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Models, Examples and Anti-Models: Images of Foreign Penal Codes within Brazilian Codification Process (1928-1940)¹

How do the actors of a given epoch perceive relationships between legal cultures within a process of normative production? How can we historiographically categorize these relationships? The process of Brazilian penal codification between 1928 and 1940 is very rich for asking these questions, above all because it was a region considered to be peripheral, because of the political transformations of the period in Brazil (a coup in 1930 and a self-coup that established a dictatorship in 1937) and because of the circulation of two legal texts from Italy, the Ferri project of 1921 and the Rocco Code of 1930. So, with the relations between Italy and Brazil in mind, this article proposes: i) that the discourses on import or export are factors in legitimizing normative production, the

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former more linked to Brazil and the latter to Italy; ii) that foreign codes can be classified in terms of their prestige and use in a given legal culture (models, anti-models or examples), with the Ferri project tending to be characterized by Brazilian jurists as an anti-model and the Rocco Code as a model (albeit a very controversial one because of Fascism).

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1. Introduction: Historical Narratives on Relationships between Legal Cultures

- 1 How national or international is a codification process? On the one hand, codification usually blends with modern State building within almost every depiction of late modern history of civil law, especially on the history of law sources. This modern trend of law emerged in Brazil firstly on the criminal law branch: our first criminal code was promulgated in 1830; the second in 1890; and the third in 1940. Our first civil code came to light only in 1916. Thus, since 1830, criminal law in Brazil was a Nation-State product. On the other hand, the international dimension of law was not absent throughout this period. Interpretation and evaluation of statutes required references to foreign law (codes and legal doctrine), as well as preparation of all these codes.
- 2 How do we analyze these relationships between legal cultures? The “influence” *topos* may be in the same origin of the Brazilian legal historiography in the 1890s², but reflections about how to deal with this kind of issue in legal history are very recent³. The theoretical and methodological contemporary approaches about dialogues between legal cultures have something in common: dissatisfaction with analyses representing these legal cultural relationships presupposing a hierarchy, a sender-centric perspective, that is, the higher culture would send some legal objects and the lower culture would simply receive these objects. In short: the influence-perspective is crumbling.
- 3 There are several ways of going beyond the influence-based narrative. The first one is to highlight the counter-fluxes. But even when empirically we found more fluxes from one culture to another, it is possible i) to ask about what happens with these fluxes inside destination-culture and ii) how this culture perceives the international relationship itself.
- 4 What I would like to propose next is an attempt to escape the inglorious search for foreign influences in the process that led to the Brazilian Penal Code of 1940. How did Brazilian jurists perceive the international dimension in the codification process? More specifically, how did they perceive the role of the different foreign codes used in the process of drafting the Brazilian Code?

2 I am referring to Martins Júnior, José Izidoro (1895): *História do direito nacional*, Rio de Janeiro, Typographia da Empresa Democratica.

3 See, for example, DUVE, THOMAS (2014): *Entanglements in Legal History. Introductory Remarks*, in DUVE, THOMAS (ed.), *Entanglements in Legal History: Conceptual Approaches, Global Perspectives on Legal History*, Frankfurt am Main, Max Planck Institute for European Legal History, 2014, pp. 3-25; FOLJANTY, LENA (2015): *Legal Transfers as Processes of Cultural Translation: On the Consequences of a Metaphor*, in Max Planck Institute for European Legal History Research Paper Series, No. 2015-09; FLORES, ALFREDO DE JESUS DAL MOLIN; MAC HADO, GUSTAVO CASTAGNA (2015): *Tradução cultural: um conceito heurístico alternativo em pesquisas de história do direito*, *História e cultura* (PPGH, UNESP), vol. 4, n. 3, dez. 2015.

5 The period between 1928 and 1940 in Brazil is particularly pertinent and interesting for this type of analysis.

6 In 1928 the attempt to replace the 1890 Penal Code was resumed after a (ca.) fifteen-year interregnum. The first attempts to replace the not very prestigious Code of 1890 date back to 1893, when the first project was drawn up and discussed until 1899⁴. In the 1910s, the jurist Galdino Siqueira drafted a project, but Parliament never discussed it⁵. Only a decade later the work was taken up again under the chairmanship of jurist Virgílio de Sá Pereira, an initiative that survived the 1930 coup, but not the coup that established the *Estado Novo* dictatorship in 1937, which lasted until 1945. In 1938, the government commissioned a new project from Alcântara Machado, Professor of Legal Medicine at the São Paulo Law School. This project, revised by a commission that significantly modified it (despite fierce criticism from Machado), would become 1940 Brazilian Penal Code.

7 A code issued during a dictatorship: how did jurists see the political character of a codification at that time of the waning of liberalism? And what about the political character of codes that were intended to be models on the international scene, such as the 1930 Italian Penal Code, promulgated during totalitarian regimes? Or the 1921 Draft for the General Part of the Italian Penal Code, whose main author, Enrico Ferri, was one of the leaders of the Socialist Party? How to deal with the use of foreign models in a nationalist climate, as was the case in Brazil at that epoch?

8 The mere fact that we raise these questions means that the prestige or lack of prestige of foreign codes does not automatically derive from their supposed technical qualities, but from the strength of the discourses⁶. The international *image* of the 1930 Italian Penal Code – a code that is a fundamental part of the history we are going to tour – has already been partially traced by Tiago Pires Marques and Stephen Skinner from a perspective close to the one I intend to follow, since both were concerned with the discourses that made the Italian Code a *model*. Marques emphasized Italy's commitment to making its code an international model⁷; Skinner emphasized the work of English, American and French legal scholars who, on many occasions, considered the

4 See SONTAG, RICARDO (2014): “Código criminológico”? Ciência jurídica e codificação penal no Brasil (1888-1899), Rio de Janeiro, Revan, pp. 253-333.

