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The last attempt of regulating insane offenders in Argentina: The Draft Penal Code elaborated by Eusebio Gómez and Jorge Eduardo Coll in 1938

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Abstract
Criminological positivism had an enormous repercussion and impact on criminal law in Argentina, although it is true that its postulates, although accepted by a large number of criminologists, did not manage to cross the walls of libraries and study rooms, being relegated to the academic world. However, there was a draft penal code drawn up by Eusebio Gómez and Jorge Eduardo Coll that was built on the principles of criminological positivism, which is why we have decided to rescue and study it. In this specific case, we have focused on the regulation of insane offenders, which were not only regulated in greater detail than in previous codes or projects, but were also placed in relation to dangerousness, which demonstrates not only the positivist affiliation of this draft code, but also the importance that the authors gave to the regulation of insane offenders in the interests of the criminal justice system.

Keywords
Argentina, Draft penal code, Eusebio Gómez, Jorge Eduardo Coll, insane offenders

Summary: 1. Introduction. 2. Formation and consolidation of the Argentine Constitutional State (1853-1880). 3. The Political Regime of the Oligarchy: Partido Nacional Autonomista (National Autonomist Party), Unión Cívica Radical (Radical Civic Union) and the beginning of Argentine dictatorships. 4. A brief review of the Argentine criminal regulation of insane offenders. 5. Eusebio Gómez and Jorge Eduardo Coll, the last positivists in Argentina. 6. The draft penal code as a whole, an innovative work for Argentina that followed some steps of the Classic School. 7. Regulation of insane offenders in the draft criminal code of 1938. 8. Conclusion. 9. Bibliographical references.

1. Introduction

Argentina was probably the country that drank most from criminological positivism, impregnating both medicine and law with its postulates. However, criminological positivism did not travel beyond the walls of the libraries and study rooms

where Argentine jurists read and built their constructions on the basis of positivism.[1] Thus, the legislative and jurisprudential impact of criminological positivism in Argentina was minimal, being reduced to a few eclectic reforms that were included in some of the penal codes that were drafted during the period in which positivism was relatively well established and spread internationally.

With the aim of not replicating previous researches, and leaving aside the option of producing a work on "the history of positivist ideas in Argentinean criminalists", we set out to trace back the regulation of insane offenders in a new place. And such a place is the no-man's land that lies between the minds of jurists and the enactment of laws and codes: the land of the projects that never see the light of day. And, in this sense, a draft penal code drawn up by Eusebio Gómez and Jorge Eduardo Coll in 1938 plays a fundamental role. Furthermore, the complexity of the Argentinean case for the foreign reader makes it necessary to devote a few words to the contextualisation of the consolidation of the constitutional state and the political panorama that was developed within it in the second half of the 19th century and the first third of the 20th century. Thus, the reader will have the necessary tools to understand how and why so many draft penal codes were elaborated, as well as the raison d'être of the approach to criminological positivism in the light of eminently conservative governments at a time when positivism had already lost its original vigor.

It must be taken into account that there are many drafts of criminal codes that were never enacted, but the one we are concerned with is particularly interesting for the purposes of regulating insane offenders, and we will explain why: Eusebio Gómez and Jorge Eduardo Coll were two Argentinian penalists (whom we will discuss in more detail later), who drew up a draft penal code based on the postulates of criminological positivism in 1938. What is truly striking about the drafting of a project with similar characteristics is the fact that, at the time it was written, positivism had already lost all the vigor that it previously had. It had become a penal current that did not go beyond the walls of libraries, as we have already mentioned, and, moreover, had already been rejected by the vast majority of the world's penalists. However, Eusebio Gómez and Jorge Eduardo Coll did not reject positivism (in fact, Luis Jiménez de Asúa defined Eusebio Gómez as "the most genuine and notorious positivist in Argentina").[2] The former for rejecting its use by totalitarian regimes and believing in it as a penal current that could truly transform both society and criminals (it was not in vain that he even wrote a Treatise on Criminal Law[3] on the basis of criminological positivism); and the latter for being attracted by Italian fascism and the regime's most prominent positivist (at least until he died): Enrico Ferri.[4]

Bearing in mind what has been explained so far, it will be understood that this paper has a structure that will allow us to understand how a fully positivist code project came to be drawn up. Thus, we will first review the construction of the Argentine constitutional state and its political context, and afterwards we will study the references

[1] Roldán Cañizares, E. & Rosso, M., "Ascension and decline of positivism in Argentina", *GLOSSAE. European Journal of Legal History*, 17 (2020), pp. 469-485.

[2] Jiménez de Asúa, L., *Tratado de Derecho penal*, Tomo I, Buenos Aires, 1962, p. 1135.

[3] Gómez, E., *Tratado de Derecho penal*, Buenos Aires, 1939.

[4] Enrico Ferri comenzó militando en las filas del socialismo italiano, pero con el paso del tiempo se adhirió al fascismo. vid. Jiménez de Asúa, L., "Evolución política y derecho penal. Carta al Maestro Ferri", *La Prensa*, 14th of March, 1927.

to insane offenders in the codes that came into being before the project that concerns us here. Subsequently, we will offer a few brief details on the lives and positions of Eusebio Gómez and Jorge Eduardo Coll in the face of criminal trends, in order to subsequently analyze the regulation of insane offenders in the latest attempt by the Argentine academy to translate into legislative reality some criminal ideas that had been arousing the passions of Argentine criminalists for more than half a century.

