisprudence. Revue critique*, Vol. I, numéro spécial, 2015, p. 206 : “*La confiance absolue sinon aveugle de la science dans la vérité et la neutralité axiologique de ses propres constructions et les dérives d’un projet scientifique qui s’instrumentalise d’entrée lui-même à des fins sociales spécifiques*”. Translation is ours.

<sup>386</sup> Little, B., “What Type of Criminal Are You? 19th-Century Doctors Claimed to Know by Your Face”, *History*, 08.08.2019: “What Lombroso was doing was combining phrenology and physiognomy, two types of pseudoscience that purported to explain a person’s personality and behavior based on his skull and facial features, respectively”. Besides, Lombroso was not only criticised by Dorado Montero. Much before, Pulido Fernández held that “phrenomatic science is a truly doctrinal asylum where each author puts in or out, devises and talks as he wants, and out of whose conflict is impossible to infer anything permanent”. Vid. Pulido Fernández, A., *Locos delincuentes. Discursos pronunciados en la Sección de Ciencias Naturales del Ateneo científico y literario de Madrid sobre el tema ‘Estado actual de la ciencia frenopática y sus relaciones con el Derecho penal’*, Madrid: Imprenta de la Revista de Legislación, 1883.

arguments, judicial practice and established narratives”.<sup>387</sup> However, not all of them were dragged by the positivist fever. Some others, who “generally sympathised” with the positivist postulates, opted out for being cautious and “not to hurry theories” whenever the facts were not “sufficiently checked”. They tried their best “not to fall into a new metaphysics”.<sup>388</sup> Dorado Montero included within such groups the following authors: von Liszt, Lacassagne, Tarde, Colajanni and the members of the Terza Scuola.<sup>389</sup>

Nevertheless, the methodology he used was very systematic: his theory was the result of more than four-hundred convicted autopsies and of six thousand analysis of living criminals.<sup>390</sup> The most common criminal traits were usually head protuberances, prominent cheekbones and slanted eyes.<sup>391</sup> Afterwards, they were classified as accountant (born, habitual, moral-fool, occasional and professional) and non-accountable (crazy, epileptic, etc.).<sup>392</sup> Ultimately, the criminal category of “passional” could not be classified neither as accountable nor as non-accountable: it depended upon an exhaustive psychological analysis.

Roughly, positivist trends bifurcated into two tendencies: a more biological-alike determinism (Lombroso) and into a more social-alike one (Ferri and Garofalo).<sup>393</sup> Yet, it actually varied enormously depending on the author and on his particularities. Ferri introduced a far kinder criminal’s theory than that of Lombroso.<sup>394</sup> It was closer to our current conception. His classification was based

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<sup>387</sup> Härter, K., “Zweckgedanke, Social Defence and Transnational Criminal Law: Franz von Liszt and the Network of Positivist Criminology (1871-1918)”, *GLOSSAE. European Journal of Legal History* 17 (2020), pp. 150-175, p. 170.

<sup>388</sup> Garofalo, R., *Indemnización á las víctimas del delito*, Madrid: La España Moderna, 1890, p. 23.

<sup>389</sup> Garofalo, R., *Indemnización á las víctimas del delito*, Madrid: La España Moderna, 1890, p. 24.

<sup>390</sup> Seen on 26.05.2018. Link: <http://criminologiaken.blogspot.com.es/2011/04/clasificacion-de-los-delincuentes-segun.html>.

<sup>391</sup> Vid. an exhaustive study on Lombroso’s theory in Musumeci, E., *Cesare Lombroso e la neuroscienze: un parricidio mancato*, Milano: Franco Angeli, 2012.

<sup>392</sup> Lombroso, C., *L’homme criminel*, Paris: Felix Alcan, 2ème éd., 1895.

<sup>393</sup> In Spain, vid. Galera, A., *Ciencia y delincuencia. El determinismo antropológico en la España del siglo XIX*, Sevilla: CSIC, 1991.

<sup>394</sup> Ferri, E., *Ciencia positiva*, Barcelona: Atlante, 1900; *Defensas penales*, Santa de Fe de Bogotá: Temis, 6ª ed., 1991; *Los Delincuentes en el arte*, Madrid: Librería de Victoriano Suárez, 1899; *Estudios de antropología criminal*, Madrid: La España Moderna, 1892; *Los hombres y las cárceles*, Barcelona: Centro Editorial Presa, 1900; *Homicidio-suicidio*, Madrid: Reus, 1934; *La justicia penal: su evolución, sus defectos, su porvenir*, Madrid: B. Rodríguez Serra, 1900; *Il*

upon factors influencing the crime, as opposed to Lombroso's theory (criminality is both pathogenic and inherent). Ferri's classification, as opposed to others',<sup>395</sup> conceived anthropological factors (race, sex, physical constitution, psyche or age), physical factors (temperature or climate) as well as social factors (religion, education and family). Grispigni subscribed this theory but added some special remarks. Likewise, Garofalo<sup>396</sup> held that there were four types of born criminal: the assassin, the violent criminal, the thief and the lascivious criminal.<sup>397</sup>

The International Union of Penal Law played a relevant role within positivism.<sup>398</sup> The IUPL was founded on Vienna in 1889 by three eminent penalists (von Liszt, Prins and Van Hamel), which later on cristalised in the International Association of Penal Law.<sup>399</sup> Many of the laws and codes were influenced by modern theories: the Italian Code of 1889, the French Act of 1885 on the deportation of recidivists, penitentiary colonies and criminal mental institutions, and the Spanish Royal Decree of 28 January 1889 creating a penitentiary colony in the Philipines; even draft bills experienced the influx (the Spanish Criminal codes, especially, the one promised in 1891 by Villaverde) or the recent French draft on the Criminal Code.<sup>400</sup>

Summing up, positivism considered the individual committing a crime as abnormal. The individual was considered almost exclusively in his material and

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*magistrato: dal reclutamento alla formazione professionale: esperienze in Italia e nel mondo*, Roma: Arti Grafiche Jasillo, 1982; *Nuevos estudios de antropología criminal*, Madrid: La España Moderna, 1893; *Los nuevos horizontes del derecho y del procedimiento penal*, Madrid: Centro Editorial de Góngora, 2<sup>a</sup> ed., Madrid, 1887; *Principii di diritto criminale : delinquente e delitto*, Torino: Unione Tipografico-Editrice Torinese, 1928; *Proyecto preliminar de código penal para Italia*, Madrid: Centro Editorial de Góngora, 1925; *Sociología criminal*, Madrid: Centro Editorial de Góngora, 1907.

<sup>395</sup> Bonanno, "La classificazione dei delinquenti e il reo per passione", *Archivio di psichiatria*, XVI, 1895, p. 364.

<sup>396</sup> Garofalo, R., *Criminologia: studio sul delitto e sulla teoria della repressione*, Torino: Fratelli Bocca, 1885; *Riparazione alle vittime del delitto*, Torino: Fratelli Bocca, 1887; *Justicia y civilización*, Madrid: La España Moderna; *La superstition socialiste*, Félix Alcan, Paris, 1895; *Polémica en defensa de la Escuela Criminal Positiva* (en colaboración con Cesare Lombroso, Enrico Ferri y Giulio Fioretti), Bolonia, 1886; *Criterio positivo de la penalidad*, Napoles, 1880.

<sup>397</sup> Classification found on: <http://itercriminis.com/raffaele-garofalo-creador-del-termino-criminologia/>. Seen on 26.05.2018.

<sup>398</sup> Vervaele, J. A. E., "Gerhardus Antonius van Hamel (1842-1917) and the new horizons of criminal justice under penal positivism", *GLOSSAE. European Journal of Legal History*, No. 17, 2020, pp. 211-232, p. 218.

<sup>399</sup> Officially, that happened in 1924.

<sup>400</sup> Garofalo, R., *Indemnización á las víctimas del delito*, Madrid: La España Moderna, 1890, p. 24.

biological sides rather than in his moral side (like Neoclassical Schools held). The issue had even been explored through the lens of literature. The Russian writer Fyodor Dostoevsky wrote *Crime and Punishment*<sup>401</sup> and *The Brothers Karamazov*,<sup>402</sup> two novels dealing with the complex phenomenon of the crime. They were not the sole remarkable works dealing with such issue though.<sup>403</sup> Besides, the treatment of the penalty was a biological concept, not a moral one. Pseudosciences –phrenology,<sup>404</sup> etc.-, probabilistic sciences and a criminology, still in their infancy, considered the criminal to be a product of non-moral responsibility, i.e. social responsibility. The rehabilitation of the criminal, though, was one of the key features of this school; yet, a latecomer in the defensist doctrine. Positivist Schools tried to find the causes of the crime, and thus, there were certain cases in which the criminal was not sanctioned. The penalty's main objective was prevention, both in its special and general facet. That explained why the first criminal liberal codes (e.g., 1822 Spanish criminal code) were heavily influenced by utilitarianism and liberalism and, within their articles, there coexisted both the retribution and the preventive approach.

### 3.3. The Eclectic Schools

Debates in the field of social sciences should avoid the risk of falling into a simplistic reductionism hindering research. Among the two aforementioned theories, the so-called Eclectic Schools emerged. These took elements from neoclassical and positivist schools and mixed them. A good example of it was the

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<sup>401</sup> Dostoyevsky, F., *Crime and Punishment*, New York: Random House, 1956. Note that the original version was published as a serial in 1866.

<sup>402</sup> Dostoyevsky, F., *The Brothers Karamazov*, London: Heinemann, 1912. Just as *Crime and Punishment*, it was also a serial, and thus, it was originally published between the years 1879-1880.

<sup>403</sup> Beser, S., *Leopoldo Alas: Teoría y crítica de la novela española*. Barcelona: Laila, 1972; Dolin, K., *Fiction and the Law. Legal Discourse in Victorian and Modernist Literature*, Cambridge: Cambridge University Press, 1999; Kayman, M. A., *From Bow Street to Baker Street: Mystery, Detection and Narrative*, Basingstoke: Macmillan, 1992; Leps, M. C., *Apprehending the Criminal: The Production of Deviance in Nineteenth Century Discourse*, Durham: Duke University Press, 1992; Maristany, L., *El Gabinete del Doctor Lombroso. Delincuencia y fin de siglo en España*, Barcelona: Cuadernos Anagrama, 1973; Miller, D. A., *The Novel and the Police*, Berkeley: University of California Press, 1988; Peset, J. L., Peset, M., «Estudio preliminar», *Lombroso y la Escuela positivista italiana*, Madrid: CSIC, 1965.

<sup>404</sup> Pulido Fernández, Á., «La frenopatía y el Código penal», *RGLJ*, 1880, T. LVIII.

eclectic school of Pellegrino Rossi<sup>405</sup> and Francesco Carrara,<sup>406</sup> in which Kant's moral retribution (neoclassical approach) was combined with the Enlightenment's emerging utilitarianism (positivist approach). Thus, Eclectic Schools tended to fly away from revolutionary statements arising from the Enlightenment in order to conjugate Law and morals from previous ages.<sup>407</sup>

In Spain, their introduction was mainly thanks to Pellegrino Rossi and his popular work *Traité de Droit pénal* which abrogated for hybridisation: intimidation with the impossibility to harm<sup>408</sup> was accepted altogether with the reform or amendment of the criminal (still, the first played a predominant role). It highlighted the mixed character given, since the idea of retribution as a punishment was still present and once it was met, the re-establishment of moral and social order could be possible.<sup>409</sup>

Joaquín Francisco Pacheco,<sup>410</sup> on the other hand, was deemed to be a proper eclectic: both for his doctrinal positioning and for his personality. He held deep moral convictions but he was pragmatic too. In 1836, he founded the Gazette

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<sup>405</sup> Rossi, P., *Cours d'économie politique*, Joubert : G. Thorel, 2<sup>ème</sup> éd., Paris, 1843. Of the same author, vid. *Traité de droit pénal*, Paris et Genève, 1829.

<sup>406</sup> Carrara, F., *Cuestiones sobre la tentativa*, Bogotá: Temis, 1992; *Opúscoli di diritto criminale*, Fratelli Cammelli, 5<sup>a</sup> ed., Firenze, 1898-1899; *Programa de derecho criminal*, Bogotá: Temis, 3<sup>a</sup> ed., 1978-1989; *Programma del corso di diritto criminale : parte generale*, Tip. Giachetti Figlio, 6<sup>a</sup> ed., Prato, 1886; *Programma del corso di diritto criminale : parte speciale*, Fratelli Cammelli, 10<sup>a</sup> ed., Firenze, 1925-1926; *Teoría de la tentativa y de la complicidad o del grado en la fuerza física del delito*, Madrid: Góngora, 2<sup>a</sup> ed., 1926.

<sup>407</sup> The intellectual and scholarly environment was shaped by the aforementioned Doctrinarism (also, Conservadurism in Great Britain).

<sup>408</sup> Iñesta Pastor, E., "La interpretación del eclecticismo en la doctrina y en la legislación de la España penal del siglo XIX", *Ius Fugit*, 2016, p. 214.

<sup>409</sup> Ramos Vázquez, I., *La reforma penitenciaria en la historia contemporánea española*, Madrid: Dykinson, 2013, pp. 217-236.

<sup>410</sup> Pacheco, J. F., *El Código Penal concordado y comentado*, Madrid: Imp. de Manuel Tello, 4<sup>a</sup> ed., 1870; *Apéndice a los comentarios del Código Penal de Don Joaquín Francisco Pacheco ó sea el nuevo Código, comentadas las adiciones que contiene*, Madrid: Imp. de Manuel Tello, 1870; *Colección de documentos inéditos relativos al descubrimiento, conquista y colonización de las posesiones españolas en América y Oceanía: sacados, en su parte, del Real Archivo de Indias bajo la dirección de Joaquín F. Pacheco y Francisco de Cárdenas*, Vaduz: Kraus reprint, 1964-1966; *Comentario a las leyes de desvinculación*, Madrid: Ramón Rodríguez de Rivera, 3<sup>a</sup> ed., 1847; *Comentario al decreto de 4 de Noviembre de 1838, sobre recursos de nulidad*, Madrid: Ramón Rodríguez de Rivera, 3<sup>a</sup>ed., 1847; *Comentario histórico, crítico y jurídico a las Leyes de Toro*, Madrid: Imp. de Manuel Tello, 1862; *Estudios de derecho penal: lecciones pronunciadas en el Ateneo de Madrid en 1839 y 1840*, Madrid: Imp. y Fundación de Manuel Tello, 4<sup>a</sup> ed., 1854; *Estudios de legislación y de jurisprudencia*, Madrid: Imprenta de la viuda de Jordán e hijos, 1843; *Lecciones de derecho político constitucional*, Madrid: Imp. y Librería de Ignacio Boix, 1845; *Lecciones de derecho político*, Madrid: Centro de Estudios Constitucionales, 1984.

of Jurisprudence and Legislation (*Boletín de Jurisprudencia y Legislación*).<sup>411</sup> The distinctive traits of his doctrine belonged to the generic eclectic framework: the penalty as a retributive function (over other purposes), freewill as a fundamental aspect to base the penal law system, the grounding of the right to punish in natural law, etc. Especially the latter was considered as a contribution of Pacheco: the solely grounding of the right to punish was not just to be found in moral law but also in the preservation of society. He believed in the conjugation of social interest with respect to usages, traditions and previous normatives. Pacheco has been extensively analysed for outlining the requirements that the penalty should fulfil: (1) morality, it was all about avoiding the corruption of the condemned; (2) personal character, since penalties were only applied to the criminal in particular; (3) equality, to avoid privileges and favourable treatment; (4) divisibility, given that the penalty could be fragmented by means of mitigating or aggravating circumstances; and (5) analogous and proportional character.<sup>412</sup> The figure of Pacheco raised positive and negative opinions. The latter ones held he was just a plagiarist of Rossi's doctrine. There were detractors to this idea though. Calvo Rubio<sup>413</sup> believed Pacheco to have some points in common with Rossi, yet there were certain questions that Pacheco dealt with and that the Italian author overlooked. Asúa<sup>414</sup> believed that his distinctive element laid in the

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<sup>411</sup> First Spanish legal review founded by Pacheco altogether with Juan Pérez Hernández, Juan Bravo Murillo, Vicente Hernández de la Rúa, Pascual Fernández Baeza and José María Huet, among others.

<sup>412</sup> Iñesta-Pastor, E., "Influencias extranjeras en la configuración de la pena en los códigos penales españoles decimonónicos", Masferrer, A. (Ed.), *La codificación penal española. Tradición e influencias extranjeras: su contribución al proceso codificador (Parte general)*, Pamplona: Aranzadi-Thompson, 2017, pp. 401-500.

<sup>413</sup> Calvo Rubio, J.A., «Pacheco, penalista», *Revista de Derecho Judicial*, Madrid: Separata, 1966.

<sup>414</sup> Jiménez de Asúa, L., *Al servicio del derecho penal: diatriba del Código gubernativo*, Madrid: Javier Morata, 1930; *El anteproyecto de Código penal sueco de 1916 : estudio crítico seguido del texto íntegro de la parte general del anteproyecto, traducido íntegramente del sueco*, Madrid: Hijos de Reus, 1917; *Casos de derecho penal para uso de los estudiantes*, Madrid: Librería General de Victoriano Suárez, 2<sup>a</sup> ed., 1929; *Código penal reformado de 27 de Octubre de 1932 y disposiciones penales de la República*, Madrid: Reus, 1<sup>a</sup> ed., 1934; *Comentarios al proyecto de Código penal argentino*, Buenos Aires: Bibliográfica Omeba, 1962; *El criminalista : 2<sup>a</sup> Serie*, Buenos Aires: Víctor P. de Zavalia, 1955-1964; *Crónica del crimen*, Madrid: Historia Nueva, 1929; *Defensas penales*, Barcelona: Antalbe, 1983; *Los delitos sociales y la reforma del Código penal : conferencia pronunciada en la Real Academia de Jurisprudencia y Legislación en la sesión del día 21 de abril de 1921*, Madrid: Reus, 1921; *Il delitto di contagio venereo : studi e proposte*, Torino: Fratelli Bocca, 1929; *Derecho penal: conforme al Código de 1928*, Madrid: Reus, 1929-1930; *El derecho penal en la República del Perú*, Valladolid: Tall. Tip. Cuesta, 1926; *Derecho penal soviético*, Buenos Aires: Tipografica editora argentina, 1947; *Endocrinología y*

technique he used. He divided the justification causes into three groups (own ones, unimputability and non-culpability). Ironically, the main critics came from the penalist from Salamanca: Pedro Dorado Montero.<sup>415</sup> Contemporary criticism was brought by Francisco Candil Jiménez. He asserted that “Pacheco’s real contribution to the writing of the 1848 Criminal Code was [...] poorly effective”.<sup>416</sup>

Pedro Gómez de la Serna,<sup>417</sup> on his turn, believed that morals could not be the sole basis of Criminal law and that utilitarian aspects should be incorporated too:

“I did not defend the system of absolute morality as the single grounding for the criminal system. I believe it is necessary to respect the morality system but united to the utilitarian system. No absolute system is good at all. I condemn the system of the spiritualists as well as I condemn the exclusive system of utilitarians”.<sup>418</sup>

This mixture between realism and moral base was a recurrent feature in all eclectic theories. Essentially, it was the same debate among spiritualists and materialists. Even if Dorado Montero was not an eclectic as such, he highlighted

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*derecho penal. Eutanasia y homicidio por compasión: dos conferencias pronunciadas en la Facultad de Derecho de la Universidad de Montevideo en junio de 1925*, Montevideo: Imp. Nacional, 1927; *El estado peligroso del delincuente y sus consecuencias ante el derecho penal moderno*, Madrid: Reus, 1920; *Estudio crítico del proyecto de código penal italiano de 1921*, Madrid: Victoriano Suárez, 1922; «Generalización del principio de la sentencia indeterminada», *Revista de Criminología, Psiquiatría y Medicina Legal*, año XII, núm. 70, Buenos Aires, 1925.

<sup>415</sup> According to him, their lessons did not only have “little substance” but actually the little it had “was borrowed”.

<sup>416</sup> Candil Jiménez, F., «Observaciones sobre la intervención de don Joaquín Francisco Pacheco en la elaboración del Código penal de 1848», *Dialnet*, Sevilla, 1975: “su verdadera participación en la redacción del Código penal de 1848 [...] fue poco eficaz”.

<sup>417</sup> Gómez de la Serna, P., «Código de comercio arreglado a la reforma decretada en 6 de Diciembre de 1868 anotado y concordado, leyes y disposiciones posteriores, leyes especiales de enjuiciamiento y repertorio de la legislación mercantil», *Revista de Legislación*, 6<sup>a</sup> ed., Madrid, 1875; «Código de comercio concordado y anotado, precedido de una introducción histórico-comparada, y seguido de la ley de Enjuiciamiento sobre los negocios y causas de comercio...repertorio alfabético de la legislación y del procedimiento mercantil», *Revista de Legislación*, 3<sup>a</sup> ed., Madrid, 1859; *Curso histórico-exegético del derecho romano, comparado con el español*, Madrid: Librería de Sánchez, 4<sup>a</sup> ed., 1869; *Elementos del derecho civil y penal de España, precedidos de una reseña histórica de la legislación española*, Madrid: Librería de Sánchez, 9<sup>a</sup> ed., 1870; *Prolegómenos del derecho*, Madrid: Imp. de Vicente de Lalama, 1845; *Tratado académico-forense de los procedimientos*, Madrid: Librería de Sánchez, 2<sup>a</sup> ed., 1853.

<sup>418</sup> *Diario de Sesiones de las Cortes*, No. 81 (13.03.1848): “Yo no he defendido el sistema de moralidad absoluta como base única del sistema penal. Creo que es necesario respetar el sistema de moralidad pero unido al sistema utilitario. Ningún sistema absoluto creo que es bueno. Yo repruebo el sistema de los espiritualistas, así como repruebo el sistema exclusivo de los utilitarios”.

the relevance of morals in the correction of the criminal.<sup>419</sup> Another great eclectic was Luis Silvela.<sup>420</sup> He belonged to the Spanish correctionalist branch. For him, the penalty was both a necessary punishment and a state control for those that systematically committed crimes in society. He also insinuated a state prevention throughout the correction of the criminal.

The period in which the Eclectic Schools emerged had certain particularities. A contemporary of Dorado Montero, named Benito Mariano Andrade,<sup>421</sup> devoted one work to describe this historical period.<sup>422</sup> The book had a first edition, which was rapidly followed by a translation thereof into German. In 1916, due to the degree of success that it had,<sup>423</sup> a second edition was printed with a foreword of the author mentioning the translator (Gustav Stezenbach), where the repercussions of this trend in the German doctrinal scenario were shown:

“The Catholic Germans, who were deeply concerned about the events in Spain, asked my permission to translate it [the book] into German, and Gustav Stezenbach did a profuse edition of it in 1911 in Konstanz, under the title *Maura und die Konservative Partei in Spanien*”.<sup>424</sup>

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<sup>419</sup> Dorado Montero, P., *El Reformatorio de Elmira*, Madrid: La España Moderna, 1898, p. 52. Also, vid. Ramos Vázquez's ‘moral accountability’ concept in Ramos Vázquez, I., *La reforma penitenciaria en la historia contemporánea española*, Madrid: Dykinson, 2013, p. 230.

<sup>420</sup> Silvela, F., *Colección de proyectos, dictámenes y leyes orgánicas, o estudios prácticos de administración*, Madrid: Imprenta Nacional, 1839; *El Derecho penal estudiado en sus principios y en la legislación vigente en España*, T. I, Madrid, 1874 and T. II, Madrid, 1879; *El Código penal y el sentido común*, Madrid, 1886; “El Derecho Penal y los sistemas fatalistas y deterministas de la Antropología Criminal”, *La España Moderna*, Vol. 111, 1898, pp. 117-148.

<sup>421</sup> Andrade, B. M., *La antropología criminal y la novela naturalista*, Madrid: Sucesores de Rivadeneyra, 1896; *Estudio de antropología criminal espiritualista*, Madrid: Sucesores de Rivadeneyra, 1899; *Estudios penales*, Madrid: Sucesores de Rivadeneyra, 1897; *La moral universal*, Madrid: Victoriano Suárez, 1907.

<sup>422</sup> Andrade, B. M., *Maura y el partido conservador*, Madrid: Imprenta de Ramona Velasco, Viuda de P. Pérez, 1916.

<sup>423</sup> Andrade, B. M., *Maura und die Konservative Partei in Spanien*, Konstanz: Aktien-Gesellschaft Pressverein Konstanz, 1911.

<sup>424</sup> Andrade, B. M., *Maura y el partido conservador*, Madrid: Imprenta de Ramona Velasco, Viuda de P. Pérez, 1916, p. 5: “Los católicos alemanes, que a la sazón se preocupaban en gran manera de las cosas de España, solicitaron mi permiso para traducirlo al alemán, y Gustav Stezenbach hizo de él una profusa edición en 1911, en Konstanz, con el título de *Maura und die Konservative Partei in Spanien*”.



Andrade was extremely humble and so he attributed his success to the comments and adaptation that the editor carried out:

“The comments of Gustav Stezenbach were certainly so sharp and appropriate that, according to my information, this modest handout reached a great popularity in certain spheres of the German opinion”.<sup>425</sup>

Be as it may, Naturalism arose after Romanticism was over. It had a set of objective, deterministic and scientific features. If Romanticism was characterised by “creative freedom, fantasy and feelings”,<sup>426</sup> naturalism held a double meaning. In its first acception, naturalism was described as a philosophical doctrine “that considers nature as a reference of reality and, consequently, tries to explain it without resorting to the supernatural or to the transcendent”.<sup>427</sup> In its second acception, it appeared described as a “literary trend of the 19<sup>th</sup> century” which stressed out the “features of realism in the spirit of both the experimental science and human behaviour”.<sup>428</sup> Thus, positivism was somehow a late variation of naturalism. Naturalism (represented by Émile Zola) and positivism (represented by Cesare Lombroso) appeared as two different realities with different degrees of acceptance within the Iberian country. Yet, it seemed that naturalism did have a greater influence in Spain than that of Lombrosian positivism itself:

“Even if in Spain there were never more fervently, convinced lombrosians than the Veronese himself [Lombroso], there was nevertheless a group of writers who were more ‘zolian’ than Zola himself, who were supporters of the ‘extreme version’ of naturalism [...] Then, radical or doctrinal naturalism rooted and developed”.<sup>429</sup>

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<sup>425</sup> Andrade, B. M., *Maura y el partido conservador*, Madrid: Imprenta de Ramona Velasco, 1916, p. 5: “Los comentarios de Gustav Stezenbach fueron, sin duda, tan atinados y pertinentes que, según mis noticias, este modesto folleto mío alcanzó en aquella época gran popularidad en ciertas zonas de la opinión alemana”.

<sup>426</sup> The Spanish Royal Academy of Language (R.A.E.). Link: <https://dle.rae.es/romanticismo>. Seen on 04.02.2019.

<sup>427</sup> The Spanish Royal Academy of Language (R.A.E.). Link: <https://dle.rae.es/naturalismo?m=form>. Seen on 04.02.2019.

<sup>428</sup> The Spanish Royal Academy of Language (R.A.E.). Link: <https://dle.rae.es/naturalismo?m=form>. Seen on 04.02.2019.

<sup>429</sup> Calvo González, J., “Naturalismo y direcciones criminológicas a finales del siglo XIX en España”, *Revista de derecho penal y criminología*, No. 12, 2003, pp. 255-270, p. 264: “Si tal vez no hubo en España lombrosianos más ardorosamente convencidos que el propio veronés, existió en ella empero un grupo de escritores más zolescos que el mismo Zola, partidarios de la

Notwithstanding the role that naturalism played in Spain, what actually explained why positivism did not have such strong influence as opposed to other European countries was the legal philosophical grounds and the common natural law grounds dominating the peninsula.<sup>430</sup> Naturalism, however, took place on its radical variety: “Naturalism in this version will inherit most of the aesthetic postulates of response or idealist reaction, as well as most of the characteristic novelistic demands of experimentalism (Zola, *Le roman expérimentel*, 1880) and documentalism (e.g., Zola’s *Le document humain*)”.<sup>431</sup> Certain aspects such as observation and demonstration were vital to alert of the “moral degradation of the social body”.<sup>432</sup> Most interestingly, “the starter naturalist, socio-scientific commitment” evolved into a “method of social prophylaxis”.<sup>433</sup> Two of its most relevant representatives were Eduardo López Bago and Alejandro Sawa Martínez, great developers of a phenomenon of this time: “the socio-medical novel”.<sup>434</sup> Unsurprisingly, in this “naturalist quest for experimentation and sociomoral reformism” one often found a set of popular topics revolving around “the crime and the criminal as an organic pathology”, as a “social disease” and other disciplines such as “anthropology (transformism and social environment)” and “criminal psychology (temperamentalism and phrenology)”.<sup>435</sup>

Another figure very close to positivism in Spain was Remigio Vega Armentero.<sup>436</sup> He belonged to the aforementioned current of radical naturalism

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‘versión extremada’ del naturalismo [...]. Dio así en arraigar y desarrollarse lo conocido como naturalismo doctrinario o ‘radical’”.

<sup>430</sup> Masferrer, A., “La distinción entre delito y pecado en la tradición penal bajomedieval y moderna. Una propuesta revisionista de la historiografía española, europea y anglosajona”, *Anuario de Historia del Derecho Español*, No. 87, 2017, pp. 693-756.

<sup>431</sup> Calvo González, J., “Naturalismo y direcciones criminológicas a finales del siglo XIX en España”, *Revista de derecho penal y criminología*, no. 12, 2003, pp. 255-270, p. 264: “El naturalismo en esta versión va a ser heredero de la mayor parte de los postulados estéticos de respuesta o reacción idealista y de las características exigencias novelísticas de experimentalismo (Zola, *Le roman expérimentel*, 1880) y documentalismo (v. gr.: *le document humain* de Zola)”.

<sup>432</sup> Calvo González, J., “Naturalismo y direcciones criminológicas a finales del siglo XIX en España”, *Revista de derecho penal y criminología*, no. 12, 2003, pp. 255-270, p. 264.

<sup>433</sup> Calvo González, J., “Naturalismo y direcciones criminológicas a finales del siglo XIX en España”, *Revista de derecho penal y criminología*, no. 12, 2003, pp. 255-270, p. 264.

<sup>434</sup> Calvo González, J., “Naturalismo y direcciones criminológicas a finales del siglo XIX en España”, *Revista de derecho penal y criminología*, no. 12, 2003, pp. 255-270, p. 264.

<sup>435</sup> Calvo González, J., “Naturalismo y direcciones criminológicas a finales del siglo XIX en España”, *Revista de derecho penal y criminología*, no. 12, 2003, pp. 255-270, p. 265.

<sup>436</sup> Vega Armentero, R., *¿Loco o delincuente? Novela social contemporánea*, Madrid: El Porvenir, 1890.

and his novels showed “his will to join Zola’s literary reform” in line with the “radical naturalism from López Bago”, but mixed with a “postromantic taste”.<sup>437</sup> He was ascribed within a “doctrinary version of naturalism” which was essentially constituted by the so-called “medico-social writers”, as for whom “Clarín’s complaints are not just limited to the rejection of their excess of naturalist canons, but he also pours harsh disqualifications against the Italian criminal anthropology itself”.<sup>438</sup> In this period, we found doctrinal discussions fully immersed “in the legitimation process of psychiatry in the clinical and judicial fields”.<sup>439</sup>

In brief, Calvo González pointed out the little impact that naturalism had in Spain and, thus, the limited reception of positivism. If we went over the fortune of the “naturalist movement in Spain” and checked the strength of the “adherences it raised”, the result would be “quite discouraging”.<sup>440</sup> Along these lines, the “support of the Lombrosian doctrines” revealed an overall picture that barely exceeded a “shallow and indirect knowledge”.<sup>441</sup> Indeed, he indicated that Pardo Bazán, a very well-known Spanish writer, only knew about the “Italian positive school” what she had consulted to “certain criminologists such as Rafael Salillas”.<sup>442</sup> Also, Ramón Pérez de Ayala, another relevant writer, did not assign to those doctrines any significant role in his writings: “The limited role played by Lombrosianism in novel literature of posterior times is obvious in Ramón Pérez de Ayala (1880-1962)”.<sup>443</sup> Back then, Lombroso’s theories were frequently either

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<sup>437</sup> Fernández, P., “Remigio Vega Armentero”, *Diccionario Bibliográfico Electrónico. Real Academia de la Historia*, seen on 07.01.2021.

<sup>438</sup> Calvo González, J., “Naturalismo y direcciones criminológicas a finales del siglo XIX en España”, *Revista de derecho penal y criminología*, no. 12, 2003, pp. 255-270, p. 266.

<sup>439</sup> Fernández, P., *Eduardo López Bago y el naturalismo radical. La novela y el mercado literario en el siglo XIX*, Ámsterdam-Atlanta: Rodopi B. V., 1995 (Quoted in Calvo González, J., “Naturalismo y direcciones criminológicas a finales del siglo XIX en España”, *Revista de derecho penal y criminología*, no. 12, 2003, pp. 255-270, p. 268).

<sup>440</sup> Calvo González, J., “Naturalismo y direcciones criminológicas a finales del siglo XIX en España”, *Revista de derecho penal y criminología*, no. 12, 2003, pp. 255-270, p. 260.

<sup>441</sup> Calvo González, J., “Naturalismo y direcciones criminológicas a finales del siglo XIX en España”, *Revista de derecho penal y criminología*, no. 12, 2003, pp. 255-270, p. 260.

<sup>442</sup> Calvo González, J., “Naturalismo y direcciones criminológicas a finales del siglo XIX en España”, *Revista de derecho penal y criminología*, no. 12, 2003, pp. 255-270, p. 260.

<sup>443</sup> Calvo González, J., “Naturalismo y direcciones criminológicas a finales del siglo XIX en España”, *Revista de derecho penal y criminología*, no. 12, 2003, pp. 255-270, p. 261: “El escaso papel jugado por el lombrosianismo en la novelística española de época algo posterior resulta igualmente evidente en Ramón Pérez de Ayala (1880-1962)”.

diluted or not systematically applied. This considerably worsened an already deficient theory per se. The clearest case was Zola, “often referred to as his [Lombroso’s] most loyal speaker”, who got acquainted with Lombrosian theories for the composition of *La bête humaine*,<sup>444</sup> but was criticised afterwards by Lombroso himself since Zola “contradicted the statistical table of his studies” and his works “did not fit his criminal profiles”.<sup>445</sup> The author concluded with a relevant idea to our research: that the purported spreading of Lombroso’s ideals to novels and society was only such in a formal way. Materially, one cannot consider this to be true:

“In the penultimate decade of the Spanish 19<sup>th</sup> century, we assist to a sort of coincidence between lombrosians and zolians, between positivists and naturalists [...] It is the time of the literary disenchantment of the latter ones when it seems that the first ones are on the rise. Leaving aside the echo of Lombroso, fostered by the initial inertia set beforehand by the polemics on evolutionism and social Darwinism, as well as by the rise of phrenology and the Social Hygiene Movement, both Ferri and Garofalo are subject to editorial attention and consecutive translations between 1885 and 1889”.<sup>446</sup>

The same could be said about the transplant of lombrosian theories into legislation and legal doctrine: if so, there was a formal one, yet the material aspect was far from being enforced.

Finally, a last remark should be done. As it will be checked in a posterior chapter, it is rather troublesome to assert that the ‘theory’ enounced by Dorado Montero was eclectic. Nevertheless, his ‘thoughts’ were eclectic: “The approximation movement between the two rival schools has already initiated and

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<sup>444</sup> Zola, É., *La bête humaine*, Paris: Bibliothèque-Charpentier, 1893.

<sup>445</sup> Calvo González, J., “Naturalismo y direcciones criminológicas a finales del siglo XIX en España”, *Revista de derecho penal y criminología*, no. 12, 2003, pp. 255-270, p. 261.

<sup>446</sup> Calvo González, J., “Naturalismo y direcciones criminológicas a finales del siglo XIX en España”, *Revista de derecho penal y criminología*, no. 12, 2003, pp. 255-270, pp. 261-262: “En la penúltima década del siglo XIX español se asiste, por tanto, a una especie de coincidencia más adjetiva que sustancial entre lombrosianos y zolescos, entre positivistas y naturalistas, con el curioso añadido de que es al tiempo del desencanto literario de los últimos cuando parece que los primeros comienzan a alcanzar mayor auge. Aparte el eco mantenido de Lombroso, también nutrido en la inercial influencia que antes habían despertado las polémicas sobre evolucionismo y darwinismo social, así como por los comienzos de la frenología y el higienismo, tanto Ferri como Garofalo son entre 1885 y 1889, en efecto, objeto de atención editorial y sucesivas traducciones”.

will consolidate over time, as the common science is penetrated by the idea that no theory, as absurd as it may seem, stops having any reason for existence”.<sup>447</sup>

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<sup>447</sup> Garofalo, R., *Indemnización á las víctimas del delito*, Madrid: La España Moderna, 1890, p. 29: “Y el movimiento de aproximación entre las dos escuelas rivales ha comenzado ya á iniciarse y se consolidará con el tiempo, á medida que en la conciencia común penetre la idea de que ninguna teoría, aun la que parezca más absurda, deja de tener algún motivo de existencia”.

**CHAPTER III:  
FOREIGN  
INFLUENCES OF  
DORADO MONTERO**

Dorado Montero was a man of his time. In the development of his theory, one can see the influences of krausism, socialism and anarchism, among others. Nevertheless, the most immediate influences dated not earlier than the 18<sup>th</sup> century. Yet, there were many doctrinal ideas from previous times: an outstriking characteristic was the series of contradictions between certain ideas arising from Aristotelian, and Aquinian philosophy and their different ways outlined by the Nominalists<sup>448</sup> and, later on, by the Empirists. All in all, he was one of the most educated scholars in Europe. Surely, trying to analyse every influence he received is a difficult task and it would far out exceed the extention of the current thesis, but I decided to elaborate a general list of doctrinal influences and the way they affected him. Such section is subject to subsequent enlargement both in quantity and in depth. Further research is needed.

Namely, the influxes he received were varied: German, French, Italian, English, Austrian, Polish, Russian, American, and Dutch. Some of them were more numerous and some of them implicated more varied authors with significant less insights. However, all of them were vital to fully comprehend the construction of the thought of Dorado Montero. Let us briefly mention them and, afterwards, we will specifically outline fourteen of them.

On the German influx we observed Paul Eltzbacher (1868-1928), Immanuel Kant (1724-1804), Franz von Liszt (1851-1919), Josef Scheicher (1842-1924), Johann Gottlieb Fichte (1762-1814), Karl David August Röder (1806-1879), Heinrich Albert Zachariä (1806-1875), Friedrich Julius Stahl (1802-1861), Max Stirner (1806-1856), Ludwig Andreas Feuerbach (1804-1872), Fritz Schiff (1889-1940), Karl Christian Friedrich Krause (1781-1832) and Georg Heinrich Schneider (1846-1904).

As for the French influx only five were identified: Alfred Fouillé (1838-1912), Auguste Comte (1798-1857), Alfred Espinas (1844-1922), Gabriel Tarde (1843-1904) and Albert Rivière (1853-1929).

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<sup>448</sup> Carpintero Benítez, F., *La ley natural: historia de un concepto controvertido*, Madrid: Encuentro, 2008, p. 109; pp. 117-131; pp. 133-139.

The Italian influx was, however, greater: Raffaele Garofalo (1851-1934), Scipio Sighele (1868-1913), Emanuele Carnevale (1861-1944), Francesco Nitti (1868-1953), Roberto Ardigò (1828-1920), Cesare Lombroso (1835-1909), Arturo Rocco (1876-1942), Pellegrino Rossi (1787-1848), Domenico Giuriati (1829-1904), Cesare Beccaria (1783-1794), Paolo Mantegazza (1831-1910), Enrico Morselli (1852-1929), Augusto Tamburini (1848-1919), Antonio Marro (1835-1913), Luigi Luciani (1842-1919), Angelo Mosso (1846-1910), Giuseppe Sergi (1841-1936), Napoleone Colajanni (1847-1921), Giuseppe Seppili (1851-1939), Francesco Carrara (1805-1888), Giovanni Carmignani (1768-1847), Enrico Pessina (1828-1916), Francesco Poletti (1821-1895), Michele Angelo Vaccaro (1854-1937), Luigi Lucchini (1847-1929), Enrico Ferri (1856-1929), Vincenzo Lilla (1837-1905), Ferdinando Puglia, Ugo Conti (1864-1942), Bernardino Alimena (1861-1915) and Gian Domenico Romagnosi (1761-1835).

There was as well an English influx: Herbert Spencer (1820-1903), Jeremy Bentham (1748-1832), David Hume (1711-1776) and John Stuart Mill (1806-1873); and an Austrian influx: Salomon Stricker (1834-1898), Julius Vargha (1841-1909), and Max Nordau (1849-1923).

Finally, there were some Polish influences -Ludwig Gumplowicz (1838-1909)-, some Russian ones -Leo Tolstoy (1828-1910), Fyodor Dostoevsky (1821-1881) and Alexander Herzen (1812-1870)-, a Dutch one -Jacob Moleschott (1822-1893)- and some Americans -Franklin Henry Giddings (1855-1931), James Mark Baldwin (1861-1934) and William Tallack (1831-1908)-.

## **1. Most relevant authors**

### **1.1. Immanuel Kant (1724-1804)**

Positivism was not an exclusively Italian invention: “Comte, first, and the English and the Germans afterwards, have been the leaders of this trend, and they still are”.<sup>449</sup> Indeed, positivism had a German taste. The general movement which ruled the 19<sup>th</sup> century and part of the previous one had its origin in one of the most known German philosophers of all time: Immanuel Kant. His influence should

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<sup>449</sup> Dorado Montero, P., *La antropología criminal en Italia*, Madrid: Imprenta de la Revista de Legislación, 1889, p. 13.



not be a surprise in any of the supporters of the absolute theories of the penalty. As it ought not to be a surprise neither regarding the defenders of the relative theories. Among the latter ones, Feuerbach and Dorado Montero stood out. Feuerbach, as Dorado Montero, saw himself influenced from the very beginning by Kant.<sup>450</sup> Separating Feuerbach from the Kantian grounds solely due to holding relative theories was not acceptable.<sup>451</sup> Especially when the influence which Kant had upon Feuerbachs' conception of Criminal law theories was a tangible one.<sup>452</sup> Dorado Montero, on the other hand, acknowledged such influence since a very early stage. Kant's influence was fundamental and he himself quoted Carle to prove this:

“The reason for this is that Kant, even if he had been strongly fought, was always the giant which dominated and pushed the rest in the rational direction, and exerted his influx over those willing to fight his doctrines, without excluding our Gioberti and Rosmini”.<sup>453</sup>

Besides, Dorado Montero coincided and asserted that over the years of “vibrancy and fight” between the supporters and detractors of the ‘new school’, ‘positivist school’ and ‘anthropological school’, he realised that the difference among them was “not that big” and that they all do “commune in spirit and truth within a same church, i.e. the classical church”.<sup>454</sup>

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<sup>450</sup> Naucke, W., “Kant und die psychologische Zwangstheorie Feuerbachs”, *Kieler Rechtswissenschaftliche Abhandlungen*, Nr. 3, Hansischer Gildenverlag, Joachim Heitmann, 1962, p. 2: “Kein Zweifel demnach, dass Kants Werke am Anfang von Feuerbachs geistiger Entwicklung eine bestimmende Rolle gespielt haben”.

<sup>451</sup> Naucke, W., “Kant und die psychologische Zwangstheorie Feuerbachs”, *Kieler Rechtswissenschaftliche Abhandlungen*, Nr. 3, Hansischer Gildenverlag, Joachim Heitmann, 1962, p. 4. Original text: “Was Feuerbach mit dem Denken vor Kant gemeinsam hat, verringert damit die Gefahr einer allzu grossen Vereinfachung, die die Begrenzung des Themas auf Feuerbachs Verhältnis nur zu Kant (und nicht auch zu anderen Denkern) mit sich bringt”.

<sup>452</sup> Seeger, H., *Die Strafrechtstheorien Kants und seiner Nachfolger im Verhältnis zu den allgemeinen Grundsätzen der kritischen Philosophie*, Tübingen: Laupp, 1892, p. 81.

<sup>453</sup> Carle, G., *La vita del diritto nei suoi rapporti colla vita sociale. Studio comparativo di filosofia giuridica*, Torino: Fatrelli Bocca, 1880, p. 330 (Quoted in Dorado Montero, P., *La antropología criminal en Italia*, Madrid: Imprenta de la Revista de Legislación, 1889, p. 11, footnote: “Kant, aun siendo fuertemente combatido, fué siempre el gigante, que, en la dirección racional, dominó y sobrepujó á todos los otros, é hizo sentir el propio influjo aun sobre aquellos que se proponían combatir sus doctrinas, sin exceptuar nuestros Gioberti y Rosmini”).

<sup>454</sup> Dorado Montero, P., *Problemas de Derecho penal*, Madrid: Imprenta de la Revista de Legislación, 1893, p. IX.

Kant's influence was not only patent in the Neoclassical Schools, but also in the Positivist Schools and in Dorado Montero's doctrine itself. Absolute theories of the penalty raised serious concerns against the teleological penalty (the *Zweckstrafe*). For them, the penalty did not have to fulfil any utilitarian goal. Within this array of ideas, we found the Kantian conception. As Dorado Montero posed it, "idealist philosophy has dominated in Italy for a long time, especially the German one".<sup>455</sup> Consequently, he also deemed that the development of the Italian legal science was, essentially, a development of the Kantian doctrine of the law. Nevertheless, he considered that only Carlo Cantoni<sup>456</sup> could be said to be a true disciple of Kant.<sup>457</sup> I do not fully agree with such view since Cantoni criticised certain "inner contradictions" and he strongly believed in the possibility of developing such theory in the "realist-spiritualist" conception.<sup>458</sup> Thus, a disciple that raised that many concerns would stop being a disciple. Although this idea could be discussed, the main concern as regarded the use of the term 'disciple' laid on the fact that the degree of corrections and amendments was so large that he had been often included within the "realist criticism" trend.<sup>459</sup> Besides, in his 'reinterpretation' (let me pose it this way), he was adopting a dualist interpretation very far away from the idealist conception adopted by Fichte: "The Kantianism of Carlo Cantoni is characterised by the annihilation of all the basic principles with which Immanuel Kant affirmed the creative achievements of the mind, the thinking [...]. It is not necessary to say that the representatives of the New Kantianism, to which Cantoni joins explicitly [...], did not come with the

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<sup>455</sup> Dorado Montero, P., *La antropología criminal en Italia*, Madrid: Imprenta de la Revista de Legislación, 1889, p. 10: "*la filosofía idealista ha dominado en Italia durante mucho tiempo, singularmente la alemana*".

<sup>456</sup> Italian philosopher and professor in Pavia (1840-1906). His most representative works were: Cantoni, C., *Corso elementale di Filosofia*, Volume I, Milano: Francesco Vallardi, 1870; *Corso elementale di Filosofia*, Volume II, Milano: Francesco Vallardi, 1870; *Emanuele Kant: la filosofia teoretica*, Milano: Bocca, 1907; *G. B. Vico Studii Critici E Comparativi*, Torino: Stabilimento Civelli, 1867.

<sup>457</sup> Dorado Montero, P., *La antropología criminal en Italia*, Madrid: Imprenta de la Revista de Legislación, 1889, p. 10.

<sup>458</sup> Cantoni, C., *La web de las biografías*. Link: <http://www.mcnbiografias.com/app-bio/>. Seen on 03.07.2020.

<sup>459</sup> Cantoni, C., *La web de las biografías*. Link: <http://www.mcnbiografias.com/app-bio/>. Seen on 03.07.2020.

intention of thinking any more of Kantianism in the direction taken by Johann Gottlieb Fichte”.<sup>460</sup>

Yet, even though it was true that the cornerstone aspects of Kant’s “idealist” philosophy shared a common substratum even for the most opposite doctrines, it should not make us lose the picture. Kant was equally responsible for the mental structures of both absolutist and relative supporters, but it ought not be over-dimensioned since Kant’s theory presented some incompatibilities with the relative theories. Without going any further, Dorado Montero himself pointed out that idealism only considered Kant’s ‘rational liberty’, not the ‘freewill’. Idealism was characterised by the “contraposition of two orders, phisic and moral” and the “latter should be subjected to human liberty” and, thereon, he clarified that such human liberty should always be the “rational liberty, never the freewill”.<sup>461</sup>

What was exactly such division about? For Kant, the moral duty was the expression of an imperative which found itself over any need or natural inclination. Hence, every duty should pass the test of autonomy and the principle of universality. The will should decide by itself the moral good without empirical or theological constraints laying outside them (freewill); yet, for that, the reason should propose what it considered to be good from a universal perspective (rational liberty); only this way, one could speak of a completely autonomous decision. Due to this, Kant found two dimensions in human reason: theoretical reason (pure, i.e. ‘knowing’), and the practical reason, which determined the will,

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<sup>460</sup> Gentile, G., *Entstehung und Entwicklung der modernen Philosophie in Italien: Die Platoniker*, Biel/Bienne: Schweizerischer Wissenschafts- und Universitätsverlag, 2016, pp. 409-410: “So zeichnet sich denn der Kantianismus von CARLO CANTONI aus durch die Vernichtung aller Grundprinzipien, mit denen IMMANUEL KANT die schöpferischen Leistungen des Geistes, des Denkens geltend gemacht hat, und was die bedeutsame philosophische Revolutionierung losgetreten und wenn man so will schon vollführt hat, die der althergebrachten Metaphysik ein Ende bereitet. Dass sich die Vertreter des Neu-Kantianismus, zu denen sich Cantoni zum Abschluss des breteffenden Werks selber ausdrücklich gesellt, nicht mit der Absicht getreten haben, den Kantianismus in der von JOHANN GOTTLIEB FICHTE eingeschlagenen Richtung weiterzudenken, das versteht sich von selbst; und so ist durchaus anzunehmen, dass manche Philosophen, die man mit Fug und Recht als Neu-Kantianer bezeichnen kann, den Kantischen Kritizismus, die Erkenntniskritik über die von Kant gezogenen Grenzen hinaus weitergeführt haben; aber dass man einen zu den Vertretern des Kantianismus rechnet, der die Grundlagen des Kritizismus in Bausch und Bogen zurückweist, diese Einordnung zu vertreten, schein nicht besonders vernünftig zu sein“.

<sup>461</sup> Dorado Montero, P., *El positivismo en la ciencia jurídica y social italiana*, p. 114.

i.e. the individual's moral action. Kant named after 'pure' the reason which was not influenced by anything empirical, traditional or teleological (religion), but the one which acted by itself without external influences (rational liberty). And he called 'practical reason' the one that determined the moral duty assuming its universalisation (freewill). Kant held that acting with freedom (freewill) entailed acting in accordance with the law, i.e. adjusting the conduct to what the reason imposes (rational freedom), in spite of whether it was pleasant or desirable".<sup>462</sup>

Thus, the difference between 'freewill' and 'rational liberty' played a major role. Let us briefly comment a related aspect when Dorado Montero commented on the work of the Italian philosopher Ariodante Mambelli. He pointed out the fact that the author admitted all the principles of traditional philosophy, namely the "distinction of two orders (natural and supernatural)", the "categorical subordination of certain things to others (things to animals, animals to man, man to God), the "consideration of man as the single being with reflexive conscience", the existence of "two entities (spirit and body)" and the "contrast of two orders (the physical one and the moral one)".<sup>463</sup> Nevertheless, he stressed that the moral order should be subjected to human freedom "but to 'rational freedom', not to 'freewill'".<sup>464</sup> A logical conclusion, hence, seemed unavoidable: "Just a rational being has the capacity to act according to the set of rules, i.e. he has a will".<sup>465</sup> This could be interpreted as indicating the existence of a "capacity to act", which, on its turn, also indicated a "minimum notion of freedom or autonomy" opposing "not plainly to immoral acting" but rather to the "compulsive acting" (where, strictly speaking, the participation of the agent does not take place). Therefore, defining "rational liberty" as somehow "independent from the inclination"

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<sup>462</sup> I am grateful to Professor Talavera Fernández from the University of Valencia for being particularly helpful in explaining such aspect of Kant's theory.

<sup>463</sup> Dorado Montero, P., *El positivismo en la ciencia jurídica y social italiana*, p. 112-113.

<sup>464</sup> Dorado Montero, P., *El positivismo en la ciencia jurídica y social italiana*, p. 114.

<sup>465</sup> Marey, M., "¿Es la exigencia kantiana de universalización un procedimiento suficiente para establecer contenidos morales-éticos? Algunas consideraciones acerca de una respuesta negativa a esta pregunta", *ARETÉ. Revista de Filosofía*, Vol. XXIII, No. 1, 2011, p. 91.

implied a “capacity to act emanating from the reflection on the action’s grounds” and not “compulsively”, despite of whether they were moral or not.<sup>466</sup>

Besides, Ferri also made a differentiation between ‘freewill’ and ‘limited moral freedom’:

“The most recent criminalists, from the Classical School, have also abandoned the old idea of an absolute freewill, as the basis and condition for an absolute moral imputability of the man, and have restricted themselves [...] to a limited moral freedom, which would correspond to a limited or relative moral imputability”.<sup>467</sup>

Leaving aside the purely legal technical aspects, Dorado Montero concluded to this question by reasserting the fact that the grounds of both positions were united whatsoever: “Hence, the harmonisation between the two opposed schools (idealist and positivist) far from being impossible, as it might look like prima facie, is a need required by the inner exigency which they both represent: the theory of the social contract, reduced to its just limits, purged from its exaggerations as regards liberty, restricted to its own circle of action (that of the ‘rational liberty’), unites itself in a loving consortium, and forms one single [theory] altogether with the theory of determinism, at its turn, corrected from its mistakes, especially that of the mechanic determinism”.<sup>468</sup> Such reality described there was the new legal philosophy, which was named after “theory of the psychic causalism” in Psychology, and “critic positivism” in general philosophy.<sup>469</sup>

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<sup>466</sup> Marey, M., “¿Es la exigencia kantiana de universalización un procedimiento suficiente para establecer contenidos morales-éticos? Algunas consideraciones acerca de una respuesta negativa a esta pregunta”, *ARETÉ. Revista de Filosofía*, Vol. XXIII, No. 1, 2011, p. 91.

<sup>467</sup> Enrico, F., *I nuovi orizzonti del diritto e della procedura penale*, Bologna: Nicola Zanichelli, 1884, 2<sup>o</sup> ed., p. 53: “I criminalisti più recenti, della scuola classica, hanno abbandonata pure la vecchia idea di un assoluto libero arbitrio, come base e condizione di un' assoluta imputabilità morale dell'uomo, e si sono ristretti, collo stesso processo di transizione fra il vecchio ed il nuovo, ad una libertà morale limitata, cui corrisponderebbero una limitata o relativa imputabilità morale”.