5 See SONTAG, RICARDO (2025): Para uma história de gavetas: o projeto de código penal brasileiro de Galdino Siqueira (1913), in Italian Review of Legal History, vol. 11, 2025.

6 A similar theoretical key has already been used to understand the prestige (or rather, the lack of prestige) of a national code in the national legal culture: the 1890 Brazilian Penal Code. See SONTAG, RICARDO (2014): “Código criminológico”? Ciência jurídica e codificação penal no Brasil (1888-1899), Rio de Janeiro, Revan, pp. 189-209.

7 See MARQUES, TIAGO PIRES (2007): Mussolini's Nose. A Transnational History of the Penal Code of Fascism, PhD Thesis, European University Institute, Firenze.

authoritarian character of the Italian Code as something normal, although some strongly denounced the fascist traces of the code, showing how jurists highlighted or elided the relationship between criminal law and political context⁸.

9 Despite this convergence with Marques and Skinner, looking at Brazil on the eve of the 1940 Penal Code raises specific theoretical challenges. Firstly, we are talking about a country considered peripheral. Marques' approach, anchored in the practices and discourses that built a code *for export*, would lack the sources to be carried out in Brazilian circumstances. Secondly, as I have already mentioned, between 1928 and 1940 Brazil went through two coups (1930 and 1937). Therefore, the political scenario of the Brazilian jurists who took a position on the 1930 Italian Penal Code was different from that of the English, American and French jurists studied by Skinner. And the legal scenario was also different, as Brazil was undergoing a process of codification. This is why the concepts of model, anti-model and example, which specify the prestige of codes within processes of normative production, will be our main tools for dealing with the theoretical challenges of our topic.

10 The main condition for this analysis is the existence of a reasonable number of discourses on the very gesture of drawing up a penal code. Although the 1940 Penal Code is the third in the history of independent Brazil, the wealth of sources from previous periods is incomparably smaller. On the eve of our first penal code, that of 1830, we only had two law schools in Brazil, which had just been created in 1827. More law schools did not start to appear until the 1890s. At that time, however, jurists who devoted themselves exclusively (or almost exclusively) to criminal law, i.e. penalists, were still a very rare species; a scenario that changed over the first decades of the twentieth century. Several figures involved in the process of Brazilian penal codification in the twentieth century can already be considered penalists (although some important ones, such as Virgílio de Sá Pereira, were not) which is why we find more reflections on the point that interests us on the eve of the 1940 Code.

11 Historiography usually describes the 1940 Brazilian Penal Code as profoundly influenced by the 1930 Italian Penal Code⁹. Brazilian penal reform intended to be updated with modern scientific theories. And these theories were embodied in doctrinal texts, but also in foreign codes and code drafts. Certainly, the Italian ones were very important – and we are going to focus on them also for this reason –, but historiographical narratives that simply describe influences seem not to be

8 See SKINNER, STEPHEN (2020): Fascista de nome, fascista por natureza? O código penal italiano de 1930 em comentários acadêmicos (1928-1946), in DAL RI JÚNIOR, ARNO; NUNES, DIEGO; SONTAG, RICARDO (orgs.), História do direito penal: confins entre direito penal e política na modernidade jurídica (Brasil e Europa), Florianópolis, Habitus, 2020, pp. 183-214.

9 For a criticism of this kind of narratives, highlighting the multiple influences over the drafts made between 1938 and 1939 (and also over the 1940 Code), see SILVEIRA, MARIANA DE MORAES (2011): Vida e morte de um “projeto bandeirante”: uma história da elaboração do Código Penal de 1940, Belo Horizonte, pp. 92-94.

able to detail how these foreign texts were represented and used by actors involved in the Brazilian codification process. For example, instead of considering importation or exportation fluxes as *a priori* historiographical categories, I would like to ask what place is assigned to them within Brazilian legal thought of that epoch.

2. Importation *versus* Exportation and the Different Meanings of Legal International Dimension

12 Nelson Hungria, one of the main drafters of the 1940 Brazilian Penal Code, criticized some Brazilian jurists who were subservient to foreign legal doctrines that sometimes did not fit to our legal system or local conditions¹⁰. Nevertheless, he was certain that a comparative approach was necessary within any normative production process in that epoch¹¹. And it actually happened during the construction of the 1940 Code¹².

13 The same relevance of the international dimension was analyzed by Tiago Pires Marques for the 1930 Italian Penal Code elaboration process¹³. Marques emphasized how, despite the nationalism of the fascist discourse, the construction of the 1930 Code depended on the international context. The national legislative commission was part of something much bigger; the solutions to be codified were discussed in international legal journals and at congresses promoted by international penal associations. The international scenario, therefore, in any case, was an indispensable support for penal codification; and a support that had become increasingly important due to the internationalization initiatives promoted by jurists at least since the end of the nineteenth century¹⁴.

10 HUNGRIA, NELSON (1943): A evolução do direito penal brasileiro, in Revista Forense, jul. 1943, pp. 5-6.

11 HUNGRIA, NELSON (1948): Direito penal comparado: histórico, objeto e finalidades, in HUNGRIA, NELSON, Comentários ao código penal, vol. I, tomo I, Rio de Janeiro, Forense, 1948.

12 See SONTAG, RICARDO (2009): Código e técnica. A reforma penal brasileira de 1940, técnica da legislação e atitude técnica diante da lei em Nelson Hungria, Dissertação (mestrado em Direito), Universidade Federal de Santa Catarina, Florianópolis, pp. 33-69.

