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Between Impunity and Treatment Orders: Mental Illness and its Legal Consequences on Argentine Criminal Codification and its Legal Culture (1877–1921)*

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Abstract
The aim of this paper is to reconstruct in a historiographical way the legal responses of the Argentine penal codification in cases of crimes committed by the mentally ill. The chosen periodization is connected to normative formulations: in 1877 the province of Buenos Aires adopted the draft Criminal Code elaborated by Carlos Tejedor and in 1921 the current Criminal Code came into force. However, our analysis was to understand the legal culture of that society beyond the legal texts. For this purpose, we used a wide range of sources: norms; legal doctrine analysis; doctoral theses; Criminal Code reform projects; readings of foreign authors by the actors of that time, etc. This paper consists of three parts. Firstly, we analyze the situation that goes from the provincial adoptions of the national projects until the sanction of the Criminal Code of 1886. In this sense, Tejedor's draft Criminal Code and the Ugarriza - Villegas - García draft – for the case of Córdoba were predominant. Secondly, we explore the criticisms that arose as soon as the Criminal Code of 1886 came into force. Thirdly, we analyze what happened regarding the mentally ill in the Criminal Code of 1921, still in force in Argentina with uncountable reforms.

Keywords
Criminal codification – legal culture – mental illness – positivism – asylum

1. From the Provincial Adoptions of National Drafts to the Criminal Code of 1886[1]

* Translated from Spanish into English by Mariano Vitetta.

[1] In this respect, see Cesano, J.L., *Consecuencias jurídico - penales y enfermedad mental. Cultura jurídica y codificación argentina (1877 - 1921)*, Buenos Aires, Brujas, 2021, pp. 17 ss.

On May 11, 1881 the Argentine Executive had sent to the Congress a draft Criminal Code prepared by Sixto Villegas, Andrés Ugarriza, and Juan Agustín García.

The initiative was sent to the House of Representatives Codification Committee, which issued an opinion as late as September 29, 1885, signed by Isaías Gil, Filemón Posse, Mariano Demaría, Bernardo Solveyra, and Félix M. Gómez.

The approach of the Committee was to take Carlos Tejedor's text as the basis, which was then applied as the local law in eleven provinces, and apply any necessary amendments to make it better, considering the opinions of criminal judges in the Capital, which the Committee had gathered. The written report, Levaggi[2] recalls, was expanded by Solveyra at the House: "The Committee—he said—has had access to two codes: the one drafted by Mr. Tejedor, at the request of the Province of Buenos Aires (actually, the request was made by President Mitre), and the same code amended by a committee appointed by the national government [in reference to the draft by Villegas, Ugarriza, and García]. The first one had relied on the Bavarian code; the second one, on the Bavarian and Spanish codes, i.e., two peoples of different races, different customs... The Committee unanimously favored relying on the code by Mr. Tejedor as a basis for its work". The spokesman for the draft said that the Committee introduced "major amendments" in Tejedor's draft. Voted without debate on the contents by the House of Representatives on the session held on November 15, 1886 and by the Senate on November 25, 1886, the draft was passed and entered into force on March 1, 1887.

What was the legal framework of mental illness under this Code?

Mental illness was discussed under article 81(1). That section established that there would be no sentence for anyone who had committed an act "in a state of insanity, somnambulism, absolute imbecility, or complete and involuntary drunkenness; and generally whenever the act had been completed and consummated under impairment of any of the senses or of intelligence which is not attributable to the agent, and during which the agent has had no consciousness of the act or of its criminality."[3]

This provision drew inspiration from Tejedor's draft and his doctrine, although—as well noted by Rodolfo Moreno—it was "much less wide in its drafting than the latter."[4]

The Tejedor draft established that any acts by "furious people, crazy people, and generally any person who has completely lost the use of their intelligence and commit a crime in that state" would not be subject to criminal punishment (article 147(2)). In turn, a separate section also provided for the defense to criminal liability for "incompetent imbeciles who are absolutely incapable of ascertaining the consequences of their actions or of understanding those actions' criminal nature" (article 147(3)).[5]

[2] In this respect, see Levaggi, A., *Historia del Derecho Penal Argentino*, Buenos Aires, Perrot, 1978. pp. 190–192.

[3] *Código penal de la República Argentina. Edición oficial*, Buenos Aires, Imprenta de Sud América, 1887.

[4] Moreno, R. [h], *El Código penal y sus antecedentes*, t. II, Buenos Aires, H.A. Tomassi Editor, 1923, p. 226.

[5] On October 29, 1877, the Province of Buenos Aires Legislature passed a law establishing that while the Federal Congress did not pass the Argentine Criminal Code, the "draft prepared by Mr. Carlos Tejedor would be considered the Criminal Code of the Province of Buenos Aires". The text cited was taken

Moreno was right in asserting that the Code, which was in force as from 1887, had a narrower span on this matter than Tejedor's draft. One of the most remarkable differences was that that Code did not establish any legal consequence in connection with any unlawful acts committed by the mentally ill; this was not the case of the draft on which the Code was based. And we say this because Tejedor's text provided that any persons who committed a crime in that state "would be [locked up] in some of the houses devoted to people of their type, or [given] to their families, to be decided by the court" (article 147, final paragraph).

While Representative Solveyra—as already explained—had said that the Tejedor draft was fundamentally based on the Bavarian Code, signed into law by King Maximilian Joseph on May 16, 1813, one could actually see the influence of other external sources on the issue of mental illness and its consequences. Spanish criminal codification, in particular, was another major source.

In fact, there is no doubt—as Tejedor so explains in the long note to article 147—that sections 1 through 5 of that article were based on article 120 of the Bavarian Code.[6] However, and unlike Tejedor's approach, this Code did not foresee any legal consequence for any persons who committed a crime in those states; the Argentine draft provided for this scenario. In the note mentioned Tejedor, quoting Adolphe Chauveau, said that the law has "a dual mission regarding madmen: if the law waives a punishment the imposition of which would be barbarian, as the madman would not understand neither its reasons nor its effects, the law must also protect society from that person's attacks, and this protective power must be expressed when the criminal courts recognize that they have no competent jurisdiction".

What was the source of inspiration for this provision?

We believe that that provision is related to the Spanish Criminal Code of 1848 (with the amendments made in 1850).

Levaggi[7] has said that Tejedor's foreign sources included that Code. And, after analyzing that Code, it is possible to identify some similarities. Article 8(1) of that text established: "The following shall be exempt from criminal liability: (1) Crazy or insane people, unless they have acted during an interval of reason. When crazy or insane people have committed an act qualified by the law as a felony, the court shall decree their confinement in one of the hospitals for the sick of that type, and they shall not be released

from: *Código Penal de la Provincia de Buenos Aires. Nueva Edición Oficial*, Buenos Aires, Imprenta y Librería de Mayo, 1884.

