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Criminal justice and abnormals at the end of the 19th century in Belgium.
Sources and principles of a social defence system*

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Abstract
The late 19th century was characterized in Belgium by the emergence of a new discourse of truth on crime and criminal that emphasized the threat posed by the 'dangerous individual' to society as a whole. The insane criminal, associated with abnormality and dangerousness, was rapidly considered as one of the categories to be controlled. As early as 1930, a social defence law created a special internment regime for these lunatics who escaped criminal punishment due to their mental deficiency. Recidivists, who were closely associated with the 'abnormals', were targeted by the same text. In both cases, the regime introduced in 1930 reflects the influence of the social defence doctrine, which, under the influence of Adolphe Prins, sought an eclectic compromise between the classical school principles and the new penology of positivistic obedience.

Keywords
Insane offenders, recidivists, habitual delinquents, dangerousness, social defence, Act of 9 April 1930, internment, Belgium, Adolphe Prins

Introduction

The late 19th century in Europe was characterized by a new understanding of crime and the criminal, against the backdrop of the shift from the Liberal State towards the Welfare State. At this time, the emerging field of criminology was trying to move beyond the theoretical impasses of the neoclassical criminal law system and its practical shortcomings by proposing a criminal policy oriented towards protecting society against 'dangerous individuals'.

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The 'social defence' project, inspired by the Italian positivistic school, was characterized by a concern for increasing the control of deviant populations, regularly associated with abnormality and degeneracy. Among the iconic figures of dangerousness were young offenders, considered the breeding ground for dangerous classes,[1] vagrants and beggars, a 'floating' population difficult to integrate in the world of work, recidivists, habitual delinquents and insane criminals, all included under the same status of dangerousness.

In Belgium, this project of social defence was built on the basis of an eclectic compromise between the principles of classical criminal law and the innovations promoted by criminological positivism, with the adoption of dangerousness laws that supplement the neo-classical Criminal Code of 1867 at its margins. Among these, *the Social Defence Act of 9 April 1930 Regarding Abnormals and Habitual Offenders* is probably the most emblematic: encompassing insane criminals on the one hand, recidivists and habitual delinquents on the other, the 1930 Social Defence Act established an exceptional regime based on security and/or care measures, whose logic reflects the influence of positivist criminology.

Largely promoted by Adolphe Prins, one of the three founders of the International Union of Penal Law (IUPL) and the main representative of the doctrine of social defence in Belgium[2], the 1930 Social Defence Act would span the entire 20th century, being only slightly reformed in 1964, before undergoing a more substantial reform at the beginning of the 21st century. This paper reviews the context of its emergence, at a time when criminal madness and recidivism fed the judicial chronicle (1), before considering the regime set up by the act for the insane criminal on the one hand (2) and for recidivists and habitual offenders on the other hand (3).

1. Sources and foundations of the 1930 Social Defence Act

The Belgian Social Defence Act was part of a context marked by the shift from the liberal rule of law to the Welfare State and characterized by a new political project aimed at protecting individuals against various risks. In such a context, several dangerousness laws emerged that could be read as the criminal aspect of a more global insurance-based regime (1.1). Centred on the 'real' offender and its dangerousness, these laws reflected a new utilitarian approach to crime that broke with the abstract postulates of the neoclassical criminal school (1.2). As symbols of dangerousness, insane criminals and repeat offenders were primary targets of these new legislative initiatives of positivistic obedience (1.3).

1.1. Social defence or the penal aspect of the Welfare State

At the end of the nineteenth century, Belgium, like other Western countries, faced a change in its socio-political regime. Against the backdrop of social and economic crisis, the (de)regulatory model of the liberal rule of law was gradually replaced by the emergence and expansion of a more interventionist Welfare State. The political objective was to promote greater social equality and to further the integration of the working class into the capitalist

[1] Preparatory works related to the Child Protection Act of 1912, *Pasinomie* (1912), p. 317.

[2] On Prins, see Cartuyvels, Y., "Adolphe Prins and social défense in Belgium: The reform in the service of maintaining social order", in Cartuyvels, Y. & Masferrer A.; (cords.), Special Issue "The birth of criminal positivism in Europe and Latin America at the end of the 19th century: rise and resistances, *Glossae, European Journal of Legal History* 17 (2020), pp. 177-210.

system in order to preserve social order and to avoid the revolutionary rupture that some were calling for.[3]

In addition to the gradual generalization of the right to vote, social and labour laws developed in the context of a new 'insurance-based' system that transferred risks from the individual to the State.[4] In the civil law sphere, this translated into the adoption of a no-fault liability regime that detached the principle of compensation or reparation for damages from the commission of a fault.

This new risk management strategy was the result of concessions by the industrial elites to counter working class agitation. It was combined with a more interventionist action by the State in the penal field: the social integration of the working classes had as its counterpart the deployment of a securitizing social control policy against various figures of dangerousness. The dangerousness laws that emerged in Belgium from the end of the 19th century onwards actually targeted a suburban proletariat that had to be separated from the working classes on the one hand, and whose criminal risk had to be prevented or managed on the other. Based on measures of protection, care or security rather than on punishment, these laws actually transposed the no-fault liability regime of civil law into the criminal field:[5] juvenile delinquents, vagrants, beggars, alcoholics, drug addicts, recidivists and habitual offenders and lunatics constituted the hard core of the 'dangerous' population against which social defence laws had to protect the 'normal' citizens.[6] These 'dangerous people', many of whom regularly shuttled back and forth between the asylum and the prison, generally experienced short periods of detention before blending into the anonymity of big cities. Perceived as presenting a persistent tendency towards delinquency, sometimes mixing with anarchists, they were viewed as a significant social threat and, as such, became the subject of increasing interest from public authorities.

Beginning in the 1870s, a few years after the promulgation of a new Criminal Code,[7] a long series of legislative initiatives considered the fates of these 'abnormals' from a social defence perspective: a draft Act on Penal Asylums (3 December 1873), Act on Public Drunkenness (16 August 1887), draft Act on Aggravated Sentences for Recidivists (5 April 1890), draft Act on the Organization of Special Institutions for the Insane and Alcoholics (26 April 1896), Act on Conditional Sentencing and Release (31 May 1888), draft Act on the Organization of Special Institutions for the Insane Criminal and the Dangerous Insane (15 April 1890), Act on Vagrancy and Begging (27 November 1891) and Child Protection Act (1912) followed one another with the common objective of social prophylaxis.

1.2. A new discourse of truth about crime, the criminal and punishment

[3] Cartuyvels, "Adolphe Prins and social défense in Belgium: The reform in the service of maintaining social order", pp. 177-210.

[4] Ewald, F., *L'Etat providence*, Paris: Grasset, 1986.

[5] Prins, A., *La défense sociale et les transformations du droit pénal*, Bruxelles : Misch et Thron (1910), pp. 55- 65.

[6] Pratt, J., "Dangerousness and Modern Society", in *Dangerous Offenders. Punishment and Social Order*, M. Brown, J. Pratt. (Eds.), London and New York: Routledge, (2000), pp. 35-48.

[7] In 1867, Belgium adopted a neoclassical Criminal Code that replaced the Napoleonic Criminal Code of 1810. This new Criminal Code was soon filled out by a law on mitigating circumstances (1867). (see Cartuyvels, Y., "The Belgian Penal Code of 1867 and the Imperial Code 1810: between continuity and innovation", in A. Masferrer (ed.), *The Western Codification of Criminal Law – A Revision of the Myth of its Predominant French Influence*, Springer, 2018, pp. 95-113.

This set of legislative initiatives of positivistic obedience was not specific to Belgium. It was part of 'a kind of common criminal law of social defence in Europe'[8] that developed, in particular, under the influence of the International Union of Penal Law and whose foundations go as far back as the Roman law.[9] Thanks to the IUPL, in which the Belgian A. Prins played a leading role, the ideas of the Italian positivistic school spread in Belgium, in particular via the *Revue de droit pénal et de criminologie,* which was its mouthpiece.