13 See MARQUES, TIAGO PIRES (2007): Mussolini's Nose. A Transnational History of the Penal Code of Fascism, PhD Thesis, European University Institute, Firenze.

14 See KALUSZYNSKY, MARTINE (1989): Les congrès internationaux d'anthropologie criminelle (1885-1914), in Mil neuf cent. Revue d'histoire intellectuelle (Cahiers Georges Sorel), vol. 7, pp. 59-70; GONZÁLEZ, ESTEBÁN; NÚÑEZ, JORGE (2020): Argentina's Participation in the International Penal and Penitentiary Congress (1872-1950), in Glossae - European Journal of Legal History, vol. 17, pp. 70-96; HALPÉRIN, JEAN-LOUIS (2023): Doctrinal Circulations in Criminal Law 1764-1914, in Comparative Legal History, vol. 2, issue 1, p. 4.

- 14 Penal codes may have been national, but their background was becoming increasingly international. Slightly exaggerating the difference between the nineteenth and twentieth centuries, but testifying very well that the actors of the time perceived a change, Nelson Hungria wrote in 1948 that
- 15 *today's world, with the ease and greater frequency of intercommunication between peoples, and with the growing need for solidarity in the elimination of crime, no longer tolerates the anachronism of heterogeneous and reciprocally ignored criminal legislation. The thick walls which, in the nineteenth century, separated the particular laws of each nation, like watertight compartments, are falling and will continue to fall*¹⁵.
- 16 Relationships between codes of different nations. But nations are not equal within the international legal landscape. For example, Italy and Brazil did not occupy the same place within the international cultural geography. How hierarchy between legal cultures affected Brazilian and Italian legal discourse on international dimension of penal codification? Joining international codification movement was a very important element for legitimizing Brazilian code drafts. Notwithstanding the nationalism of the Brazilian political regime, our new penal code would have been up to date with the international modern penal law and criminal politics (certainly, all these issues accommodated to the “national reality”). This link with international criminal trends was an inevitable legitimation tool of our codification process. The Brazilian legitimation emphasis was inclined to *importation*, particularly when relationships with European penal law were at stake.
- 17 Within the Italian case, there was a tendency to emphasize *export* dimension. Italy, that considered itself as the “cradle of penal law”, would be able to offer a model penal code to the world; a code that should mirror the strength of the Italian penal law tradition. A kind of “legal *internationalism*” that was perfectly blended with the fascist nationalistic and imperialistic

15 HUNGRIA, NELSON (1948): Direito penal comparado: histórico, objeto e finalidades, in HUNGRIA, NELSON, Comentários ao código penal, vol. I, tomo I, Rio de Janeiro, Forense, 1948, p. 363.

discourse. Justice Minister Alfredo Rocco's expectation was that the Italian Penal Code would be »taken up, in more than one State, as a model«¹⁶.

18 Was it the case of the Brazilian State regarding the 1930 Italian Penal Code? What does it mean to become a model? In the Brazilian codification history, there has never been the mere adoption of a foreign code. Furthermore, simply copying a foreign code has never been seen as a dignitary operation, even when Brazilian jurists were convinced that national legal culture was not at the same level as French, Italian or German ones. If it is true for the nineteenth century, it is even more valid for our period because of two main reasons: i) the increasing nationalistic climate and ii) the increasing of criminal law as a scientific field. In these circumstances, it is highly unlikely that the codification process would be reduced to the mere adaptation of *one* model chosen as the closest to the ideal. Not by chance, as we shall see, only the *section* on dangerousness and security measures of the Italian Penal Code was considered a model in Brazil. So, it is understandable that, according to Arno Dal Ri Júnior, the direct influence of the 1930 Italian Penal Code on the final text of the 1940 Brazilian Penal Code was quite limited¹⁷.

19 What matters most to us, however, is how the use of models functioned in Brazilian legal culture of the time. Within that legal culture, there was a dissonance between the nationalistic rhetoric and the international updating rhetoric. Connections between a certain technical choice and a certain international trend were usually very clear, whereas connections between a certain technical choice and the national context were usually very unclear. That is, nationalistic rhetoric

16 This is what Alfredo Rocco said in his discourse in 1927 presenting the penal code draft to the Parliament: "Il Progetto di Codice penale, che il governo presenta al vostro esame, ha un carattere ed un aspetto schiettamente e originalmente italiani. Come sembrano lontani i tempi, o Signori, in cui le leggi italiane portavano l'impronta francese o tedesca! Una scienza giuridica italiana si è in tutti i campi formata e, quel che forse più conta, si sono formate una pratica e un'esperienza italiane. E poichè in materia penale. E poichè in materia di diritto penale, la tradizione italiana si è sempre fedelmente conservata, anche in tempi in cui dominava, negli altri campi del diritto, l'imitazione straniera, non è stata difficile dare all'attuale Progetto un'impronta caratteristica, che non trova riscontro in alcun Codice vigente fuori d'Italia, e in alcun altro progetto fuori d'Italia preparato. É anzi da prevedere, per l'interessamento che i nostri lavori hanno destato all'estero, che il futuro codice penale italiano sarà preso, in più di uno Stato, a modello. Forma, questa, d'internazionalismo giuridico, che noi pure approviamo, come quella che si affida alla natural forza di espansione delle leggi migliori, e che dichiariamo addirittura eccellente, quando il centro di espansione della legislazione più perfetta si trova in Italia" (Lavori preparatori del codice penale e del codice di procedura penale, vol. IV – atti della commissione ministeriale incaricata di dare parere sul progetto preliminare di un nuovo codice penale, parte 11 – verbali delle sedute della Commissione, libro I del progetto, discorso Alfredo Rocco [1927], Roma, Tipografia delle Martellate, 1929, pp. 4-5).

