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"Houses Destined for Them" [*casas para elles destinadas*]: Insane Offenders, the Article 12 of the 1830 Brazilian Criminal Code and the Question of the Predecessors of Security Measures*

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To my wife Sabrina,
a brilliant practitioner (and thinker) on mental health

Abstract
The first decades of the 20th century are a landmark in the history of security measures. Why? Would much earlier preventive measures be able to backdate the history of security measures? If we want a legal history capable of analyzing its objects in their proper contexts, it is reasonable to preserve the landmark of the early 20th century. One of the possible contexts for the legal historian analysis is that of legal culture in its part constituted by specialized intellectual debate. Thereby, we can determine the disclosure of security measures as a problem for the legal culture. It requires an analysis of the status of the antecedents of security measures. Concerning Brazilian legislation, the best example of a predecessor is article 12 of the 1830 Criminal Code: a rather singular article in the legislative scenario of the early 19th century and interpreted differently along the century. By emphasizing the shifts and relocation of frontiers that occur when the security measure becomes an issue for legal science, we can challenge the memory created by several Brazilian jurists around security measures, constituted by the ideology of novelty and the unceasing quest for predecessors.

Keywords
History of criminal law, security measures, insane offenders, 1830 Brazilian Criminal Code

Summary: 1. "Houses destined for them" and the frontiers of criminal law (introduction). 2. A memory for the security measures. 3. "Molds that need not be broken" I: Singularities of the article 12. 4. "Molds that need not be broken" II: Ordinary asylums and family. 5. "Molds that need not be broken" III: Criminal asylums. 6. "Public safety" and beyond (conclusions and *post scriptum*). Bibliographical references

1. "Houses destined for them" and the frontiers of criminal law (introduction)

* This article is a translation with some additions, modifications and bibliographical updating of the chapter "*'Casas para elles destinadas': 'loucos criminosos', o article 12 do código criminal brasileiro de 1830 e a questão dos antecedentes das medidas de segurança*", published in Brodt, L. A. S., Siqueira, F. (eds.), *Limites ao poder punitivo: diálogos na ciência penal contemporânea*, Belo Horizonte, 2016, pp. 643-670. A preliminary version was published in the proceedings (book "*História do Direito*") of the *Encontro Nacional do CONPEDI de 2013*, Florianópolis-SC-Brazil. This new version was carried out within the framework of the following research projects: *L'influence de la révolte positiviste sur le droit pénal au tournant des XIXe et XXe siècles: un état de la discussion en Europe et en Amérique latine* (*Groupe Européen de Recherche sur les Normativités*) and *História do direito penal brasileiro em perspectiva comparada entre os séculos XIX e XX* (FAPEMIG, *edital demanda universal* 1/2017). I would like to thank Diego Nunes, Laura Torres and Mariana de Moraes Silveira for their helpful comments on this new version of my article.

"Insane persons who have committed crimes will be confined to the houses destined for them or delivered to their families, as it is deemed more convenient by the Judge" [*Os loucos que tiverem commettido crimes, serão recolhidos ás casas para elles destinadas, ou entregues ás suas familias, como ao Juiz parecer mais conveniente*] (article 12, 1830 Criminal Code). Would this 1830 Brazilian Criminal Code article be a rudimentary version of the future security measures, which would later gain a specific chapter within the 1940 Criminal Code?

Sketching an answer to this question helps to adequately locate the central problem to be addressed here in the sphere of the history (or "pre"-history?) of security measures in Brazilian criminal law. A fundamental methodological rule for this first part of our journey will be to avoid the endless quest for antecedents in the farthest reaches of history. Some of these antecedents certainly bear some resemblance to security measures, but we must not confuse the yarns with the fabric. That was the metaphor used by the *maestro* Paolo Grossi to explain that Roman law in medieval or modern times has been immersed in completely different mental and social structures, thus, the focus on autonomous yarns frays the fabric.[1] This metaphor is perfectly applicable to our case because it restrains us, for example, from seeking prototypes of security measures in any preventive measure.

The referred article 12 subsisted until the end of the 19th century, more precisely until 1890, when the second Brazilian criminal code came into being. For this reason, this article ended up colliding with perspectives that were already foreseeing the transformations undergone by criminal law in the first half of the 20th century with the criminological wave[2]. This friction generated some noteworthy differences in the interpretation of Article 12. In the older one of the expression "houses destined for them", it was clearly understood that article 12 was the exit door of criminal law. From then on, the issue would enter another realm: medicine, and thus the role of criminalists and legal practitioners (judges, in the first place) would cease. In the late 1880s, a new interpretation elaborated by a criminalist who declared himself a follower of the Italian positivist school, João Vieira de Araújo, changed course. In his view, "houses destined for them" are no longer simply ordinary asylums.

If the history of security measures is to be seen in connection with the relocation of the frontiers of criminal law, did João Vieira de Araújo's new interpretation (within the criminological wave of the late 19th century) make article 12 a prototype of security measures? The relocation of boundaries is, a much more complex process, but, indeed, the friction with the phase that will lead to the security measures exists in Vieira de Araújo's interpretation (even though the legislative text remained unchanged). But how much water had passed under the bridge of history from 1830 to 1889? And afterward, what was the role of the 1890 Criminal Code in the history of security measures? What are the historiographical challenges for reconstructing the history of the security measures without losing sight of the fabric of which they are part?

[1] Grossi, P., "Massimo Meccarelli, Stefano Solimano: a colloquio con Paolo Grossi", *Forum historiae iuris. Erste europäische Internetzeitschrift für Rechtsgeschichte* (20. März 2007), §69.

[2] About these transformations in Brazil, see Dias, R. F., *Criminologia no Brasil: cultura jurídica criminal na Primeira República*, Curitiba, 2017 and Sontag, R., "The Italian Scuola Positiva in Brazil between the Nineteenth and Twentieth Centuries: The Problematic Issue of 'Influence'", *GLOSSAE. European Journal of Legal History* 17 (2020), pp. 487-516.

It is historiographically safe to consider the 1940 Criminal Code as the landmark of the "constitution of a specific model of penal intervention for the insane offender"[3] in Brazil, as Maria Fernanda Tourinho Peres and Antônio Nery Filho have already done. The security measures of the 1940 code "emerged to enable criminal law to act against the irresponsible and semi-responsible, who, based on the previous code [of 1890], were outside the scope of criminal sanctions"[4]. Does the logic of inside *versus* outside effectively provide a satisfactory solution to the problem of writing the history of security measures? On the one hand, this logic is interesting because links our history to the question of the frontiers of criminal law. *A propos*, Michele Pifferi reminds us that the reflection on the nature of the security measures is part of a process in which "the steady boundaries of the discipline [criminal law] are transforming into an expanded frontier"[5]. On the other hand, what about article 12 of the 1830 code, for example? I do not intend, for the simple sake of historiographical novelty, to tamper with the landmark of the 1940 code, but we will have to take a step back to determine a way to prevent this landmark from being moved with impunity to immemorial times.

Not only historiography but also jurists reflected on the novelty of security measures, on the eve and soon after the enactment of the 1940 code, creating a memory for this institute. For this reason, the first stop of our journey will be dedicated to them.

2. A memory for the security measures

In the brief historical introductions that some criminalists provide before the dogmatic analysis of the legal institute of security measures, the search for remote antecedents is not uncommon.

According to Heleno Cláudio Fragoso, "precautionary [*cautelares*] and preventive measures have been known since ancient law [that is, since Roman law], about minors and the insane".[6] After passing through several other antecedents in all historical eras, Fragoso concludes that within 19th-century criminal codes "preventive measures can be found, sometimes under the guise of a penalty, which anticipates security measures".[7] Two of the 19th-century codes explicitly mentioned by Fragoso were the Italian code of 1889 and the Brazilian code of 1890. The absence of reference to the 1830 code is not explained, even though its provisions on the confinement of the deranged were not so different from its successor of 1890. This is the quest for distant antecedents, but Fragoso also recognizes that "security measures were for the first time organically systematized in the Swiss Criminal Code draft elaborated by Stooss in 1893" and that "it was with the Italian Criminal Code of 1930 (…) that a complete system of security measures appeared

[3] Tourinho Peres, M. F., Nery Filho, A., "A doença mental no direito penal brasileiro: inimputabilidade, irresponsabilidade, periculosidade e medida de segurança", *História, ciências, saúde – Manguinhos* mai-ago (2002), p. 336.

[4] Tourinho Peres, Nery Filho, "A doença mental no direito penal brasileiro: inimputabilidade, irresponsabilidade, periculosidade e medida de segurança", p. 345.

[5] Pifferi, M., "Difendere i confini, superare le frontiere. Le 'zone grigie' della legalità penale tra Otto e Novecento", *Quaderni fiorentini per la storia del pensiero giuridico moderno* XXXVI (2007), p. 750.

[6] Fragoso, H. C., *Lições de direito penal: parte geral* [1976], ed. rev. por Fernando Fragoso, Rio de Janeiro, 2003, p. 493.