[6] Article 120 of the Bavarian Code provided the following: "The following persons shall be exempt from any punishment: (I) children under eight; (II) furious people, crazy people, and generally any person who has completely lost the use of their understanding due to melancholia or any other serious illness affecting capacity and who have committed a crime in that state; (III) any persons who due to feeblemindedness were completely prevented from correctly ascertaining the consequences of their action or of recognizing that their actions may be punishable; (IV) any persons who due to their advanced age have lost the capacity to understand; (V) deaf-mutes, to the extent they have not been instructed on the non-permission and the civil sanctions on their action and their incapacity to be charged is unquestioned; in any case, however, they shall be punished only as minors, under article 99". For the text of the Bavarian Code, see Von Feuerbach, Paul J. A. R., *Tratado de Derecho Penal común vigente en Alemania. En Apéndice: Código Penal para el Reino de Baviera. Parte general* translation into Spanish of the 14th German edition (Giessen, 1847) by Zaffaroni, E. R., and Hagemeier, I., Buenos Aires, Ed. Hammurabi, 1989, pp. 389 ss.

[7] Levaggi, A., *Historia del Derecho Penal argentino*, p. 186.

without prior authorization from the court. Alternatively, they will be given to their family under bond for custody; if no bond for custody is offered, the provisions of the paragraph above shall apply."[8] As well explained by Iñesta Pastor, this article established "a series of warnings aimed at preventing the insane from committing new excesses, with the purpose of protecting society and avoiding social alarm, making a distinction between felonies and misdemeanors. Article 8(2)(1) provides that if the insane person has committed misdemeanors, the custody over that person is to be given to the family under bond, but if his act can be qualified as a felony, the Code provides that he must be confined to a psychiatric institution."[9] The solution adopted by this legal provision matched the opinion of its first commentators. Along this line, Pacheco said—using arguments similar to the ones used by Tejedor in citing Chauveau—: "Society is not only entitled to punishing crimes; it is also required to avoid misfortune to the extent possible. Lightning rods are built for storms... Likewise, when a person without reason disrupts society and inflicts evil on it, the public power is entitled to establish mechanisms against that person with the purpose of preventing a repetition of the act which had been committed before. There is no other basis for the decision to lock crazy people up than the imminent danger that their freedom poses to their fellow citizens."[10]

We can draw some conclusions from the assertions so far.

First, the Code of 1886 deviates on this matter in connection with the consequences resulting from the commission of a crime by a mentally ill person: while the Tejedor draft expressly provided for confinement in houses for the mentally ill or the delivery under the care of the family in these cases, the Code omitted any consideration on this respect. This silence was also a feature of the draft by Villegas, Ugarriza, and García (1881),[11] a text which was adopted by the province of Cordoba with legal force until its replacement in 1886.[12]

Second, the Tejedor draft, in providing for those consequences, drew inspiration from the Spanish Criminal Code of 1848 (as amended in 1850). This was a deviation from the Bavarian Code, which also did not establish any consequence for the individuals who had committed a crime in that state.

[8] Royal Decree of September 1, 1897 established the legal framework for the warnings related to the paragraphs of the penal code of 1870, which reproduced, with minimal variations, the text of 1848/50. See in this regard Hidalgo García, J. A., *The Criminal Code in accordance with the doctrine established by the Supreme Court*, Volume I, Madrid, Printing of the Magazine of Legislation, 1908, pp. 65-66.

[9] Iñesta Pastor, E., *El Código penal de 1848*, Valencia, Universidad de Alicante - Tirant lo Blanch, 2011, pp. 401-402.

[10] Pacheco, F. J., *El Código Penal Concordado y Comentado*, 1st ed., Volume I, Madrid, Imprenta de Santiago Saunaque, 1848, p. 147.

[11] *Proyecto de Código Penal. Presentado al Poder Ejecutivo Nacional por la Comisión nombrada para examinar el proyecto redactado por el Dr. D. Carlos Tejedor, compuesta de los Dres. Sisto Villegas, Andrés Ugarriza y Juan Agustín García*, Buenos Aires, Imprenta de El Nacional, 1881, article 93(3).

[12] While not with the scope of the Tejedor draft, the draft of 1881 was also passed as a provincial law. This was true of the province of Cordoba, which adopted the draft by means of law dated August 14, 1882, though with some amendments introduced by the Senate Legislation Committee. In this respect, see, generally, Vivas, M. C., "El proyecto nacional de 1881 como Código Penal de la Provincia de Córdoba", *Revista de Historia del Derecho*, No. 4, Buenos Aires, 1976; and Rosso, M., "Experiencia de la Codificación Penal en Argentina. La aplicación del primer Código Penal en la Provincia de Córdoba. (1867-1887)", *XIV Jornadas Interescuelas/Departamentos de Historia*. Departamento de Historia de la Facultad de Filosofía y Letras. Universidad Nacional de Cuyo, Mendoza, 2013.

Finally, the solution adopted by Tejedor—and which had been discarded in the Code—was not aimed at punishing the mentally-ill person who committed a crime, but at preventing such person from causing any damage to the society. Indeed, the analysis of the linguistic meaning of Tejedor's note we have cited clearly shows that those consequences were not strictly criminal in nature. And we say so because the author of the draft himself said that such protective power should appear "when the criminal courts declare their lack of jurisdiction."

Notwithstanding the lack of statutory recognition in the 1886 Code, while this Code was in force, we have identified cases in which the defendants were suffering from some kind of mental illness when the crime was committed, so some courts—in particular, the Court of Appeals for Criminal Matters in the Federal Capital—ordered the confinement, notwithstanding that silence.[13] This approach reinforces the non-criminal nature of the solution, especially in light of the *repressive*, though not *civil*, gap in the legislation, as remarked by Morra in 1915,[14] with criticism by the specialized contemporary scholars.[15] In fact, back then, the Civil Code provided the following in the articles relative to guardianship: "No custodial sentence shall be imposed on lunatics except in the cases in which it may be feared that not being under custody they may damage themselves or others. Lunatics can also not be taken to a lunatic asylum without authorization by the court" (article 482).[16] It was reasonable for that Court of Appeals, then, to hold as follows in another precedent: "After the court holds that the defendant cannot be held liable due to insanity, the jurisdiction of criminal courts ceases, and the freedom of the defendant depends on the civil courts establishing that the incapacity has ceased."[17]

[13] On May 16, 1898, the now extinct Court of Appeals on Criminal Matters for the Federal Capital held that "provided that there is danger, the insane defendant cannot be given to his family" (*Fallos*, vol. 83, p. 101). In this respect, see De La Rúa, J., *Código Penal Argentino. Parte general*, 2nd ed., Buenos Aires, Ed. Depalma, 1997, p. 452, note n. 8.

[14] Morra, L., "Legislación sobre alienados", *Revista de la Universidad Nacional de Córdoba*, Year II, No. 3, 1915, p. 351.

[15] Rodolfo Rivarola, for example, had stated: "Since 1891, it has been noted that this matter cannot be left to the provisions of the Civil Code, whose sole purpose is to make up for a person's lack of capacity by establishing a guardianship. Under article 144, Civil Code, the persons or officers who can request or order that the mentally ill criminal be delivered to an insane asylum do not include the court or the Office of the Prosecutor General. If 'anybody can tell, it is only when the insane person is *violent* or when he *annoys* his neighbors'. Article 482 always authorizes the civil court to impose a custodial sentence 'when there is fear that the individual may harm himself or others while not in custody'; but this decision will always depend on the report of a limited number of persons, who will often have an interest in that the fear that the ill person harms himself or others is not recognized" (See *Derecho penal argentino. Parte general. Tratado general y de la legislación actual comparada con las reformas proyectadas y con legislaciones de lengua española*, Buenos Aires, Librería Rivadavia, 1910, pp. 400-401).