Up until then, Belgian criminal law was dominated by the neoclassical school. This is evidenced by the adoption, under the direction of Jacques-Joseph Haus,[10] of a new Criminal Code in 1867 that emphasized the offender's 'free will' and moral responsibility, the requirement of a criminal act as a basis for punishment, the legality and proportionality of the sentence to the gravity of the offence but also to the degree of moral responsibility of its author, and the essentially retributive function of punishment.

Accused of forcing judges into metaphysical contortions in order to gauge the 'just punishment', denounced for its laxity, neoclassical criminal justice felt the full brunt of the 'positivist revolt'[11] carried out by the positivistic school in Italy. Against the legal doctrine of 'free will' and the retributive foundation of punishment associated with it, the positivists defended a deterministic vision of the human being, the social (and no longer moral) responsibility of the 'dangerous individual' and the protection of society as the primary objective of the response to deviance. In a more utilitarian approach, the logic of punishment then had to give way to 'measures', the content and duration of which were individualized based on the 'dangerousness' of the deviant. In the positivist perspective, punishment was no longer a moral problem of retribution but became a police issue to ensure the most effective protection of society against crime.

This approach, which made protecting society the priority of the criminal response, was more interested in the criminal individual than in the crime itself. In Belgium, it won over scholars[12] as well as politicians,[13] at a time when the recorded increase in crime – even if such an increase was disputed by some with surprisingly contemporary arguments[14] – and recidivism rates contributed to creating a form of moral panic. The abuse of mitigating circumstances, excessive use of probation and too lenient prison sentences[15] were all seen as sources of the crime problem, especially when these judicial practices were applied to 'abnormal' or 'degenerate' delinquents. However, the positivistic discourse was also criticised in the

[8] Tulkens, F., van de Kerchove, M., Cartuyvels, Y. & C. Guillain, *Introduction au droit pénal. Aspects juridiques et criminologiques*, Diegem: Kluwer, 2010, p. 110.

[9] Roman law already recognized the criminal irresponsibility of the 'furiosus' and provided for protective and security measures to be taken to prevent him from causing harm to himself or to others (Collignon, T. & Van der Made, R., *La loi belge de défense sociale à l'égard des anormaux et des délinquants d'habitude. Commentaire doctrinal et jurisprudentiel*, Brussels: Larcier, 1943, pp. 15-37).

[10] Haus, J.J. (1796-1881), professor of criminal law at the University of Louvain, is known as the father of the Belgian Penal Code of 1867.

[11] Tulkens, van de Kerchove, Cartuyvels, & Guillain, *Introduction au droit pénal. Aspects juridiques et criminologiques*, p. 108.

[12] See, for example, Des Cressonieres, J., "Le crime et l'hygiène social, *Revue de droit pénal et de criminologie*, 1910, p. 26; Lefebre, L., "La responsabilité humaine et la responsabilité pénale", *Revue de droit pénal et de criminologie* (1908), p. 551.

[13] De Lantsheere, l., "Discours à l'Assemblée générale de l'Union Internationale de droit pénal, Bruxelles, les 2, 3 et 4 août 1910", *Revue de droit pénal et de criminologie* (1910), p. 916

[14] Callier, A., "La défense sociale par la Justice", *Revue de droit pénal et de criminologie* (1909), pp. 841-855.

[15] Simons, R., "Le crime et la défense sociale", *Revue de droit pénal et de criminologie* (1908), p. 543.

judiciary. General Prosecutor Callier, for instance, minimized the issue of recidivism, criticised the liberticidal drifts of the social defence doctrine and denounced the eugenic temptation of a criminal law of dangerousness[16]. This partly explains why, in Belgium, the logic of social defence did not penetrate criminal law as a whole but developed through specific laws complementary to the 1867 Criminal Code that targeted specific categories of dangerous delinquents. Among the latter, insane criminals and recidivists constitute a specific group.

1.3. Insane criminals and repeat offenders, symbols of dangerousness

The problem of criminal insanity was a challenge for criminal justice throughout the 19th century. Under the French *Code pénal Napoléon* of 1810, which was applied in Belgium until 1867, only complete insanity, known as 'dementia', was considered a reason for non-imputability (Article 64 of the Criminal Code). This quickly raised the problem of intermittent or partial insanity, an issue that was rapidly underlined by French psychiatrists such as Professor Belloc in 1811[17] and Esquirol, the founder of asylum psychiatry, in 1814.[18]

The Belgian Criminal Code of 1867 adopted the French system and its Article 71 also considered dementia as the sole motive of criminal non-imputability. But, just as Article 64 of the French Penal Code of 1810 failed to do, it did not specify what 'dementia' was and at what level of insanity criminal non-imputability should be considered. However, in his treatise on the general principles of Belgian criminal law (*Principes généraux du droit pénal belge)*, J.J. Haus, who is known as the true author of the 1867 Criminal Code, stated: '...as soon as partial insanity is established, the accused must be acquitted; for mania is no less general, though it manifests itself only partially.'[19] Haus, taking account of the advances of psychiatry at the time, considered that partial or intermittent insanity led to criminal irresponsibility. Similarly, two renowned criminal lawyers, Nypels and Servais, wrote in their commentary on Article 71 of the Criminal Code, '[T]he term dementia... must be taken in its popular sense, which includes all forms of mental illness'. Reasoning by analogy with the rules of application in civil law for making a donation or a will, they considered that 'to commit a punishable action, one must be sane'. Nypels and Servais also pointed out that, in fact, Article 64 of the Napoleon Code of 1810 stated the same principle: in his presentation of Article 64, the government spokesman took care to specify that 'the action ceases to have the character of a crime, if its author did not enjoy the fullness of his intellectual faculties.'[20] According to the authorized doctrine,

[16] Callier, "La défense sociale par la justice", pp. 841-855. The Attorney General is critical of the general discourse on the increase in crime (p. 849). He minimizes the scope of recidivism, which only affects 'petty offenders sentenced to three months' imprisonment or less' (p. 848). He emphasizes that the number of offenders released as irresponsible is very small (p. 853) and opposes in advance the excesses of the social defence project. He denounces the regression 'to a primitive penal law, exclusive of the ideas of fault and responsibility', 'separated from the idea of justice' (p. 853) and oblivious of its moral influence (p. 851). Caillier also evokes the creation of a state of insecurity for the citizens, likely to be condemned 'not because they would be judged guilty but simply because they would be recognized as dangerous' (p. 850) as well as the eugenic temptation which, in the name of dangerousness, would tend to suppress 'not only the criminal but all his race' (pp. 853-854).

[17] Belloc, J.J., *Cours de médecine légale*, Paris: Méquignon, 1811, p. 257.

[18] Esquirol, "Démence", in *Dictionnaire des sciences médicales*, Pancoucke (Ed.), 1814, vol. VIII, p. 280.

[19] Haus, J. J., *Principes généraux de droit pénal belge*, Ghent-Paris, Hoste-Pédone, 1869, t. I., p. 490. Haus is quite clear: the absence of criminal liability is the norm in cases of 'partial mania', 'temporary mania' and 'intermittent mania' and, in the latter case, even if the act was committed in a lucid interval.