17 DAL RI JÚNIOR, ARNO (2006): O Estado e seus inimigos: a repressão política na história do direito penal, Rio de Janeiro, Revan, p. 265.

seems to be a legitimization discourse of the adaptations or choices of the international example “x” instead of the example “y” in general, with no specifications. “National reality” had a concrete argumentative impact only a few times. This is a feature of the Brazilian peripheral importation discourse regarding the use of foreign models within penal codification process.

3. Anti-Models and the Exaggerations of the 1921 Ferri’s Penal Code Draft

20 Italian criminal law culture, since the end of the nineteenth century, was becoming an important point of reference for Brazilian legal scholars. The old Francophilia was being replaced by a more differentiated entangled space, that is, connections between Brazilian legal culture and other Western countries were increasing¹⁸. Italy was placed among this process; and more specifically, Italian *scuola positiva*. The first attempt to replace the 1890 Penal Code in 1893 was led by a Brazilian scholar, João Vieira de Araújo, who declared himself a follower of the Italian *scuola positiva*, though his reform targets were quite modest in comparison with positivist targets¹⁹. Certainly, there were *scuola positiva* followers in Brazil that embraced the more radical theoretical assumptions of the school (and the radical reform attempts resulting from them), but Brazilian legal mainstream was quite prudent. The positivist shift from the theoretical study of the crime to the empirical study of the criminal with its consequences (flexibility of the sanctions; dangerousness as the pivotal concept of the penal system; legal responsibility instead of moral responsibility; and so on) always had to find compromises with the main pillars of “traditional” criminal law²⁰.

21 However, Brazilian legal scholars carefully and respectfully followed what was evolving within Italian criminal law scenario. And in 1921 something important happened. The leader of the

18 See, for example, SENA, NATHÁLIA NOGUEIRA ESPÍNDOLA DE; SONTAG, RICARDO (2020): A tradução brasileira do “Tratado de direito penal alemão”, de Franz von Liszt (1899): história de uma tradução cultural entre Brasil e Alemanha, in *Revista Brasileira de Ciências Criminais*, vol. 171, set. 2020, p. 63.

19 SONTAG, RICARDO (2020): The Italian Scuola Positiva in Brazil between the nineteenth and twentieth centuries: the problematic issue of “influence”, in *Glossae. European Journal of Legal History*, vol. 17, 2020, p. 506.

20 See SONTAG, RICARDO (2020): The Italian Scuola Positiva in Brazil between the nineteenth and twentieth centuries: the problematic issue of “influence”, in *Glossae. European Journal of Legal History*, vol. 17, 2020; SABADELL, ANA LUCIA; DIMOULIS, DIMITRI (2022): Limits and Displacements in the Adoption of Criminological Positivism in Brazil (1890-1940), in PIFFERI, MICHELE (ed.), *The Limits of Criminological Positivism. The Movement for Criminal Law Reform in the West, 1870-1940*, New York, Routledge, 2022.

Italian *scuola positiva*, Enrico Ferri, who also gave some lectures in Brazil in 1908²¹, as the president of the government commission for the reform of Italian criminal law, brought to light the more coherent legislative wording of his school theoretical proposals: the *1921 Draft for the General Part of the Italian Penal Code*. In 1921, the movement to replace the 1890 Brazilian Penal Code was dormant, as Galdino Siqueira's 1913 penal code draft was forgotten in a drawer. But the desire to replace the old 1890 Code remained alive.

22 So, a dormant desire that could awaken at any moment. The translation of Ferri's draft was published in the famous *Revista Forense* in 1921, and in the editors' note we read that one of the main reasons for this editorial initiative was precisely to collaborate in the process of reforming the »very defective 1890 Code«. According to the Brazilian editors, the »undisputed mastery of the Italian genius« in criminal law – that started with Beccaria, passing through Romagnosi, Carmignani, Carrara, Zanardelli, Pessina, Manzini, Lombroso, Garofalo and Ferri – was reflected in the 1921 draft. But the eulogy of the »Italian genius« came along with the remark that the members of the Italian commission were part of the »radical orientation«²².

23 In Italy as well the Ferri draft was blamed for being radical. Indeed, Ferri's legislative architecture was firmly based on the dangerousness of the criminal. Instead of evaluating the moral responsibility of the accused, the Ferri draft determined that every person that committed a crime would be sanctioned according to his dangerousness, regardless of moral responsibility. As a result, the judge would have great discretion to decide the fate of the accused: from indefinite detention in the case of high dangerousness to judicial pardon in the case of very low dangerousness. This is the positivist unitary concept of sanction. Differently, the dualist concept maintained the traditional concept of punishment (based mainly on moral responsibility) along with the security measures (based mainly on dangerousness). The unitary concept of the Ferri

21 SONTAG, RICARDO (2020): The Italian Scuola Positiva in Brazil between the nineteenth and twentieth centuries: the problematic issue of "influence", in *Glossae. European Journal of Legal History*, vol. 17, 2020, pp. 495-498.

22 Exposição de motivos do Projecto Preliminar do Código Penal Italiano, in *Revista Forense*, 1921, p. 261.

draft was the core of its radicalism and of this coherent legislative result of the positivist criminal-centered approach²³.

24 Italian legal mainstream was almost unanimous in accusing the Ferri draft of being radical mostly because these features would represent an undesirable breakdown of the traditional pillars of criminal law. The Ferri draft, as pointed out by Paul Garfinkel, »provided a clear example of how not to conduct a rewriting of the nation's criminal statutes«²⁴ – this is what I am calling here an *anti-model*.