[16] *Código Civil de la República Argentina. Sancionado por el Honorable Congreso el 29 de Setiembre de 1869 y corregido por ley de 9 de Setiembre de 1882, Edición Oficial*, Buenos Aires, Establecimiento tipográfico de "La Pampa", 1883, p. 119. In the relevant note, Vélez Sarsfield cited article 466 of the Civil Code of Chile as the source of the provision.

[17] See *Instituta de la Jurisprudencia establecida por las Exmas. Cámaras de Apelaciones de la Capital de la República Argentina en sus sentencias por orden numérico y alfabético por J.J. Hall*, Buenos Aires, Félix Lajouane Ed., 1891, p. 293; and note 3, Jur. Crim., vol. 4, p. 297, Ser. 2nd: "A defendant prosecuted for attempted murder was found not liable because he had committed the act in a state of insanity and was sent to an asylum as an insane person, and not as an inmate. One of his family members asked for his release, which was rejected because this is a matter affecting the marital status of a person, which corresponds to an ordinary civil court. If that court finds merit in the request, the release should be ordered. The criminal court has nothing else to decide on, as its jurisdiction has ceased after holding that the defendant is not legally liable as a final decision".

2. Criticism against the Criminal Code of 1886[18]

Moreno said: "The Code [of 1886, in force as from the following year] did not say"—as we have already explained—"a word about what had to be done with individuals who were acquitted based on mental illness, such as insanity, somnambulism, imbecility, or drunkenness, and, in general, based on the unconsciousness grounds listed; so an individual in those conditions should be released, which would amount to an actual social danger."[19]

How can we describe the state of the legal culture in connection with this criticism?[20]

Moreno's concerns were undoubtedly shared by the main advocates of the *Scuola Positiva*, by other noted legal experts who made up the *International Union of Criminal Law* (1889) and by European reformist proposals aiming at overcoming, based on certain pragmatism, the disputes between classical thought and the new scientific trends mentioned. This happened in Switzerland with the draft by Carl Stooss (1893).[21] Julio Leal Medina has correctly pointed out that, since the late 19th century, punishment "will no longer be exclusive and omnipresent with the introduction in Italian thought of deterrence measures and the draft for a Swiss Criminal Code by Stooss, which will bring a new criminal law" made up by two ways.[22]

Let us analyze these European trends.

Garófalo said the following in connection with them: "For us [members of the *Scuola Positiva*] … alienated criminals are a separate class. In this view, the only difference between legal experts and us is that legal experts believe that insofar as the existence of alienation has been recognized, the criminal science has nothing to do with that, and that, in any case, the law must establish that there is no crime, while, on the contrary, we believe that the crime exists, even if it is of a special nature, that is, the crime is an effect, not of a character determined by a temporary pathological state, which may improve, worsen or transform, and that, as a result, depending on the progress of the illness, the criminal may become more or less dangerous, and even entirely harmless. This is why repression must acquire a special form; not that of absolute elimination, but

[18] In this respect, see Cesano, J.D., *Consecuencias jurídico - penales y enfermedad mental* [...], p. 29 ss.

[19] Moreno, *El Código penal y sus antecedentes*, vol. II, p. 227.

[20] As reflected in the text, this criticism came not only from legal experts but also from forensic physicians. In this respect, see Cesano, J.D., *Criminalidad y discurso médico – legal (Córdoba 1916 – 1938)*, Córdoba, Ed. Brujas, 2013, pp. 68 ss.

[21] We will go back to Stooss's thought in the next section.

[22] Leal Medina, J., *La historia de las medidas de seguridad. De las instituciones preventivas más remotas a los criterios científicos penales modernos*, Navarra, Ed. Aranzadi, 2006, p. 236.

indefinite incarceration in an asylum for alienated criminals."[23] Lombroso[24] and Ferri[25] also believed the same; they were in favor of the creation of criminal asylums.

In turn, Adolphe Prins, a cofounder with Franz von Liszt and Gérard van Hamel of the *International Union* mentioned above, argued this in 1910: "There are cases in which punishment cannot be considered the only measure to sanction a moral liability and improve the offender, nor can one consider hospitalization exclusively aimed at treating an ill person. On the contrary, treatment orders and social protection measures must be applied on criminals who are dangerous, regardless of whether these criminals are normal or abnormal. When applying these measures one makes a distinction between individuals who may improve or heal and those who must be put away from society so that the society is not harmed."[26]

In our cultural environment, there have been isolated voices opposing these ideas. Godofredo Lozano stated as follows: "What could be the basis for the creation of a special institution? No matter what positivists say, that institution would be special repression. We do not find it evident. The total or partial elimination of these crazy criminals is a repression measure which appears meaningless in light of the criminal science. The society cannot in any way impose a criminal stamp on those unfortunates. He who has harmed another with no awareness whatsoever must be sent by the criminal system not to a prison but to an ordinary asylum to release himself of any harmful acts. When an insane individual is sent to one of those facilities, he is sent there for a special curative treatment, and he will remain there for as long as his state persists."[27] Along the same

[23] Garófalo, R., *Criminología. Estudio sobre el delito y sobre la teoría de la represión*, translated by Pedro Dorado Montero, Madrid, La España Moderna, 1890. We used the reprint by Valetta Ediciones, Buenos Aires, 2007, p. 243. In fact, the concern for the issue of the *actual* liability of the alienated individual has been discussed in depth since the end of the 19th century throughout Europe. And while the debate intensified—as we showed in the text—with the contributions of Italian criminal anthropology claiming for, based on the classificatory principle and the special consideration of the criminal mentally ill individual, a specific institution, we must recognize that the origin of penitentiary asylums date back to the end of the 18th century. The Bastille is one of those precedents, which had been used as a security asylum where criminal insane individuals were held. The English reformation was also key in the process for the creation of penitentiary asylums. John Howard (1726–1790) in *The State of Prisons in England and Wales* (1777) wrote a fierce criticism of the coexistence in prisons of the mentally ill and healthy individuals, so several politicians and philanthropists promoted, among other humanitarian ideas, the reformation of the institutions confining criminals who were insane. In this respect, see Barrios Flores, L.F., "Origen, evolución y crisis de la institución psiquiátrico penitenciaria", *Revista de la Asociación Española de Neuropsiquiatría*, Madrid, Asociación Española de Neuropsiquiatría, vol. XXVII, Nº. 100, 2007, p. 473.

[24] Lombroso, C., *El delito. Sus causas y remedios*, Madrid, Librería general de Victoriano Suárez, 1902, p. 538: "Another institution which we believe is aimed at conciliating humanity with social security is that of asylums for criminals. Much can be debated about the theory of punishment, but there is one point on which everybody agrees—among criminals and individuals considered as such, there are many alienated individuals. Regarding them, prison is an injustice, but freedom would be a risk which is now only tackled by measures violating morality and social security at the same time".