[20] Nypels, J.S.G. & J.J. Servais, *Le Code pénal interprété*, Vol. I , Ghent: Libr. AD Hoste, 1874, sub Art. 71, pp. 225-226. F. Passelecq points out that the formula 'enjoyed the fullness of his intellectual faculties' is in fact not due to the government speaker, who used a more diffuse formula. It was Ribout, rapporteur to the Legislative Council (*Corps législatif*), who had interfered afterwards precisely to introduce this precision

'dementia' in the legal sense of Article 71 of the Criminal Code and the resulting criminal irresponsibility therefore existed as soon as any kind of insanity was established at the time of the act, whether it was total or partial, permanent or intermittent, which also included states of "imbecility" or "fury" as considered by the civil Code.[21]

What was done with insane criminals in judicial proceedings? If they were recognized as irresponsible, they escaped punishment and were subject to a medical and administrative measure of indeterminate length under the 1850-1873 civil legislation on psychiatric collocation, just like the non-delinquent insane.[22] If recognized responsible, because not insane enough to escape penal liability, they were subject to criminal sentencing, but frequently benefited from mitigating circumstances and reduced penalties on the grounds of their "abnormality" and resulting "diminished responsibility". This was, for exemple, the case for the psychopaths "sentenced to lighter sentences than normal offenders, even though they were more dangerous"[23] In both cases, concern grew over the years. The intrusion of experts into courtrooms had the effect of increasing the judicial decisions of irresponsibility or reduced responsibility: "as a result of the progress of science and a greater understanding of the human mind, the field of irresponsibility is constantly expanding, and one sees everywhere only madness, half-madness, unconsciousness and reflex', a lawyer emphasized."[24] The consequence, another explained, is that through 'the skilful play of appraisals and counter-appraisals...an acquittal or the infliction of a derisory punishment on the most dangerous criminals destroys social security.'[25]

The system of Article 71 of the Criminal Code was not convincing. On the one hand, the medico-administrative regime reserved for insane offenders declared irresponsible appeared deficient in terms of security. Many of them, after being acquitted and interned, were rapidly released without being kept track of by the Permanent Deputation, the administrative body in charge of following them up.[26] On the other hand, as the lawyer Passeleck pointed out in 1913, the condemned insane criminals benefited from mitigating circumstances and found themselves, too, quickly released:

The defendant is on trial. The material facts of the charge are established. But the judge is struck by something abnormal: the defendant's physical defects, alarming ancestry or previous history, the excessive monstrosity of the act committed, the strangeness of the motive attributed to the perpetrator, (...) the madness of the execution compared to the risks of expected repression, etc. 'Do I have to deal with a mentally healthy person or a madman', wonders the judge? And he appeals to the lights of medical science. The experts examine, observe, confer, conclude, and submit a report: 'the individual is responsible, but with mitigated or reduced responsibility'. For the judge, this is both too little and too much. Too little (...) 'if the defendant

(Passeleck, F., "De la position pratique du problème de la 'responsabilité atténuée' dans le droit pénal belge actuel", *Revue de droit pénal et de criminologie* (1913), pp. 354-355).

[21] De Ryckere, R., Jaspar, L., "La loi de défense sociale à l'égard des anormaux. Evolution des conceptions", *Revue de droit pénal et de criminologie* 5 (1964-1965), p. 404.

[22] Act of 18 June 1850 on 'le régime des aliénés', art. 7-4°, remplaced by article 1er§5 of the 28 december 1873 Act on 'le régime des aliénés'.

[23] De Ryckere, Jaspar, "La loi de défense sociale à l'égard des anormaux", p. 405, note 15.

[24] Lefebre, L., "La responsabilité humaine et la répression pénale", *Revue de droit pénal et de criminologie,* 1908, p. 558.

[25] Ruttiens, R., "L'Ecole positive et ses adversaires", *Revue de droit pénal et de criminologie* (1911), pp. 486-487.

[26] Passelecq, F., *De la position pratique du problème de la 'responsabilité atténuée' dans le droit pénal belge actuel,* pp. 530-531. See also Trousse, P.E., "La contribution de la Revue de droit pénal aux transformations du droit criminel", *Revue de droit pénal et de criminologie, Publication jubilaire, (1907-1957),* s.d., p. 38.

is still responsible, he is therefore not mad; he remains punishable; I must punish him'. Too much because, in balance with this almost weightless fragment of responsibility that remains with the defendant, the minimum penalty attached by law to the offence appears too heavy (...). So, the judge looks elsewhere in the law for a way to reconcile his sense of fairness with his professional zeal... What does he do? He classifies the 'offender's responsibility' among the 'circumstances of the offence' and the defendant will ultimately be sentenced to a penalty, but without severity... Thus the problem is posed every day. Thus it is solved every day.[27]

If the diagnosis of abnormality and irresponsibility gave rise to passionate discussions –from when should the judge consider that psychological abnormality leads to penal irresponsibility–,[28] one point, on the other hand, garnered consensus: the criminal regime that makes responsibility the criterion of punishment is anti-social and does not protect society against irresponsible or half responsible but dangerous individuals. Such dangerousness is attested by the increasing figures of recidivism, a phenomenon largely attributed to the leniency enjoyed by insane delinquents, especially those who were considered partially responsible.[29]

Recidivists and habitual delinquents indeed constituted a second group whose dangerousness fascinates. As the Minister of Justice Jules Lejeune pointed out in 1888, it was not so much the serious crime, relatively stable, but the repetitive petty crime that constituted the most worrying social danger at the time: '*That (serious crime) is not where the social danger lies... Major crime does not increase significantly. The rising tide of concerns is that of crimes of all kinds... The severity of repression must be intensified, not for serious crimes, but for misdemeanours and especially for recidivism.*'[30]

Representing about a third of the prison population at the beginning of the 20th century,[31] 'minor' recidivists or habitual delinquents who committed property offences constituted a second group of individuals perceived as particularly dangerous to social order. Associated with the insane delinquents – who very often fed the recidivism cohort –, these repeat offenders were in turn labelled 'abnormal' or 'degenerate' due to their persistent tendency to delinquency. Enshrined in the same stigma, insane offenders, recidivists and habitual delinquents would then be subject to the same social defence law in 1930. Grounded in dangerousness rather than responsibility, this law was supposed to complement the security gaps left open by both Article 71 of the Criminal Code and the insufficient penal response to repetitive petty crime. As Adolphe Prins pointed out, 'the repetition of minor sentences does not prevent beginners from

[27] Passselecq, *De la position pratique du problème de la 'responsabilité atténuée' dans le droit pénal belge*, pp. 354-355.

[28] On this, see Cartuyvels, Y., "Responsabilité morale et défense sociale. Deux versions asymétriques de l'individualisation des peines en Belgique au XIXe siècle", in M. Porret (Ed.), *Cesare Beccaria. La controverse pénale, XVIIIe-XXIe siècle*, Rennes: Presses Universitaires de Rennes, 2015, pp. 183-210.

[29] 'It is even, one can say, especially in view of these partially responsible abnormals that the 1930 Act was elaborated, since it was produced, in main order, to react against the mitigated punishments which were inflicted only to the partially responsible ones...' (Commission in charge of studying the revision of the Social Defence Act of 9 April 1930 Regarding Abnormals and Habitual Offenders, Report on the revision of the provisions relating to insane and abnormal persons, *Revue de droit pénal et de Criminologie et des Archives Internationales de Médecine légale*, (April-May 1940), p. 217.

[30] Lejeune, J., "Discussion des articles du projet de loi établissant la libération conditionnelle et les condamnations conditionnelles dans le système pénal", *Pasinomie* (1888), p. 244.