<sup>468</sup> Dorado Montero, P., *El positivismo en la ciencia jurídica y social italiana*, p. 248: “Por donde se ve cómo la armonía entre las dos escuelas contrarias, idealista y positivista, lejos de ser, como á primera vista aparece, imposible, es una necesidad reclamada por la interna exigencia que ambas representan: la teoría del contrato social, reducida á sus justos límites, purgada de sus exageraciones en orden á la libertad, y contraída al círculo propio de su acción, el de la libertad racional, se une en amoroso consorcio y forma, por así decirlo, una misma con la teoría del determinismo, corregida, á su vez, de sus yerros, sobre todo del del determinismo mecánico”.

<sup>469</sup> Dorado Montero, P., *El positivismo en la ciencia jurídica y social italiana*, p. 248.

Back then, Alfonso Testa fought the new Italian criminal trends “with the weapons of ‘transcendental idealism’”. In 1843, he published a very detailed, critical exam of it in *Della Critica della ragione pura di Kant* and he ended up declaring himself a Kantian.<sup>470</sup> Be as it may, Dorado Montero was confident in this aspect that “after examining their works [Italian scholars]” one came to the conclusion that the rest was, ultimately, “the very same of what Kant exposed”.<sup>471</sup>

Therefore, despite being very opposed groups, both idealists and experimentalists were influenced by Kant. Dorado Montero briefly outlined the two main representative schools of idealism: the Catholic Philosophers and the Hegelian School. In the first one, one found the representatives of the Italian philosophy or *italianísima* (as he posed it), who sought after harmonising Christianity with Kant and Hegel (Mamiani, Galluppi, Luis Ferri, Bertini, Bonatelli, Ferrari, Franchi, Gioberti, Rosmini, and Conti).<sup>472</sup> In the second one, others were highlighted: the Spaventa brothers (Bertran and Silvio), Antonio Tari, De Meis, Nicolas Marselli, Barzelotti and Francisco de Santis.<sup>473</sup> Experimentalism, nevertheless, was harder to defend. It differed from idealism and, as a result of being ‘new’, its main exponents were “few and very obscured by the idealists”.<sup>474</sup> He briefly identified two subgroups within experimentalism: the former ones<sup>475</sup> and the main ones. Among the former ones, there were Galile, Vico, Giordano Bruno, Pedro Pomponazzi, Genovesi, Spedalieri, and Beccaria. Among the main ones, he only stressed Gioia and Romagnosi, granting the latter an outstanding relevance. Finally, Dorado Montero concluded that even if the experimentalists were determining in the appearance of the positivist thought (and, thus, his one as well), the component ‘influence of Kant’ could never be

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<sup>470</sup> Testa, A., *Della Critica della ragione pura di Kant*, Lugano: Veladini e Comp., 1843. Other works and further consideration were developed by this author. To this respect, it is especially helpful to consult: Testa, A., *Collezione degli opuscoli editi ed inediti*, Piacenza: A. Del Majno, 1848.

<sup>471</sup> Dorado Montero, P., *La antropología criminal en Italia*, Madrid: Imprenta de la Revista de Legislación, 1889, p. 10.

<sup>472</sup> Dorado Montero, P., *La antropología criminal en Italia*, Madrid: Imprenta de la Revista de Legislación, 1889, p. 11.

<sup>473</sup> Dorado Montero, P., *La antropología criminal en Italia*, Madrid: Imprenta de la Revista de Legislación, 1889, p. 11.

<sup>474</sup> Dorado Montero, P., *La antropología criminal en Italia*, Madrid: Imprenta de la Revista de Legislación, 1889, p. 12: “eran escasos, y los que había, casi casi estaban oscurecidos por los idealistas”.

<sup>475</sup> Those constituted a sort of ‘proto-positivist’ authors.

detached and it always constituted a constant, i.e. a common ground for most scholars:

“That is how Italy, under the influence of Locke and Condillac (this latter being the mentor of Gioia and Romagnosi themselves), and under the influence of the Kantian doctrine itself, has been educating and instructing little by little in what today is called ‘positivism’ to a whole generation”.<sup>476</sup>

However, for Dorado Montero, it was self-evident that not all positivists liked to be related to Kant (mainly for his idea of free will). Yet, “as soon as one examines his works, one will realise that, leaving aside some minor considerations, the rest is, in essence, the same as what was exposed by Kant”.<sup>477</sup> This idea will be developed in later works when criticising the non-pure determinism which was used by positivist, determinist alike authors. Kantian idealism was a product on his own, Italian positivism was based on Kant’s doctrine and also middle schools in between: a third tendency was developed, far more rational than the other two extremes. Dorado Montero noted that the Italian people was “very fond of balances and very willing to equidistantly move away from both German idealism and English positivism”.<sup>478</sup> Thus, he granted to the third school the adjectives of transitive and superior, and he thought of such school as the one called to survive the aforementioned ones. Some remarks, however, needed to be done.

When reading the two volumes of his most representative work, his ideological thought could be misunderstood. On it, he devoted a great amount of effort into criticising detractors of the freewill who seemed to self-betray their ideals: most of them, at the end, resorted to the conception of penal liability. In what was deemed to be a critic to the characteritic half-hearted position of the Third School, he was actually not advocating for an extremist positivism: it was a

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<sup>476</sup> Dorado Montero, P., *La antropología criminal en Italia*, Madrid: Imprenta de la Revista de Legislación, 1889, p. 12: “Así es como Italia, bajo el influjo de Locke y de Condillac (este último maestro de los mismos Gioia y Romagnosi), y bajo el influjo asimismo de la propia doctrina kantiana, ha venido formando poco á poco y educando en lo que hoy se llama ‘positivismo’ á toda una generación”.

<sup>477</sup> Dorado Montero, P., *La antropología criminal en Italia*, Madrid: Imprenta de la Revista de Legislación, 1889, p. 10.

<sup>478</sup> Dorado Montero, P., *La antropología criminal en Italia*, Madrid: Imprenta de la Revista de Legislación, 1889, p. 13-14.

criticism towards positivist incoherences. Rather than attacking positivism itself, he drew attention to the fact that the penal conceptions handled in that time were still the Kantian ones. Almost every theory in Criminal law was rooted in the same conception we used almost three centuries ago: the Kantian conception. A conception very much linked towards a sort of eclecticism; indeed, Catholic philosophers “tried to harmonise Christianity with modern philosophy (Kant, Hegel or Binding); even though when, on the other hand, they tried to fight them”.<sup>479</sup>

All of this could indicate that Kant’s influence over Dorado Montero pushed him to a mild eclecticism. In 1889, he described the main aspects of the positivist school: “that universal man, the so-called reference-man (the one as held by idealism) is just pure abstraction because men in real life have their special way of being [...] Crime is a relative thing and there is no act which is criminal per se”.<sup>480</sup> Initially, one could think that he was plainly describing the features of such school. Nevertheless, in 1915, he talked about his particular proposal and a match between his ideas and this positivist characteristics were observed: “There is no crime, just as there is no law either, but because men create it [...] As soon as the mental orders created by each individual would find all of them in an equal footing, and none of them would impose over the others, legal coactive life would be impossible. Therefore, the crime would also be impossible”.<sup>481</sup>

## **1.2. Karl David August Röder (1806-1879)**

Röder has often been classified as a correctionalist.<sup>482</sup> However, when outlining the main theories of criminality, he made a notorious stop at the absolute theory. After developing the main features of such trend, he pointed out

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<sup>479</sup> Dorado Montero, P., *La antropología criminal en Italia*, Madrid: Imprenta de la Revista de Legislación, 1889, p. 11.

<sup>480</sup> Dorado Montero, P., *La antropología criminal en Italia*, Madrid: Imprenta de la Revista de Legislación, 1889, p. 24.

<sup>481</sup> Dorado Montero, P., *El Derecho protector de los criminales*, Ed. Jiménez Gil, Tomo 1, Madrid, 1915, p. 15.

<sup>482</sup> Quisbert, E., “Historia del Derecho penal a través de las escuelas penales y sus representantes”, *Centro de Estudios de Derecho*, 2008, p. 56.



the main defect of such theory: “the uncertainty of this theory, as well as the fragility of its assertions about the ‘purported’ opposition between morality and law”.<sup>483</sup> Within this theory, many of the ‘absolutists’ wanted to retribute only the exterior result of the fact, whereas others (within the same theory) opted for retributing only the inner aspect.<sup>484</sup>

In the foreword of one of the editions of Krause’s work,<sup>485</sup> Richard Mucke asserted the following:

“The subsequent treaty contains the pamphlet on the lectures on Natural Law or Legal Philosophy/Philosophy of the State, as Krause re-wrote it for the first lecture in Göttingen in the summer of 1826, and he amended and improved it for the second lecture in the summer of 1828 and again later on. Yet, according to the handwritten note of the author himself, not everything in it was presented and not all of what was presented was written down in the pamphlet. [...] Both transcriptions were used by Röder as the main basis for the lectures he published in 1874 on the system of Legal Philosophy (Leipzig, Brockhaus)”.<sup>486</sup>

As we have seen, Röder was directly influenced by the theories of Krause, what definitely influenced Dorado Montero on its turn, who adopted much of the Krausist postulates. Though, in order to complement Röder’s view on Krause’s writings, it would be interesting to have a look at Mucke’s edition since the book

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<sup>483</sup> Röder, K. D. A., *Die Herrschenden Grundlehren von Verbrechen und Strafe in Ihren Inneren Widersprüchen: Eine Kritische Vorarbeit zum Neubau des Strafrechts*, Wiesbaden: Julius Riedner, 1867. We use the following version: Röder, K. D. A., *Las doctrinas fundamentales reinantes sobre el delito y la pena en sus interiores contradicciones: ensayo crítico preparatorio para la renovación del Derecho penal*, Madrid: Librería de Victoruiano Suárez, 3<sup>o</sup> ed., 1876, p. 63: “so zeigt sich hier besonders ausfallend das Unhaltbare der Theorie, zugleich aber die Richtigkeit er Behauptung eines Gegensasses zzwischen Recht und Sittlichkeit“.

<sup>484</sup> Röder, K. D. A., *Die Herrschenden Grundlehren...*, p. 63: „Was nun den Bregiff des Verbrechens, als des zu Vergeltenden, betrifft, den die absolute Theorie gibt –indem Einige nur äuseren Erfolg der That, Andere aber nur das Innere bei der That: das Gewollte, also die böse Willensrichtung oder Schuld im Sinn des Sprachgebrauchs, vergelten mollen“.

<sup>485</sup> Krause, K. Ch. F., *Vorlesungen Über Naturrecht: Oder Philosophie des Rechtes und des Staates*, Leipzig: Otto Schulze, 1892.

<sup>486</sup> Krause, K. Ch. F., *Vorlesungen Über Naturrecht: Oder Philosophie des Rechtes und des Staates*, Leipzig: Forgotten Books, 1892, p. IV: „Die nachfolgende Abhandlung enthält das Heft zu den Vorlesungen über Naturrecht oder Philosophie des Rechts und Staates, wie es Krause für den erstmaligen Vortrag in Göttingen im Sommer 1826 neubearbeitete und zu dem zweimaligen Vortrage im Sommer 1828 und doch noch später ergänzte und verbesserte. Doch wurde nach des Verfassers eigner handschriftlicher Bemerkung nicht alles darin Enthaltene wirklich vorgetragen und nicht alles Vorgetragene im Hefte niedergeschrieben. [...] Beide Niederschriften dienten Röder zur Hauptgrundlage der von ihm 1874 herausgegebenen Vorlesungen über das System der Rechtsphilosophie (Leipzig, Brockhaus)“.

“contains a great number of deep thoughts or, at least, fragments thereof which Röder did not use”.<sup>487</sup> What is more, Dorado Montero based his reasoning in Röder’s approach regarding the lack of consistency in positivist doctrines. Röder maintained that “it would be an obvious nonsense to make punishment dependent merely on the existence of an external, even if blameless, damage caused by merely natural human forces (e.g., by chance, unsurmountable error, compulsion).”<sup>488</sup> That was to say, that one should not ground the penalty *solely* on the external wrong.

Röder was well-known among Spanish scholars to the extent that he himself translated into German a work from Giner de los Ríos.<sup>489</sup> He had also some ideas with respect to the undetermined sentence. He “showed himself as a pioneer” but he “gave into the environment of his time” since he “advocated for the cell-isolation regime” yet he was also supporting an intermediate stage “in which the evidence of the amendment [of the criminal] was proved and ascertained”.<sup>490</sup> Nevertheless, Antón Oneca did not profess much enthusiasm on correctionalism, and particularly on Röder, due to the degree of legal uncertainty which went along with such movement: “It is taken as a point of departure a concept from the law, which is completely indifferiate from morals, and when grounding the legality or the wrongdoing of the conduct exclusively in the inclination of the will, it heavily endangers the legal certainty”.<sup>491</sup> As for the cell-

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<sup>487</sup> Krause, K. Ch. F., *Vorlesungen Über Naturrecht: Oder Philosophie des Rechtes und des Staates*, Leipzig: Forgotten Books, 1892, p. IV: „indem eine grosse Anzahl tiefer Gedanken oder wenigstens Gedankensplitter in dem Hefte enthalten sind, die Röder nicht verwerthete”.

<sup>488</sup> Röder, K. D. A., *Die Herrschenden Grundlehren...*, p. 64: “Es würde offener Unsinn sein, bloß vom Dasein eines äußeren, wenn auch schuldlos, durch lediglich naturgesesslich wirkende Kräfte des Menschen (z.B. durch Zufall, unüberwindlichen Irrthum, Zwang) angerichteten, Schadens die Strafe abhängig machen”.

<sup>489</sup> Giner de los Ríos, F., Calderón, A., *Zur Vorschule des Rechts. Kurzgefasste grundsätze des Naturrechts in 47 vorlesungen*, Leipzig : Dieterichsche Verlagsbuchhandlung, 1907.

<sup>490</sup> Antón Oneca, J., “La teoría de la pena en los correccionistas españoles”, *Estudios Jurídico-Sociales, Homenaje al Profesor Legaz y Lacambra*, tomo II, Santiago, 1960, p. 1016: “Y Röder, que, en la previsión de la sentencia indeterminada, se mostró precursor, en cambio cedió al ambiente de la época al preconizar el régimen de aislamiento celular, si bien fue también partidario de un grado intermedio donde se asegurase y se sujetara a prueba la reforma que hay podido experimentar”.

<sup>491</sup> Antón Oneca, J., “La teoría de la pena en los correccionistas españoles”, *Estudios Jurídico-Sociales, Homenaje al Profesor Legaz y Lacambra*, tomo II, Santiago, 1960, p. 1016: “Se parte de un concepto del Derecho, indiferenciado de la moral, que al hacer radicar la juridicidad o antijuridicidad de la conducta exclusivamente en la inclinación de la voluntad, pone en grave peligro a la seguridad jurídica”.

isolation system, the main reason why Röder defended such system was because the inmates had to remain “completely and constantly separate from each other”.<sup>492</sup> Otherwise, a prison would be no other thing than a corruption centre since there was “a reciprocal instruction and teaching into perversion”.<sup>493</sup> In the author’s opinion, the benefits were numerous: “it calms down their ‘irritated passions’, it promotes their ‘self-reflexion’, their inner ‘retreat’ and their taste for work, and it turns them into ‘more compliant’ individuals”.<sup>494</sup> It should be added the “fast progresses that the convicted perform on their instruction”.<sup>495</sup> Röder attempted to fight back the criticism towards the “cell-isolation system” back on his time. It was said, and it is still hold nowadays, that such system dehumanised individuals, affected brains and caused propension to despression. For Röder, nevertheless, it did not seem so clear:

“Mental illnesses as such (as opposed to the mere transitory hallucinations) are, just as suicide, less common in equal circumstances in cell-isolation prisons than in the old prisons”.<sup>496</sup>

If instead of “moving the inmate away from the company of the rest of the criminals” one was to lock the convicted into a cell without working neither seeing anybody, that could regrettably happen: “Such insane mistakes were committed in the first tests which were conducted in North America with the terrible results that could be expected”.<sup>497</sup> Yet, as time went on, those mistakes were corrected by “essentially reforming the whole organisation and execution of the cell regime - especially in Europe-”. As a German, Röder was up-to-date with the legal developments of his country and he quoted a “report addressed to the Senate of

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<sup>492</sup> Röder, K. D. A., *Las doctrinas fundamentales reinantes sobre el delito y la pena en sus interiores contradicciones: ensayo crítico preparatorio para la renovación del Derecho penal*, Madrid: Librería de Victoriano Suárez, 3<sup>o</sup> ed., 1876, p. 332.

<sup>493</sup> Röder, K. D. A., *Las doctrinas fundamentales...*, 1876, p. 332.

<sup>494</sup> Röder, K. D. A., *Las doctrinas fundamentales...*, 1876, p. 351.

<sup>495</sup> Röder, K. D. A., *Las doctrinas fundamentales...*, 1876, p. 352.

<sup>496</sup> Röder, K. D. A., *Las doctrinas fundamentales...*, 1876, p. 353: “Las enfermedades mentales propiamente dichas (á distinción de las meras alucianaciones transitorias) son, así como el suicidio [...] mucho más raras en igualdad de condiciones en las prisiones celulares que en las antiguas”.

<sup>497</sup> Röder, K. D. A., *Las doctrinas fundamentales...*, 1876, p. 354: “Errores tan insanos se cometieron en los primeros ensayos que de este sistema se hicieron en América del Norte, y con el pésimo resultado que era de suponer”.

Bremen”<sup>498</sup> in which there were offered several reasons why the isolation system was not harmful. Basically, it was stated that the necessary human contact was given in the Pennsylvania system since the vigilant, the employees and the personnel of the prison coming around was enough to make the prisoner forget of his isolation. Besides, there were several complementary activities such as outdoor exercise, religious practices or leisure time which the inmate could “devote to useful readings”. Thus, for “no man possessing healthy mental faculties can this regime [...] produce the slightest disturbance”.<sup>499</sup> The only possibility of failure that Röder admitted in the cell-isolation system was to be found in a “defect of the treatment/performance of the regime”, e.g., disciplinary measures of deprivation of light, nourishment, etc. This report concluded with the following statement:

“The assertion that the isolation leads to weaken and to truncate the strength of the spirit is always contrary to the truth [...] False is, as well, the opinion that when those convicted gain their liberty back, they are incapable of social skills with other men”.<sup>500</sup>

Recidivism was the last aspect worthy to mention on Röder. He did not attribute any responsibility to the cell-isolation system. Röder agreed recidivism within the aforementioned system was rather unfrequent. It happened to those inmates “whose imprisonment was too short” and to those criminals “very used to the criminal business”.<sup>501</sup> His position as to the incorrigible criminal was perfectly summarised in the following paragraph:

“In this category of prisoners, neither the cell-regime nor any other can work the miracle of bringing them to a better life before long; being they themselves so difficult to convert as the political criminals, because they are used as well to act according to own principles and opinions (ie. Communists)”.<sup>502</sup>

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<sup>498</sup> I have not been able to find any reference to such.

<sup>499</sup> Röder, K. D. A., *Las doctrinas fundamentales...*, 1876, p. 355: “En ningun hombre que tenga sanas sus facultades puede semejante régimen [...] producir la más mínima perturbación”.

<sup>500</sup> Röder, K. D. A., *Las doctrinas fundamentales...*, 1876, pp. 355-356: “La afirmación de que el aislamiento conduce á debilitar y truncar las fuerzas del espíritu es precisamente contraria á la verdad siempre [...] No menos falsa es la opinión de que, al recobrar su libertad estos reos, son ya incapaces para el trato social con los otros hombres”.

<sup>501</sup> Röder, K. D. A., *Las doctrinas fundamentales...*, 1876, p. 358.

<sup>502</sup> Röder, K. D. A., *Las doctrinas fundamentales reinantes sobre el delito y la pena en sus interiores contradicciones: ensayo crítico preparatorio para la renovación del Derecho penal*, Madrid: Librería de Victoriano Suárez, 3<sup>o</sup> ed., 1876, p. 359: “En esta clase de reos, ni el

What Röder pursued, rather than trying to annulate the personalities of inmates, was trying to neutralise the kind of criminal subculture that could be found in populated and average prisons, where the constant contact between inmates ended up by corrupting those average or corrigible criminals, since the dynamics of power within a penitentiary usually forced ‘good’ inmates to fall into practices, morals and values of the ‘evil’ or ‘corrupted’ inmates.<sup>503</sup> In the list of vices present in prisons, Röder extensively listed some of them. Indeed, the “intimate treatment and close connection among a great number of demoralized men” was extremely dangerous.<sup>504</sup> Also, “the cohabitation” between the inmates which had “an analogous way of thinking and of feeling” did not only weaken the penalty’s force, but it vested upon the penalty “a special charm”.<sup>505</sup> Furthermore, the exemplariness of the penalty was destroyed since for certain criminals which had been convicted several times “feel in it [in prison] like home, and, indeed, nothing makes them suffer their penalty”.<sup>506</sup>

To summarise, Röder’s writing focused on the “separate system” or “Pennsylvania system”, as opposed to both the “classification system” and the “Ausburn system”. The first one essentially consisted on the separation of inmates by groups. Within this first one the classification of Suringar deserved especial mention.<sup>507</sup> The second one only separated inmates on the night, whereas in the rest of the day there was an absolute silence.<sup>508</sup> He criticised them both, as he considered that the only one providing true isolation was the

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régimen celular ni ningún otro puede hacer el milagro de traerlos á mejor vida en poco tiempo; siendo en su mayor parte casi tan difíciles de convertir como los delincuentes políticos: porque también ellos están acostumbrados á obrar por principios y opiniones propias (á saber, comunistas)”.

<sup>503</sup> “The purportedly beneficial influence of the bests over the rest of the inmates is nothing but an illusion. On the contrary, they [...] end up giving in the general perversion”. Vid. Röder, K. D. A., *Las doctrinas fundamentales reinantes sobre el delito y la pena en sus interiores contradicciones: ensayo crítico preparatorio para la renovación del Derecho penal*, Madrid: Librería de Victoriano Suárez, 3<sup>o</sup> ed., 1876, p. 332.

<sup>504</sup> Röder, K. D. A., *Las doctrinas fundamentales...*, 1876, p. 333.

<sup>505</sup> Röder, K. D. A., *Las doctrinas fundamentales...*, 1876, p. 334.

<sup>506</sup> Röder, K. D. A., *Las doctrinas fundamentales reinantes sobre el delito y la pena en sus interiores contradicciones: ensayo crítico preparatorio para la renovación del Derecho penal*, Madrid: Librería de Victoriano Suárez, 3<sup>o</sup> ed., 1876, p. 335.

<sup>507</sup> Willem Hendrick Suringar was “one of the founders of the Nederlandsch Genootschap tot Zedelijke Verbetering der Gevangenen”, a society set up in 1823 to help rehabilitate prisoners. Vid. *Collections of Adam Pierson* (University of Amsterdam). Link: <https://archives.uba.uva.nl/agents/people/1742>. Seen on 20.10.2020.

<sup>508</sup> Röder, K. D. A., *Las doctrinas fundamentales...*, 1876, p. 347.

Pennsylvania system.<sup>509</sup> The other two ones failed in implementing the isolation element: “they both produce a a semi-isolation misrepresentation which is more figurative than real [...] thus they constitute the origin of new inconvenients”.<sup>510</sup>

### 1.3. Georg Heinrich Schneider (1846-1904)

This German psychologist and philosopher authored a set of works having an impact on our author. In his *Nuovi orizzonti*, Ferri quoted two works of him of great relevance: *Der thierische Wille* and *Der menschliche Wille*.<sup>511</sup> They both dealt with a key aspect for Dorado Montero and positivism: the question on the existence of freewill and its determination. Schneider influenced Ferri, who also influenced Dorado Montero. Let us have a look at those ideas.

In *Der thierische Wille*,<sup>512</sup> Schneider pointed out that “when one speaks of a free will, it is always only a relatively free one”, which specifically consisted on the “victory of the more functional ideas over the less functional ones”.<sup>513</sup> There could not be any question on the existence of “an absolutely free will in man”.<sup>514</sup> For him, the will depended entirely on both “our bodily and mental constitution, as well as on our relations to our surroundings”; therefore, it was not possible to “speak of an absolutely free choice”.<sup>515</sup> Naturally, it was not an easy task since our will had the “greatest appearance of absolute freedom” when our actions took place.<sup>516</sup> Obviously the ‘moral’ principles of men were present in the equation,<sup>517</sup>

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<sup>509</sup> Back then, such feature was considered as a very positive element, as opposed to the current opinion.

<sup>510</sup> Röder, K. D. A., *Las doctrinas fundamentales...*, 1876, p. 349.

<sup>511</sup> Ferri, E., *I nuovi orizzonti del diritto e della procedura penale*, Bologna: Nicola Zanichelli, 1884, 2<sup>o</sup> ed., p. 35.

<sup>512</sup> Schneider, G. H., *Der thierische Wille*, Leipzig, 1880.

<sup>513</sup> Schneider, G. H., *Der thierische Wille*, Leipzig: Verlag von Ambr. Abel., 1880, p. 80: “Wenn man von einem freien Willen spricht, so ist das allemal nur ein relativ freier. Worin besteht nun diese relativ Willensfreiheit? In dem Sieg der zweckmäßigeren Vorstellungen über unzweckmäßigere”.

<sup>514</sup> Schneider, G. H., *Der thierische Wille*, Leipzig: Verlag von Ambr. Abel., 1880, p. 79: “Dass von einem absolut freien Willen auch beim Menschen nicht die Rede sein kann”.

<sup>515</sup> Schneider, G. H., *Der thierische Wille*, Leipzig: Verlag von Ambr. Abel., 1880, p. 79.

<sup>516</sup> Schneider, G. H., *Der thierische Wille*, Leipzig: Verlag von Ambr. Abel., 1880, p. 79-80.

<sup>517</sup> Schneider, G. H., *Der thierische Wille*, Leipzig: Verlag von Ambr. Abel., 1880, p. 80.

but it was always the “most agreeable action” the one “leading to action”, and usually, “the most agreeable is identical with that of the greatest utility”.<sup>518</sup>

“The principle of utility in nature has generally allowed only those animals to exist [...] as they are unpleasantly touched and deterred by the perceptions or conceptions of just those things which can harm them”.<sup>519</sup>

The distinction between “‘free’ and ‘not free’ wills” rightly referred to “mainly to human changes of will”.<sup>520</sup> Paradoxically, the animal instincts could sometimes lead to the less useful decision:

“Alive natures, in which the instincts first arising have such an intensity that they immediately lead to action, more often commit useless actions and therefore generally have a less free will than other men of less strong instincts, who are accustomed to do everything with deliberation and after careful consideration. The uneducated person, who is unable to estimate the consequences of his actions, also acts more often inexpediently and less freely than the more educated person who is fully aware of the value of his actions for the future. In particular, however, the relative freedom of the will is known to depend on the extent to which the suppression of inexpedient impulses is or is not practised in education”.<sup>521</sup>

Within this outline, Schneider distinguished different “degrees” as regarded “passion and self-control” and “free and unfree will”.<sup>522</sup> Whereas he concluded that absolute freewill was not to be found in man, he admitted that a “relative freedom” was shown in the “higher animals and in man”; however, in

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<sup>518</sup> Schneider, G. H., *Der thierische Wille*, Leipzig: Verlag von Ambr. Abel., 1880, p. 80.

<sup>519</sup> Schneider, G. H., *Der thierische Wille*, Leipzig: Verlag von Ambr. Abel., 1880, pp. 80-81: “Das Zweckmässigkeitsprincip in der Natur hat im allgemeinen nur diejenigen Thiere bestehen lassen, bei denen es so ist, denen die Wahrnehmung und Vorstellung gerade derjenigen Dinge angenehm find, deren Besitz dem Individuum nützt, und welche durch die Wahrnehmungen oder Vorstellungen gerade derjenigen Dinge unangenehm berührt und abgeschreckt werden, welche ihnen schaden können”.

<sup>520</sup> Schneider, G. H., *Der thierische Wille*, Leipzig: Verlag von Ambr. Abel., 1880, p. 81.

<sup>521</sup> Schneider, G. H., *Der thierische Wille*, Leipzig: Verlag von Ambr. Abel., 1880, p. 82: “Lebhafte Naturen, bei denen gleich die zuerst entstehenden Triebe eine solche Intensität haben, dass sie sofort zur Action führen, begehen öster unzweckmässige Handlungen und haben deshalb im Allgemeinen einen weniger freien Willen, als andere Menschen von weniger starkem Tribleben, die gewohnt find alles mir Bedacht und nach reislicher Ueberlegung zu thun. Auch handelt der ungebildete Mensch, der die Folgen seines Thuns nicht abzuschätzen vermag, öster unzweckmässig und weniger frei als der gebildetere, der sich der Werthigkeit seiner Actionen für die Zukunft vollständig bewusst ist. Besonders aber hängt bekäntlich die relative Freiheit des Willens davon ab, wie weit in der Erziehung die Unterdrückung unzweckmässiger Triebe geübt ist oder nicht”.

<sup>522</sup> Schneider, G. H., *Der thierische Wille*, Leipzig: Verlag von Ambr. Abel., 1880, p. 84.

the latter one it “developed to a higher degree than in the higher animals”, thus, maintaining the traditional anthropocentrist approach.<sup>523</sup>

On *Der menschliche Wille*,<sup>524</sup> after stressing the influences<sup>525</sup> of Kant, Spencer, Hegel and some others,<sup>526</sup> which in this turn influenced Dorado Montero too, Schneider stressed that “objective knowledge as such” was incapable of causing any will; it was only because the “knowledge of the good” was connected with the “pleasure of the good” that we strived for it.<sup>527</sup>

After wondering about the relationship between will and cognition, he coincided with the position of Schopenhauer: the will did not emerge from “cognition”, but rather the will was the “original”; it existed “before all cognition”.<sup>528</sup>

“Also in recent times, the opinion has been expressed that the will is the first condition for the emergence of cognition and feelings, that the feelings only express the reactions to the needs and urges of the will, the satisfaction (feeling of pleasure) or non-satisfaction (feeling of displeasure) of the same, and that they form the middle link by means of which we learn something at all about our own will, which is in itself unconscious”.<sup>529</sup>

Schneider showed himself very convinced of the “inherently unconscious character of the will”, since we can be “mistaken” about our own will.<sup>530</sup> The fact that our will and our actions were “indirectly also followed by feelings” was based on the fact that our actions themselves and their success were “just as good

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<sup>523</sup> Schneider, G. H., *Der thierische Wille*, Leipzig: Verlag von Ambr. Abel., 1880, p. 84.

<sup>524</sup> Schneider, G. H., *Der menschliche Wille*, Berlin: Feed. Dümmlers Veelagsbuchhandlung, 1882.

<sup>525</sup> Schneider, G. H., *Der menschliche Wille*, Berlin: Feed. Dümmlers Veelagsbuchhandlung, 1882, pp. 265-266.

<sup>526</sup> Also Lotze, Bain and Wolff.

<sup>527</sup> Schneider, G. H., *Der menschliche Wille*, Berlin: Feed. Dümmlers Veelagsbuchhandlung, 1882, pp. 275-276.

<sup>528</sup> Schneider, G. H., *Der menschliche Wille*, Berlin: Feed. Dümmlers Veelagsbuchhandlung, 1882, p. 278.

<sup>529</sup> Schneider, G. H., *Der menschliche Wille*, Berlin: Feed. Dümmlers Veelagsbuchhandlung, 1882, p. 278: “Auch in neuester Zeit ist die Ansicht, dass der Wille die erste Bedingung zur Entstehung der Erkenntniss und der Gefühle sei, dass die Gefühle nur die Reactionen auf die Bedürfnisse und Triebe des Willens, die Befriedigung (Lustgefühl) oder Nichtbefriedigung (Unlustgefühl) desselben ausdrücken, und dass sie das Mittelglied bilden, vermöge dessen wir von unserm eigenen an sich unbewussten Willen überhaupt etwas erfahren”.

<sup>530</sup> Schneider, G. H., *Der menschliche Wille*, Berlin: Feed. Dümmlers Veelagsbuchhandlung, 1882, p. 279.



objects of knowledge” as any other process: therefore, it was “quite wrong” to regard the will as the “direct origin of the feelings”.<sup>531</sup>

#### 1.4. Raffaele Garofalo (1851-1934)

Jointly with Lombroso and Ferri, Garofalo was one of three undisputed authors in the positivist movement.<sup>532</sup> It has been said they constituted “an inseparable trinity”.<sup>533</sup> There were, nevertheless, certain differences among their positionings.<sup>534</sup> Whereas, Lombroso focused on anthropology (he was a medical doctor), Ferri tended more towards anthropology and Garofalo did so in the legal field.<sup>535</sup> The targets of the latter were “laws and their application”, and Ferri’s ideas were designed for “sociologists and philosophers”.<sup>536</sup> They created very relevant contributions in conjunction.<sup>537</sup> Yet, Garofalo himself did also contribute with a fruitful set of works on his own.<sup>538</sup> Particularly, there are two of them

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<sup>531</sup> Schneider, G. H., *Der menschliche Wille*, Berlin: Feed. Dümmlers Veelagsbuchhandlung, 1882, p. 283.

<sup>532</sup> Garofalo, R., “Prólogo”, *Indemnización á las víctimas del delito*, Madrid: La España Moderna, 1890, p. 8: “The founders and main apostles thereof [are]: Lombroso, Ferri and Garofalo”.

<sup>533</sup> Garofalo, R., “Prólogo”, *Indemnización á las víctimas del delito*, Madrid: La España Moderna, 1890, p. 11.

<sup>534</sup> Ferri, E., *Discordie positiviste sul socialismo: Ferri contra Garofalo*, Palermo: R. Sandron, 1895.

<sup>535</sup> Collin, F., “Étude critique du système de Ferri”, *Revue de droit pénal et de criminologie*, 1927, No. 4, p.435-452.

<sup>536</sup> Garofalo, R., *Indemnización á las víctimas del delito*, Madrid: La España Moderna, 1890, p. 8.

<sup>537</sup> Garofalo, R., Ferri, E., Lombroso, C., Fioretti, J., *Polemica in difesa della scuola criminale positiva*, Bologna: Nicola Zanichelli, 1886. Of the same authors, *cnfr. La escuela criminológica positivista*, Madrid: La España moderna, 1890.

<sup>538</sup> Garofalo, R., *Criminologia: studio sul delitto e sulla teoria della repressione*, Torino: Fratelli Bocca, 1885; Garofalo, R., *La superstizione socialista*, Torino: Roux Frassati e Co., 1895; Garofalo, R., *Riforma della procedura penale in Italia. Progetto di un nuovo codice*, Torino: Fratelli Bocca, 1889; Garofalo, R., *I congressi giuridici in Italia*, Napoli: Tip. della R. Università, 1907; Garofalo, R., *Alcune osservazioni sul progetto del codice penale con relazione di Zanardelli presentato alla camera dei deputati da Savelli il 26 novembre 1883*, Torino: Fratelli Bocca, 1884; Garofalo, R., *Contro la corrente! Pensieri sulla proposta abolizione della pena di morte nel progetto del nuovo codice penale italiano*, Napoli: Ernesto Anfossi, 1888; Garofalo, R., *Commentario del Nuovo codice di procedura penale*, Milano: F. Vallardi, 1914; Garofalo, R., *Le nullità nei giudizi penali e l'istituto della cassazione*, Napoli, E. Marghieri, 1903; Dell'Amministrazione della giustizia nel circondario di Napoli, 1889; *Di un criterio positivo della penalità*, Napoli: Vallardi, 1880; *De la solidarit  des nations dans la lutte contre la criminalit *, Paris, 1909; *Justicia y civilizaci n*, Madrid: La Espa a Moderna, 1900; *Le aggressioni alla forza pubblica e i delinquenti abituali*, Roma: Tipografia del Senato, 1914; *Le d lit naturel*, Paris, 1887; *La nuova filosofia del diritto criminale*, Roma: Ermanno Loescher e C., 1904; *L'anomalie du criminel*, Paris, 1887; *La Forza irresistibile*, Torino, 1885; *Le Type criminel*, Paris, 1886; *Dei*

which ought to be mentioned: first the *Criminologia*<sup>539</sup> and, secondly, *Riparazione alle vittime del delitto*.<sup>540</sup> They were both translated into Spanish by Dorado Montero,<sup>541</sup> who allowed the Spanish jurists to approach the works of the Italian criminologist. As the translation of the first one was near to be published, Garofalo did personally thank Dorado Montero:

“I am very happy that the publication of the *Criminologia* is near and I am very grateful for the care which you are taking in translating this book into the beautiful Spanish language”.<sup>542</sup>

As concerns *Criminologia*, Dorado Montero defined it as the “most characteristic and peculiar work of Garofalo”.<sup>543</sup> It constituted: “the most systematic book that the emerging school had produced back then (and maybe even until today) [...]”. It brought the concept of natural crime forward for the first time”.<sup>544</sup> What was particularly remarkable of this work was that he added a new criterion: the adaptability of the offender to the social environment, what meant that “the criminal measure must [should] be determined by the possibility of the

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*recidivi e della recidiva*, Milano: L. Vallardi, 1891; *El delito como fenómeno social*, Madrid: La España moderna, [s.a.]. *El delito como fenómeno social*, Madrid: La España moderna, 1905; *Idee sociologiche e politiche di Dante, Nietzsche e Tolstoi : studi seguiti dalla conferenza Ignoranza e criminalità al governo di Parigi nel 1871*, Palermo: Reber, 1907. Also, see some conferences and notes read of the same author: *L'Individuo e l'organismo sociale*, Torino : Bocca, at the Collegio romano, on 21.01.1897; *La vendetta e il perdono in Dante*, Napoli : Tipografia Angelo Trani, at the Circolo Filologico in Napoli, on 01.06.1903; *La guerra e il progresso sociale*, Napoli : Prem. Stab. tip. Federico Sangioanni & Figlio, at R. Accademia di scienze morali e politiche della Società Reale di Napoli, 1916; *L'educazione popolare in rapporto alla criminalità in Italia*, Torino: Fratelli Bocca at the Collegio Romano, 16.01.1896 il 16 gennaio 1896.

<sup>539</sup> Garofalo, R., *Criminologia: studio sul delitto e sulla teoria della repressione*, Torino: Fratelli Bocca, 1885.

<sup>540</sup> Garofalo, R., *Riparazione alle vittime del delitto*, Torino: Fratelli Bocca, 1887.

<sup>541</sup> Garofalo, R., *Indemnización á las víctimas del delito*, Madrid: La España Moderna, 1890; Garofalo, R., *La criminología: estudio sobre el delito y sobre la teoría de la represión*, Madrid: La España Moderna, 1890.

<sup>542</sup> “Carta de Raffaele Garofalo a Pedro Dorado Montero”, Letter III, GREDOS: *FPDM. Correspondencia de Pedro Dorado Montero. General*. Seen on 17.02.2021. Link: Seen on 31.01.2021. Link: <https://gredos.usal.es/handle/10366/76721>. “Sono molto lieto che la pubblicazione della *Criminologia* sia prossima e le sono molto grato de la cura che Ella si é data di traduire questo libro nella bella lingua spagnuola”, pp. 1-2.

<sup>543</sup> Garofalo, R., *Indemnización á las víctimas del delito*, Madrid: La España Moderna, 1890, p. 9.

<sup>544</sup> Garofalo, R., *Indemnización á las víctimas del delito*, Madrid: La España Moderna, 1890, p. 11.

adaptation of the offender, [...] by examining the conditions of existence in which it may be presumed that he ceases to be fearsome”.<sup>545</sup>

That being said, it all corresponded to the rationale of the penalty, but since the very moment in which one focused on “the criterion for indicating [...] the most suitable form of social sanction” and “its degree”, we would be entering the “technical-legal part of criminal sociology”.<sup>546</sup> To this respect, Garofalo shed some light on his *Di un criterio positivo della penalità*.<sup>547</sup>

Regarding the *Riparazione*, Dorado Montero referred to it as “if not the most important”, certainly “the most personal, exclusive and characteristic work from the author”.<sup>548</sup> In his very extense foreword to the translation, he started with a simple contextualisation for the reader: the clash between the old, classical school of Criminal law and the new, positivist (or Italian) school. While the first one was “incongruent and illogical” and nothing could “be extracted out of it”, the latter was made up of nothing but a set of “nihilists of punitive law” who “became delirious” and who tried to “turn every criminal into an ill man”.<sup>549</sup> It was worthy to point out that both the biographical and the bibliographical data that Dorado Montero used were obtained by first-hand correspondence. He wrote several times with Garofalo and inquired about information which he used later on for the elaboration of the foreword.<sup>550</sup> When Dorado Montero introduced Garofalo in the foreword (“from 1876, when he was barely 20 years old, he already started publishing very critical articles against the dominant theories in Criminal law and, in general, on the problem of punitive justice”),<sup>551</sup> he was essentially performing

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<sup>545</sup> Garofalo, R., *Criminologia: studio sul delitto e sulla teoria della repressione*, Torino: Fratelli Bocca, 2<sup>o</sup> Ed., 1891, p. 330 (quoted in Ferri, E., *Sociologia criminale*, Roma: Casa editrice italiana, 1884, p. 688).

<sup>546</sup> Ferri, E., *Sociologia criminale*, Roma: Casa editrice italiana, 1884, p. 688.

<sup>547</sup> Garofalo, R., *Di un criterio positivo della penalità*, Napoli: Dottor Leonardo Vallardi, 1880

<sup>548</sup> Garofalo, R., *Indemnización á las víctimas del delito*, Madrid: La España Moderna, 1890, p. 15.

<sup>549</sup> Garofalo, R., *Indemnización á las víctimas del delito*, Madrid: La España Moderna, 1890, p. 6.

<sup>550</sup> “Carta de Raffaele Garofalo a Pedro Dorado Montero”, Letter III, GREDOS: *FPDM. Correspondencia de Pedro Dorado Montero. General*. Seen on 17.02.2021. Link: Seen on 31.01.2021. Link: <https://gredos.usal.es/handle/10366/76721>. “qui acchuso é il cenno biografico che Ella mi domanda”, p. 1.

<sup>551</sup> Garofalo, R., *Indemnización á las víctimas del delito*, Madrid: La España Moderna, 1890, p. 10.

a copy-paste of the letter in Italian.<sup>552</sup> Such pattern was repeated several times. When he stressed out that since the publication of the *Criminology*,<sup>553</sup> “two Italian editions and three French editions saw the light”;<sup>554</sup> when mentioning that Garofalo had been “one of the founders of the new review *La scuola positiva nella giurisprudenza penale*, which has been published in Naples under the direction of Giulio Fioretti since its appearance in 1891 until the present year, and that now it is published in Rome under the direction of the professor and deputy Enrico Ferri”;<sup>555</sup> also writing down that “Garofalo has continued his career as a magistrate and he is a Magistrate of the Regional Court”;<sup>556</sup> indicating that “he has been appointed by the Italian Government as a member of the Commission working on the reform of the Criminal Procedure Code and on the elaboration of a new one”;<sup>557</sup> and summarising the various congresses which the Italian jurist assisted to, namely “the one from Rome (1885, November), [...] the second Congress of Criminal Anthropology in Paris (1889), the one of Criminal law in Brussels (1889), the penitentiary in Saint Petersburg (1890) and the juridical one in Florence (1891)”.<sup>558</sup>

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<sup>552</sup> “Carta de Raffaele Garofalo a Pedro Dorado Montero”, Letter III, GREDOS: *FPDM. Correspondencia de Pedro Dorado Montero. General*. Seen on 17.02.2021. Link: Seen on 31.01.2021. Link: <https://gredos.usal.es/handle/10366/76721>. “Fin dal 1876 cominciò a pubblicare articoli critici sulla teoria di diritto penale dominante ed in generale sul problema della giustizia penale”, p. 4.

<sup>553</sup> Garofalo, R., “Prólogo”, *Indemnización á las víctimas del delito*, Madrid: La España Moderna, 1890, p. 12.

<sup>554</sup> “Carta de Raffaele Garofalo a Pedro Dorado Montero”, Letter III, GREDOS: *FPDM. Correspondencia de Pedro Dorado Montero. General*. Seen on 17.02.2021. Link: Seen on 31.01.2021. Link: <https://gredos.usal.es/handle/10366/76721>. “[...] ebbe due edizioni italiane e tre edizioni francesi”, p. 5.

<sup>555</sup> Carta de Raffaele Garofalo a Pedro Dorado Montero”, Letter III, GREDOS: *FPDM. Correspondencia de Pedro Dorado Montero. General*. Seen on 17.02.2021. Link: Seen on 31.01.2021. Link: <https://gredos.usal.es/handle/10366/76721>. “Su quest’ultimo anno fu uno dei fondatori della ‘Scuola positiva’, rivista pubblicata finora in Napoli dall’avvocato G. Fioretti ed ora in Roma dal Professore Enrico Ferri”, p. 6.

<sup>556</sup> Garofalo, R., *Indemnización á las víctimas del delito*, Madrid: La España Moderna, 1890, p. 13. Also, vid. “Carta de Raffaele Garofalo a Pedro Dorado Montero”, Letter III, GREDOS: *FPDM. Correspondencia de Pedro Dorado Montero. General*. Seen on 17.02.2021. Link: Seen on 31.01.2021. Link: <https://gredos.usal.es/handle/10366/76721>. “Il Garofalo ha continuato la sua carriera di magistrato. Egli ha ora l’età di circa 40 anni ed é Consigliere di Corte di Appello”, p. 7.

<sup>557</sup> “Carta de Raffaele Garofalo a Pedro Dorado Montero”, Letter III, GREDOS: *FPDM. Correspondencia de Pedro Dorado Montero. General*. Seen on 17.02.2021. Link: Seen on 31.01.2021. Link: <https://gredos.usal.es/handle/10366/76721>. “Ha avuto dal Ministero italiano l’incarico di lavorare allá preparazione di un nuevo codice di procedura penale”, p. 7.

<sup>558</sup> Garofalo, R., *Indemnización á las víctimas del delito*, Madrid: La España Moderna, 1890, p. 15. Also, vid. “Carta de Raffaele Garofalo a Pedro Dorado Montero”, Letter III, GREDOS: *FPDM. Correspondencia de Pedro Dorado Montero. General*. Seen on 17.02.2021. Link: Seen on

Dorado Montero's assessment on Garofalo was a very positive one. No wonder, he considered his writings to be the ones "condensating in the most organic and complete way [...] the system of criminal contemporary positivism".<sup>559</sup> Neither, little surprise brought the comparison to Lombroso and Ferri, the writings from whom shall not be considered as "reflective, elaborated, systematised, logically interrelated and congruent" as the ones from Garofalo.<sup>560</sup> Yet, Dorado Montero held an objection. It could be summarised as followed. He should not limit himself to develop a specific principle of all the principles making up the new Criminal law, but he should rather develop the rest of them with whom they are linked. Those 'principles' are stated by the correctionalist school:

"Garofalo, and the others with him, are very close to take the plunge, and they will do so as they get rid of the influx that still exert on them some of the classical doctrines (which they attack so much)".<sup>561</sup>

As regards the positioning against the criminals, Garofalo honestly assessed that there were two kinds of wishes: apparent and real ones. He focused on the real ones and he realised that there was a preventive aim (expulsion of the criminals out of the social scheme) and a repressive aim (damage compensation). Furthermore, right after Lombroso's second edition of *L'uomo delinquente* and Ferri's *La teorica dell'imputabilità e la negazione del libero arbitrio*,<sup>562</sup> Garofalo published a very interesting study to this respect.<sup>563</sup>

Numerous assertions from Dorado Montero addressing Garofalo and Fioretti allowed us to discover he was disagreeing with them on certain aspects.

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31.01.2021. Link: <https://gredos.usal.es/handle/10366/76721>. "Le sue principali relazioni sono quelli fatti al congresso di antropologia criminale di Roma (1885) e di Parigi (1889), al congresso di diritto penale di Bruxelles (1889), a quello penitenziario di Pietroburgo (1890) ed a quello giuridico di Firenze (1891)", p. 6.

<sup>559</sup> Garofalo, R., *Indemnización á las víctimas del delito*, Madrid: La España Moderna, 1890, p. 25.

<sup>560</sup> Garofalo, R., *Indemnización á las víctimas del delito*, Madrid: La España Moderna, 1890, p. 25.

<sup>561</sup> Garofalo, R., *Indemnización á las víctimas del delito*, Madrid: La España Moderna, 1890, p. 30: "Garofalo, y los otros con él, están muy cerca de dar este paso, y lo darán cuando se vayan sacudiendo del influjo que, á su pesar, ejercen sobre ellos algunas, no todas, de las doctrinas clásicas, que tanto combaten".

<sup>562</sup> Ferri, E., *Sociologia criminale*, Roma: Casa editrice italiana, 1884, p. 688.

<sup>563</sup> Garofalo, R., "Studi recenti sulla penalità", *Giornale napolitano di filosofia e lettere*, Napoli: Tip. Perrotti, 1878.

They showed incoherence within their determinist postulates: “it is very strange that those who, because of being determinists cannot attribute to freewill of the individual the psychic and physical anomalies lying on him, want to make him responsible thereof, as if it was on his hand to make them disappear”.<sup>564</sup> That was why he judged as “unjustifiable” this penal rigour in “writers of the ‘New Italian School’” -especially Garofalo- and their “cruelty and revenge spirit against the criminal”.<sup>565</sup> Besides, when he analysed the emergence of the new Italian school, he saw their supporters performing “wasteful attempts” since they aimed at knowing the “causes producing the crime”, yet they did not wonder what “did the crime consist of”.<sup>566</sup> Once they realised this mistake, they tried to fix it:

“Garofalo started to do so with his *Criminologia*, whose first chapter was devoted to the definition of the ‘natural crime’, i.e. a crime that was always a crime per se regardless of time and place”.<sup>567</sup>

Additionally, Garofalo was particularly harsh concerning the non-fool criminals,<sup>568</sup> since he frequently asked for the application of the “death penalty”; a demand that was far from appearing on his theory whenever the criminal was, indeed, a fool criminal.<sup>569</sup> Ferri himself was quite severe too: he asked those criminals to “clean up swamp terrains and those infected with malaria” and to employ their forces on “public works”.<sup>570</sup> On the other hand, Dorado Montero carried out a book review of Lombroso’s *La superstizione socialista*.<sup>571</sup> His contributions to the *Revue internationale de sociologie* made him very popular

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<sup>564</sup> Dorado Montero, P., *El Derecho protector de los criminales*, Madrid: Ed. Jiménez Gil, Tomo 1, 1915, p. 338: “parece bastante extraño que quienes por ser deterministas no pueden atribuir á la voluntad libre del sujeto las anomalías físicas y psíquicas que en él radican, quieran hacerle responsable de las mismas, como si estuviera en su mano el hacerlas desaparecer”.

<sup>565</sup> Dorado Montero, P., *El Derecho protector de los criminales*, Madrid: Ed. Jiménez Gil, Tomo 1, 1915, p. 341.

<sup>566</sup> Dorado Montero, P., *El Derecho protector de los criminales*, Madrid: Ed. Jiménez Gil, Tomo 1, 1915, pp. 535-536.

<sup>567</sup> Dorado Montero, P., *El Derecho protector de los criminales*, Madrid: Ed. Jiménez Gil, Tomo 1, 1915, pp. 535-536.

<sup>568</sup> Those who are not exempt from responsibility.

<sup>569</sup> Dorado Montero, P., *El Derecho protector de los criminales*, Madrid: Ed. Jiménez Gil, Tomo 2, 1915, p. 11.

<sup>570</sup> Dorado Montero, P., *El Derecho protector de los criminales*, Madrid: Ed. Jiménez Gil, Tomo 2, 1915, p. 11.

<sup>571</sup> Dorado Montero, P., “Recensión a la obra de Raffaele Garofalo: ‘La superstizione socialista’”, Turín: Roux Frassati, *Revista de Derecho y de Sociología*, Vol. 1, No. 6, 1895, pp. 773-777.

too.<sup>572</sup> The conception of Dorado Montero on the crazy criminal was far kinder than the two of them.<sup>573</sup>

### 1.5. Enrico Ferri (1856-1929)

Ferri<sup>574</sup> produced a very extensive oeuvre.<sup>575</sup> Dorado Montero quoted Ferri in his idea that social, anthropological and physical factors of the crime were far inextricably more interconnected than it was thought and that they could not be separate.<sup>576</sup> He attached a brief reference to Secchi and his work *L'unità delle forze fisiche*.<sup>577</sup> It was though a supporting example of the idea of interconnection and it did not seem to have a further connection to other authors.

In 1896, Ferri stated that “no more than twenty years ago, the organic and psychic description of the criminal began with the works of Cesare Lombroso and the Positive Criminal School”.<sup>578</sup> Even if the traditional Criminal law had been forged “without searching for its deep nourishing roots” within the “pathological soil of individual and social degeneration”,<sup>579</sup> the new trends were progressively coming into force.

“In fact, the Classical Criminal science, from Cesare Beccaria to Francesco Carrara, dealing exclusively with crime, had always left the criminal in the shadows,

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<sup>572</sup> Garofalo, R., “De la solidarité des nations dans la lutte contre la criminalité”, *Revue internationale de sociologie*, 1909, Paris.

<sup>573</sup> Dorado Montero, P., *Los peritos médicos y la justicia criminal*, Madrid: Hijos de Reus, 1906, pp. 141-143.

<sup>574</sup> Ferri, E., *I nuovi orizzonti del diritto e della procedura penale*, Bologna: Zanichelli, 1881; *Studi dalla criminalità in Francia dal 1826 al 1878*, 1881; *I delinquent nell'arte*, Genova: Libreria Editrice Ligure, 1896; *Socialismo e criminalità*, Torino: Fratelli Bocca, 1883; *Sociologia criminale*, Roma: Casa editrice italiana, 1884; *Relazione sui discorsi inaugurali dei rappresentanti il pubblico ministero negli anni 1884 e 1885*, Roma: Fratelli Bencini, 1886; *Socialismo e scienza positiva (Darwin, Spencer, Marx)*, Roma: Casa editrice italiana, 1894; *Il metodo rivoluzionario*, Roma: Tipografia cooperativa sociale, 1902; *I socialisti nazionali e il Governo fascista*, Roma: La Gironde, 1923; *Il Fascismo in Italia e l'opera di Benito Mussolini*, Mantova: Paladino, 1928.

<sup>575</sup> To see a vast bibliography *vid.* pages 63-81 of the work of Mario Sbriccoli, “Elementi per una bibliografia del socialismo giuridico italiano”, *Per la storia del pensiero giuridico moderno*, Milano: Giuffrè Editore, 1976, pp. 1-165.

<sup>576</sup> Dorado Montero, P., *La antropología criminal en Italia*, Madrid: Imprenta de la Revista de Legislación, 1889, p. 74.

<sup>577</sup> Secchi, P. A., *L'unità delle forze fisiche*, Roma: Tipografia Forense, 1864.