2. Formation and consolidation of the Argentine Constitutional State (1853-1880)

After the revolution of May 1810, some provinces of the former Viceroyalty of the Río de la Plata (1776-1810) fought for their independence from Spain. Seeking a new political organization, in 1816, they declared the independence of the "United Provinces of South America". However, various attempts to establish a general government based on a common written constitution (1813, 1819, and 1826) failed.[5] Attempts were resumed once the disputes between "unitarians" and "federals" had expired. Thus, in 1853 the first National Constitution was dictated, although without the participation of the province of Buenos Aires, without a doubt the most powerful of the 14 that conformed the Confederation.[6] This scenario produced a heated political and warlike conflict between Buenos Aires and the rest of the Confederate provinces, creating a clash that came to an end in 1860 with the incorporation of Buenos Aires to the Confederation and with a constitutional reform that started a strong dynamic of consolidation of the national and provincial state institutions.[7]

In the National Constitution of 1853, the federal structure was assumed as part of the historical legacy, under the influence of the model of the United States of America. The goal of establishing a uniform legal system among unequal provinces encouraged the convention to adopt the system of national codification of substantive law, inspired by the European continental experience. The National Congress was empowered to enact the codes of civil, commercial, criminal and mining law (Art. 64°. 11), while the provinces retained their political identities, with their local governments and court systems, including their own formal law.

Juan Bautista Alberdi argued that the Argentine constitutional model was an original solution that he called a "mixed system"[8], which intended to overcome the old tensions between the federal and unitary factions. In this context, the need to impose a common law over the whole country was as compelling to the elite as the historical legacy to adopt the federal structure and preserve provincial identities. The profound cultural and economic differences between the provinces and the lack of lawyers in many of them were strong reasons for establishing national codification of substantive law. However,

[5] Agüero, A., & Rosso, M., "Codifying the Criminal Law in Argentina: Provincial and National Codification in the Genesis of the First Penal Code", *The Western Codification of Criminal Law*, pp. 297-322, particularly p. 299.

[6] For an overview, Goldman, N. (dir.), *Revolución, República, Confederación. Nueva Historia Argentina*, vol. III, 2 ed. Buenos Aires., 2005.

[7] Sozzo, M., "Los exóticos del crimen: inmigración, delito y criminología positivista en la Argentina (1887-1914)", *Delito y sociedad* 20 (32), 2011, pp. 19-51.

[8] Alberdi, Juan B., *Bases y puntos de partida para la organización política de la República Argentina.* Buenos Aires, *La Nueva Cultura Argentina*, 1915, p. 118.

in order to arrive at the adoption of this system, several discussions had to be overcome by the constituents.

The opinions that clashed most vigorously in the Constituent Congress of 1852 were those of the Tucuman deputy Salustiano Zavalía, on the one hand, and those of the deputy José Benjamín Gorostiaga from Santiago de Compostela, on the other, both lawyers graduated from the University of Córdoba (Argentina). Zavalía argued that it was up to the provinces to dictate their own substantive codes; he argued that the possibility of the national Congress having a legislative monopoly to dictate these rules was contrary to the form of government established by the Constitution and added that "in the United States, each one dictated its own laws."[9] Gorostiaga retorted by arguing that if Zavalía's opinion prospered "the country would be an immense labyrinth from which inconceivable evils would result."[10] Zavalia insisted on his position, proposing that empowering the provinces to dictate their own substantive codes would allow them to "dictate laws suited to their organization, customs and peculiarities, laws that are less lavish, simpler and better suited to their interests."[11] On this point, the priest and deputy for the province of Catamarca, Pedro Alejandro Zenteno, in agreement with Gorostiaga's position, argued that Zavalía's intention was inserted in the Constitutional text itself, since the Congress "[was] a meeting of men from all the provinces, they represented their sovereignty and interests and could therefore dictate laws for the whole Confederation."[12] The Gorostiaga position, which assigned the competence to dictate the basic codes to the Congress of the Nation, prevailed when the point was put to a vote.[13]

It should be recalled that Buenos Aires had not participated in the convention that sanctioned the 1853 text after rejecting the terms of the San Nicolás de los Arroyos Agreement.[14] However, after six years, following the battle of Cepeda, it was agreed that it would be incorporated with the right to revise the constitutional text.[15]

Buenos Aires elected its constituent convention members in December 1859 and Bartolomé Mitre, Domingo Sarmiento, Dalmacio Vélez Sarsfield, José Mármol y Valentín y Adolfo Alsina, among others, were elected.[16] The composition of the commission revealed the preponderance of sectors of liberalism that advocated constitutional reform as a preliminary to union. Mitre wrote the Informe de la Comisión Examinadora de la Constitución Federal, in which he analyzed the frustrated attempts at constitutional organization (1813, 1819 and 1826) that had left Argentine nationality as a result, but more as a de facto construction than as a de jure situation.[17] This situation gave rise to two fundamental principles, the first of which established provincial sovereignties as the basis of all national organization and the second the principle of freedom as the

[9] Ravignani, Emilio, *Asambleas Constituyentes Argentinas: 1810-1898*, Buenos Aires, 1937, p. 528.

[10] *Ibidem*.

[11] *Ibidem*. p. 529.

[12] Ravignani, E., *Asambleas Constituyentes Argentinas…*, p. 529.

[13] The 1860 reform introduced an express mention in the wording of Article 64° so that this power could not be understood as affecting the exercise of "local jurisdictions".

[14] Bianchi, A., *Historia de la formación constitucional argentina: (1810-1860)*, Buenos Aires, 1997.

[15] Sampay, A., *Las constituciones de la Argentina: 1810-1972*, Buenos Aires, 1975.

[16] Ravignani, E. (Ed.). *Asambleas constituyentes argentinas: 1810-1898*. Vol. IV. Buenos Aires, 1937, p. 512.