[7] Fragoso, *Lições de direito penal*, p. 494.

in the legislation, spreading widely in the codes promulgated thereafter",[8] including the Brazilian Criminal Code of 1940. Álvaro Mayrink da Costa repeats some of Fragoso's observations - a usual procedure in the historical sections of law handbooks and treatises - and adds some information about the Brazilian context. Mayrink da Costa lists examples of security measures in Brazilian criminal law since the 1830 Criminal Co–e - the aforementioned article –2 - passing through the 1890 code and all the drafts that succeeded it until the 1940 Criminal Code.[9]

Security measures as a great novelty in the scholarly debate and the penal legislation of the late 19th century and the first half of the 20th century: such was the perception of the jurists who witnessed the transformations that resulted in the 1940 Brazilian Criminal Code, even when they admitted the existence of more or less distant antecedents. And there was some justification for this view. The 1940 code is an undoubted milestone because it had a specific and very articulate chapter on security measures. The two drafts that preceded it - that of Alcântara Machado (1937-1939) and that of Sá Pereira (1927-193–) - also had specific chapters on the subject. As for Galdino Siqueira's draft of the 1910s, the issue is more delicate. Siqueira argued that there were already provisions of this kind in his proposal, but that they were indeed sparse and timid, dependent on the main penalty, and without autonomy. In the Brazilian criminal law literature of the first half of the 20th century, it is possible to find a real debate on the matter: monographs on the notion of security measures appear; articles in specialized journals; and a much larger number of pages in criminal law textbooks and treatises in comparison with the places where one could expect some word on this topic within the analogous literature of the 19th century.

In one of the pioneers and most important Brazilian monographs on our topic, the 19“7 "*Medidas de Segurança*" (Security Measures), taking the preventive feature of security measures as a starting point, Ataliba Nogueira finds antecedents of the institute in Brazil even in times of "unwritten law".[10] In the more recent past, security measures would be the provisions on the internment of the "insane offender" in "asylums for the mentally ill", as well as a series of other "accessory penalties" [*penas acessórias*] and "effects of the conviction [*efeitos da condenação*]".[11] Nogueira tries to identify precursors from a very simple and generic criterion - prevention -, so it is more relevant to capture the historical density of the institute the following remark he raises: The "acceptance of some preventive measures [...] does not invalidate the statement that the law in force does ignore security measures. Scarce and sparse, without a system, without general principles of application, confused with penalties or other measures, many of them adopted as procedural means, they are merely precursors of the most modern legal institute".[12] The problem lies precisely in the notion of precursor: To what extent does such a category of analysis, in the name of an evolutionary line, make us lose sight of the link between a given institute and its historical context - for example, the link with the affirmation of the frontiers of criminal law and with the relocation of such frontiers? In Brazil, the Sá Pereira draft of the 1930s made the "first official attempt to systematize security measures".[13]

[8] Fragoso, *Lições de direito penal*, pp. 494-495.

[9] Mayrink da Costa, Á., *Direito penal: vol. I, tomo II – parte geral* [1982], 4ª ed., Rio de Janeiro, 1992, p. 656.

[10] Nogueira, A., *Medidas de segurança*, São Paulo, Saraiva, 1937, p. 241.

[11] Nogueira, *Medidas de segurança*, pp. 242-243.

[12] Nogueira, *Medidas de segurança*, p. 243.

[13] Nogueira, *Medidas de segurança*, p. 244.

Demosthenes Madureira de Pinho, in an article from 1938, expresses a similar conception, even though he is a little more cautious because he rejects the possibility of finding precursors of the security measures in legislation before the 18th century. However, Madureira de Pinho ends up finding a series of antecedents throughout the 19th century. This is the case of the internment established for juvenile offenders in the 1810 French Criminal Code, which would be "a real security measure".[14] Switching his attention to his own country, he denies the existence of security measures in the Brazilian codes of 1830 and 1890 – which is quite strange, because if there were (prototypes of) security measures in the 1810 French code, there would be also in the Brazilian ones. However, it is more significant for us that Madureira de Pinho recognizes the Stooss draft for the Swiss criminal code (1893) and the Italian Rocco draft (1927) as two milestones in the history of security measures.[15]

On the eve of the 1940 Criminal Code, when the Alcântara Machado draft of 1938 already had a well-developed chapter on the topic, we find the relevant monograph by Aníbal Bruno. Concerning the antecedents of the security measures, Bruno's reasoning was similar to those we have seen so far. Based on a generic and elementary criterion – prevention -, he identifies several sparse provisions in the 19th century that could stand as precursors: The measures for "minors" and "insane" in most 19th century criminal codes; some English statutes of the late 19th century; an Egyptian legislation of 1891 on vagrants; and switching to Brazil: decree n. 1.132 of December 22, 1903 (among others analogous to it until the 1930s); decree n. 145 of July 11, 1893, on the foundation of a correctional colony for vagrants and *capoeiras*;[16] and the 1927 juvenile code.[17] Moreover, Bruno mentions the "curiosity of investigators" that, in the search for "fragments of preventive measures", "tried to discover traces of them in the oldest legislations, coexisting with the primitivism of the talion".[18] Once again, however, such a search for antecedents does not preclude the perception of a great novelty: "the concept of security measures, their fundament, and the broad objectives with which they are presented today in the doctrine and the codes are a result of this movement of profound renovation that has been driving criminal law in the last decades".[19] The beginning of the theory of the new institute should be attributed, according to Bruno, to Franz von Liszt.[20] According to him, von Liszt's theory was propelled by several international congresses, all of them in the late 19th century and early decades of the 20th century.[21] As for the legislative landmarks of the "introduction of the security measures under the form of an organic institute" once more the Stooss draft, the Rocco code, and, in Brazil, the Sá Pereira draft, are recalled.[22] For Aníbal Bruno, the security measures collaborated with the expansion of traditional criminal law due to the theories of social defense and dangerousness: "with the security measures, criminal law inaugurates a new experience".[23] Although Bruno also looks for

[14] Madureira de Pinho, D., *Medidas de segurança (teoria geral)*, Rio de Janeiro, 1938, p. 27.

[15] Madureira de Pinho, *Medidas de segurança*, 1938, p. 30.

[16] An Afro-Brazilian mixture of fighting, dance and music. As pointed out by Clóvis Moura, capoeira is a "técnica de defesa e ataque criada pelos escravos brasileiros", but "no início, a capoeira tinha de se manifestar também em espaços controlados pelo senhor, e, por esse motive os negros tinham necessidade de imprimir à luta um caráter ambíguo, que virava divertimento, 'brincadeira'" (Moura, C., "Capoeira", en C. Moura (ed.) *Dicionário da escravidão negra no Brasil*, São Paulo, 2004, p. 84-86).

[17] Bruno, A., *Medidas de segurança*, Recife, 1940, p. 140.

[18] Bruno, *Medidas de segurança*, p. 129.

[19] Bruno, *Medidas de segurança*, p. 9.

[20] Bruno, *Medidas de segurança*, p. 19 and p. 98.

[21] Bruno, *Medidas de segurança*, p. 99-128.

[22] Bruno, *Medidas de segurança*, p. 56, p. 130 and p. 141.

[23] Bruno, A., *Direito penal. Vol. II* [1962], 3. ed., Rio de Janeiro, 1967, p. 16.

antecedents of security measures in Antiquity, he insists that "its integration into Criminal Law with the consequent systematization, with its foundations and objectives established, is the work of modern doctrine and legislation".[24]

On the issue of the frontiers of criminal law, it is worth reading an excerpt from Aníbal Bruno on the administrative or criminal law nature of security measures: "Would security measures be administrative police measures? But it is not the police that applies them, it is not the administrative laws that prescribe them, and it is not the works of administrative law, in general, that deal with them. It is the criminal codes that regulate them, it is the works of criminal law that study them, it is the criminal judges who judge their opportunity, who apply them, who supervise their execution, who suspend or revoke them".[25] Whether or not we consider these arguments sufficient to account for the legal nature of security measures, the facts mentioned by Aníbal Bruno describe very well the cultural milieu within which we must understand the history of security measures. The controversy about the administrative or jurisdictional nature is part of this milieu, even though the jurisdictional positions allow us to see more clearly that what was at stake was a question of relocation of boundaries. Oscar Stevenson, for example, said that "we cannot degrade security measures to the category of administrative measures. To do so would be to denature them of their essence as a genuine criminal law institute".[26] For this reason, he criticized the terminology of the 1930 Italian Penal Code ("administrative security measures") and praised the 1940 Brazilian Criminal Code for not using the expression "administrative". For him, such measures were jurisdictional, thereby expanding "the concept of jurisdiction and criminal judgment" so that "the concept of security measures opened a new sector in criminal law".[27] If the need to understand objects in their contexts is adopted as a methodological premise, the notion of security measures is inseparable from this debate. For this reason, explicit discontinuity must separate article 12 of the 1830 Criminal Code from the 20th-century history of security measures.