<sup>578</sup> Ferri, E., *I delinquenti nell'arte*, Genova: Libreria Editrice Ligure, 1896, p. 15.

<sup>579</sup> Ferri, E., *I delinquenti nell'arte*, Genova: Libreria Editrice Ligure, 1896, p. 15.

attributing to him a unique and average type of man like all the others -except for exceptional cases of obviously abnormal circumstances, such as childhood and congenital deaf-mutism or manifest madness or drunkenness”.<sup>580</sup>

Courts in the traditional criminal law system attributed the “criminal actions” performed criminal not to the degeneration,<sup>581</sup> but to the “guiltiness”.<sup>582</sup> Nevertheless, the new human science started “rather highlighting the differential characters from delinquent to delinquent” and such approach replaced “the classic type [of criminal], unique and colourless” placing instead many “different figures of the delinquent man”.<sup>583</sup> At the end of the 19<sup>th</sup> century, psychiatry gave “precise and complete descriptions”,<sup>584</sup> which only came to improve and to enrich previous positivist theories such as “Morel’s great theory of human degeneration”.<sup>585</sup>

Unsurprisingly, his theory evolved from a conception more focused on the biological influences of the criminal into a position in which social aspects came to play a predominant role over it: “it is not just limited to a biological inferiority, such as idiocy, madness, suicide, etc.” but it rather came given by the “pressure of the environment itself” which ended up adding “an antisocial aggressive power”.<sup>586</sup> Ferri’s thought did not “remain stationary”; going beyond the “sterile boundary of sociology”, he was able to “free himself from a paralysis of development, reaching the practical and fruitful side of socialism”.<sup>587</sup> Yet, he did

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<sup>580</sup> Ferri, E., *I delinquenti nell’arte*, Genova: Libreria Editrice Ligure, 1896, p. 16: “Infatti, scienza classica criminale, da Cesare Beccaria a Francesco Carrara, occupandosi esclusivamente del delitto, aveva sempre lasciato nella penombra il delinquente, attribuendogli un tipo unico e medio di uomo come tutti gli altri -meno casi eccezionalissimi di circostanze evidentemente anormali, come l’infanzia e il sordomutismo congenito o la pazzia manifesta o l’ubriachezza”.

<sup>581</sup> Vid. De Montyel, M., *Impulsions homicides consécutives á la lecture d’un roman passionnel chez un dégénéré Annales médico-psychologiques*, 1894.

<sup>582</sup> Ferri, E., *I delinquenti nell’arte*, Genova: Libreria Editrice Ligure, 1896, p. 22.

<sup>583</sup> Ferri, E., *I delinquenti nell’arte*, Genova: Libreria Editrice Ligure, 1896, p. 17.

<sup>584</sup> Ferri, E., *I delinquenti nell’arte*, Genova: Libreria Editrice Ligure, 1896, p. 22-23.

<sup>585</sup> Morel, B. A., *Traité des dégénérescences physiques, intellectuelles et morales de l’espèce humaine et des causes qui produisent ces variétés maladives*, Paris: J. B. Baillière, 1857; Morel, B. A., *De la formation du type dans les variétés dégénérées*, Paris: J.B. Baillière, 1864; Morel, B. A., *Traité des maladies mentales*, Paris: Librairie Victor Masson, 1860.

<sup>586</sup> Ferri, E., *I delinquenti nell’arte*, Genova: Libreria Editrice Ligure, 1896, p. 18.

<sup>587</sup> Ferri, E., *I delinquenti nell’arte*, Genova: Libreria Editrice Ligure, 1896, p. 70.



never stop believing in a certain influx of the biological circumstances, as depicted by Paul Bourget<sup>588</sup> in one of his works:

“Since race is to an entire people what temperament is to an individual, it is easy to see that the thesis of *Cosmopolis* coincides with the fundamental conclusion of criminal sociology, that crime is a phenomenon determined not only by the conditions of the social environment, but also, and at the same time, by biological conditions”.<sup>589</sup>

Even though perhaps, the most influencing work of Bourget was *Le disciple*.<sup>590</sup> On it, the main character, Adrien Sixte, was a renowned philosopher. He wrote three books in which one may observe the influence of Darwin, Spencer and Ribot on his thought, among others:

“These years of continuous labour in this hermitage at the street Guy-de-la-Brosse had produced, besides the *Anatomy of the Will*, a *Theory of the Passions*, in three volumes, whose publication would have been still more scandalous than that of the *Psychology of God*”.<sup>591</sup>

Sixte had a very routine life until he was accused of inciting a young man to commit a crime due to the influx of his novels. Then, a very interesting debate on the limits of responsibility followed up. Whereas the mother from the criminal attributed the responsibility to Sixte,<sup>592</sup> the latter did, nevertheless, reject any responsibility. The aim of Bourget was “fighting the consequences of determinism, scientist, materialist and cynical psychology, which are embodied by the figure of Adrian Sixte”.<sup>593</sup>

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<sup>588</sup> Bourget, P., *Cosmopolis*, Paris : Lemerre, 1894.

<sup>589</sup> Ferri, E., *I delinquenti nell'arte*, Genova: Libreria Editrice Ligure, 1896, p. 125: “E poichè la razza è per un popolo quello che il temperamento è per un individuo, così è facile vedere che la tesi de *Cosmopolis* coincide colla conclusione fondamentale della sociologia criminale, che il delitto è un fenomeno determinato non soltanto dalle condizioni dell'ambiente sociale, ma altresì, ed insieme, dalle condizioni biologiche”.

<sup>590</sup> Bourget, P., *Le disciple*, Paris: Plon-Nourrit, 1901.

<sup>591</sup> Bourget, P., *Le disciple*, Paris: Plon-Nourrit, 1901, p. 34: “Ces années d'un labeur continu dans cet ermitage de la rue Guy-de-la-Brosse avaient produit, outre cette *Anatomie de la volonté*, une *Théorie des passions*, en trois volumes, dont la publication aurait été plus scandaleuse encore que celle de la *Psychologie de Dieu*”.

<sup>592</sup> Essentially, she unveiled the booklet “Confession of a Young Man of the Period”, a text which his son wrote in jail which proved that influence.

<sup>593</sup> Echevarría, I., “Crimen y responsabilidad”, *El País*, 25.01.2003. Seen on 06.02.2021. Link: [https://elpais.com/diario/2003/01/25/babelia/1043455154\\_850215.html](https://elpais.com/diario/2003/01/25/babelia/1043455154_850215.html).

Definitely, Ferri's ideas were found in Dorado Montero. One of the aspects in which Ferri influenced the Spanish author the most was the doubt on man's freewill and, subsequently, the issue of inherent contradictions of the criminal's degree of responsibility:

“by admitting from the common conscience, misled by the spiritualist illusions of the pretended free will in man, that madness is a disease and a ‘misfortune’ (what has been recognized until the first years of our century) [...], the figure of the crazy criminal carried and still carries with it [...] a living contradiction -for, it is said, if he is insane he is not a criminal-”.<sup>594</sup>

Also, Dorado Montero coincided with Ferri on his view of the uselessness of prisons. For them, penitentiary institutions were highly counter-productive:

“The prison in short doses, as costly as it is stupid and corrupting, and then the police surveillance, which becomes nothing but a persecution that ruins the less wicked without curbing the more perverse, end up completing the figure of these ‘castaways of society’, who then drag their existence in a purulent and chronic sequence of mediocre crimes and irreparable recidivism -product much more of social degeneration than of individual pathology itself”.<sup>595</sup>

Besides, out of the four types of criminal,<sup>596</sup> he referred to the occasional criminal as an individual with “organic and psychical abnormalities”.<sup>597</sup> Yet, those abnormalities were “much less serious and frequent than in other criminals”. The perfectly normal man, stated Ferri, “does not exist either in the physiological or in the psychological organism”.<sup>598</sup> Examples of such criminal were quite well-

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<sup>594</sup> Ferri, E., *I delinquenti nell'arte*, Genova: Libreria Editrice Ligure, 1896, p. 23: “ammettendosi dalla coscienza comune, fuorviata dalle illusioni spiritualistiche del preteso libero arbitrio nell'uomo, che la pazzia è una malattia ed una ‘sventura’ (ciò che del resto si è disconosciuto fino ai primi anni del nostro secolo) e il delitto invece è una ‘colpa’, la figura del delinquente pazzo portava e porta con sè, nel senso comune, una contraddizione vivente -giacchè, si dice, se è pazzo non è delinquente-”.

<sup>595</sup> Ferri, E., *I delinquenti nell'arte*, Genova: Libreria Editrice Ligure, 1896, p. 24: “Il carcere a brevi dosi, altrettanto costose quanto stupide e corruttrici, e poi la sorveglianza della polizia, che diventa il più delle volte una persecuzione che rovina i meno malgavi senza frenare i più perversi, finiscono per completare la figura di questi ‘naufraghi della società’, che trascinano poi la loro esistenza in una sequela purulenta e cronica di delitti mediocri e di recidive irreparabili -prodotto ben più della degenerazione sociale che non della patologia individuale”.

<sup>596</sup> Bonanno, G., “La classificazione dei delinquenti e il reo per passione”, *Archivio di psichiatria*, XVI, Torino, 1895, p. 364-383.

<sup>597</sup> Ferri, E., *I delinquenti nell'arte*, Genova: Libreria Editrice Ligure, 1896, p. 25.

<sup>598</sup> Ferri, E., *I delinquenti nell'arte*, Genova: Libreria Editrice Ligure, 1896, p. 25.

known: the adulterer, the thief, the gambling addict or the provoked violent, among others. In order to exemplify that such criminal type was so common that almost everyone could be identified with it, Ferri came up with the hypothesis of *Tuer le mandarin*,<sup>599</sup> which he incorrectly attributed to Rousseau.<sup>600</sup> In a nutshell, the story depicted the possibility of killing a Chinese richman and inheriting his fortune by just pressing a button without anyone ever knowing such thing happened. Thus, the hypothesis analyses how easily man could find individuals willing to do so, given that the crime would be anonymous and it would have no legal or social consequences at all.

The born criminal could be detected in Zola's novel. The protagonist, Jacques Lantier, was "a true type of born criminal, epileptic in nature, with accesses of necrophilia or sexual perversion of the corpse".<sup>601</sup> Like many other authors of his time, Ferri could not avoid falling into the errors of primitive positivism, and so he also ventured at establishing dubious rules which were nowadays titled after the "pseudoscientific" adjective:

"Since often people's highly developed feelings of altruism are matched by their limited intelligence, those who lack moral sentiment are often bestowed with an intellect that, despite not being very deep or equilibrated, is notably sharp and lucid".<sup>602</sup>

Though, this improper widening of the scientific thought and its consequent "pseudoscientific" character was mostly due to the proliferation of the 'naturalist novel' and the 'psychological novel', which portrayed the "determining conditions of the environment" and the "states of mind of the individual", respectively.<sup>603</sup> Many authors, among which one might find Ferri, were convinced that they could

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<sup>599</sup> Chateaubriand, F., *Génie du christianisme*, Paris : Beaulé et Jubin, 1837. The original version was published in 1802.

<sup>600</sup> Due to the fact that he had read Balzac, who wrongly attributed the story to Rousseau on his *Le Père Gloriot*. For further information on Balzac's misleading association vid. Coimbra Martins, A., "O Mandarim assassinado", *Ensaio Queirosianos*, Lisboa, 1967.

<sup>601</sup> Ferri, E., *I delinquent nell'arte*, Genova: Libreria Editrice Ligure, 1896, p. 119.

<sup>602</sup> Ferri, E., *I delinquenti nell'arte*, Genova: Libreria Editrice Ligure, 1896, p. 20: "Giacchè, come avviene spesso che nelle persone a sentimenti sviluppatissimi di altruismo corrisponda intelligenza limitata, così a chi manca di sentimento morale natura prodiga spesso un ingegno, se non profondo ed equilibrato, pero molto acuto e lucido".

<sup>603</sup> Ferri, E., *I delinquenti nell'arte*, Genova: Libreria Editrice Ligure, 1896, p. 103.

find criminological traits<sup>604</sup> and medically diagnosed diseases within this kind of novels:

“Before Cesare Lombroso, barely the genius of Shakespeare, as we shall now see, in the portrayal of his characters, or that of Dostoyevsky in his observation, unfortunately personal, of the convicts in Siberia, or the talent of Eugene Sue in his observation of the Parisian slums, could delineate the sociological type of the born criminal; but after the creation of criminal anthropology, this type has already entered contemporary art, especially through the initiative of Émile Zola”.<sup>605</sup>

Charcot found that the “physical stigmata” and “characteristic attitudes”<sup>606</sup> of those deformed and demoniacs in art reproduced “[...] the features and poses that the modern scientist detects and studies in those [people] suffering from severe hysteria and hystero-epilepsy”.<sup>607</sup> The doctor Edouard Lefort published a monograph illustrated with 109 heads,<sup>608</sup> which had been preceded by Edmondo Mayor’s anthropological-criminal study on the iconography of the Caesars.<sup>609</sup> Lefort arranged such work “at the style of Charcot”, i.e. trying to find out whether the characteristics matched those represented by the different artists performing the criminals in art.<sup>610</sup> Back then, the faith kept in science was superlative to the extreme of better trusting “objective traits” of criminals described within novels - little worthy of scientific rigour-, rather than having to trust in the old-fashioned, aprioristic, neoclassical postulates of Criminal law:

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<sup>604</sup> Tebaldi, A., *Fisionomia ed espressione studiate nelle loro deviazioni*, Padova: Drucker & Tedeschi, 1884. Vid. First Part, Chapter two (*Tipi di deviazione fisionomica*) and Second Part, Chapter Four (*Le espressioni in relazione ai disordini psico-fisici*), pp. 28-46 and pp. 112-133, respectively.

<sup>605</sup> Ferri, E., *I delinquenti nell'arte*, Genova: Libreria Editrice Ligure, 1896, p. 19: “Appena il genio di Shakespeare, come vedremo or ora, nella figurazione dei suoi personaggi o quello di Dostoiévsky nella osservazioni, purtroppo personale, dei forzati in Siberia o il talento di Eugenio Sue nell’osservazione dei bassi fondi parigini, hanno potuto, prima di Cesare Lombroso, delineare il tipo sociologico del delinquente nato; che però, dopo la creazione dell’antropologia criminale, è già entrato nell’arte contemporanea, specialmente per l’iniziativa di Emilio Zola”.

<sup>606</sup> Charcot, *Les démoniaques dans l'art*, Paris, 1887.

<sup>607</sup> Ferri, E., *I delinquenti nell'arte*, Genova: Libreria Editrice Ligure, 1896, p. 28.

<sup>608</sup> Lefort, E., *Le type criminel d'après les savants et les artistes*, Lyon: Storck, 1892. In his statement of purpose, Lefort aims at addressing “the most important question” he has ever been asked for: “Should we deem every criminal as an insane, as many people admit it? Or if no criminal is insane, where does his responsibility begin?”.

<sup>609</sup> Ferri, E., *I delinquenti nell'arte*, Genova: Libreria Editrice Ligure, 1896, p. 31.

<sup>610</sup> Lefort, E., *Le type criminel d'après les savants et les artistes*, Lyon: Storck, 1892, p. 2.

“Art [...] has almost always kept alive, even in the observation of criminals, the presence of human reality and its positive physiological and psychic attitudes, against the more or less platonic aberrations of a metaphysical nebula”.<sup>611</sup>

Indeed, the criminal type sensed by Cesare Lombroso and scientifically described by the Italian Anthropological School had “a perfect match in the artistic work of many centuries”.<sup>612</sup> Particularly, Ferri thought so of Dostoevsky’s *Crime and Punishment* or Émile Zola’s *La Bête Humaine* because even if they “load the colours of the truth” they did not come to “alter its relationships and proportions”.<sup>613</sup> Certain elements deemed by Ferri as “typically criminal” were, among others, a “coarse and obtuse head, an asymmetrical face, small and grizzly eyes, enormous and square jaws, low and receding forehead, protruding eyebrows and cheekbones, pointed or looped ears (reproducing Darwin’s lobule), abundant and hard hair and a sparse or missing beard”.<sup>614</sup>

For Ferri,<sup>615</sup> such thing as the room for manouvre of the “personal factor” was very little. Just as the functioning of positive sciences; that was the difference “between positive science and metaphysics”, since it did only affect the manner or intensity with which we approached the issue.<sup>616</sup> Even though it was quite common, not all the enthusiasts of the new positivistic school had rejected any religious approach. Indeed, when Ferri referred to the Third International Congress of Criminal Anthropology, held in Brussels in 1892, he aimed at De Baets, “who was a priest”. Besides, the Pope himself “declared that he does not want to disown [...] the marvellous conquests of contemporary scientific thought”.<sup>617</sup>

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<sup>611</sup> Ferri, E., *I delinquenti nell'arte*, Genova: Libreria Editrice Ligure, 1896, p. 29: “L’arte [...] hanno quasi sempre mantenuta viva, anche nell’osservazione del delinquenti, la presenza della realtà umana e dei suoi positivi atteggiamenti fisiologici e psichici, contro le aberrazioni più o meno platoniche di una nebulosa metafisica”.

<sup>612</sup> Ferri, E., *I delinquenti nell'arte*, Genova: Libreria Editrice Ligure, 1896, p. 36.

<sup>613</sup> Ferri, E., *I delinquenti nell'arte*, Genova: Libreria Editrice Ligure, 1896, p. 104.

<sup>614</sup> Ferri, E., *I delinquenti nell'arte*, Genova: Libreria Editrice Ligure, 1896, p. 32.

<sup>615</sup> Vid. “Il diritto di punier come funzione sociale”, *Archivio di Psichiatria, scienze penali ed antropologia criminale*, vol. III, fascicolo 1.

<sup>616</sup> Ferri, E., *I delinquenti nell'arte*, Genova: Libreria Editrice Ligure, 1896, p. 103.

<sup>617</sup> Ferri, E., *I delinquenti nell'arte*, Genova: Libreria Editrice Ligure, 1896, pp. 128-129.

With his description of Raskolnikoff,<sup>618</sup> Dostoievsky achieved his goal of reaching “the deep and obscure roots of volitional determination: from the instinctive flashes of a degenerate cerebration to its precise, but impulsive, almost somnambulistic and automatic muscular realisation”.<sup>619</sup>

The intuition that had led Dorado Montero to presume the future development of a genetic science, shared its roots with Ferri’s blueprint. Indeed, it was quite possible he took such idea from him. Ferri stated that before Darwin “only a descriptive anatomy of organs, tissues and organic elements was made”.<sup>620</sup> Even though that was necessary, he abrogated for something deeper: the “genetic anatomy”.<sup>621</sup> He did, however, acknowledge the limitations thereof: “this is located at the opposite extreme of moral anatomy, which is much more difficult”.<sup>622</sup>

There was both an environmental and a biological basis for the human acting, yet the first one was subjected to the configuration set by the latter:

“Beliefs and opinions and theories are themselves the effect, the result, more or less perceived, of this same temperament and environment, since one is born idealist or positivist, mystic or materialist, reactionary or radical, atheist or believer, and in the surrounding variety of scientific or religious or political opinions each man appropriates and absorbs that which best responds to the dispositions, embryonically contained and organised in his physiological and psychic personality”.<sup>623</sup>

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<sup>618</sup> Main character of his novel *Crime and Punishment*.

<sup>619</sup> Ferri, E., *I delinquenti nell'arte*, Genova: Libreria Editrice Ligure, 1896, p. 131.

<sup>620</sup> Ferri, E., *I delinquenti nell'arte*, Genova: Libreria Editrice Ligure, 1896, p. 132.

<sup>621</sup> Even if the closest thing to their mindset back then would limit to “various phases of individual life and in the corresponding various species of the zoological scale”. Videre Ferri, E., *I delinquenti nell'arte*, Genova: Libreria Editrice Ligure, 1896, p. 132. Also, other possibility (rather solely theoretical) was “tracing the most distant dissimilar embryos in the different psychological stratifications, which in each individual accumulated the hereditary transmission of infinite generations”. Vid. Ferri, E., *I delinquenti nell'arte*, Genova: Libreria Editrice Ligure, 1896, p. 132.

<sup>622</sup> Ferri, E., *I delinquenti nell'arte*, Genova: Libreria Editrice Ligure, 1896, p. 132.

<sup>623</sup> Ferri, E., *I delinquenti nell'arte*, Genova: Libreria Editrice Ligure, 1896, p. 140: “Che anzi e credenze ed opinioni e teorie sono esse stesse l'effetto, la risultante più o meno avvertita di questo stesso temperamento e ambiente, poichè si nasce idealisti o positivisti, mistici o materialisti, reazionari o radicali, atei o credenti e nella varietà circostante delle opinioni scientifiche o religiose o politiche ogni uomo si appropria ed assorbe quella che più risponde alle disposizioni, embrionalmente contenute e organizzate nella sua personalità fisiologica e psichica”.

Ferri also stressed out the determining role that intention should perform when determining the penalty and when trying set the guilt in a criminal act:

“Every human action is as much worthwhile and moral or immoral as the internal motives that determine it are worthwhile and moral or immoral. A materially beneficial act may in reality be despicable, if moved by the ignoble aim of seduction or blackmail”.<sup>624</sup>

However, the whole issue with freedom and Ferri’s consideration was not so dichotomic. Many contradictions, as well as certain incompatibilities, arose. The element ‘freedom’ in this scheme was not as simple as ‘doing what one would like to’. Ferri did not fall into such mistake: “For either by this ‘freedom’ we mean physical freedom alone, which consists in the absence of impediments to the development of one’s own tendencies and activity, however much these may be determined by the individual constitution and the external environment, and then we are in full agreement”.<sup>625</sup> Ferri warned that then we would be in a “full physical and moral determinism”, since we would be admitting that “all actions” were a “determining effect of their determining causes”. Yet, this would not exclude “any of man’s physical freedoms” such as freedom of movement but only the “freedom of the individual”.

“By that equivocal ‘freedom’ is meant a kind of free-will attenuated and stripped of the most evident oppositions to the facts, and then we are in a state of misunderstanding and, moreover, without having the advantages of an open and frank determinism, we have all the damages of the ancient physical goal of free-will”.<sup>626</sup>

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<sup>624</sup> Ferri, E., *I delinquenti nell'arte*, Genova: Libreria Editrice Ligure, 1896, p. 147: “Ogni azione umana per tanto vale ed è morale od immorale, per quanto valgono e sono morali od immorali i motivi interni che la determinano. Un atto materialmente benefico può essere in realtà spregevole, se mosso da scopo ignobile di seduzione o di ricatto”.

<sup>625</sup> Ferri, E., *I nuovi orizzonti del diritto e della procedura penale*, Bologna: Nicola Zanichelli, 1884, 2° ed., p. 48: “Infatti o per questa « libertà » si intende la sola libertà fisica, che consiste nell'assenza di impedimenti allo sviluppo delle proprie tendenze e della propria attività, per quanto queste siano determinate dalla costituzione individuale e dall'ambiente esterno, ed allora noi siamo perfettamente d'accordo”.

<sup>626</sup> Ferri, E., *I nuovi orizzonti del diritto e della procedura penale*, Bologna: Nicola Zanichelli, 1884, 2° ed., pp. 48-49: “Oppure per quella equivoca « libertà » si intende una specie di libero arbitrio attenuato e sfrondato delle più evidenti opposizioni ai dati di fatto, ed allora si versa nell'equivoco e per giunta, senza avere i vantaggi di un aperto e schietto determinismo, si hanno tutti i danni dell'antico meta fisico libero arbitrio”.

Therefore, he got to a conclusion, which he passed to Dorado Montero himself, that the only conceivable realities were “only absolute freewill or absolute determinism”.<sup>627</sup> Besides, the renowned disdain of Dorado Montero towards ‘eclectical schools’ and especially ‘middle ways’ also appeared as depicted by Ferri:

“Every middle way is a nonentity and causes difficulties to sprout at every step. If, finally, by this equivocal and generic ‘freedom’ is meant the internal energy that each individual has to develop in a way that is precisely individual, proper, different from the others, because each has a special physical-psychic temperament, which makes him react in a special way to the various pressures of the environment, then we are also in agreement; but then, again, we are far from a true ‘moral freedom’, which, on the contrary, is implicitly recognised as a ‘moral freedom’. On the contrary, it implicitly recognises the fundamental determinism of organic and psychic constitution for each individual; a determinism that man has in common with every other living being”.<sup>628</sup>

Another relevant trait of the Doradian criminal legal philosophy came from Ferri. The latter asserted, and so did the Spanish penalist, that one of the “most frequent misunderstandings” laid on the fact of “denying the old freewill” while maintaining at the same time “an indefinite moral freedom” and “reproaching positivist determinism for reducing man to an automaton and the whole of nature, physical and moral, to a mere mechanism”.<sup>629</sup> For Ferri, every human action was the “necessary and unavoidable effect of determining causes”; every man had his own “physiognomy”, to whose influence he responded differently “from other man” and from “he himself in different conditions of time and space, since the state of his organism is different”.<sup>630</sup> Man was not considered

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<sup>627</sup> Ferri, E., *I nuovi orizzonti del diritto e della procedura penale*, Bologna: Nicola Zanichelli, 1884, 2<sup>o</sup> ed., pp. 48-49.

<sup>628</sup> Ferri, E., *I nuovi orizzonti del diritto e della procedura penale*, Bologna: Nicola Zanichelli, 1884, 2<sup>o</sup> ed., pp. 48-49: “Che se, daultimo, per questa equivoca e generica « libertà » si intende la energia interna che ogni individuo ha di svolgersi in modo appunto individuale, proprio, diverso dagli altri, perchè ciascuno ha una speciale tempra fisio -psichica, che gli fa reagire in un modo speciale alle varie pressioni dell'ambiente, allora siamo pure d'accordo ; ma allora, di nuovo, siamo ben lontani da una vera « libertà morale » , che anzi si riconosce implicitamente il determinismo fondamentale della costituzione organica e psichica per ogni individuo ; de terminismo che l'uomo ha in comune con ogni altro essere vivente”.

<sup>629</sup> Ferri, E., *I nuovi orizzonti del diritto e della procedura penale*, Bologna: Nicola Zanichelli, 1884, 2<sup>o</sup> ed., p. 49: “.

<sup>630</sup> Ferri, E., *I nuovi orizzonti del diritto e della procedura penale*, Bologna: Nicola Zanichelli, 1884, 2<sup>o</sup> ed., p. 49.



by him as an entity alien to laws of determinism, for he was “nothing more, like every living being, than a machine”; he was subject to the “universal law of causality”.<sup>631</sup> Due to a combination of “physical, physiological and psychical causes” he could not act any other way.<sup>632</sup> And the logical, traditional criminal law response was immediately attacked by him as follows:

“[Man] is not machine-made, in the sense of an inorganic mechanism, precisely because it is a living organism, which has its own special responsiveness to external causes, determined necessarily, case by case, by the preceding physical and psycho-psychological causes”.<sup>633</sup>

A last insight into the Ferri-Dorado Montero connection was to be found in his statement alledging that determinism did not mean the end of life as we knew, since he enclosed a further nuance that also made Dorado Montero look as if he was believing on freewill:

“That is why those who say that, once free will is denied men become automatons subject to Muslim fatalism, are rather naive. Men are so little automaton that each of them is endowed with his own special way of reacting against the external environment; but this does not exclude, and indeed demands, physical and moral determinism, for otherwise, if man had a freedom, independent to a little or a lot from the determining causes, one would no longer conceive the same personality as a permanent type of individual character”.<sup>634</sup>

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<sup>631</sup> Ferri, E., *I nuovi orizzonti del diritto e della procedura penale*, Bologna: Nicola Zanichelli, 1884, 2<sup>o</sup> ed., p. 52.

<sup>632</sup> Ferri, E., *I nuovi orizzonti del diritto e della procedura penale*, Bologna: Nicola Zanichelli, 1884, 2<sup>o</sup> ed., p. 52.

<sup>633</sup> Ferri, E., *I nuovi orizzonti del diritto e della procedura penale*, Bologna: Nicola Zanichelli, 1884, 2<sup>o</sup> ed., p. 52: “Ma non è fatto a macchina, nel censo di meccanismo inorganico, appunto perchè esso è un organismo vivente, che ha una propria e speciale risonanza alle cause esterne, determinata necessariamente, caso per caso, dalle cause fisiche e psico-psicologiche precedenti”.

<sup>634</sup> Ferri, E., *I nuovi orizzonti del diritto e della procedura penale*, Bologna: Nicola Zanichelli, 1884, 2<sup>o</sup> ed., p. 52-53: “Ecco perché sono pure illusioni quelle di chi dice che, negato il libero arbitrio, gli uomini diventano automi soggetti al fatalismo musulmano. Gli uomini sono così poco automi, che ognuno di essi è dotato di un proprio e speciale modo di reagire contro l'ambiente esterno; ma ciò non esclude ed anzi esige il determinismo fisico e morale, ché altrimenti, se l'uomo avesse una libertà, indipendente per poco o per molto dalle cause determinanti, più non si concepirebbe la stessa personalità, come tipo permanente di carattere individuale”.

Finally, in *Polemica in difesa della scuola criminale positiva*,<sup>635</sup> supplementary aspects regarding such issue were observed. I will, however, not display a further outline on this matter though.

Moving on, Ferri mentioned Dorado Montero among the leading intellectuals of his time who advocated “the method and fundamental inductions of criminal sociology”.<sup>636</sup> On such list, leaving aside Dorado Montero himself, he also mentioned Mott (Universidade de São Paulo), Viveiros de Castro (Universidade do Rio de Janeiro), Lucas (Universidade de Coimbra), Vieira De Araujo (Universidade do Recife), Hamon (Université Nouvelle de Bruxelles), Prins (Université Libre de Bruxelles), van Hamel (Universiteit van Amsterdam), Durckheim (Université de Bordeaux), and Vargha (Universität Graz).

Ferri noted as well that at the First Congress of the International Institute of Sociology (1894), Noricow held a presentation on “Justice and Darwinism” and Dorado Montero held his on “Sociology and Criminal law”.<sup>637</sup> At the Second Congress of the International Institute of Sociology (1895), Ferri highlighted the contribution on “Crime as a social phenomenon” by Tönnies, Garofalo, Tavares, De Medeiros, Puglia and himself. Ignoring the third one, he directly focused on the Fourth Congress (1897), in which Dorado Montero and Puglia referred to the “Criminal Justice of the Future”.<sup>638</sup> Ferri coincided with the ideas of Dorado Montero regarding the evolution of the crime. He stated the fact that society had always had a “criminal or repressive ministry”, but “by gradually stripping itself from the spirit of revenge, penance and retributive justice” was now to be reduced to its “genuine character of a clinic of preservation from the disease of crime”.<sup>639</sup> Thereupon, he gave credit of this idea and its developings to Dorado Montero.<sup>640</sup>

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<sup>635</sup> Ferri, E., *Polemica in difesa della scuola criminale positiva*, Bologna: Nicola Zanichelli, pp. 85-114.

<sup>636</sup> Ferri, E., *Sociologia criminale*, Roma: Casa editrice italiana, 1884, p. 41.

<sup>637</sup> Ferri, E., *Sociologia criminale*, Roma: Casa editrice italiana, 1884, p. 49.

<sup>638</sup> Ferri, E., *Sociologia criminale*, Roma: Casa editrice italiana, 1884, p. 49. Specifically, he readdressed to the *Annales de l'Institut Internationale de Sociologie*, Paris, I, 1895; II, 1896; IV, 1898.

<sup>639</sup> Ferri, E., *Sociologia criminale*, Roma: Casa editrice italiana, 1884, pp. 545-546.

<sup>640</sup> Dorado Montero, P., “Du droit pénal répressif au droit pénal préventif”, *Annales Institut International de Sociologie*, Paris, 1899, V, p. 255.

Even at the time when Ferri exposed what he called “our positivist theory”, he quoted Dorado Montero<sup>641</sup> for his rationale behind moral freedom:

“If we now complete the series of the various species of social sanction, in the extra-legal field, in the civil and administrative field and in the truly criminal field [...] it is easy to see that the traditional theory of moral guilt as a condition of punishability is reduced to making punishment [...] a gratuitous exception to the whole series of sanctions, not only natural but also social, by introducing into the criminal form of social sanction alone an element of ‘moral culpability’ which is completely unknown or neglected in every other kind of sanction. Therefore, our positivist theory, which does not require this element even in the penal sanction, has the great merit [...] of linking - in full agreement with universal determinism (telluric, organic, social) - this penal sanction to the whole series of natural (physical, biological, social) sanctions, thus, subjecting it to the empire of natural laws themselves and giving it a truly positive and much firmer foundation than that much contested and indecipherable ‘moral freedom’”.<sup>642</sup>

In his *Sociologia Criminale*,<sup>643</sup> Ferri’s criticism started, just as Dorado Montero, by criticising the defects of the “abstract reasoning” within the Classical Criminal law, since when it moved “further and further away from the real world”, it both ended up losing “the sense of reality” and also creating “illusory difficulties where none exist”.<sup>644</sup> His priority was to “leave behind the nebulous heights of

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<sup>641</sup> Dorado Montero, P., *Problemas jurídicos contemporáneos*, Madrid: España moderna, 1893.

<sup>642</sup> Ferri, E., *Sociologia criminale*, Roma: Casa editrice italiana, 1884, p. 570: “Se noi ora completiamo la serie delle varie specie di sanzione sociale, nel campo extra-legale, nel campo civile ed amministrativo e nel campo veramente criminale — chiudendola fra l'estremo inferiore della semplice sanzione di disistima pubblica e l'estremo superiore della condanna penale per vero e proprio reato — è facile vedere, che la teoria tradizionale della colpa morale come condizione di punibilità si riduce a fare della pena, propriamente detta, una eccezione gratuita a tutta la serie delle sanzioni, non solo naturali, ma anche sociali, coll'introdurre appunto, nella sola forma penale di sanzione sociale, un elemento di morale colpeabilità, che è completamente ignoto o trascurato in ogni altra specie di sanzione. E quindi la nostra teoria positiva, che non richiede questo elemento neanche nella sanzione penale, ha il grande pregio, che è anche una riconferma di verità, di rannodare — in pieno accordo col determinismo universale (tellurico, organico, sociale) — codesta sanzione penale a tutta la serie delle sanzioni naturali (fisiche, biologiche, sociali) sottoponendola quindi all'impero delle stesse leggi naturali e dandole così un fondamento veramente positivo e ben più saldo di quella tanto contestata e indecifrabile ‘morale libertà’”.

<sup>643</sup> In order to avoid confusion, it should be born in mind that Ferri’s *I nuovi orizzonti del diritto e della procedura penale* changed its name on its third edition to *Sociologia criminale*.

<sup>644</sup> Ferri, E., *Sociologia criminale*, Roma: Casa editrice italiana, 1884, p. 681.

aprioristic philosophy” and so restoring the “clear observation of everyday facts”.<sup>645</sup>

“In our century, the need for a positive, experimental, observational philosophy has imposed itself in order to return to the pure and perennial source of the reality of things”.<sup>646</sup>

Thus, whereas the “Classical School cancels all moral responsibility, and therefore also social responsibility”, the Positivist Schools abrogate “to extend social responsibility as far as possible”.<sup>647</sup> Ferri contemplated the use of a variety of measures: preventive, reparative, repressive, and eliminative measures. Often, the figure of Ferri has been accused on being the soft sector of positivism (defending just the two first) or being like the rest of Lombrosian positivists (thus, only supporting the latter ones). Even if one thought of him as hard positivist, certain limits within his positioning could be pinpointed. As regarded the repressive measures, they “should always be temporary but, as a rule, indefinite”.<sup>648</sup> That reminded Dorado Montero’s opinion concerning the undeterminate sentence.<sup>649</sup> As concerned the eliminative measures, he contemplated them only if they were used “against the most criminal and dangerous actions (atavistic criminality) either because of their seriousness (qualified murders, violent rapes, fires, etc.) or because of the character of the individuals committing them (born criminals, or crazy,<sup>650</sup> habitual)”.<sup>651</sup> In a nutshell, the response to criminological problems could be found in what he named after ‘sociological medicine’ where “the great classes of hygienic measures (preventive means) and therapeutic disciplines (reparative and repressive

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<sup>645</sup> Ferri, E., *Sociologia criminale*, Roma: Casa editrice italiana, 1884, p. 681.

<sup>646</sup> Ferri, E., *Sociologia criminale*, Roma: Casa editrice italiana, 1884, p. 681: “si è imposta nel nostro secolo la necessità della filosofia positiva, sperimentale, di osservazione, per ritornare alla fonte pura e perenne della realtà delle cose”.

<sup>647</sup> Ferri, E., *Sociologia criminale*, Roma: Casa editrice italiana, 1884, p. 686.

<sup>648</sup> Ferri, E., *Sociologia criminale*, Roma: Casa editrice italiana, 1884, p. 687.

<sup>649</sup> Dorado Montero, P., “La sentencia indeterminada”, *Revista general de legislación y jurisprudencia*, Vol. 60, No. 120, 1912, pp. 5-26.

<sup>650</sup> Escuder, J.M., *Locos anómalos*, Madrid: Sucesores de Rivadeneyra, 1895; «El crimen de un loco y un imbécil», *RGLJ*, T. 61, 1882; and «Locos lúcidos», *RGLJ*, T. 63.

<sup>651</sup> Ferri, E., *Sociologia criminale*, Roma: Casa editrice italiana, 1884, p. 687: “contro le azioni più criminose e pericolose (criminalità atavica) sia per la loro gravità (omicidi qualificati, stupri violenti, incendi, ecc.) sia per il carattere degli individui che le commettono (delinquenti nati, o pazzi, abituali)”.

means) and of surgical operations (eliminative means) constitute the armamentarium with which society can provide for the permanent necessity of its own preservation”.<sup>652</sup>

At the Early Middle Ages, the theory of intention over the material commission of the wrongdoing predominated in some sectors, among which stood out Hugue de Payens<sup>653</sup> who defended that “sin and guiltiness did not lie in the act itself, but rather in the intention” and so the one who “took life away from the enemy” only sinned if “the action was grounded on hate”, yet it was not that way when he did so “with purity of intention”.<sup>654</sup> Arising from the knowledge of both anthropology and criminal psychology, Ferri concluded that the offender presented many “different anthropological varieties of organic and psychic characters” each of them with the potential and effective “power of anti-social activity”. The Italian author completely disregarded the “almost algebraic” type of man as assumed by “classical science and legislation”.<sup>655</sup> Dorado Montero agreed with Ferri in this idea. That was the reason why the legislator should elaborate the norms jointly with sociologists in order to bring and to adapt the “various means of social defence to the various categories of offenders”.<sup>656</sup>

A decisive factor in Dorado Montero’s *Undeterminate Sentence*<sup>657</sup> was to be found in Ferri too. He quoted Garofalo in his work. In it, Garofalo concluded that appreciating other elements as an object for the criminal judgement other than the crime itself ultimately meant “punishing a man not for what he has done but for what he would be capable of doing”.<sup>658</sup> In an humorous note, Ferri pointed out that this already took place in the classical criminal justice, even if we did not

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<sup>652</sup> Ferri, E., *Sociologia criminale*, Roma: Casa editrice italiana, 1884, p. 687: “anche nella medicina sociologica le grandi classi di provvedimenti igienici (mezzi preventivi) e discipline terapeutiche (mezzi riparatori e repressivi) e di operazioni chirurgiche (mezzi eliminativi) costituiscono l’armamentario, onde la società può provvedere alla permanente necessità della propria conservazione”.

<sup>653</sup> First Grand Master and founder of the Knights Templar.

<sup>654</sup> Baños, P., *Así se domina el mundo*, Barcelona: Editorial Ariel, 1<sup>o</sup> Ed., 2017, p. 328.

<sup>655</sup> Ferri, E., *Sociologia criminale*, Roma: Casa editrice italiana, 1884, p. 690.

<sup>656</sup> Ferri, E., *Sociologia criminale*, Roma: Casa editrice italiana, 1884, p. 691.

<sup>657</sup> I referred to his general theory, not to any particular kind of work.

<sup>658</sup> Carnevale, E., “L’arbitrio del giudice nell’applicazione della pena”, *Riv. pen.*, ag. 98, p.

want to acknowledge so.<sup>659</sup> He opposed the arguments of Brusa<sup>660</sup> (Carrara's disciple) and of some of his colleagues by contraposing them to Setti's arguments. They were well answered, on this subject, by Setti.<sup>661</sup>

### 1.6. Vincenzo Lilla (1837-1905)

The main goal of Vincenzo Lilla was to “resurrect the Ethics of Aristotle by taking it as a source in Legal Philosophy”.<sup>662</sup> Dorado Montero analysed his most relevant work<sup>663</sup> and he noted that such book was “not completely finished”,<sup>664</sup> since only its first volume saw the light.<sup>665</sup> Even if Vincenzo Lilla belonged to an idealist school, he was somehow critic with his sector and stated the following:

“The abstract ethics of Hegel, Cousin and Gioberti come to an end, and the formal ethics of Kant declines, and the modern thought turned its eyes to the ethics of Aristotle because it does not mutilate the human nature, but it asserts and acknowledges it as it is, with all its needs, without sacrificing nor pleasure before goods, neither goods before virtue, but coordinating them according to the rationality of the ends”.<sup>666</sup>

If, in many occasions, we have referred to Dorado Montero's conception of the fallibility of human nature, it seemed plausible he received such influence from Lilla himself. If Dorado mentioned the imperfect human nature, Lilla

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<sup>659</sup> Ferri, E., *Sociologia criminale*, Roma: Casa editrice italiana, 1884, p. 691.

<sup>660</sup> Brusa, E., *Sul nuovo positivismo nella giustizia penale*, Torino: Unione Tipografico, 1887, pp. 57 ff. He devotes his Chapter 38 to the “The whole treaty of the judicial process focuses on the proof of facts that which took place, never of simple possibilities”, in order to criticise the way of acting under the new positivist postulates.

<sup>661</sup> Setti, “L'azione penale privata e la scuola positiva”, in *Riv. Carc.*, 1888, XVIII, fasc. 5°. Cit. in Ferri, E., *Sociologia criminale*, Roma: Casa editrice italiana, 1884, p. 693.

<sup>662</sup> Dorado Montero, P., *El positivismo en la ciencia jurídica y social italiana*, Madrid: Imprenta de la Revista de Legislación, 1891, p. 106.

<sup>663</sup> Lilla, V., *Filosofia del Diritto*, Napoli: Presso Nicola Joven Libraio Editore, 1880.

<sup>664</sup> Dorado Montero, P., *El positivismo en la ciencia jurídica y social italiana*, Madrid: Imprenta de la Revista de Legislación, 1891, p. 107.

<sup>665</sup> Years later, in 1903, a more detailed work was published: Lilla, V., *Manuale di filosofia del diritto*, Milano: Società Editrice Libreria, 1903.

<sup>666</sup> Dorado Montero quotes from *Filosofia del Diritto* a paragraph within the Foreword: “La ética abstracta de Hegel, Cousin, Gioberti, toca ya a su ocaso, y la ética formal de Kant declina, y el pensamiento moderno vuelve los ojos hacia la ética Aristóteles, porque no mutila la naturaleza humana, sino que la afirma y reconoce tal como es, con todas sus necesidades, sin sacrificar los placeres los bienes, ni los bienes a la virtud, sino coordinando los bienes según la racionalidad de los fines”. Vid. Dorado Montero, P., *El positivismo en la ciencia jurídica y social italiana*, Madrid: Imprenta de la Revista de Legislación, 1891, p. 107.

maintained that “the law has never submitted or conformed to the living among men” and it will never do so in the future “because it is far superior to their imperfections”; within history “law has only showed up under more or less imperfect forms”, i.e. “the rule of the strongest, the *jus private violentiae*, the expression of the national will, etc.”.<sup>667</sup> It was very typical for Lilla to make a very strong differentiation between the rational law and the historical law. The first one studied “the true and own essence of the law” whereas the latter one focused on the “several forms it has acquired within history”.<sup>668</sup> The conception that the Italian author held was that law was “an objective order, a real entity, yet aerial and unfathomable”. It was never “achievable in life in all its purity”.<sup>669</sup> Law for Lilla was “the natural law of the Scholastics, immutable, absolute, equal, inflexible, of all times and countries”, i.e. the “eternal principles of justice”.<sup>670</sup>

In a nutshell, Lilla thought of four kinds of law: ideal law, natural law, positive law and rational law. Natural law was based on a set of values inherent to the human nature and human reason, ideal law was a theoretical, idealist model of reference (it did not possess a real character as natural law did), positive law was between ideal law and natural law (since it was real -as opposed to ideal law- but it was not yet so real as natural law, it was still on the making), and rational law was the generic concept that encompasses the previous three ones. Dorado Montero held Lilla’s definition of ideal law, in an attempt to reject any absolute truths and to conclude a highly relativist framework in which the transcendental problem was adscribed.

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<sup>667</sup> Dorado Montero, P., *El positivismo en la ciencia jurídica y social italiana*, Madrid: Imprenta de la Revista de Legislación, 1891, p. 109.

<sup>668</sup> Dorado Montero, P., *El positivismo en la ciencia jurídica y social italiana*, Madrid: Imprenta de la Revista de Legislación, 1891, p. 109, footnote (1).

<sup>669</sup> Dorado Montero, P., *El positivismo en la ciencia jurídica y social italiana*, Madrid: Imprenta de la Revista de Legislación, 1891, p. 108.

<sup>670</sup> Dorado Montero, P., *El positivismo en la ciencia jurídica y social italiana*, Madrid: Imprenta de la Revista de Legislación, 1891, p. 108.

## 1.7. Leo Tolstoy (1828-1910)

Dorado Montero professed towards Leo Tolstoy nothing but a deep feeling of admiration. He described him as “a generous soul, full of love for one’s own neighbour, and enemy of all kinds of oppression”.<sup>671</sup>

He pointed out this author’s main difficulty. It was not the fact that his positionings varied to such extent that he overcame and even contradicted a prior statement he made. The main issue for Tolstoy’s comprehension laid on the fact that he did never systematise a treaty of legal philosophy, religious philosophy or social philosophy. Dorado Montero offered a solution:<sup>672</sup> either one went throughout his whole academic production and forged his personal analysis, or one took over the secondary sources. Regarding the latter option, he provided us with the leading systematic schemes existing on the matter, mainly revolving around two authors: Ossip-Lourié and Paul Eltzbacher. It was precisely then when the relations between Dorado Montero, Tolstoy and Eltzbacher were intertwined. Dorado Montero dedicated to the latter a very discreet article in a Spanish popular review.<sup>673</sup> On it, Dorado Montero qualified Eltzbacher’s work as “purely descriptive”,<sup>674</sup> but very “clear” and “exact”.<sup>675</sup> However, it was not the most relevant aspect steaming from the book review. There was plenty of evidence he would never commit the same mistakes that their future colleagues will fall into:

“As a matter of fact, the dictatorial siege to the European democracies, as well as the strong public presence of reactionary Spanish positionings, made perfectly foreseeable the destiny of such legal reform [...] -despite that the jurisdictional guarantees foreseen in the *Ley de Vagos y Maleantes* to the administrative councils designed for Castejón’s ‘moral police’ were not similar at all-, and which underwent a

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<sup>671</sup> Calvo González, J., *El alma y la ley. Tolstói entre juristas. España (1890-1928)*, Sevilla-Zamora: Comunicación Social, Colección “Historia y presente”, 1º ed., 2010, p. 139: “*El conde León Tolstoy, alma generosa, saturada de amor al prójimo, enemiga de toda opresión*”.

<sup>672</sup> Calvo González, J., *El alma y la ley. Tolstói entre juristas. España (1890-1928)*, Sevilla-Zamora: Comunicación Social, Colección “Historia y presente”, 1º ed., 2010, p. 141.

<sup>673</sup> Dorado Montero, P., “Der Anarchismus, von Dr. Paul Eltzbacher”, *La España Moderna*, Madrid, Año 12, No. 139, 1900, pp. 192-193.

<sup>674</sup> At the front page, Eltzbacher summed up the main objective of his work: “*Je ne propose rien, je ne suppose rien, j’expose*”.

<sup>675</sup> Dorado Montero, P., “Der Anarchismus, von Dr. Paul Eltzbacher”, *La España Moderna*, Madrid, Año 12, No. 139, 1900, p. 193.



soon remodelling after the right-wing electoral triumph, whose main contribution was the introduction of the analogy”.<sup>676</sup>

The main exponents of positivism turned into fascists when the movement headed towards the beginning of the 20<sup>th</sup> century. The weaknesses of positivism, i.e. their potentially risky statements, became a real danger when its postulates evolved and met the new political developments. Indeed, Jorge Barreiro deemed Asúa’s major mistake<sup>677</sup> when elaborating the *Ley de Vagos y Maleantes* to be that the law “will constitute a very important instrument to be used with political aims, and that will be easily justified on the basis of the defensist groundings of its precepts. The *Ley de Vagos y maleantes* -as Del Rosal pointed out- was applied with governmental and repressive aims more than with the criminological aim with it was dictated”.<sup>678</sup>

Tolstoy pointed out that the State was grounded on violence. Consequently, he made one statement as regarded ‘certain people’: “Currently, they abominate from the State, since it is a coercive organisation, and everything it entails (laws, authorities, Courts, public force, etc.). ‘They’ are those who abhor violence as a common bond among men. Spirits enjoying a great moral cannot conceive an order in which such common base is an unjust social order. That is the reason why in the world exists an army of thinkers -not small at all- who attack

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<sup>676</sup> Martín Martín, S., “Penalística y penalistas españoles a la luz del principio de legalidad (1874-1944)”, *Quaderni fiorentini per la storia del pensiero giuridico moderno*, Vol. 36, No. 1, 2007, pp. 503-609, p. 578: “En efecto, el asedio dictatorial a las democracias europeas, y la vigorosa presencia pública de las posiciones reaccionarias españolas, hacían perfectamente predecible el destino de esta reforma legal, rápidamente apadrinada en las filas del defensismo — aunque en nada se pareciesen las garantías jurisdiccionales previstas en la ley de vagos a los consejos administrativos diseñados para «la policía de costumbres» de Castejón—, y sometida a una pronta remodelación tras el triunfo electoral de las derechas, cuya principal aportación consistió en introducir la analogía”.

<sup>677</sup> Bear in mind that the authors of the draft of the *Ley de Vagos y Maleantes* were Jiménez de Asúa and Mariano Ruiz-Funes, both of them penalists. Vid. Jiménez de Asúa, L., “Ley de vagos y maleantes. Un ensayo legislativo sobre la peligrosidad sin delito”, *Revista General de Legislación y Jurisprudencia*, Vol. 82, No. 163, 1933, pp. 577-635.

<sup>678</sup> Jorge Barreiro, A., *Las medidas de seguridad en el Derecho español*, Madrid: Civitas, 1975, p. 53: “La Ley citada será un importante instrumento a utilizar con fines políticos y ello podrá justificarse fácilmente en base al fundamento defensista de sus preceptos. La Ley de vagos y maleantes -como señala Del Rosal- se aplicó con fines gubernativos y represivos más que con el propósito criminológico con que se dictó”. As regards Del Rosal’s quotation, vid. Del Rosal, J., *Derecho Penal español (Lecciones)*, II, 1<sup>o</sup> ed., Madrid: S. Aguirre Torre Impresor, 1960, pp. 344, p. 312.

what one might call the grounds of social life”.<sup>679</sup> Anarchists, and to some extent the liberals as well, were being reflected in such statement. There was a coincidence in Dorado Montero’s theoretical bedrock with them. Right after, the editor unveiled a crucial aspect: Eltzbacher, at his turn, was profoundly influenced by Tolstoy. Eltzbacher even devoted an article at a yearbook to Tolstoy.<sup>680</sup> Eltzbacher’s most relevant work<sup>681</sup> was translated into Spanish by Dorado Montero, as previously indicated on the preceding pages. The new name of the Spanish version would be slightly different, though.<sup>682</sup> The chapter of such work devoted to Tolstoy’s doctrine was published in the *Boletín de la Institución Libre de Enseñanza*.

On the other hand, he also forged his own personal analysis on the Russian author. To do so, he focused on Tolstoy’s novel *Resurrection*.<sup>683</sup> Dorado Montero showed a particularly marked enthusiasm about the manner Tolstoy spread his criminal doctrine and penal thought. He did so in an indirect, yet efficient fashion: he disseminated the most essential aspects of his doctrine in an enjoyable and entertaining way, thus, reaching a much larger number of people.<sup>684</sup> He was known for his Christian version of anarchism. In doing so, after having analysed the time he lived, he concluded that the current life was “irrational, inhuman, unfair, and anti-Christian”: that was why it should be replaced with another out of which the “real order” will emerge, an order in which “Christ’s supreme law will reign, i.e. the rule of love”.<sup>685</sup> A further area of concern

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<sup>679</sup> Dorado Montero, P., “Der Anarchismus, von Dr. Paul Eltzbacher”, *La España Moderna*, Madrid, Año 12, No. 139, 1900, p. 193: “*En el día de hoy abominan del Estado, en cuanto organización coercitiva, y de lo que tal organización supone (leyes, autoridades, Tribunales, fuerza pública, etc.) todos cuantos aborrecen la violencia como lazo de unión entre los hombres. Los espíritus de gran delicadeza moral no pueden concebir que un orden que en tal base estriba pueda ser un orden social justo. Tal es la causa por la que actualmente existe en el mundo una falange, no pequeña, de pensadores que atacan lo que puede llamarse los «fundamentos» de la vida social*”.

<sup>680</sup> Eltzbacher, P., “Die Rechtsphilosophie Tolstojs”, *Preußische Jahrbücher*, Bd. 100, Hft. 2, 1900, pp. 266-282.

<sup>681</sup> Eltzbacher, P., *Der Anarchismus: Eine ideengeschichtliche Darstellung seiner klassischen Strömungen*, Berlin: J. Guttentag, 1900.

<sup>682</sup> Eltzbacher, P., *El Anarquismo según sus más ilustres representantes: Godwin, Proudhon, Stirner, Bakunin, Kropotkin, Tucker, Tolstoy, etc.*, Madrid: La España Moderna, 1901.

<sup>683</sup> Tolstoy, L., “Воскресение”, *Niva*, 1899.

<sup>684</sup> Calvo González, J., *El alma y la ley. Tolstói entre juristas. España (1890-1928)*, Sevilla-Zamora: Comunicación Social, Colección “Historia y presente”, 1º ed., 2010, p. 141.