[31] Prins reports this proportion from the figures of the prison population held in the prison of Louvain in 1905 (Prins, A., *La défense sociale et les transformations du droit pénal*, Brussels: Misch et Thron, 1910, pp. 104-105).

continuing their adventurous life or recruiting companions' and there comes a point where these repeat offenders 'in turn enter the dangerous classes.'[32]

As is often the case, the Social Defense Act of 1930 in fact enshrined judicial practice. Seeking to avoid imposing light sentences on those "abnormal" but dangerous offenders who benefited from diminished responsibility, judges interpreted article 71 of the Penal Code very broadly, preferring to acquit them so as to allow their collocation for an indefinite duration in an asylum. And as, over time, psychiatrists in these institutions increasingly considered the release of internees from the point of view of social defence, both jurisprudence and medical practice prepared the ground for a substantial reform that the 1930 Act would only enshrine and organize.[33]

2. The Social Defence Act of 9 April 1930 Regarding Abnormals and Habitual Offenders and the regime for the insane criminal

The 1930 Social Defence Act reflected the influence of Adolphe Prins, the father of social defence in Belgium (2.1). It had the particularity of including in the same text insane criminals, subject to an indefinite internment measures in lieu of punishment (2.2), and recidivists and habitual offenders, subject to a "placing at the government's disposal" measure after their punishment (2.3).

2.1. Adolphe Prins and the normal-abnormal divide

As a founding member of the International Union of Penal Law, A. Prins (1845-1919) contributed greatly to the dissemination of the new ideology of social defence. Through three key works, *Criminalité et répression* (1886), *Science pénale et droit positif* (1889) and *La défense sociale et les transformations du droit pénal* (1910),[34] Prins outlined the framework of 'the transformation of the guiding ideas of criminal law' for which he was calling, a project whose contours he summarised in three articles published in the criminal law journal *Revue de droit pénal et de criminologie*, in 1907, 1909 and 1912.[35]

Endorsing the discourse of positivist criminology, Prins noted that 'cracks appear everywhere in the old edifice of criminal law'[36] and criticised neoclassical criminal law and its logic of abstraction, which forget the 'real man' existing behind the criminal act and lose sight

[32] Prins, *La défense sociale et les transformations du droit pénal*, pp.101-102.

[33] Cornil, L., «Le droit pénal et la procédure pénale après la tourmente », *Novelles, Procédure pénale*, T. 1er, Bruxelles Larcier, 1946, p.13.

[34] Prins, A., *Criminalité et répression. Essai de Science pénale*, Bruxelles, Bruxelles-Leipzig, Librairie européenne C. Muquardt, Merzbach et Falk, 1886; Prins, A., *Science pénale et droit positif*, Bruxelles-Paris: Bruylant-Christophe et librairie A. Marescq aîné, 1889, et Prins, A., *La défense sociale et les transformations du droit pénal.* On the works of Prins, see Tulkens, F., "Le projet de la défense sociale en droit pénal : A. Prins", in *Généalogie de la défense sociale en Belgique (1880-1914)*, in Tulkens, F., (Ed.), Brussels: Story-Scientia, 1988; Mary, P., "A. Prins ou la légitime défense sociale", *Revue de droit pénal et de criminologie*, 1 (1990), pp. 115-130 ; Beauthier R. & J. Vanderlinden, "Prins et l'histoire du droit pénal", in *Cent ans de criminologie à l'ULB,* Mary, P. & P. Van De Vorst, (Eds.), Brussels, ULB, 1990, pp. 221-237.

[35] Prins, A., "De la transformation des idées directrices du droit criminel", *Revue de droit pénal et de criminologie* (1907), pp. 14-19. Prins, A., "La liberté morale dans le droit pénal nouveau", *Revue de droit pénal et de criminologie* (1909), pp. 517-520; Prins, A., "L'esprit nouveau dans le droit criminel étranger", *Revue de droit pénal et de criminologie* (1912), pp. 133-151.

[36] Prins, "De la transformation des idées directrices du droit criminel", p. 20.

of the fact that the priority of criminal law is to maintain order. According to Prins, it was urgent to abandon the disputes over responsibility 'as far as possible'[37] and to adopt a dual penalty-measure system on the 'normal-abnormal' divide.

The normal-abnormal divide structures Prins' penal thinking most sharply in his later contributions just before World War I. In his article *L'esprit nouveau dans le droit criminel étranger* (1912), Prins explains that society is globally divided into two groups, 'normal' and 'abnormal' families. As he reasons, 'normal families' come mainly from the privileged classes, with morally developed children and adults who are able to control their instincts. If a criminal act is committed, punishment remains meaningful for these 'delinquents who have a background of normal activity and morality'[38] and should not be abandoned. Moreover, popular conscience would not accept it and such an abdication could provoke the return of private vengeance.[39] In contrast, 'abnormal families', found especially in the 'lower depths', are populated by disgraced or 'deficient' individuals whose 'inferiority' is precocious and goes back to birth. Under the influence of 'unfavourable social factors that join unfavourable biological factors', these 'degenerate or deficient' children turn into defective adults to make up the population of 'unemployed, vagrants, indigents, degenerate or deficient delinquents'. They constitute the nursery of 'abnormal and precocious criminals.'[40] For these, qualified as 'social waste,'[41] considered 'unsuitable for regular life', 'predisposed to a lower life' and endowed with a 'tendency for crime,'[42] security measures, which are not punitive but protective of society, are necessary. For these dangerous-by-nature individuals, it is necessary to think of a regime distinct from criminal law, giving greater prominence to experts to enlighten judges to make the best decision, and privileging a 'closer association between the judiciary and the administrative authorities.'[43]

Did Prins consider prophylactic intervention even before any criminal act has been committed? In his article *La liberté morale dans le droit pénal nouveau* (1909), Prins could give that impression as he writes, "[T]he social defence doctrine goes further than criminal law itself; it goes beyond punishment and crime...it sees the dangerous state of degenerate beings who have not committed a crime, but who will commit one if left to themselves; and there, social defence takes on its highest character, it becomes social protection...'[44] However, to my knowledge, nowhere in his writings does Prins clearly advocate for a penal intervention before the commission of a penal act, except in the field of juvenile justice : in this field, he encourages, in a classical way for the time, the adoption of a tutelary system of childhood protection that allows for preventive intervention,[45] which is reflected in the evolution of juvenile justice in Belgium, as elsewhere in Europe, at the beginning of the 20th century.[46] But otherwise, Prins

[37] Prins, "La liberté morale dans le droit pénal nouveau", p. 518.

[38] Prins, "La liberté morale dans le droit pénal nouveau", p. 136.

[39] Prins, "La liberté morale dans le droit pénal nouveau", p. 141.

[40] Prins, "L'esprit nouveau dans le droit criminel étranger", pp. 134-136. Prins clearly adopts here the degeneration theory that would feed, at the end of the 19th and beginning of the 20th century, the discourse on eugenics.

[41] Prins, "L'esprit nouveau dans le droit criminel étranger", p. 141.

[42] Prins, "L'esprit nouveau dans le droit criminel étranger", p. 136.

[43] Prins, "L'esprit nouveau dans le droit criminel étranger", p. 145.

[44] Prins, "La liberté morale dans le droit pénal nouveau", pp. 518-519.

[45] Prins, "La défense sociale et les transformations du droit pénal", pp. 141-169 (point VI De l'état dangereux avant le crime et le délit).