[25] Ferri, E., *Sociología criminal*, reprint of the 2nd Spanish edition, translated by Gonzáles del Alba P. (1908), Buenos Aires, Valletta Ediciones, 2006, p. 516: "Regarding insane or half-insane criminals, it is known that after the isolated proposals made for more than fifty years by some alienists, such as Georget and Brière de Boismont, a literature has developed in favor of criminal asylums; while there are very few objections or reservations among alienists".

[26] Prins, A., *La defensa social y las transformaciones del Derecho penal*, Buenos Aires, Ediar, 2010, p. 69.

[27] Lozano, G., *La escuela antropológica y sociológica criminal (Ante la sana filosofía)*, La Plata, Imprenta de El Fiscal-Calle 4-esquina 51-La Plata, 1889, p. 182. The transcription in the text observes original spelling. Two years after that, Pedro E. Gamen wrote the following in his doctoral dissertation

lines, Obarrio advocated that position arguing: "[c]riminal law ... must limit itself to establishing as a rule that the lack of awareness or discernment is a defense to criminal liability. Doing more would undoubtedly exceed its authority."[28]

These isolated voices contrasted, however, with the majority view at the time.

Ingenieros, for example, argued harshly against article 81(1). First, the author argued that the concept of "state of insanity", included in the legal provision, was indeterminate and not scientific enough: "In modern psychopathology it is no longer admissible to discuss 'states of insanity', as this concept remains restricted to the types of diseases seen in psychiatric clinics. There are countless degrees of psychical anomalies and abnormalities, which may refer to the entire personality of the ill person or only to some of his psychological functions."[29] But Ingenieros was mostly concerned about the practical perils resulting from irresponsible individuals: a criminal who is known to be alienated and, therefore, cannot be held liable—the author said—"is an outlaw and may recover his freedom; this promotes the use of insanity as a defense to punishment, but this approach overlooks the fact that the alienated criminal is as dangerous as (and in certain instances way more dangerous than) other criminals. We have to think that if society has the right to preventively incarcerate alienated individuals who have not committed any crimes, the society cannot be deprived of the right to incarcerate … those individuals who have endangered the security of their neighbors."[30]

Also in Buenos Aires, the doctoral dissertations by Armando Pessagno and Horacio P. Areco, which are consistent with Ferri's thought, asked for consequences to be imposed on the individual who had violated a criminal law provision while mentally ill. Areco pointed out that it is not up to the criminal anthropologist "to do the clinical study or diagnosis, not even to prescribe the treatment for that type of alienation. These tasks are up to the psychiatrist, but the criminologist is concerned with knowing how fearsome the insane criminal is, in order to prescribe the social means of defense which

defended in the University of Buenos Aires School of Law and Social Sciences, along the lines of Lozano's thought: "A criminal is not an insane or ill person either. If it were so, that would be a misnomer. There is no criminal with no free will, with no moral liability. Society builds hospices and asylums for the sick and the insane, and prisons for the criminals. Is the society wrong in not having the same commiseration feelings for the criminal than for a disgraced alienated person? It is true that some alienists assimilate crime with insanity. But others … oppose such an assimilation. This matter is not within our province, as it is a pathological case requiring special studies. But we believe that there are certain psychological manifestations authorizing and even requiring a distinction between crime and insanity" (see Moreno, M., *El libre albedrío y el Derecho Penal*. *Tesis presentada para optar al grado de Doctor en Jurisprudencia*, Buenos Aires, Imprenta y Encuad., 1901, p. 30).

[28] Obarrio, M., *Curso de Derecho Penal*, Buenos Aires, Félix Lajouane Editor, 1909, pp. 299–300.

[29] Ingenieros, J., *Criminología*, Madrid, Daniel Jorro Editor, 1913. We are using the reprint by Buena Vista Editores, Colección Criminología Argentina, No. 3, preliminary study by Galfione, M.C., Córdoba, 2012, p. 79. Ingenieros's idea, which we reproduce in the text, was shared by Bermann, G., *El determinismo en la ciencia y en la vida*, Sociedad cooperativa "Nosotros", Buenos Aires, 1920, p. 164 ss. This coincidence should not be considered strange. On the contrary, this idea was recurrent in the psychiatric doctrine of the time. In this respect, the professor of legal medicine at London University H. Maudsley—who also cites Bermann—had said something along those lines: "(...) we do not have to understand insanity as a single illness to be recognized by a specific sign; insanity is rather made up by several diseases, each of which has its own characteristics, its specific process, its more or less specific cause, and its own ending" (see *El crimen y la locura*, Spanish version of the last English edition, by Lombardía F. & Sánchez, F., Valencia, Sempere y Compañía Editores, s/f, p. 136).

[30] Ingenieros, *Criminología*, p. 83.

are most convenient."[31] Pessagno, in turn, while making a distinction between the criminality of the individual who had a healthy mind from the one who was not healthy, made reference to the need to take "measures … against such an ill person,"[32] but he made it clear that these measures could "never aim at correcting that criminal."[33]

In the academia in Cordoba, both legal scholars and forensic doctors had voiced their disagreement with this legislative gap as to the action of the mentally ill who have committed a crime. Legal scholar Moyano Gacitúa said: "if insane individuals are not punished, they cannot be exempt from the State's action to protect general interests, and the codes should not do without them and relegate them to mere administrative action, as our code does. To fill this void, modern codes and our drafts have pertinent provisions. They say that if the mental illness of the person who committed the crime is temporary or if a repetition may be expected, the court shall order that the criminal be confined in a facility for alienated criminals or in a special section of common asylums. The person shall only be released with a court decision to be made after hearing the prosecutor and the experts. It was necessary to change the state of things we were in, as public tranquility and individual safety can be violated by a madman without any consequences when he has been wrongfully discharged or released without taking the appropriate cautionary measures".[34] In turn, Alberto Stucchi, who was an alternate professor of Forensic Medicine at the University of Cordoba School of Medical Sciences, was equally critical regarding the solution in the code in force when stating: "the complete inconsistency between the new scientific trends and criminal legislation, whose classical approach is increasingly inapplicable today and therefore increasingly ineffective as to its function, from the point of view of social defense. Psychopathological and sociological studies in recent times have contributed to significantly reduce liability, so that there is an uptick in the number of individuals escaping criminal actions. This is the reason why amending the law is required if we want to avoid the serious abuses committed on a daily basis to favor criminals at the expense of modern doctrines. From this point of view, it is easy for the reader to conclude how inconsistent many of the provisions in our code are in the relevant part...."[35]

This issue was also debated in the National Penitentiary Conference, held in Buenos Aires, from May 4 through May 11, 1914. On this topic, a legal scholar, Areco, and a physician, Helvio Fernández, took part.[36] And while both speakers disagreed on the need to create criminal asylums—as proposed by the majority in Congress—,[37] as it was

[31] Areco, H. P. *Enrique Ferri y el positivismo penal*, Buenos Aires, J. Lajouane & Cía., Editores, 1908, pp. 58-59.

[32] Pessagno, A., *Etiología del delito*, Buenos Aires, Imprenta de López, Barderi y Cía., 1908, p. 67.