<sup>685</sup> Calvo González, J., *El alma y la ley. Tolstói entre juristas. España (1890-1928)*, Sevilla-Zamora: Comunicación Social, Colección “Historia y presente”, 1º ed., 2010, p. 142.

was explored when analysing the use of violence: “the key of all teachings of Jesus Christ laid on the precept of never applying violence, not even to resist evil”.<sup>686</sup>

The aforementioned novel explored those questions throughout the perspective of Nekhlyudov. After his visit to the prison, he had observed “people of a very simple nature, nor good neither bad, who were vested on the traditional moral notions of the peasant and the Christian, yet they had been detached from them little by little in order to acquire some others consisting in admitting the legitimacy of all sorts of violence”.<sup>687</sup> The main character also felt the social concerns around many related topics, namely: whether freewill existed or not; if out of the cranial capacity of individual one might deduce his guiltiness; the relevance of the crime’s inheritance; whether there was an innate crime and an innate immorality; what exactly were things such as morality, insanity, degeneration or character; what influx might climate, ignorance, imitation spirit or hypnotism have over the crime, etc.<sup>688</sup>

On the imposition of penalties, Tolstoy showed a firm conviction: “nobody can or should impose penalties to his equals, and when he does so, he is producing truly and countless social damages, leaving aside injustices”.<sup>689</sup> Given the sphere of Tolstoy’s truly concerns, Nekhlyudov never focused into the most extended question: what shall be done about the criminals. The matter was only important for him if the punishments did produce a decrease on crime and if it corrected the criminals.<sup>690</sup> At this point, one of Tolstoy’s central points stepped in: the so-called automorphism. This phenomenon consisted in the autoreassertion of a certain lifestyle due to only relating to social groups in which one’s own way of acting was

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<sup>686</sup> Calvo González, J., *El alma y la ley. Tolstói entre juristas. España (1890-1928)*, Sevilla-Zamora: Comunicación Social, Colección “Historia y presente”, 1º ed., 2010, p. 143: “La clave de todas las enseñanzas de Cristo se halla en el precepto que manda no aplicar nunca la violencia, ni siquiera para resistir al mal”.

<sup>687</sup> Calvo González, J., *El alma y la ley. Tolstói entre juristas. España (1890-1928)*, Sevilla-Zamora: Comunicación Social, Colección “Historia y presente”, 1º ed., 2010, p. 145: “En la prisión había visto Nekhlyudov naturalezas sencillas, ni buenas ni malas, penetradas de las tradicionales nociones morales del aldeano y del cristiano, que poco a poco se habían despojado de esas nociones para adquirir otras que consistían en admitir la legitimidad de toda violencia”.

<sup>688</sup> Calvo González, J., *El alma y la ley. Tolstói entre juristas. España (1890-1928)*, Sevilla-Zamora: Comunicación Social, Colección “Historia y presente”, 1º ed., 2010, p. 147.

<sup>689</sup> Tolstoy, L., *Resurrección*, p. 146: “Nadie puede ni debe, según él, imponer penas a sus semejantes, y el imponerlas produce, además de injusticias, verdaderos e innumerables daños sociales”.

<sup>690</sup> Tolstoy, L., *Resurrección*, p. 156-157.

legitimised and supported. Thus, in those groups positive reinforcement took place. Such effect might be provided in both directions: either in lower class groups (poor people and criminals) or in upper class groups (wealthy individuals and religious factions).

“In common understanding, the thief, the murderer and the prostitute should be ashamed of their lifestyle. Indeed, they are not. People who by chance or by their own mistakes happen to get to a wrong position become so habituated with it that there is nobody to get it out of their minds that their profession is good, and to further reassert themselves in such position, they keep themselves inside the circles made up by their equals and where their options are highly approved”.<sup>691</sup>

Almost as an identic reproduction of Tolstoy’s thought, Dorado Montero’s conception of crime tried to seek crime’s primordial causes out of the boundaries of the conventional crime. For both authors, it was necessary to go beyond that. For Tolstoy himself, “out of the facts that laws label as crimes, it is not possible to blame guiltiness on those who commit them, but to other causes that reside out of them”.<sup>692</sup>

For *Resurrection*’s main character Nekhlyudov, the circumstances of his time were deplorable. If the novel’s main concerns were the cruelty and the hypocrisy, there was also a significant part devoted to the long time that judicial processes took. Criticisms against endlessly delays on judicial processes were nothing new though.<sup>693</sup>

Tolstoy’s final solution for the criminals might seem a bit utopian: they needed not to be punished but they needed to be forgiven up to seventy-seven

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<sup>691</sup> Tolstoy, L., *Resurrección*, p. 182: “Comúnmente se cree que el ladrón, el asesino y la prostituta deben avergonzarse de su género de vida. No es así. Las personas que por azares de la suerte o por errores propios llegan a una falsa posición se connaturalizan de tal modo con ella, que no hay quien les quite de la cabeza que su oficio es bueno, y para confirmarse en tal opinión, se mantienen dentro de los círculos que están formados por sus iguales y donde se aprueban altamente sus opciones”.

<sup>692</sup> Calvo González, J., *El alma y la ley. Tolstói entre juristas. España (1890-1928)*, Sevilla-Zamora: Comunicación Social, Colección “Historia y presente”, 1º ed., 2010, p. 144: “Para Tolstói, de los hechos que las leyes califican de delitos y como tales castigan no es posible considerar culpables a quienes los cometen, sino a otras causas que residen fuera de ellos”.

<sup>693</sup> Pérez Marcos, R. M., “Tomás Cerdán de Tallada, el primer tratadista de derecho penitenciario”, *Anuario de Historia de Derecho Español*, LXXV, 2005, pp. 755-802.

times.<sup>694</sup> It was part of his Christian anarchism. In the novel, Nekhlyudov was told by an old man that God was the only one who knew how to punish and to reward; humans did not. Consequently, in his coinciding line of thought, Dorado Montero pointed out at the following quote: “All evil comes from the fact that men have attempted something impossible: being themselves evil, they want to correct the others”.<sup>695</sup> There was an indirect appeal coming from Dorado Montero’s mouth asking for his theory to be taken into account, despite its abstract approach. Indeed, while he was asking for Tolstoy’s theory to be accepted, yet indirectly he was also asking for his ideals to be seriously taken into account. It was not a coincidence that this petition was located at the end of his masterpiece: “that the scholars of every kind take good care of the reasonings and warnings from our author, think about them and do not reject them due to being reckless or utopian. All innovations started with such character but, nonetheless, they turned into common sense, widely accepted truths after some time; just as all the words from one language started being mere barbarisms and neologisms, yet they ended up constituting a catalogue of pure, traditional terms of a language”.<sup>696</sup> Besides, a second idea should be born in mind:

“Tolstoy does not name ‘anarchism’ to his theory of law, State and property after. He names ‘anarchism’ to the theory abrogating for a life without government, whose way of achieving it is the use of violence”.<sup>697</sup>

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<sup>694</sup> The Holy Bible, Matthew, 18:21-22 ESV.

<sup>695</sup> Dorado Montero, P., *El Derecho protector de los criminales*, Madrid: Ed. Jiménez Gil, Tomo 2, 1915 pp. 604-605: “*Todo el mal proviene de que los hombres han emprendido una cosa imposible: siendo malos ellos mismos, quieren corregir a los demás. Hombres viciosos intentan corregir a hombres viciosos*”.

<sup>696</sup> Dorado Montero, P., *El Derecho protector de los criminales*, Madrid: Ed. Jiménez Gil, Tomo 2, 1915, pp. 609: “*que los estudiosos de todo género [...] se hagan cargo de los razonamientos y advertencias de nuestro autor, se paren ante ellos y los mediten, en lugar de rechazarlos de plano y sin más por descabellados o por utópicos. Todas las innovaciones han empezado por tener este carácter, y, sin embargo, han venido con el tiempo a pasar a la categoría de verdades de sentido común y aceptación general; de la propia suerte que todas las palabras de una lengua han comenzado por ser barbarismos y neologismos, y han acabado por formar el catálogo de las voces puras y castizas*”.

<sup>697</sup> Eltzbacher, P., *Der Anarchismus: Eine ideengeschichtliche Darstellung seiner klassischen Strömungen*, Berlin: J. Guttentag, 1900, p. 197: “*Tolstoj nennt seine Lehre über Recht, Staat und Eigentum nicht Anarchismus. Als Anarchismus bezeichnet er die Lehre, welche ein Leben ohne Regierung als Ziel aufstellt und dieses durch Anwendung von Gewalt verwirklicht sehen möchte*”.

Here, a crucial difference could be observed. The first doctrine might be referred to as Tolstoy's proposal and labelled as 'Christian anarchism'. Yet, the second part of the statement was referring to standard anarchism. It was very easy to check the difference, since in the standard conception of anarchism the use of violence was allowed (especially in revolutions to take over the power), whereas Tolstoy rejected it always in any case. Tolstoy was classed as an anarchist, yet his real classification included many 'buts'. This different version from anarchism was the one that inspired Dorado Montero the most. Ironically, Dorado Montero did not become a pure anarchist but a Christian anarchist, despite having rejected the Catholic Church as an institution. Similarly, he was a positivist and he was not.

Tolstoy's thought did not match any of the existing Christian Churches,<sup>698</sup> instead he drew his attention towards what he called Christ's pure doctrine.<sup>699</sup>

"Churches have not only remained alien to Christ's doctrine, but they have been enemies to it".<sup>700</sup>

Tolstoy was convinced that the Church had ended up adjusting itself to the demands of the modern world and so, it had modified the pure doctrine of Christianity. The world would, thus, only accept his doctrine after the Church has adapted Christ's version. This was particularly true when it came to humbleness and the vow of poverty. The greed was specially criticised by Tolstoy. Notwithstanding that, it resulted much harder accepting and implementing Christ's doctrine rather than cleverly altering it. Consequently, "Churches invent subtleties to show that men live in harmony with the law of Christ, when they actually live against it".<sup>701</sup> Eltzbacher highlighted that, steaming from the 'supreme rule of love', Tolstoy established the precept of non-violent resistance:

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<sup>698</sup> His dissidence went far beyond a strict reliance on the argument that atheism and anticlericalism were the new, ground-breaking trends on his time.

<sup>699</sup> Eltzbacher, P., *Der Anarchismus: Eine ideengeschichtliche Darstellung seiner klassischen Strömungen*, Berlin: J. Guttentag, 1900, p. 197.

<sup>700</sup> Eltzbacher, P., *Der Anarchismus: Eine ideengeschichtliche Darstellung seiner klassischen Strömungen*, Berlin: J. Guttentag, 1900, p. 197: "die Kirchen sind stets der Lehre Christi nicht bloß fremd, sondern ihr gradezu feindlich gewesen, und sie müssen dies notwendig sein".

<sup>701</sup> Eltzbacher, P., *Der Anarchismus: Eine ideengeschichtliche Darstellung seiner klassischen Strömungen*, Berlin: J. Guttentag, 1900, p. 198: "Die Kirche erdachte Spitzfindigkeiten, um darzuthun, dass die Menschen, indem sie dem Gesetze Christi entgegen lebten, mit ihm im Einklang lebten".

“Never resisting evil means never exerting violence over another, i.e. do not ever perpetrate any act contradicting love”.<sup>702</sup> And so, Tolstoy himself, in his Christian belief, referred to two biblical verses: “Ye have heard that it hath been said, an eye for an eye, and a tooth for a tooth: but I say unto you, That ye resist not evil: but whosoever shall smite thee on thy right cheek, turn to him the other also”.<sup>703</sup>

Eltzbacher was very systematic, and once he carried out this set of general ideas on each author, he resumed the analysis focusing on concrete aspects. In the first place, he happened to hold a vision of the legal order very grounded on natural law: “he rejects, as a matter of principle, every norm that depends on man’s will; every norm whose maintenance is entrusted to man’s power, especially to courts; which deviates from the moral law, which is different within the different territories; and which can be arbitrarily changed at any moment”.<sup>704</sup> Rather than this aspect, Dorado Montero fairly related more towards the ultra-personalised conception of moral enunciated by Tolstoy: “The kingdom of God is not outside in the world, but in man’s own soul”.<sup>705</sup> Be as it may, the relation of Tolstoy towards the Law was per se a conflictive one. Law, by its very nature, went against his precept of non-violent resistance. Since man’s law required coercive, restrictive and violent measures to be implemented, he concluded that Law was always violent.<sup>706</sup> Furthermore, he pointed out something that the studies in criminology and prisons reports exposed in the following years: that human criminal laws did nothing but to increase the number of criminals. Criminality seemed to skyrocket after the passing and implementation of criminal laws.

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<sup>702</sup> Tolstoj, L., *Worin besteht mein Glaube?*, p. 17: “Widerstrebe nicht dem Übel bedeutet: widerstrebe niemals dem Bösen, das heisst: thu nie einem anderen Gewalt an, das heisst: begehe nie eine Handlung» die der Liebe zuwiderläuft”.

<sup>703</sup> The Holy Bible (KJV), St. Matthew 5: 38-39.

<sup>704</sup> Eltzbacher, P., *Der Anarchismus: Eine ideengeschichtliche Darstellung seiner klassischen Strömungen*, Berlin: J. Guttentag, 1900, p. 210: “denn er verwirft grundsätzlich jede Norm, die auf dem Willen von Menschen beruht, durch Menschengewalt, insonderheit durch Gerichte, aufrechterhalten wird, vom Sittengesetz abweichen, in verschiedenen Gebieten verschieden sein und jederzeit will kürlich geändert werden kann”.

<sup>705</sup> Tolstoj, L., *Darlegung des Evangeliums*, p. 50: “Das Reich Gottes ist nicht draussen in der Welt sondern in der Seele des Menschen”.

<sup>706</sup> Tolstoj, L., *Worin besteht mein Glaube?*, p. 29.

“Christ says: you believe that your laws reduce and fight back the crime, yet they do not do other thing than increasing it; there is just one way to prevent evil, and it consists on returning good for evil, and to do good to all”.<sup>707</sup>

Many critics were poured by many scholars such as Concepción Arenal (past) and Dorado Montero himself in his *El reformatorio de Elmira* (future). In the second place, Tolstoy analysed the State. Similarly, as what happened to the Law, the State was something that went frontally against the Christian thought due to analogous reasons: it removed the State because Christianity denied every form of government. Abolitionism was very linked towards such proposal. The main authors holding abolitionist theories were the philosopher and theologian Soloviev<sup>708</sup> and the political ideologue of anarchism Kropotkin.<sup>709</sup>

## **2. Other authors**

### **2.1. Karl Christian Friedrich Krause (1781-1832)**

The early origins of correctionalism in our country can be traced back to the Spanish Preventive School. This school heavily relied upon the ideas of Seneca. It constituted a genuine Hispanic trend, where one could even speak of the Spanish correctionalist school.<sup>710</sup> Yet, in the second half of the 19<sup>th</sup> century, the correctionalist trend emerged in Spain. For Antón Oneca, correctionalist ideals were tightly defended for any variation at the beginning, but only because “it was within a relevant sector of the Spanish intelligentsia”, which was Krausism, “whose daughter was the German doctrine of the *Besserungstheorie*”. However, as time went on, the Spanish doctrine started to develop their own

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<sup>707</sup> Tolstoj, L., *Worin besteht mein Glaube?*, p. 45-46: “Ihr glaubt, dass Eure Gesetze das Übel verbessern, sie vergrößern es aber nur; es giebt nur einen Weg, dem Übel zu steuern, er besteht darin, Böses mit Gutem zu vergelten, allen ohne Unterschied Gutes zu thun”.

<sup>708</sup> Soloviev, V., *La Russie et l'Église universelle*, Paris : Librairie Stock, 1889; Soloviev, V., *War, progress, and the end of history, including a short story of the Anti-Christ. Three discussions by Vladimir Soloviev*, London: University of London Press, 1915.

<sup>709</sup> Kropotkin, P., *Idée anarchiste au point de vue de sa réalisation pratique*, Genève: Le Révolté, 1879; *Le Procès de Solovieff*, Genève, 1879; *La Commune de Paris*, Genève: Le Révolté, 1880.

<sup>710</sup> Jorge Barreiro, A., *Las medidas de seguridad en el Derecho español*, Madrid: Civitas, 1975, p. 45. In this assertion, Jorge Barreiro quoted a very relevant work on the Spanish correctionalist school: Antón Oneca, J., “La teoría de la pena en los correccionistas españoles”, *Estudios Jurídico-Sociales, Homenaje al Profesor Legaz y Lacambra*, tomo II, Santiago, 1960.



thought and they continued “rather than Röder’s doctrine, the *Spanish tradition of the several ends of the penalty*.” As indicated above, such tradition started “from Seneca”, went on with “the theologians and moralists of the 16<sup>th</sup> and 17<sup>th</sup> centuries”, and it was still held in the “Enlightenment period”.<sup>711</sup> The traditional correctionalist trend doctrine established the correctional purpose as the sole end that the penalty should follow.<sup>712</sup> According to Jorge Barreiro, the Spanish Correctionalism (newer, obviously) changed such conception: the correctional purpose should not be the only one.<sup>713</sup> In my opinion, such aspect was what made Dorado Montero’s theory less typical. Whereas on temporal grounds he clearly belonged to the Spanish Correctionalism (not to the traditional one), this correctional purpose or amendment of the criminal seemed to be the only one he defended.<sup>714</sup> So, in this aspect, Dorado Montero was more in line with traditional correctionalism: “There is no other possible way of restoring the law by the penalty but acknowledging the correction as the essential end”.<sup>715</sup> In this concrete aspect, Dorado Montero did not satisfactorily fit when holding that “our representatives resume the Spanish tradition of the several ends of the penalty”.<sup>716</sup> For the author of Salamanca there was just one possible end: the

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<sup>711</sup> Jorge Barreiro, A., *Las medidas de seguridad en el Derecho español*, Madrid: Civitas, 1975, p. 45.

<sup>712</sup> Silvela, L., *El Derecho penal español. Estudiado en los principios y en la legislación vigente en España*, Madrid: Establecimiento tipográfico de Ricardo Fé, Tomo I, 1903, p. 8.

<sup>713</sup> Antón Oneca, J., “La prevención general y la prevención especial en la teoría de la pena”, *Discurso leído en la apertura del Curso académico de 1944-1945*, Salamanca, 1944 (Quoted in Jorge Barreiro, A., *Las medidas de seguridad en el Derecho español*, Madrid: Civitas, 1975, p. 45).

<sup>714</sup> Antón Oneca, J., *La utopía penal de Dorado Montero*, Salamanca: Ediciones Universidad, 1951, p. 85. According to him, one of the greatest “mistakes” of Dorado Montero was vesting the special prevention as the only possible end for the penalty. I find it rather surprising that Antón Oneca judged Dorado in such a harsh manner bearing in mind they belonged to different schools.

<sup>715</sup> Silvela, L., *El Derecho penal español. Estudiado en los principios y en la legislación vigente en España*, Madrid: Establecimiento tipográfico de Ricardo Fé, Tomo I, 1903, p. 230: “No queda, pues, más camino para llegar á la restauración del Derecho por la pena que, que reconocer en ésta la enmienda como fin esencial”.

<sup>716</sup> “Silvela tries to harmonise the two principles of absolute justice and correction, without forgetting that of the general prevention”, vid. Antón Oneca, J., “La teoría de la pena en los correccionistas españoles”, *Estudios Jurídico-Sociales, Homenaje al Profesor Legaz y Lacambra*, tomo II, Santiago, 1960, p. 1018.

amendment or correction of the criminal. Krause<sup>717</sup> inherited as well certain ideas held by Johannes Nagler and the penalty as a social aspect.<sup>718</sup>

## 2.2. Antonio Marro (1835-1913)

Antonio Marro was an Italian psychiatrist and sociologist. He was the disciple and successor of Cesare Lombroso. He held that the crime had a biological origin. Marro<sup>719</sup> also worked at the Assylum of Turin. Dorado Montero was constantly quoting his most famous work,<sup>720</sup> which was “worthy to be mentioned next to Lombroso’s *Uomo delinquente*” and, even though it was “not so complete as the latter”, it was a very “ordered” and “frugal” work which usually did not “draw bold and premature conclusions”.<sup>721</sup>

Dorado Montero made the first reference to him in *La antropología criminal en Italia*.<sup>722</sup> Marro himself, with other penalists such as Bianchi, Benedikt or Garofalo, developed his doctrine with the one of Ferri in the Congress of Criminal Anthropology which took place in Rome in 1885.<sup>723</sup>

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<sup>717</sup> Krause, K.Ch. F., *Abriss des Systems der Philosophie des Rechts*, 1828; Krause, K.Ch. F., *Das System des Rechtsphilosophie*, 1874.

<sup>718</sup> Nagler, J., *Die Strafe : eine juristisch-empirische Untersuchung*, Aalen: Scientia Verlag, 1918. I use Nagler, J., *Die Strafe : eine juristisch-empirische Untersuchung*, Aalen: Scientia Verlag, 1970, pp. 48-54.

<sup>719</sup> Marro, A., *I caratteri dei delinquenti : studio antropologico-sociologico*, Turin: Fratelli Bocca, 1887; Marro, A., *La pubertà studiata nell'uomo e nella donna in rapporto all'antropologia, alla psichiatria, alla pedagogia ed alla sociologia dal dottor Antonio Marro*, Turin: Fratelli Bocca, 1897.

<sup>720</sup> Marro, A., *I caratteri dei delinquenti : studio antropologico-sociologico*, Turin: Fratelli Bocca, 1887.

<sup>721</sup> Dorado Montero, P., *La antropología criminal en Italia*, Madrid: Imprenta de la Revista de Legislación, 1889, p. 158.

<sup>722</sup> Dorado Montero, P., *La antropología criminal en Italia*, Madrid: Imprenta de la Revista de Legislación, 1889, p. 19.

<sup>723</sup> Dorado Montero, P., *La antropología criminal en Italia*, Madrid: Imprenta de la Revista de Legislación, 1889, p. 67.

### 2.3. Luigi Lucchini (1847-1929)

The Italian jurist and politician had been categorised by Dorado Montero as a scholar “rejecting freewill” yet, at the same time, he was “quite concerned for some years” to find a legal basis in which to erect the “responsibility of the criminals”.<sup>724</sup>

“Which other reason but to impose a penalty, instead of a protective or healing treatment, would someone want to find out who is responsible, i.e. who deserves it and who does not? [...] Among those penalists, the duality penalty-treatment remains still alive”.<sup>725</sup>

In the first volume of such work, Dorado Montero had already identified many criticisms that Lucchini could face. How could he justify the application of the penalty as an evil? Which individuals ought to suffer it? How to ground imputability, fundamentation which he so urgently needed?<sup>726</sup> Unsurprisingly, this was the moment in which positivist authors elaborated so many “theories on the rationale of criminal imputability independently from freewill” and, thus, they established a clear distinction between “imputable and non-imputable individuals” and the “acts falling within the first or the second category”:<sup>727</sup>

“Tarde (personal identity and social resemblance), Poletti, Liszt and some others (normality of the agent), Impallomeni, Manzini and Alimena (propensity to psychological constraint), Conti, Lucchini, Vida (integrity of intelligence), Ferri and other writers from the anthropological school (the mere fact of living in society and its need for defence)”.<sup>728</sup>

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<sup>724</sup> Dorado Montero, P., *El Derecho protector de los criminales*, Madrid: Ed. Jiménez Gil, Tomo 2, 1915, p. 10.

<sup>725</sup> Dorado Montero, P., *El Derecho protector de los criminales*, Madrid: Ed. Jiménez Gil, Tomo 2, 1915, p. 10: “¿Para qué, sino para imponer pena propiamente dicha, no tratamiento protector ó curativo, se quiere saber quiénes son responsables, es decir, quiénes la merecen, y quiénes no?” [...] En estos penalistas continúa viva la dualidad de pena y tratamiento”.

<sup>726</sup> Dorado Montero, P., *El Derecho protector de los criminales*, Madrid: Ed. Jiménez Gil, Tomo 1, 1915, pp. 432-433.

<sup>727</sup> Dorado Montero, P., *El Derecho protector de los criminales*, Madrid: Ed. Jiménez Gil, Tomo 1, 1915, pp. 432-433.

<sup>728</sup> Dorado Montero, P., *El Derecho protector de los criminales*, Madrid: Ed. Jiménez Gil, Tomo 1, 1915, pp. 432-433: “Como las de Tarde (identidad personal y semejanza social), Poletti, Liszt y algunos otros (normalidad del agente), Impallomeni, Manzini y Alimena (susceptibilidad de coacción psicológica), Conti, Lucchini, Vida (integridad de la inteligencia), Ferri y otros escritores de la escuela antropológica (el mero hecho de vivir en sociedad y la necesidad de defender a ésta)”.

Ferri himself complemented such view on Lucchini: he “remained in a true eclecticism” and he did not even think to be appropriate to “deny any free will”, thus remaining in “circle of old ideas”, especially when he attempted to “replace volitional freedom with freedom of the intellect”.<sup>729</sup> After reading Lucchini’s *Elementi di procedura penale*, Dorado Montero agreed that one of the “major defects one could attribute to him” was precisely that “there were no great novelties on the doctrine” and that he stood “too close to the traditional theories”.<sup>730</sup> Nevertheless, such thing did not entail any hindrance for two reasons. On the one hand, Lucchini carried out a “praiseworthy attempt” at reducing the subject of “criminal prosecution” to the “scientific system”.<sup>731</sup> On the other hand, changes from one system to the other “were not implemented and should not be implemented in an abrupt manner, but rather gradually” and in the case of Lucchini, he could be of interest given that the process of change needed “people of a truly conservative spirit” who progressively assumed and “incorporated the regeneration seed”.<sup>732</sup> It was a rather poetic way of describing an eclectic individual.

#### 2.4. Giulio Fioretti

The relevant aspect to highlight here about Fioretti was that he “sustained ‘the impossibility of considering the conscious motives of the action as an absolute criterion of imputability’”.<sup>733</sup>

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<sup>729</sup> Ferri, E., *I nuovi orizzonti del diritto e della procedura penale*, Bologna: Nicola Zanichelli, 1884, 2<sup>o</sup> ed., p. 50.

<sup>730</sup> Dorado Montero, P., “Recensión a la obra de Luigi Lucchini: ‘Elementi di procedura penale’”, *Revista de Derecho y de Sociología*, Florencia: G. Barcèra, 1895, Vol. 1, No. 3, 1895, pp. 399-400, 399.

<sup>731</sup> Dorado Montero, P., “Recensión a la obra de Luigi Lucchini: ‘Elementi di procedura penale’”, *Revista de Derecho y de Sociología*, Florencia: G. Barcèra, 1895, Vol. 1, No. 3, 1895, pp. 399-400, 399.

<sup>732</sup> Dorado Montero, P., “Recensión a la obra de Luigi Lucchini: ‘Elementi di procedura penale’”, *Revista de Derecho y de Sociología*, Florencia: G. Barcèra, 1895, Vol. 1, No. 3, 1895, pp. 399-400, 400.

<sup>733</sup> Ferri, E., *Sociologia criminale*, Roma: Casa editrice italiana, 1884, p. 693-694: “la impossibilità di considerare i motivi coscienti dell'azione come criterio assoluto della imputabilità”.

Nevertheless, his objections, even if “correct as a psychological observation”, were not valid against the “criterion of determining motives” since he was referring to the “daily habitual actions” which we performed without conscious motives, almost automatically.<sup>734</sup> However, such could work for several actions but “deliberating and committing a crime” could not be considered as an “unmotivated action”, since it was done without thinking of the determining reasons.<sup>735</sup> Therefore, a crime could only be committed unconsciously by an insane offender, and this was the only case in which the criterion of motives did not apply.<sup>736</sup>

## 2.5. Ugo Conti (1864-1942)

Dorado Montero frequently quoted Ugo Conti, an Italian politician and professor. In a chapter he contributed to the *Completo Trattato teorico e pratico di Diritto penale secondo il Codice unico del regno d'Italia*,<sup>737</sup> he focused on a very important matter which focused Dorado Montero’s attention during his lifetime: the responsibility. As a matter of fact, the scope of this study was limited to determine the role that responsibility played in each of ten specific crimes contained in articles 49 to 60 of the Italian Criminal Code. Those were: people committing a crime when obeying an authority, self-defence, necessity, excusable excess, incitement, error in personam, minority of age, deaf-muteness, mitigating circumstances and responsibility of a third party under someone’s vigilance.<sup>738</sup> Even though the Italian Criminal code contained other circumstances excluding or mitigating the imputability (ignorance of the law, voluntariness, mental disorders or drunkenness), Conti focused in the aforementioned ones.<sup>739</sup> Yet, the development of those crimes was relevant for the construction of his approach.

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<sup>734</sup> Ferri, E., *Sociologia criminale*, Roma: Casa editrice italiana, 1884, p. 684-685.

<sup>735</sup> Ferri, E., *Sociologia criminale*, Roma: Casa editrice italiana, 1884, p. 684-685.

<sup>736</sup> Ferri, E., *Sociologia criminale*, Roma: Casa editrice italiana, 1884, p. 684-685.

<sup>737</sup> Dorado Montero, P., “Recensión de la obra de Jules Lacointia: ‘Code pénal d’Italie’”, *RGLJ*, Vol. 39, N° 78, 1891, pp. 265-267.

<sup>738</sup> Dorado Montero, P., “Recensión la obra de Ugo Conti: ‘Gli articoli 49 á 60 del Codice penale italiano’”, *RGLJ*, 1892, Vol. 40, No. 81, 1892, p. 460.

<sup>739</sup> Dorado Montero, P., “Recensión la obra de Ugo Conti: ‘Gli articoli 49 á 60 del Codice penale italiano’”, *RGLJ*, 1892, Vol. 40, No. 81, 1892, p. 460.

## 2.6. Herbert Spencer (1820-1903)

Herber Spencer was the main representative of positivism in England. English positivism was enshrined in Carle's monography, appearing as a convenient exchange with Germany and its idealism:

“Thus, [...] the English positivism migrated to Germany where it adopted a more systematic position and where it almost approached materialism; at its turn, the same German idealism got to partially penetrate in the positivist England. From here it flows that today in England there is a positivist [movement], which clearly tends to idealise itself. Whereas, in Germany, the intellectuals are now tired of an idealism which had gone too far, and they try to react against it diving into a patient and forbearing exam of the facts. It could also be said that Spencer and Hegel are approaching one towards the other: while Hegel is looking for a solid base for his speculations in the immense number of facts collected by Spencer, this latter, in order to dominate and to unify the facts thereof, resorts to an abstract conception silimar to the one of Hegel”.<sup>740</sup>

The contribution of Herbert Spencer was decisive for the introduction of positivism into several countries, according to Dorado Montero: “Everything that they [abstract/idealist schools] have been loosing in Italy has been gained by positivism [...] mostly due to Spencerian evolutionism”.<sup>741</sup> On the other hand, Ferri coincided with him: “In a very short space of years, almost simultaneously, vital contributions of positive science were performed by Darwin in biology, by Spencer in natural philosophy by Spencer and by Marx in social science”.<sup>742</sup>

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<sup>740</sup> Carle, G., *La vita del diritto nei suoi rapporti colla vita sociale. Studio comparativo di filosofia giuridica*, Torino: Fatrelli Bocca, 1880, p. 640: “Così, per arrestare lo sguardo all'età nostra, il positivismo inglese emigrò oggidì nella Germania, ove assunse un incasso più sistematico, e venne pressochè accostandosi al materialismo; e alla sua volta lo stesso idealismo Germanico riuscì in parte a penetrare nella positiva Inghilterra. Di qui la conseguenza, che oggi nell'Inghilterra trovassi un positivismo, che tende palesemente ad idealizzarsi: mentre in Germania gli intelletti ormai stanchi di un idealismo, che si era spinto tropp'oltre, cercano di reagire contro di esso approfondendosi in un esame paziente e longanime dei fatti. Quasi si direbbe che Spencer ed Hegel stanno avviandosi l'uno verso dell'altro: mentre Hegel cerca una base alle sue speculazioni nel numero immenso di fatti raccolti dallo Spencer, questi, per dominare e unificare i fatti stessi, ricorre ad una concezione astratta, simile a quella di Hegel”.

<sup>741</sup> Dorado Montero, P., *La antropología criminal en Italia*, Madrid: Imprenta de la Revista de Legislación, 1889, p. 18.

<sup>742</sup> Ferri, E., *I delinquent nell'arte*, Genova: Libreria Editrice Ligure, 1896, pp. 102-103: “nello stesso brevissimo giro di anni, quasi contemporaneamente, basi vitali di scienza positiva furono date alla biologia da Darwin, alla filosofia naturale da Spencer e alla scienza sociale de Marx”.

Besides, in his *Nuovi orizzonti*,<sup>743</sup> Ferri used Spencer's works in order to provide of two examples when dealing the rationale for the imputability.<sup>744</sup> Whereas in "inorganic machines" the final reactions ultimately depended on the "external causes", within "organic beings" the action of external causes was only a small part of them; there prevailed the "internal" and "physiological" causes.<sup>745</sup>

## 2.7. Alexander Herzen (1812-1870)

This Russian philosopher and economist was in one of the works of Dorado Montero,<sup>746</sup> where he was referred to as one of the "current representatives of positivism".<sup>747</sup> Ferri, one of the most influential authors in Dorado Montero, by quoting him,<sup>748</sup> confirmed his purely positivist approach:

"Indeed, physiology, and more recently psycho-pathology thanks Ribot's work, combined to demonstrate that the individual human will is completely subject to natural influences that are not only moral or psychological, but purely physical, rather than being its more or less absolute ruler".<sup>749</sup>

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<sup>743</sup> Ferri, E., *I nuovi orizzonti del diritto e della procedura penale*, Bologna: Nicola Zanichelli, 1884, 2<sup>o</sup> ed., p. 50.

<sup>744</sup> Spencer, H., *Les premieres principes*, Paris, 1871, p. 226. Of the same author, *Essais*, Paris, 1879, III, 272.

<sup>745</sup> Ferri, E., *I nuovi orizzonti del diritto e della procedura penale*, Bologna: Nicola Zanichelli, 1884, 2<sup>o</sup> ed., p. 50.

<sup>746</sup> Dorado Montero, P., *La antropología criminal en Italia*, Madrid: Imprenta de la Revista de Legislación, 1889.

<sup>747</sup> Dorado Montero, P., *La antropología criminal en Italia*, Madrid: Imprenta de la Revista de Legislación, 1889, p. 19.

<sup>748</sup> Herzen, A., *La physiologie de la volonté*, Paris, 1874.

<sup>749</sup> Ferri, E., *I nuovi orizzonti del diritto e della procedura penale*, Bologna: Nicola Zanichelli, 1884, 2<sup>o</sup> ed., p. 39: "La fisiologia infatti, e più recentemente, per opera del Ribot la psico-patologia concorrono a dimostrare la volontà umana individuale completamente soggetta alle influenze naturali di ordine non solo morale o psicologico, ma puramente fisico, anzichè esserne la dominatrice, più o meno assoluta".

CHAPTER IV:  
DORADO  
MONTERO'S  
CRIMINAL  
DOCTRINE. THE  
PROTECTIVE LAW OF  
THE CRIMINALS



Dorado Montero developed a very extensive theory on the penalty in his *Derecho Protector de los Criminales*. He did not think of the “act itself” holding “absolutely equal importance” in every single “case or circumstance”, but he rather focused on its subjective “evaluation” and “categorisation”.<sup>750</sup> He maintained his rejection of absolutist theories and of the idea that there was an unvariable conception crime being the same through time and history. The significant aspect for him was how to evaluate it and also how to classify it. This latter was relevant for the purpose of establishing an adequate treatment -not punishment-. He did not focus on the crime, but on the criminal instead:

“It seems to me that, by not paying enough attention to this, we fall into many errors, and above all, into the fundamental error of believing that there is only one moral and juridical order, an absolute and immutable order, which is usually the one that its defenders offer us as such, i.e. the one that they subjectively form and to which they afterwards grant objective reality (without realising what they are doing)”.<sup>751</sup>

The penalty was so relative that the principle *propter necessitatem illicitum efficitur licitum* could be applied here: without changing a bit the “real legal order”, by solely “modifying my own mental order”, I could sometimes “take for good” what sometimes, with a different mental order, I “deem as evil”.<sup>752</sup> Two examples were provided. The first one concerned the legitimacy of homicide in wartime within the Waldensians<sup>753</sup> in the Middle Ages. The second one was a similar thesis held by Tolstoy.<sup>754</sup> Besides, self-defence could be included within this category given that they partially “derogated” some criminal acts.<sup>755</sup> So to

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<sup>750</sup> Dorado Montero, P., *El Derecho protector de los criminales*, v.1, ..., p. 16.

<sup>751</sup> Dorado Montero, P., *El Derecho protector de los criminales*, v.1, ..., p. 18: “Me parece a mí que, por no fijarse en esto lo suficiente, se cae en bastantes errores, y sobre todo, en el fundamental de creer que solo existe un orden moral y jurídico, orden absoluto é inmutable, que suele ser cabalmente el que como tal nos ofrecen sus defensores, es decir, el que ellos subjetivamente forman y al que luego (sin percatarse de lo que hacen) dan realidad objetiva”.

<sup>752</sup> Dorado Montero, P., *El Derecho protector de los criminales*, v.1, ..., p. 20.

<sup>753</sup> The Waldensians were adherents of a Christian church (who later on would join Protestantism) which preached apostolic poverty as a way to perfection.

<sup>754</sup> Dorado Montero, P., *El Derecho protector de los criminales*, v.1, ..., p. 20.

<sup>755</sup> Dorado Montero, P., *El Derecho protector de los criminales*, v.1, ..., p. 20.

speak, “there is [...] no other justice or injustice in the world, but the ones they [men] mentally create for their particular use”.<sup>756</sup>

As when he made a critical analysis of his own proposal, he assessed the effectiveness of the new penal law. He grounded it on society’s acceptance. If a certain social trend (like a new criminal approach) got wide support from the majority of the population it would be the most powerful instrument. Those new ideas will then turn into beliefs of the mass and so they were to remain both dogmatic and uncontested.<sup>757</sup> Besides, whether we talked of the intimidative end or the corrective end within the penalty, it did not pose any difference for him: “They both are teleological functions, which look after a future result. Consequently, they are to be organised around the achievement of such objective”.<sup>758</sup> Big discussions on which end should prevail were useless. There were only two ends: either we talked of the penalty as a teleological reality or we did so as an abstract one. In the first case, one might find both the positivists, and the correctionalists; whereas in the latter, one found the theological school, and the Hegelians (within the Neapolitan school). Intimidating and corrective ends were comprised within the teleological school. They should neither adjust themselves to the seriousness of the crime nor to the gradation of responsibility incurred on by them: they should be proportionate to the degree of necessity required by the pursued end.<sup>759</sup> Absolute theories of the crime focused on the punishment of the already committed crime, but teleological theories focused on the future commission of crimes: “Strictly speaking, one cannot talk about criminal responsibility –and its corresponding penalty- but within the so-called absolute criminal theories”.<sup>760</sup> He was very categorical at first. If the need for reform came given by the lack of efficacy of the correction of the criminal, then all the penalties not fulfilling this goal should be overruled. Let us explore this by looking individually at the several elements of crime.

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<sup>756</sup> Dorado Montero, P., *El Derecho protector de los criminales*, v.1, ..., p. 23: “[...] no hay en el mundo, para los hombres, otra justicia ni otra injusticia sino las que ellos mismos crean mentalmente para su uso particular [...]”.

<sup>757</sup> Dorado Montero, P., *El Derecho protector de los criminales*, v.1, ..., p. 185.

<sup>758</sup> Dorado Montero, P., *El Derecho protector de los criminales*, v.1, ..., p. 186.

<sup>759</sup> Dorado Montero, P., *El Derecho protector de los criminales*, v.1, ..., p. 187.

<sup>760</sup> Dorado Montero, P., *El Derecho protector de los criminales*, v.1, ..., p. 187.

## 1. The delinquent

The degree of abstraction lying in his theory was very high. It dealt with many aspects of legal philosophy. Dorado Montero extensively devoted a chapter of one of his main works analysing several aspects as regarded the delinquent.<sup>761</sup> The varied set of topics ranged from the requirement of the voluntariness,<sup>762</sup> intention,<sup>763</sup> dangerousness as a requirement for punishing, atavic and evolutive criminality and the great variety of criminals. His attention was mainly focused on abstruse topics such as application of the law, its interpretation, legal sources or nonretroativity of laws.<sup>764</sup> Yet, criminal dogmatics and legal science on their strict acceptation were deliberately overlooked, since the change he aimed for was not achievable through dogmatics but rather by legal philosophy.<sup>765</sup> It did not mean that he was not good at it, as Asúa pointed out.<sup>766</sup> This relativisation of the nature of the penalty read as followed:

“If it is recognised that there are no criminal offences because such offences are man-made definitions based on prevailing systems of value, then how can one admit the existence of individuals possessing criminal characteristics or tendencies?”<sup>767</sup>

Yet, it remained a mystery how could he possibly speak of some beings as to be ‘morally inferior’.<sup>768</sup> It was difficult to establish a coherent link between his utopian theory and this particular expression (and its derivative expressions), since as regarding the ‘moral conception’ he always held their ‘equally value of them all’.<sup>769</sup> He was against any pre-established conception of truth; thus, no

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<sup>761</sup> Dorado Montero, P., *Bases para un nuevo Derecho penal*, Barcelona: Manuel Soler, 1902, pp. 37-53.

<sup>762</sup> Dorado Montero, P., *La psicología criminal en nuestro Derecho legislado*, Madrid: Hijos de Reus, 1911, pp. 42-77, and pp. 95-110.

<sup>763</sup> Dorado Montero, P., *La psicología criminal en nuestro Derecho legislado*, Madrid: Hijos de Reus, 1911, pp. 78-94, and pp. 149-216.

<sup>764</sup> Ramos Pascua, J. A., “El positivismo jurídico en España: D. Pedro Dorado Montero”, *Anuario de Filosofía del Derecho*, No. XII, 1995, pp. 503-546, p. 506.

<sup>765</sup> Ramos Pascua, J. A., “El positivismo jurídico en España: D. Pedro Dorado Montero”, *Anuario de Filosofía del Derecho*, No. XII, 1995, pp. 503-546, p. 506.

<sup>766</sup> Jiménez de Asúa, L., “Recordando a D. Pedro Dorado Montero”, *Revista de Estudios Penitenciarios*, No. 195, 1971, pp. 1617-1630.

<sup>767</sup> López-Rey, M., *Pioneers in Criminology...*, p. 610.

<sup>768</sup> Dorado Montero, P., *Nuevos derroteros penales*, Barcelona: Henrich & Compañía, 1905, pp. 74-83.

<sup>769</sup> Dorado Montero, P., *Bases para un nuevo Derecho penal*, Barcelona: Manuel Soler, 1902, pp. 25: “Moral conceptions find themselves under the foot of equality. None of them can assume, on solid grounds, the right to become an organ monopolising the truth”.

moral was good or evil per se.<sup>770</sup> The only expression which somehow could fit within this theory was the ‘moral deterioration’ or ‘degeneration’ of the criminal.<sup>771</sup> Such aspect was maybe not a core one for Dorado Montero. He plainly thought of it as a trait of inferiority of the criminal, always linked to improvement. Therefore, biological determinism found little ground on his theory, since this latter did conceive the possibility of correction for the criminal.<sup>772</sup> It was, nevertheless, a central aspect for Lombroso’s theory, which was transported from Italy to Germany,<sup>773</sup> and afterwards, from Germany to Spain.<sup>774</sup> In the latter, however, the social conditions were maybe not the most adequate ones for its rooting.<sup>775</sup>

Lombroso held an “early reference” to Darwin.<sup>776</sup> Gadebusch Bondio<sup>777</sup> emphasized that Lombroso had gone through a “development towards less rigorous penalties”.<sup>778</sup>

“At the 5<sup>th</sup> Congress for Criminal Anthropology in Amsterdam (1901), it becomes clear that a eugenic direction had developed within the school of Lombroso which, according to Gadebusch Bondio, had not been supported but tolerated by Lombroso and Ferri”.<sup>779</sup>

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<sup>770</sup> The “trascendental problem” can be observed here as well.

<sup>771</sup> Those terms linked him to the Old Spanish Correctionalist School. Including him within the correctionalists would entail a denial of the positivist elements of his theory.

<sup>772</sup> Martín Martín, S., “Penalística y penalistas españoles a la luz del principio de legalidad (1874-1944)”, *Quaderni fiorentini per la storia del pensiero giuridico moderno*, Vol. 36, No. 1, 2007.

<sup>773</sup> Gadebusch Bondio, M., „Die Rezeption der kriminalanthropologischen Theorien von Cesare Lombroso in Deutschland von 1880-1914“, Diss. phil. (Abhandlungen zur Geschichte der Medizin und der Naturwissenschaften, Heft 70), Husum 1995, 297 Seiten.

<sup>774</sup> Maristany, L., “Lombroso y España: nuevas consideraciones”, *Anales de literatura española*, No. 2, 1983, pp. 361-382.

<sup>775</sup> Álvarez-Uría, F., *Miserables y locos. Medicina mental y Orden social en la España del siglo XIX*, Barcelona: Tusquets, 1983.

<sup>776</sup> Burk, T., „Geschichte der Degenerationstheorien“, *Thomas J. Burk (personal blog)*, p. 214: “Gadebusch Bondio hat auf einen überzeugenden Beleg einer frühen Bezugnahme Lombrosos auf Darwin hingewiesen”.

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<sup>778</sup> Burk, T., „Geschichte der Degenerationstheorien“, *Thomas J. Burk (personal blog)*, p. 222: “Gadebusch Bondio hebt hervor, Lombroso habe eine Entwicklung zu weniger rigorosen Strafvorstellungen durchgemacht”.

<sup>779</sup> Burk, T., „Geschichte der Degenerationstheorien“, *Thomas J. Burk (personal blog)*, p. 225: “Auf dem 5. Kongreß für Kriminalanthropologie in Amsterdam (1901) zeigt sich, daß sich

## 2. The treatment

Despite its undeniable linkage with positivism, the treatment foreseen within the Protective Law of the Criminals could not purely fall within the scope of the social defence. That was due to the fact that criminal sanctions for Dorado Montero were not preeminently aiming for society's protection, but rather at the protection of the individual. Thus, in this respect, he differed from the purest form of positivism:

“Even if we dealt with old or young people, male or female, individuals in these or those circumstances, the sense and the procedure of the reaction were identical in all cases: retaliation, expiation and the retribution of the committed crime, for which penalties are for. Guardianship and protection of the criminal were things no one thought of since he [the criminal] was not deemed as to need them”.<sup>780</sup>

The period of time in which Dorado Montero lived characterised itself for the discovery and further development of experimental medicine<sup>781</sup> and physiology,<sup>782</sup> as two vital tools for the progress of criminal law and criminology. It was thanks to this period that we found theories which “contribute[d] to establish a differentiation between the figure of the mentally ill and the criminal”.<sup>783</sup> The crime policy of each country was, ultimately the one which could manage the aspect of the treatment.<sup>784</sup> Besides, the costs incurred by the treatment ought not to be defrayed by the “convicted” nor by “his family”, but should be covered by the “whole society” (municipality, province or the State itself).<sup>785</sup> The rationale for this was very clear: when the “subject is individually exculpated, he

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innerhalb der Schule Lombrosos eine eugenische Richtung herausgebildet hatte, die so Gadebusch Bondio, von Lombroso und Ferri zwar nicht unterstützt, doch toleriert worden sei”.

<sup>780</sup> Dorado Montero, P., *El Derecho protector de los criminales*, v.1, ..., p. 220.

<sup>781</sup> Bernard, C., *Introduction à l'étude de la médecine expérimentale*, Paris : Collège de France, 1859.

<sup>782</sup> Béclard, J., *Traité élémentaire de physiologie humaine*, Paris, 4e éd., 1862; Magaz i Jaime, J., *Tratado elemental de fisiología humana*, Barcelona: Est. Tip. de Narciso Ramírez, 1871; Quesada i Agius, B., *Tratado elemental de fisiología general*, Madrid: Est. Tip. de Eduardo Cuesta, 1880; Prochiantz, A., Claude Bernard, *La révolution physiologique*, Paris : PUF, 1990.

<sup>783</sup> Calvo González, J., “Naturalismo y direcciones criminológicas a finales del siglo XIX en España”, *Revista de derecho penal y criminología*, no. 12, 2003, pp. 255-270, p. 268.

<sup>784</sup> Dorado Montero, P., *Bases para un nuevo Derecho penal*, Barcelona: Manuel Soler, 1902, pp. 130-132.

<sup>785</sup> Dorado Montero, P., *Problemas jurídicos contemporáneos*, Madrid: La España Moderna, 1893, p. 35.

is exonerated from the penalty (a punishment) and the whole society is charged, thus, asserting the collective responsibility thereof”.<sup>786</sup>

### 3. The criminal procedure

His idea of the process was a very vague, general one: Dorado never had in mind any “revolutionary methods or processes”, but he rather thought that this “could be achieved by a process of social evolution, resulting from the process of the sciences, especially of psychology”, which according to him would eventually “absorb sociology and anthropology”.<sup>787</sup> However, when addressing the issue, Dorado Montero declared that “the whole scaffold of judicial and procedural institutions” which were used back then “should disappear” and “should leave the way open” to other procedures.<sup>788</sup> In his article, López-Rey summarised this future procedural system: “The existing criminal procedure would be replaced by a flexible one, adaptable to the circumstances of each case, and having as its sole aim the cure of the offender or potential offender”.<sup>789</sup> Dorado Montero considered that the current criminal procedure was highly counterproductive since it created an unnecessary confrontation between the two parts in the process:

“Both become enemies during the criminal proceedings in which the judge as a representative of Society takes practically only into account what can be used against the offender, while the latter reacts in an opposite way and refers only to what is in his favour”.<sup>790</sup>

Thus, everything would change if we considered the two parts to have the same aims and interests.<sup>791</sup> The features of the process should be based on

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<sup>786</sup> Dorado Montero, P., *Problemas jurídicos contemporáneos*, Madrid: La España Moderna, 1893, p. 35: “al exculpar individualmente al sujeto y librarle de pena, de castigo, se inculpa á toda la sociedad en que aquél se ha producido y se afirma la responsabilidad colectiva de la misma”.

<sup>787</sup> López-Rey, M., *Pioneers in Criminology...*, p. 609.

<sup>788</sup> Dorado Montero, P., *Bases para un nuevo Derecho penal*, Barcelona: Manuel Soler, 1902, p. 107.

<sup>789</sup> López-Rey, M., *Pioneers in Criminology...*, p. 610.

<sup>790</sup> López-Rey, M., *Pioneers in Criminology...*, p. 609.

<sup>791</sup> Dorado Montero considered that “judge and defendant behave to each other as two enemies”. Vid. Dorado Montero, P., *Bases para un nuevo Derecho penal*, Barcelona: Manuel Soler, 1902, p. 108.

“individual rights subordinated to the effectiveness of the treatment”, “flexible criminal codes” with open, non-binding provisions, no distinction as for “juvenile or adult treatments”, no need for attorneys, solicitors or other figures, but only “judges specially trained in the relevant disciplines (anthropology, psychology and sociology)” and “provisional diagnosis”.<sup>792</sup> In a nutshell:

“The traditional conception that the offender has paid his debt to society as soon as he has completed his sentence, has no place in Dorado’s protective system”.<sup>793</sup>

Dorado Montero’s theory was never close to be implemented. A certain degree of social stability and governance was needed for that. It was more of a utopia, as some authors have labelled it.<sup>794</sup> The problem of his theory was that all the abstract (formal) requirements were perfectly coherent but at the material aspects could simply be attained with the theoretical requirements. It simply did not work.

It would constitute a violation of the truth to maintain that, just because of being somehow determinist and positivist, his theory sought the brainwashing of the criminal as to generate a new, unproblematic individual. Positivism asked for the modification of the individual, but it did not care about the criminal’s personality and it supported a total or partial replacement of his psyche. Dorado Montero did set a very strong limit to this undesired, totalitarian feature. He established that the main objective of his theory was to protect the individual. The closest thing to the aforementioned ill-timed, positivist idea he said was that psychology<sup>795</sup> was “charged with the task getting the old soul replaced by the new soul”.<sup>796</sup> The personality of the offender ought to be intact; just the soul (a way he had to refer to predisposition towards his acting) should be replaced. Having the personality annulated either by mean of educative correction or by biological means was to be forbidden (much later on, lobotomy was developed and

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<sup>792</sup> López-Rey, Manuel, *Pioneers in Criminology...*, p. 610.

<sup>793</sup> *Ibid.*, p. 610.

<sup>794</sup> Antón Oneca, J., *La utopía penal de Dorado Montero*, Salamanca: Ediciones Universidad, 1951, p. 85. For a more scientific perspective on the qualifier ‘utopian’ vid. Sánchez Granjel, L., “Medicina y Antropología en la génesis de la utopía penal de Dorado Montero”, *Eguzkilore. Cuaderno del Instituto Vasco de Criminología*, No. 3, 1989, pp. 155-170.

<sup>795</sup> Dorado Montero, P., *Los peritos médicos y la justicia criminal*, Madrid: Hijos de Reus, 1906, pp. 28-31.

<sup>796</sup> Dorado Montero, P., *El Derecho protector de los criminales*, Tomo 1, p. 22.

prohibited). Such guarantee was so important that it even named his theory: the *Derecho Protector de los Criminales*. The ‘protection’ of the criminal was precisely the cornerstone that defined and structured the whole treatment of the criminal. Summing up, it consolidated Dorado Montero’s theory as one of the most brilliant ones of this time: not an equidistant, eclectic theory, but rather the most rights-based, functional, predominantly determinist theory of all 19<sup>th</sup> century Europe.

When describing the penal sanctions and corresponding techniques to be used, Dorado Montero regularly used the expression “moral correction of the offenders”. This might lead to confusion. The term “moral” regularly appeared in Dorado Montero’s writings: moral inferiority of the criminal, moral deterioration, morally weak persons, etc. The term ‘moral’ was, nevertheless, meaning ‘personality’ or ‘personal attitudes’, rather than what guides our actions between good and evil. Nevertheless, that use of ‘moral’ was due to two reasons. The first cause has already been developed above: the Christian influences. Religion being for him one of the components of morality -not at all the sole one-, his religious education made that many of the concepts he used were Christian and many other legal constructions he articulated were impregnated with such etymology. In order to go through his oeuvre, one ought to be careful with the terms he used since not all of them were endowed with the legal meaning that one might expect. In some parts, reading and understanding Dorado Montero is a comprehensive task of reinterpretation. One can get easily confused, given the feeling of a permanent state of conflict within his ideas. Sometimes, even contradictory information can be found: religious expressions on the one hand, determinist assertions on the other; neoclassical language contrasts to positivist content. As for the second reason, it was for people to better understand his futuristic project. He adapted a positivist narrative to the language found in the predominating morals. People on his time were not remotely ready for such statements; not even the society of Jiménez de Asúa (a bit later on), nor even the whole, posterior 20<sup>th</sup> century and, neither our current society. The rejection was double due to ignorance and fear. On the one hand, society was simply not able to understand the insights of such an advanced, ahead of its time proposal. On the other hand,



however, the uncontrolled effects of it was something to . It threw them back again to the traditional conception. Understandably, this happened in the era of Dorado Montero, where Lombroso's developments were completely deprived of humanity. It also happened later on with Jiménez de Asúa and the uprising of fascism, Nazism and other totalitarian movements. Likewise, it happens nowadays as well for we are told that the mapping of the genetic structure can lead to changes in virtually any single human characteristic.<sup>797</sup> Yet, it was not only geared towards making himself closer to the population at large, but it was also intended for the academic elites of his time to accept his theory at some point. Perhaps eclecticism (school of thought supposed to be closer to positivism) was the only one that grew a significant interest in Spain, leaving aside the traditional law and, to a minor extent, *correccionalismo*.<sup>798</sup> In a land more suited to eclectic positions, introduction of positivism was somehow achieved because, at some point, a huge part of the doctrine (Catholics and supporters of the Neoclassical Schools) insisted on adopting Dorado Montero as part of their own doctrine. Even if his message suffered some modifications and was a bit distorted, it eventually got to be accepted; despite it was pseudo-labelled as neoclassical author, or even eclectic at the Spanish doctrine. That 'appropriation' took place quite a long time after and it was certainly meritorious: it was nor easy at that time neither for the immediate years that followed the disclosure of this theory.<sup>799</sup>

The criminal procedure was something more prone to be tackled in positivist positions than in idealist positions. The latter ones, usually, focused on the rationale of the penalty thereof and in questions of legal philosophy. They dealt with issues that held an indisputable truth. It could either come from the 'divine will' or from 'human nature', but in both cases there was always a need to find a common ground (or norms) binding to all members of society. As opposed to it, positivism tended to look after a minimum of norms for everyone, but only

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<sup>797</sup> Warneck, L., "The Promises of CRISPR Genome Editing in Biomedicine", *Labiotech*, 03.03.2021. Link: <https://www.labiotech.eu/interview/crispr-therapeutics-genome-editing/>.