[46] Bailleau Fr., Cartuyvels Y., La justice pénale des mineurs en Europe, *Déviance et Société* 3 (2002). Although the law formally concerned only "delinquent children", the vagueness of its incriminations *de facto* legalized preventive judicial practices targetting 'morally abandoned children', in order to curb, in the words of the Minister of Justice Henry Carton de Wiart, 'the rising tide of juvenile delinquency' (See Cartuyvels, Y., "Les

seems to remain faithful to the necessity of a criminal act as a condition of penal or para-penal intervention. However, it could be argued that as far as the insane were concerned, Prins did not need to consider the question, for a 'civil' regime of deprivation of liberty, very close to penal internment, was provided for the dangerous insane who had not committed a crime by a psychiatric collocation Act of 1850.[47]

At the heart of the alternative system to punishment considered for 'abnormal' individuals, an indefinite security and care measure, depending on the danger of the person and its evolution, must replace the penalty. Anticipating the criticism that such a measure would be a 'disguised punishment', Prins explains everything that separates the punishment and the system of measures that he advocates. The first difference is terminological: 'prison sentence' (*Gefängnisstrafe*) or 'house of punishment' (*Zuchthausstrafe*) are used in one case, while 'security institutions' (*Verwahrungs Anstalt*) or 'work institutions' (*Arbeitserziehungs Anstalt*) are used in the other. The next difference is the goal: 'to punish' in one case, addressing the feelings of guilt and responsibility of the perpetrator, with the aim of 'expiation, intimidation or moral reformation'; 'to protect, keep or treat' in the other, prioritizing 'order and discipline' in a system that keeps these 'moral defectives' away from social life. The ultimate goal is indeed to avoid, as it is done with 'the physically invalid and the sick', the 'contagion of epidemics', in this case 'the contagion of crime.'[48]

The principle of bifurcation between punishment and measure is accompanied by another split between two types of security measures. Within the category of abnormals, Prins distinguishes between the 'dangerous' and the 'inferior' (who are destined to become dangerous). For the 'inferior', that is the 'degenerates' or the 'insufficient', establishments where 'prophylaxis must prevail over discipline' must be provided,[49] while for the 'dangerous', establishments where 'discipline must prevail over prophylaxis' are required. This is quite faithfully the programme that the 1930 Belgian Social Defence Act Regarding Abnormals and Habitual Offenders adopted, endorsing a double regime of preservation measures that would not escape criticism of 'disguised punishment' or 'linguistic mystification.'[50]

2.2. The legal regime for the insane delinquent: an internment of indeterminate length

Compared with the other dangerousness laws passed elsewhere in Europe at the time, the Social Defence Act Regarding Abnormal and Habitual Offenders of 9 April 1930 was a latecomer on the scene. Its first sources date back to 1880, however,[51] and it is not surprising that the law bears the imprint of Prins' social defence project. The law presents an important particularity that is recalled here: whilst the greater part of its content is devoted to 'abnormals',

grandes étapes de la justice des mineurs en Belgique. Continuité, circularité ou ruptures?" *Journal du doit des jeunes* 207 (2001), pp. 13-17).

[47] Cartuyvels, Y., De Spiegeleir, S., "La privation de liberté des personnes atteintes d'un trouble mental en Belgique : un double régime", *Revue Interdisciplinaire d'Etudes Juridiques* 88 (2022), pp. 75-102.

[48] Prins, "De la transformation des idées directrices du droit criminel", p. 18.

[49] Prins, "L'esprit nouveau dans le droit criminel étranger", pp. 150-151.

[50] As early as 1930, Léon Cornil, the Attorney General of the Brussels Court of Appeal, emphasized the 'punishing' nature of the security measures taken against habitual offenders, the 'dangerous' ones mentioned here by Prins (Cornil, L., "La Loi de Défense sociale à l'égard des anormaux et des délinquants d'habitude du 9 avril 1930", *Discours prononcé par M. Léon Cornil, Procureur Général, à l'audience solennelle de rentrée de la Cour d'Appel de Bruxelles, le 15 septembre 1930*, s.l., s. d.).

[51] The source of the 1930 Social Defence Act is found in a *Draft Act of April 15, 1880 regarding the organization of special asylums for the internment of the convicted insane and the dangerous insane*.

that is to say the criminally insane, its Chapter VII nonetheless discusses the case of recidivists and habitual offenders, included in the same category of dangerousness and abnormality as insane criminals.

As the Attorney General L. Cornil pointed out in 1930, 'this new law [did] not touch the foundations of the right to punish' and was seen rather as a complement to the classical criminal regime, aimed at protecting society against some specific categories of dangerous individuals.[52] Its main innovation was to introduce an internment measure for insane offenders declared irresponsible on the basis of Article 71 of the Criminal Code. The law targeted 'abnormals', that is to say the totally insane (*déments*) and individuals 'in a serious state of mental imbalance or mental debility rendering the defendant incapable of controlling his actions' (Art. 1, 1930 Act).[53] In both cases, the insane offender exited the criminal justice system and took the 'protection of society' path, provided that three conditions were met, namely, he was the author of a felony or misdemeanour punishable by at least three months' imprisonment; he was recognised as being in a 'serious state' of dementia or mental imbalance at the moment of the judicial decision; and he represented a danger to society, a condition not included in the legal text but introduced very rapidly by the jurisprudence.[54] The Act therefore had a twofold effect: first, insane offenders were no longer subject to the medical-administrative regime foreseen by the civil 'internment' system as was previously the case,[55] but entered the more security-oriented social defence system. Second, the law extended the regime of criminal irresponsibility to those who 'are neither completely mad nor completely sane, but who constitute a danger for society to some extent.'[56] This apparent decriminalization was however offset by the shift of these 'half-mad' individuals to the more security-minded social defence regime, whereas they previously received lenient sentences only.

The regime established in 1930 was based on a twofold measure of medical and judicial control. The former consisted of putting the offender under *observation* within the *psychiatric wing of a prison*, which could be (but was not necessarily) decided by the investigating court (*juridiction d'instruction*) or the sentencing court (*juridiction de fond*) (1930 Act, Art. 1).[57] Such psychiatric wings existed in Belgium since 1920, when they were initiated by Dr Vervaeck, director of the Penitentiary Anthropology Service and a strong advocate of Lombroso's theories.[58] The introduction of this observation measure reflected the new importance of psychiatric expertise in the social defence system at a time when the judiciary was increasingly seeking to justify the legitimacy of its decisions on scientific knowledge. The judicial authorities remained free to choose the expert and Article 3 of the law provided for the possibility of a counter-expertise at the request of the defendant, who in any case had to be able to be heard assisted by his lawyer if he wished before being subject to such a measure.[59]

[52] Cornil, *La Loi de Défense sociale à l'égard des anormaux et des délinquants d'habitude du 9 avril 1930*, pp. 14-15.

[53] See Liège Court of Appeal, 8 November 1833, *Revue de droit pénal et de criminologie* (1934), p. 57.

[54] Brussels Court of Appeal, *Chambre des mises en accusation*, 28 October 1931, *Revue de droit pénal et de criminologie* (1931), p. 1121; Cassation, 26 February 1934, *Pasicrisie*, 1934, I, p. 180.

[55] See Cartuyvels & De Spiegeleir, *La privation de liberté des personnes atteintes d'un trouble mental en Belgique: un double régime*, pp. 76-78 and 83.

[56] M. Janson, Minister of Justice, *Annales de la Chambre*, session 1927-1928, p. 81.

[57] See Brussels Court of Appeal, *Chambre des mises en accusation*, 16 June 1934, *Revue de droit pénal et de criminologie* (1934), p. 724.

[58] Vervaeck, L., La stérilisation des anormaux et des criminels dangereux, *Revue de droit pénal et de criminologie* 5 (1926), pp. 449-450.

[59] See Brussels Court of Appeal, *Chambre des mises en accusation*, 1 July 1931, *Revue de droit pénal et de criminologie* (1931), p. 860.

The second measure provided by the law was an *internment measure* that could be ordered by the investigating or sentencing court (Art. 7). This measure was set for a 'relative' indeterminate period of 5, 10 or 15 years depending on the gravity of the offence (Art. 19). By opting for such a relative indeterminate duration, the 1930 legislator forged a compromise between the concepts of classical criminal law (protection of individual freedoms, principle of proportionality) and the positivist ideology (duration based solely on dangerousness). However, the limited duration could be extended indefinitely, so that the objective of preserving liberties and combatting arbitrary detention claimed by the law was hardly achieved: the measure indeed allowed for the lifetime elimination of the interned person who persists in presenting a danger for society.[60] The law also stipulated that the release of the internee required a probationary period ("probationary release" or *libération à l'essai*) before leading to a definitive release (*liberation definitive*), possible when "the internee's mental state has improved sufficiently for him to no longer constitute a social danger" (1930 Act, Art. 19). During such probationary release, the internee was also subject to psychiatric supervision for at least one year (Art. 21).