"The admission, in the criminal law, of security measures, with an almost perfect, organic and juridical systematization (...) constitutes the greatest merit of the new [1930 Italian] Code and this justifies attributing to it a physiognomy of its own. The same could be justly said of our Code [of 1940]".[28] This is the opinion of the already mentioned Demosthenes Madureira de Pinho about the novelty of the Brazilian 1940 Criminal Code, although he states - always in a quest for precursors - that, in an unsystematic fashion, security measures have existed practically forever: "The laws of Manu, the legislation of the Athenian republic, the French Code of 1810, the Brazilian Code of 1830, the Portuguese Code of 1851 and from then on all the Codes and drafts disorderly contained security measures, reflecting the first phase of the evolution of this institute of nowadays criminal law".[29] When the "laws of Manu" are mentioned, one can see the risk, for historical narrative, of searching for precursors: it tends to understate the differences between historical contexts.

[24] Bruno, *Direito penal*, pp. 16-17.

[25] Bruno, *Medidas de segurança*, p. 86.

[26] Stevenson, O., "A jurisdicionalidade das medidas de segurança", *Revista forense* dez. (1945), p. 431.

[27] Stevenson, "A jurisdicionalidade das medidas de segurança", p. 435.

[28] Madureira de Pinho, D., "Algumas inovações do código penal", *Revista forense* jan. (1941), p. 40.

[29] Madureira de Pinho, "Algumas inovações do código penal", p. 41.

Despite the search for antecedents, the recognition that there was something new between the end of the 19th century and the beginning of the 20th century was inevitable[30]. The authors we have seen so far used to speak of a process of systematization of security measures, the great novelty of the penal codes of the first half of the 20th century - including the 1940 Brazilian Code. The concept of systematization made the sensation of novelty compatible with the desire to avoid completely unknown lands – one of the authors of the 1940 Criminal Code, Nelson Hungria, represented the new security measures as an "expansion to the criminal law orbit of administrative provisions already known in civilized countries against insane persons, alcoholics, and minors"[31]. Historiographically, perhaps the perception of novelty makes fewer mistakes, even if it is necessary to recognize the existence of some antecedents. But the problem of historical reconstruction is not exactly that of identifying novelty. Both endless genealogies and the ideology of novelty do not sufficiently address the most serious historiographical problem: understanding historical transformations in their context. In our case, regardless of the question of novelty, it is important to realize how the issue of security measures is inserted in the context of the late 19th century and the first half of the 20th century since they became the object of intense debate in the national and international spheres, that is, they became a relevant object for the science of criminal law. In short, they gain a role that places them at the center of a real relocation of the frontiers of criminal law:[32] I am referring to the issue of "integration in Criminal Law", as it was intuited by Aníbal Bruno. Notwithstanding, the history of security measures between the end of the 19th century and the first half of the 20th century is not representable as a simple process of systematization. For some authors of that time, integration meant admitting the full jurisdictional nature of the institute as opposed to its alleged administrative nature, but, from a historical point of view, it is not necessary to solve such a classification problem. The mere fact that such a debate took place is a sign of integration in a broader sense and of the relocation of criminal law boundaries: both the jurisdictional positions and the very articulate chapter of the 1930 Italian penal code on "administrative security measures" are facets of the same process. Though the 1930 Italian code definition was an attempt to mark the boundaries of criminal law,[33] as pointed out by Michele Pifferi, these boundaries were relocated. Both the jurists engaged in defining boundaries and those engaged in overcoming them were no longer dealing with the old geography of criminal law.

The 1830 Brazilian Criminal Code was still a long way from this process when it established the provision of article 12 on the internment of the insane offender. But this

[30] For other examples of this view, see Garcia, B., "Medidas de segurança", *Revista forense* ago. (1946), p. 221; Garcia, B., *Instituições de direito penal*. *Vol. I. Tomo II*, 4. ed. revista e atualizada. 24. tiragem, São Paulo, [1965], p. 592; Marques, J. F., *Tratado de direito penal*. *Vol. III*, 2. ed., São Paulo, 1966, pp. 175-176; Noronha, E. M., *Direito penal. Vol. I*, 9. ed., São Paulo, 1973, p. 313.

[31] Hungria, N., *Comentários ao código penal. Vol. 3*, Rio de Janeiro, 1948, p. 21.

[32] About the debates around the frontiers of criminal law in Brazil in the first half of the 20th century, see Sontag, R., *Código e Técnica: a reforma penal brasileira de 1940, tecnicização da legislação e atitude técnica perante da lei em Nelson Hungria*, Master thesis, Florianópolis, 2009, and in the book Sontag, R., *"Código criminológico"? Ciência jurídica e codificação penal no Brasil (1888 – 1899)*, Rio de Janeiro, 2014 (which is the revised version of ideas already expounded in my doctoral thesis of 2012), Prando, C., *O saber dos juristas e o controle penal*: *o debate doutrinário na Revista de Direito Penal (1933 – 1940) e a construção da legitimidade pela defesa social*, Rio de Janeiro, 2013, especially chapter 4, and earlier, still in legal historiography, Mafei Rabelo Queiroz, R., *A modernização do direito penal brasileiro. Sursis, livramento condicional e outras reformas do sistema de penas clássico no Brasil, 1924-1940*, São Paulo, 2007, chapter 3, even though the issue of the frontiers of criminal law was not a central theme.

[33] Pifferi, "Difendere i confini, superare le frontiere. Le 'zone grigie' della legalità penale tra Otto e Novecento", p. 791.

code was indeed heterodox to the standards of criminal codes of the early 19th century, and for this reason, it caught the attention of late 19th century jurists such as João Vieira de Araújo.

3. "Molds that need not be broken" I: Singularities of the article 12

João Vieira de Araújo, as we have already seen, is usually known as one of the pioneers of the reception of the ideas of the Italian positivist school in Brazil.[34] Since our purpose is not to go into detail on his approach to the 1830 Criminal Code, it will suffice to mention two aspects. The first: when operating with the binomial "classic school" *versus* "positivist school" it was not difficult to fit the 1830 code in the first pole due to the time it got written. The expression "classic school" was invented by the positivists to identify a bygone phase of criminal law. Thus, this expression carries in its core a considerable dose of pejorative charge, because of the evolutionist schemes of positivism. On the one hand, João Vieira did not fail to criticize the 1830 code from this point of view, but the old code had great prestige, and not even the pejorative expression of the positivists was able to annul this prestige. Positivist Vieira de Araújo had his reasons for not deploring the 1830 code, because its text provided, among other things, for the satisfaction of damages resulting from crime in the criminal procedure, like what positivists such as Raffaele Garofalo advocated.[35] Among other examples of fortunate provisions of the 1830 code, Vieira de Araújo highlighted our article 12.

In his criticism of free will and moral responsibility, Vieira de Araújo reaches the most positivist claims, that such concepts would only serve to let dangerous individuals at liberty.[36] For this reason, it would be necessary to differentiate the sanctioning response (prison or criminal asylum) according to the type of delinquent[37]. But the 1830 Brazilian code would be an example of "classicism" not entirely deplorable because it provided, in its article 12, the internment of the insane offender who had been acquitted: With "the words - houses destined for them - the genius of Bernardo Pereira de Vasconcellos, author of the code, revealed itself in many other provisions, casting them in molds that need not be broken to adapt them to the demands of the present time".[38]

Indeed, article 12 of the 1830 code is a frontier provision, and, not coincidentally, it did not widely spread among early 19th-century codes. For this reason, Argentinian jurist Ladislao Thot, writing at the time of the irresistible rise of security measures – the 1930s -, considered such a provision worthy of remembrance: "As to the provisions concerning insane offenders, the value in terms of criminal policy [of the 1830 Brazilian code] is yet to be seen in the acceptance of lucid intervals on the one hand, and on the other hand, in their internment in houses destined for them. The condition of this internment was that the insane person had committed a crime".[39]

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[34] See, for all, Alvarez, M. C, "A criminologia no Brasil ou como tratar desigualmente os desiguais", *Dados – revista de ciências sociais* 45/4 (2002), p. 690.

[35] Garofalo, R., *Riparazione alle vittime del delito*, Torino, 1887.

[36] Vieira de Araújo, J., *Código criminal brazileiro: commentario philosophico-scientifico em relação com a jurisprudência e a legislação comparada*, Recife, 1889, p. 89.

[37] Vieira de Araújo, *Código criminal brazileiro*, p. 230.

[38] Vieira de Araújo, *Código criminal brazileiro*, p. 232.

[39] Thot, L., "O Código Criminal Brasileiro de 1830. Estudo histórico-jurídico comparativo", *Pandectas brasileiras: registro de doutrina, jurisprudência dos tribunais e legislação* 8 (1930), p. 49.

What would have been the sources of inspiration for this peculiar article 12?