25 More specifically, there were those who attacked the draft as liberticidal; and there were those who attacked it as authoritacidal. In the first kind of discourse, Ferri's proposals would undermine individual guarantees because of the uncertainty of the sanctions; in the second kind of discourse, this uncertainty would be a risk to the State's authority embedded within its legislation²⁵. Moreover, Ferri's proposals would be unfeasible: Italian State budget would not be enough for constructing all types of establishments required to the different kinds of sanction and for educating the new criminological judge required for the application of these sanctions. A huge expense of money, the critics feared, with no guarantee of return in terms of social defense²⁶.

26 Budget was an even more serious issue for a peripheral country like Brazil. Not by chance, even those who praised the Ferri draft pointed out this hurdle. In 1922, Brazilian jurist Plínio Barretto tried to revive the dormant debate around the replacement of the 1890 Code and his main

23 About the Ferri draft, see SBRICCOLI, MARIO ([1990] 2009): La penalistica civile. Teorie e ideologie del diritto penale nell'Italia unita, in SBRICCOLI, MARIO, Storia del diritto penale e della giustizia. Scritti editi e inediti (1972-2007), tomo I, Milano, Giuffrè, 2009, pp. 585-587; PIFFERI, MICHELE (2020): The Theory of Social Defence and the Italian Positive School of Criminal Law, in Glossae. European Journal of Legal History, vol. 17, 2020, p. 37-42; MUSUMECI, EMILIA (2015): The Positivist School of Criminology and The Italian Fascist Criminal Law. A Squandered Legacy?, in SKINNER, STEPHEN (ed.), Fascism and Criminal Law. History, Theory, Continuity, Oxford, Hart, 2015, p. 43-47; GARFINKEL, PAUL (2016): Criminal Law in Liberal and Fascist Italy, Cambridge University Press, pp. 344-388; LATINI, CARLOTTA (2018): Storia di un giurista 'eretico'. Il diritto e il processo penale nel pensiero di Enrico Ferri, Napoli, Editoriale Scientifica, pp. 117-119.

24 GARFINKEL, PAUL (2016): Criminal Law in Liberal and Fascist Italy, Cambridge University Press, p. 388.

25 For this approach on the criticism against the Ferri draft, see SONTAG, RICARDO (2013): "Uma linguagem antijurídica": as críticas ao projeto de parte geral de Código Criminal italiano da comissão Enrico Ferri na Rivista Penale (1919-1923), in Revista Brasileira de Ciências Criminais, vol. 104, set./out. 2013.

26 GARFINKEL, PAUL (2016): Criminal Law in Liberal and Fascist Italy, Cambridge University Press, p. 370.

inspiration was the Ferri draft. It is worth listening to Barreto about the necessary conditions for a reform along the lines of Ferri's to be possible:

- 27 *the courts must function and from universities must emerge magistrates with a great technical capacity, who are able to exercise the somewhat discretionary powers the law must grant them for the imposition of sanctions, their measure and their application. It is essential, for this purpose, that, in relation to magistrates, a clear distinction is established between civil and penal judges, either for the filling of positions, or for the exercise of the functions of summarization and decision-making. On the other hand, it is necessary to establish, in Law Schools, a special course for boys, preferably focused on the study of criminal law. For this class of bachelors, compulsory attendance at an advanced course in criminal anthropology, criminal psychology and criminal sociology, statistics and forensic medicine must be instituted. [...] Thus, [...] the magistrates will be able to determine, with certainty, the greater or lesser dangerousness of the delinquent*²⁷.
- 28 For Barreto, the Ferri draft was impeccable, but impractical even in Italy, and even more so in Brazil. Lack of money to build the necessary establishments for the application of the code and the scarcity of magistrates versed in criminology were some of the obstacles that Barreto listed for a reform of this type in Brazil²⁸.
- 29 In addition, there was still, Barretto lamented, the »tyranny of habit«, which would make Brazilian bachelors »sad prisoners of the black letter of the law« and so little used to (positivist) »observation«. What would predominate among our intellectuals would be a "bookish wisdom". In any case, some ideas from the Ferri draft could and should be used, such as a less closed and objective system of circumstances and a more elastic penitentiary regime, so that the personality of the criminal could have a greater weight in the execution of sentence. However, sadly concluded Barretto, »transplanting here the Italian draft is not possible«²⁹.
- 30 From 1928 until 1937, a penal code draft was in discussion in Brazil and its main author, Virgílio de Sá Pereira, was sympathetic to Enrico Ferri's positivistic ideas. For him, Ferri was the

27 BARRETO, PLÍNIO (1922): A reforma penal, in BARRETO, PLÍNIO, Questões criminaes, São Paulo, O Estado de S. Paulo, 1922, pp. 47-48.

28 BARRETO, PLÍNIO (1922): A reforma penal, in BARRETO, PLÍNIO, Questões criminaes, São Paulo, O Estado de S. Paulo, 1922, pp. 57-58 and p. 60.

29 BARRETO, PLÍNIO (1922): A reforma penal, in BARRETO, PLÍNIO, Questões criminaes, São Paulo, O Estado de S. Paulo, 1922, pp. 57-65.

world's most important criminal law scholar since Beccaria³⁰ and it is not a chance that, within his draft's statement of reasons, the Ferri draft is often mentioned as an example, as a source of good ideas to the Brazilian future code³¹. The penal code draft built up by Sá Pereira's commission was the most positivistic one in the history of Brazilian penal codes and drafts³².