2.3. The ambivalent nature of the internment measure, between care and security

The social defence law raised three questions as early as 1930. The first concerns the *nature* of the internment measure. Faithful to Adolphe Prins's reasoning, the 1930 legislator considered the internment measure not to be punishment. Abnormals would be treated 'not as offenders, but as sick individuals'. Internment was therefore 'a social and humanitarian measure', and the abnormals were subjected to a 'scientifically organized' care regime.[61] Very quickly, however, this distinction between punishment and care was denounced as a fiction. Several high-ranking magistrates, such as Attorney General Cornil, underlined that internment was in fact an 'improved punishment'[62] and, if the security measure 'is neither afflictive nor infamous in the theoretical definition given by the positivistic school theorists, it necessarily becomes afflictive and infamous in its practical implementation.'[63] It would be experienced as punishment by the internee and perceived as such by the public. The fact that 'this punishment is called internment and the prison in which it is served is called a psychiatric annex of a penitentiary centre does not change anything', Attorney General Leclerc added one year later.[64]

The second issue concerns where to place the internee. This question predates the 1930 Act. Throughout the 19th century, the balance swung between *prison-asylums* (introducing a psychiatric section within the prison) and *asylum-prisons* (creating a penitentiary structure within the asylum).[65] As early as 1873, the creation of a 'prison hospice' was considered in Belgium and the Draft Act of 15 April 1890 also envisaged the organization of 'special asylums' for the internment of convicted insane criminals as well as non-delinquent but dangerous insane individuals. However, the cost of building new establishments led to another choice. While the 1930 Act speaks of 'special establishments', it does not specify their

[60] The 1964 Act, reforming the 1930 Social Defence Act, eliminated those time limits, thus transforming 'relatively' indeterminate periods into an 'absolutely' indeterminate period.

[61] Projet de loi, Exposé des motifs, *Documents parlementaires, Chambre*, session 1922-1923, No. 151.

[62] Cornil, *La loi de défense sociale à l'égard des anormaux et des délinquants d'habitude du 9 avril 1930. Mercuriale du 15 septembre 1930*, pp. 50-51.

[63] Cornil, L., *La mesure de sûreté envisagées objectivement, Discours prononcé à l'audience solennelle de rentrée de la Cour de cassation, le 16 septembre 1929*.

[64] Leclerc, P., Note under Cassation 12 May 1930, *Pasicrisie Belge Cassation* (1930), p. 215.

[65] van de Kerchove, M., "L'organisation d'asiles spéciaux pour aliénés criminels et aliénés dangereux. Aux sources de la loi de défense sociale", in Tulkens, F. (Ed.), *Généalogie de la défense sociale en Belgique (1880-1914)*, Brussels: Editions Story-Scientia, pp. 113-14.

character. A Royal Decree of 15 December 1930 envisaged the creation of 'special quarters' or 'special sections' both in prisons and in psychiatric asylums for the insane criminal. In practice, the 'prison-asylum' formula prevailed: psychiatric annexes, which were originally intended as places of observation, were chosen as places of internment, which symbolically and practically strengthened the penal nature and punitive character of this 'measure of care and security.'[66]

Finally, the ambivalent nature of internment was further illustrated by the creation, in 1930, of a medico-judicial body responsible for overseeing, implementing and controlling the internee's trajectory. Once a judge decided to refer the accused to the social defence system, psychiatric commissions linked to the main psychiatric annexes of the prisons took over. Composed of a judge, a lawyer and a physician from the psychiatric annexe, the psychiatric commission – later renamed 'Social Defence Board' (*Commission de défense sociale*) – designated the establishment where the internee would be placed, decided on any transfers to another establishment, and decided on a probationary or definitive release (Art. 14). The 1930 Act thus established a medico-judicial procedure that associated magistrates and physicians in the decision-making process, but also in following up the internee's trajectory.

2.4. Critical findings on the 1930 Act and reform projects: lawyers and physicians in conflict

In 1949, two scholars from the University of Liège, Jean van den Bossche and Albert Fetweiss, proposed a synthesis of the findings made after ten years' implementation of the social defence legislation.[67] They highlighted, with statistical data to support their statement, that the original fear of the law being applied too widely had not been borne out: prisons had not been emptied in favour of establishments for abnormals and the number of internees between 1932 and 1939 represented 3.5 to 4.5 percent of the people given a criminal sentence or sentenced to imprisonment without parole.[68] Internment had been ruled for the totally insane (*déments*) (21.76%) and, among the "abnormals", for the mentally unbalanced (*déséquilibrés*) (46.07%) and the mentally deficient (*débiles mentaux*) (32.17%). Furthermore, the periods of internment were 5 years (79.14%), 10 years (18.26%) and 15 years (2.60%), which confirms that the targets were indeed insane offenders who had committed minor offences.

Probationary release was widely used (67%), a phenomenon accentuated by the fact that some internees had *de facto* been placed from the outset on probationary release. The aim of combatting recidivism seemed to have been achieved, as the percentage of people released on probation and subsequently reintegrated did not exceed 23%, with some specialists estimating that only half of this group was actually reintegrated due to recidivism.[69]

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[66] The 1964 Act also authorizes internment in a 'private facility', that is, a general psychiatric hospital, so as to reinforce the curative nature of the measure (Art. 14). However, the placement of internees in psychiatric annexes of prisons was maintained throughout the 20th century and has not disappeared today, at the beginning of the 21st century. Belgium has been regularly condemned by the European Court of Human Rights on this issue, from 1998 to the present day. (see Cartuyvels, Y., "La privation de liberté des auteurs d'infraction atteints d'un trouble mental en Belgique au prisme du droit des droits fondamentaux : CEDH versus CDPH", *Archives de Politique Criminelle*, 44, (2022), pp. 87-103.

[67] Van den Bossche, J. & A. Fettweis, "La loi belge de défense sociale et les anormaux", *Revue de droit pénal et de criminologie* 3 (1949), pp. 234-287.

[68] Ibid., "La loi belge de défense sociale et les anormaux", pp. 236-238.

[69] Vervaeck, L., "Le premier bilan quinquennal de la loi de défense sociale à l'égard des anormaux", *Revue de droit pénal* (1936), p. 802.

However, despite the positive comments it received, reforming the 1930 Act was quickly considered. At the heart of the criticism is the assimilation made by the 1930 law between the "totally insane" and the "abnormal". If the first one is totally irresponsible as he is incapable of understanding the (im)moral meaning of his act and of controlling it, the second one is not in the same situation: if incapable of controlling his action like a normal man, he stays endowed with morality and therefore remains aware of the criminal nature of his act. Submitting these two categories of irresponsible persons to the same measure of internment and treatment, as the 1930 law does, raises a number of criticisms.[70]

As early as 1935, the Minister of Justice, Eugène Soudan, appointed a commission to prepare the revision of the law. The commission submitted a 'Report on the Revision of Provisions Relating to the Totally Insane (*déments*) and Abnormals' written by two lawyers, Léon Cornil and Louis Braffort.[71] In response to the criticisms formulated at the time, the commission suggested several modifications, one of which was substantial.