[17] *Ibidem*.

goal to which all political organization should be subordinated.[18] The union of both principles, federalism and liberalism, was equivalent to the union of the two factions that had historically confronted each other in the country and was the necessary step that had to be taken, through a constitutional reform, to guarantee the definitive organization of the nation. The opportunity that arose in 1860 represented not only the definitive union of the old political spaces under a single magna carta, but also the fusion of the traditions that underpinned the political and legal structure embodied in the "new" Constitution.[19]

Taking then the 1853 text as a reference, with the reform of 1860, we must consider that the penal norms that were sanctioned under the new constitutional system aimed to put into effect the basic postulates of the new criminal doctrine of the time. Many of these provisions had been enacted previously, some of them in the laws of the Assembly of the year XIII, others in the Regulations of 1817 and in the Constitutions of 1819 and 1826, extending their influence until the period in which the draft penal code we are concerned with here was drawn up.

3. The Political Regime of the Oligarchy: Partido Nacional Autonomista (National Autonomist Party), Unión Cívica Radical (Radical Civic Union) and the beginning of Argentine dictatorships

From the 1880s onwards, politics was in the hands of a small group of men that historiography grouped together under the generic name of oligarchy.[20] These men, who made up a variable and heterogeneous group, came together in the Partido Nacional Autonomista (PAN) that dominated national politics for decades.

Since 1870, the unimpeded vote had been in force, an electoral system under which all native or naturalized males over the age of 18 could vote. The political struggle was focused on the creation of the electoral rolls through voluntary registration with the qualifying board of each district. This registration scheme resulted in low voter turnout (voting was not compulsory) and contributed to the recurrent practice of fraud.[21] Control of voter lists and polling stations became common, as votes were cast aloud and voters were pressured to choose a candidate. Other fraudulent means included having the same person vote several times, inventing names on the lists, or preventing opponents from voting.[22] At the same time, the full list system was in place, whereby all elective offices were held by the list with the highest number of votes, with no minority representation.

The PAN managed to impose its candidate Julio Argentino Roca, who took office on 12 October of that year, and from then on, his figure would dominate the political scene, replacing the old warlordism with a balance in which the provincial elites increased their power and expressed the interests of the sector linked to foreign trade and banking. At the same time, the year 1890 marked the end of the so-called "*Desert Campaign*"[23]

[18] Zimmermann, E., "Centralización, justicia federal y construcción del Estado en la organización nacional", *Revista de Instituciones, Ideas y Mercados*, 46, 2007, p. 268.

[19] *Ibidem.*

[20] Botana, Natalio R., *El orden conservador. La política argentina entre 1880 y 1916*, Buenos Aires, 1977.

[21] Ortiz Bergia M. [et al.], *Procesos amplios, miradas locales: una historia de Córdoba entre 1880 y 1955*, Córdoba, 2015, pp. 38-39.

[22] *Ibidem*.

[23] Donghi, T. H., & Hora, R., *Una nación para el desierto argentino*, Buenos Aires, 2005.

and the capitalization of the city of Buenos Aires. These two milestones made it possible for the new president to actively administer the country and make political use of the achievements made.[24]

Roca was able to dominate the political scene in Argentina from 1880 to 1912 despite facing multiple tensions, such as the struggles between local oligarchies. Roca managed to resolve these disputes because the larger interests at stake were above these local tensions and because the new political force was based on relations of friendship or kinship.[25]

Peace and administration was the motto of the Roca government, which carried out an intense legislative activity that was reflected in the passing of numerous laws, including the Law of the Civil Registry of Persons, the Organic Law of the Courts and the Law of National Territories. The latter incorporated important regions, the basis of the future provinces of Misiones, Chaco, Formosa, La Pampa, Neuquén, Chubut, Santa Cruz and Tierra del Fuego.

Given the strong preeminence of the PAN and the absence of opposition groups capable of competing, the electoral competition was always settled within the party. Thus, in 1886, the PAN leader, Julio A. Roca, proposed Miguel Juárez Celman and Carlos Pellegrini, who won in April of that year.[26] In this way, the PAN prevailed in each of the national elections from 1880 until 1912, when a new era in the electoral field began with the passing of Law 8871, known as the "Saenz Peña Law". This law established universal, secret and compulsory male suffrage through the creation of an electoral list.[27] Under the Saenz Peña Law, the elections that would give the final blow to the PAN were held. On 2nd of April 1916 the first elections were held under Law 8871 and on 12 October of the same year Hipólito Irigoyen of the Unión Cívica Radical became president, leaving behind more than 40 years of PAN governments.

Once the PAN governments came to an end and Hipólito Irigoyen took power in the name of the Radical Civic Union, the period known as the "radical stage" began, taking place between 1916 and 1930, when the first of the many coups d'état that would shake Argentina throughout the 20th century occurred. It was a period in which the conservative majority in the Senate and in many of the provincial governments led to rule by decree, with the consequent loss of democratic legitimacy that this entailed for Argentina's fragile democracy. However, the elections held in 1922 once again gave victory to the Unión Cívica Radical, which led to Marcelo Torcuato de Alvear, replacing Hipólito Yrigoyen, becoming President of the Argentine Republic. However, although they were the same party, Alvear's policies were quite different from those implemented by Yrigoyen during his years in government, which led to a deep internal division within the Unión Cívica Radical, with its logical consequences for the country's governability. This was so much the case that, in the 1928 elections, the Unión Cívica Radical contested the elections split into two different groups, with the list headed by Yrigoyen winning.[28]

[24] Oszlak, Oscar, *La formación del estado argentino*, Buenos Aires, 1982.

[25] For more information about this period, Botana, Natalio R., *De la República posible a la República verdadera (1880-1910)*, Buenos Aires, 1997; Also, Chiaramonte, J., *Ciudades, provincias, estados: Orígenes de la Nación Argentina (1800-1846)*, Buenos Aires, 1997.

[26] Botana, Natalio R., *El orden conservador*…

[27] *Ibidem*.