In Edward Livingstone's draft of the criminal code for the American state of Louisiana of 1824, known by Brazilian legislators when elaborating the 1830 code,[40] there was a similar article that provided for the "security" of the accused in a "state of insanity": "Art. 30. No act done by a person in a state of insanity can be punished as an offense. (...) In all the cases mentioned in this article, the court having cognizance of the offense shall make an order to secure the person of the accused".[41]

The most exemplary code of that time, the French one of 1810, in the form of its article, was closer to the Brazilian one, but, focusing on its content, there was a relevant distance because it provided for a measure of this kind only in relation to minors: "Art. 64; *Il n'y a ni crime ni délit, lorsque le prévenu était en état de démence au temps de l'action, ou lorsqu'il a été contraint par une force à laquelle il n'a pu résister*", and "*art. 66. lorsque l'accusé aura moins de seize ans, s'il est décidé qu'il a agi sans discernement, il sera acquitté; mais sera, selon les circonstances, remis à ses parents, ou conduit dans une maison de correction, pour y etre élevé et détenu pendant tel nombre d'années que le jugement déterminera, et qui toutefois ne pourra excéder l'époque où il aura accompli sa vingtieme année*".[42] The similarity is in the provision of two alternatives - internment in a "*maison de correction*" or "*remision a ses parents*" - which may lead us to imagine that article 12 of the Brazilian code generalized the French formula (even though there are no sources confirming this hypothesis).

In Italy, among the codes before the penal unification that has similar provisions, they are always restricted to minors.[43] Not by chance, in 1885, Raffaele Garofalo sought the urgent approval of an 1881 bill[44] that provided exactly what João Vieira de Araújo highlighted was already properly foreseen in the 1830 Brazilian Criminal Code: the possibility for the judge to order the internment of insane offenders in criminal asylums. For this reason, the provision of the Brazilian code was apt, according to Vieira de Araújo, to adapt to the "demands of the present time", as we have already seen.

The other powerful model of that epoch - although probably less than the French one - the 1803 Austrian Criminal Code did not establish anything similar: There was only the formula of imputability and nothing else.[45]

[40] See Dantas, M., "Da Luisiana para o Brasil: Edward Livingston e o primeiro movimento codificador no Império (o Código Criminal de 1830 e o Código de Processo Criminal de 1832)", *Jahrbuch fü Geschichte Lateinamerikas* dec. (2015), pp. 173-205.

[41] Livingstone, E., *Project of a New Penal Code for the State of Lousiana*, London, 1824, pp. 112-113.

[42] *Code pénal suivi de l'exposé des motifs presenté par les orateurs du gouvernement* (...). *Tome premier*, Paris, 1812, pp. 14-15.

[43] See *Codice penale per il principato di Piombino* [1808], ristampa anastasica, Padova, 2001, p. 45, art. LIII; *Codice dei delitti e delle pene pel regno d'Italia* [1811], ristampa anastasica, Padova, 2002, p. 25, art. 66; *Codice per lo regno delle Due Sicilie* [1819], ristampa anastasica, Padova, 1996, pp. 17-18, art. 64; *Codice penale per gli stati di S. M. Il re di Sardegna* [1839], ristampa anastasica, Padova, 1993, p. 26, art. 93; *Codice penale pel granducato di Toscana* [1853], ristampa anastasica, Padova, 1995, p. 16, art. 37.

[44] Garofalo, R., *Criminologia*, Torino, 1885, p. 485.

[45] See *Codice penale universale austriaco* [1803], ristampa anastasica, Padova, 2001, p. 1, §2°.

We could go on scanning through all codes and drafts of the 18th and 19th centuries, but the inconclusive results we have reached so far would probably not change.[46]

Article 12 of the 1830 Brazilian Criminal Code was quite singular in the 19th-century legal scenario, but not unique. In Argentina, José Daniel Cesano pointed out that the 1866 Carlos Tejedor criminal code draft established a legal consequence for the acquitted insane offender in article 2 of the third title. This article of the Tejedor draft did not remain in the final version that originated the first unitary Argentinian criminal code in 1886.[47] Nevertheless, the Tejedor draft became law in eleven Argentinian provinces before 1886.[48] One important part of the Tejedor abovementioned article is quite similar to the Brazilian one: "*Las personas nombradas* [which included insane offenders] *que cometan algun crímen, seran encerradas en algumas de las casas destinadas para los de su clase, ó entregadas á su familia, segundo lo estime el juez por conveniente*".[49] According to Cesano, the source of inspiration to this part of the article 2 of the third title was the 1848-1850 Spanish Criminal Code[50], which stated: "*Cuando el loco ó demente hubiese ejecutado un hecho que la ley califique de delito grave, el tribunal decretará su reclusion en uno de los hospitals destinados á los enfermos de aquella clase, del cual no podrá salir sin previa autorización del mismo tribunal. En otro caso será entregado á su familia bajo fianza de custodia; y no prestándola, se observará lo dispuesto en el parráfo anterior*".[51] The wording of article 12 of the 1830 Brazilian code is more similar to the Tejedor draft than the Spanish one because the Argentinian draft and the Brazilian article did not make the distinction between family or asylum according to the gravity of the offense and did not provide the "*fianza de custodia*" or the judge's power over the release of the insane offender from the asylum. Was it a Brazilian "influence" over the eleven provincial Argentinian codes through the Tejedor draft? Or even an influence of the Brazilian code over the Spanish one? Commenting the Spanish provision, Joaquín Francisco Pacheco tried to convince his readers that this article was not bizarre by stating that "*estas prescripciones de que hablamos ni son novedades en nuestra práctica, ni es este Código el primero que las consigna. Lo que se dice aquí, se ha acostumbrado en nuestros tribunales, aunque no tuviéramos ley que lo preceptuara; y en las Concordancias hemos visto que el código del Brasil expresamente lo sanciona también. No habia ninguna razon para que el nuestro dejase de consignarlo, ni para que lo hiciese en otros términos que los que emplea*".[52] The Brazilian code was the only one explicitly mentioned by Pacheco. Nevertheless, I do not want to exhume the old nationalistic topic of the influence of the Brazilian 1830 code over foreign codes.[53] All these codes were

[46] Vivian Chieregatti Costa, in her detailed analysis of the legislation that influenced 1830 Brazilian Criminal Code, did not find any foreign provision to which clearly relate the Brazilian article 12 to (see Chieregatti Costa, V., *Codificação e formação do Estado-nacional brasileiro: o Código Criminal de 1830 e a positivação das leis no pós-independência*, Master thesis, São Paulo, 2013, pp. 238-274).

[47] Cesano, J. D., *Consecuencias juridico-penales y enfermedad mental. Cultura jurídica y codificacion argentina (1877-1921)*, Córdoba, 2021, p. 20.

[48] Cesano, *Consecuencias juridico-penales y enfermedad mental*, p. 65.

[49] Tejedor, C., *Proyecto de Código Penal para la República Argentina. Parte primera*, Buenos Aires, 1866, p. 147.

[50] Cesano, *Consecuencias juridico-penales y enfermedad mental*, p. 22.

[51] *Apud* Pacheco, J. F., *El código penal concordado y comentado. Vol. I*, Madrid, 1848, p. 137.

[52] Pacheco, *El código penal concordado*, p. 148.

[53] For criticism, I would say of the influence- or origin-centered perspective for analyzing relationships between codes, with particular attention towards the 1830 Brazilian code, see Nunes, D., "The 'Code Pénal' in the Itinerary of the Criminal Codification in America and Europe: 'Influence' and Circularity of Models", A. Masferrer (ed), *The Western Codification of Criminal Law. A Revision of the Myth of its Predominant French Influence*, Cham, 2018, pp. 281-294.

part of a minority fringe regarding the regulation of the legal consequences to insane offenders in the 19th century – I think this is an important feature that we must consider from a legal-historian perspective.

In the footnote on the part regarding the houses for insane offenders of his draft, Carlos Tejedor stressed that punishment against them was a barbarous thing, that law must "*proteger también á la sociedad contra sus ataques, y este poder de protección deve manifestarse en el momento en que la justicia penal proclama su incompetencia*"[54]. Beyond this borderline, it is not criminal justice anymore: in the 19th century, many of Tejedor's Brazilian colleagues, as we will see, had a similar view.

4. "Molds that need not be broken" II: Ordinary asylums and family

Maybe the 1830 Criminal Code was somehow *avant-la-lettre*, but not that much. João Vieira de Araújo knew it well, for it was an interpretation that would make article 12 suitable to the "demands of the present time". Before proceeding with our Vieira de Araújo, let us now look at some examples of earlier interpretations of article 12 of the 1830 code.

The first is the well-known jurist Thomaz Alves Junior, who wrote in 1864 his "*Annotações theoricas e práticas ao código criminal*" [Theoretical and Practical Annotations to the Criminal Code]. In the "annotation" to article 12, he stressed that it was an administrative and "highly humanitarian" provision[55] (because it excluded the application of punishment). As this provision was considered an administrative measure, it is not surprising that it was not an obligatory presence in the criminal codes of the 19th century, as we have already noted.