31 Yet Sá Pereira was also concerned with *scuola positiva*'s unfeasible proposals and exaggerations. According to him, unlike what Ferri had done in his draft, the legislator's task would be »appeasing and reconciling«. Therefore, in the name of the «dictates of criminal policy», his project reconciled the traditional sentencing according to the objectivity of the crime with the innovative subjective criterion, which has "in view the delinquent and punishes him for what he is"³³. In other words, the dual-track system; the reconciling model built up by European scholars³⁴. It was seen at that epoch as a moderated model that recognized the limits of the traditional punishment enforceable only against morally responsible criminals, avoiding the radical Ferrian perspective and the US-proposals even more radicals in the flexibility of the sanctions. If Ferri's draft was exaggerated for most of the Brazilian and Italian scholars, for some US-scholars the qualms of Ferri's proposals with legality sounded traditional³⁵. Tribute to

30 SÁ PEREIRA, VIRGÍLIO DE (1927): O conceito actual do direito penal, in Revista Forense, jul./dez. 1927, p. 218.

31 See, for example, SÁ PEREIRA, VIRGÍLIO DE (1930): Projecto de código penal brasileiro: exposição de motivos sobre a parte geral, Rio de Janeiro, Imprensa Nacional, pp. 3-4, pp. 40-41, p. 59 and p. 87.

32 See QUEIROZ, RAFAEL MAFEI RABELO (2007): A modernização do direito penal brasileiro: sursis, livramento condicional e outras reformas do sistema de penas clássico no Brasil, 1924-1940, São Paulo, Quartier Latin, pp. 198-202; SONTAG, RICARDO (2014): "Código criminológico"? Os projetos de código penal brasileiro Virgílio de Sá Pereira (1927-1937) e os modelos codificatórios italianos, in WOLKMER, ANTONIO CARLOS; FONSECA, RICARDO MARCELO; SIQUEIRA, GUSTAVO SILVEIRA (orgs.), História do Direito CONPEDI/UFSC, Florianópolis, FUNJAB, 2014, p. 200.

33 SÁ PEREIRA, VIRGÍLIO DE (1934): O systema penal no projecto brasileiro, in Justiça: doutrina, legislação, jurisprudência, Porto Alegre, nov. 1934, p. 425.

34 See PIFFERI, MICHELE (2013): L'individualizzazione della pena. Difesa sociale e crisi della legalità penale tra Otto e Novecento, Milano, Giuffrè, pp. 165-324.

35 See PIFFERI, MICHELE (2014): Global Criminology and National Tradition: The Impact of Reform Movements on Criminal Systems at the Beginning of the 20th Century, in DUVE, THOMAS (ed.), Entanglements in Legal History: Conceptual Approaches, Frankfurt am Main, Max Planck Institute for Legal History and Legal Theory, 2014.

tradition made Sá Pereira's discourse similar to the Italian and European ones³⁶. For him, »if it [his penal code draft] rests on ancient foundations, it is because the past has coated them with the solidity of granite; if it contains innovations and audacities, it is because science imposes them as sure directives for the future«³⁷.

32 In addition to conciliation, there was also the argument of adaptation to national reality. Even though it is a marginal argument, it has always come into play to reinforce the distance from the exaggerations found abroad – among them, the Ferri draft. For example, Brazilian circumstances would not allow the punishment to be served after a period of internment for medical treatment to be freely decided by the judge. Local potentates in the interior of the country would be able to scandalously release their *protégés*. For this reason, Sá Pereira argued, the draft required that at least a third of the sentence be served even after the period of confinement for medical treatment³⁸.

33 Sá Pereira and his collaborators tried to make up an equilibrated draft, but the equilibrium did not convince everyone. The jurist Gastão Ferreira de Almeida, for example, criticized the *scuola positiva*'s influence over the code draft. The result was, in his opinion, an excessive doctrinal code, that is, a »criminological code«, and not a »legal code«. And this problem was worsened by the »foreign theories influence«; and, even worst: »foreign theories« upheld by a chief of the Italian Socialist Party (referring to Enrico Ferri, obviously)³⁹.

34 The suspicions of the new governments (Fascism in Italy and *Estado Novo* in Brazil) regarding the Ferri draft and the Sá Pereira draft were, for Almeida, worthy of praise. Both projects signified a serious and dangerous "legal revolution". In the Italian case, Almeida praised the Rocco draft for having curbed the exaggerations of the Ferri one. The doctrinal debate could be dynamic; the proposition and debate of new, very new ideas was healthy. However, within normative production, stability, tradition and broad consensus come into play (»all great empires [...] carefully distinguish between 'doctrines' and facts. They encourage the study and debate of the former. But they only establish in law truths proven by time, practical reason, and universal legal

36 See SONTAG, RICARDO (2014): "Código criminológico"? Os projetos de código penal brasileiro Virgílio de Sá Pereira (1927-1937) e os modelos codificatórios italianos, in WOLKMER, ANTONIO CARLOS; FONSECA, RICARDO MARCELO; SIQUEIRA, GUSTAVO SILVEIRA (orgs.), História do Direito CONPEDI/UFSC, Florianópolis, FUNJAB, 2014, p. 201.

37 SÁ PEREIRA, VIRGÍLIO DE (1934): O systema penal no projecto brasileiro, in Justiça: doutrina, legislação, jurisprudência, Porto Alegre, nov. 1934, p. 426.

38 SÁ PEREIRA, VIRGÍLIO DE (1930): Projecto de código penal brasileiro: exposição de motivos sobre a parte geral, Rio de Janeiro, Imprensa Nacional, p. 163.

39 ALMEIDA, GASTÃO FERREIRA DE ([1933] 1937): Os projectos do Código Criminal Brasileiro (de Sá Pereira) e do Código dos Delictos para a Itália (de Ferri), São Paulo, Edições e Publicações Brasil, pp. 20-22.

consensus«⁴⁰). In the same way, according to Almeida, the Brazilian government realized the risks of the »serious legal revolution« brought about by the ideas of the *scuola positiva*. Risks that could be summed up in the shaking of the first postulate of liberal criminal law: strict legality.