[28] Godio, J., *Historia del movimiento obrero argentino (1870-2000), 2 Tomos*. Buenos Aires, 2000, p. 395.

But the international situation did not help the new Argentine government, which was overwhelmed by the consequences of the worldwide Great Depression caused by the crash of 1929. Thus, after months of great instability during which there was even an anarchist attempt on Yrigoyen's life, General José Félix Uriburu staged a coup d'état in 1930 that put an end to the radical governments that had governed Argentina since 1916.[29]

Thus, on 6 September 1930, Uriburu led a coup d'état that not only overthrew the constitutional government of Hipólito Yrigoyen, but established the first of a series of military dictatorships that lasted until 1983. Uriburu was recognised as de facto president, leading the country from the standpoint of a corporatist Catholic nationalism. However, political instability, coupled with the economic problems that persisted both in Argentina and in the world, led to the government passing into the hands of a conservative political alliance known as the "Concordancia", a union between the National Democratic Party, the Anti-Personalist Radical Civic Union (one of the splits in the Radical Party referred to above) and the Independent Socialist Party. It was in this way that Agustín Juan P. Justo became president in 1932, remaining in office until 1938, during which time Eusebio Gómez and Jorge Eduardo Coll drew up the draft penal code that is the subject of this paper.[30]

4. A brief review of the Argentine criminal regulation of insane offenders.

Focusing on the criminal regulation of insane offenders, in the light of all the political and institutional instability that has accompanied Argentina since its independence, it should be noted that during the first half of the 19th century there were few changes in the criminal justice system inherited from the colonial era. At the beginning of the revolutionary period, some symbolic reforms were implemented, such as the abolition of judicial torture and the Inquisition courts that took place in 1813. However, the lack of a common authority after 1820 conditioned the effectiveness of these general reforms adopted in the first decade after the revolution. In fact, deeper reforms were undertaken in each provincial territory after 1820, but they were more concerned with establishing the constitutional aspect and territorial organization than with reforming substantive or procedural criminal law.

In 1886, with the passing of the law adopting the draft criminal code drawn up by Carlos Tejedor (1867) as the basis for the National Criminal Code, the constitutional mandate was fulfilled and a pressing need in the country's legislation covered.[31] The code came into force on the first of March 1887 and in its article 81.1 referred to crimes committed by people with some kind of mental illness in the following terms: "art. 81: The following are exempt from punishment: 1. 1. anyone who commits the act while in a state of insanity, somnambulism, absolute imbecility or complete or involuntary blindness; and generally, provided that the act has been resolved and consummated in a disturbance of the senses or intelligence, not attributable to the agent, and during which the latter has not been aware of the act or its criminality."

[29] del Mazo, G., *La segunda presidencia de Yrigoyen*. Buenos Aires, 1984, p. 140.

[30] Horowitz, J., Pons, H., & Suriano, J., *El Radicalismo y el movimiento popular:(1916-1930)*. Buenos Aires, 2015, p. 320.

[31] Núñez, R., *Derecho penal, parte general*, Buenos Aires, 2009, p. 152.

This provision was not a novelty, but was inspired by Tejedor's project, specifically article 147. 2, which exempted from punishment "the furious, the insane and in general those who ha[d] completely lost the use of their intelligence and commit a crime in this state". The Tejedor project also established as a cause for exemption from punishment "those retarded, absolutely incapable of appreciating the consequences of their actions, or of understanding their criminality."

In addition to this, the Tejedor project provided for legal consequences in relation to illegal acts committed by the mentally ill. This was stated at the end of article 147: "Those who commit any crime shall be locked up in one of the houses destined for those of their kind, or handed over to their families, as the judge deems appropriate...." This shows that, although the Tejedor Project was inspired by the Bavarian Code of 1813, the issues related to mental illness and its consequences were not taken from this text, but can be presumed to have been inspired by the Spanish Penal Code of 1848.

The national penal code of 1887 makes no reference to this. The text did not foresee any type of legal consequence for the crimes committed by the persons that, exhaustively, it detailed in article 81.1. In short, while the Tejedor project expressly foresaw internment in homes destined for the mentally ill or the handover in care to the family, the Penal Code of 1886 omitted any consideration in this respect.

Three years after entering into force, a project to reform the Penal Code was presented. Thus, in 1891, a reform project was drafted by doctors Norberto Piñero, Rodolfo Rivarola and José Nicolás Matienzo. The second paragraph of Article 59 stated that "if the disturbance [was] not momentary or if its repetition can be feared, and the act committed is one of those punishable by law by death, imprisonment, deportation or penitentiary, the judge shall decree the confinement of the agent in an establishment for the criminally insane or in a special department of the common asylums, from which he shall not be released except by judicial resolution in which it is declared, after hearing the Public Prosecutor's Office and after expert opinion, that the danger that motivated the confinement has disappeared". The third paragraph states that "in the case of an offence punishable by a penalty other than those mentioned, the agent shall be released on bail to guarantee his subsequent good conduct."

We can see how the text openly states the need for special asylums, since this type of detention could not be carried out in ordinary asylums. Rather special homes were needed offering certain security measures that regular hospitals did not have. But that was not the only reason for creating criminal asylums; they also argued that it was imperative not to house ordinary alienated persons with criminals, as both had different treatments and the integrity of the former would be put at risk by possible attacks by the latter.

This bill was rejected by the national legislature, and in 1906 a new one was presented, drafted by doctors Francisco Beazley, Rodolfo Rivarola, Diego Saavedra, Cornelio Moyano Gacitúa, Norberto Piñero and José María Ramos Mejía.[32] In this text, the question of crimes committed by the mentally insane was typified in article 41 on its second paragraph: "In the case of mental illness, the judge shall order the confinement of the agent in an insane asylum, from which he shall not be released except by judicial resolution, with a hearing of the Public Prosecutor's Office and after the opinion of

[32] *Ibidem*. p. 174.

experts, who declare that the danger of the sick person harming himself or others no longer exists". We can see that this project leaves aside the idea of creating criminal asylums (an institution advocated by the Scuola Positiva), and instead proposes detention in ordinary asylums.