When commenting on the last part of article 12 - the expression "houses destined for them" - Alves Júnior evoked the Pedro II asylum: "In this respect, the Empire's capital has nothing to envy abroad, because the Pedro II asylum is a monumental building and worthy of all respect. We regret that small asylums have not been created in the provinces, limited to their needs so that the administration does not find itself in the cruel and immoral necessity of keeping imprisoned those who were never criminals"[56]. Perhaps Alves Júnior's judgment of the asylum of the Empire's capital was excessively optimistic, but what is important to emphasize here is the fact that he brings as an example of the "houses destined for them" of article 12 an ordinary asylum. Here we begin to note the distance between Alves Júnior's earlier interpretation and João Vieira de Araújo's later one.

As for the judge's discretion, Thomaz Alves Júnior stated that "the discretion granted here to the judge is not to impose punishment, but rather the administrative discretion, looking at the position and resources of the insane person, his relations with his family and the wishes of the latter, to decide whether he should be confined to the respective mental institution or left to the care of his family."[57] "Position and resources

[54] Tejedor, *Proyecto de Código Penal*, p. 147.

[55] Alves Junior, T., *Annotações theoricas e práticas ao código criminal*. *Vol. I*, Rio de Janeiro, 1864, p. 255.

[56] Alves Junior, *Annotações theoricas e práticas*, p. 255.

[57] Alves Junior, *Annotações theoricas e práticas*, pp. 255-256

of the insane person": From this understanding, the law opened up a much greater possibility for the poor insane offender to be confined – and this was what happened.[58] However, the most important thing to note here is the fact that the judge's discretion was considered administrative and was linked to several aspects - such as the resources and wishes of the offender's family - that had little to do with dangerousness or social defense.

Moreover, the mere existence of the possibility of delivering the insane person to the family is a remnant of a conception that did not see internment as the only option to deal with them. Not by chance, the statutes [*código de posturas*] of Rio de Janeiro stipulated that " every person who cares a furious insane person, must keep him in good vigilance or deliver him to appropriated charity houses" [*toda a Pessoa que tiver algum louco furioso, será obrigada a conserval-o em boa guarda, ou a recolhel-o para as Casas de caridade apropriadas*] (§ 4º, tit. 5).[59] Later, the 1890 Criminal Code (that would maintain the possibility of delivery of the insane offender to his family, as we will see) defined as misdemeanor [*contravenção*] a very similar hypothesis: letting wander insane persons (article 378). However, the institutionalization of persons with mental issues was the growing hegemonic strategy within medical culture and practice of the 19th century – and this context is what builds the preceding Pedro II asylum in the 1850s.[60] One of the last chapters of this history is the abolition of the provision regarding the delivery of the insane offender to his family – a topic we would return to in the next section.

Now, focusing again on article 12 of the 1830 code, when exemplifying the "houses destined for them" in such an optimistic way as Thomaz Alves Júnior, Manoel Dias de Toledo also referred to the Pedro II asylum and, adding optimism, recalled some on-going projects in the province of Pernambuco: "We know of some ad hoc establishments, which are called asylums [*hospícios*], such as the Pedro II asylum in Rio de Janeiro, with all comforts and luxury, whose regulation is the decree of December 4, 1852. Some provinces have small houses where the insane are maintained - here in Pernambuco, however, they are already preparing their building, which promises a lot of comforts". Once again, through the examples used in the text, the meaning of the expression "houses destined for them" is revealed: Ordinary asylum. And explaining the purpose of such establishments, the tone is welfare (in all its ambiguity): "The purpose of these establishments is to prevent the unfortunate insane person from wandering the streets and dying in misery."[61]

Regarding the possibility of delivery to the family, Toledo is even more explicit than Alves Júnior: "In consideration of the social position of the individual and his family, the Code in the last part of this article allows the insane offenders to be delivered to their families since they can be better treated by them than in asylums."[62] "Houses destined for them": "them" would most likely be predominantly the poor (and black) insane criminal. The comment already made about Thomaz Alves Júnior also applies here: it was not

[58] See Tourinho Peres, Nery Filho, "A doença mental no direito penal brasileiro: inimputabilidade, irresponsabilidade, periculosidade e medida de segurança", p. 337.

[59] *Codigo de posturas da ilustrissima camara municipal*, Rio de Janeiro, 1854, p. 17.

[60] See Portocarrero, V., *Arquivos da loucura: Juliano Moreira e a descontinuidade histórica da psiquiatria*, Rio de Janeiro, 2002, pp. 43-45 and Siqueira Gonçalves de, M., "Os primórdios da Psiquiatria no Brasil: o Hospício Pedro II, as casas de saúde particulares e seus pressupostos epistemológicos (1850-1880)", *Revista brasileira de história da ciência* 6/1 (2013), pp. 61-62 and p. 68.

[61] Dias de Toledo, M., *Lições acadêmicas sobre artigos do código criminal*, 2. ed., Rio de Janeiro, 1878, p. 211.

[62] Dias de Toledo, *Lições acadêmicas*, p. 212.

primarily a matter of dangerousness or social defense that would determine the option for internment or delivery to the family.

The book "*Código criminal do Império do Brazil annotado*" [Criminal code of the Empire of Brazil with annotations] (1877) by Vicente Alves de Paula Pessoa is interesting for the picture we are drawing, although its commentaries on the code are mostly only normative references. In the laconic annotation to article 12, Paula Pessoa refers to Book 4, Tit. 103 of the *Ordenações Filipinas* [Phillipines Ordinances].[63] This part of the old 17th-century Ordinances dealt with the "curators for orphans, mentally ill and prodigals", a purely civil law [*direito civil*] chapter that referred only to the delivery of the insane criminal to his family. Indeed, our article 12 is a frontier institute not solely with administrative law. In Argentina, after the 1886 code enactment, which did not provide for the internment of acquitted insane offenders, some judges (in the criminal jurisdiction) however tried to force them to go to asylums. Then, some jurists criticized such decisions emphasizing that something like this could only be done in civil courts [*juez civil*] through the procedure of interdiction and appointment of a legal guardian [*curatela*] for the insane person, according to the stipulations of the article 482 of the 1869 Argentinian Civil Code.[64] In contrast, Brazilian criminal judges had this power, but Paula Pessoa's annotation shows us that the frontier with civil law does exist as well in our case.

Article 12 stands for a double frontier concerning the judge's power: between criminal law and civil law, and between criminal law and administrative law. Nevertheless, Tobias Barretto, in his famous "*Menores e loucos*" [Minors and insanes], published in 1884, had a more radical view on the faculty attributed to the judge by article 12. He affirmed, more strongly than his peers, that from then on there was another country: "One does not understand the concept of article 12, by which the insane who have committed crimes will be confined to the houses destined for them or delivered to their families, as it is deemed more convenient by the judge, and not, as it should be, as the doctors decide."[65]

Article 12 of the 1830 Criminal Code as a frontier provision: this is what we have found in these comments by Brazilian jurists from the 1860s, 1870s, and early 1880s. The construction of ordinary asylums had just begun in Brazil, and the specific criminal asylums were distant goals. No standard linked with criminal law knowledge was invoked to preside over the judge's decision to intern or deliver the insane offender to his family. Regarding the consensus on the administrative nature of the faculty attributed to the judge by article 12, it is not a matter of opposing this consensus to the jurisdictional thesis of the 20th century. What is noteworthy is the absence of polemics on the subject during a significant part of the 19th century. This is the most eloquent sign that article 12 was the exit door to criminal law. Beyond the fringe of insanity, penal institutions and criminal law knowledge should no longer intervene. The very instauration of the polemic between jurisdictionalists and administrativists is a cue of the historical transformation ongoing at the beginning of the 20th century.

5. "Molds that need not be broken" III: Criminal asylums

[63] Alves de Paula Pessoa, V., *Código criminal do Império do Brazil annotado*, Rio de Janeiro, 1877, p. 44.

[64] Cesano, *Consecuencias juridico-penales y enfermedad mental*, pp. 26-27 and p. 66.

[65] Barretto, T., *Menores e Loucos* [1884]. *Obras Completas vol. V*, Sergipe, 1926, pp. 64-65.

João Vieira de Araújo's interpretation, as previously mentioned, was inserted in a different context in comparison with that of Thomaz Alves Júnior and Joaquim Augusto de Camargo: positivist school, more demands for criminal asylum, and so on. The fact that the text of article 12 was sufficiently open to receive novelties – "houses destined for them" as specific criminal asylums - was one of the reasons for Vieira de Araújo's praise of the 1830 code. Change without legislative reform. This was a very desirable prospect for him probably for two main reasons: first, because it was more consistent with his gradualism; second, because trying to promote all the necessary reforms by replacing the 1830 code could bring the risk of a "classic" reversal. The Italian Zanardelli draft - considered a reaffirmation of the "classical" standards of criminal law - was a looming specter that Vieira de Araújo had in mind.