Adopting a position also defended by most physicians at the time,[72] the Cornil-Braffort report proposed separating the regime for 'totally insane' offenders (*déments*) from that for 'abnormal' offenders, whom the 1930 Act lumped together and subjected to the same measure. The assimilation of the two categories 'proved to be a pure fiction' (p. 218) and an error. On the one hand, public opinion was outraged that 'abnormal' offenders, who were nevertheless capable of understanding the meaning of their actions, escaped punishment and were 'treated as nothing but sick people'; on the other hand, the assimilation was also problematic for the totally insane, who were subjected to a regime that was too repressive for them. The report therefore proposed to provide for two distinct regimes: The insane or *déments*, found irresponsible, would be subject, as long as they represented a social danger, to the administrative measure of internment foreseen by the laws of 18 June 1850 and 28 December 1873 for ordinary mentally ill persons. From a legal perspective, the measure is unchanged and remains a security measure. As for abnormal offenders, they would be subject to a 'special sentence of internment', adapted to their abnormality (pp. 219-228) and whose duration (fixed but renewable) will depend on their social dangerousness. In the end, the proposal was not adopted. Some lawyers wondered if such a change might not represent a step backwards for the abnormal offenders, sended back to the criminal law system or submitted to a hybrid logic combining punishment and internment. And for their part, psychiatrists, who were initially in favour of the split, now objected that it would be difficult to draw a clear clinical line dividing the insane criminals into the two categories.

The report also considered replacing the relative indeterminate duration of internment (5, 10 or 15 years depending on the gravity of the offence) with a simple indefinite duration, depending on the mental evolution of the internee. Physicians supported such a change, since 'setting the duration of internment according to the severity of the offence is heresy from the medical point of view' and it made no sense 'to set in advance the number of months or years that will be medically necessary' to treat a patient.[73] The lawyers resisted, as accepting the

[70] De Ryckere, Jaspar, "La loi de défense sociale à l'égard des anormaux... ", p. 411.

[71] Commission chargée d'étudier la révision de la loi du 9 avril 1930 de défenses sociale à l'égard des anormaux et des délinquants d'habitude, Rapport sur la révision des dispositions relatives aux déments et aux anormaux, *Revue de droit pénal et de criminologie* (1940), pp. 213-284.

[72] De Greef, E., "Rapport sur le projet de réforme de la loi de défense sociale", *Journal belge de neurologie et de psychiatrie* (1947), p. 401; L. Vervaeck, "Quels sont les anormaux qui relèvent des sentences de défense sociale?", *Revue de droit pénal* (1936), p. 355.

[73] Van den Bossche & Fettweis, "La loi belge de défense sociale et les anormaux*",* p. 272. See also De Greef, E., "Rapport sur le projet de réforme de la loi de défense sociale", pp. 397-444.

simple indefinite duration would give considerable power to the Social Defence Commission, an agency within which 'the psychiatrist expert, given the very importance of the medical problem at hand, [would] have a preponderant influence'. Abandoning such a decision-making power to an administrative agency was thus out of the question, as it would mean a 'real abdication of the judiciary' and a threat to the individual freedoms of which judges are the guardians.[74] The report did not endorse this proposal, which would be adopted later, when the law was revised in 1964.

Relations between physicians and lawyers were tense. In a text published in 1947, the "Belgian Society of Mental Medicine" (*Société de médecine mentale de Belgique*) severely criticised the Cornil-Braffort report, in which it saw lawyers taking power over physicians, and 'from the point of view of criminal anthropology, a regression'. The problem was first one of form: the Society of Mental Medicine regretted that 'the study commission was composed solely of penalists to the exclusion of any physician; that it did not hear sufficiently the members of the psychiatric annexes commissions (and the forensic physicians in particular) who applied the Social Defence Act'. But the criticism was also one of substance, with a strong denunciation of 'proposed modifications (that) accentuate legal and purely formal elements to the detriment of the biological, psychological and clinical elements from which the 1930 law was born.'[75] In an explanatory commentary on the Society of Mental Medecine position, Dr Ley, who acted as a spokesman for the physicians specialised in treating insanity, was more explicit. The forensic physician felt as well that the reform was premature: before modifying the 1930 law, it would be appropriate to give it the means to be implemented and to create the tools it needed.[76] Ley also felt that the project 'established on abstract theoretical notions, by lawyers distant from clinical realities', considerably increased the burden on the social defence apparatus and made it less feasible in the absence of available means. Finally, the psychiatrist wrote, the report restricted the powers of the social defence commissions in favour of the courts, 'theoretically so competent in psychopathology that they are supposed to make much wiser decisions.' For the physicians, this was turning the world upside down, since 'good social defence requires, on the contrary, extending the powers of the bodies that are in contact with clinical realities.' More specifically, maintaining a minimum and maximum duration of internment was criticised, when 'the simple indefinite sentence is obviously the solution of the future', as well as the introduction of a bilateral assessment, to which doctors preferred a 'single consultation with a common report'. To conclude, the spokesperson for the Society of Mental Medicine deplored 'a very clear tendency to restrict the influence of the physician at all levels.' He believed that such an evolution could 'dramatically increase the number of recidivists' and reminded his audience that 'the decisions to be made regarding the abnormal will always, whether we like it or not, remain in the domain of medicine rather than in the domain of law.'[77]

If the (power) relations between lawyers and physicians were clearly difficult, there was one issue – that the Report did not consider – on which they agreed, to wit, the need to maintain the requirement of a criminal act as a condition for applying the social defence law. This requirement, at the heart of the principle of legality of offences and penalties, was required by

[74] Van den Bossche & Fettweis, "La loi belge de défense sociale et les anormaux", pp. 275-276.

[75] "Voeu de la Société de médecine mentale de Belgique, adopté en sa séance du 29 novembre 1947", *Revue de droit pénal et de criminologie* 5 (1950), pp. 505-506.

[76] Dr. Ley's list of necessary improvements has surprisingly contemporary accents: 'well-equipped laboratories staffed by social workers, appropriate facilities, increased numbers of physicians, organization of psychotherapy and medical care, adequate training and remuneration of medical and nursing employees…' (Ley, J., "L'opinion médicale concernant la réforme de la loi de défense sociale", *Revue de droit pénal et de criminologique* 5 (1950), pp. 507-508).

[77] Ley, *L'opinion médicale concernant la réforme de la loi de défense sociale*, pp. 506-510.

the Social Defence Act. It was justified by the lawyers in the name of respect for freedom. In their critical synthesis, Van Den Bossche and Fettweis insisted on 'absolute respect for this supreme principle'. In their view, 'handing down a social defence sentence against an individual who has not committed any act prohibited by criminal law' was out of the question. For non-offending insane people, administrative internment on the basis of the 1850-1873 laws should be sufficient. Physicians did not seem to oppose this: 'between the insane person who has committed a crime and one who could commit one, the difference is capital and never, without a well determined act, crime or misdemeanour, will we have the right to consider an insane person a criminal and to treat him as such', Doctor Miot wrote in 1889.[78]

3. The placing of recidivists and habitual offenders at the government's disposal

Chapter V of the 1930 Social Defence Act is devoted to recidivists, to whom the legislator adds the category of habitual offenders (3.1). In addition to an aggravated sentence, these categories of offenders are subject (optionally or obligatorily, depending on the case) to a security measure after the sentence, the nature of which appears to be punitive (3.2).

3.1. Chapter V of the Social Defence Act: how to protect society effectively against recidivists and habitual offenders

While the 1930 law is mainly devoted to insane delinquents, Chapter V of the law considers the fates of recidivists and habitual offenders, with the latter placed in the same category of abnormality and dangerousness as the former. These repeat offenders, insensitive to the message of punishment, lost for rehabilitation, must be incapacitated: 'society cannot give the spectacle of impotence in the face of rebellion against the law.'[79] As Prins pointed out, the repeat offender was not an 'ordinary offender' but rather a 'special kind of offender; he has a special kind of life...and successive relapses make him, at some point, enter the social class that has always been called the criminal or dangerous class'. This category of offenders therefore also justified 'additional measures based on the permanent dangerous state of the offender', as provided for, for example, in the Norwegian Penal Code of 1902, the Prevention Crime Act of 1908 in England and Article 38 of the preliminary draft of the Austrian Penal Code of 1909.[80]

The Belgian Criminal Code of 1867 provided for three forms of legal recidivism for which the judge had the possibility of imposing an aggravated sentence (Criminal Code, Art. 54-57). Moreover, since 1836, an additional measure of 'referral to special surveillance by the police' could be imposed on the recidivist who was released after serving his sentence (Criminal Code, Art. 7). Over the years, this system was deemed ineffective: petty recidivists continued to be given light sentences, the optional strengthening of the penalty was not systematically used, and police surveillance of a number of released recidivists failed. Many of the latter

[78] Docteur Miot, *Bulletin de l'Académie Royale de Médecine de Belgique*, 1889, 4th series, Vol. III, Issue 9, p. 663.