The penal code was finally reformed in 1921. At that point in time Argentina had, for the first time, a national penal code aligned with the latest developments in criminal law. Article 34, paragraph 1 of the text stipulated that "anyone who was unable at the time of the act, either due to insufficient faculties, morbid alterations or unconsciousness..., to understand the criminality of the act or to direct his actions" was not punishable. In the case of insanity, the court could order the confinement of the agent in an insane asylum, from which he shall not be released except by judicial decision, after hearing the Public Prosecutor's Office and following the opinion of experts who declare that the danger of the sick person harming himself or others has disappeared". As we can see, the rule was directly inspired by art. 41 of the 1906 draft, which have just discussed.

We can argue that until the enactment of the 1921 Code, the early criminal codification process in Argentina was characterized by a certain lack of attention to the anti-juridical acts of those suffering from some kind of mental illness. The first Penal Code of 1886 did not foresee, as the Tejedor project did, the handing over of the mentally ill person to his family or his internment in an institution specializing in the care of mentally ill persons. Beyond the legal text, in judicial practice some criminal courts, under the protection of the civil provisions, continued to provide for internment in a home for the insane, although this security measure was finally given legislative form in the Criminal Code of 1921.

5. Eusebio Gómez and Jorge Eduardo Coll, the last positivists in Argentina.

Eusebio Gómez was born in the city of Rosario in 1880, and died in Buenos Aires on 27 July 1954. After studying law, he devoted himself to the practice of law and teaching (as well as to the judiciary, as he also became a judge); however, looking at his work, we will observe how positivism is present in a good part of his bibliography. Thus, in 1908 he published a study on the Buenos Aires' underworld entitled *La mala vida en Buenos Aires*,[33] while in later years he focused on the influence of human passions and politics on delinquency in his works *Pasión y delito*[34] and *Delincuencia político-social.*[35] However, as previously explained, the most prominent work by Eusebio Gómez that enshrined him as a referent of criminological positivism in Argentina is his Criminal Law Treaty.[36]

A clear example of the influence of criminological positivism on Eusebio Gómez can be found in the way he managed the National Penitentiary when he became General Director of Penal Establishments in the Province of Buenos Aires. With Eusebio Gómez in office, the prisons of Buenos Aires began to focus on the recovery of the delinquent, and many of the ideas he had already expressed in his penitentiary writings, another of the subjects on which Eusebio Gómez researched, were reflected in his decisions.

[33] Gómez, E., *La mala vida en Buenos Aires*, Buenos Aires, 1918.
[34] Gómez E., *Pasión y delito*, Buenos Aires, 1917.
[35] Gómez E., *Delincuencia político-social*, Buenos Aires, 1933.
[36] Jiménez de Asúa, L. *Tratado de derecho penal*, Tomo I, Buenos Aires, 1952, p. 374.

Bearing in mind what has been said so far, if we talk about the scope and limitations that positivism had on Argentine soil, we can be sure that, both in terms of scientific publications and the application of positivist principles in penitentiary practice, Eusebio Gómez was one of the great driving forces and references of late criminological positivism in Argentina. Thus, it is not strange that his understanding of the penal universe ended up leading to a draft penal code for Argentina.

Jorge Eduardo Coll was born in Buenos Aires in 1882, dying in the same city in July 1967. Coll held political posts, becoming Minister of Justice and Public Instruction between 1938 and 1942, when Roberto M. Ortiz assumed the presidency of Argentina.[37] In the legal world, he was a criminal lawyer, also holding the posts of secretary of the Court of Instruction of Buenos Aires, prosecutor, member of the Court of Appeals in Criminal and Correctional Matters of Buenos Aires. Likewise, in the academic world, Coll was a professor at the University of Buenos Aires, where he worked teaching and researching between 1918 and 1946, to later return in 1955 after the end of Peronism,[38] and becoming an honorary professor in 1966.

In the study of his academic career we can find different elements, fundamentally centered on the guardianship and correction of minors, which demonstrate Coll's closeness to the principles of criminological positivism. Thus, works such as *Los menores delincuentes*,[39] serve to extract the line of thought that Coll maintained in this respect: his commitment to a preventive approach in the fight against juvenile delinquency. In fact, his concern for the State's responsibility in the training of young people, especially those who were in a situation of neglect, was not only reflected in his scientific publications, but also had a practical aspect, ensuring that, although not in the form of a law, the positivist principles he put forward did leave the libraries and offices of academics. Thus, based on "the conviction that all young people, regardless of their circumstances, as the depositaries of the future of the nation, should be protected", Coll was the founder of the Patronato Nacional de Menores, as well as the organizer of the I Conference on Abandoned Children and Delinquents, where he was committed to the application of eminently positivist principles in pursuit of the correction and prevention of juvenile delinquency.

Finally, we understand that it is necessary to mention in reference to this union of the two authors that, although both Eusebio Gómez and Jorge Eduardo Coll were fervent followers of the positivist school, both did so from very different political perspectives. Thus, while Eusebio Gómez was a fervent democrat, Jorge Eduardo Coll was a sympathizer of fascism for a good part of his life, disavowing it once it was defeated on the European battlefields. However, this obvious political difference did not prevent the two from working together to achieve a penal code that would have been sufficient to fulfill their positivist aspirations.

6. The draft penal code as a whole, an innovative work for Argentina that followed some steps of the Classic School

[37] Leiva, Alberto D., "La impronta de Jorge Eduardo Coll en el Derecho Argentino", *Seminario permanente sobre Historia de la Facultad de Derecho*, 2012, p. 5.