Although Vieira de Araújo had clearly stated his opposition to a global reform that would replace the 1830 Criminal Code,[66] in "*La riforma dei codici criminali*" [The reform of criminal codes], written in 1888 and published in 1889 in Cesare Lombroso's "*Archivio di psichiatria, scienze penali ed Antropologia criminale*" [Archives of Psychiatry, Criminal Sciences, and Criminal Anthropology], he made a list of provisions of the Brazilian code that could undergo some amendments. One of them is precisely our article 12 - a contradiction with the other text we saw in which Vieira de Araújo spoke of "molds that need not be broken"?

This part of the text is confusing, perhaps, it's because of the translation, or due to the lack of clarity of the Portuguese original draft sent to the journal. Comparing article 12 of the 1830 code with the reform proposal in the Italian version of Vieira de Araújo's text, one can draw the absurd conclusion that there would be nothing to reform because the Italian version pointed as a reform a hypothesis already admitted by the article 12: "As for article 12 of the same code of 1830, it would be enough to allow the magistrate (…) the discretion to denounce the criminally insane to be interned to asylums."[67] Article 12, as we already know, allowed the judges to send the insane offender to asylums. They had the *discretion* to do so, even though it was not mandatory. The probable explanation for this strange fragment of Vieira de Araújo's article is a translation error. And one of the possible causes of this error lies in the Italian legal system of that epoch, where there was not yet such a provision, as we saw earlier in Raffaele Garofalo's request for the approval in Italy of an 1881 reform bill similar to what already existed in Brazil. So, Vieira de Araújo probably was claiming for mandatory internment of the insane offender, although this reform was not among the most urgent ones, since article 12 of the code then in force allowed the judge to always decree internment, judicially nullifying the hypothesis of delivery to the family.

In other texts, this opinion of Vieira de Araújo is explicit – in 1893 he proposed the abolition of the possibility of delivering the insane offender to his family. On this occasion, the new 1890 Criminal Code was in force, but for positivists such as Vieira de Araújo, this code was a "classical" setback from the old 1830 code. Then, in a somewhat

[66] Vieira de Araújo, J., "Sobre o parecer da comissão (...)" [1889], *O direito: revista de legislação, doutrina e jurisprudência*, 1890, pp. 5-25.

[67] This is the Italian version: "*nel medesimo codice* [the Brazilian one of 1830] *(art. 12) basterebbe lasciare al giudice di diritto, al presidente del tribunale e del giurì l'arbitrio di poter denunziare i pazzi criminali perchè vengano ricoverati nei manicomi*" (Vieira de Araújo, J., "La riforma dei codici criminali" [1888], *Archivio di psichiatria, scienze penali ed antropologia criminale* 10 (1889), p. 54).

strange fashion considering his gradualist ideas (but not properly in contradiction),[68] Vieira de Araújo proposed a criminal code draft in 1893 that included the abovementioned amendment (article 24),[69] because the new code of 1890 reproduced the possibility of delivering the insane offender to the family. However, even before this proposal in 1893 (and before the 1890 code), Vieira de Araújo believed in the possibility of judges anticipating the reform: "Suppressing the faculty of delivering the insane to the family, the provision [of article 12 of the 1830 code] is so far-sighted in its wording that a decree of the imperial government could institute criminal asylums, once parliament had voted the necessary funds. Or the judge, aware of his mission, would cease to use his discretion [of delivering the insane offender to the family]."[70]

Besides the anticipation of the reform through the judges, the above fragment shows us the already mentioned change in the understanding of the expression "houses destined for them": João Vieira de Araújo explicitly referred to criminal asylums [*hospícios penaes*].

And here begins a second problem: the inexistence of criminal asylums in Brazil. Only a couple of years later, in 1892 - despite the presence of previous initiatives - the government would appoint physician Joaquim Cardoso de Mello Reis to study European criminal asylums to seek models to establish them in Brazil.[71] The first Brazilian criminal asylum would have to wait more than twenty years to become a reality, which would happen in Rio de Janeiro only on April 30, 1921.[72]

Interning insane offenders in ordinary asylums, according to João Vieira de Araújo, was an inadequate alternative.[73] We are at the antipodes of the interpretations of Thomaz Alves Júnior or Manoel Dias de Toledo, who saw very naturally the hypothesis of the insane offender being interned in an ordinary asylum since these offenders were not real criminals. Lack of criminal asylums and impossibility of using normal asylums: a dead end, since prison would be an even more absurd hypothesis, both from the "traditional" and the positivist perspectives.

In a text about rape, adopting particularly punitive interpretations, Vieira de Araújo addressed this paradox from a positivist point of view. Starting from Raffaele Garofalo's scheme, he considered rape a "natural crime" that offends the "feeling of piety" and approved the Brazilian code for providing lower penalties for rape against prostitutes. When coming to the issues related to the responsibility applied to this type of crime, he

[68] About this apparent contradiction, see Sontag, "*Código criminológico*"?, pp. 253-292.

[69] Vieira de Araújo, J., "Projecto de código penal. Exposição de motivos", *Revista acadêmica da faculdade de Direito do Recife*, 1893, p. 112.

[70] Vieira de Araújo, *Código criminal brazileiro*, p. 231.

[71] Macedo Soares, A. J. de, "Manicomios penaes", *O direito: revista mensal de legislação, doutrina e jurisprudência* 58 (1892), p. 189.

[72] For historical analysis on its creation, see Carrara, S., *Crime e loucura: o aparecimento do Manicômio Judiciário na passagem do século*, Rio de Janeiro, 1998 (especially pp. 187-194); Maciel, L. R., *A loucura encarcerada: um estudo sobre a criação do Manicômio Judiciário do Rio de Janeiro (1986-1927)*, Master thesis, Niterói, 1999 (especially pp. 87-108 and pp. 125-137); Carrara, S., "A história esquecida: os manicômios judiciários no Brasil", *Revista brasileira crescimento e desenvolvimento humano* 20 (2010), pp. 17-26; and Teixeira Dias, A. A., *Arquivos de ciências, crimes e loucuras: Heitor Carrilho e o debate criminológico do Rio de Janeiro entre as décadas de 1920 e 1940*, Ph.D. Thesis, Rio de Janeiro, 2015, pp. 155-161. See also the testimony of its first director, Heitor Carrilho: Carrilho, H., "O manicomio judiciario do Rio de Janeiro", *Archivo judiciario* (supplemento) 5/6 (1928), p. 102.

[73] Vieira de Araújo, *Código criminal brazileiro*, p. 232.

addressed our point: the applicability of article 12. Let us analyze, then, the two fragments on responsibility of this text: "If the crime may have as its origin vice or disease, and the delinquents may be considered healthy or sick, this great division determines the practice advised by science, founded on the diversity of sanctions, the punishment in the strict sense and the criminal asylum, an institution so well defended by Enrico Ferri"[74]. Next, the reality that hinders the ideal: "If we do not have [in Brazil] criminal asylums for the criminals declared insane who kill, rape or steal with impunity, not even being confined to ordinary asylums, the guarantee of order and the tranquility of the honest and peaceful people demand that the insane be subjected to the same penalties as the sane when by their dangerousness they offer a threat, the so-called moral irresponsibility in this case is equivalent to actual impunity"[75]. By proposing that the insane offender should be punished ("classically") like everyone else, Vieira de Araújo forced a way out of the paradox by annulling two legal provisions of the Brazilian criminal code of that time: the "classic" provision on lack of responsibility, with the only two possible consequences for insane offenders, i.e., treatment in "houses destined for them" or delivery to their families. The obsession with social defense prevailed over the legality and also over the coherence of his discourse, first refusing the possibility of interning insane offenders in ordinary — and not specific, criminal — asylums, and later on, he did not hesitate to accept the hypothesis of placing the mentally ill in an ordinary prison - in theory, also very different from the ordinary asylum, but more harmful to the individual.

Three aspects, in summary, deserve to be highlighted about João Vieira de Araújo's view on article 12 of the 1830 criminal code. His interpretation according to the "houses destined for them" should be understood exclusively as criminal asylums, along the same lines of psychiatrist's claims that insane offenders should not be interned within ordinary asylums (this is why sometimes the directors of the National Asylum tried to avoid allowing insane offenders patients)[76]; the need to avoid delivering insane offenders to their families because these offenders must be interned; in the absence of adequate places for internment, the prevalence of the obsession with social defense, that imploded the interpretation of the "houses destined for them" exclusively as criminal asylums.

6. "Public safety" and beyond (conclusions and *post scriptum*)

"Individuals exempt from guilt as a result of mental disease shall be delivered to their families, or interned in asylums, if their mental state so requires for the public safety" [*Os individuos isentos de culpabilidade em resultado de affecção mental serão entregues a suas familias, ou recolhidos a hospitaes de alineados, si o seu estado mental assim exigir para segurança do publico*] - this was the article 29 of the 1890 Criminal Code, which replaced article 12 of the 1830 code. The new provision, despite similarities with the old one, promoted a change in comparison with the interpretations we saw in the works of Manoel Dias Toledo and Thomaz Alves Júnior: instead of the criteria of the social position of the insane offender's family, the determinant for internment would be

[74] Vieira de Araújo, J., "O estupro violento. Esboço theorico do art. 222 do Código Criminal. A gênese anthropologica do delicto", *O direito: revista mensal de legislação, doutrina e jurisprudência* 50 (1889a), p. 7.