[79] Collignon & van der Made, *La loi belge de défense sociale à l'égard des anormaux et des délinquants d'habitude (loi du 9 avril 1930): commentaire doctrinal et jurisprudentiel*, p. 310.

[80] Prins, *La défense sociale et les transformations du droit pénal*, pp. 76-79.

disappeared in the anonymity of big cities, so much so that the recorded recidivism rates reached a peak of 45 to 50 percent shortly before World War I.[81]

To address this situation, the Belgian authorities decided, in accordance with the recommendations of Adolphe Prins, to introduce two innovations in Chapter V of the 1930 Act: on the one hand, they added to the three categories of recidivists the new category of 'habitual offenders' (Art. 23), who were defined as 'anyone who has, in the last fifteen years, committed at least three offences, each of which led to correctional imprisonment of at least six months, and whose behaviour demonstrates a persistent tendency to delinquency' (Art. 25).[82] On the other hand, they abolished the measure of 'referral to special police surveillance', replacing it with a measure of 'placing at the government's disposal' (*mise à disposition du gouvernement* (MDGVT)) to take effect after the sentence. The measure was mandatory, with a duration of 20 years, for recidivists of a crime on top of a crime (Art. 24, 25), but optional in the other less serious cases and subject to a maximum duration of 5 to 10 years, depending on the sentence handed down. Once the measure was pronounced, the recidivist or habitual offender could be subject to a measure of internment in an establishment designated by Royal Decree (Art. 27). The internment measure could not be extended and the internee could petition for release on parole during the internment, a decision that would be taken by the Court of Appeal (Art. 28).

3.2. The punitiveness of a security measure

The status of this 'security measure' rapidly became a matter of discussion. Minister of Justice Paul Hymans referred to it as a 'removal measure', while the director of the socio-anthropological penitentiary service, Doctor Vervaeck, called it a measure of 'social elimination.'[83] In his Mercuriale of 15 September 1930, Attorney General Léon Cornil also spoke of a 'sentence of elimination', while noting that it had all the aspects of punishment. For Cornil, the distinction being made here between measure and punishment was clearly a linguistic artifice: 'The radical distinction between punishment and elimination measures has been emphasized: the regimes will be clearly different'. However, 'the security measure..., if we want to make it effective, cannot be any less afflictive and infamous than a penalty'. And whatever the authorities might say, it was 'a punishment upon punishment'. Judges and offenders would see it that way. Moreover, the principle of non-retroactivity of penal law applies to the measure, which clearly shows its criminal character.[84]

In a ruling of 11 December 1933, the Court of Cassation settled the debate: the detention of recidivists and habitual delinquents, whilst a security measure, was indeed additional punishment. The Court justified this finding with two arguments: it first pointed out that the detention of recidivists and habitual offenders differed fundamentally from the internment of the abnormal, who were subject to a curative and educational regime, which was not the case for the former; the Court then added that the measure of placing someone at the government's disposal 'has replaced the old referral to special police surveillance, which had the same purpose' and 'Article 7 of the Penal Code expressly included the referral to special surveillance

[81] Goethals, J., *Abnormaal en delinkwent. De geschiedenis en het aktueel functioneren van de wet tot bescherming van de maatschappij*, Antwerp: Kluwer, 1992, p. 111.

[82] See Collignon & van der Made, *La loi belge de défense sociale à l'égard des anormaux et des délinquants d'habitude (loi du 9 avril 1930): commentaire doctrinal et jurisprudentiel*, pp. 314-315.

[83] Vervaeck, L., "Deux années d'application de la loi de défense sociale à l'égard des anormaux et des récidivistes", *Revue de droit pénal et de criminologie* 3 (1933), p. 232.

[84] Cornil, *La loi de défense sociale à l'égard des anormaux et des délinquants d'habitude du 9 avril 1930. Mercuriale du 15 septembre 1930*, pp.78-79 & 94.

among the penalties'. The Court concluded that 'the placing at the government's disposal, unlike the internment (of abnormals), is of the nature of a penalty" and such a decision did indeed constitute a worsening of the punishment.[85]

Although the discussion continued in the legal doctrine,[86] there is little doubt that the MDGVT, while it may have been administrative in its implementation, was similar to a penalty after the penalty. This punitive dimension, whilst being *a priori* derogatory to the principle of proportionality of the sentence, was acceptable to neoclassical thinkers insofar as everything was done upstream to avoid resorting to it. For them, the existence of the other component of the 1930 Social Defence Act regarding insane criminals, combined with the promulgation of the Childhood Protection Act in 1912 and the efforts made to improve the prison system, justified being severe with these repeat offenders who refuse the offered opportunities and continue to present persistent delinquent behaviour.[87]

The 1930 Act reflected the spirit of the times and would encounter little resistance in Parliament. Only the communist left was critical, fearing that the law – and more specifically its Article 23 on habitual offenders – would be used to criminalize left-wing activists.[88]

4. Conclusions

At the end of the 19th century, the threat posed by the 'dangerous classes' for the existing social order favoured a diversion strategy. An urban underclass separate from the working class was socially constructed as a criminal threat. Targeting the 'abnormal', associating dangerousness with a pathology that psychiatry largely helped to format throughout the 19th century, reifying the deviant as a product of degeneration, the new reading of risk individualized, medicalized and depoliticized the issues of deviance. The priority became that of detecting 'dangerous individuals', classifying them and protecting society from the social danger that they represented.

Insane delinquents and repeat offenders were prime targets at the heart of this social defence discourse that swept through Belgium, as well as other countries in Europe, starting at the end of the 19th century. Like other incarnations of dangerousness, they became the subject of a social defence legislation that developed at the periphery of the Criminal Code. An indefinite security measure was provided as an alternative to criminal sentencing in the case of insane criminals and complementing criminal sentencing for recidivists and habitual delinquents, in order to protect society from the criminal risk that both categories of offenders represented.

Inspired by positivism, the 1930 Social Defence Act reflected the eclectic approach defended in Belgium by Adolphe Prins. It expressed the desire to find a compromise between the principles of classical criminal law and the security concerns of the social defence discourse. Complementary to the Criminal Code, whose logic was not questioned for 'normal' offenders, the 1930 Act maintained the requirement of a criminal act as a basis for its para-penal

[85] Cassation, 11 décembre 1933, *Revue de droit pénal* (1934), p. 43.

[86] Boucquey, E. & J. Janssens, "La nature juridique de la mise à disposition du gouvernement des récidivistes et délinquants d'habitude", *Revue de droit pénal et de criminologie* (1957-1958), pp. 894-902.

[87] Cornil, *La loi de défense sociale à l'égard des anormaux et des délinquants d'habitude du 9 avril 1930. Mercuriale du 15 septembre 1930*, p. 82.

[88] Intervention of Deputy Jacquemotte, *Parliamentary Annals, Chamber,* 1925-1926, 2 July 1926.

intervention. At the sentencing stage, however, it strayed more from the traditional principles of legality and proportionality. At this stage, the classical retributive criminal law that guarantees freedom was replaced by a social defence law whose ultimate goal was to 'maintain order.'[89]

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[89] Prins, "La défense sociale et les transformations du droit pénal", p. 56.

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