35 *the illustrious legislator did not miss the danger. For him, it was necessary to mitigate the serious legal revolution resulting from the important innovations of the scuola positiva [...] which in fact break the traditional and secure framework of a penal code that is strict law; it requires explicit cases and previously fixed penalties – as was our good old 1891 code*⁴¹.

36 However, Sá Pereira also agreed that there were exaggerations within both *scuola positiva* and Enrico Ferri's penal code draft. Most of Brazilian criminal discourses at that time adopted this prudent tone. Thus, Ferri's draft became a sort of *anti-model*, even though it could sometimes be a source of good examples. Within Brazilian legal imaginary, Ferri's draft was the frontier that could not be overcome; it was an example of excessive innovation, therefore an *anti-model* – as well as the Soviet legislation that was also mentioned with this tone in Brazilian criminal discourses of that time.

4. Examples and the Controversial 1930 Italian Penal Code Model

37 Unlike the Ferri draft, the 1930 Italian Penal Code was praised as technically almost perfect, especially because it brought innovations without subverting traditions (an example was the security measures regulation). From the second Sá Pereira's draft⁴², going from the 1937 Alcântara Machado's draft, until the 1940 Penal Code, the Italian Fascist Penal Code became a pivotal text within Brazilian codification debate.

38 Brazilian jurists noted the relationship between the Italian Penal Code and Fascism in two different perspectives: i) either tending to separate what was the direct product of Fascism from what would have a technical value, or ii) tending to approach the Brazilian political regime which

40 ALMEIDA, GASTÃO FERREIRA DE ([1933] 1937): Os projectos do Código Criminal Brasileiro (de Sá Pereira) e do Código dos Delictos para a Itália (de Ferri), São Paulo, Edições e Publicações Brasil, p. 20 note.

41 ALMEIDA, GASTÃO FERREIRA DE ([1933] 1937): Os projectos do Código Criminal Brasileiro (de Sá Pereira) e do Código dos Delictos para a Itália (de Ferri), São Paulo, Edições e Publicações Brasil, p. 21.

42 See SONTAG, RICARDO (2014): "Código criminológico"? Os projetos de código penal brasileiro Virgílio de Sá Pereira (1927-1937) e os modelos codificatórios italianos, in WOLKMER, ANTONIO CARLOS; FONSECA, RICARDO MARCELO; SIQUEIRA, GUSTAVO SILVEIRA (orgs.), História do Direito CONPEDI/UFSC, Florianópolis, FUNJAB, 2014, pp. 184-204.

was established in 1937 to Fascism attempting to justify the similarities between the Brazilian penal code draft and the 1930 Italian Code.

39 In 1933, a legislative committee was discussing the Sá Pereira draft. Among the members of this committee was Mario Bulhões Pedreira. Also in 1933, we found an article by Pedreira on Soviet penal reforms and the 1930 Italian Code. Pedreira selected these two experiences because he considered them paradigmatic for understanding the type of penal codification movement that, according to him, began with Carl Stooss' 1894 Swiss penal code draft⁴³. The characteristics of this penal codification movement, according to Pedreira, were the following: i) integration of principles, rather than radical innovations; ii) articulation between the technical-legal orientation and the biological sciences; iii) coexistence between the criteria of dangerousness and moral imputability, between security measures and penalties. In short, "the predominance of pragmatic rules, aimed at adapting the repressive system to the current conditions of social evolution, serving science without offending collective feelings"⁴⁴.

40 Pedreira took a critical tone against the Italian Code when he talked about the death penalty (adopted by the Italian Code) and the regulation of political crimes (for which the Italian Code abolished liberal criteria such as the prohibition of extradition for political criminals⁴⁵). Options which stemmed from the influence of Fascism on the code, denounced Pedreira⁴⁶.

41 Worthy of praise, on the other hand, were the technical features of the Italian Code, which were far superior to the Soviet ones; the discipline of security measures; and the fact that it seeks to innovate without subverting – the opposite, according to Pedreira, of what Soviet legislation did⁴⁷.

42 Regarding this last aspect, although the Italian Code was considered in Brazil to be a model to be mitigated, it was still a code that shared the idea of "integration of principles" to avoid radical innovations. Therefore, in addition to the Ferri draft, the Soviet reforms were also seen as

43 PEDREIRA, MARIO BULHÕES (1933): Códigos penaes modernos, in Revista de Direito Penal, abr. 1933, p. 277.

44 PEDREIRA, MARIO BULHÕES (1933): Códigos penaes modernos, in Revista de Direito Penal, abr. 1933, p. 278.

45 About this issue, see NUNES, DIEGO (2019): Extradition in Fascist Italy (1922-1943) and in Brazil of Getúlio Vargas (1930-1945) between the ascension of Fascism Criminal Law and the survival of the liberal tradition of Criminal Law, in Sequência (UFSC), vol. 39.

46 PEDREIRA, MARIO BULHÕES (1933): Códigos penaes modernos, in Revista de Direito Penal, abr. 1933, p. 293.

47 PEDREIRA, MARIO BULHÕES (1933): Códigos penaes modernos, in Revista de Direito Penal, abr. 1933, pp. 296-298.

examples of innovations that were too radical. It is possible to deduce that the mitigation of the Italian model, for Pedreira, had to take place regarding the excessive absorption of the individual by the State. It was therefore necessary to reconcile »social demands« with »individual autonomy«⁴⁸.