<sup>798</sup> Dorado Montero, P., "El correccionalismo penal y sus bases doctrinales", *Revista general de legislación y jurisprudencia*, Vol. 55, No. 111, 1907, pp. 401-437.

<sup>799</sup> This aspect will be further developed in the chapter exploring Dorado Montero's affiliation, even this topic could aim for an entire book of its own.

those which relied on science.<sup>800</sup> They were more susceptible to deny the existence of a universal truth. They considered it to be a mere illusion for the human spirit, ie., a complete utopia. Instead of wasting efforts in trying to achieve such consensus, they focused on well-grounded rules for norms and legal procedures. In this sense, idealism “rode free” in almost “every branch” (legal philosophy, political Law, economy, Roman law, international law), whereas the positivist trend “has invaded first, and with more strength than any other legal branch, criminal law and criminal procedure”.<sup>801</sup> Interchangeably, the Critical School was a latecomer, so “it has only a certain dominance of legal philosophy, criminal law, and sociology”.<sup>802</sup> Antón Oneca had a very relevant contribution on the analysis of correctionalism. I find it difficult to share the criticism he poured against this system:

“It does not question to the reality of the processes and prisons whether the all the condemned are corrigible neither what should be done about those who, when succumbing to an external stimulus which is difficult to repeat, do not need a second education”.<sup>803</sup>

However, the Protective Law of the Criminals required a personalised, individual treatment of every criminal and the question whether a certain individual was corrigible or not was always raised. In fact, in the criminal procedure, certain traits of the scientific method were observed. Such method had started to be applied to the sphere of social sciences and humanities:

“As long as the law turns its back against science, the Criminal code will not be fair, nor reasoned, neither complete. Everything that is related to humanity must look for its rationale and for its basis on nature’s knowledge and human organism”.<sup>804</sup>

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<sup>800</sup> See here the influence of English empirism, mainly with Lock and Hume.

<sup>801</sup> Dorado Montero, P., *La antropología criminal en Italia*, Madrid: Imprenta de la Revista de Legislación, 1889, p. 15.

<sup>802</sup> Dorado Montero, P., *La antropología criminal en Italia*, Madrid: Imprenta de la Revista de Legislación, 1889, p. 15.

<sup>803</sup> “No se pregunta la realidad de los procesos y las prisiones si todos los condenados son corregibles ni qué ha de hacerse con aquellos que, sucumbiendo a un estímulo exterior de difícil repetición, no necesitan segunda educación”.

<sup>804</sup> López Bago, E., *El preso. La Inquisición moderna, Estudios de la vida humana en cárceles y presidios. Novela médico-social*, Madrid: Imprenta de José Góngora, 1888, p. 99. Quoted in Calvo González, J., “Naturalismo y direcciones criminológicas a finales del siglo XIX en España”, *Revista de derecho penal y criminología*, No. 12, 2003, , pp. 255-270, pp. 265-266.

When Dorado Montero wrote his first work studying the Italian Positivist School, he devoted Chapter 10 (Principal merits of the new school) to point out that the main virtue thereof “could be summarised in just one statement”: having applied to this branch of the law “the procedure of the experimental sciences, i.e. the positive method”.<sup>805</sup> For some, there was no other option but to start applying such method everywhere in the field of social sciences: “And so tries positive philosophy to demonstrate that it is not possible to apply to the study of social phenomena a method other than the experimental method”, yet Dorado Montero advocated for it in order to prevent extreme positionings in which positive schools often felt, this is to say “not to attach importance to the causes that do not have it” or “not to place over them an exaggerate one”.<sup>806</sup> Dorado Montero identified this in other scholars too. In Vanni’s *Programma critico di Sociologia*<sup>807</sup> and *Il problema della filosofia del diritto*,<sup>808</sup> the author coincided with Dorado Montero in the exigence of “reconstructing every social discipline according to the modern criterion arising from the new requirements from sciences”.<sup>809</sup> For other scholars though, this movement had a very relevant grip<sup>810</sup> and it was not a very appropriate movement, since it would give place to a hugely disordered, crossed-over, and inexact assertions.<sup>811</sup>

In *Datanomics*,<sup>812</sup> Llaneza pointed out that the main obstacle regarding data protection was attempting to solve a technological question as if it was a legal

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<sup>805</sup> Dorado Montero, P., *La antropología criminal en Italia*, Madrid: Imprenta de la Revista de Legislación, 1889, p. 151: “Todos ellos pueden condensarse en uno solo, que es el de haber aplicado á esta rama del derecho el procedimiento de las ciencias experimentales, ó lo que es igual, el método positivo”.

<sup>806</sup> Dorado Montero, P., *La antropología criminal en Italia*, Madrid: Imprenta de la Revista de Legislación, 1889, p. 25.

<sup>807</sup> Vanni, I., *Prime linee di un programma critico di Sociologia*, Perugia: Tipografia di V. Santucci, 1888.

<sup>808</sup> Vanni, I., *Il problema della filosofia del diritto*, Verona: Donato Tedeschi e Figlio, 1890.

<sup>809</sup> Dorado Montero, P., “Reseña al libro de Anziolotti: ‘La Filosofia del Diritto e la Sociologia’”, *RGLJ*, Vol. 41, No. 82, 1893, pp. 427-429, p. 428.

<sup>810</sup> Masferrer, A., “The reception of the positivist school in the Spanish criminal doctrine (1885-1899)”, *GLOSSAE. European Journal of Legal History*, No. 17, 2020, pp. 303-352, p. 344: “These works emerged in a historical context of fascination for the use of the positivist method in science –in general– and the biological and medical sciences –in particular–”.

<sup>811</sup> Masferrer, A., “Codification of Spanish Criminal Law in the Nineteenth Century: A Comparative Legal History Approach”, *JCL*, 4:1, 2009, pp. 115-118.

<sup>812</sup> Llaneza, P., *Datanomics: Todos los datos personales que das sin darte cuenta y todo lo que las empresas hacen con ellos*, Deusto, 2019.

question; we should rather fight technological problems with technology. Similarly, for Dorado Montero, such change of approach was operated: within social defence, scholars were fighting criminality as a legal question; but a medical or psychiatric matter must be fought with medicine, rather than with laws. Defining criminality as a scientific matter, rather than a moral one would allow us to overcome the main problem positivism faced: that the application of the scientific method to social sciences is incorrect.<sup>813</sup> For him, we could solve such conflict by assuming criminality was a medical matter, not a legal one. In this period, pseudosciences attempted at reaching other spheres. As a result, many works in such line appeared. By only looking at the titles, one could already appreciate those scientific, utilitarian, positivist influxes.<sup>814</sup> Alfred Fouillée published some works among which *Tempérament et caractère selon les individus* should be highlighted.<sup>815</sup>

In a conversation between the evolutionary biologist Justin García and the sociologist Georges-Claude Guilbert, the latter came to tell the first one that “in gender studies they mostly assumed we are not born biologically determined” and that “everything is exclusively the result of socialisation, and of the roles which education, family and society progressively permeate on us”.<sup>816</sup> García was certainly shocked, not because his thought was the opposite one, but because of the adverb he used: exclusively. Biology and sociology are opposed. Biology focuses on empirical data, and sociology on long, complex (often purely theoretical) approaches. Biology focuses on a posteriori conclusions, whereas sociology deals with a priori, man-made statements. Similarly, positivism and Neoclassical Schools were, respectively, reproducing the same pattern. Let us oversimplify the idea.<sup>817</sup> Sociologists usually reject whatsoever biological aspect

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<sup>813</sup> Dorado Montero, P., *Los peritos médicos y la justicia criminal*, Madrid: Hijos de Reus, 1906, pp. 19-22.

<sup>814</sup> Fernández, P., “La novela medico-social: entre fisiología y sociología”, *Eduardo López Bago y el naturalismo radical. La novela y el mercado literario en el siglo XIX*, Ámsterdam-Atlanta: Rodopi B. V., 1995, pp. 75-83.

<sup>815</sup> Fouillée, A., *Tempérament et caractère selon les individus, les sexes et les races*, Paris: Félix Alcan, 6e éd., 1895.

<sup>816</sup> Estupinyà, P., *S=EX<sup>2</sup>. La ciencia del sexo*, Debate, 2013, p. 311.

<sup>817</sup> I am fully aware, though, that sociology was a very prominent branch of positivist schools, thus, hardly suspicious of sharing the stiffness of neoclassical statements. Yet, we decided to oppose it to a higher ‘positivist’ discipline (biology) to avoid being so Manichaeic in our example. That, on its turn, allowed us to point out that the matter was far more complex, and that

in a very dogmatic way, and so did the Neoclassical Schools in their very core. They both revolve mainly around ideology. Unsurprisingly, logical contradictions usually show up. Most Neoclassical Schools ‘betray’ this dogmatic aspect when trying to explain some ideas: namely that criminality does not faithfully follow (or keeps little degree of connection towards) the rules of instruction, education and moral guidance, or that in societies holding more permissive points of view towards criminality there are no more criminals than in more repressive societies. If purely scientific findings showed something going against the theoretical, man-made scaffold, the latter would not usually accept them, because their theoretical constructions come first, and scientific outcomes should fit within them. In a very illustrative footnote, Dorado Montero made a calm reflection on the experimental. According to him, “metaphysic and abstract theories have moved away from reality”, thus building penology only “the way Sieyès constructed the constitutions”, i.e. in a very artificial, aprioristic manner. The experimental method in the new school played a very significant role, thought “its need had already been sensed by the correctionalists themselves”.<sup>818</sup> The problem here consisted in that they have overstepped on what was “fair” and they took “Criminal law out of its own sphere”, thus, “creating a new metaphysics” which was, at least, as exaggerated as the first one (Neoclassical Schools).<sup>819</sup>

It was, nevertheless, not clear whether criminal law should be still ‘considered’ as a human science in the new era, or whether it will someday enter the sphere of empirical sciences. Jiménez de Asúa, the most outstanding disciple of Dorado Montero, once said: “In a distant future, criminology will end up swallowing criminal law”.<sup>820</sup> Should this happen in a near future, the argument that ‘it is not correct to apply the scientific method to moral sciences’ would be definitively overruled. The debate might favour the final victory of the scientific,

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even within Positivist Schools there were more or less dogmatic models in a per se endlessly diverse spectrum.

<sup>818</sup> Dorado Montero, P., *La antropología criminal en Italia*, Madrid: Imprenta de la Revista de Legislación, 1889, pp. 173-174, footnote (1).

<sup>819</sup> Dorado Montero, P., *La antropología criminal en Italia*, Madrid: Imprenta de la Revista de Legislación, 1889, pp. 173-174, footnote (1).

<sup>820</sup> Jiménez de Asúa, L., “El derecho penal del futuro”; José Mora Guarnido (dir.), *El mundo de la posguerra*, p. 13: “En el remoto mañana la Criminología se tragaría al Derecho penal”.

positivist conception. Such a controversy had been on since the early origins of empiricism, yet never entirely tackled. What had traditionally been the great, inconclusive debate could see its final days coming. In the upcoming decades, as it seems, biological and medical sciences will unavoidably take over the whole sphere of legal fields, much more silently than in Lombroso's age, yet in a much more determining manner. In my opinion, this is the main challenge that the criminal law is to face in the coming decades. Dorado Montero was too generous as regards the period of time in which this would happen;<sup>821</sup> yet, with the current scientific developments, it will not take too long. The traditional conception of criminal law needs an urgent argument for solving this weakness. Otherwise, time and scientific findings will expose its vulnerabilities. The defenders of traditional criminal law find themselves in an urgent need for a new ground-breaking reason which does not simply ground on "the incorrect use of a methodology not suited for social science".<sup>822</sup>

#### 4. The punishment

The positivists of the new criminal school refused the concept of crime as a "product of the freewill of the agent".<sup>823</sup> They considered the crime as a "very

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<sup>821</sup> He estimated such takeover to take place when socialism would emerge and when the swift towards a bourgeois society would take place, roughly in fifty years after his death. Nevertheless, the uprising of fascism and other worldwide political events postponed the reaching of such political conditions.

<sup>822</sup> Masferrer, A., "The Reception of the Positivist School in the Spanish Criminal Doctrine (1885-1899)", *GLOSSAE. European Journal of Legal History*, No. 17, 2020, pp. 3-4: "his dualism (res cogitans–res extensa) paved the way for those who understood that the scientific method needed to be empirical (res extensa), and that even social sciences should adopt this method because otherwise they would be (dis)regarded as a mere opinion, but not as a real science". Of the same author, "Criminal Law and Morality Revisited: Interdisciplinary Perspectives", Masferrer, A., *Criminal Law and Morality in the Age of Consent*, Cham: Springer, p. 2: "There is no doubt that not all immoral behaviour—or sins—should be criminalized: sins and crimes are not the same, as the moral and legal orders differ. It follows that Human law should never attempt to forbid all vices. The relation between criminal law and morality derives from the relation between politics, law and morality, whose provinces are different. Moral laws and civil laws have different limits and practical purposes. The sphere of moral law is much broader than civil law, which means, for example, civil laws should never concern themselves with the criminal thoughts a person may have inasmuch as they do not go beyond that, i.e. any kind of external act. As to practical purposes, civil laws have their own ethical-practical rationality, which affects not only the reasoning process but also the realm to which it applies".

<sup>823</sup> Dorado Montero, P., *La antropología criminal en Italia*, Madrid: Imprenta de la Revista de Legislación, 1889, p. 126.

complex knot” which was the result of the intervention of “infinite causes”, and so they rejected as well the “ancient concept of penalty”.<sup>824</sup> It might, nevertheless, seem that the new school was not coherent, as it continued to use both the terms ‘crime’ and ‘penalty’. Yet, those concepts had to be emptied out of their former meanings. Thus, a ‘crime’ should not be “freewill which commits a crime or abandons the righteous path”, as much as a ‘penalty’ should not be understood as a “set of mediaeval concepts of redeem and retribution” anymore.<sup>825</sup> On the basis of several works,<sup>826</sup> Dorado Montero pointed out that “modern positivists of Criminal law [...] have failed to refrain from falling into the traditional concern according to which the penalty is a natural consequence of the crime and it is applied because the crime has existed”.<sup>827</sup> Criticism kept on growing even more since some positivists such as Garofalo asked for the eradication of the criminal as a means to output the social revenge.<sup>828</sup> Surprisingly enough, such kind of attitude found itself not only in the writings of anthropological positivists, but also in those of social positivists. This particularly outraged Dorado Montero:

“How was it possible that Ferri included within the defence means against the criminals available to society those repressive and neutralising, leaving aside the preventive and restorative ones?”<sup>829</sup>

Dorado Montero blamed Marro and Puglia in similar terms. Definitively, such contradiction could be due to the fact that all of them kept on considering the penalty as an evil. In positivist schools, the penalty ought not to have such

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<sup>824</sup> Dorado Montero, P., *La antropología criminal en Italia*, Madrid: Imprenta de la Revista de Legislación, 1889, p. 126.

<sup>825</sup> Dorado Montero, P., *La antropología criminal en Italia*, Madrid: Imprenta de la Revista de Legislación, 1889, p. 127.

<sup>826</sup> Garofalo, R., *Criminologia: studio sul delitto, sulle sue cause e sui mezzi di repressione*, Torino: Biblioteca antropologico-giuridica, 1885, p. 67; Ferri, E., *I nuovi orizzonti del diritto e della procedura penale*, Bologne: Zanichelli, 2<sup>o</sup> ed., 1884, p. 121.

<sup>827</sup> Dorado Montero, P., *La antropología criminal en Italia*, Madrid: Imprenta de la Revista de Legislación, 1889, p. 127: “los positivistas modernos del Derecho penal [...] no han sabido sustraerse á la tradicional preocupación según la cual la pena es una consecuencia natural del delito y se aplica porque el delito ha existido”.

<sup>828</sup> Dorado Montero, P., *La antropología criminal en Italia*, Madrid: Imprenta de la Revista de Legislación, 1889, p. 129.

<sup>829</sup> Dorado Montero, P., *La antropología criminal en Italia*, Madrid: Imprenta de la Revista de Legislación, 1889, p. 128: “¿Cómo era posible que Ferri incluyera entre los medios de defensa de que la sociedad puede disponer contra los criminales, además de los preventivos y reparadores, los represivos y eliminativos”.

connotation. According to Dorado Montero's main theory,<sup>830</sup> which he developed at the end of his life, the penalty should be considered as the due treatment of an individual in abnormal circumstances. After pointing out history's inevitable advance forward,<sup>831</sup> he posed a rethoric question to crystallise his indignation:

“How can it be explained those two opposed assertions of positivist penalists: particularly that the efficacy of the penalties to prevent the crimes is negligible, and that humanitarian tendencies of the classical school, especially of Beccaria's and Howard's henchmen, taking care of the destiny and wellbeing of the criminals, are to be considered unhealthy and indefensible?”<sup>832</sup>

In the first part of the statements, one could see Garofalo, whereas the second one matched Ferri. Again, both branches of positivism (the more anthropological one but also the most social one) were said to incur in such contradiction.

Moreover, two clear steps towards the construction of the new concept of punishment were identified. Firstly, the penalty as a repressive means should be completely abolished; should it be preserved, it ought to hold a preventive character. Secondly, since the causes of the crime were multiple, so should be the means to remove it, and it should respond to the three classes of factors: anthropological, social and physical.<sup>833</sup> That was why sometimes Dorado Montero fits more adequately into the continuing of correctionalist or positivist trends, rather than pretending he was some sort of special figure within correctionalism or plainly resorting to the ambiguous field of eclecticism.

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<sup>830</sup> Dorado Montero's own created theory of the Protective Law of the Criminals was best outlined in his work *El Derecho protector de los criminales*, which was divided in two different volumes.

<sup>831</sup> Namely, Beccaria's objective of lowering and abolishing many of the existing penalties, and Howard's improvements of life in prison.

<sup>832</sup> Dorado Montero, P., *La antropología criminal en Italia*, Madrid: Imprenta de la Revista de Legislación, 1889, p. 129-130: “¿cómo pueden explicarse estas dos contrarias afirmaciones de los penalistas positivos: que la eficacia de las penas para prevenir los delitos es insignificante, y que las tendencias humanitarias de los penalistas clásicos, especialmente de los secuaces de Beccaria y Howard, que se preocupan mucho de la suerte y bienestar de los delincuentes, sean malsanas é indefendibles?”

<sup>833</sup> Dorado Montero, P., *La antropología criminal en Italia*, Madrid: Imprenta de la Revista de Legislación, 1889, p. 130.



Dorado Montero lived in a period in which the reigning criminal doctrine was eclectic. Such iusphilosophical trend was led by the Italian penalist Pellegrino Rossi, whose Spanish counterpart in Spain was Joaquín Francisco Pacheco.<sup>834</sup> A brief outline showed that up to four main scenarios took place. Firstly, there was the Mediaeval and early Modern criminal law with great authorities like Thomas Aquinas. Regrettably, and mostly due to political aspects, such period was full of violence, authoritarianism and biased decisions. Secondly, the enlightened Criminal law as opposed to the *Ancien Régime* mostly taking place after the French Revolution (Beccaria, Feuerbach and Bentham).<sup>835</sup> Thirdly, the liberal Criminal law based on the ideas of individuality, the principle of legality, and the systematic indexing of crimes. As accurately depicted, such trend perfectly met the features of the Spanish political panorama: moderation, mixture, cultural dependence on France and conservatism. Spain was overcoming the previous enlightened thought and it geared towards an overlapping of law and morals. They looked after ending the abuses of the Enlightenment. Fourthly, the system of positivism and social defence with Ferri, Garofalo, and Lombroso. A rough simplification of the scheme would read as follows: retribution, prevention, retribution (taking prevention and amendment as a nice but a secondary, accessory goal), and prevention. Therefore, he who on the basis of the political time in which Dorado Montero lived attempted to label

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<sup>834</sup> At that time, a doctrinal discussion arose around the extent of Pacheco's originality: some authors defended him (Romero Girón, Gutiérrez Fernández, and Calvo Rubio), whereas some others maintained he just copied all or some of Rossi's ideas (Dorado Montero or Antón Oneca, among others). The main way to check this out was to read his work *Estudios de Derecho penal. Lecciones pronunciadas en el Ateneo de Madrid*.

<sup>835</sup> Yet, it was true that in a parallel way in Germany, absolutist theories of the penalty developed thanks to Kant, Binding, and Hegel. However, in order to avoid historical oversimplifications, vid. the nuance analysis on the relation between law and morality in the Enlightenment: Masferrer, A., "The Role of Nature in the Secularization of Criminal Law in Europe (17th–19th Centuries). The Criminal Law of the Enlightenment Revisited", Masferrer, A., *Criminal Law and Morality in the Age of Consent*, Cham: Springer, p. 110: "Some may argue that the criminalization of sexual misbehaviors in the eighteenth century was due to the absolutist political system, which was reluctant to undertake the needed reforms to modernize criminal law. In my view, this is not entirely true. A careful examination of the ideas of some of the most remarkable thinkers of the Enlightenment era revealed that the secularization of criminal law did not necessarily imply the decriminalization of those behaviors which according to some scholars, perpetrators needed to have been punished for their sinful character. As will be seen, the ideas of some authors such as Montesquieu, Beccaria, Rousseau, Voltaire, Kant, Bentham and Blackstone, regarding some of the sexual misbehaviors which were persecuted and punished in the early modern age, do not show a clear break with the supposed 'Christian' or 'moralizing' of criminal law".

him as an eclectic, he would do so in a temporal, political framework; thus, forgetting about the legal-doctrinal framework (which exceeded in relevance the historical aspect). The doctrinal-framework depicting the electical criterion (and pre-eminently retributive) appeared in the parliamentary debates:

“They did not strive to hold the spiritualist or the utilitarian principle; they took what came in handy out of each school. They adopted a prudent system; they did not want to create a work on philosophy, but to draft a practical Code for their fellow-citizens [...] If he [the legislator] forgets about the real world, he is seeking forward to impose his particular restrictions to a people which is not ready to admit them”.<sup>836</sup>

With such conciliating tone, very distinct from what Spanish legislators and scholars were used up until this moment, De La Serna concluded his intervention. A few lines after, he asserted that “such issues can be solved even better by talented people with a general education who have no worries concerning schools of thought, entrenched habits, and free from such yoke to that under which we have learned and that subjugates us”.<sup>837</sup> Thus, the two-coined character of the doctrinal predominant thought could be summarised as followed: “no absolute penal system was follows, yet the purpose of the penalty corresponded, in the first place, to the expiation or retributive principle”.<sup>838</sup>

Definitively, Dorado Montero could not be considered as an eclectic author at all. One of the main exponents of eclecticism, Francisco Pacheco, held that the purposes of the penalty were three. In descending order of relevance, those were expiation (retribution), intimidation, and the reform of the criminal.<sup>839</sup> Precisely, this latter was the very core of Dorado Montero’s criminal theory. Not only did Pacheco consider amendment to be the less important end of them all, but for him only the two first were the truly essential ones.<sup>840</sup> Thus, wisely depicted by Emilia Iñesta, for the eclectic Pacheco “amendment/correctionalist purposes” were not even an “exigence characterising criminal law”, but only a “vague

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<sup>836</sup> *Diario de Sesiones de las Cortes*, No. 81 (13.03.1848).

<sup>837</sup> *Diario de Sesiones de las Cortes*, No. 81 (13.03.1848).

<sup>838</sup> *Diario de Sesiones de las Cortes*, No. 81 (13.03.1848).

<sup>839</sup> Pacheco, J. F., *Estudios de Derecho penal. Lecciones pronunciadas en el Ateneo de Madrid*, Madrid: Imprenta y fundación de Manuel Tello, 1848, p. 207.

<sup>840</sup> Pacheco, J. F., *Estudios de Derecho penal. Lecciones pronunciadas en el Ateneo de Madrid*, Madrid: Imprenta y fundación de Manuel Tello, 1848, p. 207.

longing for civilisation and culture”.<sup>841</sup> That being said, it did not mean he did not consider them to be relevant; he did, but never at the same degree of relevance than the aforementioned ones. Yet, if Pacheco would have read Dorado Montero’s work,<sup>842</sup> he would surely exclude the basis of his proposal from the criminal law sphere. If the main purpose of the penalty in Dorado Montero’s criminal theory was the amendment of the criminal, whereas the main aim in the eclectic movement still was the retribution/expiation principle, there was an incompatibility of values. Some other aspects excluded him from eclecticism too, such as the determination of the penalty,<sup>843</sup> the steadfast belief of on freewill’s existence<sup>844</sup> or its unwavering reliance on natural law. After the social contract,<sup>845</sup> the predominating doctrinal aura of the 19<sup>th</sup> century rejected the artificial rationale of positive law and resorted the traditional conception of natural law. Unsurprisingly, a social crime would entail a moral crime for Pacheco. This allegation applied for eclecticism in general.

Additionally, the degree of likelihood in admitting variations as for the absoluteness of the law was different between them. Pacheco acquiesced to some variations, but always within the much broader framework of a well-defined law: “*evil* is just one, always; yet, *evils* change depending on the epochs, the peoples,

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<sup>841</sup> Iñesta Pastor, E., *El Código penal español de 1848*, València: Tirant lo Blanch, 2011, p. 272.

<sup>842</sup> It should be noted that Pacheco preceeded much in time to Dorado Montero. When Pacheco passed away in 1865, Dorado Montero was only four years old.

<sup>843</sup> Iñesta Pastor, E.; Masferrer, A., “Tradición e influencias extranjeras en la clasificación de las penas en los códigos españoles decimonónicos”, Masferrer, A. (ed.), *La Codificación penal española. Tradición e influencias extranjeras: su contribución al proceso codificador (Parte General)*, Pamplona: Thompson Reuters Aranzadi, 2017, pp. 517-528.

<sup>844</sup> “Freedom, innate as for the human being, brought along the possible breakdown of the natural rules governing himself. The violation thereof was the moral delict, which constituted an appalling yet unavoidable consequence of such liberty”. Pacheco, J. F., *El Código penal concordado y comentado*, Madrid: Imprenta y fundición de Manuel Tello, 5<sup>o</sup> ed., 1881, p. VIII: “*La libertad, innata en el hombre, traía como forzosa ilacion el posible quebrantamiento de las reglas naturales que le rigen: el quebrantamiento de esas reglas era moralmente el delito; desgraciada pero inevitable consecuencia de aquella libertad*”.

<sup>845</sup> Iñesta Pastor, E., *El Código penal español de 1848*, València: Tirant lo Blanch, 2011, p. 269: “Pacheco would thoroughly criticise the thesis of the social contract, the defence theory (grounding the penalty on its need to defence society, and whose main representative is Romagnosi), and Bentham’s utilitarian conception on the penalty”. Besides, Professor Masferrer held the rationale for this rejection of the social contract as the only measure to create the law on behalf of Pacheco, vid. Masferrer, A., *Criminal Law and Morality in the Age of Consent*, Cham: Springer, p. 120: “Joaquín Francisco Pacheco, one of the drafters and the main commentator of the 1848 SCC, argued that society has the right to approve criminal laws, but these laws should be in accordance with nature and reason, since society has no right to decide what is just or unjust”.

the doctrines, and the customs. [...] The *duty* is one, yet the *duties* are manifold as per ages and nations. *Law* is one, yet the number of *laws* increases, diminishes, changes, and modifies according to the civilisation. The *holy* is one, yet *its idea* is neither conceived nor applied the same way”.<sup>846</sup> Dorado Montero, on his behalf, plainly accepted them without any fundamental framework. He did not acknowledge a universal, invariable truth:

“Let us change a man’s condition and we will witness how he changes his criterion: let us think of him as rich, instead of poor; Catholic, instead of Muslim; producer, instead of consumer; employer, instead of worker; republican, instead of royalist; French, instead of Spaniard; trader, instead of peasant or philosopher, and we will be astonished of how much did his criterion variate, sometimes with the speed and the ease with which actors change their roles, their clothes and their physiognomy”.<sup>847</sup>

This denial of an immutable reality was taken from Ferri himself, who presented it in a very similar way much before Dorado Montero: “If, therefore, we take two men or one man at different times, we shall see that their reactions to the same external cause will be very different, not because some new element of moral freedom has been born in man, but only because the development of the psychic factors of his action is greater in him”.<sup>848</sup>

However, Pacheco’s retributive character was far-off from Kant’s stiffness. Both were coincident about the rationale of the penalty given that it was based on “cardinal basis, i.e. inborn notions of the abstract crime and the penalty in general, whose character does not admit any variation as long as our species shall last”.<sup>849</sup> The position was enormously different when it came to the rest

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<sup>846</sup> Pacheco, J. F., *El Código penal concordado y comentado*, Madrid: Imprenta y fundición de Manuel Tello, 5<sup>o</sup> ed., 1881, p. XIII: “*El mal es uno, uno siempre; pero los males varían, segun las épocas, y los pueblos, y las doctrinas, y las costumbres. El deber es uno; pero los deberes son diversos, con arreglo á las edades y á las naciones. El derecho es uno; pero los derechos se aumentan, se disminuyen, se truecan y modifican segun la civilizacion. Lo santo es uno; pero no en todas partes está concebida ni aplicada su idea de la misma suerte*”.

<sup>847</sup> Dorado Montero, P., *El Derecho protector de los criminales*, v.1, p. 22.

<sup>848</sup> Ferri, E., *I nuevi orizzonti del diritto e della prozedura penale*, Bologna: Nicola Zanichelli, 1884, 2<sup>o</sup> ed., p. 51: “Per cui, se si prendono due uomini od uno stesso uomo in tempi diversi, noi vedremo che saranno sva riatissime le reazioni loro ad una stessa causa esterna, non già perchè nell' uomo sia nato qualche nuovo elemento di libertà morale, ma solo perchè maggiore è in esso lo sviluppo dei fattori psichici della sua azione”.

<sup>849</sup> Pacheco, J. F., *El Código penal concordado y comentado*, Madrid: Imprenta y fundición de Manuel Tello, 5<sup>o</sup> ed., 1881, p. XV: “*bases capitales, nociones ingénitas del crimen*”.

(especially, the determination of the penalty). As regards the creation of a philosophical structure able to arrange a system of punishment, Pacheco dismissed that this could even exist. In order to systematise and to structure the punishment, “the only origin and principles of the penal laws are things like the ordinary instinct itself, sometimes passion, some other times they are doctrines arising from a misguided morality or even some considerations steaming from the political organisation of States”.<sup>850</sup> Kant maintained that the determination of the penalty should remain unchanged. On the contrary, Pacheco<sup>851</sup> settled that there was no science of penal law: not even a theory that deserved such name.<sup>852</sup>

Any attempt linking eclecticism towards correctionalism, and thus including Dorado Montero with the eclectics, should be refused. Antón Oneca contributed a powerful insight: “I believe that the term ‘expiation’ as used by penalist from Écija has a meaning other than ‘purifying punishment’ -as used by correctionalists. It is rather identified with the concept of absolute justice”.<sup>853</sup> Besides, Dorado Montero’s disdain towards Pacheco was notorious. One of his red lines was Pacheco’s *Lecciones*: “though they were written in a very rhetorical and pompous way, they bore not only little substance, but the little they had was almost entirely borrowed; the source was Rossi’s *Traité de droit pénal*”.<sup>854</sup> Indeed, undeniably denoting Dorado Montero’s German influences, he himself pointed out the fact that even if Pacheco was to be the author of reference for some more years for people interested in law, the people aiming more towards study and research would progressively opt for the Spanish translations of

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*abstracto y de la pena en general, cuyo carácter no admite variación en tanto que dure nuestra especie”.*

<sup>850</sup> Pacheco, J. F., *El Código penal concordado y comentado*, Madrid: Imprenta y fundición de Manuel Tello, 5<sup>o</sup> ed., 1881, p. XVI: “*El instinto solo de ordinario, que algunas veces la pasión, que otras las extravagantes doctrinas de una desatinada moralidad, que otras, por último, consideraciones deducidas de la organización política de aquellos estados, son los únicos gérmenes y los exclusivos principios de las leyes penales*”.

<sup>851</sup> Pacheco was also known as the penalist from Écija, name of his hometown.

<sup>852</sup> Pacheco, J. F., *El Código penal concordado y comentado*, Madrid: Imprenta y fundición de Manuel Tello, 5<sup>o</sup> ed., 1881, p. XVI: “*No hay ciencia de este derecho: no hay teoría que merezca tal nombre para él*”.

<sup>853</sup> Antón Oneca, J., “El Código penal de 1848 y D. Joaquín Francisco Pacheco”, *Anuario de derecho penal y ciencias penales*, Tomo 18, Fasc/Mes 3, 1965, p. 481: “*Creo que la palabra expiación empleada por el penalista ecijano no tiene la significación de castigo purificador, como en los correccionistas, sino que se identifica con la justicia absoluta*”.

<sup>854</sup> Dorado Montero, P., *De Criminología y penología*, Madrid: Viuda de Rodríguez Serra, 1906, pp. 136-137.

Röder's works, for Silvela's *Tratado de Derecho penal*, and for articles, pamphlets, and oral lectures coming from Salmerón, Giner, Azcárate, and the rest of the Spanish krausists.<sup>855</sup> Definitely, Dorado Montero rejected retributionism. Hence, despite living surrounded by an eclectic environment, he did simply not share such doctrine. One might be tempted to deem him as a positivist, but as much that was technically possible (according to the time he lived), he felt that the main goal that the penalty should pursue was not plain prevention but the real reform of the criminal.

One of the most revealing inputs of Dorado Montero was pointing out that we did not overcome the traditional retributive system yet; mostly due to our construction on morals.<sup>856</sup> Let us start with a current example: the 'compliance' systems.<sup>857</sup> They do not fulfil any other function than finding out a guilty individual, i.e. the responsible person. Normally, it is done so that one may place on someone the pecuniary responsibility. Take for instance in the very recent Covid-19 pandemic the supply of a set of medical protective masks in Spain. At the University Hospital Parc Taulí,<sup>858</sup> a complain was raised before the Spanish Ministry of Labour and Social Economy. It was observed that the masks which the doctors were using were not efficient.<sup>859</sup> This meant that the medical personnel could easily get infected.<sup>860</sup> Resulting from that panorama, healthcare experts asserted that those responsible for this situation ought to be found accountable. Specifically in this case, the end of the penalty<sup>861</sup> reminded of a softened version of revenge: someone had to pay for this. Notwithstanding that,

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<sup>855</sup> Dorado Montero, P., *De Criminología y penología*, Madrid: Viuda de Rodríguez Serra, 1906, p. 137.

<sup>856</sup> Dorado Montero, P., *Valor social de leyes y autoridades*, Barcelona: Sucesores de Manuel Soler, 1903, pp. 129-148.

<sup>857</sup> A compliance management system is an integrated system comprised of written documents, functions, processes, controls, and tools that help an organization comply with legal requirements and minimize harm to consumers due to violations of law. Definition taken from <https://www.compli.com/compliance-solutions/compliance-topic-centers/compliance-management-system/>. Seen on 05.06.2021.

<sup>858</sup> It is the main hospital of the city of Sabadell, located in the province of Barcelona (Catalonia, Spain).

<sup>859</sup> The aforementioned complain was filed on 15.04.2020. Seen on the 18.04.2020.

<sup>860</sup> The reason for this was that the provided FFP2 masks did not have the capacity to filter the particles of the virus. The pore size, which theoretically had filter particles down to one micron, was significantly bigger, thus, allowing the virus to pass through it.

<sup>861</sup> Dorado Montero profoundly discussed such topic in Dorado Montero, P., *De Criminología y penología*, Madrid: Viuda de Rodríguez Serra, 1905, pp. 7-58.

this was not the only end: performing professional tasks with a minimum degree of quality was also present. In a certain way, human nature might sometimes overlook duties. The permanent risk of a sanction in most cases helps to pursue excellence. Here, maybe the retributive feature is not the central element, but the relevance of the preservation of the penalty and the need for an unavoidable punishment (as Kant would hold) is maintained precisely because of this: so that society members find themselves somehow ‘on the watch’, and they can give the best of themselves. An anarchist system in which everything is to be regulated by the population’s conscience thereof is something highly desirable that appears depicted in many of the old and modern utopias, like that of Thomas More.<sup>862</sup> What’s more, it is the system that goes hand in hand with Dorado Montero’s proposal. He thought that, as society advanced, it would progressively tend towards this trend. Almost two hundred years have elapsed since his proposal then and none of this is in force. Humanity still needs this level of formality in the penalty, as well as in many other responsibility-related activities: the construction of a house, prevention of medical negligence or simply acting ‘right’. A different design could work for small communities. In bigger communities or in mass societies though, one could more easily ‘hide’ his own mistakes and elude his own accountability. A system based on trusting human nature is not viable. This is why, nowadays, rather than a retributive character, the penalty performs a function of ‘standard fulfilment’, this is to say, a ‘minimum framework’ function to avoid a poor fulfilment of duties. The same way that the educative system still requires exams and grades, the penal system also needs this basic, restrictive character. The debate on when will mankind reach such society or what are the necessary conditions to do so is a purely anthropological one that exceeds the scope of the current thesis. It belongs to another science of knowledge, even though it was one of the milestone points of Dorado Montero.

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<sup>862</sup> More, T., *Utopía: el estado perfecto*, Barcelona: Apolo, 1937.

## 5. The imputability

The environment in 19<sup>th</sup> century Spain was heavily influenced by a theory of imputability grounded almost exclusively on freewill.<sup>863</sup> Even the Spanish panorama was still revolving around absolute theories, certain innovation introducing mitigating and aggravating circumstances were timidly disrupting the traditional Criminal law principles.<sup>864</sup> The Supreme Court started to accept the modifying circumstances and a wider, less-uptight degrees of imputability.<sup>865</sup> What once was a very simple, univoque concept saw the number of existing theories of responsibility skyrocketing. Starting from the “classical theory” which consisted in a “moral and social responsibility, based upon the notions of obligation, free will, and personality”, they evolved into “modern theories”.<sup>866</sup> Those latter were mainly divided into three: a “mere social responsibility”, therefore based upon the “notion of the defense of the social organism”; a “social and moral responsibility without the suppression of the free will”; and a “social and moral responsibility but reduced to a simple noumenon”.<sup>867</sup> Bear in mind that eclecticism, whereas political or legal, was on the rise. Even if the positivist conception of imputability was far from being implemented back then, certain advances were being made and things such as the ‘dangerous state’ were being considered.

After some years, in 1931, Jiménez de Asúa held a rejection towards the ‘dangerous state’ because the concept of criminal capacity was essential for criminal law. In 1945, he finally accepted the dangerous state. He did so by placing it within the concept of criminal capacity. Indeed, that was a smart

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<sup>863</sup> Vid. González González, J., *La imputabilidad en el Derecho penal español. Imputabilidad y locura en la España del siglo XIX*, Granada: Comares, 1994.

<sup>864</sup> Builla Alegre, A., “Teoría de las circunstancias atenuantes y eximentes de responsabilidad criminal según el Código español: ¿Cabe alguna modificación en vista de los nuevos estudios frenopáticos?”, *RGLJ*, T. LXVII, 1885. Vid., Masferrer, A., *Spanish Legal Traditions*, Madrid: Dykinson, 2<sup>o</sup>ed., 2012, pp. 353-354.

<sup>865</sup> González del Alba, P., “Locura o imbecilidad incompletas. Doctrina del Tribunal Supremo”, *RGLJ*, T. XC, 1897.

<sup>866</sup> Vid. the schematic display of such classification in Bernaldo de Quirós, C., *Las nuevas teorías de la criminalidad*, Madrid: Imp. Revista de Legislación, Madrid, 1898, p. 143.

<sup>867</sup> Bernaldo de Quirós, C., *Las nuevas teorías de la criminalidad*, Madrid: Imp. Revista de Legislación, Madrid, 1898, p. 143. A noumenon is a concept used within philosophy in order to refer to an object that cannot be perceived by throughout sensible apprehension, but rather by an intellectual or abstract one.



movement since it helped to overcome the old debate “freewill-determinism”. Therefore, he divided responsibility into two categories: subjective and objective responsibility. He just put the focus on the criminal’s lifestyle dangers entailing a risk to society. That way he asserted the need for criminal capacity as one of the crime’s features but separating it from freewill.<sup>868</sup> It was a major outcome because he endowed criminal capacity of this psychological perspective. This latter is still held nowadays. But back in the time of Dorado Montero, the sole meaning of it was “the capacity to know one’s own duty”. Salillas himself drew the attention to the ‘crazy criminal’.<sup>869</sup> Progressively, schools started to realise that an inevitable clash on the grounds of this aspect (imputability) was erecting: imputability was, without any doubt, the aspect in which the two schools differed the most.<sup>870</sup>

The theoretical grounds for this discussion dated back to Stoicism. The Stoics had a similar approach to that of the Lombrosian determinists. According to them, if everything “does obey to laws of nature how can we tell mankind to abide the laws of nature bearing in mind that he [the human] cannot avoid this in any case?”.<sup>871</sup> Similarly, for Lombrosian determinism, if the criminal was born this way and he could not help his tendencies and criminal acts, how could somebody as Lombroso treat them with such hatred and contempt?<sup>872</sup> Criminals were not masters of their own destiny. They were not responsible; they were not accountable for their own acts. Why should Lombroso and other positivists show themselves so insensitive with the individual? The response of Stoicism was immediate: man was a rational being and so he was entitled to take his own decisions. Therefore, their determinism was not an absolute one: “the outcome is that, strictly speaking, no action is by itself good or bad because within

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<sup>868</sup> Roldán Cañizares, E., *Luis Jiménez de Asúa: un jurista en el exilio*, Universidad de Sevilla: Sevilla, 2018, p. 186.

<sup>869</sup> Salillas, R., “Los locos delincuentes en España”, *RGLJ*, T. LXIV, 1899, pp. 117-142.

<sup>870</sup> González del Alba, P., “La imputabilidad ante las escuelas antropológicas”, *RGLJ*, 1896, T. XXCVIII and XXCIX; Romero de Tejada, J. G., «La imputabilidad ante las escuelas criminológicas», *Revista de los Tribunales*, T. XXX, 1886, pp. 741 and ff.

<sup>871</sup> Copleston, F., *A History of Philosophy*, 1946, p. 348 (I handle Copleston, Frederick, *Historia de la filosofía*, Tomo I. Grecia y Roma, Liber).

<sup>872</sup> Spanish supporters of Lombroso were nothing closet o the Italian author. Vid. Campos, R., Huertas, R., “Lombroso but not Lombrosians? Criminal Anthropology in Spain”, Knepper, P., Ystehede, P.J. (Eds.), *The Cesare Lombroso Handbook*, Abingdon: Routledge, 2013, pp. 309-323.

determinism there is no place for voluntary action nor for moral responsibility”.<sup>873</sup> However, this did that determinism was not valid, but rather that determinism with those remarks was not determinism anymore: it had changed to a freewill positioning. This was precisely what Dorado Montero criticised. Since pure determinist systems have to make room for these exceptions, their whole system fell down. Despite trying to keep the same name, their ‘determinist’ conception was not determinist at all any longer. Unsurprisingly, he condemned the positioning behind mixed theories,<sup>874</sup> which struggled to reconcile the freewill and the determinist positionings. For him, the new penal law system should be determinist to the ultimate consequences:

“The predicament arises precisely when one wants, at the same time, to punish more or to punish less to a set of individuals as opposed to those understood to be normal, i.e. the referral/baseline individuals. They are to be punished more, with a preventive or preserving penalty or with a security measure against their dangerous tendencies; yet they are to be punished less, with a penalty basing its roots on the personal merit, thus entailing a penalty that assumes capacity and responsibility”.<sup>875</sup>

After those inconsolable inconsistencies took place, Dorado Montero checked that the most frequent solution was to “give up on the grounds of pure reason before life’s demands and to attend the needs of the ‘practical reason’”.<sup>876</sup> Both the ‘determinists’ and the ‘freewillers’ agreed upon such argument as a ‘way out’ to this paradox.<sup>877</sup>

To this respect, Copleston disagreed when he asserted that “no determinist system can be coherent in practice” and that it should not “catch us by surprise” given that “freedom is one reality to whom we are conscious about” and “albeit it can be theoretically excluded, it is newly re-introduced again through where we

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<sup>873</sup> Copleston, F., *A History of Philosophy*, 1946, p. 348 (I handle Copleston, Frederick, *Historia de la filosofía*, Tomo I. Grecia y Roma, Liber).

<sup>874</sup> Named after ‘eclecticos’ in Spain.

<sup>875</sup> Dorado Montero, P., *El Derecho protector de los criminales*, Ed. Jiménez Gil, Tomo 1, Madrid, 1915, p. 147.

<sup>876</sup> Dorado Montero, P., *El Derecho protector de los criminales*, Ed. Jiménez Gil, Tomo 1, Madrid, 1915, p. 152.

<sup>877</sup> Dorado Montero, P., *El Derecho protector de los criminales*, Ed. Jiménez Gil, Tomo 1, Madrid, 1915, p. 152.

least expect it”.<sup>878</sup> Criminalists of the new school did “deny man’s freewill” and it was the “main foundation of all their doctrine”; they were aware that without this premise the “whole building would crumble”.<sup>879</sup> Enrico Ferri himself pinpointed the key aspect of criminal imputability.<sup>880</sup> His point of view evolved: “whereas he grounds the first one [imputabilidad] on freewill’s denial, he now denies [...] that the criterion for criminal capacity is intelligence, but is rather social defence”. In Ferri’s *I nuovi orizzonti del diritto e della procedura penale*,<sup>881</sup> the first chapter was essentially devoted to the matter of freewill’s denial and criminal responsibility. The starting point was set by traditional Criminal law and classical legal philosophy:

“Man is endowed with free will, with moral freedom: he may want good or evil. Therefore, if he chooses to do evil, he is imputable and must be punished. And depending on whether or not he is free, or whether he is more or less free in this choice of evil, he is also imputable or not, or more or less imputable and punishable”.<sup>882</sup>

He pointed out that positivist physio-psychology had “completely annihilated such belief in ‘freewill’ and in ‘moral freedom’”, two concepts which were only a “mere illusion of subjective psychological observation”.<sup>883</sup> As regarded the freewill of “wanting a certain thing instead of another”, it was too described as nothing but a “pure illusion” which stemmed from “the lack of knowledge of the physiological precedents”.<sup>884</sup> Thus, it was not surprising that “external phenomena, whose precedents we ignore” were fortuitous; whereas the

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<sup>878</sup> Copleston Frederick, *A History of...*, p. 348.

<sup>879</sup> Dorado Montero, P., *La antropología criminal en Italia*, Madrid: Imprenta de la Revista de Legislación, 1889, p. 26.

<sup>880</sup> Vid. Ferri, E., *La teorica dell’imputabilità e la negazione del libero arbitrio*, Florencia: Barberá, 1878.

<sup>881</sup> Ferri, E., *I nuovi orizzonti del diritto e della procedura penale*, Bologna: Nicola Zanichelli, 1884, 2<sup>o</sup> ed., pp. 33-71.

<sup>882</sup> Ferri, E., *I nuovi orizzonti del diritto e della procedura penale*, Bologna: Nicola Zanichelli, 1884, 2<sup>o</sup> ed., p. 33: “L’uomo è dotato di libero arbitrio, di libertà morale : può volere il bene od il male ; e quindi, se sceglie di fare il male , esso ne è imputabile e deve esserne punito. E secondo che esso è o non è libero, oppure è più o meno libero in questa scelta del male, è anche imputabile o no, oppure più o meno imputabile e punibile.”.

<sup>883</sup> Ferri, E., *I nuovi orizzonti del diritto e della procedura penale*, Bologna: Nicola Zanichelli, 1884, 2<sup>o</sup> ed., p. 33: “la fisio – psicologia positiva ha completamente annientata questa credenza nel libero arbitrio, nella libertà morale, che si dimostra una pura illusione della osservazione psicologica soggettiva”.

<sup>884</sup> Ferri, E., *I nuovi orizzonti del diritto e della procedura penale*, Bologna: Nicola Zanichelli, 1884, 2<sup>o</sup> ed., p. 34.

internal phenomena “are free”.<sup>885</sup> Even if we ignored their causes, it did not mean they did not exist. Many physiological or social reasons for taking decisions remained unknown; “less evidences do not mean less existence” and so one should acknowledge “will’s subordination to those causes”.<sup>886</sup> As science evolved, we got to know them but, by now, man will not be allowed to attribute them to our freewill. This process of ampliation of knowledge was highlighted while referring to the last findings from Buckle and Wagner:<sup>887</sup> “statistics reveals the submission of individual wills [...] to external influences of the physical and social environment”.<sup>888</sup> But even as concerned the purely environmental aspects or those biological ones we were able to control, “each of us has experienced” how “our freewill and even our own feelings can be modified”.<sup>889</sup> He was thinking of things such as the ‘climate’, a ‘nervous breakdown’ due to stress at work or a ‘deep digestive process’.<sup>890</sup>

Dorado Montero was very influenced by Ferri on his denial of freewill. Ferri was known for having started as a radical denier of freewill and, later on, turning into more moderate positions. This was a major issue for Dorado Montero, who received the most of his influx from Italian positivist authors. In this sense, its minum expression was that “no philosopher” had ever maintained that “memory or intelligence” were “independent from their determining causes”.<sup>891</sup> This was the softest positon he held, whereas the general rule was more radical:

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<sup>885</sup> Ferri, E., *I nuovi orizzonti del diritto e della prozedura penale*, Bologna: Nicola Zanichelli, 1884, 2<sup>o</sup> ed., p. 34.

<sup>886</sup> Enrico, F., *I nuovi orizzonti del diritto e della prozedura penale*, Bologna: Nicola Zanichelli, 1884, 2<sup>o</sup> ed., p. 41: “Ma minore evidenza non significa minore esistenza [...] riconoscere codesta soggezione della volontà alle cause”.

<sup>887</sup> Buckle, H. T., *Histoire de la civilisation en Anglaterre*, Paris: Librairie Internationale, T. 2, 1865; Wagner, A., *Die Gesetzmässigkeit in den scheinbar willkührlichen menschlichen handlungen*, Hamburg: Boyes & Geisler, 1864.

<sup>888</sup> Ferri, E., *I nuovi orizzonti del diritto e della prozedura penale*, Bologna: Nicola Zanichelli, 1884, 2<sup>o</sup> ed., p. 40.

<sup>889</sup> Ferri, E., *I nuovi orizzonti del diritto e della prozedura penale*, Bologna: Nicola Zanichelli, 1884, 2<sup>o</sup> ed., p. 40

<sup>890</sup> Ferri, E., *I nuovi orizzonti del diritto e della prozedura penale*, Bologna: Nicola Zanichelli, 1884, 2<sup>o</sup> ed., p. 40

<sup>891</sup> Ferri, E., *I nuovi orizzonti del diritto e della prozedura penale*, Bologna: Nicola Zanichelli, 1884, 2<sup>o</sup> ed., p. 42: “nessuno dei filosofi ha sostenuto mai che la memoria o l'intelligenza siano indipendenti dalle loro cause determinanti”.

“If we get rid of the old conception of the will as a spiritual faculty in its own right, from which the fiat of every deliberation ought to flow, and give a positive conception of what is called the will, the inconceivability of a real free will becomes even more evident”.<sup>892</sup>

Before the abstract, a priori conceptions of good and evil, if we asked “positive psychology for a less fantastic idea of the spiritual faculties” its answer would be that those spiritual ideas, were “nothing but abstractions of our mind”.<sup>893</sup> Ferri’s rationale for the rejection freewill could be summarised as followed:

“There is no memory, but individual acts of memory, just as there is no intelligence, but individual thoughts, and so on. Similarly, the will is nothing but the synthetic abstraction of all the individual volitional acts we perform, and there is no will as an entity in its own right that issues volitional commands from time to time”.<sup>894</sup>

Thus, there was no preestablished system of free morals; there were only acts or decisions taken on grounds we do not know well. So, the psychophysiological work of “deliberating” brought us to a “state of consciousness”, the so-called volition, and it also led individuals to perform (or not) “certain movements”. After confirming this process, he came to the conclusion that there was “no will per se”, but only individual acts of volition, and those latter ones were nothing but “the consciousness of the physical-psychological process that is [were] about to take place”, thus, making it impossible for Ferri to “conceive moral freedom or free will”.<sup>895</sup> He gave in admitting that the “influences of the environment” and their “variations” inflicted

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<sup>892</sup> Ferri, E., *I nuovi orizzonti del diritto e della procedura penale*, Bologna: Nicola Zanichelli, 1884, 2<sup>o</sup> ed., p. 42: “spogliandoci del vecchio concetto di una volontà, presa come facoltà spirituale per sè stante, onde dovrebbe scaturire il fiat per ogni singola deliberazione, e facendoci invece un concetto positivo di ciò che chiamasi volontà, riesce anche più evidente l'inconcepibilità di un vero e proprio libero arbitrio”.

<sup>893</sup> Ferri, E., *I nuovi orizzonti del diritto e della procedura penale*, Bologna: Nicola Zanichelli, 1884, 2<sup>o</sup> ed., p. 43.

<sup>894</sup> Ferri, E., *I nuovi orizzonti del diritto e della procedura penale*, Bologna: Nicola Zanichelli, 1884, 2<sup>o</sup> ed., p. 43-44: “non esiste una memoria, ma singoli atti di memoria, come non esiste un'intelligenza, ma singoli pensieri e via dicendo. Allo stesso modo, la volontà altro non è che l'astrazione sintetica di tutti i singoli atti volitivi da noi compiuti e non esiste quindi una volontà, come ente per sè stante, che emetta di tanto in tanto dei comandi volitivi”.