[38] Horowicz, A., *Los cuatro peronismos*, Buenos Aires, 2005, p. 128.

[39] Coll, Jorge E., *Los menores delincuentes*, Buenos Aires, 1933.

In the preamble to the draft code we are studying here, a series of doctrinal principles were listed which clearly reflected the faith of Eusebio Gómez and Jorge Eduardo Coll in the principles of criminological positivism, which, as is evident, would have an impact on the regulation of insane offenders. Thus, on the basis that the institutions that sought social defense against crime had already been accepted by all the general laws that were in force in Europe and America, both authors understood that Argentina could not escape from them. In fact, Eugenio Florian asserted that "never in Latin America has criminological positivism had a legislative manifestation similar to this project, which had boldly placed itself at the head of all the codes or projects that Latin America had elaborated after the advent of Ferri's project."[40] For his part, Felipe Grispigni said that "where the realization of positivist principles was fully verified, even formally, in the 1937 draft penal code", which had ideas that "corresponded to the majority of Argentinian scientists."[41] Y desde su punto de vista, Julio Andrés Belloni afirmó que este proyecto "no se trataba, en efecto, de una mera ampliación del campo de realización de los nuevos principios penales, sino de algo más. Era un progreso en la forma misma de realización que se acercaba mucho a la orientación señalada en Roma, dieciséis años atrás, por el proyecto Ferri."[42] However, in spite of the praises of the distinguished Italian positivists, an analysis of the project shows that, despite the fascination of its creators with positivist ideas, many elements of the classical school were still in force, such as giving greater importance to the crime than to the offender or maintaining a structure typical of the classical criminal codes.[43]

Thus, guided by the pursuit of the ideals of peace and collective security (which, according to both authors, had been eternally troubled by the outbreak of crime), both the method and the postulates of the positive school were needed to achieve them. In fact, in an attempt to justify the adoption of positive measures, they go back to the analysis of previous codes such as the Tejedor Project, which, according to Eusebio Gómez and Jorge Eduardo Coll, was inspired by the Bavarian code, which had been elaborated by Feuerbach, one of the fathers of penal positivism according to Florian.

In these general words about the project, it is necessary to refer to the idea of dangerousness, which is not clearly defined in the text. But if this is so, it is because the

[40] Florian, E., "La marcha triunfal del positivismo en la legislación penal", *Estudios y documentos para la reforma penal I. Opiniones sobre el proyecto de código penal*, Buenos Aires, 1941, p. 5.

[41] Grispigni, Felipe, "La transformación del derecho penal en la más reciente legislación extranjera", *Estudios y documentos para la reforma penal I. Opiniones sobre el proyecto de código penal*, Buenos Aires, 1941, p. 21.

[42] Belloni, J.A., "El nuevo proyecto argentine en el desenvolvoimiento de las reformas penales", *Estudios y documentos para la reforma penal I. Opiniones sobre el proyecto de código penal*, Buenos Aires, 1941, p. 27.

[43] In view of the difficulties in finding this draft and in order not to obstruct the correct and fluid reading of this paper, we set out the structure of the draft at the foot of the page: The draft consists of two books: the first contains a set of general provisions and is divided into ten titles: Title I: Application of the Law, Title II: The Offence, Title III: The Offender, Title IV: The Regime of Minority, Title V: Penalties, Title VI: Imposition of Penalties, Title VII: Conditional Sentence, Title VIII: Reparation of Damages, Title IX: Actions, Title X: Extinction of Penalties and Actions. The second book, for its part, covers the precepts relating to offences in particular and is divided into fourteen titles, which bear the following headings: Title I: Offences against the person, Title II: Offences against honesty, Title III: Offences against civil status, Title IV: Offences against freedom, Title V: Offences against intellectual rights, Title VI: Offences against patrimony, Title VII: Offences against public security, Title VIII: Offences against the security of the Nation, Title IX: Political Offences, Title X: Offences against public order, Title XI: Offences against national sentiment, Title XII: Offences against public administration, Title XIII: Offences against public faith, Title XIV: Offences against commerce, industry and public economy.

authors themselves were aware of the difficulty of achieving a specific definition of the term. Thus, Eusebio Gómez himself stated that the concept of dangerousness had not yet been specified in a formula that would allow a unanimous consensus to be reached to enshrine it.[44] Nevertheless, he understood that dangerousness was a principle that criminal law could not do without. This was so because, although for some it was the basis of imputability and, therefore, the reason for justifying sanctions, and for others it was the only effective criterion for solving the problem of adopting a sanction for the offender, it was undeniable that its existence was key to the criminal universe.

Besides this idea about dangerousness, the fact that positivism permeated this code project is an undeniable sign of the strength that the Positive School had in Latin America, making the force of its postulates remain stronger than in European territory. In this sense, the fact that Argentina was one of the nations that most enthusiastically embraced the postulates of criminological positivism was reflected in the great expectation that Ferri's project had in 1921 and in this draft code that concerns us here. However, the title of this section suggests that, although the project had a clear positivist influence, the material limitations were insurmountable.

For this reason, in technical-legal matters, the essence and the precepts of the penal code in force since 1922 were retained, without any alterations other than those required by practice and the demands of scientists, especially with regard to offences in kind. This was not even denied by the authors of the draft, who made it clear in the preamble that they had "retained a large number of provisions of the existing code, maintaining the text of the same in its entirety". This was only natural, they added, as "the foolish intention to modify for the sake of modification was far from their spirit".