[33] Pessagno, A., *Etiología del delito*, p. 67.

[34] Moyano Gacitúa, C., *Curso de Ciencia Criminal y de Derecho penal argentino*, Buenos Aires, Félix Lajouane, Editor, 1899, p. 350.

[35] Stucchi, A., "La responsabilidad del punto de vista médico - legal", *Revista de la Universidad Nacional de Córdoba*, Año 5, Nº 3, Mayo de 1918, pp. 25–26.

[36] In the schedule for the Conference, this topic was covered in Section II (criminal regime and prison reforms), matter 1, section (b) (Correct treatment of criminal alienated individuals and alienated criminals). The schedule of the Conference was published as Exhibit B in Lancelotti, M. A., *La criminalidad en Buenos Aires al margen de la estadística (1887 a 1912)*, reprint of the first edition (1914), Colección Criminología Argentina, Córdoba, Buena Vista Editores, 2012, pp. 115-117.

[37] Paz Anchorena said that, after "a lively debate in this Congress, the positions proposed were voted on and this conclusion was reached: 'The treatment of criminal alienated individuals and alienated criminals must take place at special facilities of ordinary asylums or specific areas of these asylums.' (Paz

considered that their implementation would be very expensive, they were very critical as to the fact that no punishment was set for the criminal alienated individual. The arguments put forward showed adhesion, in this respect, to the postulates of the *Scuola Positiva.* The society—they said—has the right and the duty to live and make progress, and in light of these purposes certain conservation and treatment orders are adopted. Therefore, both authors claimed that a judiciary which stays quiet when faced with social danger would not be a true judiciary, as it would not be delivering on its essential mission. The courts have to defend society from the criminal alienated individual with the resources of civilization. Prisons, asylums, and colonies are places where courts exercise their protective functions. Against the classical thought alleging that prison is an injustice for the insane person and thus that freedom is appropriate, Areco would say, together with the positivists, "that if prison is an injustice, freedom is a danger and that only a naïve position would counsel freedom. Prisons are not an instrument for torture nor is it revenge their aim; prisons are an institution for social security. For certain types of abnormality, prisons, or penitentiary colonies are better than asylums."[38]

As explained, these ideas prevailed back then. There were of course nuances, stretching from some extreme opinions proposing the sterilization of the alienated criminal (this is the case of the doctoral dissertation of José Hualde[39]) to opinions trying to uphold criminal punishment for them with the purpose of avoiding simulation,[40] and other texts which started to include, in criminal language, treatment orders for criminals with mental pathologies, as happened in 1918 with Paz Anchorena.[41]

What was happening with the drafts for reform which were being incubated?

There were two drafts for comprehensive reform: the 1891 draft, prepared by Norberto Piñero, Rodolfo Rivarola, and José Nicolás Matienzo,[42] and the 1906 draft,

Anchorena, J.M., *La prevención de la delincuencia. Instituciones de adaptación posible en la República Argentina*, Buenos Aires, Imprenta y Casa Editora "Coni", 1918, p. 333).

[38] Miceli, C.; Riccitelli, L.; Celentano, C.; Bruno, D.; Reghitto, M.A., "'Delincuentes alienados y alienados delincuentes'. Fundamentaciones y discusiones acerca de ambas entidades en el *Congreso penitenciario* de 1914", *XII Encuentro Argentino de Historia de la Psiquiatría, la Psicología y el Psicoanálisis*, Buenos Aires, October 7 and 8, 2011.

[39] See *Profilaxis de la locura*, Buenos Aires, 1899 with the information of Vezzetti, H., *La locura en la Argentina*, Buenos Aires, Ed. Paidós, 1985, pp. 158-159. In his doctoral dissertation, published in 1918, José María Paz Anchorena discussed the problem of sterilization and rejected it: "The state and the society do not have a right to prevent future criminality by sterilizing human beings who present the danger of reproducing abnormal elements, though there can be a lot of truth in the assertion that two imbeciles result in a degenerate" (see Paz Anchorena, *La prevención de la delincuencia* [...], p. 320).

[40] This was precisely what Ingenieros thought. In his book *La simulación de la locura* (reprint by Jorge Sarmiento Editor/*Universitas*, Córdoba, 2008, p. 327) he said: "The application of new criteria [to punish alienated criminals depending on their classification) to replace the current ones in criminal law [no liability] solves the problem we introduced…: the simulation of insanity loses all interest for the simulating criminal, as the issue of no criminal liability disappears as a defense to criminal punishment" (comments in square brackets added by the authors).

[41] Ingenieros, *Criminología*, p. 323: "Insanity could have been a defense to criminal liability in the classical approach, which only focused on punishing the accused. But today, according to modern criminal trends, the insane individual is just somebody who is dangerous and requires a treatment order to be applied for his treatment".

[42] *Proyecto [de] Código Penal [de la] República Argentina. Redactado en cumplimiento del Decreto de 7 de Junio de 1890 y precedido de una Exposición de Motivos. Por los Dres. Norberto Piñero, Rodolfo Rivarola, José Nicolás Matienzo*, Buenos Aires, Taller Tipográfico de la Penitenciaría Nacional, 1891.

which President Quintana entrusted to a committee made up by Francisco Beazley, Rodolfo Rivarola, Diego Saavedra, Cornelio Moyano Gacitúa, Norberto Piñero, and José María Ramos Mejía.[43]

Article 59(1)(2) of the 1891 draft set forth: "If the affection is not temporary or if its repetition may be feared, and the act is executed as one of those punished by death penalty, prison, deportation, or penitentiary, the court shall order that the agent be held in a criminal alienated individuals facility or a special department for ordinary asylums, of which he will only be released by court order issued after holding a hearing with the prosecutor and following the opinion by experts, establishing that the danger which gave rise to the imprisonment ceased."[44] Its third paragraph established that "if the act is punished with a punishment other than those mentioned, the agent shall be set free under bond for custody, guaranteeing his future good conduct"; while such bond is not posted, the provisions of paragraph 2 shall apply.

One can see that the mentioned draft is positivist in nature regarding the need to have criminal asylums[45] because—as said in the draft's statement of purposes—"that confinement must be done in facilities with security conditions which are not present or even required in ordinary asylums. And even if these asylums offered heightened security measures, it would not be prudent to confine in them criminal alienated individuals together with ordinary alienated individuals, because many problems would arise; in some cases, those problems would be insurmountable, as there would be difficulties in applying the correct treatment for some and for the others, and because innocents may be victims of attacks by the criminals."[46]

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[43] *Proyecto de Código Penal para la República Argentina. Redactado por la Comisión de Reformas Legislativas constituida por decreto del Poder Ejecutivo de fecha 19 de diciembre de 1904*, Buenos Aires, Tipografía de la Cárcel de Encausados, 1906.