[75] Vieira de Araújo, "O estupro violento. Esboço theorico do art. 222 do Código Criminal. A gênese anthropologica do delicto", p. 11.

[76] See, for example, Carrara, *Crime e loucura*, pp. 190-191 and p. 196; MACIEL, *A loucura encarcerada*, p. 125.

"public safety". In future research, this legal change deserves to be contrasted, with proper documental research, with the effective selectivity of criminal justice in controlling insane offenders, in terms of class, race and gender.

Even so, two cornerstones of article 12 of the former code were maintained: The possibility of delivering the insane offender to his family (which Vieira de Araújo's criminal code draft of 1893, as we have seen, tried to suppress) and the use of an expression - asylum [*hospitaes de alienados*] - linked to the older interpretations of the 1830 code (and this expression could only encompass criminal asylums if they were considered a species of the ordinary asylum genus).

According to Galdino Siqueira, a jurist who often drew inspiration from Franz von Liszt, in a 1921 book, commenting on the aforementioned article 29 of the 1890 code, the expression "public safety" restrained some of the discretion granted to the judge by the previous wording; and on the expression asylum [*hospitaes de alienados*], he repeated Vieira de Araújo's praise of the 1830 code. The code of 1890, in Siqueira's opinion, would have promoted a modification "for the worse", since "the previous code uses the generic expression - houses destined for them -, perfectly adaptable to the case of the creation of special establishments for the internment of these individuals, as is prescribed today by penitentiary science and is a reality in many educated countries. In this, as in many other points, the legislator was of the utmost foresight, making the provision to apply to scientific conquests, but which the author of the current code seems not to have duly grasped, substituting it with the expression asylums [*hospitaes de alienados*], establishments where only those who are simply insane can be admitted. Effectively, (...) both as to treatment and as to safety, insane offenders (...) should not be interned in ordinary asylums, and much less in penitentiaries, but particular establishments."[77]

The criterion "public safety" and the criminal asylum as a mandatory alternative to the delivery of insane offenders to their families: with these elements would we now be dealing with security measures in the strict sense? And I think that strict sense must signify changes in the frontiers of criminal law. The last issue - criminal asylums - from the conceptual point of view carried some overlapping between law and medicine, pushing the boundaries of criminal law. But as we saw in the section on how some criminalists addressed the origin of security measures, the search for antecedents must also take into account how problems are embedded in their historical contexts. Variations in technical solutions and proximities between technical arrangements isolated are excessively vague criteria for tracing historical passages (in our case, significant relocations of the boundaries of criminal law). Then, we must enlarge our focus, to include other fields of the legal culture, such as scholarly debate. To analyze the history of security measures in a contextualized manner, one possible alternative is to determine when and how they became a question for the legal culture, deepening (at least) their intellectual context.

At the beginning of the 1890 code trajectory, we do not find yet the typical discussions that would emerge a few years later about security measures: Dualism (dual-track system) or unitarism (individualization of punishment or the Ferrian concept of sanction); fundamentals of security measures; how to regulate the intervention of the

[77] Siqueira, G., *Direito penal brazileiro. Parte Geral*, Rio de Janeiro, 1921, pp. 393-394.

judiciary, and so on.[78] Not by chance, in a moment - the 1920s - when the debate and the legislative experiences with security measures were no longer incipient, Galdino Siqueira felt there was a lack of more detailed regulation: "The legislator [of 1890], when determining prevention measures concerning such individuals [insane offenders], providing for their internment, when dangerous, should either have stated generically, as did the previous code, leaving to special laws and ordinances the creation and functioning of appropriate establishments, or regulate it in a general feature, such as the Norwegian code, the English statute, etc. The code says nothing about the manner and time of internment, nor about the authority that can determine it, perhaps because the legislator understands, as to the last point, that it would be the domain of judicial or police organization statutes [*leis de organisação judiciaria ou policial*]. Hence the doubts that have risen in this regard, creating a serious situation for public safety that has not been resolved by special laws."[79]

In 1890 and 1903, two decrees (decree n. 206-a of February 15, 1890, and decree n. 1.132 of December 22, 1903) regulated the organization of asylums and the procedures for the entry and exit of patients.[80] Almost nullifying the provision of the 1890 code on the delivery of the insane offender to his family, the first decree stipulated that an insane person who disturbed "public tranquility" [*tranquillidade publica*] (among other hypotheses) must be interned in an asylum (article 13). It was not a coincidence that the National Asylum has created in 1917, a section exclusively for insane offenders (the Lombroso section), because of the increasing number of "dangerous" insane persons sent to the asylum by the authorities.[81] Within the second decree, regarding the insane offender, there was the stipulation that they should not be placed in ordinary prisons (article 10). Article 11 of the same decree is another sign of the dusk of the old provision regarding the delivery of the insane offender to his family because this article stated that "as long as the states do not have criminal asylums, the insane offender and the insane convicted shall only be allowed to stay in public asylums, in pavilions specially reserved for them" [*emquanto não possuirem os Estados manicomios criminaes, os alienados delinquentes e os condemnados alienados sómente poderão permanecer em asylos publicos, nos pavilhões que especialmente se lhes reservem*].

Despite the existence of these decrees, in a 1911 text entitled "*Loucos criminosos e criminosos loucos*" [Insane offenders and offenders that are insane], Ataulpho de Paiva pointed out that it was still "necessary to deal with the weak points of the imperfect and flawed legislation in this regard. It is needful to organize a general, systematic plan, defining precisely the legal status of the mentally ill."[82]

This lack of proper regulation was also stressed in 1930 by Antonio José da Costa e Silva – in comparison with Galdino Siqueira or João Vieira de Araújo, he was a

[78] About the debates on these issues in USA and in Europe, see Pifferi, M., *L'individualizzazione della pena. Difesa sociale e crisi della legalità penale tra Otto e Novecento*, Milano, 2013.

[79] Siqueira, *Direito penal brazileiro*, pp. 395-396.

[80] For a legal-historian overview on these decrees (and also on some other legislation of that epoch regarding similar issues), see Silva, K. C. da, *Crime e loucura: a instituição das medidas de segurança pessoais detentivas no manicômio judiciário Maurício Cardoso (1941-1943)*, Master thesis, Florianópolis, 2020.

[81] See Facchinetti, C., Ribeiro, A., Crús Chagas, D., Sá Reis, C., "No labirinto das fontes do Hospício Nacional de Alienados", *História, Ciências, Saúde – Manguinhos* 17 (2010), p. 763 (note 12).

[82] Paiva, A. de, "Loucos criminosos e criminosos loucos. O problema no Brasil", *O direito: revista mensal de legislação, doutrina e jurisprudência* 116 (1911), p. 170.

traditional jurist that used to find inspiration in German technicist trends, and he helped in the elaboration of the 1940 Brazilian Criminal Code, even though not as an official member of the commission. Costa e Silva highlighted two main flaws in the Brazilian legislation of that time: a) Lack of criteria for the internment of the insane offender and b) lack of determination of the attributions of the judicial and/or administrative authorities.[83] Though not sufficient for jurists such as Costa e Silva, three years before the publication of his book, decree n. 17.805 of May 23, 1927, already regulated the criminal asylum [*manicômio judiciario*]: Articles 109, 111, and 112 defined the judicial authority as competent to determine the internment or release of insane offenders, but the release depended on a report from the director of the asylum (articles 111 and 112). The path toward security measures was paved.

Antonio José da Costa e Silva called article 29 of the 1890 Criminal Code a security measure,[84] but the issues he raised around this article were not yet fully settled in the Brazilian legal culture on the eve of the 1890 code. Later on, the issues raised by jurists such as Costa e Silva push the boundaries of criminal law. And we could add other questions that would occupy our jurists: Establishing security measures *ante* or *post delictum*? Which specific measures should be included in the legislation? And so on. Let's look at one detail of this broad picture. At the 1st Brazilian Criminology Conference of 1936, José Pereira Lira and Demosthenes Madureira de Pinho agreed that the individual guarantees linked to legality stipulated in the 1934 Brazilian Constitution would not impede the adoption of security measures *ante delictum*; however, the former voted for prudence, that is, for security measures only *post delictum*,[85] while the latter, in the name of the efficiency of the fight against crime, accused the adepts of this limitation of amputating the new and welcome provision.[86]

The existence of all these intertwined issues is a sign that the security measure had become a problem for the legal culture of that time; a problem that animated the meetings of criminalists and that demanded an articulated response. The answer was the dual-track system, which was implemented at the legislative level in a kind of code within the code, as was the chapter on security measures within the 1940 Criminal Code.

But, in 1890, despite all the water that had passed under the bridge of history (the new interpretations of article 12 of the 1830 code and the changes promoted by article 29 of the 1890 code), we are still facing the exit doors of the realms of criminal law. The relocation of its boundaries is visible in the draft codes that followed in subsequent years.