Regarding the political-social aspect of the project, beyond the fact that the positivist formulas could be exploited by authoritarian tendencies as had already occurred in fascist Italy or in Primo de Rivera's Spain, the Project of Eusebio Gómez and Jorge Eduardo Coll maintained the clear liberal affiliation of the existing code, limiting the possibilities (despite Coll's fascist leanings) that the resulting text could be used as a repressive weapon in the event that a fascist government (or one of a similar approach) came to power.

Therefore, and making it clear throughout the preamble that the bill is inspired by positivist principles, although with some concessions made in the light of the material realities of Argentina, we can also find in it a slight reference to insane offenders, to whom it refers as follows: "alienated offenders and those who have committed crimes in a state of unconsciousness shall be subjected to internment until it is established, with due formalities, that their dangerousness has completely disappeared. In the case of the unconscious person, the sanction may not be imposed if the personal conditions of the subject, the circumstances of the offence and the report of the official experts authorise the absence of any dangerousness to be declared. Likewise, with regard to sanctions, mention is also made of the possible measures to be taken against insane offenders, since it is specified that, in addition to the sanctions of imprisonment and imprisonment for common criminals, "internment in an insane asylum or special establishment suitable for cure or treatment" will also be applicable.

[44] Gómez, *Tratado de Derecho penal*, p. 336.

7. Regulation of insane offenders in the draft criminal code of 1938

In order to understand how two penalists decided to draw up a project based on positivist postulates at a time when the ideas of Lombroso, Ferri and Garofalo were less and less present, it is necessary to transcribe a paragraph from the Explanatory Memorandum: "on the postulates, no longer discussed, of the positive school, postulates that serve as a solid foundation even for codes of adverse doctrinal tendencies, even if there is obstinacy in not recognizing it, on the postulates we repeat, and, especially, on the basis of the principle of dangerousness in crime, we have drawn up the reform, with a rigorous scientific discipline that, because it is so, determines the hope of the best practical results". Based on these words, it can be deduced that both Eusebio Gómez and Jorge Eduardo Coll understood that positivism, beyond having triumphed as a current, had impregnated the basic elements of criminal law with its principles, provoking a transformation of the misnamed classical school.

It is worth noting that, when positivism had lost all its brilliance in the old continent, Eusebio Gómez was still a great defender of Italian doctrine, causing the famous Spanish penalist Luis Jiménez de Asúa to define him as a "man of constant affection" who had amply demonstrated his devotion to Enrico Ferri.[45] Eusebio Gómez was also an author with a very complete training from the point of view of our penalist, as he had been influenced from all possible spheres, as we have mentioned before. Thus, being a professor of criminal law in Buenos Aires gave him the theoretical imprint; his work as a judge gave him real experience; the position of director of the National Penitentiary of Buenos Aires gave him penal and penitentiary knowledge; and, finally, the drafting of a draft criminal code together with Jorge E. Coll pushed him to give legislative expression to his thoughts.

In the explanatory memorandum to the draft criminal code of 1937, Eusebio Gómez, together with Jorge E. Coll, started from the premise that the institutions of social defense had already been accepted in Europe and America, so that he understood that the "fierce school disputes" had already ceased. For this reason, the new draft penal code that they were constructing revolved around dangerousness, a postulate of the positive school, which, according to him, was no longer disputed. It could be argued at this point that the Argentine legal system had already made room for the dangerous state with the additional law that Jiménez de Asúa had praised years earlier.[46] But in the eyes of Eusebio Gómez, the jurists who worked on the additional law found themselves constrained by the limitations of the penal code, unable to develop the idea of dangerousness beyond what the text allowed them to do. It was therefore necessary to create a new code in which dangerousness would be included without previous limitations.[47]

To be fair to the truth, initially, Eusebio Gómez was not going to be in charge of drafting the project. Instead, Jorge Eduardo Coll and Norberto Piñeiro were going to be

[45] Jiménez de Asúa, L., "El Tratado de derecho penal de Eusebio Gómez", *El Criminalista*, Tomo VI, Buenos Aires, 1952, pp. 17-19.

[46] Jiménez de Asúa, L., *El nuevo código penal argentino y los recientes proyectos complementarios ante las modernas direcciones del derecho penal*. – Conferencias pronunciadas en la Universidad de Buenos Aires los años 1923 y 1925, Madrid, 1928.

[47] Tau Anzoátegui, V. (coord.), *Antología del pensamiento jurídico argentino (1901-0945)*, Buenos Aires, 2008, pp. 169-171.

responsible for it. However, after the latter resigned, Eusebio Gómez took his place. Thus, Argentine President Agustín P. Justo commissioned two criminal lawyers with extensive academic and public experience to draft a project to provide the country with a new penal code. A few months after the commission, on 8 July 1936, a draft code was presented, organized in two books and comprising 393 articles in which the positivist imprint was palpable, as can be seen from the inclusion of the concepts of dangerousness and social defense. However, as happened with so many other legislative projects in a convulsive period in Argentina, this one did not see the light. Nevertheless, many of its elements, especially those closer to criminal policy than to criminological positivism, served as a reference point for laws that came into being later.

As far as insane offenders were concerned, this project, on which they did not deny the influence of the draft criminal code drawn up by Ferri in 1921, represented an important change with respect to what was regulated in the 1921 code and, of course, in the 1886 code. While in the first Argentine code insane offenders were exempt from punishment and did not generate any legal consequence (although this did exist in the Tejedor Project that inspired it), in the 1921 penal code the situation did change. In the code published at the same time as the Ferri project, the unlawful acts carried out by insane offenders would have legal consequences (following the reference of the 1906 draft criminal code). These would be none other than internment in an insane asylum, which could only be abandoned in the event of a judicial decision.