[44] In his talks at the University of Buenos Aires in 1923, Luis Jiménez de Asúa said he was against the creation of criminal asylums. This type of insane asylums—he would say—"which were once supported by many, especially in England, Germany, and North America, and which José Ingenieros spoke of with his high authority, is now going through an acute crisis. [...] [T]he sagacious Spanish psychiatrist Gayarre is against the creation of this class of asylums, because there is no difference between criminal alienated individuals and innocent alienated individuals. In confining insane individuals who have committed a crime in a single facility, that facility becomes a prison. When these criminal sick individuals are together, the asylum becomes an actual battlefield, as proven by Flügge. It then becomes necessary, as done in the insane criminals section of Düren, to dilute these cases among other peaceful sick individuals, insane individuals, and stuporous individuals, which would result in a very effective psychical isolation" (*El Código Penal Argentino y los proyectos reformadores ante las modernas direcciones del Derecho penal*, 2nd edition - expanded and updated, Buenos Aires, Librería y Editorial "La Facultad", 1943, pp. 76-77).

[45] This does not mean that the draft reflects in its entirety all the postulates of the new school (criminological positivism). This can be seen both in the statement of purposes of the document and in the opinion of the contemporary scholars. In this regard, Dellepiane, A., *Las causas del delito*, Buenos Aires, Imprenta de Pablo E. Coni é Hijos, 1892, p. 19, stated: "And if in the field of doctrinal opinions it is necessary to step on firm ground and avoid the innovation spirit that permeates everything, prudence is a more necessary requirement when trying to introduce reforms in the current legislation". Rivarola was of the same opinion—as explained, he was also a member of both committees (1891 and 1906)—: "It is also possible that while a theoretical reasoning is elaborated, without major personal liability, the idea may be accepted that a code must respond to a 'generally admitted theory to justify the right to punish'. But in light of the official responsibility of a public office or an assignment to prepare the text of the criminal law, the approach is different and care is to be taken to follow a relative appreciation of the possibility of a convenient criminal law in each institution, without creating a theory in the Code" (see Rivarola, J. "De la definición del delito", *Escritos filosóficos*, Publicaciones de Filosofía Argentina, vol. V, Buenos Aires, Ed. Losada, 1945, p. 129).

[46] *Proyecto de Código Penal.* p. 54.

In turn, the 1906 draft, in its article 41(a)(2)(2), provided that "In the event of mental disease, the court shall order that the agent be confined in an asylum, from which he shall not be released but for court order, after hearing the opinion of the prosecutor and the experts, who shall confirm that there is no danger that the insane person may harm himself or others". As can be seen, this provision, unlike the previous draft, makes no reference to a *criminal asylum*—an institution proposed by the *Scuola Positiva*—, a departure which may be explained by the beliefs of the Committee members, included in the statement of purposes; there was an approach to exclude from the text "[a]ny school concerns, theoretical discussions, academic debates", so that the draft was a common work "free from any sectarian spirit and that it constituted a free area, protected from any accusations of exclusivism."[47] All in all, and if we compare this normative solution with the one in the Code of 1886, it is clear that the illegal act of the adult without capacity to be charged did not go unpunished in the draft, as the Code provided for their confinement in an asylum.

3. The Criminal Code of 1921[48]

The Code of 1921, currently in force, provides in its article 34(1) that there is no punishment for "he who could not at the moment of the event, whether due to insufficient faculties, morbid alteration thereof or his state of unconsciousness…, understand that his act was a criminal act or could not guide his actions. In the event of insanity, the court may order that the agent be confined in an asylum, from which he shall not be released but for court order, after hearing the opinion of the prosecutor and the experts, who shall confirm that there is no danger that the insane person poses a damage to himself or others".

While the final draft of the article comes from the second Senate Committee, that article generally draws from the text passed in the House of Representatives.[49] In fact, Moreno himself, in expressing the reasons for the Special Committee at the House made express reference to the legal consequence provided for in the cases of insanity, and he drew a parallel line between innovation and the criticisms we have examined in connection with the Code of 1886. This was explained by Moreno on August 21, 1917: "our law [i.e., the Code of 1886], like almost all laws in force in other States, establish no punishment for the person who commits the act in a special moment of disturbance; for example, in cases of insanity. But our law does not take any measures against the person who has committed the act in those conditions. Just like a drunkard who murders, after full and voluntary drunkenness is proven, goes in the street and gets drunk again, and probably murders again, the same happens, Mr. President, with the madman or any other persons with mental affections who are acquitted for these reasons. All of this has happened because the law has taken into account old criteria for finding that there is no liability which are more connected with religious sanctions for sins than with legal sanctions, and not with those which the society should impose on criminals. This is why we have transformed the approach and have established that these dangerous individuals

[47] *Proyecto de Código Penal*, XIII.

[48] In this respect, see Cesano, J. D., *Consecuencias jurídico – penales* [...], pp. 49 ss.

[49] In connection with the parliamentary proceedings of the Code of 1921, see Cesano, J. D., *Rodolfo Moreno (H), su mundo parlamentario y el proceso de codificación penal argentino*, Córdoba, Ed. Brujas, 2018.

must be confined until the situation and the state of danger stops, which must be duly proven."[50]

Where did this innovation come from?

In fact, the rule drew directly from the draft of 1906, whose article 41(a)(1)(2) we have already mentioned.

What was the legal nature of this legal consequence?

We have already explained that the Code of 1886 established no consequence whatsoever. However, in the previous legislative tradition, the Tejedor draft did establish a consequence. In our view, however, that confinement was not strictly criminal in nature; instead, it was a civil measure which could be ordered with the deterrence purpose of avoiding any possibility of repeated harmful behavior by a mentally ill person. As we have also explained, the Velez Code had also established this consequence for insane individuals. And, in fact, the statement of purposes for the draft of 1906—which is the direct source of the Moreno Code—shows how the members of the Committee had noticed this situation, just like the Committee drafting the draft of 1891[51] did when stating: "The Civil Code authorizes locking up insane individuals in those conditions. We do nothing but follow its guidelines, with the difference that the enforcement of the measure is a duty of the criminal court, because we believe it would be completely illogical that the court with reliable evidence of the insanity and its dangers before itself has to resort to another court to confine the individual. The release of criminal insane individuals must be decided by criminal courts...."[52]

But let us look back on our question.

We believe that the Code of 1921, in this article 34(1) established a treatment order which is criminal in nature; not only because it tasked (and tasks) the criminal court with the issuing of the confinement order against the alienated individual, but also because a comprehensive analysis of the legislative document shows that a dual system was being created. Together with punishment, there appeared treatment orders as criminal legal consequences regarding the commission of the crime or, in the case of the mentally ill, of an act which satisfies the statutory offense definition and which is wrongful.

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[50] Moreno, R. (h.), *El Código penal y sus antecedentes*, vol. I, p. 124.

[51] In its statement of purposes, the draft said this (*Proyecto [de] Código Penal [de la] República* Argentina, pp. 48–49): "One cannot understand why somebody who has harmed the community and is capable of harming it would still have some kind of privilege, which in the end would go against that very person: that of not being confined in an appropriate healthcare facility, where he could be treated as required by his illness. And this is more difficult to grasp because civil laws allow as an exception that the insane individual be deprived of his freedom when it may be feared that, using that freedom, he may harm himself or others (article 482, Argentine Civil Code), without requiring that the alienated individual has committed a crime; it is enough that the fear of harm exists, whether it results from the nature of the disease or any other cause. There is no doubt that the provision mentioned could be invoked to ask the civil court that the criminal alienated individual be temporarily confined, but it could also happen that the provision is not invoked and nobody asks for any measure. Then, the insane individual would be free and would become a threat for the public, without any personal gain. The law must imperatively order that dangerous madmen be locked up; and, as the participation of the criminal court is necessary whenever there are crimes, this court must adopt, when the agent is an ill person, the measure to protect the society, with a view to the future and to trying to cure him."