<sup>895</sup> Ferri, E., *I nuovi orizzonti del diritto e della procedura penale*, Bologna: Nicola Zanichelli, 1884, 2<sup>o</sup> ed., p. 44.

a deadly blow to “moral freedom”.<sup>896</sup> Thus, it made “all psychological and social science impossible and absurd”.<sup>897</sup> Even statistics revealed the “subjection of individual wills”, taken collectively, to the “external influences” of the physical and social environment.<sup>898</sup> Many authors were quoted by Ferri in this and in other immediately related issues.<sup>899</sup>

Ferri deeply questioned moral freedom for its feasibility of erecting itself as the basis of “the whole edifice of human responsibility” given the fact that moral freedom was “so strongly contested even by orthodox thinkers” and that it received “such serious and daily denials from the most incontestable factual observations”. No wonder he asked himself how could the criminalist claim that such conception of Criminal law had the “dignity and force of a true science”.<sup>900</sup> When Dorado talked about school transitioning, because even if “conclusions of positive psychology concerning the freewill issue are not completely admitted” certain “concessions” were made which were assuredly both “a transition to the complete recognition of the new ideas” as well as “a sure indication of their final triumph”.<sup>901</sup> Dorado Montero heavily aversed the idea of coming to terms with a mild school or with a mitigated current of thought:

“Psychologists, who stand between the old and the new, deny the existence of true free will, but support a certain ill-defined ‘freedom’, which serves, as always, to please

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<sup>896</sup> Ferri, E., *I nuovi orizzonti del diritto e della procedura penale*, Bologna: Nicola Zanichelli, 1884, 2<sup>o</sup> ed., p. 44.

<sup>897</sup> Ferri, E., *I nuovi orizzonti del diritto e della procedura penale*, Bologna: Nicola Zanichelli, 1884, 2<sup>o</sup> ed., p. 45.

<sup>898</sup> Ferri, E., *I nuovi orizzonti del diritto e della procedura penale*, Bologna: Nicola Zanichelli, 1884, 2<sup>o</sup> ed., p. 40: “la statistica rivela la sottomissione delle volontà individuali, collettivamente prese, alle influenze esterne dell’ ambiente fisico e sociale”

<sup>899</sup> Schopenhauer, A., *Essai sur le libre arbitre*, Paris, 1877; Maudsley, H., *La physiologie de l’esprit*, Paris, 1879; Ribot, T. A., *Les maladies de la volonté*, Paris, 1883; Scolari, S., *Istituzioni di scienza politica*, Pisa, 1881, p. 174 ff.; Scolari, S., *Enciclopedia giuridica*, p. 26 ff.; Rossi, P., *Trattato di diritto penale*, Torino, 1856, I, chapter 9, p. 141.; Mancini, P. S., *Lettere a Mamiani sul diritto di punire*, Livorno, 1875, p. 171.; Lucchini, L., “Rivista critica del Progetto Vigliani”, *Rivista penale*, 1878; Lucchini, L., *Corso di diritto penale*, Siena, 1879; Buccellati, A., *La razionalità del diritto penale*, Milano, 1874, p. 43; Buccellati, A., *Il nihilismo e la ragione del diritto penale*, Milano, 1882, paragraph 185.

<sup>900</sup> Ferri, E., *I nuovi orizzonti del diritto e della procedura penale*, Bologna: Nicola Zanichelli, 1884, 2<sup>o</sup> ed., p. 46.

<sup>901</sup> Ferri, E., *I nuovi orizzonti del diritto e della procedura penale*, Bologna: Nicola Zanichelli, 1884, 2<sup>o</sup> ed., p. 47.

the majorities, who now like to show themselves to be progressive while remaining attached to traditions; but it does not serve science”.<sup>902</sup>

A concluding example to this respect was provided: two dogs not reacting the same way. As Ferri indicated, whereas in the field of “inorganic machines” the ultimate reaction depended “solely upon external causes”, the field of “organic beings” held different rules: the action of “external causes” was supplemented by that of “internal, physiological causes”.<sup>903</sup>

In conclusion, as regarded responsibility, Dorado Montero distinguished between the subjective and the objective one:

“The same scientific progress that serves as the base to the change from the individual responsibility to collective responsibility demands an additional transformation: that of the subjective responsibility into objective responsibility”.<sup>904</sup>

If the penalty was to be regarded as an evil, the criterion to measure it ought to be “exclusively subjective”. The determinist theory was entirely illogical in this aspect: asking for the “imposition of a punishment” to someone that did not deserve it (since he was not free) was both a “contradiction” and a “cruelty”.<sup>905</sup> Nevertheless, if the penalty was “considered as a good”, the criterion for its imposition should be “exclusively objective”, thus, the one enjoying of criminal treatment would not be anymore the one ‘deserving it’ but the one ‘needing it’.<sup>906</sup> At its turn, this demanded the so-called “diffuse responsibility”.<sup>907</sup> Both the

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<sup>902</sup> Ferri, E., *I nuovi orizzonti del diritto e della procedura penale*, Bologna: Nicola Zanichelli, 1884, 2<sup>o</sup> ed., p. 47: “I psicologi, che stanno fra il vecchio ed il nuovo, negano la esistenza del vero e proprio libero arbitrio, ma sostengono una certa ‘libertà’ mal definita, che serve, come sempre, ad accontentare le maggioranze, che ora amano di mostrarsi progressive pur restando attaccate alle tradizioni; ma non serve però alla scienza”.

<sup>903</sup> Ferri, E., *I nuovi orizzonti del diritto e della procedura penale*, Bologna: Nicola Zanichelli, 1884, 2<sup>o</sup> ed., p. 50.

<sup>904</sup> Dorado Montero, P., *Problemas jurídicos contemporáneos*, Madrid: La España Moderna, 1893, p. 27: “El mismo progreso científico que sirve de base al cambio de la responsabilidad individual en colectiva exige así bien otra transformación, a saber: la de la responsabilidad de subjetiva en objetiva”.

<sup>905</sup> Dorado Montero, P., *Problemas jurídicos contemporáneos*, Madrid: La España Moderna, 1893, pp. 29-30.

<sup>906</sup> Dorado Montero, P., *Problemas jurídicos contemporáneos*, Madrid: La España Moderna, 1893, pp. 29-30.

<sup>907</sup> Dorado Montero, P., *Problemas jurídicos contemporáneos*, Madrid: La España Moderna, 1893, p. 27.

“wrongly named” penal responsibility and the civil responsibility should be “difuse”.<sup>908</sup>

## 6. The indeterminate sentence

The conditional sentence was born for the first time in Boston. It was conceived for those criminals under age and minors, and only some time later it was also extended to adult criminals.<sup>909</sup> In a nutshell, it allowed “the tribunals to order, in certain cases, the suspension of the execution of Criminal sentences ruled by themselves”.<sup>910</sup> Such approach was absolutely disruptive with the former, neoclassical conception of sentences: “the aim is to establish them before hand in correspondence with the law, and with the legal objective of the penalty, *quasi re bene gesta*, completely disregarding whether serving such penalty made them worse and more harmful than before (even though everybody has this conviction)”.<sup>911</sup>

In Spain, the new trend made its way too. In 1899, the Minister of Justice, the Count of Torrealanz, presented a bill to the Parliament,<sup>912</sup> which contained “the first, and the sole one we have had on the conditional sentence”.<sup>913</sup> Dorado Montero was worried that the public would consider the proposal of the Minister

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<sup>908</sup> Dorado Montero, P., *Problemas jurídicos contemporáneos*, Madrid: La España Moderna, 1893, p. 31.

<sup>909</sup> Dorado Montero, P., “Sobre la facultad de indultar las penas, concedida á los Tribunales”, *Revista Política y Parlamentaria*, No. 7, Madrid, 1900, pp. 1-2.

<sup>910</sup> Dorado Montero, P., “Sobre la facultad de indultar las penas, concedida á los Tribunales”, *Revista Política y Parlamentaria*, No. 7, Madrid, 1900, pp. 1-2.

<sup>911</sup> Röder, K. D. A., *Die Herrschenden Grundlehren von Verbrechen und Strafe in Ihren Inneren Widersprüchen: Eine Kritische Vorarbeit zum Neubau des Strafrechts*, Wiesbaden: Julius Riedner, 1867, p. 34: „Ebendarum Sperrt man die Sträflinge noch oft genug ein nicht nur ohne alle Rücksicht auf die Wahrscheinlichkeit oder auch nur Möglichkeit der Erreichung oder Förderung des gemeinen sowohl als des eignen Besten fondern man lässt die auch, nach Ablauf der doch vorgeblich dem Recht und Rechtszweck der Strafe entsprechend vorausbestimmten Strafzeit, *quasi re bene gesta* wieder los, ohne nur danach zu fragen, ob Sie nicht gerade durch die Strafe weit schlechter und gefährlicher geworden find als sie es vorher waren, ja trotzdem, das mann hiervon überzeugt ist“.

<sup>912</sup> Dating from 08.01.1900 and published in the Official Gazette on 10.01.1900.

<sup>913</sup> Though he acknowledged that maybe the Code Montilla in 1902 attempted to introduce certain reforms of similar characteristics. Vid, Dorado Montero, P. *El Derecho protector*, v.2, p.152, footnote 1: “by virtue of which the Courts were entitled to suspend, in certain cases and under certain conditions, the penalties depriving from freedom until six months (Book I, Title III, Chapter IV, Article 84 -the only one in the chapter-)”.



to be a “temerary revolution” and, in 1900, he published an article where he “gave account of the countries which had already adopted it” or which were “about to do so”.<sup>914</sup> If we resorted to such article, the concerned countries were the following ones:

“England, the first European nation where the conditional sentence was transplanted from North America (by the Probation of First Offenders Act of 8 August 1887); Belgium, the first nation of the continent where the institution of reference was introduced (by the law of 31 May 1888); France (law Bérenger of 26 March 1891); canton of Neuchâtel (art. 339 of the Criminal code of 29 May 1891); Duchy of Luxemburg (law of 23 May 1892); canton of Geneva (law of 29 October 1892); Portugal (law of 6 July 1893); Norway (law of 2 May 1894); Saxony (order of the Ministry of Justice of the Kingdom of Saxony of 25 March 1895); Prussia (Royal Order of the King of Prussia of 23 October 1895); Wurtemberg (rescript of 24 February 1896); Bavaria (ministerial order of 24 March 1891); Hamburg (resolution of the Senate of 30 April 1896); canton of Vaud (law of 13 May 1897).”<sup>915</sup>

Furthermore, there were also legal drafts and projects of special laws on the aforementioned issue in other places: in Italy; in the Swiss canton of Ticino; more recent projects of Criminal Code in France; the Federal Swiss Code, the Austrian Code, the Hungarian Code. All of them admitted the conditional sentence. In Germany, and in some other places, there were several attempts to introduce it (they brought its discussion in the Reichstag as well as in the

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<sup>914</sup> Dorado Montero, P., *El Derecho protector de los criminales*, v.2, p. 152.

<sup>915</sup> Dorado Montero, P., “Sobre la facultad de indultar las penas, concedida á los Tribunales”, *Revista Política y Parlamentaria*, No. 7, Madrid, 1900, pp. 1-15, p. 2: “Inglaterra, primera nación europea, donde la condena condicional fué trasplantada de Norte América (por the probation of first offenders act de 8 Agosto de 1887); Bélgica, primera nación del continente, donde se introdujo la institución de referencia (por la ley de 31 Mayo 1888); Francia (ley Bérenger de 26 Marzo de 1891); cantón de Neuchatel (art. 339, Código penal de 29 Mayo de 1891); ducado de Luxemburgo (ley de 23 Mayo 1892); cantón de Ginebra (ley de 29 Octubre 1892); Portugal (ley de 6 Julio 1893); Noruega (ley de 2 Mayo 1894); Sajonia (orden del Ministerio de Justicia del reino de Sajonia de 25 Marzo 1895); Prusia (Real orden del Rey de Prusia de 23 Octubre 1895); Wurtemberg (rescripto de 24 Febrero 1896); Baviera (orden ministerial de 24 Marzo de 1891); Hamburgo (resolución del Senado de 30 de Abril 1896); cantón de Vaud (ley de 13 Mayo 1897). Además, hay proyectos de leyes especiales sobre el particular en otros sitios (como en Italia y en el cantón del Tesino); los proyectos de Código penal más recientes, como el francés, el federal suizo, el austríaco, el húngaro, etc., admiten la condena condicional; en Alemania y en otros lugares se han hecho tentativas para introducirla, habiéndose llegado á discutir ya en el Reichstag sobre el asunto, del propio modo que también en las dietas territoriales”.

territorial ‘diets’).<sup>916</sup> The conditional sentence was broadly known far before Torrealanz’s bill saw the light: “it has been there for nothing less than thirty years in the United States” and, since its introduction in Europe, “it has been thirteen years”. He complained of such delay in our country: “we play exactly the same role as regards the capitals of third and fourth role”.<sup>917</sup> One could think that the very origin of such proposal were French, because since “a very long time” when Spain tried to legislate on some matters, France was “the sole country where we know how to turn our eyes to, in order to take it as a model”.<sup>918</sup> The latter statement was criticised by some scholars, according to whom that stereotype was openly inaccurate.<sup>919</sup> Yet, its real origin came from Belgium. Even though Torrealanz had taken as a reference “the French law on attenuation and aggravation of the penalties (also known as Law Bérenger)”, the truth is that “Bérenger was not the author of the conditional sentence” but he “took it from other places”, specifically from Belgium, despite the fact that since 1884 he had already presented a project in France.

“If we have a look all over Europe and we consider the necessity of the penitentiary progress, we realise that the races which are bathed by the North Sea are the ones that perform better. The first place belongs to the Scandinavian countries, the Netherlands and Belgium; afterwards, England, Germany and France; later on, Switzerland, Italy, Austria-Hungary and Russia; finally, Portugal, Spain, Romania and the states at the south of the Danube; thus, with few exceptions, progress in this matter shrinks as we move away from the septentrional sea”.<sup>920</sup>

If this idea was not that ground-breaking, why did Dorado Montero consider it to be a very transcendental tool? Precisely, because it introduced the

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<sup>916</sup> Dorado Montero, P., “Sobre la facultad de indultar las penas, concedida á los Tribunales”, *Revista Política y Parlamentaria*, No. 7, Madrid, 1900, pp. 1-15, p. 3.

<sup>917</sup> Dorado Montero, P., “Sobre la facultad de indultar las penas, concedida á los Tribunales”, *Revista Política y Parlamentaria*, No. 7, Madrid, 1900, pp. 1-15, p. 1.

<sup>918</sup> Dorado Montero, P., “Sobre la facultad de indultar las penas, concedida á los Tribunales”, *Revista Política y Parlamentaria*, No. 7, Madrid, 1900, pp. 1-15, p. 1.

<sup>919</sup> Masferrer, A., (ed.), *La Codificación española. Una aproximación doctrinal e historiográfica a sus influencias extranjeras, y a la francesa en particular*, Cizur Menor (Navarra): Thomson Reuters Aranzadi, 2014; *La Codificación penal española. Tradición e influencias extranjeras: su contribución al proceso codificador. Parte General*, Cizur Menor (Navarra): Thomson Reuters Aranzadi, 2017; *La Codificación penal española. Tradición e influencias extranjeras: su contribución al proceso codificador. Parte Especial*, Cizur Menor (Navarra): Thomson Reuters Aranzadi, 2020.

<sup>920</sup> Rivière, A., *Révue Pénitentiaire*, December 1897, p. 1.253.

characteristic of the new model, alleging the need to implement some changes: never intending to foster a change of model. Dorado Montero, who advocated for a change of model, knew that if the indeterminate sentence was implemented in the old model, the clash between the two of them would be so irreconcilable, that it would end up bringing, necessarily, the whole new model:<sup>921</sup>

“The conditional sentence does not harmonise itself with the capital ideas that constitute and sustain the regular criminal law, which is a criminal law from the past; brutal, vindictive, repressive, retributive. It does only harmonise with a new criminal law, utilitarian, of social prevention and foreseeable, of social hygiene, of preventive police [...]”.<sup>922</sup>

Naturally, Dorado Montero’s approach to the undeterminate sentence<sup>923</sup> took some elements from Ferri’s preventive police:

“According to Ellero’s concept, these preventive or social hygiene means can be divided into two main categories. The measures of direct police and close to the crime, which are the least useful and effective, because they aim only to prevent the crime when the causes are already developed (and therefore they have a repressive or compressive character). However, there are those that, for the reason now mentioned, have been almost exclusively thought of and resorted to so far in science and especially in legislation. The measures, in the second place, of indirect and remote police, which tend to remove or make less evil the very causes of the crime, and as such, as far as they extend their effectiveness, are true and proper penal substitutes, as I called them, because ‘once the crime is removed, the punishment is removed at the same time’”.<sup>924</sup>

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<sup>921</sup> Dorado Montero, P., *El Reformatorio de Elmira*, Madrid: La España Moderna, 1898, p. 119.

<sup>922</sup> Dorado Montero, P., “Sobre la facultad de indultar las penas, concedida á los Tribunales”, *Revista Política y Parlamentaria*, No. 7, Madrid, 1900, pp. 1-15, p. 1: “La condena condicional no se armoniza con las ideas capitales que informan y sostienen el derecho penal corriente, que es derecho penal del pasado, brutal, vengativo, represivo, retributivo; no se armoniza sino con un derecho penal nuevo, utilitario, de previsión y prevención social, de higiene social, de policía preventiva”.

<sup>923</sup> Dorado Montero, P., “La sentencia indeterminada”, *RGLJ*, Vol. 60, No. 120, 1912, pp. 5-26.

<sup>924</sup> Ferri, E., *Sociologia criminale*, p. 684-685: “Questi mezzi preventivi o di igiene sociale si distinguono alla lor volta, secondo il concetto dell'Ellero, in due grandi categorie. I provvedimenti di polizia diretta e prossima al delitto, che sono i meno utili ed efficaci, perchè mirano soltanto ad impedire il reato, quando già le cause ne sono sviluppate (e perciò hanno indole repressiva o compressiva), e sono tuttavia quelli a cui, per la ragione ora accennata, quasi esclusivamente si è pensato ed avuto ricorso finora nella scienza e soprattutto nella legislazione. I provvedimenti, in secondo luogo, di polizia indiretta e remota, che tendono a togliere od a rendere

The logics behind this were overwhelming. Let us bring up an example. Let us picture Civilisation (A) which constructed its settlement at the shores of the River A. On its turn, Civilisation (B) did so at the shores of the River B. Civilisation (A) evolved: it generated culture, architecture and universities; it developed agriculture, industry, manufactures; and it created a complex society with politics, education and health care, among others. So did Civilisation (B). Suddenly, the River A became almost completely drought. This triggered enormous changes in Civilisation (A) in order to survive. It progressed and it changed its society to the extent that all sectors were radically affected: technology, ecology, consumption, economy, etc. The River B kept a regular flow and brought constant water supplies. Civilisation (B) did not experiment any significant changes. Perhaps they started constructing skyscrapers rather than unfamiliar houses since they were running out of space. But, leaving aside that, no major changes were implemented. What happened then? When a reform or change takes place in superficial elements, it is not much of a deal -Civilisation (B)-. Yet, when a basic, core element is altered, the changes are not isolated, and their impact is transversal. Thus, it brings a change of model -like in Civilisation A-. This was precisely what Dorado Montero tried to do. Even if he could be mistaken for an eclectic, he was seeking for a radical change of model, yet in a very calmed, discreet manner.

“Isn’t it true that this way, by vesting the judges of a certain faculty of granting pardon, the penal system receives a death blow, a system in which we have been nursed (the retributive penal system)?”<sup>925</sup>.

He aimed to change from the abstract model of Criminal law to a more utilitarian one: “before the demands of abstract justice and abstract logics there are the impositions of reality, or in other terms, the real truth, the utilitarian

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meno malefiche le cause stesse del reato, e come tali, sin dove estendono la loro efficacia, sono veri e proprii sostitutivi penali, con'io li chiamai, perchè ‘tolto il delitto è tolta al tempo stesso la pena”.

<sup>925</sup> Dorado Montero, P., “Sobre la facultad de indultar las penas, concedida á los Tribunales”, *Revista Política y Parlamentaria*, No. 7, Madrid, 1900: “¿No es verdad que de esta manera, al propio tiempo que se otorga á los juzgadores una cierta facultad de conceder indultos, se da un golpe de muerte al sistema penal, en medio del que nos hemos amamantado, al sistema penal retributivo, al fundado”.

justice”.<sup>926</sup> He had assumed that Luis María de la Torre y de la Hoz (commonly known as the Count of Torrealanaz) knew “very well all of this” and that he knew “where his project of 8 January was bringing him towards”. For him, the system which Torrealanaz was starting to introduce could be described as follows:

“It deviates itself from the expiatory, retributive, restorative sense of the penal function, and it enroles de facto in the promoters and defenders of the utilitarian and preventive penal system; the one that takes as the criterion to punish not the committed crime (in order to punish in proportion to its seriousness to make its author proportionally redeem it), but the degree of the dangerousness that the criminal offers (to try to avoid it -if any-); the one that asks for the penalty to be applied, not when the abstract justice so requires, and in as much quantity as it demands, but solely when -and as far as- social need, utility and social convenience requires, and as a means to prevent the commission of future crimes”.<sup>927</sup>

For him, the best model to have was the latter since “a more useful, more human, more fair work is done, even if one deviates from the rules of the so-called absolute justice [...] leaving without penalty the criminals rather than imposing it”.<sup>928</sup> He took his main argument to hold such view from the Howard Association in London, given that “making a child or a youngster into prison” normally entailed that they were “lost forever”.<sup>929</sup> Not all the great personalities did think, though, that the prisoner was lost in prison. Ernst Bertrand, for instance, showed himself skeptical.<sup>930</sup>

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<sup>926</sup> Dorado Montero, P., “Sobre la facultad de indultar las penas, concedida á los Tribunales”, *Revista Política y Parlamentaria*, No. 7, Madrid, 1900: “frente á las reclamaciones de la Justicia y de la lógica abstractas, se hallan las imposiciones de la realidad, ó lo que es lo mismo, la verdad real, la justicia utilitaria.”.

<sup>927</sup> Dorado Montero, P., “Sobre la facultad de indultar las penas, concedida á los Tribunales”, *Revista Política y Parlamentaria*, No. 7, Madrid, 1900: “se aparta del sentido expiatorio, retributivo, reparador, represivo, en suma, de la función penal, y que se alista de hecho entre los promovedores y defensores del sistema penal utilitario y preventivo, del que toma como materia y criterio de punibilidad, no el delito realizado (para castigarlo en proporción á su gravedad, para hacérselo expiar á su autor en proporción al merecimiento de éste), sino el grado de peligro que el delincuente ofrezca (para procurar conjurarlo, si lo hay); del que pide que se aplique la pena, no cuando la justicia (abstracta) lo quiera, y en tanta cuantía como ella lo exige, sino solamente cuando y hasta donde lo reclame la necesidad social, la utilidad y la conveniencia social, y como medio de impedir la perpetración de futuros delitos”.

<sup>928</sup> Dorado Montero, P., “Sobre la facultad de indultar las penas, concedida á los Tribunales”, *Revista Política y Parlamentaria*, No. 7, Madrid, 1900.

<sup>929</sup> “The minors shall never be recluded in prisons”

<sup>930</sup> The question was initially set out regarding the oppsoition of solitary confinement vs. communal confinement. Vid. Félix Sevilla, F., “Mi viaje por Francia y Bélgica. Un magistrado

Dorado Montero issued some critics against the proposal. Firstly, why did the project try to “limit the power of the tribunals” to apply the conditional sentence to just “three specific penalties”<sup>931</sup> out of the twentieth which were contained in the general list (art. 26 Criminal Code)? Besides, as regarded the latter two, why did not they extend it [the conditional sentence] to “all its degrees, limiting it to the minimum”? Secondly, why the conditional sentence could not be applied to “those condemned for misdemeanours”; he did not understand why “whereas the ones committing crimes” could be applied it did not apply for the ones “committing misdemeanours”. Thirdly, there were many perpetrators of certain crimes<sup>932</sup> excluded from the conditional sentence: “Won’t their stay in prison be as harmful as for the rest?”.<sup>933</sup> Finally, why the conditional sentence, which will be years later developed by his pupil Jiménez de Asúa,<sup>934</sup> was interdicted to be ‘always’ applied to young criminals “disregarding which crime is it as well as the circumstances”.<sup>935</sup>

The influences<sup>936</sup> that led him to the articulation of his undeterminate sentence focused in the notes of the conditional sentence held at the different congresses: the International Penitentiary Congresses of Saint Petersburg and Paris of 1890 and 1895, respectively; those held in in the Brussels meeting of the International Union of Penal Law in 1889; those of the 21° Congress of the German jurists held in Cologne in 1891; and those of Hungarian Legal Congress

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penitenciario”, *Vida penitenciaria*, Madrid, No. 55, Año II, 1933, pp. 12-14, p. 13: “el sistema celular de larga duración con la creencia errónea que el delincuente pierde en la celda su sentido social y se deshumaniza. [...] han reconstituido completamente su vida, no llegando la reincidencia más que al 12 por 100 de los liberados”.

<sup>931</sup> Namely, the Spanish ‘arresto mayor’, ‘presidio’ and the ‘prisión correccional’.

<sup>932</sup> “External security of the State, crimes against humanity, crimes against the Parliament or the Ministerial Council, violent theft in an uninhabited place, larceny or scam worthy of more than 100 pesetas, havocs and anarchists, smuggling and fraud, those which can only be pursued at the request of a party, and those which the Tribunal deems adequate”. Vid. Dorado Montero, P., “Sobre la facultad de indultar las penas, concedida á los Tribunales”, *Revista Política y Parlamentaria*, No. 7, Madrid, 1900.

<sup>933</sup> Dorado Montero, P., “Sobre la facultad de indultar las penas, concedida á los Tribunales”, *Revista Política y Parlamentaria*, No. 7, Madrid, 1900, pp. 1-2.

<sup>934</sup> Jiménez de Asúa, L., *La sentencia indeterminada. El sistema de penas determinadas “a posteriori”*, Madrid: Reus, 1913.

<sup>935</sup> Dorado Montero, P., “Sobre la facultad de indultar las penas, concedida á los Tribunales”, *Revista Política y Parlamentaria*, No. 7, Madrid, 1900, pp. 1-2.

<sup>936</sup> Dorado Montero, P., *La psicología criminal en nuestro Derecho legislado*, Madrid: Hijos de Reus, 1911, pp. 313-322.

held in Budapest in 1896”.<sup>937</sup> Also, he read the work of M. Tallack, the Secretary of the Howard Association (mentioned several times in this work), specially his book *Penological and preventive principles*<sup>938</sup> as well as Rivière. Additionally, he mentioned the International Penitentiary Congress of Paris (1885) -specifically what the commissioners from the USA wrote down in their Report- and the *Révue Pénitentiaire*<sup>939</sup> -the issue XXI, year 1897-.<sup>940</sup> For other referential guidelines inside Spain, he mentioned Concepción Arenal, Salillas, Cadalso, Guillén y López Cancio, Ramón Albó y Martí, Lastres and Romero Girón. A brief reference to La Sagra was made though he set him aside due to “being a little distant”.<sup>941</sup> However, no analysis on this issue would be complete without developing the influx of Dorado Montero’s contemporary Fernando Cadalso Manzano.<sup>942</sup>

Dorado Montero had pointed the prominent relevance<sup>943</sup> of two of his works: *Estudios penitenciarios*<sup>944</sup> and *Diccionario de legislación de prisiones*.<sup>945</sup> Cadalso Manzano came into contact with Dorado Montero in the International

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<sup>937</sup> Dorado Montero, P., “Sobre la facultad de indultar las penas, concedida á los Tribunales”, *Revista Política y Parlamentaria*, No. 7, Madrid, 1900, pp. 1-2.

<sup>938</sup> Tallack, W., *Penological and Preventive Principles*, London: Wertheimer, Lea & Co, 1889.

<sup>939</sup> The Official Gazette of the Société Générale des Prisons (*Butlletin de la Société Générale des Prisons*) was created in 1877. After 25 years, in 1892, it turned into the *Revue pénitentiaire et de droit penal*. Among its members and founders, we might outstand Marc Ancel, René Bérenger or Gabriel Tarde. The *Comité des travaux historiques et scientifiques* on its webpage highlighted other relevant figures and their significant role: BENOIST Charles (1861-1936) - membre fondateur, BERARD Auguste (1802-1846) – membre, BERGERON Jules (1817-1900) – membre, BOULEY Henri (1814-1885) – membre, CHABRIÈRES Maurice (1829-1897) – membre, CHEYSSON Émile (1836-1910) – membre, DAGUIN Fernand (1848-1922) – membre, DUFAURE Jules (1798-1881) - membre fondateur, GLASSON Ernest Désiré (1839-1907) – membre, JOLY Henri (1839-1925) – président, LEFÉBURE Léon (1838-1911) - membre fondateur, LEREDU Georges (1860-1943) - membre, 1885- ; secrétaire ; trésorier ; président, 1924, LYON-CAEN Charles (1843-1935) – membre, PICOT Georges (1838-1909) – membre, ROGER Henri (1809-1891) – membre, TARDE Gabriel de (1843-1904) – membre, VOISIN Félix (1832-1915) – président, and WURTZ Adolphe (1817-1883) - membre, 1877-1883.

<sup>940</sup> Dorado Montero, P., “Sobre la facultad de indultar las penas, concedida á los Tribunales”, *Revista Política y Parlamentaria*, No. 7, Madrid, 1900, pp. 1-2.

<sup>941</sup> Dorado Montero, P., “Sobre la facultad de indultar las penas, concedida á los Tribunales”, *Revista Política y Parlamentaria*, No. 7, Madrid, 1900, pp. 1-2.

<sup>942</sup> He was born just two years before Dorado Montero (1859-1939).

<sup>943</sup> Dorado Montero, P., “Sobre la facultad de indultar las penas, concedida á los Tribunales”, *Revista Política y Parlamentaria*, No. 7, Madrid, 1900.

<sup>944</sup> Cadalso y Manzano, F., *Estudios Penitenciarios: Presidios españoles, escuelas y positiva y colonias penales, con un breve compendio de la legislación, costumbres jurídicas y prácticas penitenciarias que rigen en los establecimientos*, Madrid: Centro editorial de F. Góngora, 1983.

<sup>945</sup> Cadalso y Manzano, F., *Diccionario de legislación penal, procesal y de prisiones*, Madrid: Imprenta de J. Góngora y Alvarez, 1907.

Penitentiary Congress of Paris of 1895. Dorado Montero wrote the *Reformatory of Elmira*, which Cadalso visited and whose model he tried to copy. With his book,<sup>946</sup> Dorado Montero explored the main aspects from the perspective of Criminal law and Criminology, but Fernando Cadalso had been in presence at the aforementioned facility and so he decided to analyse Dorado's work in the *Revista de Prisiones y de Policía*.<sup>947</sup> Though Cadalso was not the only one reviewing it,<sup>948</sup> he was very acute. He prevented the reader: even if the work was very interesting from the "legal point of view", it was far more interesting from the "penitentiary point of view".<sup>949</sup>

Cadalso opened the analysis pouring a critic towards the system used in prisons of the state of Pennsylvania (particularly that of the city of Philadelphia) and their implementation of the Auburn system.<sup>950</sup> After exposing some ideas, those of the Medical Association of New York and its President (Mr Flint), he came to the conclusion that the criminal system in force was no longer valid. The growth of criminality and recidivism rates was worrying, "especially among the young and habitual criminals, reaching in some cases the 40%".<sup>951</sup> The most visible elements of the new developing system were "the societies of patronage, the schools of reform, the prison colonies, etc., which exist in France, Switzerland, Belgium, Germany, England, Sweden, the aforementioned reformatory, and the

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<sup>946</sup> Dorado Montero, P., *El Reformatorio de Elmira*, Madrid: La España Moderna, 1898.

<sup>947</sup> The National Library of Spain (Biblioteca Nacional de España) reports that the *Revista de Prisiones y de Policía* was the continuation of the *Revista de las Prisiones*, which started to be published in 1893 in Madrid and Fernando Cadalso kept on directing it. The new review, though, had a new section devoted to the police (since in 1896 the judicial police body was created). After some years, it will recover its original name *Revista de las Prisiones* (1899 -1903). Link: <http://bdh.bne.es/bnearch/biblioteca/Revista%20de%20prisiones%20y%20de%20polic%C3%ADa/qls/0003768531;jsessionid=0E37023FF5B7FE4CF14337AF62DD25B7>. Seen on 17.09.2020.

<sup>948</sup> Benito, L. "Noticias bibliográficas. El reformatorio de Elmira (Estudio de Derecho Penal preventivo)", *Revista General de Legislación y Jurisprudencia*, Madrid: Imprenta de la Revista de Legislación, AñoCuadragésimosexto, Tomo 98, 1898, p. 191.

<sup>949</sup> Cadalso Manzano, F., "El Reformatorio de Elmira", *Revista de Prisiones y de Policía*, Madrid, Año VI, No. 46, 8 de Diciembre de 1898, pp. 445-448, p. 445.

<sup>950</sup> Also known as the rule of silence, this system entailed that the prisoners were forbidden to talk when they were meeting at a workschool, school or other communitarian occupations. For an accurate distinction between the Pennsylvania/Philadelphia system (separate system) and the Auburn system (silent system), vid. Ramos Vázquez, I., *La reforma penitenciaria en la historia contemporánea española*, Madrid: Dykinson, 2013, pp. 110-111; pp. 112-116.

<sup>951</sup> Cadalso Manzano, F., "El Reformatorio de Elmira", *Revista de Prisiones y de Policía*, Madrid, Año VI, No. 46, 8 de Diciembre de 1898, pp. 445-448, p. 446.



ones which are planned to be created in North America”.<sup>952</sup> After exposing the two possible systems (punitive -looking back to the committed crime- and the preventive -looking forward to prevent crimes from taking place-), and after stressing out the fact that the Reformatory of Elmira clearly held the latter approach, he focused on the objective it pursued. Cadalso, quoting Dorado Montero, pointed out a critical note by stating that the goal was “the reform of the criminal”, yet the “word reform should not be understood as a “substantial reform of the individual, just as the pure correctionalists aimed at with his concept of ‘correction’ (highly ambiguous and yielding unpractical results)”.<sup>953</sup> Such acception of the word ‘reform’ actually meant to the “reasonable possibility that the convicted, once he is back to the free life, acts in a way so that he does not violate the laws”.<sup>954</sup> In a nutshell, the main objective was that the criminal ended up “less predisposed at committing a crime” than a “non-criminal belonging to his same [social] class”.<sup>955</sup> The reciprocical feedback between Dorado Montero and Cadalso was noticeable. The idea of the undetermined sentence came from Cadalso, as well: “when the delinquent is reformed, the penalty does not have any longer *raison d’être* and it is over. Due to this, the sentences as imposed to the inmates at the reformatory are undetermined, and that is why too, the parole or conditional freedom is granted”.<sup>956</sup> Besides, such system provided that the released criminal would have a six-month period “out of the reformatory” without any special tutelle in order to weight whether “complete freedom” could be awarded or not.<sup>957</sup>

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<sup>952</sup> Cadalso Manzano, F., “El Reformatory de Elmira”, *Revista de Prisiones y de Policía*, Madrid, Año VI, No. 46, 8 de Diciembre de 1898, pp. 445-448, p. 446.

<sup>953</sup> Cadalso Manzano, F., “El Reformatory de Elmira”, *Revista de Prisiones y de Policía*, Madrid, Año VI, No. 46, 8 de Diciembre de 1898, pp. 445-448, p. 447.

<sup>954</sup> Cadalso Manzano, F., “El Reformatory de Elmira”, *Revista de Prisiones y de Policía*, Madrid, Año VI, No. 46, 8 de Diciembre de 1898, pp. 445-448, p. 447.

<sup>955</sup> Cadalso Manzano, F., “El Reformatory de Elmira”, *Revista de Prisiones y de Policía*, Madrid, Año VI, No. 46, 8 de Diciembre de 1898, pp. 445-448, p. 447.

<sup>956</sup> Cadalso Manzano, F., “El Reformatory de Elmira”, *Revista de Prisiones y de Policía*, Madrid, Año VI, No. 46, 8 de Diciembre de 1898, pp. 445-448, p. 447: “cuando el delincuente se halla reformado, la pena no tiene razón de ser y acaba. Por esto las sentencias impuestas á los reclusos en el Reformatory son indeterminadas, y por esto también se otorga la libertad ó liberación condicional”.

<sup>957</sup> Cadalso Manzano, F., “El Reformatory de Elmira”, *Revista de Prisiones y de Policía*, Madrid, Año VI, No. 46, 8 de Diciembre de 1898, pp. 445-448, p. 448.

In the following issue of the review,<sup>958</sup> Cadalso further analysed Dorado Montero's proposal. Even if this second part was more focused in the physical description of the penitentiary establishment, a relevant remark on the spirit of the new system could be spotted: "the Reformatory is not guided by neither by inflexible legal precepts nor by casuistical regulations set beforehand".<sup>959</sup> Thus, the functioning was closer to the concept of judicial discretionality, though in this case, it did not depend on the judge but on the maximum power within the penitentiary: both the "Board of Managers" and the "General Superintendent".<sup>960</sup> The reformatory, however, was graver than what it might look like: it was different from a similar, also renowned institution (the Schools of Reform),<sup>961</sup> in which young criminals<sup>962</sup> were accepted too, but only those having committed misdemeanours.<sup>963</sup> Lastly, some figures were highlighted, as Cadalso referenced a paragraph of Dorado Montero concerning the characteristics of the criminals within the institution:

"Of them, 68% are completely illiterate; 75% lack a regular and remunerative profession; 92% have lived without the benefits of a good domestic environment; 75% are under the average of the well-being levels corresponding their social class".<sup>964</sup>

The third part of the analysis fundamentally addressed the classification of the inmates.<sup>965</sup> There were three possible classifications: the "testing" group, the "neutral" group and the "conviction" group. Dorado Montero was detailed when describing the classification.<sup>966</sup> The modus operandi was very simple: everyone entered the neutral group and, if after six months their behaviour was rated as

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<sup>958</sup> Cadalso Manzano, F., "El Reformatorio de Elmira II", *Revista de Prisiones y de Policía*, Madrid, Año VI, No. 47, 16 de Diciembre de 1898, pp. 453-455.

<sup>959</sup> Cadalso Manzano, F., "El Reformatorio de Elmira II", *Revista de Prisiones y de Policía*, Madrid, Año VI, No. 47, 16 de Diciembre de 1898, pp. 453-455, pp. 453.

<sup>960</sup> Cadalso Manzano, F., "El Reformatorio de Elmira II", *Revista de Prisiones y de Policía*, Madrid, Año VI, No. 47, 16 de Diciembre de 1898, pp. 453-455, pp. 454.

<sup>961</sup> "Escuelas de Reforma".

<sup>962</sup> Between 16 and 30 years old.

<sup>963</sup> Cadalso Manzano, F., "El Reformatorio de Elmira II", *Revista de Prisiones y de Policía*, Madrid, Año VI, No. 47, 16 de Diciembre de 1898, pp. 453-455, pp. 454.

<sup>964</sup> Cadalso Manzano, F., "El Reformatorio de Elmira II", *Revista de Prisiones y de Policía*, Madrid, Año VI, No. 47, 16 de Diciembre de 1898, pp. 453-455, pp. 455.

<sup>965</sup> Cadalso Manzano, F., "El Reformatorio de Elmira. Clasificación de los reclusos", *Revista de Prisiones y de Policía*, Madrid, Año VI, No. 48, 24 de Diciembre de 1898, pp. 461-463.

<sup>966</sup> Dorado Montero, P., *El Reformatorio de Elmira*, Madrid: La España Moderna, 1898, pp. 43-44.

good or bad, they would move to the first or to the second group, respectively. Once within the “testing” group, if another 6 months elapse with positive results, they get the parole; if, after another additional 6 months, the results keep being good, they would receive “complete freed”.<sup>967</sup> Moreover, the institution considered two further categories: “incurables” and “those who are deemed to be reformed yet there are still reasons to keep them inside”.<sup>968</sup> Whereas the ones in the first group showed themselves as rebellious to “all the means that the Reformatory has”, and they were, therefore, “expelled” and “relocated” in a regular prison of the State, the latter ones were employed within the institution.<sup>969</sup> After naming the several “prices” to which the inmates could aim at, he concluded with a remark on the treatment of the religious aspect: “moral and religious influences are used in order to increase and to favour the ethical power of the inmates”.<sup>970</sup>

Regardless of what one might have thought of, he was not a penitentiary. Notwithstanding what Oliver Olmo stated,<sup>971</sup> Concepción Arenal and Cadalso Manzano themselves were penitentiary, but Dorado Montero was a penalist and, thus, this should be considered as regards his approach. Penalists or penitentiary, the truth was that, despite all the efforts made by many experts on their fields,<sup>972</sup> the prison remained almost the same: “such ‘invariability’ was

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<sup>967</sup> Cadalso Manzano, F., “El Reformatory de Elmira. Clasificación de los reclusos”, *Revista de Prisiones y de Policía*, Madrid, Año VI, No. 48, 24 de Diciembre de 1898, pp. 461-463, p. 461.

<sup>968</sup> Cadalso Manzano, F., “El Reformatory de Elmira. Clasificación de los reclusos”, *Revista de Prisiones y de Policía*, Madrid, Año VI, No. 48, 24 de Diciembre de 1898, pp. 461-463, p. 462.

<sup>969</sup> Cadalso Manzano, F., “El Reformatory de Elmira. Clasificación de los reclusos”, *Revista de Prisiones y de Policía*, Madrid, Año VI, No. 48, 24 de Diciembre de 1898, pp. 461-463, p. 462.

<sup>970</sup> Cadalso Manzano, F., “El Reformatory de Elmira. Clasificación de los reclusos”, *Revista de Prisiones y de Policía*, Madrid, Año VI, No. 48, 24 de Diciembre de 1898, pp. 461-463, p. 463: “se hace uso de las influencias morales y religiosas para aumentar y favorecer el poder ético de los reclusos”.

<sup>971</sup> As quoted by Núñez, J. A., *Fernando Cadalso y Manzano: Medio siglo de reforma penitenciaria en España (1859-1939)*, Valladolid: Universidad de Valladolid, p. 75 (Oliver Olmo, P., “Historia y reinención del utilitarismo punitivo”, Gastón Aguas, J.M., Mendiola, F., (Coord.), *Los trabajos forzados en la dictadura franquista*, Pamplona: Instituto Gerónimo de Uztáriz, 2007, pp. 90).

<sup>972</sup> As for the penitentiary reform efforts in Spain at the beginning of the 20<sup>th</sup> century and their specific instruments (the Regulation of 5 May 1913, Dueso’s penitentiary colony, advances in Primo de Rivera’s time or Victoria Kent’s reforms), vid. Ramos Vázquez, I., *La reforma penitenciaria en la historia contemporánea española*, Madrid: Dykinson, 2013, pp. 395-450.

not even altered by the progressist experience of the Second Republic, which did not modify the punitive-award character of the progressive system, since it kept on assessing the submission and obedience of the convicted as a means for obtaining their freedom”.<sup>973</sup>

Núñez asserted that the “relationship of Pedro Dorado Montero with the Italian positivist criminology” was one of the topics that historiography has tackled the most. Some of them considered him as a “critic of positivism” acting as a very “powerful curb” to the ideas of Lombroso; some thought of him as the “disciple and friend of Ferri”; some others held a “eclecticism” or “positivist correctionalist”.<sup>974</sup>

The work of Núñez shed some light in the relationship between Dorado Montero and Cadalso. In one of Cadalso’s attempt at winning a professorship,<sup>975</sup> one of the members of the Tribunal in charge of examining his application in 1910 was Dorado Montero himself.<sup>976</sup> On the other hand, the 6<sup>th</sup> International Penitentiary Congress took place in Brussels.<sup>977</sup> On behalf of Spain, both Cadalso and Dorado Montero were appointed. Cadalso was designated Vicepresident of the Fourth Section (Minors), whereas Dorado Montero came to substitute another participant (José Álvarez Mariño).<sup>978</sup> This was not the sole time they coincided, since in Brussels Cadalso “held long conversations with Dorado Montero” who had recently published *The Reformatory of Elmira*.<sup>979</sup>

Núñez reminded of Saldaña’s words referring to Cadalso and his trip to the USA. He got into contact with the American reformatories, as opposed to other

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<sup>973</sup> Núñez, J. A., *Fernando Cadalso y Manzano: Medio siglo de reforma penitenciaria en España (1859-1939)*, Valladolid: Universidad de Valladolid, p. 75: “Invariabilidad ni siquiera alterada por la experiencia progresista de la Segunda República que no modificó el carácter punitivo-premial del sistema progresivo al continuar valorando la sumisión y obediencia de los penados como medio para obtener su libertad”.

<sup>974</sup> Núñez, J. A., *Fernando Cadalso y Manzano: Medio siglo de reforma penitenciaria en España (1859-1939)*, Valladolid: Universidad de Valladolid, p. 96.

<sup>975</sup> Criminal Law at the University of Oviedo.

<sup>976</sup> Núñez, J. A., *Fernando Cadalso y Manzano: Medio siglo de reforma penitenciaria en España (1859-1939)*, Valladolid: Universidad de Valladolid, p. 118.

<sup>977</sup> Núñez, J. A., *Fernando Cadalso y Manzano: Medio siglo de reforma penitenciaria en España (1859-1939)*, Valladolid: Universidad de Valladolid, p. 210.

<sup>978</sup> Núñez, J. A., *Fernando Cadalso y Manzano: Medio siglo de reforma penitenciaria en España (1859-1939)*, Valladolid: Universidad de Valladolid, p. 210.

<sup>979</sup> Núñez, J. A., *Fernando Cadalso y Manzano: Medio siglo de reforma penitenciaria en España (1859-1939)*, Valladolid: Universidad de Valladolid, p. 210.

Spaniards -Ventura de Arquellada, Marcial Antonio López or Dorado Montero- who “had written their books without moving out of their homeland and with data comfortably extracted from other works: books born out of books”.<sup>980</sup> Such statement should be nuanced, since Dorado Montero was one of our most internationalised authors, speaking several languages, and attending international congresses. Regrettably, due to health issues, he did not carry research abroad as often as he could have (bear in mind he applied to conduct research in France, but he had to cancel it).

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<sup>980</sup> Núñez, J. A., *Fernando Cadalso y Manzano: Medio siglo de reforma penitenciaria en España (1859-1939)*, Valladolid: Universidad de Valladolid, p. 333 (Saldaña, Quintiliano “La reforma de los jóvenes delincuentes en España”, *Progreso Penitenciario. Revista de disciplina penal* (Órgano de la Asociación benéfica de funcionarios de prisiones), 10 de Junio de 1925, Año XIII, nº 540, pp. 241-42).

**CHAPTER V:  
PLACING DORADO  
MONTERO IN THE  
SPANISH  
DOCTRINAL FIELD**

## 1. Labelling the unclassifiable

Humans need classifications. They never work completely, but it is a central element in our limited nature that allows us to better understand the reality surrounding us. It is precisely classifications that enable us to overcome the oversimplified categories and to appreciate further nuances. A base is needed.

As regards the affiliation of Dorado Montero, there was a relevant quotation which led my interest onto the composition of this section:

“They have attributed to him [to Dorado Montero] ideas which he never expressed or have identified him with some of the theories held by certain penal schools of his time”.<sup>981</sup>

With such statement López-Rey warned us that Dorado Montero was not in any way an Italian positivist. This equalled saying he was not a determinist either. The author, nevertheless, was right when he held that Dorado Montero had been simplistically ascribed within the Italian Positivist School. Yet, some legal historians and legal philosophers took advantage of this statement and they looked forward to include him within the traditional system of Criminal law (Neoclassical Schools). Within this cluster, three factions could be identified. The first faction consisted of scholars aiming at camouflaging their neoclassical affiliation by holding he created a ‘middle term proposal’. Essentially, they were the same ones that called him an ‘eclectic’. The second faction was made up by those authors who, acknowledging Dorado Montero’s religious disaffection, asserted that his Christian influences led to a mixture of the new positivist ideas with the Christian limits. The third faction comprised a group which believed that, just by attributing this a to a mistranslation (namely that ‘correctionalism’ instead of ‘positivism’ or ‘social defence’), he had created a third way. For them, correction was not the same as correctionalism as the term was so unique that one should respect the original language expression ‘correccionalismo’. Be as it may, the three of them defended that Dorado Montero did not deny freewill, thus, ascribing him within the Neoclassical Schools. Freewill was a cornerstone in his theory when it came to determining his line of thought.

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<sup>981</sup> López-Rey, M., *Pioneers in Criminology...*, p. 605.

It came to my understanding that, in what I have loosely labelled as the ‘first wave’, Dorado Montero was simply included within the positivists. He was lumped together with Lombroso, Ferri and Garofalo. Some time after, the ‘second wave’ tried to bring Dorado Montero back to the neoclassical postulates (López-Rey easily fit in this wave). Finally, a current ‘third wave’ tried to draw him back to positivism. Whether this was probably due to the rise of neuroscience, biological sciences and new disciples as ‘neurolaw’,<sup>982</sup> I cannot possibly conform to fully discredit and underestimate this third wave. Dorado Montero was very much confident when he deliberately denied freewill.

As the reader might have already noticed, I cannot share the point of view expressed by the quotation from López-Rey. As much as my personal beliefs do not allow me to deny freewill, the findings I obtained through the study of Dorado Montero do not permit me to assert he was “mistakenly categorised as a determinist”, when the main fact remains that he (1) had a religious crisis, (2) he abnegated from Catholicism and (3) he remained an eternal skeptic his whole life. It was precisely this eternal doubt what made Dorado Montero the way he was and it was what made his Protective Law of the Criminals one of the most critical theories of all 19<sup>th</sup> century Europe. Once clarified the freewill aspect, other positions should be analysed. Another speculation on the nature of Dorado Montero’s theory was the combination of correctionalism and positivism: “Dorado’s theory tries to reconcile two very different things: Comte’s positivist ideas with some of the old Spanish School of thought aiming at the moral ‘enmienda’ (moral correction of the offender)”.<sup>983</sup> Here, the group of scholars eager to include him within the Neoclassical Schools held he was not a positivist and that he was trying to fight it by means of mixing it with a genuine Spanish, more neoclassical theory (‘enmienda’).<sup>984</sup> In short, he seemed to be fighting pure positivism. Nevertheless, a contradictory statement clashed this idea: “His life was a two-fold struggle: he first fought against traditional criminological ideas and systems, and secondly, against his physical handicap”.<sup>985</sup> He clearly referred

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<sup>982</sup> Picozza, E., *Neurolaw. An introduction*, New York: Springer, 2011.

<sup>983</sup> López-Rey, M., *Pioneers in criminology...*, pp. 607-608.

<sup>984</sup> Ramos Vázquez, I., *La reforma penitenciaria en la historia contemporánea española*, Madrid: Dykinson, 2013, pp. 217 ff.

<sup>985</sup> López-Rey, M., *Pioneers in criminology...*, pp. 606.



to the fact he fought the ‘traditional’ liberal criminal law ideas (or neoclassical conception of criminal law), because he was strongly innovative. Thus, this second assertion seemed to indicate he fought the traditional ideas of his time. Those paragraphs showed how easily one could place Dorado Montero in one side or the other.

I agree with López-Rey, though, when he stood out the fact that Dorado Montero had sometimes been considered as a radical. Given his critical, acid theory against the administration and the judiciary, some authors deemed he was asking for the disparition of the State. Some others, though holding an equally oversimplified view, were more specific when claiming that Dorado Montero was an abolitionist. According to them, he ‘held’ that penal law should disappear as such. Those latter authors were Kropotkin and Sionief. That being said, I find myself not in the position to share his rationale. Gumpłowicz’s influence stressed on him the enormous role that the State should play. Thus, for Dorado Montero, “there is no possible existing law without the State itself, and citizens have no other rights than those granted by the State”.<sup>986</sup> From my perspective, not only he always regarded peaceful political evolution as far more desirable than political revolution, but he was fully aware that his system was so ahead of his time that it could not be implemented but after a long period of time. He was aware of the many lacks and of the inadequacy of spirit of his time. He challenged society’s capacity to develop and to adopt his proposed model. Dorado Montero’s project could only take place after the necessary transformation thereof had taken place:

“The political and criminal foresight of Asúa and Ruiz Funes follows the correctionalist path of Dorado, and deems it as an indispensable requirement for its implementation the existence of a democratic State of law, not conceived in the current form but according to the parameters of the liberal statalism, i.e. as a representative institution of the national will and as a guarantor of the rights by means of an auto-limitation of its sovereignty. Asúa’s opinion includes, additionally, the condition of the

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<sup>986</sup> Gumpłowicz, L., *Derecho político filosófico*, Madrid: La España Moderna, 1915, pp. 85-86: “No hay Derecho sino en el Estado, y los ciudadanos no tienen otros derechos que los que el Estado le adjudica”.

emergence of socialism, thought it does not despise the advances conquered by the liberal democracy”.<sup>987</sup>

This was especially ironic since his most well-known pupil, Luis Jiménez de Asúa, experienced the same difficulties as when re-defining the future of criminal law dogmatics. Asúa thought of Criminal law as divided into three stages, namely: Bourgeois Criminal law (with the neoclassicals), Transitional Criminal law (within his time) and the *Derecho Protector de los Criminales* (with Dorado Montero).

“As what refers to the transitional period, Jiménez de Asúa used the expression ‘immediate future’ out of which steamed a real belief on the rapid arrival of socialism. This idea was probably influenced by the settlement of the Soviet regime on which he talked about at the end of the 20<sup>th</sup> century. He set his hopes on Soviet Union’s law following the way set in his criminal evolution: to reach a Criminal law which was based on the socialist principles being, at its turn, a future example for Europe and America”.<sup>988</sup>

The tandem Dorado Montero-Jiménez de Asúa offered many advantages to understand a common reality with different approaches. They both knew that society had not reached yet the necessary stage of evolution. Whereas Dorado Montero grounded this on the excessive dominating position of traditionalism, Jiménez de Asúa did so on the risk of such theories turning into totalitarianism. For Dorado Montero, the society of his time was still far too immersed in the principles of the neoclassical Criminal law, and could never possibly conform to the new ideas and perspectives as established by positivism and correctionalism. Society had simply stagnated in regarding Criminal law. For Jiménez de Asúa, though, the inadequacy of society’s standards to the new Criminal law originated from totalitarianism. The rise of the new Criminal law system (positivism)

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<sup>987</sup> Martín Martín, S., “Penalística y penalistas españoles a la luz del principio de legalidad (1874-1944)”, *Quaderni fiorentini per la storia del pensiero giuridico moderno*, Vol. 36, No. 1, 2007, pp. 503-609, p. 577: “La prospectiva político-criminal de Asúa y Ruiz Funes prosigue la senda correccionalista de Dorado, y sólo estima requisito indispensable para su gradual implantación la existencia de un Estado democrático de derecho, concebido no al modo actual, sino según los parámetros del estatismo liberal, esto es: como institución representativa de la voluntad nacional y garantizadora de los derechos a través de la autolimitación de su soberanía. La opinión de Asúa incluye además la condición del advenimiento del socialismo, pero no desdeña los avances conquistados al amparo de la democracia liberal”.

