

GERN 2020-2021*

The birth of penal positivism in Europe and Latin-America: rise and resistances

Friday, 21 June 2019

Seminario de Profesores de Derecho Romano (4th Floor, Room 4P03)

Faculty of Law, University of Valencia

On Friday June 21, 2019, an International Seminar entitled “*The birth of penal positivism in Europe and Latin-America: rise and resistances*” took place at the Faculty of Law, University of Valencia. It was organized by Yves Cartuyvels (University of Saint-Louis – Bruxelles, Belgium) and Aniceto Masferrer (University of Valencia, Spain), and financed by the *Groupe Européen de Recherches sur les Normativités (GERN)*, the University of Saint-Louis - Brussels), and the University of Valencia (in the context of the research project entitled “Las influencias extranjeras en la Codificación penal española: su concreto alcance en la Parte Especial de los Códigos decimonónicos”, ref. DER2016-78388-P, financed by the Spanish ‘Ministerio de Economía y Competitividad’).

In presenting the Seminar on «the birth, reception and resistances to positivism», I gave the following speech as an ‘Introduction’ of the project.

This seminar on «the birth, reception and resistances to positivism» is in line with a previous seminar on the “Influence of the Napoleon Code in the Western World” that we discussed yesterday. It brings together a group of scholars from Western Europe and Latin America, who are progressively forming a interdisciplinary network interested in the history of criminal law from a critical perspective.

The Napoleon Penal Code, inspired by Bentham, was closely associated with the *classical school*, whose principles and ideals it conveyed. As it is well known, during the 19th century, its philosophy spread to the Western world, with specificities and developments specific to each country. During a long part of the 19th century, the classical doctrine has been amended in different countries by the neo-classical one, as promoted by Rossi, Ortolan and other ones. Globally speaking, we can state that an eclectic compromise between classical and neo-classical principles have dominated the criminal law field during an important part of the 19th century.

In the last third of the 19th century, the classical-neoclassical penal philosophy was challenged by a new discourse on crime and punishment that questioned the main principles of the then dominating penal culture. Linked to a positivist approach of crime and criminal, the “new penology” criticized the weaknesses of the (neo)-classical penal policy, questioned the offender's representation as having free-will and claimed to reconnect the penal policy with its real priority, the protection or “defense” of society against crime.

This ‘new penology’ will be conceptualized in its most explicit form by the Italian positivist school, giving birth to criminology as administrative science used for social control purposes. However, the «criminal question travels». This means that the issues raised by the emergence of penal positivism in Italy were also addressed at the time in most Western countries, under

the influence of an international debate (for instance conducted within the “International Union of Penal Law”) but also filtered by the social and cultural context specific to each country.

This seminar will focus on the positivist approach, its reappropriation or translation in different countries, the embedding and desembedding processes to which it gives rise. The field of research is wide and we had to make choices. So, we decided to focus, **as a first step, on the intellectual debate and its developments in different countries:**

- What kind of criticism of the existing penal practices and theories have encouraged the birth of the «new penology»?
- In what political context did this happen? In which way has the positivist project been part of the new Social State project and its assurantial logic?
- Which were the most important points of tension with the classical penal project from liberal obedience dominating at the time?
- Who was supporting the positivist approach and who was resisting it in each country? Prins in Belgium, Saleilles in France, Van Hamel in Holland, Von Liszt in Germany and other important scholars in other countries played a key role in the dissemination and reinterpretation of the positivist discours, not to mention Italy of course, where the debate cannot be reduced to the works of Lombroso Ferri and Garofalo alone – let’s think to the *Terza scuola* –, even if their role has been central.

To examine and compare the emergence but also the resistances and eclectic compromises that the new positivistic discourse will generate in different countries, two meetings are organised:

- The first one took place in Valencia on 21 June 2019;
- The second one in Brussels, in May 2020. With the ambition of a global publication in *Glossae. European Journal of Legal History* in July 2020.

If the results are convincing, we may pass to a **second step** later, focusing on the implementation of the positivist philosophy in the criminal legislation. But this is only a project whose realisation will depend, in its existence and in the choice of its subject, on the results of this first International Seminar.

The Seminar followed the program (see it in the Appendix) and all contributors made interesting presentations that were later on followed by enriching discussions with questions and comments.

Yves Cartuyvels
Université Saint-Louis- Bruxelles

Program of the International Seminar GERN
The birth of penal positivism in Europe and Latin-America: rise and resistances

9h00-9h15 : Introduction and presentation of the research, **Yves Cartuyvels**, (Université Saint-Louis- Bruxelles)

9h15-9h35 : ‘Between Repression and Prevention: Social Defense in E. Ferri and Silvio Lomngi’, **Michele Pifferi**, (University of Ferrara, Italy)

9h35-9h55 : ‘The significance of transnational criminal law for the juridical discourses and the positivist school in Germany, from Franz von Liszt and Carl Ludwig von Bar to Ferdinand von Martitz’, **Karl Haerter**, Max-Planck-Institut für europäische Rechtsgeschichte - University of Darmstadt, Germany); potential article for publication: ‘Zweckstrafe, Social Defence and Transnational Criminal Law: Franz von Liszt and the Network of Positivist Criminology (1871-1918)’

9h55-10h15: “Italian eclecticism between the two criminal law schools”, **Stefano Vinci** (University of Bari, Italy)

10h15-10h45 : ‘The reception of Social Defence in Spain: Pedro Dorado Montero’s influences’, **José Franco-Chasán** (University of Augsburg, Germany)

10h45 - 11h05 : ‘The primacy of iusnaturalism over positivism in the Spanish criminal law (1848-1928)’, **Aniceto Masferrer** (University of Valencia, Spain)

11h05-11h20 : discussion

Pause-café

12h00-12h20 : ‘The Eclecticism or The Utilitarianism in the determination of punishments’, **Emilia Iñesta – Pastor** (University of Alicante, Spain)

12h20-12h40: Jose Almaraz Harris and the influence of Ferri in Mexico, **Oscar Cruz Barney** (UNAM, Mexico-city)

12h40-13h : ‘Ascension and decline of positivism in Argentina’, **Matias Rosso** (National University of Córdoba), **E. Roldan Cañizares** (Seville University, Spain) (*intervention by E. Roldán Cañizares*)

13h00 : Discussion

13h45 : Conclusions : **Aniceto Masferrer** (University of Valencia, Spain)¹

14h00-15h30 : **Lunch**

15h30-16h30 : Internal meeting for the Seminar contributors

¹ ‘Rise and Fall of Positivism and its influence on Portuguese Criminal Law’, **F. Costa Pinto, P Caeiro** (University of Coimbra, Portugal) will not be presented (Authors not present).