[52] *Proyecto de Código Penal*, XLI/XLII.

To reach this conclusion, we must be aware of the state of the matter immediately before the Code of 1921 was enacted.

Moreno, in the origin of the draft that would end up with the enactment of the Code, had proposed to enact the draft of 1906, with some amendments. And in that process he submitted his proposal in a survey aimed at university professors, among others. On January 25, 1917, Juan P. Ramos, a full professor of criminal law at the University of Buenos Aires, expressed his critical opinion, to the extent that his first conclusion was this: "The draft for the Criminal Code of 1906, given its system, does not respond to the state of the contemporary criminal science. As a consequence, the Congress must not pass it."[53] The Ramos report did not cover everything in connection with the draft submitted by Moreno. It only covered some matters connected with the cases of lack of criminal liability due to mental illness and minority, as well as the treatment of habitual criminals. And the position expressed there—based on the then modern legislative trends in Switzerland, Austria, and Germany—favored the idea that punishment as the only consequence for crimes was insufficient in some cases. That is why the proposal was to include treatment orders, as another criminal law reaction to criminal behavior.

Ramos said the following in his report: "Based on what appears in the drafts cited [in reference to the drafts in Switzerland, Austria, and Germany], we have already seen that the function of criminal law, i.e. the defense of society, is realized not only by imposing punishments, but by means of *sichernde Massnahemen* in the Swiss and German codes and the *Sicherungsmittel* in the Austrian code; all of them, treatment orders. To attain that function, it is appropriate to give the court wide, actually very wide, powers. With them, the judicial function is at the top of its activity and the purpose of the law is realized: social defense."[54] Actually—Ramos continued—"for some types of criminals, it is appropriate to consider that the punishment as such is totally useless. In some cases due to the age of the offender; in others, due to his inveterate habit for crime or due to being one of those scumbags who live in idleness, in mendacity, in vagrancy, or in the vice of drinking…; in other cases when in the presence of human beings which are evidently inferior, i.e. what the law considers individuals who cannot be held liable due to their psychic state, the law must consider itself incapable of developing, by punishment only, the most rewarding and evident requirements of social defense."[55]

In relation to the preliminary draft of the Swiss Criminal Code of 1915, an instrument which is frequently cited in the Ramos report, Luis Jiménez de Asúa said, in 1916, that "[t]he application of a treatment order depends not on the commission of a given type of crime, but on the state of the criminal. These orders are not mentioned in the special part (except for misdemeanors, article 293). The court may issue any such orders provided that the dangerous state of the criminal makes them necessary in the specific case. The three treatment orders, especially regulated in the preliminary draft, entail deprivation of freedom; they have been imposed after the punishments of this type and before the general rules applicable to all these deprivations."[56] These were discipline

[53] [no author], "Del doctor Juan P. Ramos, Profesor de Derecho Penal en la Universidad de Buenos Aires", *Código penal argentino*, Edición recopilada y ordenada por Raffo de la Reta, J. C., vol. I (Antecedentes), Buenos Aires, Talleres Gráficos Argentinos de L.J. Rosso y Cía, 1921, pp. 280-281.

[54] "Del doctor Juan P. Ramos [...]", p. 232.

[55] "Del doctor Juan P. Ramos [...]", p. 232.

[56] Jiménez de Asúa, L., *La unificación del Derecho penal en Suiza*, Madrid, Hijos de Reus Editores, Impresores y Libreros, 1916, p. 285.

houses for adolescents (article 91), confinement of individuals who cannot be held liable and individuals with diminished liability (articles 13, 15, and 18) and those for convicts and confinement of habitual criminals (article 42). As a matter of fact, these provisions had been designed in Swiss law, in the preliminary draft of 1893 prepared by Carl Stooss. Stooss is to be credited with having started this path in a fairly pragmatic endeavor. The Swiss reform proposer would be glad—as Urs said—with partial and select modifications, refining the existing means of social control instead of questioning the fundamental principles of liberal law.[57] The preliminary draft of 1893 not only established an adequate punishment and culpability as a reaction to the act, but it also contained "the novelty of the so-called treatment orders, whereby offenders who were exempt from criminal punishment in full or in part could be confined when public safety so required. Multiple recidivists had to be put on surveillance, instead of being punished, when the court were of the idea that they would reoffend. Criminals whose crimes were due to lack of affection to work or drunkenness should have been sent to a work facility or a facility for the recovery of drunkards. Stooss believed that the common feature of these treatment orders was the purpose of avoiding new events by the person individually affected by the measure, by means of education, correction, or—if necessary—by means of custody which would render that individual inoffensive."[58] Unlike a punishment, designed as an evil retributing the act and aimed at the measure of culpability, what lies at the center of treatment orders is not the act, but the state of the offender, his danger or need for treatment. According to Stooss, the act is just one of its symptoms. In light of this, to determine how long the measure should last, the offender's culpability is not decisive; being successful in the treatment or the disappearance of the dangerousness is.

Let us go back to the Argentine Code of 1921. Why do we claim that such Code adopted a system combining punishments and treatment orders to react to crimes?

Our claim is based on a comprehensive understanding of Book First of the Moreno Code.

We first need to take a look at how crimes committed by minors who could not be held liable due to their age were regulated in the Code, especially in articles 36 and 37. In the Special Committee of Representatives, in connection with these provisions, there is a clear reference to the house for disciplinary education of adolescents, as in the preliminary draft for the Swiss Code of 1915—which is cited—and where the work of Luis Jiménez de Asúa of 1916, which we just mentioned, is also cited.

In turn, and in connection with habitual criminals, the text passed by the Representatives, in its article 52 provided for the consequence of confinement for an indefinite period, as an ancillary measure to the last sentence. Regardless of the following debate on its nature, in our opinion the provision also established a treatment order, which supplemented the punishment, unlike what happened in the drafts of 1891 and 1906, which regulated those orders under the section for punishments. The second Senate committee changed the word *relegación* (confinement) for *reclusión* (imprisonment).

[57] 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. 260.

[58] Wolfgang, F., "Las medidas de corrección y seguridad en el sistema de consecuencias jurídicas del Derecho penal. Clasificación en las teorías de la pena, configuración material y exigencias en el Estado de Derecho", *InDret* 3 (2007), Barcelona, p. 5.

Moreno placed treatment orders in a different section as compared to the predecessors of 1891 and 1906, when the orders were regulated under the section of recidivism.

We believe these clarifications were due because they help to describe confinement in asylums for alienated individuals as an actual treatment order and the Moreno Code as the first legislative document, with the force of law, including the use of punishments and treatment orders in our cultural environment.

In fact, authors who were contemporary to this Code of 1921—both national and foreign—so recognized, which does not mean that they have described the system designed by Moreno as entirely consistent with the legislations considered to be the more advanced by then.