<sup>988</sup> Roldán Cañizares, E., *Luis Jiménez de Asúa: un jurista en el exilio*, Sevilla: Universidad de Sevilla, 2017-2018, p. 82.

degenerated into totalitarian political systems, thus, harming the reputation of the new criminal system. Indeed, at the time Lombroso lived, racism was starting to be a problem, since most of his postulates were misinterpreted by Nazi theories, even if such outcome was not Lombroso's initial purpose: "Bulferetti's interpretation that the enthusiasm for ethical values such as charity, individual freedom and freedom of thought saved Lombroso from slipping into racism must be put into perspective".<sup>989</sup> That was why, at the end of his academic production, he decided to fly away from the new conception of Criminal law: "he was conscious that, on the time he lived, it was necessary to maintain the classical guarantees of law; yet, he did not reject them [...] but he just postponed them for a future society".<sup>990</sup>

As it could be deduced from the main text, the relationship of Dorado Montero with natural law was rather a complicated one. Its origin could be traced back to Gumplowicz's rejection of natural law: "None of the authors on natural law, as well as none of the philosophers who are always talking about such right, have been able to prove it [the existence of natural law]".<sup>991</sup> Indeed, Dorado Montero acknowledged that such position was very common among positivist authors. His own denial of natural law was far from being an over-simplified one. He was aware that even though human relations were endowed of guarantees only when defended by the State, they did already exist before in something he designated as "non-well-defined state" (which was the equivalent to Ardigò's "potential law", Cogliolo's and Pulia's "moral nebula", and Gumplowicz's "simple morality stage").<sup>992</sup> They admitted that the main problem came in determining the origin of rights and so an inevitable question arose: does the State grant them or it does just recognise a pre-existing reality? There was a coincidence in Gumplowicz's thought ("the origin does not lay on natural law, and they are not

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<sup>989</sup> Burk, T. J., „Geschichte der Degenerationstheorien“, *Thomas J. Burk (personal blog)*, p. 233: "Bulferetti's Deutung, der Enthusiasmus für ethische Werte wie Wohltätigkeit, individuelle Freiheit und Freiheit des Denkens etc. habe Lombroso vor einem Abgleiten in den Rassismus bewahrt, muß relativiert werden".

<sup>990</sup> Roldán Cañizares, E., *Luis Jiménez de Asúa: un jurista en el exilio*, Sevilla: Universidad de Sevilla, 2017-2018, p. 84.

<sup>991</sup> Gumplowicz, L., *Philosophisches Staatsrecht*, Wien: Mainz, 1877, p. 13: "Was immer die Naturrechtslehrer und Philosophen von einem solchen Rechte sprechen, keiner von ihnen kann uns ein solches ausserhalb der Verbindung mit dem Staate zeigen".

<sup>992</sup> Gumplowicz, L., *Derecho político filosófico*, Madrid: La España Moderna, 1915, p. 86.

innate but they are elaborate within society as real needs demand so”).<sup>993</sup> Nevertheless, soon after he set himself apart from Gumpowicz. As opposed to him, Dorado Montero understood that the origin was not to be found on the State. Rather, when social opinion turned too strong for the public power to ignore it, one might somehow start to call them “rights” (thus approaching to Grotius’ conception of “perfect rights”).<sup>994</sup>

Undeniably, Dorado Montero held a legal philosophy whose central point of view laid on understanding normativities in a broad sense:

“The opposite direction did not want to see in the man other rights than those which he is really acknowledged and guaranteed, i.e. those rights which he can effectively claim for, and it wrongly believed in our view that man cannot assert other than those [rights] legally recognised and having the possibility for a legal action”.<sup>995</sup>

Further developing the old Roman question “leges vs. iura”, his knowledge on the production of normativity sought as well extending the traditional conception of rules adopting the concept of ‘multinormativity’:

“The term ‘multinormativity’ is aimed at a number of phenomena, which are also discussed under the title of ‘legal pluralism’. This is particularly true with regards to what usually appears as the conceptual core of ‘legal pluralism’, i.e. the coexistence of different modi of normativity in the same social space and the related questions of classification, legitimation and collision. ‘Multinormativity’ is also directed at different forms of normativity and not only to those that are traditionally counted among the sources of law”.<sup>996</sup>

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<sup>993</sup> *Ibid.*

<sup>994</sup> Salam, A., *Perfect and Imperfect Rights, Duties and Obligations: From Hugo Grotius to Immanuel Kant*, Merton College, 2014, p. 19.

<sup>995</sup> Dorado Montero, P., *Problemas de Derecho penal*, Madrid: Imprenta de la Revista de Legislación, 1893, p. XV: “La dirección opuesta no ha querido ver en el hombre otros derechos que los que realmente le son reconocidos y garantizados, es decir, los derechos que puede hacer valer, y ha creído, equivocadamente a nuestro juicio, que no puede hacer valer más que los legalmente reconocidos y provistos de una acción”.

<sup>996</sup> Duve, T., “Was ist ›Multinormativität‹? – Einführende Bemerkungen”, *Rechtsgeschichte - Legal History*, Vol. 25, 2017, pp. 81-101, pp. 90-91: “Der Begriff ›Multinormativität‹ auf eine Reihe von Phänomenen, die auch unter dem Titel des ›Rechtspluralismus‹ diskutiert werden. Das gilt vor allem im Blick auf das, was üblicherweise als Begriffskern des ›Rechtspluralismus‹ erscheint, die Koexistenz verschiedener modi von Normativität in demselben sozialen Raum und die damit verbundenen Fragen von Klassifikation, Legitimation und Kollision. Auch ›Multinormativität‹ richtet sich auf verschiedene Formen von

The need for a method for this enterprise has led to the suggestion of a knowledge-historical approach to global legal history. From this knowledge-historical perspective, law and other modes of normativity could be seen as forming part of the totality of propositions that the members of a culture consider to be true and that are relevant for producing positively marked options for behaviour. Whether such matter is, certainly, an ancient one, this comprised normative knowledge labelled in the Western tradition as social, religious, indigenous norms, state law and, specially, natural law,<sup>997</sup> customs,<sup>998</sup> and common sense.<sup>999</sup> Practical knowledge, implicit understandings and all other norms and rules that have significance for the production of normative knowledge are an object of global legal history – just as, obviously, the results of this process. The object of global legal history is thus normative knowledge in this wide sense.

At the international level, Jiménez de Asúa's famous assertion was attributed to him: "criminal law will be engulfed by criminology".<sup>1000</sup> Similarly, other sciences absorbed as well other ones: anthropology and sociology were phagocytised by psychology and correctional psychology.<sup>1001</sup> Yet, Dorado Montero, as influenced by Anzilotti, started to suspect that it was quite improbable that sociology absorbed "every social science" (including legal philosophy), because this latter would "retain its autonomy" and would enriched itself as its construction would rely "on the data from sociology".<sup>1002</sup> Nevertheless, when Ferri referred to a paper of Dorado Montero (*Du droit penal répressif au droit penal préventif*), he seized the opportunity to relate it to a reference of

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Normativität, und zwar nicht allein auf solche, die traditionell zum Kreis der Rechtsquellen gezählt werden".

<sup>997</sup> Much before the Codification itself, the Kingdom of Valencia (currently Spain) included natural law within its legal system as one of the legal sources available, altogether with privileges, fueros or royal legislation. Vid. Masferrer, A., *Spanish Legal Traditions*, Madrid: Dykinson, 2<sup>o</sup>ed., 2012, p. 196.

<sup>998</sup> Masferrer, A., *Spanish Legal Traditions*, Madrid: Dykinson, 2<sup>o</sup>ed., 2012, p. 196: "Usatges de Barcelona".

<sup>999</sup> Masferrer, A., *Spanish Legal Traditions*, Madrid: Dykinson, 2<sup>o</sup>ed., 2012, p. 196: "Common law [including both Roman and Canon law], equity and common sense".

<sup>1000</sup> *Annales de la Faculté de Droit et des Sciences Politiques de Strasbourg*, "Les orientations nouvelles des sciences criminelles et penitentiaires", Paris: Dallaoiz, 1954.

<sup>1001</sup> López-Rey, M., *Pioneers of Criminology...*, p. 609.

<sup>1002</sup> Dorado Montero, P., "Reseña al libro de Anzilotti: 'La Filosofia del Diritto e la Sociologia'", *RGLJ*, Vol. 41, No. 82, 1893, pp. 427-429, p. 428.

Vicente Lanza: “one can see how rightly some eclectics have been able to say that the apostles of the new verb (the positive criminal school) do not concern themselves with the search for the rational genesis of the right to punish after all”.<sup>1003</sup> This remark from Ferri, placing him within a group different from that of the eclectics, reinforced my initial suspicions which led me to think Dorado Montero was more of a positivist, rather than an eclectic.

Next in order, another statement of López-Rey made me question myself about other aspects:

“In combining free will and determinism, i.e. in admitting both of them, Dorado goes further than the old Spanish penologists, to whom the free will was the basic element of any penal treatment. On the other hand, in admitting a determinism mitigated by free will, he did not go as far as the supporters of the Italian Positive School”.<sup>1004</sup>

From my point of view, such assertion is rather a risky one. Trying to ascribe Dorado Montero in some sort of original, equidistant position in the doctrine, opened the door to countless contradictions. The efforts to justify such eclectic position failed conspicuously. Copleston did already identify the freewill problem incardination within determinist theories:

“Since the Stoics defended that everything obeyed to the rules of nature, the following objection should be made to them: ‘Why is man being told of keeping the rules of nature if he cannot avoid submit to them in any case?’ Stoics would respond that man is rational and, thus, even if he always has to act according to the natural laws, he has the privilege of knowing them and consciously accepting them. So, it follows that the moral exhortation has an end: the man is free to change of inner attitude. This entails, of course, a modification of the determinist thesis, if not something else... There cannot and there

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<sup>1003</sup> Lanza, P., *Fondamento razionale e fini della pena*, 1899, p. 4 (Quoted in Ferri, E., *Sociologia criminale*, Roma: Casa editrice italiana, 1884, p. 546): “dopo ciò si veda con quanta ragione qualche eclettico ha potuto dire che “gli apostoli del nuovo verbo (la scuola criminale positiva) in fin dei conti (sic) non si preoccupano della ricerca della genesi razionale del diritto di punire”.

<sup>1004</sup> López-Rey, M., *Pioneers of Criminology...*, p. 611.

will not be any determinists who can be completely consequent, and Stoics do not constitute an exception from this rule”.<sup>1005</sup>

Actually, there did exist determinist postulates which were consequent. Let us assume that determinist theses were completely incompatible with freewill. Determinism and freewill were irreconcilable/antithetical. The critics of Copleston to this respect were based on this scenario. His critics aimed towards those determinists who admitted a bit of freewill. They were doing something incoherent. Yet, a similar criticism could be poured against freewill supporters. And so, Copleston’s last assertion required a nuance: Stoics were not inconsistent because they were determinists, but they were so because freewill supporters thought of a universal god whose natural rules no one could scape from.<sup>1006</sup>

In his otherwise brilliant analysis on the Stoics, Copleston acknowledged that Stoic determinism soon experimented a great modification in practice. He pointed out Cleanthes’ perspective on virtue<sup>1007</sup> and the fact that humans necessarily followed the path drawn by Destiny. Also, Seneca held that “fate leads the willing and drags the unwilling”,<sup>1008</sup> but on the other hand, Stoics considered the man as “free to change his inner attitude and to adopt another [attitude] of submission and resignation rather than that of rebellion”.<sup>1009</sup> Plus, Stoics ended up by “admitting a scale of values”.<sup>1010</sup> He understood the reason why the late Stoics decided to admit a scale of values. In short, if men were determined, there would be no reason why they would bother at all in behaving correctly or in

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<sup>1005</sup> Copleston, F., *Historia de la Filosofía. Tomo I: Grecia y Roma*, Liber, p. 348. In relation to Copleston’s analysis, vid., Hicks, R. D., *Stoic and Epicurean*, New York: C. Scribner, 1910, pp. 88-89. “Instead of re nouncing the task of attaining an impossible wisdom, the school introduced the conception of progress toward virtue. [...] Cleanthes says in a striking passage: ‘Man walks in wicked ness all his life or, at any rate, for the greater part of it. If he ever attains to virtue, it is late and at the very sunset of his days’”. As to the last quotation, he referred to Pearson, A. C., *The Fragments of Zeno and Cleanthes*, London, 1891, p. 281.

<sup>1006</sup> Then, some scholars from the Neoclassical School would respong that god allows for such parcel of freewill, which is a tricky aspect itself: the freewill element is being introduced again inside a determinist scheme. It is, certainly, the eternal debate.

<sup>1007</sup> Cappelletti, A. J., “La ética de Cleanthes”, *Revista venezolana de Filosofía*, No. 30, 1994, pp. 33-50.

<sup>1008</sup> “Ducunt volentem fata, nolentem trahunt”.

<sup>1009</sup> Copleston, F., *Historia de la Filosofía. Tomo I: Grecia y Roma*, Liber, p. 348.

<sup>1010</sup> Copleston, F., *Historia de la Filosofía. Tomo I: Grecia y Roma*, Liber, p. 348.

improving themselves. Thus, they decided to encourage people to do their best, and in doing so, they had to introduce freewill again:

“This rigorous moral idealism is characteristic from the ‘early Stoicism’; late Stoics insisted much more on the notion of progress, bewaring of encouraging man to enter the paths of virtue and to persevere on them”.<sup>1011</sup>

In practice, this meant that the freewill element was once again introduced without aiming to do so. It was particularly significant to observe that freewill was sometimes a key aspect which man consciously sought after and, sometimes, an undesired element that popped in everytime a determinist system was to be erected:

“No determinist system can ever be consistent on practice. This should not surprise us since freedom is a reality of which we are conscious, and even if it is theoretically excluded, it is again introduced where least expected”.<sup>1012</sup>

Dorado Montero partially agreed with such statement. Yet, he disagreed with its core since it overlooked the critics poured on the Neoclassical School itself. In a nutshell, both determinism and freewill schools could be coherent provided they did not admit within their own schemes freewill and determinism, respectively. Dorado Montero himself fiercely opposed those authors who, in their analysis, defended determinism, yet they accepted a little bit of freewill as well. This was not consistent and he could never possibly conform to such an incoherent argument:

“It is not possible to admit grades within it [freewill]. Either one is free or one is not. And if one is free, all men are so equally, all men act so because they want to, and any force is imposed on his conduct leading him to the action. Those who speak of the ‘relative freewill’, i.e. freedom which is in part free and in part not free, in part indifferent and neutral and in part undetermined, they do not realise that such conception has no defense; given that if the obstacles that the will is imposed (motives for acting, physiological impulsions, nervous exaltation, passions, etc.) have a power such to drag it

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<sup>1011</sup> Copleston, F., *Historia de la Filosofía. Tomo I: Grecia y Roma*, Liber, p. 349: “Este riguroso idealismo moral es característico del primer estoicismo; los estoicos posteriores insistieron mucho más en la noción de progreso, cuidándose de animar al hombre a que entrase por las sendas de la virtud y perseverase en ellas”.

<sup>1012</sup> Copleston, F., *Historia de la Filosofía*, Tomo I: Grecia y Roma, Liber, p. 348.



in a determined direction [...] such will results enslaved; it lost all spontaneity [...] On the contrary, if the will beats all the snares coming over it [...] remaining absolutely owner of itself, in puris naturalibus, [...] we come to the whereabouts of the true absolute freewill. No third exit seems possible: a will that obeys to natural causality to a certain extent and, to some extent as well, flies away from its control and only depends on itself [...] ”.<sup>1013</sup>

He deeply criticised the supporters of the Eclectic School since when, within a freewill theory, one accepted a glimpse of determinism, the whole theory crumbled and broke down. Such hatred against inconsistency was not new. In fact, it very much reminded of Spinoza's 'Empire within another Empire'.<sup>1014</sup> According to the latter, due to our Judaeo-Christian background, one might assert the following: we could admit that God ruled everything and, thus, nothing escaped to his control, but humans were endowed of a small parcel of freewill or capacity to decide. For Spinoza, we ignored what determined our conscience and, consequently, we thought it flowed from ourselves. He opposed to such possibility: man cannot be in nature as a State within another State.<sup>1015</sup> This attempted to be rebated by many legal philosophers,<sup>1016</sup> by Catholic doctrine and by the liberal Criminal law system.<sup>1017</sup> Nevertheless, Spinoza's thought was clear: both the 'virtues' and the 'vices' formed part of our human nature. We were guided by our appetites but neglect their causes:

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<sup>1013</sup> Dorado Montero, P., *De Criminología y penología*, Madrid: Viuda de Rodríguez Serra, 1906, p. 18: “No es posible admitir grados en ella; ó se es libre, ó no; y de serlo, todos los hombres lo son de igual manera, todos obran porque quieren y como quieren, sin que en su conducta se interponga fuerza alguna que les lleve forzosamente á la acción. Los que hablan del libre albedrío relativo, es decir, de una libertad en parte libre y en parte no, en parte indiferente y neutra y en parte determinada, no se hacen cargo de que tal concepción no tiene defensa; pues si las trabas que á la voluntad se ponen (motivos del obrar, impulsiones fisiológicas, exaltación nerviosa, pasiones, etc.) tienen poder bastante para arrastrarla en una dirección determinada [...] dicha voluntad queda esclavizada, perdiendo toda espontaneidad [...] Por el contrario, si la voluntad vence todas las asechanzas que se le tiendan [...] quedando en absoluto dueña de si misma, in puris naturalibus, [...] venimos á parar al verdadero libre albedrío absoluto. No parece posible otra tercera salida: una voluntad que obedezca hasta cierto punto á la causalidad natural, y hasta cierto punto también se sustraiga á ella y no dependa sino de su antojo [...]”.

<sup>1014</sup> Field, S., “Democracy and the Multitude: Spinoza against Negri”, *Theoria: A Journal of Social and Political Theory*, 2012, Vol. 59, No. 131, pp. 21-40, p. 29.

<sup>1015</sup> Depending on the language of the version handled, the expression might vary from State to Empire, yet they all referred to the same 'umbrella' concept. It was the independent but interrelated content arranged as a matryoshka.

<sup>1016</sup> Fichte was the most relevant one to this respect.

<sup>1017</sup> Campos Marín, R., “Crimen y locura. La patologización del crimen en la España de la Restauración”, *Norba. Revista de Historia*, Vol. 20, 2007, pp. 85-105.

“They mistakenly confuse effect with cause. And so, everything that has the appearance to be the fruit of a freewill determination is actually submitted to a strict and necessary causal determination. Human soul is not exempted of this causal link of divine expression of the necessary substance. There is no ‘absolute’ or ‘free’ will man can find in human soul, but rather the soul is determined to want this thing or this other thing due to a cause, which is, as well, determined by other cause, which is on its turn determined by another cause and this way up to the infinite”.<sup>1018</sup>

A great illustrative example as stated by Polo Blanco could help us shedding some light on the matter: “If a rock falling down would suddenly acquire conscience, it would also think that it was falling due to its very free determination. It would think that it was doing so, yet completely ignoring the inexorable law which determined it”.<sup>1019</sup> The reason was to be found in Spinoza’s *Tractatus Theologicus*:

“Such statement can only be hold if we depart from a metaphysics of the human soul which does not conceive it as produced by natural causes but rather ‘immediately created by God’ and which is so independent from the rest that possesses an absolute power to determine and to righteously use the reason. Notwithstanding that, this did not even happen to the first man, who could not avoid his fall. Besides, should we admit that this first man ‘had the power of righteously using his own reason’, how was he possibly deceived? Precisely because of this, Spinoza would clearly reject such interpretation since the experience has repeatedly shown that [...] if living according to reason, instead of by the full desire was in our hands, we would always opt to act in a way in accordance to the guidelines of reason”.<sup>1020</sup>

And so, in Jiménez Sánchez analysis, it was highlighted Spinoza’s unavoidable character of our passions:

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<sup>1018</sup> Polo Blanco, J., “Notas en torno a la Ética de Spinoza”, *Bajo palabra. Revista de Filosofía*, No. 3, 2008, p. 66.

<sup>1019</sup> Polo Blanco, J., “Notas en torno a la Ética de Spinoza”, *Bajo palabra. Revista de Filosofía*, No. 3, 2008, p. 66.

<sup>1020</sup> Jiménez Sánchez, J. J., “Los fundamentos del Estado político en Spinoza”, *Anales de la Cátedra Francisco Sánchez*, No. 46, 2012, p. 216.

“Everybody is drawn by his own pleasure. Likewise, the first man experienced so, given that he did not have the power to correctly use his reason, but rather he was like us: subjected to passions”.<sup>1021</sup>

In Spinoza’s eagerness to restructure religions, he presented a radical, different conception of natural law. Traditionally, the Christian conception of natural law consisted on a civil/constitutional law controlled by natural law, whereas for Spinoza’s conception of natural law, civil law would try to limit and manage natural law, which he deemed to be our bold, ever-increasing capacities (even passions).

So, if the Catholic conception defended a limitation of our natural characteristics, Spinoza’s natural law was simply our power in the state of nature (greatly praised by him). Ultimately, it was nature itself struggling to expand, to grow uncontrollably bigger, and to exploit all our possibilities of getting to the plenitude or our being.<sup>1022</sup> Whereas the voluntarist conception found its equivalent constitutional order in Bentham’s legal positivism and whereas the essentialist conception did so with regards to Locke’s iusnaturalism, it was undeniable that the multitudes’ conception enshrined in Spinoza’s theory presented a perfectly alternative doctrine equidistant from a Hobbes’ individualist contractualism as well as from scholastic natural law. Though easily mistaken as a sub-branch of contractualism, Spinoza’s idea of how to govern the power of ‘multitude’ was far from being ascribed within the *Leviathan*.<sup>1023</sup> As opposed to what one may think of ‘revolutionary’ theories, his proposal, just as the one from Dorado Montero, did not ask for the abolition of the state. Yet, a legal, institutional framework was still needed for his theory to work properly. Since human relations appeared described as a conflict between needs and wishes (*vid.* Spinoza’s *conatus* vs. passions<sup>1024</sup>), such organic, legal structure was necessary. “If all of them were effectively guided by reason, States would not be

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<sup>1021</sup> Jiménez Sánchez, J. J., “Los fundamentos del Estado político en Spinoza”, *Anales de la Cátedra Francisco Sánchez*, No. 46, 2012, p. 217.

<sup>1022</sup> Again, it was impossible not to find astonishing parallelisms between some of the postulates of Nietzsche (1844-1900) and of Dorado Montero (1861-1919).

<sup>1023</sup> Hobbes, T., *Leviathan*, London : J. M. Dent & Sons, 1943.

<sup>1024</sup> Fallas Vargas, F., “El conatus como categoría radical en la teoría política de Spinoza”, *Revista de Filosofía*, Universidad de Costa Rica, Vol. XLII, 2004, p. 27.

needed any longer, yet instead a society of wiseman based upon concord would be established”,<sup>1025</sup> but since it was not the case as concerned human nature, the dichotomy State/Constitution was required. In this sense, both Spinoza and Dorado Montero, ended up giving in the requirements of the practical reason. Also, as regarded society,<sup>1026</sup> which could not be constituted as a mere transference of individual rights in the benefit of a third person/institution placed above them. This would entail that they would get rid of their own power (*potentia*). Though contractualism accepted as well that some rights were inalienable, its *rationale* was different: “Hobbes argument is not grounded on material impossibility of such waiver, but in the logical impossibility of giving up his own conservation. Whereas, for Spinoza it is ontologically indissociable the individual’s right-power of his own”.<sup>1027</sup> Spinoza’s scheme helped to avoid whatsoever radical break that might arise for the transition between the two legal philosophies performing two constitutional models, namely legal naturalism and legal positivism. Before the constitutional diatribe of ‘compilation vs. codification’ and ‘history vs. reason’, he claimed for a bridged transition among two models. Spinoza’s philosophical position was, after all, not so distant from the one of Dorado Montero.

Therefore, that assertion from López-Rey is rather surprising, since in Dorado Montero’s main work he did not show himself very enthusiast of this sort of conciliating fusion between determinism and freewill. There existed some aspects with which I could come to terms. On the first place, Dorado Montero relented to the conflict freewill-determinism and, at a certain point, he said that men at the end (of punishment) should settle themselves to the needs of the practical reason.<sup>1028</sup> On the second place, he mentioned this eclectic perspective in a similar paragraph. Correctionalists held that the cause of the crime was the criminal’s will. Yet they did not consider that this will was spontaneous, whereas

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<sup>1025</sup> Spinoza, B., *Ética demostrada según el orden geométrico*, Madrid: Editorial Nacional, 4<sup>o</sup> ed., 1984, E4P37S.

<sup>1026</sup> Here ‘society’ should be understood as ‘constitution’; as part of the mental exercise we must do to reinterpret.

<sup>1027</sup> Peña Echevarría, J., “Cómo se ordena la potencia de la multitud. Instituciones y derecho de la ciudad en la teoría política de Spinoza”, *Revista Laguna*, Universidad de Valladolid, Vol. 31, 2012, pp. 48-49.

<sup>1028</sup> Dorado Montero, P., *El Derecho protector de los criminales*, v.1, pp. 139-140.

the determinists maintained that crime was just a product of a causal link. For him, the two points of view will one day come to merge into a single one but that will possibly happen when humanity has gone deeper into human nature and into his acting mechanism: “Chemistry, histology and physiology have here a wide horizon in which they can perform”.<sup>1029</sup> When he said that both perspectives ‘will one day come to merge into a single one’, he was emphasising the fact that when our scientific knowledge became greater (so, ‘when we go deeper into human nature and into his acting mechanism’) one of the two options would be the successful one. Once our knowledge evolved, one of the two theories would prove right; but never a mixture of the two of them could ever be truly consistent. Note that, even nowadays, we find it difficult to define and to limit the extent of the so-called mitigating or aggravating circumstances, not to mention the particular way in which they are to be applied.

Finally, regarding the last statement,<sup>1030</sup> the fact that he was not so inhuman as certain Lombrosian theories or as Garofalo’s attitude towards the criminal does not allow us to assert that he did not accept determinism.<sup>1031</sup> He accepted a great part of it. Concluding he was an eclectic was a very poor solution. It would be a hotchpotch leading unclear conclusions. His undeniable humanist thought does not allow us to assert he was not so determinist, as long as we want to stay loyal to the truth. He was as determinist as the Italian positivists.

In that sense, Dorado Montero’s determinist hypothesis highly matched what Stephen Hawking would years after. The latter thought that there might be some sort of universal law according to which all our actions were predetermined and that no single aspect of our lives was left to freewill. Dorado Montero stated the following: “We assume that no part or element from nature stops exerting its influence, more or less immediately, on the performing of such effects; it is just that nowadays we are not able to highlight all the steps of the corresponding

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<sup>1029</sup> Dorado Montero, P., *El Derecho protector de los criminales*, Madrid: Ed. Jiménez Gil, Tomo 1, 1915, p. 65.

<sup>1030</sup> ‘He did not go as far as the supporters of the Italian Positive School’. Vid. p. 229 of this thesis.

<sup>1031</sup> Campos, R., Huertas, R., “Lombroso but not Lombrosians? Criminal Anthropology in Spain”, Knepper, P., Ystehede, P.J. (Eds.), *The Cesare Lombroso Handbook*, Abingdon: Routledge, 2013, pp. 309-323.

process”.<sup>1032</sup> In this aspect, their approaches matched, especially when those matters revolved around freedom and determinism. We do not possess a trustable knowledge, yet we show ourselves arrogant when we blame it on determinist postulates. Affirming one knows how human nature works, i.e. being sure on degree of accountability exists in human nature, in order to justify the punishments we have established, is inaccurate. At the eyes of Dorado Montero, the transcendental doubt should prevail. Precisely because determinism acknowledged that there were many things escaping from our ‘purported’ freewill, it was (1) a safer option (which, just as the eclectic model, allowed us to completely get rid of the death penalty), (2) a far humbler approach than that of freewill supporters and (3) a more adequate view to Dorado Montero’s open perspective. He came clear about it: “Doing is a result from wanting, and wanting, in its turn, is a result of countless physiological, physical and chemical actions that determine it. But all of them remain largely ignored for the individual inside whom they take place”.<sup>1033</sup>

For Dorado Montero it was hard to give credit of eclecticism as a viable and coherent system. His denial of death penalty came given inasmuch as it admitted the determinist doubt. Such idea could take place because of two reasons. The first one was because within the judicial process there could be a human mistake (administrative or procedural). The second one consisted on the possibility of an unknown disease impairing human’s criminal capacity (accountability). In the latter case, it was clear that determinism was implicit, even if it was ‘just a little’. There were no barriers as regarded the degree, either there was or there was not:

“Will draws from his own [human] nature, from his own [human] way of being, from his own [human] sort which has not been freely chosen but received *a fortiori*”.<sup>1034</sup>

A less common, yet still recurrent idea was to ascribe Dorado Montero within a Catholic scheme. His faith in education and culture to overcome society’s problems to the traditional conception of freewill and his notion of responsibility could make us wonder. Whereas he formally rejected Catholicism, his de facto

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<sup>1032</sup> Dorado Montero, P., *El Derecho protector de los criminales*, p. 204.

<sup>1033</sup> Dorado Montero, P., *El Derecho protector de los criminales*, pp. 210-211.

<sup>1034</sup> Dorado Montero, P., *El Derecho protector de los criminales*, p. 207

ideas could indicate otherwise. Nevertheless, we would be overlooking a relevant fact. It was precisely educators and formative systems the ones that should operate those biological changes, i.e. the ones that should consider the new biological developments in order to change the human conduct: “I am inclined to think that by means of modifying our chemical composition and subsequently our organic structure (macro or micro), our inner psyche will be modified too, and so will our personality, our will and our actions. I cannot speak about this right know: nor in which proportion neither to which extent, but I am sure this will be modified. I guess that psychologists and educators will find in a deep talisman to this respect on bromatology, chemistry (especially biological chemistry) and in their coadjutant factors such as hygiene, surgery and orthopaedics. What is all of this but use and performing of the correctionalist system?”.<sup>1035</sup> Thinking that just by means of education we could modify someone’s action enclosed an authoritarian, superficial approach for him. By doing this with education we would only be forcing human nature to change in the formal aspect, and not into what was actually driving the individuals’ decisions. Influxes exerted over the individual’s will could only be performed through the organic structure.<sup>1036</sup> Education was nothing but a model of pressure and compression.<sup>1037</sup> So, it should be mostly an organic, corporal transformation, even if repetition was a *conditio sine qua non* to generate the new, sought habits.<sup>1038</sup>

The old penal system was based on a very widespread conception. It considered the will of the criminals to be as healthy and complete as the will of the righteous ones. Therefore, one could only respond to this with the imposition of painful punishments, given that crime was considered a completely voluntary and conscious decision.<sup>1039</sup> Despite living outside the time of authoritarianism, Dorado Montero was already aware of the risks of abandoning the system of the traditional, neoclassical criminal law and all its guarantees that arose from the

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<sup>1035</sup> Dorado Montero, P., *El Derecho protector de los criminales*, p. 229.

<sup>1036</sup> That was why a range of scholars categorised him as a ‘biological determinist’ or as a ‘biological positivist’.

<sup>1037</sup> Somehow, it reminded of Hermann Hesse’s work *Demian* and the therein depicted acts of coercive German education.

<sup>1038</sup> Dorado Montero, P., *El Derecho protector de los criminales*, p. 218

<sup>1039</sup> Dorado Montero, P., *El Derecho protector de los criminales*, p. 220

French revolution. He did not need the big wars and the uprising of totalitarianism and fascism to forewarn the problem that such extremely open conception of Criminal law could generate. He understood that society was not ready yet, just as Jimenez de Asúa concluded later on: “society had not evolved yet to the extent of being able to abandon the criminal guarantees of the bourgeois law, so that the maintenance of liberal system’s chinks was still essential”.<sup>1040</sup> I am not in any way, making a personal, reckless assumption on Dorado Montero’s positivism, yet López-Rey did also acknowledge it:

“In spite of his positivism and determinism, Dorado is here like in other important aspects of his theory, under the evident influence of the old Spanish School of Penology”.<sup>1041</sup>

Notwithstanding that, we still could not hold that his theory was, simply, a mix of both old penalism and determinism. Christian influences (or old Spanish Penalist School) were introduced throughout the usage of religious expressions or analogies performed within his statements, but the content itself was not led by the old Penalism/Christian: it was mostly a matter of form. Sometimes, behind the concepts one might perceive the influence of such ideas but their influence was not so profound as to consider that his theory was under the aforementioned influence. In this sense, López-Rey seemed very eloquent when asserting that when Dorado Montero spoke about ‘spiritualisation of the penalty/Criminal law’ he had in mind the importance of psychological factors.<sup>1042</sup> In sum, though the terms he used were particularly religious (‘only when the old soul has been replaced by the new one we can say that the individual has been cured’), that did not deform his theory in a way that: (1) it suddenly turned his thought neo-classical; or that (2) penal neo-classicism had the same weight as determinism.

Finally, agreeing with a last conclusion of López-Rey’s was rather difficult. He held that Dorado represented fundamentally a continuation of the ‘correccionalista’ Spanish Penological School of thought whose origin could be traced back to Seneca.<sup>1043</sup> All the authors making up the aforementioned school

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<sup>1040</sup> Roldán Cañizares, E., *Opr. Cita.*, p. 83.

<sup>1041</sup> López-Rey, M., *Pioneers in Criminology...*, p. 611

<sup>1042</sup> López-Rey, M., *Pioneers in Criminology...*, p. 611

<sup>1043</sup> López-Rey, M., *Pioneers in Criminology...*, p. 612.



of thought believed in freewill. As much as Dorado kept record of several Spanish thinkers throughout his work (Cerdán de Tallada, Juan Eusebio, Lardizábal y Uribe, Marcos Gutiérrez, and Mr Ramón Salas),<sup>1044</sup> their very rationale was completely different: his legal philosophy, again, led to a rampant determinism. Indeed, determinism had a direct impact in his day-to-day relationships. Even if, in Salamanca, the degree of acceptance of Dorado by his students was high and the consideration professed by the teaching body was beyond any doubt, his acceptation was not so undisputed. Many of his students were astonished by his new arguments (very keen on determinism) and they ended up raising complains to higher university instances.<sup>1045</sup> Besides, he had several intellectual clashes with many personalities, among which the big confrontation in Valencia with Father Cámara should be outstood:

“He faced Tomás Cámara, Father Cámara as he was commonly referred to, who cursed against him from the pulpit. He was very close to excommunication and exile. [...] The Bishop exercised as a fundamentalist and as a defender of high classes, to which Dorado wanted to seize the control they exercised by means of Criminal law over the poorest”.<sup>1046</sup>

After some considerations, we could observe that his ‘transcendental doubt’ and his difficulty of being classified after one school or another came together: “Perhaps this is the best legacy Dorado Montero received from the krausoinstitutionalism (over whose legacy it has been so discussed about): his wide, tolerant, flexible way of facing the several questions, having a look at problems from different perspectives, bearing in mind countless aspects and taking into account the opinion of diverse schools. His trip to Italy, where he studied Law, Philosophy and Anthropology, got to open his thought to all scientific and ideological currents of the university world back then, mainly

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<sup>1044</sup> Dorado Montero, P., *El Derecho protector de los criminales*, v.1., p. 487.

<sup>1045</sup> Vid. Chapter 1, where all the biographical data is contained.

<sup>1046</sup> Juanes Díaz, S., “Dorado Montero”, *La Gaceta de Salamanca*, Salamanca, 2019. Seen on 03.12.2019. Link: <https://www.lagacetadesalamanca.es/opinion/dorado-montero-YX624818>.

composed of several intertwined trends”.<sup>1047</sup> I was not, however, the only one rejecting his eclectic position and his complete affiliation to correctionalism:

“Since the very moment in which Dorado Montero based his Protective Law of the Criminals upon the determinist hypothesis, thus placing in the same level the child and the adult, and the sane and the insane, he had to renounce to the idea of responsibility, thus, moving away considerably from Röder and the other correctionalists, who conceived the criminal as a free man to lead his will to do good, just as he had led it before in an evil sense”.<sup>1048</sup>

That his purported eclectic positioning was something I found difficult to justify it is something I have previously stated. That he moved “considerably away from Röder” was something that Dorado Montero himself pointed out when criticising such school:

“It had necessarily to suffer from those defects which usually the aprioristic doctrines have -the lack of data above all-. That is why his points of view were very exclusive and narrow, focusing his attention mainly in the improvement of the criminal, judging that the only cause for his objectionable acting were the weakness or perversion of his will. Thus, he neglected the study and reform of other organic and social causes that make up the determining environment of such will”.<sup>1049</sup>

Yet, I do not only find surprising the authors referring to him as an eclectic, but also those who described him as a correctionalist. He himself specifically stressed out the aforementioned problem with freewill within the correctionalist school too:

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<sup>1047</sup> Antón Oneca, J., “La teoría de la pena en los correccionistas españoles”, *Estudios Jurídico-Sociales: Homenaje al Profesor Legaz y Lacambra*, tomo II, Santiago, 1960, p. 1024.

<sup>1048</sup> Antón Oneca, J., “La teoría de la pena en los correccionistas españoles”, *Estudios Jurídico-Sociales: Homenaje al Profesor Legaz y Lacambra*, tomo II, Santiago, 1960, p. 1024: “Desde el momento en que basó Dorado Montero su Derecho protector de los criminales en la hipótesis determinista, colocando en el mismo plano al niño y al adulto, al sano de mente y al loco, hubo de renunciar a la idea de responsabilidad, alejándose considerablemente de Röder y de los demás correccionistas, quienes concebían al delincuente como hombre libre para dirigir su voluntad hacia el bien, así como la había dirigido anteriormente en el sentido del mal”.

<sup>1049</sup> Dorado Montero, P., *Problemas de Derecho penal*, Madrid: Imprenta de la Revista de Legislación, 1893, p. XII: “tuvo necesariamente que adolecer de aquellos defectos de que adolecen las doctrinas aprioristas, de la falta de datos sobre todo; y por eso sus puntos de vista fueron harto exclusivos y estrechos, concentrando principalmente su atención en la mejora del delincuente, juzgando que la única causa de su obrar reprehensible era la debilidad o perversión de su voluntad, y descuidando el estudio y reforma de otras causas orgánicas y sociales que forman el ambiente determinante de aquella voluntad”.

“Besides, this school was affected by an essential vice: admitting and setting as the basis of the penalty the freewill of the agent, which is incompatible with the inner sense of the whole correctional system”.<sup>1050</sup>

Towards the end of his academic production, he did not come to accept correctionalism as a whole, but he did accept “its sense”:

“The leading conclusion of the lessons of criminal anthropology and sociology cannot be other than [...] the acceptance of the criminal sense of correctionalism”.<sup>1051</sup>

Indeed, his own, self-aware need of not heading into a simple eclecticism was made clear in the first work he wrote: “Without being eclectics, simply by loving the truth, one must wait and wish for the mutual correction, rectification and rapport of both tendencies; such will bring another more complete and less exclusive. Therefore, the independence of Criminal law must be ensured; it ought not to be enfeoffed to Criminal anthropology nor to sociology, etc., but it is necessary to consider the assistance of such sciences”.<sup>1052</sup>

One of the reasons of my reluctance to use the term “eclectical” with Dorado Montero was because he was very strict himself when categorising. In analysing the several Criminal law projects of the 19<sup>th</sup> century, Antón Oneca pointed out that Dorado Montero did not consider Luis Silvela as a full correctionalist, but rather a “halfway correctionalist”, and he did so because Silvela and other scholars<sup>1053</sup> “admitted the ‘retribution’ as means for the correction”.<sup>1054</sup> Indeed, he used a term (“semicorrectionalist”) that helped to

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<sup>1050</sup> Dorado Montero, P., *Problemas de Derecho penal*, Madrid: Imprenta de la Revista de Legislación, 1893, p. XII: “Además, esta escuela estaba afecta de un vicio esencial, el de admitir y colocar como base de la penalidad la libertad del agente, la cual es incompatible con el sentido interno de todo el sistema correccional”.

<sup>1051</sup> Dorado Montero, P., *El Derecho protector de los criminales*, Madrid: Ed. Jiménez Gil, Tomo 1, 1915, p. 341: “El resultado á que llevan las enseñanzas de la antropología y de la sociología criminales no puede ser otro, en el fondo, a mi juicio, que la aceptación del sentido penal del correccionalismo”.

<sup>1052</sup> Dorado Montero, P., *La antropología criminal en Italia*, Madrid: Imprenta de la Revista de Legislación, 1889, pp. 173-174: “Sin ser eclécticos, más amando la verdad, debe esperarse y desearse la mutua corrección, rectificación y compenetración de ambas tendencias; lo cual dará por resultado otra más completa y menos exclusiva. Hay, pues, que recabar, sí, la independencia del Derecho penal, no infeudarlo á la antropología criminal, á la sociología, etc., pero hay que tener en cuenta también los auxilios de estas ciencias”.

<sup>1053</sup> Dorado Montero, P., *De Criminología y Penología*, Madrid: Viuda de Rodríguez Serra, 1906.

<sup>1054</sup> Antón Oneca, J., “Los proyectos decimonónicos para la reforma del Código penal español”, *Anuario de derecho penal y ciencias penales*, Tomo 25, Fasc/Mes 2, 1972, p. 259

illustrate the complexity of classifying such doctrine and its different gradings. Another reason to deem Dorado Montero as not subjected within a simple eclecticism was because, since his first writings,<sup>1055</sup> he refused to name the Terza Scuola after “eclectical”. This critic aimed at using the same neoclassical grounds with new scientific adaptations:

“There is those who, still sticking to the old ideas, seek after their maintenance with the new ones, thus uniting them in an impossible connubium, which we do not even dare to name after eclecticism, as we cannot betray the ethimology of such word”.<sup>1056</sup>

All of this without even mentioning “many positivists” who were firmly “determined to correct positivism” and who could be included within the “fledgling positivists (the so-called critic positivists)”.<sup>1057</sup> Dorado Montero identified and listed them: mainly “Puglia, Cogliolo, and Vanni”, but he also mentioned three other authors accepting the conception of the contractual organism of Fouillée, namely Gustavo Bonelli (with “certain differences”), Colajanni (“vindicating its priority with regards to De Greef”), and Icilio Vanni (“but with certain reservations in the *Programma critico di Sociologia*”).<sup>1058</sup> Finally, there were those who were not able to get used to the new conditions and, thus, they did “sway in uncertainty” and chose sides “depending on the circumstances”.<sup>1059</sup> Under such heading, he included: “Pessina, Gabba, Del Giudice, Filomusi-Guelfi, Miraglia and even, to a certain extent, Carle himself”.<sup>1060</sup> Under his point of view, they kept on “paying a tribute to idealism”

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<sup>1055</sup> Dorado Montero, P., *El positivismo en la jurídica y social italiana*, Madrid: Imprenta de la Revista de Legislación, 1891, p. 249: “no es ecléctica, sino crítica y conciliadora, y que tiene, por consiguiente, un entero valor científico que no tienen las teorías eclécticas; que abraza y funde en un solo término los dos que eran antitéticos, tomando como base las doctrinas naturalistas y levantándose sobre ellas á la concepción del ideal”

<sup>1056</sup> Dorado Montero, P., *El positivismo en la ciencia jurídica y social italiana*, Madrid: Imprenta de la Revista de Legislación, 1891, p. 249: “aquellos que, apegados todavía á las ideas antiguas, pretenden mantenerlas al lado de las nuevas, uniéndolas en imposible connubio, que ni eclecticismo nos atrevemos á llamar, siquiera por no hacer traición á la etimología de la palabra”.

<sup>1057</sup> Dorado Montero, P., *El positivismo en la ciencia jurídica y social italiana*, Madrid: Imprenta de la Revista de Legislación, 1891, p. 249: “Sin hablar de muchos positivistas que, como hemos mostrado, se proponen corregir el positivismo y que muy bien podrían incluirse en el grupo de los positivistas de nuevo cuño, esto es de los positivistas críticos”.

<sup>1058</sup> Dorado Montero, P., *El positivismo en la ciencia jurídica y social italiana*, Madrid: Imprenta de la Revista de Legislación, 1891, p. 249.

<sup>1059</sup> Dorado Montero, P., *El positivismo en la ciencia jurídica y social italiana*, Madrid: Imprenta de la Revista de Legislación, 1891, p. 249.

<sup>1060</sup> Dorado Montero, P., *El positivismo en la ciencia jurídica y social italiana*, Madrid: Imprenta de la Revista de Legislación, 1891, Footnote (2), p. 249.

especially to the “hegelian one”, at the same time they acknowledged the need of Legal Philosophy to “have in mind much of the acquisitions” by the “so-called experimental sciences”.<sup>1061</sup> He concluded with a very illustrative quotation: “Actually, they do not belong to the critical direction which we are examining [...], neither can they be exactly included within the purely idealist direction”.<sup>1062</sup> I believe that Dorado Montero’s theories suggested a more positivist taste, rather than the neutral, usually meaningless classification of ‘eclectic’. Some authors who came after him identified this special place in the doctrine, like Antón Oneca who described him as a: “respectful son of the correctionalist school” in whom, nevertheless, the “positivist influence remained”, since it was first acquired “during his stay in Bologna as a scholar of the *Colegio de San Clemente*”.<sup>1063</sup>

However, I appreciate certain nuances in which an eclectic positioning can be glimpsed. When he described the first stages of the development of positivism, he identified three main stages: the first one (1865 to 1870) with the influence of Gabelli, Villari, and Angiulli; the second one (1870-1880), in which positivism and its relevance grew exponentially; and the third one (1880-onwards), when positivism ruled and dominated “in all spheres of thought almost with no contradiction”.<sup>1064</sup> It was such “almost with no contradiction” where Dorado Montero appreciated the existence of some incoherences in positivist postulates. This orientation seemed to be confirmed later on when he argued that while the representatives of the positivist and the neoclassical schools fiercely fought to dominate over each other, “a third one came” which was “more rational” precisely “for being less exaggerate”, and which he thought it was “the one that will prevail”.<sup>1065</sup> Thereupon, a general idea obtained from Carle which I have not been

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<sup>1061</sup> Dorado Montero, P., *El positivismo en la ciencia jurídica y social italiana*, Madrid: Imprenta de la Revista de Legislación, 1891, Footnote (2), p. 249.

<sup>1062</sup> Dorado Montero, P., *El positivismo en la ciencia jurídica y social italiana*, Madrid: Imprenta de la Revista de Legislación, 1891, Footnote (2), p. 249.

<sup>1063</sup> Antón Oneca, J., “La teoría de la pena en los correccionistas españoles”, *Estudios Jurídico-Sociales, Homenaje al Profesor Legaz y Lacambra*, tomo II, Santiago, 1960, p. 1024: “Hijo respetuoso de la escuela correccional, en quien, sin embargo, prevaleció la influencia positivista, recibida durante su estancia en Bolonia como escolar del Colegio de San Clemente”.

<sup>1064</sup> Dorado Montero, P., *La antropología criminal en Italia*, Madrid: Imprenta de la Revista de Legislación, 1889, p. 13.

<sup>1065</sup> Dorado Montero, P., *La antropología criminal en Italia*, Madrid: Imprenta de la Revista de Legislación, 1889, p. 13.

able to trace,<sup>1066</sup> held that “the Italian people is very fond on middle terms, and very willing, by its nature, character, customs and history to move away equally from the both German idealism and the English positivism”.<sup>1067</sup> But anyway, he ended up using the term ‘eclecticism’. When referring to this sort of ‘Terza Scuola’ he concluded the following:

“Many people will unfairly call [this new philosophical trend] after ‘eclectic’, but it is, honestly, the single one existing in Italy, even with the infinite number of nuances that can exist between two opposed colours”.<sup>1068</sup>

Thus, something close to a doctrinal eclecticism could be found in Dorado Montero. When analysing the divorce, he concluded the following:

“The legislator should not only take into account the opinion of the majority, but he should also take into account the opinion of the minority, and pay attention to it. If there is any majority to be heard, it is that of the wisemen and people of relevance in the country; not [the opinion] of all the inhabitants without distinction, because, in this case, the over-excitement of the passions may conquer a great number of followers in favour of a rule which is neither the best nor the fairest. Truth, just as virtue, is usually in the hands of a few”.<sup>1069</sup>

Jorge Barreiro stood out that the figure of Dorado Montero protruded “due to his doctrinal eclecticism” because he was “conceiving the penalty as a protection or tutelage of the criminal” yet, at the same time, he grounded such thesis in the “determinist hypothesis”, confirming this equidistant positioning

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<sup>1066</sup> It probably belongs to from Carle’s single work quoted in *La antropología criminal en Italia*: Carle, G., *La vita del diritto nei suoi rapporti colla vita sociale. Studio comparativo di filosofia giuridica*, Torino: Fratelli Bocca, 1880.

<sup>1067</sup> Dorado Montero, P., *La antropología criminal en Italia*, Madrid: Imprenta de la Revista de Legislación, 1889, p. 13.

<sup>1068</sup> Dorado Montero, P., *La antropología criminal en Italia*, Madrid: Imprenta de la Revista de Legislación, 1889, p. 14: “dirección que muchos llamarán injustamente ecléctica; que en puridad es la única existente en Italia, aunque con los infinitos matices que pueden existir entre dos colores opuestos”.

<sup>1069</sup> Dorado Montero, P., “Recensión de la obra de L. Olivi: ‘El Congreso jurídico de Florencia y la cuestión del divorcio’”, *RGLJ*, 1892, Vol. 41, No. 82, 1893, pp. 196-198, p. 198: “El legislador no debe tener en cuenta tan solo la opinión de la mayoría, sino que también debe hacerse cargo de la minoría, y atenderla. Si á alguna mayoría debe atender es á la de los sabios y á las de las personas de cierta representación en el país, no á la de todos los habitantes sin distinción, porque, en este caso, la sobreexcitación de las pasiones puede conquistar un gran número de adeptos en favor de una regla que no es la mejor ni la más justa. La verdad, como la virtud, suelen ser patrimonio de pocos”.

between correctionalism and positivism, respectively.<sup>1070</sup> Some others did not use the term “eclectical” but, instead, they resorted to other ones which were nothing but synonyms thereof. Jiménez de Asúa included him within the “Spanish critic positivism”.<sup>1071</sup> Dorado Montero himself acknowledged the excesses of positivism and offered an explanation to it: “Positivism has sometimes gone too far in its assertions, just because it was required so due to its position: completely contrary to idealism. In order to offset an exaggeration, an imbalance, another exaggeration and imbalance of similar or superior strength is needed. Against the absolute and sole dominion of the abstract school in Italy (especially over the law), it necessarily had to come the absolute and sole dominion of the positivist and experimental school”.<sup>1072</sup> This third school started in Italy, it was named after the *Terza Scuola*, and its main exponents were Bernardino and Alimena.<sup>1073</sup>

In the early stage of his academic production, a rather definitive statement on his eclectic positioning took place when affirming of positivism that “far from being the doctrine of the future, it will end up leaving the place for a third one [...] It is the doctrine of critical positivism, product of the fusion and correction of idealism and positivism”. Following this recognition, a very good description of this “third school” was provided: “to reach the Kantian solution with presence of new elements which Kant could not know, even if he wondered them”.<sup>1074</sup> His definition merged a doctrine based upon Kant’s philosophy with new scientific and positivist elements. He adopted quite a reconciliatory tone when asserting that new theories were “nothing but an unavoidable consequence”

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<sup>1070</sup> Jorge Barreiro, A., *Las medidas de seguridad en el Derecho español*, Madrid: Civitas, 1975, p. 46.

<sup>1071</sup> Asúa, J., *Tratado de Derecho penal, 1949-1963*, Vol. II, p. 139.

<sup>1072</sup> Dorado Montero, P., *La antropología criminal en Italia*, Madrid: Imprenta de la Revista de Legislación, 1889, p. 19: “el positivismo ha ido á veces demasiado lejos en sus afirmaciones, porque así lo requería su misma posición, de todo en todo contraria al idealismo; en cuanto para contrabalancear una exageración, un desequilibrio, se necesita otra exageración y desequilibrio, de la misma, y á veces mayor fuerza que los primeros. Contra el absoluto y único dominio de la escuela abstracta en Italia, sobre todo en el derecho, ha debido forzosamente venir el absoluto y único dominio de la escuela experimental y positiva”.

<sup>1073</sup> Vinci, S., “Bernardino Alimena and Emanuele Carnevale: The Third School of Criminal law searching for a compromise”, *GLOSSAE. European Journal of Legal History*, No. 17, 2020.

<sup>1074</sup> Dorado Montero, P., *La antropología criminal en Italia*, Madrid: Imprenta de la Revista de Legislación, 1889, p. 20.

of the old ones.<sup>1075</sup> He assumed that the former ones were a necessary step in humanity's development. Going only part of the way was not the same as going the wrong way.<sup>1076</sup> That was another reason to consider he was not that radical. He did not support the idea of a positivist movement which broke with the past, but rather as mere evolution from the original Classical School. That arrogant, bittersweet attitude of the Anthropological School holding their superior originality on the top of the Classical School was reproved by Dorado Montero:

“It is, after all, rather strange that precisely those who rest the most on the principle *natura non facit saltum*, i.e. the principle of the gradual evolution of every organism, are the ones claiming that their science came to the world all of a sudden”.<sup>1077</sup>

Denial of freewill was both something “explicit and implicit in thinkers of all times” and an “exigence of contemporary society”. There was quite a big number of thinkers abrogating for the “possibility of renouncing to this premise [freewill] to ground imputability and criminal liability”.<sup>1078</sup> Something similar happened to the laws and codes when for incriminatory purposes they “attended more to the material and moral damage” rather than tending to the “voluntary element of the action”. This was something that should not surprise us, since such idea (plus mitigating and aggravating circumstances) already took place within the Classical School itself -Beccaria and Filagieri-, and also within the new school. Yet, Dorado Montero recognised that such aspect already came given by the correctionalist school.<sup>1079</sup>

According to Dorado Montero, the main criticism against the Positivist School laid on taking just one principle out of all the existing positivist ones, namely: determining the penalty according to the personal circumstances of the criminal, rather than focusing on the seriousness of the crime. In order for the

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<sup>1075</sup> Garofalo, R., *Indemnización á las víctimas del delito*, Madrid: La España Moderna, 1890, p. 18.