This situation, maintained since 1921, sought to be transformed in a significant way in the draft we are studying here. In the text drafted by Eusebio Gómez and Jorge Coll, far from considering insane offenders as unimputable, article 62 determined that, if the crime was committed in a state of mental alienation, the court would order the committal of the subject to an insane asylum, from which he could not be released except by judicial decision and following an expert opinion that determined that the danger, both for him and for others, had disappeared. A release from the asylum, of course, would be obtained after the inmate had undergone specific treatment in pursuit of recovery.

Likewise, if the offence was committed in a state of complete unconsciousness, the court would have to order the detention of the agent in a suitable establishment, from which he could only be released under the same conditions expressed above, i.e. by judicial decision and with the opinion of official experts. Similarly, if the offence had been committed because of a serious mental abnormality or in a state of chronic intoxication caused by alcohol or the use of drugs or narcotics, the court would have to order the officer's internment, for an indefinite period of time, in a special establishment, with a curative regime and compulsory work, as soon as the health conditions so permitted. In this case, the period of internment could not be less than the maximum of the sanction stipulated for the offence, nor less than three years, if this maximum is less than the term of the sanction stipulated for the offence. Similarly, if the sanction is life imprisonment, the same would be imposed. In this line, it is also important to emphasize that, when, following a report by official experts, it is judged that the stay in the establishment is no longer necessary, the court will convert the internment into confinement or imprisonment in accordance with what is established for the offence, but both would not be for an indeterminate period of time.

We believe that it is also important to highlight, as an example of the concern of Eusebio Gómez and Jorge Eduardo Coll for the situation of insane offenders, that the

draft also refers to those convicted persons who become alienated during their sentence. Thus, the draft states that if the convicted person becomes alienated or suffers another mental illness that prevents the execution of the sentence, the time of the alienation or illness will be counted towards serving the sentence, without this preventing the convicted person from being placed in an insane asylum or in another establishment of the Public Prosecutor's Office, always with the mediation of reports issued by official experts who attest that there is no danger to themselves or to third parties.

As for the insane asylums mentioned in article 62, another article, in this case article 50, details that internment in an insane asylum would be effective in criminal asylums or in special sections of the common asylums of the State. Furthermore, being aware of the impossibility of automatically applying the provisions of the article, fundamentally due to the lack of means, it was established that, in the event that such establishments were not available, internment would take place in special sections of public institutions where treatment was possible. This fact is worth to be noted, since in the vast majority of positivist reform proposals throughout history, one of the biggest problems was the lack of realism in terms of the country's institutional and material capacities, something that did not occur in Eusebio Gómez and Jorge Eduardo Coll's project.

It is also worth highlighting the reference to juvenile insane offenders, something which, on the other hand, is logical if we remember that Jorge Eduardo Coll devoted a large part of his efforts to investigating juvenile delinquency. In this sense, with respect to minors, it was decreed that if they needed special treatment due to a deficiency of their senses, because they were mentally retarded or suffered from mental illnesses, they would be interned in "the corresponding establishment", if it was not convenient or possible to leave them in the care of their parents or guardians. It can be seen at this point how there is an incipient concern for the insane minor who offends, but the truth is that the legal solution was to leave him in the care of the family or to look for an institution which, according to the literal wording of the article, was not entrusted with the reform and rehabilitation of the minor, but merely with his internment.

Finally, at the beginning of the analysis of the draft, we referred to the inclusion of dangerousness, so we would like to mention the relationship between this and mental illness. Thus, in the same way that the insane offender would receive specific treatment as a consequence of his illness, Article 17, in its 3rd paragraph, stated that "abnormal organic and psychological conditions" would be considered circumstances of greater dangerousness in the offender. We believe this is a very interesting topic, the idea of how a mental illness can be both a proof of dangerousness and a key point in order to receive a special treatment focused on the rehabilitation of the subject instead of a traditional punishment. In this line, if the draft penal code had been enacted, the pre-criminal dangerousness of potential insane offenders would have led to detention and internment in special asylums where they would have been treated with the aim of preventing future harm to the peaceful coexistence of Argentine society.

8. Conclusion

Therefore, if we pay attention to the legislative evolution of the treatment of insane offenders, it can be seen that the proposal put forward in the 1938 draft penal code was merely another step in the slow but gradual development that had taken place in this

respect between the codes of 1886 and 1921. While the former eliminated any type of legal consequence for the act committed by insane offenders, the latter decreed internment in an insane asylum, without specific treatment aimed at their reintegration into society. If the project of Eusebio Gómez and Jorge Eduardo Coll had been successful, it would have taken a step forward in the preventive and corrective treatment of insane offenders, not relegating them to an unsolvable confinement in national asylums, but rather betting on the recovery of the man (not in vain Eusebio Gómez was a great detractor of the death penalty). However, the bill was never passed by the Argentinean parliament, never being published and waiting for the proper legislation to move forward in order to ensure their rehabilitation.

There is no doubt that the Argentine political context was key to the elaboration of the project we have studied. In fact, this was the main reason why we felt it necessary to take a brief look at Argentine politics in the late nineteenth and early twentieth centuries. On the one hand, the succession of conservative governments understood that the application of the principles of criminological positivism could serve to achieve social defense, as had been demonstrated in the cases of the Dictatorship of Primo de Rivera in Spain and the Italian Fascist Dictatorship.[48] On the other hand, it was political instability itself (not in vain did the government of Juan P. Justo fall in 1938) which meant that the project drawn up by Eusebio Gómez and Jorge Eduardo Coll did not leave the walls of parliament. This was the occasion when criminological positivism came closest to regulating insane offenders in particular and Argentine penalism in general, even taking into account that in the elaboration of this draft code, many elements of the previous code, elaborated under the postulates of the classical school, were maintained. However, its postulates were diluted in the waters of the Río de la Plata, as happened in the rest of the world.

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[48] Roldán Cañizares, E., *Luis Jimenez de Asúa. Derecho penal, República, exilio*, Madrid, 2019, pp. 33-34.

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