In his talks at the University of Buenos Aires in 1922, Julio Herrera recognized that confinement in asylums for the mentally ill was a treatment order in 1922, and he added that their structure was complete, in the Moreno Code, with the adoption of the following "treatment orders: minor correctional facilities, drunkard asylums for individuals who cannot be held liable, and confinement for an indefinite period for recidivists."[59]

In turn, José Peco, one year before (in 1921), albeit with a more critical tone than that of Herrera, had said the following in connection with the draft passed by the House of Representatives: "There is an abundance of punishments and very few treatment orders, all against the contemporary trend of restricting the supremacy of punishments, as well extending the scope of action of treatment orders."[60]

Ramos, analyzing the text passed by the Representatives, would say: "it introduces several and important modifications to the draft submitted by Moreno in the sessions of 1916 [he was talking about the draft of 1906, with the first amendments proposed by the code drafter] (...); it is an evident signal of progress if compared with the previous drafts which were the basis for it. It destroys some harmful institutions of our old criminal system; it modifies others; it is based on new scientific principles and organizes a series of protective rules which, while not equal to others in other nations, will allow for the republic to be part of the rising trends of criminal law."[61]

In his talks at the University of Buenos Aires in 1925, Professor Luis Jiménez de Asúa, from Madrid, would say that the Argentine Code "had adopted a reduced number

[59] Facultad de Derecho y Ciencias Sociales de la Universidad Nacional de Buenos Aires, *Conferencias pronunciadas los días 28 de junio y 4 de julio por el Dr. Julio Herrera,* 1922, p. 42.

[60] Peco, J., *La reforma penal Argentina de 1917 -20*, Buenos Aires, Valerio Abeledo Editor - Librería jurídica, 1921, p. 95.

[61] See [no author], *Concordancias del Proyecto de Código Penal de 1917. Trabajos del curso de seminario del derecho penal de los años 1919 y 1920*, T° I, Buenos Aires (Facultad de Derecho y Ciencias Sociales), p. XI-XII. After some years, Ramos would repeat this opinion in his article Ramos, J. P., "Errores y defectos técnicos del Código Penal", *Psiquiatría y Criminología,* Año I, Buenos Aires - July-August 1936, No. 4, p. 245 when stating: "This was not such a new or 'innovative' principle, as supposed by the Code of 1921. It was practically established by the English courts. It existed in the classical code of Italy of 1889, article 46, and in its code of criminal procedure of 1913, articles 594 and 595. But that was some progress as compared to the code being repealed. Was this enough to say that the new code followed the most innovative principles in criminal matters? No. The Code of 1887 was really bad for the new one to be praised for being an improvement. It was just an incomplete progress in the state of the criminal science in the world in the year 1921".

of treatment orders, which were timidly organized. Its articles only mention the confinement of criminal alienated individuals, the isolation of individuals who cannot be held liable, and the confinement in the Southern territories of recidivists and habitual offenders."[62]

The timidity of which the Moreno Code was accused of was not by chance. It is evident that the drafter did not want to design a text that would be trapped in the purest criminologist positivism logic. Historiographic literature has established this thoroughly.[63] All in all, and notwithstanding this discretion—which was even understood by some critics[64]—, Moreno proved to be receptive regarding some postulates of the Swiss codification movement (embodied in the work of Carl Stooss) in admitting, as already explained, the use of treatment orders for some offenders.

4. Conclusions

Until the enactment of the Code of 1921, the early criminal codification process in Argentina had been somehow silent on the wrongful acts by individuals suffering from mental illness.

While the Tejedor draft—adopted by eleven provinces as the law—established, following Spanish legislation (in the Code of 1848, with the amendment of 1850), that the mentally ill individual would be given to the family or that he would be confined in "houses for people of his type", this measure was not strictly criminal in nature. In fact, the measure was more similar to civil measures in which the power to protect the society in these acts was realized, which happened when the criminal courts declared their lack of jurisdiction. This is why the Code by Velez (enacted in 1869) established a provision (the old article 482) authorizing the civil court to restrict the personal freedom of an insane individual when there is fear that he "may harm himself or others".

In turn, the first Criminal Code which was in force for the entire nation (that of 1886, in force as from the following year) directly removed that normative possibility in the Tejedor draft. In the practice of courts, this removal did not mean that some criminal courts would continue ordering, under civil provisions which were already in force,

[62] Jiménez de Asúa, L., *El Código penal* [...], p. 273.

[63] Roldán Cañizares, E. & Rosso, M., "Ascension and decline of positivism in Argentina", *GLOSSAE. European Journal of Legal History*, 17 (2020), p. 479, stated that this code was expected to be openly positivist, but that its positivism was very timid and attenuated, so it had to be considered eclectic. In fact, even if institutions such as conditional release and suspended sentence were incorporated, professors such as Juan P. Ramos or José Peco in Argentina, and Jiménez de Asúa in Spain, were harsh critics of the lack of positivism. Along this line, Jiménez de Asúa said that "this was a timid document of an almost neoclassicist nature as to the political and criminal trend expressed, whose technical construction is to be admired, notwithstanding its multiple defects".

[64] In fact, Ramos himself acknowledged the following in the first issue of *Revista Penal Argentina* (the means to communicate the ideas of the Center of Criminal Studies, which was headed by the same professor): "… 'We will criticize and judge, under its essential postulates [in reference to criminological positivism and the *International Union of Criminal Law*], but without ever forgetting that we live in a country whose society *today* would not tolerate the passing of a Code equivalent to the drafts of Stooss and Ferri, because they require administrative and legal conditions that we lack so far'…" (see Ramos, J. P., "La Escuela de Enrico Ferri en la República Argentina", in *Scritti in onore di Enrico Ferri per il cinquantesimo anno di suo insegnamento universitario*, Torino, Unione Tipografico – Editrice Torinese, 1929, p. 404).

confinement in asylums for insane individuals or that they left the decision up to the civil court.

There is no doubt that this normative gap sparked the criticism of legal scholars and forensic doctors alike. Without denying the existence of opposing opinions—which based their positions on the defense of free will, something which was not relevant in the individual which cannot be held liable—most authors, from Buenos Aires and from Cordoba, voiced their opposition against the lack of a criminal legal answer in the Code of 1886. It was possible to identify two trends in the construction of such answer: on the one hand and as a result of the dialogue with the advocates of the *Scuola Positiva* (especially Ferri), a proposal was made to create criminal asylums to confine these individuals. On the other hand, based on some of the representatives of the International Union of Criminal Law (for example, Adolphe Prins) and specific realizations of foreign codification processes (in particular, the Swiss drafts of 1893 and 1915; the last one was made known in our culture by Luis Jiménez de Asúa), the notion began to take form that treatment orders were a second way of criminal law, together with punishment. Treatment orders were first incorporated into the legislation when the Code of 1921 became effective.

In Argentina, starting with the Moreno Code, punishment and its formal requirements, which had almost completely prevailed in the system and the legal regulation that European and Latin American societies in the 19th century had established as a consequence for crimes, started to lose that exclusivity, when treatment orders were established in parallel as a criminal and legal model to maintain the order and the coexistence of citizens.

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