The 1913 Criminal Code draft, elaborated by Galdino Siqueira, traces a transition within the legislative proposals field. Siqueira outlined more details in comparison with the 1890 code about the internment of insane offenders (article 16) and created a "supplementary detention" [*detenção supplementar*] if the individual is deemed dangerous (article 48),[87] but there was not a specific chapter devoted to security measures.

[83] Costa e Silva, A. J. da., *Codigo Penal dos Estados Unidos do Brasil commentado*. *Vol. 1,* São Paulo, 1930, p. 220-227.

[84] Costa e Silva, *Codigo Penal*, p. 220.

[85] Lira, J. P., "These VII – Medidas de segurança. Relatorio", *Revista de direito penal* out-nov-dez (1936), pp. 223-224 and p. 229.

[86] Pinho, D. M. de, "These VII – Medidas de segurança. Discussão", *Revista de direito penal* out-nov-dez (1936), pp. 232-233.

[87] Siqueira, G., *Projecto de codigo penal brazileiro*, Rio de Janeiro, 1913, pp. 141-142 and pp. 151-152.

According to the Spanish criminalist Jimenez de Asúa, in his analysis of the history of Brazilian penal reforms, the "criminal from a criminological point of view" was not yet present in this proposal, which would occur only in the subsequent draft in the 1920s.[88]

The Sá Pereira Criminal Code drafts (1927-1937) and the Alcântara Machado draft (1937-1938) provided lengthy chapters on security measures. Since 1933, the Italian Criminal Code was used by Brazilian jurists as the main model for their proposals (which does not prevent the possibility of variations),[89] and it was the triumphant trend in the 1940 Brazilian Criminal Code. Using this model meant, among other features, that a varied range of security measures (not only criminal asylums) was provided, and that dangerousness gained a dimension incomparable with the timid mention of "public safety" in article 29 of the 1890 Criminal Code – this is why in the 1940 code system security measures was able to target not only insane offenders.[90] Some features of these proposals are ancient, such as the expulsion of the foreigner, defined as a security measure by the Alcântara Machado draft (article 99),[91] and that was for a long time, especially in the First Republic (1889-1930), an important measure of administrative control in Brazil,[92] or the local exile [*exílio local*] (article 97 of the 1940 code) which is very similar to a kind of banishment [*desterro*] provided by the article 52 of the 1830 code as a punishment. However, all these old yarns were now part of a different fabric, whose main model was the 1930 Italian code.

The old molds were crumbling.

On the eve and after the 1940 code, Brazilian jurists composed a memory about the security measures. Within their memorial painting, the ideology of novelty and the quest for more or less distant predecessors coexisted. Notwithstanding the old yarns, these jurists praised the genius of characters such as Carl Stooss for their contribution to the legislative building of the groundbreaking security measures. Nevertheless, I think remembering the old features is historiographically more interesting if we oppose them to the praising narratives, as Urs Germann does by critically analyzing the 1893 Stooss draft: "It would be misleading to overestimate the originality and formal consistency of Stooss's first draft only because it was later praised as a model [such as Brazilian jurists had done] (…). Stooss's conception of security measures was in large part based on instruments of social control which had already existed outside the fields of criminal law (...). Stross's initial idea was to link these regulations and institutions more closely to law enforcement and, in criminal cases, to transfer the competence for admitting individuals

[88] Jimenez de Asua, L., *Tratado de derecho penal* [1949]. *Tomo I*, 3. ed. actualizada, Buenos Aires, 1963, p. 1.152 and p. 1.332.

[89] About the models of the Sá Pereira drafts for the security measures chapter, see Sontag, R., "'Código criminológico'? Os projetos de código penal brasileiro Virgílio de Sá Pereira (1927-1937) e os modelos codificatórios italianos", A. C. Wolkmer, R. M. Fonseca, G. S. Siqueira (eds.), *História do Direito CONPEDI/UFSC*, Florianópolis, 2014.

[90] For details on the security measures in the Alcântara Machado draft and in the 1940 Criminal Code, see Mafei Rabelo Queiroz, *A modernização do direito penal brasileiro*, pp. 206-212 and Moraes Silveira, M. de, *Revistas em tempos de reformas: pensamento jurídico, legislação e política nas páginas dos periódicos de direito (1936-1943)*, Masther thesis, Belo Horizonte, 2013, pp. 292-296.

[91] Alcântara Machado, A. J. de, "Projeto do codigo criminal brasileiro", *Revista da faculdade de Direito de São Paulo* vol. 34 n. 2 (1938), p. 90.

[92] See Nunes, D., *Le* "*irrequietas leis de segurança nacional*". *Sistema penale e repressione del dissenso politico nel Brasile dell'Estado Novo (1937-1945)*, Ph.D thesis, Macerata, 2014, pp. 60-74; Santos Guerra, M. P. dos, *Anarquistas, trabalhadores, estrangeiros: a construção do constitucionalismo brasileiro na Primeira República*, Curitiba, 2015.

to the judiciary. From a systemic point of view, this concept would burst the well-established boundaries between criminal and public law."[93] In the Brazilian case, emphasis on novelty meant praising the 1940 criminal code and its authors,[94] meanwhile the quest for ancient predecessors meant taming the turmoil of novelty: What was going on, in their view, would only be a smooth (and progressive) process of systematization (the use of the word systematization as a positive label is noteworthy because of the central role of the systematic thought within a modern legal culture).[95] It is true that this legal memory also gives us useful hints for historical reconstruction (security measures as a frontier issue, for example), but I think we must link the old yarns with the new fabric avoiding the concept of systematization as the key to the comprehension of the historical process we are trying to comprehend (i. e, I do not want to deny the existence of the system of security measures in the 1940 Brazilian code). By avoiding this concept, we can find narrative paths that are not praising or reassuring. And then it will be easier to stress the authoritarian features of the security measures[96] (though the link with authoritarian States is not mandatory), such as the controversial possibility of application of the traditional punishment and the security measure for semi-imputable [*semi-imputáveis*] or the prison-fashion of the criminal asylums.

Neither the ideology of novelty nor the myth of long-lasting continuity: We are dealing with legal displacements or shifts, if I may add an adjective to the nouns Peter Burke often uses for highlighting historical transformations as changes of emphasis or adaptations.[97]

None of these displacements or shifts brought the Brazilian reform attempts to the orbits of the 1921 Enrico Ferri's Criminal Code draft nor to the American tendencies identified by Michele Pifferi.[98] Despite the existence of Brazilian jurists (such as the positivist Corrêa de Araújo)[99] claiming for the American solution, any Brazilian draft accepted the indeterminate sentence nor abandoned criminal moral responsibility. Indeterminacy and dangerousness as fundamental criteria were only welcomed in the world of security measures. Unlike the Ferri draft, no Brazilian proposal adopted the unitarian solution. And these were also the main features of the 1940 Criminal Code.

The old molds crumbled.

[93] Germann, U., "Toward New Horizons: Penal Positivism and Swiss Criminal Law Reform in the late 19th and early 20th Centuries", *GLOSSAE. European Journal of Legal History* 17 (2020), p. 270.

[94] See Moraes Silveira, *Revistas em tempos de reformas* p. 295.

[95] For a beautiful synthesis about this issue, see Cappellini, P., "Sistema giuridico", P. Cappellini, *Storie di concetti giuridici*, Torino, 2010, pp. 239-248.

[96] See Moraes Silveira, *Revistas em tempos de reformas* p. 295-296.

[97] See, for example, Burke, P., *What is Cultural History?*, 2. ed., Cambridge, 2008, p. 75 and Burke, P., *What is the History of Knowledge?*, Cambridge, 2016, p. 35.

[98] See Pifferi, M., *L'individualizzazione della pena. Difesa sociale e crisi della legalità penale tra Otto e Novecento*, Milano, 2013, pp. 240-244. On the Brazilian case, see Sontag, "'Código criminológico'? Os projetos de código penal brasileiro Virgílio de Sá Pereira (1927-1937) e os modelos codificatórios italianos", pp. 199-200 (focusing on the Sá Pereira draft) and Sabadell, A. L., Dimoulis, D., "Limits and Displacements in the Adoption of Criminological Positivism in Brazil (1890-1940)", M. Pifferi (ed.), *The Limits of Criminological Positivism. The Movement for Criminal Law Reform in the West, 1870-1940*, London and New York, 2022, pp. 244-245.

[99] Corrêa de Araújo, J. A., "Individualisação e indeterminação da pena", Id., *Os novos horizontes da justiça criminal*, Rio de Janeiro, 1932, p. 180.

(The flourishing debate and proposals around security measures are also the history of the vanishing of the remnants of an alternative perspective: the one that recognized other paths for the treatment of mental health issues than institutionalization. I am referring to the parts of the 1830 and 1890 codes about the insane offender's family. Maybe these provisions would sound naïve for the consolidated psy sciences of the present, but the perspective that took their place is the one that has been questioned – because of more pressing flaws than naivety - since around the 1960s by the anti-institutionalism movement).

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