<sup>1076</sup> Gaarder, J., *Sophie's World*, New York: Berkley Books, 2002, p. 65.

<sup>1077</sup> Garofalo, R., *Indemnización á las víctimas del delito*, Madrid: La España Moderna, 1890, p. 18: “No deja de ser extraño que, precisamente aquellos que más se sirven del principio *natura non facit saltum*, esto es, del principio de la evolución gradual de todo organismo, sean los que pretenden que su ciencia haya venido al mundo completamente de golpe”.

<sup>1078</sup> Garofalo, R., *Indemnización á las víctimas del delito*, Madrid: La España Moderna, 1890, p. 19.

<sup>1079</sup> Garofalo, R., *Indemnización á las víctimas del delito*, Madrid: La España Moderna, 1890, p. 20.



new science to work properly, it was necessary to accept all the principles at once: “all the principles require and complement each other”.<sup>1080</sup> Otherwise, there was nothing but “contradiction and inconsistency”.<sup>1081</sup> In the book review of Mr Lacoïntia, he highlighted that the author incurred into many “contradictions”, since he admitted “the death penalty” but criticised “the Italian penal code” precisely for “having abolished it”.<sup>1082</sup> Those tensions as regarded the death penalty were a natural process as depicted by Bernaldo de Quirós:

“At this stage, the old question that concerned only the death penalty pervades all penalties, and the abolitionist of the former joins hands with the abolitionist of penal servitude as a whole. From Beccaria to Röder and from the latter to Vargha, Dorado, Poletti, and Solovieff, covering a period of a century, this process has gone on and still continues, being completed, from its positive side, by the elaboration of that penal substitute which is destined to better fulfill its function in civilized countries, namely, the system of tutelage which is being organized in penitentiary science”.<sup>1083</sup>

Within the Italian Criminal Code, even though Lacoïntia held the legitimacy of the death penalty, he praised the “removal” of many dispositions thereof which entailed “refusals of certain rights belonging to the personality”. He was thinking of “defamatory punishments”,<sup>1084</sup> “seizure of goods”, “forced labour” and “corporal punishments”, among others.<sup>1085</sup> On the other hand, the penalty ought to be “reforming”, as shown by “solitary confinement” (pp. 38-39) and “conditional freedom” (pp. 40-41); yet, at the same time, it should be “afflictive and exemplary”, such as the “death penalty” and “life imprisonment” (pp. 35-

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<sup>1080</sup> Garofalo, R., *Indemnización á las víctimas del delito*, Madrid: La España Moderna, 1890, p. 26.

<sup>1081</sup> Garofalo, R., *Indemnización á las víctimas del delito*, Madrid: La España Moderna, 1890, p. 26.

<sup>1082</sup> Dorado Montero, P., “Recensión de la obra de Jules Lacoïntia: ‘Code pénal d’Italie’”, *RGLJ*, Vol. 39, No. 78, 1891, pp. 265-267.

<sup>1083</sup> Bernaldo de Quirós, C., *Las nuevas teorías de la criminalidad*, Madrid: Imp. Revista de Legislación, Madrid, 1898, pp. 236-237.

<sup>1084</sup> In Spanish, “penas infamantes”. For a detailed historical study vid. Masferrer, A., *La pena de infamia en el Derecho histórico español. Contribución al estudio de la tradición penal europea en el marco del ius commune*, Madrid: Dykinson, 2001, 429 pp. On the same issue vid. Cañizares Navarro, J.B., *Las penas infamantes en la Codificación penal francesa*, Madrid: Dykinson, 2020, 332 pp.

<sup>1085</sup> Dorado Montero, P., “Recensión de la obra de Jules Lacoïntia: ‘Code pénal d’Italie’”, *RGLJ*, Vol. 39, No. 78, 1891, p. 266.

37).<sup>1086</sup> That was probably why Dorado Montero, at his classification, maintained that Lacointa “did not belong to the new anthropological school, nor to the old ‘expiation’ schools, neither to the pure correctionalist school” but he should rather be “included within the eclectic school”.<sup>1087</sup> Nevertheless, there were certain elements which Dorado Montero agreed upon such as “judicial discretionality on the determination of the penalty”, “compensation to those wrongfully accused” and “modifying circumstances of responsibility”.<sup>1088</sup> For Dorado Montero, the whole model should be adopted. Picking up some principles of the Classical School, a couple from Correctionalism and two or three of the Positivist School was an incorrect approach. Taking ‘partial’ models was to make them crumble. Even if they chose a positivist feature (accepting personal circumstances) instead of a classical one (seriousness of the crime), the rest of the positivist principles rested unaccepted. The penalty as a special tutelle that the criminal required (due to his situation of inferiority) was not accepted; the idea that the penalty was not a harm, but that actually it was a good was not acknowledged; the notion of the penalty as to have a retributive character was not even considered; and the penalty’s imposition *quia peccatum est* instead of a *ne peccetur* one was not contemplated.<sup>1089</sup> Consequently, “the separation of those assertions, so intertwined among them” could only “mutilate the system” and “lead it to a mistake”.<sup>1090</sup> And so, most of the times they incurred into “insoluble contradictions”; positivists tried to get together “principles that mutually reject each other” and “principles belonging to incompatible systems themselves”.<sup>1091</sup> Ultimately, that was the case of the author we are analysing: Garofalo. Apparently, Garofalo asked for certain characteristics which were difficult to reconcile with his positivist position: he demanded the application of the

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<sup>1086</sup> Dorado Montero, P., “Recensión de la obra de Jules Lacointia: ‘Code pénal d’Italie’”, *RGLJ*, Vol. 39, No. 78, 1891, p. 267.

<sup>1087</sup> Dorado Montero, P., “Recensión de la obra de Jules Lacointia: ‘Code pénal d’Italie’”, *RGLJ*, Vol. 39, No. 78, 1891, p. 266.

<sup>1088</sup> Dorado Montero, P., “Recensión de la obra de Jules Lacointia: ‘Code pénal d’Italie’”, *RGLJ*, Vol. 39, No. 78, 1891, p. 267.

<sup>1089</sup> Garofalo, R., *Indemnización á las víctimas del delito*, Madrid: La España Moderna, 1890, pp. 26-27.

<sup>1090</sup> Garofalo, R., *Indemnización á las víctimas del delito*, Madrid: La España Moderna, 1890, p. 27.

<sup>1091</sup> Garofalo, R., *Indemnización á las víctimas del delito*, Madrid: La España Moderna, 1890, p. 27.

penalty *quia peccatum est*; he complained that the penalties progressively acquired the character of ‘disciplinary corrections’; he asked for an increase in the severity of the repression; he frequently asked for the death penalty to be applied -also due to intimidation purposes-; and he opposed to the mitigation of the penalty.<sup>1092</sup> Some assertions of this author reminded Dorado Montero far too much of the classical postulates, which he particularly abhorred: “conception of the penalty as revenge, as a punishment, as a retribution of the inflicted harm”.<sup>1093</sup> Therefore, the credibility of positivists was undermined: if they defended a *quia peccatum est* conception (instead of a *ne peccetur* one, as they should), pursuing to better know the circumstances of the criminal for the purpose of the application of the penalty was just pointless. Hence, there was one of the heading, many contradictions of the positivist school.<sup>1094</sup>

Therefore, our author, “who was a disciple of Ferri”,<sup>1095</sup> was not subjected to a clear categorisation. He himself abrogated for a “detachment” and he “openly rejected the naturalist-criminological canon” since he deemed the “belief on the ‘born criminal’ and the repressive social defence” to be ultimately incompatible with a “progressive (correctionalist) and preventive conception”.<sup>1096</sup> Even if we thought of Dorado Montero more as a positivist than as an eclectic, there still remained the question as to whether he could be considered more of a correctionalist than a positivist. That issue for Dorado Montero has virtually no relevance at all: “both of them have met the same essential purpose, i.e. even if both have been born on their own without caring one for each other, they are daughters of the same social cause: the need to reform the penalty”.<sup>1097</sup> He talked about a process of ‘correctionalisation’ of the Positivist School. Essentially, the

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<sup>1092</sup> Garofalo, R., *Indemnización á las víctimas del delito*, Madrid: La España Moderna, 1890, p. 28.

<sup>1093</sup> Garofalo, R., *Indemnización á las víctimas del delito*, Madrid: La España Moderna, 1890, p. 28.

<sup>1094</sup> Garofalo, R., *Indemnización á las víctimas del delito*, Madrid: La España Moderna, 1890, p. 29: “The new school is riddled with those inevitable contradictions”.

<sup>1095</sup> Calvo González, J., “Naturalismo y direcciones criminológicas a finales del siglo XIX en España”, *Revista de derecho penal y criminología*, No. 12, 2003, pp. 255-270, p. 263.

<sup>1096</sup> Calvo González, J., “Naturalismo y direcciones criminológicas a finales del siglo XIX en España”, *Revista de derecho penal y criminología*, No. 12, 2003, pp. 255-270, p. 263.

<sup>1097</sup> Garofalo, R., *Indemnización á las víctimas del delito*, Madrid: La España Moderna, 1890, p. 22: “Ambas han respondido al propósito esencial, esto es, que ambas, aunque han nacido de por sí y sin preocuparse la una de la otra, son hijas de la misma causa social: la necesidad de reformar la penalidad”.

Correctional School had paved the way for the Positivist School. The latter “has received from correctionalism its most wholesome and acceptable part”. Conclusively, the “decisive step” which the Positivist School had to take was “denying any repressive character” on the penalty, in order to acknowledge on it “only the preventive one”.<sup>1098</sup> At the very end, they had to merge in one. Labels, in such scenario, were not important.

## **2. The ‘Doradian’ contribution**

The insights on the stage of criminal science’s role on his time were depicted by Dorado Montero. He asserted that the penal science found itself “in very critical moment”, which all sciences experimented when they went through “the experimental method”, i.e. the so-called “analitical moment”.<sup>1099</sup> This period was characterised by one aspect: researchers were so focused “in determining the basis of such sciences” that they forget “going into the general inductions” which are, essentially, the result of “the coordination of a notorious number of data, and the compenetration and systematisation of all subordinate inductions belonging to different fields of exploration”.<sup>1100</sup> Unsurprisingly, that seems to be the case of actual society in which the use of big data, numerous disciplines and their respective knowledge are being combined, thus, generating interdisciplinary areas of wisdom.

Concerned researchers did what Descartes said it had to be done with philosophy: “as the new house is erected, one must make use of the old one; as the new general criminal conceptions are elaborated [...], one must keep on using the old conceptions”.<sup>1101</sup> It was precisely the “cause for inevitable contradiction” in which fell all those who “trying to reconstruct on new basis the edifice of

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<sup>1098</sup> Garfalo, R., *Indemnización á las víctimas del delito*, Madrid: La España Moderna, 1890, p. 22.

<sup>1099</sup> Dorado Montero, P., *Problemas de Derecho penal*, Madrid: Imprenta de la Revista de Legislación, 1893, p. IX.

<sup>1100</sup> Dorado Montero, P., *Problemas de Derecho penal*, Madrid: Imprenta de la Revista de Legislación, 1893, p. IX.

<sup>1101</sup> Dorado Montero, P., *Problemas de Derecho penal*, Madrid: Imprenta de la Revista de Legislación, 1893, p. X-XI.

Criminal law” started “leaving the foundations standing”.<sup>1102</sup> Along with the presented metaphor, they claimed for “a set of reforms”, whose spirit “could not be other than that of the criminal function as a completely preventive one”.<sup>1103</sup> Besides, the location of Dorado Montero’s project should not be summarised as the mixture of the neoclassical school and positivism, but a mixture between correctionalism and positivism, i.e. “the union of the correctionalist school and of the positivist one, the infusion of spirit of the first one into the messy cluster of data of the second one; the widening of the metaphysical, closed framework of the former one with the young, alive blood arising from experimental observation which the latter brings”.<sup>1104</sup>

As regarded the particular impact he had, a particular concern can be raised: two visions collided. The first view was a post-Dorado Montero one. His influence, modernity or degree of success were assessed as compared to our current standards. The second view was the perception in his time: to which extent were his arguments accepted or contested? For our research, it is important to take into account the last one, since it determined the degree of acceptance of such philosophy back then. Nowadays, the bias is too big, and it would be blatantly incorrect to assert he had such relevance in Spain in a time in which positivism was utterly distrusted. Maybe not even because they knew it could lead to totalitarianism, fascism and Nazism, but simply, because it was too different from the neoclassical thought. Pointing out he was very advanced for his time tended to distort the analysis of the reception of doctrinal positivism within Spain. Thus, I am inclined to think that neo-classical thinkers attempted at highlighting the reduced acceptance that his theories had. Whereas, on the other hand, positivists tried to magnify his relevance in an attempt to show the accuracy

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<sup>1102</sup> Dorado Montero, P., *Problemas de Derecho penal*, Madrid: Imprenta de la Revista de Legislación, 1893, p. X-XI.

<sup>1103</sup> Dorado Montero, P., *Problemas de Derecho penal*, Madrid: Imprenta de la Revista de Legislación, 1893, p. X-XI.

<sup>1104</sup> Dorado Montero, P., *Problemas de Derecho penal*, Madrid: Imprenta de la Revista de Legislación, 1893, p. XIV: “la unión de la escuela correccionalista y de la positiva, la infusión del espíritu de la primera en el cúmulo no muy ordenado de datos de la segunda, el ensanchamiento del molde metafísico y cerrado de aquella con la sangre joven y viva, procedente de la observación experimental, que trae ésta”.

of their statements, given that Dorado Montero was undeniably closer to positivism.

It has been widely accepted that Jiménez de Asúa was the main figure as to the development of the legal dogmatics of Criminal law. Nevertheless, it was Dorado Montero the one who planted the seed of the early development of legal dogmatics in Spain. He came before and he was the precursor of the criminal science in Spain. His sharp personality and the fresh approach he brought to penal law was very praised by Valentí i Camp:

“Dorado Montero, who was one of our few, real wisemen, brought to penology a very wide revisionist principle [...] Martínez Ruiz (Azorín) depicted the figure of Dorado Montero in a very adequate sentence when he said: ‘He is a man that embraces reality and thinks’”.<sup>1105</sup>

Forasmuch as some authors published more works and tended to overlook their teaching obligations, it was not the case for Dorado Montero. He was a prolific writer with a cutting-edge academic production, and also a devoted, outstanding teacher: “Not just his contribution to penology, but his contribution to teaching and pedagogy will not remain unnoticed either”.<sup>1106</sup> Besides, the *Révue internationale de sociologie* consecrated one section to the Castilian author in one of his volumes:

“We have learned from the decease of several sociologists whose memory must be remembered. [...] Mr Pedro Dorado Montero was born in Navacarros on May 19<sup>th</sup> 1861. He became professor of Criminal law at the University of Salamanca. He developed a great interest for criminal sociology and anthropology. He translated into Spanish many of the writings of R. Garofalo. He was the author of several works in Spanish such as: *Criminal Anthropology in Italy*, *Positivism in the Italian Social and Legal Science*, *Criminal Law Problems*, *The Reformatory of Elmira*, *Studies of Preventive Criminal Law*, *Criminal Law in Spain*, *Grounds for a New Criminal Law*, *New Criminal*

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<sup>1105</sup> Valentí i Camp, S., *Ideólogos, videntes y teorizantes*, Barcelona: Minerva, 1922, p. 105: “Dorado Montero, que era uno de nuestros pocos sabios de verdad, llevó a la Penología un criterio ampliamente revisionista [...]. Martínez Ruiz (Azorín) trazó en una frase acertadísima la silueta de Dorado Montero cuando dijo: ‘Es un hombre que se abraza a la realidad y piensa’”.

<sup>1106</sup> Maldonado de Guevara y Fernandez Ocampo, L., *Elogio de Dorado Montero y otros catrdráticos de Salamanca. Discurso pronunciado en la Universidad de Salamanca en la apertura del curso 1919 a 1920*, Salamanca: Impr. Núñez, 1919, p. 38.

*Horizons, Medical Exigencies and Criminal Justice, About Criminology and Penology, Criminal Psychology in Our Legislation, The Protective Law of the Criminals, Social Value of Laws and Authorities, and Law and Its Priests.* Dorado Montero did welcome the foundation of our review and since its very origin it appeared on the lists of its main collaborators. On the next year, he contributed with a long article on responsibility on crime and its extension, published in our number issued on September 1894. Furthermore, Mr Dorado was one of the first scholars who got into the International Institute of Sociology after its foundations. He became a member on 15<sup>th</sup> August 1913. In the third congress, held in Paris on July 1897, he sent a very relevant study: *The Role of Criminal Justice in the Future*. It started a great discussion in which several personalities took part, such as Ferdinando Puglia, Jacques Novicow, René Worms, Casimir de Kelles-Krauz, Paul de Lillienfeld, Oscar d’Araujo, Alfred Espinas (out of which only two of them remain alive). This publication could not fail to remember this collaboration. It did so electing Mr Pedro Dorado Montero among its vice-presidents for the year 1918. The deserving Spanish criminologist very much appreciated the distinction spontaneously granted on behalf of his colleagues. It was one of the last one he received. After being stroked by a certain disease, he decided to retreat to Salamanca in 16<sup>th</sup> January 1919”.<sup>1107</sup>

The aforementioned author, René Worms, referred to him as a ‘criminologist’. Also, many other authors referred to him as a ‘sociologist’, and actually Dorado Montero was a ‘penalist’.<sup>1108</sup> The boundaries between those sciences were not clear: criminal anthropology was rebaptised as ‘criminology’ some years after. Positivism was the general scheme in which those disciplines were included, and sometimes a great part of Dorado Montero’s ideas shared more traits with Sociology than with Criminology (so to speak, the “sociological theses” which were defended by “Gabriel Tarde, Durkheim or even Ferri”).<sup>1109</sup> Dorado Montero was appointed as one of the responsible personalities of the reception of positivism in Spain: “Rafael Salillas, Pedro Dorado Montero (1861-

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<sup>1107</sup> Worms, R., “Chronique”, *Revue internationale de sociologie*, No. 28, Paris: Marcel Giard & Cie, 1920, pp. 328-329.

<sup>1108</sup> Though he touched many other related sciences, his main field was Penal law.

<sup>1109</sup> Masferrer, A., “The Reception of the Positivist School in the Spanish Criminal Doctrine (1885-1899)”, *GLOSSAE. European Journal of Legal History*, No. 17, 2020, pp. 303-352, p. 2.

1919) and Constancio Bernaldo de Quirós (1873-1959) were direct responsible or inducers of the new awareness and interest leading to such reception”.<sup>1110</sup>

The figure of Dorado Montero had a very relevant impact on many authors (national, European, and international). In a letter dated 25<sup>th</sup> February 1910, Alfonso S. Carranza asked Dorado Montero to read his book *Régimen carcelario argentino* and to give some feedback on it.<sup>1111</sup> He looked after his “informed opinion” and, thus, he enclosed a copy of such work. Apparently, he “had read Dorado Montero’s valuable works on Criminal law” and he “took some paragraphs which absolutely matched the ideas” he held.<sup>1112</sup> Carranza was not the single one though. There were some others such as Edmund Mezger, Luis Jiménez de Asúa, Hanz Welzel,<sup>1113</sup> José Álvarez-Buylla Godino, Constancio Bernaldo de Quirós and José Antón Oneca. I am briefly addressing the three latter.

On the one hand, there were Franz von Liszt (1851-1919) and Pedro Dorado Montero (1860-1919), who lived approximately in the same period of time. On the other hand, Luis Jiménez de Asúa (1889-1970) and José Antón Oneca (1897-1981) also lived nearly in the same period of time, respectively. Therefore, there were huge interconnections between the four jurists. José Antón Oneca had attended von Liszt’s seminars of criminal law.<sup>1114</sup> Von Liszt was the greatest influence of Jiménez de Asúa, who was the most outstanding pupil from Dorado Montero. Jiménez de Asúa, altogether with Mariano Ruiz-Funes, was at the examining tribunal when Antón Oneca applied for the Chair of Criminal law of

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<sup>1110</sup> Calvo González, J., “Naturalismo y direcciones criminológicas a finales del siglo XIX en España”, *Revista de derecho penal y criminología*, No. 12, 2003, pp. 255-270, p. 263: “Inductores o directos responsables en la nueva sensibilidad e interés que conduce a esa recepción habrían sido el mencionado Rafael Salillas, así como Pedro Dorado Montero (1861-1919) y Constancio Bernaldo de Quirós (1873-1959).”

<sup>1111</sup> Carranza, A., *Régimen carcelario argentino*, Buenos Aires: Talleres Gráficos la Victoria, 1909.

<sup>1112</sup> “Carta de Alfonso S. Carranza a Pedro Dorado Montero”, *FPDM. Correspondencia de Pedro Dorado Montero con intelectuales hispanoamericanos*. Seen on 31.01.2021. Link: <https://gredos.usal.es/handle/10366/76721>.

<sup>1113</sup> His contribution and influence revolved mainly around the “finalism” as opposed to “causalism”. Vid. Roldán Cañizares, E., *Luis Jiménez de Asúa: un jurista en el exilio*, Sevilla: Universidad de Sevilla, 2017-2018, pp. 307-309, and pp. 311-318.

<sup>1114</sup> Calvo González, J., “José Antón Oneca”, *Diccionario biográfico español (Real Academia de la Historia)*. Link: <http://dbe.rah.es/biografias/11648/manuel-mariano-de-lardizabal-y-uribe>. Seen on 17.10.2020.



the University of Salamanca.<sup>1115</sup> He came to direct the review *Anuario de Derecho Penal y Ciencias Penales* and, as regarded his scientific production, he especially focused on:

“the criminal codification processes in Spain, as well as the criminal reformism in the Enlightenment philosophy (Marquis of Beccaria, Manuel de Lardizábal y Uribe, Jeremy Bentham; respect the theories of the special prevention of the penalties, even though with a prevalence of the retribution theory and some vanguardist statements on general prevention), and criminal correctionalism and its doctrinal basis in Spain (Félix de Aramburu y Zuloaga and Pedro Dorado Montero; correctionalist-positivist trend on the rehabilitation or resocialisation of the inmate)”.<sup>1116</sup>

Lardizábal, the relevant Spanish penologist,<sup>1117</sup> had related to other enlightened scholars such as Jovellanos or Martínez Marina. His own influence was, nevertheless, independent from those authors, since his work was spread to Latin America, thus, contributing to the ideas of Beccaria thereof, the author who shaped the majority of his thought. However, this latter assertion has often been nuanced as to stress the degree of originality of Lardizábal.<sup>1118</sup> Besides, he was also known as the Spanish Beccaria,<sup>1119</sup> due to the importance that his ideas had on the criminal reform.

His thought was, indeed, a complex one. As Dorado Montero himself, it was rather difficult to label:

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<sup>1115</sup> He finally obtained the Chair in 1923.

<sup>1116</sup> Calvo González, J., “José Antón Oneca”, *Diccionario biográfico español (Real Academia de la Historia)*. Link: <http://dbe.rah.es/biografias/11648/manuel-mariano-de-lardizabal-y-uribe>. Seen on 17.10.2020: “los procesos de codificación penal en España, así como del reformismo penal en la filosofía de la Ilustración (marqués de Beccaria, Manuel de Lardizábal y Uribe, Jeremy Bentham; respecto de las teorías de la prevención especial de las penas, aunque aún con predominio de la teoría de la retribución, y precursores planteamientos de la prevención general), y correccionalismo penal y sus bases doctrinales en España (Félix de Aramburu y Zuloaga y Pedro Dorado Montero; dirección correccionalista-positiva sobre rehabilitación o resocialización del preso)”.

<sup>1117</sup> Lardizábal y Uribe, M., *Discurso sobre las penas, contrahido á las leyes criminales de España, para facilitar su reforma*, Madrid: J. Ibarra, 1782.

<sup>1118</sup> Quintero Olivares, G., “Beccaria y el Iluminismo italiano en la cultura jurídica hispana”, Arroyo Zapatero, L.; Estrada Michel, R.; Nieto Martín, A., (Edit.), *Metáfora de la crueldad. La pena capital del tiempo de Cesare Beccaria al tiempo actual*, Cuenca: Ediciones de la Universidad de Castilla-La Mancha, 2016, pp. 53-78, p. 67: “Lardizábal, in many of his stances, initiates by displaying Beccaria’s opinion, and then he develops his own opinion, whether he agrees or disagrees with Beccaria”.

<sup>1119</sup> In words of Quintiliano Saldaña.

“The basis of his thought is the Christian rationalism of the Second Spanish Scholastics, without any contact with the classical school, much less with the liberal rationalist and laicist of his days, with which, nevertheless, shared the same concern for the reform of societies and institutions”.<sup>1120</sup>

A proof of such complexity lied in his varied background, given he frequently quoted “thinkers belonging to the naturalist rationalism of the 17<sup>th</sup> century (like Grotius or Puffendorf)” but also even with “his contemporaries who did not match his thought (like the jurist and politician Brissot de Warville or Rousseau)”.<sup>1121</sup> Antón Oneca came to point out that he differentiated himself from the enlightened foreign penalists in listing among the particular ends of the penalty, in the first place, the reform. Throughout this work it has been substantially stated the predominant role which was attributed to Jiménez de Asúa as the developer of legal dogmatics, it was not surprising that his pupil, Antón Oneca, was remarkable for the “dogmatic construction of the crime of assault -delito de lesiones-”.<sup>1122</sup> Finally, if we went on a descending line of influence, one of Antón Oneca’s most known pupils was Marino Barbero Santos,<sup>1123</sup> outstanding scholar who, at its turn, directed the doctoral thesis of Luis Alberto Arroyo Zapatero.<sup>1124</sup>

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<sup>1120</sup> Soria Sesé, L., “Manuel Mariano de Lardizábal y Uribe”, *Diccionario biográfico español (Real Academia de la Historia)*. Link: <http://dbe.rah.es/biografias/11648/manuel-mariano-de-lardizabal-y-uribe>. Seen on 15.10.2020: “La base de su pensamiento es el racionalismo cristiano de la segunda escolástica española, sin ningún contacto con el de la escuela clásica y menos aún con el racionalista liberal y laico de sus días, con el que, no obstante, compartió una misma preocupación por la reforma de la sociedad y de las instituciones”.

<sup>1121</sup> Soria Sesé, L., “Manuel Mariano de Lardizábal y Uribe”, *Diccionario biográfico español (Real Academia de la Historia)*. Link: <http://dbe.rah.es/biografias/11648/manuel-mariano-de-lardizabal-y-uribe>. Seen on 19.10.2020.

<sup>1122</sup> Calvo González, J., “José Antón Oneca”, *Diccionario biográfico español (Real Academia de la Historia)*. Link: <http://dbe.rah.es/biografias/11648/manuel-mariano-de-lardizabal-y-uribe>. Seen on 17.10.2020.

<sup>1123</sup> Barbero Santos, M., *Marginación social y derecho represivo*, Barcelona: Bosch, 1980; *Política y derecho penal en España*, Madrid: Tucur Ediciones, 1977; “Estado constitucional de derecho y sistema penal”, *Revista de derecho y ciencias penales: Ciencias Sociales y Políticas*, No. 2, 2000, pp. 125-133; “Concepto de la pena en el primer Fichte”, *Boletín de la Real Academia de Extremadura de las Letras y las Artes*, TOMO 5, 2, 1994, pp. 205-215; “El sistema punitivo español”, *Cahiers de défense sociale: bulletin de la Société Internationale de Défense Sociale pour une Politique Criminelle Humaniste*, No. 17-18, 1990-1991, pp. 131-140; “La Défense sociale trente ans après”, *Cahiers de défense sociale: bulletin de la Société Internationale de Défense Sociale pour une Politique Criminelle Humaniste*, No. 13, 1986, pp. 27-36; and “Silvio Ranieri y la Escuela Positiva”, *Anuario de derecho penal y ciencias penales*, Tomo 22, Fasc/Mes 1, 1969, pp. 5-14.

<sup>1124</sup> In 2019, he held a Conference on the 100-year death anniversary of Pedro Dorado Montero. Vid. Arroyo Zapatero, L. A., “Centenario de la muerte de Don Pedro Dorado Montero: 100 años de ciencia penal en España”, *Instituto de Derecho Penal Europeo e Internacional*

The next author was José Álvarez-Buylla Godino. In a letter he wrote to Dorado Montero,<sup>1125</sup> one might appreciate several aspects. The first one is that he considered himself as both an “admirer” and a “disciple” of Dorado Montero. The second was that he had decided to write to him just because the his “beloved professor” and “friend of Dorado Montero”, Mr Adolfo Posada,<sup>1126</sup> had indicated him to do so after asking for “a book in legal anthropology, leaving aside those of Ferri and Lombroso”. The third one was that such book was “not very extense” and that it was “translated into French or Spanish”. Unfortunately, we do not know whether he answered him, and if he did, which work did he recommend.

Constancio Bernaldo de Quirós greatly expressed the several influences of Dorado Montero in his work *Las nuevas teorías de la criminalidad*.<sup>1127</sup> He reported that there were in Spain “two other works of the same character” whose “worth” was enormous, namely: Dorado Montero’s *Criminal Anthropology in Italy* and Aramburu’s *Modern Penal Science*.<sup>1128</sup> However, they both only treated the “anthropological aspect”. Even if it was the “most novel on account of its extraordinary apparatus unknown to jurists” they just “limited themselves to Italy”.<sup>1129</sup> Moreover, they limited themselves to expounding its operation in only one country, Italy. That was the reason why, after ten years from their publication, Bernaldo de Quirós had decided to “complete and continue them” to the best of his ability.<sup>1130</sup> The only thing that did not convince Bernaldo de Quirós was “Dorado’s personal equation”, i.e. his “his tendency to muddle up

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(*Universidad de Castilla-La Mancha*), Ciudad Real, 08.10.2019. Laura Pascual Matellán, whose work I quoted before, also took part in the aforementioned tribute.

<sup>1125</sup> “Carta de José Buylla Godino a Pedro Dorado Montero”, *Gredos: FPDM. Correspondencia de Pedro Dorado Montero*. Link: <https://gredos.usal.es/handle/10366/100228>.

<sup>1126</sup> His full name was Adolfo González-Posada y Biesca. He was full Professor of Political Law at the University of Oviedo, Senator on behalf of Oviedo (1921-1922) and, above all, a very prolific writer.

<sup>1127</sup> Bernaldo de Quirós, C., *Las nuevas teorías de la criminalidad*, Madrid: Imp. Revista de Legislación, Madrid, 1898. I use the English version: Bernaldo de Quirós, C., *Modern Theories of Criminality*, Boston: Little, Brown and Company, 1912.

<sup>1128</sup> Masferrer, A., “The reception of the positivist school in the Spanish criminal doctrine (1885-1899)”, *GLOSSAE. European Journal of Legal History*, No. 17, 2020, pp. 327-335.

<sup>1129</sup> Bernaldo de Quirós, C., *Las nuevas teorías de la criminalidad*, Madrid: Imp. Revista de Legislación, Madrid, 1898, p. XX.

<sup>1130</sup> Bernaldo de Quirós, C., *Las nuevas teorías de la criminalidad*, Madrid: Imp. Revista de Legislación, Madrid, 1898, p. XX.

matters”.<sup>1131</sup> A remark rather odd, considering he labelled Dorado Montero after the ‘radicals’, altogether with Vargha, Tolstoy and Solovyov.<sup>1132</sup> They did “repudiate the double entry penology of the reformers and developed only its preventive side” and such branch was “already in the decline”.<sup>1133</sup> Positivism which “took form in Italy under the influence of Ardigò and Siciliani”, and “organic correctionalism” which rose in Spain under the influence of Giner have been “happily combined by Dorado”, thus forming a “fusion perhaps never realised until now”.<sup>1134</sup> Lastly, as concerned this ‘radical branch’ which Bernaldo de Quirós spoke of, the tendency did “culminate in Tolstoy, who, according to Goldenweiser, has illustrated in his *Resurrection* the paradox of considering ‘punishment as a crime and crime as a punishment’”.<sup>1135</sup> He had a saying too on the fixed sentence:

“Nevertheless, we can easily understand how the principle of indeterminate sentence, or rather, the principle of sentence without previous determination is applicable to the general problem of fixed penalty. Thus stated, it is related to the corrective doctrine. It is difficult to understand how a writer like Garofalo may criticise it; because while, on one hand, he declares that the object of punishment is the correction of the delinquent, on the other, he establishes a fixed term for each crime, that is, a certain number of days, months, or years in a State institution. Garofalo’s Spanish translator, Dorado Montero, has felt it his duty to rectify this statement, citing against it the name of a Spanish correctionalist,<sup>1136</sup> who in several of his works has fought fixed

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<sup>1131</sup> Bernaldo de Quirós, C., *Las nuevas teorías de la criminalidad*, Madrid: Imp. Revista de Legislación, Madrid, 1898, p. 102.

<sup>1132</sup> Bernaldo de Quirós, C., *Las nuevas teorías de la criminalidad*, Madrid: Imp. Revista de Legislación, Madrid, 1898, p. 135.

<sup>1133</sup> Bernaldo de Quirós, C., *Las nuevas teorías de la criminalidad*, Madrid: Imp. Revista de Legislación, Madrid, 1898, p. 135.

<sup>1134</sup> Bernaldo de Quirós, C., *Las nuevas teorías de la criminalidad*, Madrid: Imp. Revista de Legislación, Madrid, 1898, pp. 136-137.

<sup>1135</sup> Bernaldo de Quirós, C., *Las nuevas teorías de la criminalidad*, Madrid: Imp. Revista de Legislación, Madrid, 1898, p. 138.

<sup>1136</sup> Bernaldo de Quirós was referring to Francisco Giner de los Ríos. Vid. Giner de los Ríos, F., *Principios de Derecho Penal*, Madrid, 1873, p. 170: “Among the many historical negations of the right understanding of punishment must be mentioned [...] the serious error of determining a priori and in an absolute way the duration of the penalty announced in the sentence, as if it could be anything but the one thing necessary to accomplish the end in view, and which, at the time the term is served, is still extremely uncertain”.

penalty, even before the time when Kraepelin and Willert asked for the abolition of fixed penalty”.<sup>1137</sup>

Willert himself asserted that “to established a fixed term for each crime” would be as if a physician prescribed “a treatment for a patient determining on which day he was to leave the hospital whether cured or not”.<sup>1138</sup>

To conclude, it should also be stressed out that Bernaldo de Quirós translated into Spanish<sup>1139</sup> the works of one of the authors who influenced the most in Dorado Montero: Enrico Ferri.<sup>1140</sup> Such version had a pointful impact in Spain since it became the most used version in the country.

### **3. Ending considerations**

As I started to suspect, Dorado Montero did not articulate neither a complex system nor a systematic arrangement thereof. His thought amounted to a profoundly theoretical approach, yet very ambitious, almost utopian. The several proposals he attempted to provide were not applicable neither to the historical and political reality of his time nor nowadays. After a careful scrutiny of his works, the reader might have the impression that he is still owed a clear proposal. Besides, the systems he drafted, were so abstract that the longed solution to the unfair system of Criminal law back on his time could not be found. In order to carry out the project he had in mind, consisting in mixing those “ingenious intuitions of the great poets of the abstract philosophical speculation” (a priori, theoretical discussions) with the “certitude arising from the observance of facts, its comparison and the inductions deriving thereof”, he was fully aware of the degree of reality needed to do so. Dorado Montero and his theory have both

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<sup>1137</sup> Bernaldo de Quirós, C., *Las nuevas teorías de la criminalidad*, Madrid: Imp. Revista de Legislación, Madrid, 1898, pp. 174-175.

<sup>1138</sup> Bernaldo de Quirós, C., *Las nuevas teorías de la criminalidad*, Madrid: Imp. Revista de Legislación, Madrid, 1898, pp. 174-175.

<sup>1139</sup> Ferri, E., *Los delinquentes en el arte*, Madrid: Librería de Victoriano Suárez, 1899.

<sup>1140</sup> Ferri, E., *I delinquenti nell' arte*, Genova: Libreria Editrice Ligure, 1896.

been labelled as ‘utopian’.<sup>1141</sup> Either this was not true or he promoted a remarkable realistic utopia:

“In pursuance of such work, the cooperation of many scholars and the assistance of many generations is needed, given its own nature. Thus, the claim that just one or few can carry it out, even if they were geniuses, turns out to be a reckless, absurd and ridiculous”.<sup>1142</sup>

The thought of Dorado Montero was pure abstraction. However, lack of concreteness was not uncommon in the time he lived: “Dorado appears as a committed intellectual inasmuch as he believes to have solutions but they are general and abstract, like if this generality character almost constituted a general rule on his time”.<sup>1143</sup> We are human beings living in a mundane world: we need of a practical system to live with. Even if it was to be imperfect to a major and minor extent. It is preferable a system with defects, rather than no system at all. It was somehow paradoxical that Dorado Montero, despite of being extremely abstract in his theoretical drafting, acknowledged as well the necessity of the theory meeting the needs of the ‘practical reason’. Before this situation of contradictory terms (determinism vs. freewill), the author observed that the most frequent practice was to “abandon, before the demands of life, the *fueros* of the ‘pure reason’ (or theoretical reason) in order to attend the imperatives of the ‘practical reason’”.<sup>1144</sup> It was a way out that could be observed within both supporters of determinism and akin to the new system, and within freewill followers and defenders of traditional conceptions.

On the other hand, I have reached the conclusion he predicted the future in newly developing sciences which are shaping our current world. It is true that certain disciplines and sectors of science are making openly irrational statements

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<sup>1141</sup> Antón Oneca, J., *La utopía penal...*, 1951; and Sánchez Granjel, L., “Medicina y Antropología en la génesis...”, 1989.

<sup>1142</sup> Dorado Montero, P., *Problemas de Derecho penal*, Madrid: Imprenta de la Revista de Legislación, 1893, p. XV: “Para una obra semejante, se necesita, dada su misma índole, la cooperación de muchos estudiosos y el concurso de muchas generaciones, por eso, la pretensión de que uno solo, ó pocos, aunque sean genios, han de poder llevarla á cabo, es una pretensión temeraria, absurda y hasta ridícula”.

<sup>1143</sup> Blanco Rodríguez, J. A., *El pensamiento sociopolítico de Dorado Montero*, Centro de Estudios Salmantinos: Salamanca, 1982, p. 9.

<sup>1144</sup> Dorado Montero, P., *El Derecho protector...*, v.1., p. 152.

attributing to science positions which it should never reach.<sup>1145</sup> Nevertheless, the very much hoped boom of biological sciences and of ‘genetics’ in particular was both predicted by him and needed according to his rationale.<sup>1146</sup> Most of them, are mixing criminal law, genetics, neurology, psychology and sociology. Nowadays, we are living a second Lombrosianism.<sup>1147</sup> If criminal anthropology<sup>1148</sup> was the groundbreaking event back then, nowadays its more accurate version from 2021 onwards is neurolaw.<sup>1149</sup> The new discipline is hard to delimit, and even

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<sup>1145</sup> Morse, S.J., “Avoiding irrational neurolaw exuberance: a plea for neuromodesty, *Mercer Law Review*, Vol. 62, 2011, pp. 837-859; “Criminal law and common sense: an essay on the perils of and promise of neuroscience”, *Public Law and Legal Theory Research Paper Series*, Vol. 99, 2015, pp. 38-72; Morse, J., “New Neuroscience, old problems”, Garland, B. (ed.), *Neuroscience and the Law*, Washington DC: Dana Press, 2004; “Moral and legal responsibility and the new neuroscience”, Illes, J. (ed.), *Neuroethics: defining the issues in theory, practice and policy*, New York: Oxford University Press, 2006. Also, in a parallel way: Greene, J.; Cohen, J., “For the law, neuroscience changes nothing and everything”, *Philosophical Transactions of The Royal Society B Biological Sciences*, 359, 2004, pp. 1775-1785; Bechtel, W.; Hamilton, A., “Reductionism, integration and the unity of the sciences”, Kuipers, T. (ed.), *Philosophy of science: focal issues*, New York: Elsevier, 2007.

<sup>1146</sup> Blair, J. R.; Mitchell, D.; Blair, K., *The psychopath: emotion and the brain*, Malden: Blackwell, 2005; Romeo, F., *Antropologia giuridica: un percorso evolucionista verso l'origine della relazione giuridica*, Torino: Giappichelli Editore, 2012; Sacco, R., *Antropologia giuridica*, Bologna: Il Mulino, 2007; Seung, S., *Connectome: how the brain's wiring makes us who we are*, Boston – New York: Houghton Mifflin Harcourt, 2012; Zeki, S.; Goodenough, O.R., *Law and the brain*, Oxford: Oxford University Press, 2004; Andorno, R., “Principles of international biolaw. Seeking common ground at the intersection of bioethics and human rights”, *Droit bioéthique et société*, Vol. 7, Brussels: Bruylant, 2013; Aronson, J.D., “The law’s use of brain evidence”, *Annual Review of Law and Social Science*, Vol. 6, 2010, pp. 93-108; Casonato, C., *Introduzione al biodiritto*, Torino: Giappichelli, 2009; Zeki, S., Goodenough, O. (eds.), *Law and the brain*, London: Oxford University Press, 2004; and Gabbard, G.O., *Psychodynamic psychiatry*, Milan: Raffaello Cortina, 4<sup>th</sup> ed., 2007.

<sup>1147</sup> *Conference Was Lombroso Right? The historical legacy of Neurosciences*, Seminar of the GERN (Groupement Européen de Recherches sur les Normativités), 2010-2013.

<sup>1148</sup> The old-fashioned term to refer to Criminology.

<sup>1149</sup> Goodenough, O. R.; Tucker, M.; “Law and cognitive neuroscience”, *Annual Review of Law and Social Science*, Vol. 6, 2010, pp. 61-92; Lehrer, J., *Proust was a neuroscientist*, San Diego: Mariner Books, 2008; Lynch, Z.; Laursen, B.; *The neuro revolution. How brain science is changing our world*, New York: St. Martin’s Press, 2009; Santosuosso, A., *Le neuroscienze e il diritto*, Como-Pavia: Ibis, 2009; Spranger, T.D. (ed.), *International neurolaw: a comparative analysis*, Bonn: Springer, 2012; Churchland, P.S., *Neurophilosophy, towards a unified understanding of the mind-brain*, Cambridge: The MIT Press, 1986; Churchland, P.S., *Brain-wise: studies in neurophilosophy*, Cambridge: The MIT Press, 2002; Di Giovine, O., “Neuroscienze (diritto penale)”, *Enciclopedia del Diritto*, Vol. VII, 2014, pp. 721-734; McCauley, R.N., “Reduction: models of cross-scientific relations and their implications for the psychology-neuroscience interface”, Thagard, P. (ed.), *Handbook of the philosophy of science: philosophy of psychology and cognitive science*, Amsterdam: Elsevier, 2007; Piccinini, G.; Craver, C., “Integrating psychology and neuroscience: functional analyses as mechanism sketches”, *Synthese*, Vol. 183, pp. 283-311; Roskies, A.L., “How does the neuroscience of decision-making bear on our understanding of moral responsibility and free will?”, *Current Opinion in Neurobiology*, Vol. 22, 2012, pp. 1022-1026; Sirgiovanni, E.; Corbellini, C.; Caporale, C.; “A recap on Italian neurolaw: epistemological and ethical issues”, *Mind & Society*, Vol. 16, 2016, DOI: 10.1007/s11299-016-0188-1; Farisco, M., *Filosofia delle neuroscienze*, Padova: Edizioni Messaggero, 2012; Bennett, M.R.; Hacker, P.M.S., *Philosophical Foundation of Neuroscience*,

certain mathematical concepts are involved. To this respect, the use of the so-called ‘partial differential equation’<sup>1150</sup> in mathematics deserves special mention. This scientific concept<sup>1151</sup> develops an abstract theory allowing to analyse whatever evolutive patron. It is used in a huge variety of subjects ranging from medicine (detection and evolution of a tumour) to economics (partially predicting the stock market behaviour). It has also applications in the industrial sector (as to envision deterioration of industrial or technological devices), or the ecology (to anticipate the extinction of certain species). What it is interesting in here is to which extent it can be used to predict and follow the evolution of criminality rates. They are being currently used in judgements and in courtrooms.<sup>1152</sup> It is not exempted from some critical remarks though.<sup>1153</sup> Currently, we are exploring the problem of freewill and its implications regarding social and moral responsibility

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London: Wiley-Blackwell, 2003; Bottalico, B., “Cognitive neuroscience, decision making and the law”, *European Journal of Risk Regulation*, Vol. 2, Issue 3, 2011, pp. 427-432; Colorio, A., “Diritto e cervello: verso le nuove frontiere del neurodiritto”, *i-lex Scienze Giuridiche, Scienze Cognitive e Intelligenza artificiale* (Rivista on-line: [www.i-lex.it](http://www.i-lex.it)), No. 10, 2010, pp. 371-415; Di Giovine, O., *Un diritto penale empatico? Diritto penale, bioetica e neuroetica*, Torino: Giappichelli, 2009; Gazzaniga, M.S., “Neuroprediction, Violence, and the Law: Setting the Stage”, *Neuroethics*, Vol. 3, 2015, pp. 67-99; Bianchi, A.; Gulotta, G.; Sartori, G. (eds.), *Manuale di neuroscienze forensi*, Milan: Giuffrè Editore, 2009; Greely, H.T., “Will neuroscience radically transform the legal system?”, *Slate*, 2012; *MaRBL Research Papers Neurolaw*, vol. V., 2014, Maastricht University; Patterson, D.; Pardo, M.S., *Philosophical Foundations of Law and Neuroscience*, University of Alabama Public Law Research Paper, 2009; Searle, J.R., *Freedom and neurobiology. Reflections of free will, language, and political power*, Columbia University Press, 2007; Goodenough, O.; Prehn, K.; “A neuroscientific approach to normative judgement in law and justice”, *Philosophical Transactions of The Royal Society B Biological Sciences*, Vol. 359, pp. 1709-1726; Bertolino, M., “Il breve camino del vizio di mente. Un ritorno al paradigma organizzistico?”, Santosuosso, A. (ed.), *Le neuroscienze e il diritto*, Pavia: Ibis, 2009; Bianchi, A., *Manuale di neuroscienze forensi*, Milano: Giuffrè, 2009.

<sup>1150</sup> PDE as to its acronym in English.

<sup>1151</sup> Farlow, S.J., *Partial Differential Equations for Scientists and Engineers*, New York: John Wiley & Sons, 1982. It was reprinted in an edition from Dover in 1993, and newly reprinted in a 2003 edition. The concept, though with new implications as regards philosophical and legal areas, is not new at all.

<sup>1152</sup> Uttal, W., *Neuroscience in the courtroom*, Lawyers & Judges Publishing Company Inc, 2009; Canepa, G., “L’esame psicodiagnostico nei giudizi medico legali di accertamento e revisione della pericolosità sociale”, Traveso, G.B. (ed.), *Criminologia e psichiatria forense*, Milano: Giuffrè, 1987.

<sup>1153</sup> Opocher, E., *Il problema della giustizia nel materilismo storico*, Milano: Bocca, 1948; Holmes, O., “The path of the law”, *Harvard Law Review*, Vol. 10, No. 8, 1897, pp. 457-478.



just as Dorado Montero and others colleagues did some time ago.<sup>1154</sup> Even within psychology there are more biological-alike conceptions.<sup>1155</sup>

Finally, I would like to raise a somehow eclectic concern, regardless of how much Dorado Montero often disliked them. Nothing ever stays the same. No matter how well-grounded is the moral, political or philosophical system we hold. Neoclassicals faced a change of paradigm and, when the diatribe neoclassical law vs. positivist law took place, the result was not the victory of a paradigm: positivist exaggerations were dismantled and the neoclassical conception on penalty and responsibility was altered forever. To my understanding, Dorado Montero changed the grounding conditions of both postures, leaving them exactly in the same base arguments; yet absolute theories were impaired and they would never hold the same meaning they had back in the 16<sup>th</sup>, 17<sup>th</sup> and 18<sup>th</sup> centuries.<sup>1156</sup>

As a tribute to Dorado Montero, let us find not a simple, eclectic theory. Let us not swim against this historical momentum; yet, let us not be drawn by its stream.

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<sup>1154</sup> Kine, M.; Carruthers, P., “Moral responsibility and consciousness”, *Journal of Moral Philosophy*, Vol. 9, pp. 220-228; Morse, S.J., “The non-problem of free will in forensic psychiatry and psychology”, *Behavioral Sciences & the Law*, Vol. 25, 2007, pp. 203–220; Nichols, S., “How can psychology contribute to the free will debate?”, Baer, J.; Kaufman, J.; Baumeister, R. (eds.), *Are we free?*, Oxford-New York: Oxford University Press, 2008; and Salmon, W., *Scientific explanation and the casual structure of the world*, Princeton: Princeton University Press, 1984.

<sup>1155</sup> De Jong, L.H., “Levels of explanation in biological psychology”, *Philosophical Psychology*, Vol. 15, No. 4, 2002, pp. 441-462.

<sup>1156</sup> I indicated such idea in a previous article: Franco-Chasán, J., “Pedro Dorado Montero: A Transitioning Figure”, *GLOSSAE. European Journal of Legal History*, No. 17, 2020, pp. 353-395, p. 354.

# CONCLUSIONS

FIRST: contrary to what historiography has been asserting, I maintain that Dorado Montero was not an eclectic of any sort. Even if labelling him as a 'correctionalist' is definitely more accurate than considering him as a plain eclectic author, it is still incorrect. His iusphilosophical and criminal thought lays undeniably closer to positivism than to neoclassical postulates.

SECOND: despite being a positivist, many elements which have been previously described (predominant natural law aura in Spain, common philosophical background of the Spanish society, his particularly strict Christian education, etc.) shaped his thought in a very unique way. His thought is not an orthodox positivist one, but rather a very personal positivist thought: a Doradian positivism.

THIRD: whether supporters of the neoclassical law conception or of the positivist conception criticise his postulates and try to debunk his ideas, it cannot be asserted that Dorado Montero was not consistent in his mental performances. He pursued, and respectively showed, coherence to its last consequences.

FOURTH: two aspects must be distinguished: Dorado Montero's role in the introduction of positivism within Spain and the success experienced by the aforementioned trend. As regards the first one, our findings came to respond this issue in a positive way: he was responsible, altogether with some other authors, philosophers, medical doctors and psychologists, for the introduction of positivism in Spain. Not only the numerous translations he performed allowed the jurists of Spain to approach the new criminal trends and iusphilosophical movements, but his immensely rich notations before any translation (often filling in dozens and dozens of pages) and the considerations made in countless book reviews had a major impact on it. Besides, even if sometimes very long, the guiding thread in his prolific bibliography exposed all the incoherences found in the neoclassical thought, those even greater inconsistencies in the eclectics and the exaggerations and recurring mistakes of positivists.

FIFTH: positivists often resorted to the old penal conceptions of the crime, what ended up severely affecting the essence of positivism or directly converting it into an undefined, contradictory field named after 'eclecticism'. Towards the

latter, Dorado Montero felt categorically less respect than even for pure positivism itself (which, at least, was consequent with its own postulates).

SIXTH: Dorado Montero, despite the degree of rejection that this generated back on his time (and it still generates today), assumed the denial of freewill.

SEVENTH: Dorado Montero was immersed in the world of abstract ideas. Mixing a strong rationalism arising from Kant, and some other German authors, with the advances in criminal anthropology (criminology) and sociology, he describes a reality in which every moral value or legal representation is nothing but a mere product of mankind's imagination. Man is the responsible for the elaboration of morals, law and culture in his own mind. Thus, for him, there were as many moral and legal orders as individuals there were in the planet. Such idea clashes with the basis of a shared morality but, strangely -and in a very confusing way for the novice reader- it matches a great part of anarchist ideals, specifically the Christian anarchism of Tolstoy. This confuses the reader even more, since if the main critics would take place because in his abstract rationalism (reminding of Hegel) he lost contact with reality and assumed his 'trascendental problem', the easy solution would be then to conclude that it was a common mistake among positivists (a very common one considering extreme turn of nominalism and their rejection of a common shared philosophical culture). Nevertheless, one sees him 'reconciliating' with religious aspects found within a Christian anarchism. Such aspect might make the understanding of his work harder. Dorado Montero was more complex than such reasoning. Certainly, the existence of a 'Doradian positivism' cannot be denied on any rational grounds.

EIGHTH: Dorado Montero accepted both positivist postulates as for the rationale of the penalty as well as for the determination of the penalty. However, Spain accepted the positivist rules for the determination of the penalty but did reject their rationale. That explains why, despite the interest that such author has grown in the last decades, Dorado Montero is, somehow, still left aside. It was not that Dorado Montero was not responsible for the introduction of positivism in Spain, which he was, but since the triumph of positivism as such did not take place (at least not completely), the figure of Dorado Montero did not offer a safe

field of research for obtaining conclusions of interest. It was merely a mistake in the order of the factors, rather than a mistake in the product. Actually, the analysis of his positivist ethos, did shed light on the construction of the 20<sup>th</sup> century penal law and of the criminal law of the future.

NINTH: his Protective Law of the Criminals was describing the criminal law of the future: neither the criminal law of Dorado Montero's society, nor the one of his disciple Jiménez de Asúa, but the criminal law of the future of our society. The future of both criminal law and criminology is taking the path described by the penalist from Navacarras.

TENTH: the aforementioned future scenario which is taking shape under the new neurological, medical, psychological and genetic findings is re-opening a very old debate. Shortly, it is described in terms of freewill vs. determinism; however, in a more detailed way it entails the shaping of criminal law and freedom, and about how is the State of Law going to face biological determinism and its moral and legal implications addressing the individuals' rights and freedoms conquered by the western civilisation. More actually, it leads us to an even more concerning question: is the existence of those individual rights suitable in the new genetic and biological panorama? Bear in mind that Dorado Montero acknowledged the momentum of history, which cannot be stopped. He once referred to the neoclassical thought as a very ancient tree with many branches, which was sterile and incapable of producing more fruits; whereas the young trees (referring to positivism) were lighter, more flexible and more likely to take over. The result of the neoclassical-positivist debate ended up with a new reality. It was not a mix of them, i.e. an eclectic one; but a reality in which both the neoclassical thought and the positivist thought had moved one step forward, moving away from the neoclassical 'aura'. Therefore, even the 19<sup>th</sup> century neoclassical law had changed its aura (and accepted some ideas closer to a positivist rationale) due to the historical momentum. Nowadays, such debate between positivism (very softened by eclectic approaches) and biological determinism/newly developed genetic sciences can lead the historical momentum towards a new scenario, where those soft positivists might change their 'aura' for a more determinist one, and those genetic, biological determinists remain the same. But even if we thought

that nothing had changed, because the two positings had rejected each other, and a doctrinal disagreement was held, that is not true: an invisible step forward has been taken. The point is not how to avoid that, given that going against the historical momentum is a suicide move, but rather how to work on new arguments for our current soft positivism, in order not to avoid the step, but to better, more ethically and morally face that invisible step.

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