43 As for security measures, Pedreira's article further confirms Tiago Pires Marques' thesis that this part of the Italian Code had become a model⁴⁹. For Pedreira, the regulation of security measures in the Italian Code was a sign of real progress. On this point, Pedreira echoed the praise given to the Italian Code by jurists from all over the world:

44 *the discipline of security measures in the new Italian Code represents a real affirmation of progress in positive criminal law, provoking applause from the Second Congress of the International Association of Criminal Law and from criminalists of established reputation in all currents*⁵⁰

45 In Pedreira's discourse, the key word in the penal codifications of that time was pragmatism, the hallmark of all penal reforms between the end of the nineteenth century and the beginning of the twentieth century, including the Italian Penal Code. In this respect, criticizing some legal historians who have dealt with the Italian Code, Tiago Pires Marques stated that »more than simply instrumentalizing the inherited criminal juridico-penal order to their ends, they recomposed the syntax of the penal institutions, an operation that bears a properly creative dimension«⁵¹. In fact, the specificity (»creativity«) of the Italian Code must be underlined, but this instrumentalist (pragmatic) trait is part of the representation that the actors involved in this construction made of their action. This is what we find in Pedreira's discourse, and also in the famous excerpt from Alfredo Rocco's explanatory memorandum, in which he stated that the best parts of the *scuola classica* and of the *scuola positiva* were used in view of the needs of social defense. Therefore, regardless of the opposition at the theoretical-methodological level between "instrumentalization of inherited tradition" and the "specific syntax" of a code (as proposed by Marques), pragmatism is a fact that appears in the available sources – both Italian and Brazilian – and therefore cannot be dismissed.

48 PEDREIRA, MARIO BULHÕES (1933): Códigos penaes modernos, in Revista de Direito Penal, abr. 1933, p. 299.

49 MARQUES, TIAGO PIRES (2007): Mussolini's Nose. A Transnational History of the Penal Code of Fascism, PhD Thesis, European University Institute, Firenze.

50 PEDREIRA, MARIO BULHÕES (1933): Códigos penaes modernos, in Revista de Direito Penal, abr. 1933, p. 296.

51 MARQUES, TIAGO PIRES (2007): Mussolini's Nose. A Transnational History of the Penal Code of Fascism, PhD Thesis, European University Institute, Firenze, p. 53.

46 In 1936, commenting on the re-establishment of the death penalty in Italy for political criminals, Brazilian jurist Roberto Lyra described the Fascist regime as »despotism«, »the truculent imperialism of a happy adventurer«, and fiercely criticized Enrico Ferri and De Marsico for having supported Mussolini's measures⁵². Here we are still in 1936, before the coup that established the *Estado Novo* in 1937. Later, in 1937, Lyra would become part of the committee that would work on the new penal code. Another member of this committee, Nelson Hungria, at a conference in delivered in 1940, in showing the coherence of criminal law trends with the idea, typical of the *Estado Novo*, of the supremacy of collective interests over individual ones, considered the adoption of the death penalty »against rebels with weapons in their hands« to be justifiable⁵³. In a 1937 article on criminal law under Nazism and Soviet Communism, it is possible to deduce that, for Hungria, Italy's "authoritarian-conservative" tendency was not the worst thing because of the maintenance of the principle of legality⁵⁴ (but, we must remember, it was a legality little concerned with individual guarantees because it was much more functional to the affirmation of the State's authority⁵⁵). In the 1960s, Nelson Hungria took part in a major campaign against the death penalty⁵⁶.

47 The Brazilian positivist Lemos Britto, in 1934, also criticized the 1930 Italian Penal Code for adopting the death penalty, recalling the famous case of Violeta Gibson:

48 *When a madwoman, Violeta Gibson, English by birth and interned in one of her country's mental institutions, tried to eliminate Benito Mussolini, an exceptional statute equated the person of the head of the Italian government with that of the Italian state itself and established the death penalty for*

52 LYRA, ROBERTO (1936): *Compendio de direito penal*, vol. I, Rio de Janeiro, Jacyntho, pp. 29-31.

53 HUNGRIA, NELSON (1941): O direito penal no Estado Novo, in *Revista Forense*, fev. 1941, p. 268.

54 HUNGRIA, NELSON (1937): O direito penal autoritário, in *Revista Forense*, 1937, p. 437.

55 See, for example, COSTA, PIETRO (2011): O princípio de legalidade: um campo de tensão na modernidade penal, in DAL RI JÚNIOR, ARNO; SONTAG, RICARDO (orgs.), *História do direito penal entre medievo e modernidade*, Belo Horizonte, Del Rey, 2011, pp. 73-74; PIFFERI, MICHELE (2019): Criminology and the Rise of Authoritarian Criminal Law, 1930s-1940s, in SKINNER, STEPHEN (ed.), *Ideology and Criminal Law. Fascist, National Socialist and Authoritarian Regimes*, Oxford, Hart, 2019, p. 120.

56 On these variations in Hungria's thought on the death penalty for political crimes, see NUNES, DIEGO (2009): Os crimes políticos nos escritos de Nelson Hungria, in DAL RI JÚNIOR, ARNO; NUNES, DIEGO (orgs.), *Regimes de legalidade e a construção do direito penal moderno: a questão do crime político*, Anais dos Encontros de História do Direito da UFSC, Florianópolis, Fundação Boiteux, 2009.

*anyone who attacked him or intended to attack him. The Rocco Code, imitating Soviet legislation on this point, incorporated the exceptional statute. However, one can understand this call for the death penalty in a totalitarian state like fascist Italy, ruled by a dictatorship that confuses the national will with that of the man who embodies it. This call does not and cannot fit within a democracy like ours, in which citizens, instead of stripping themselves of their prerogatives and the constitutional guarantees of their rights, seek to secure and strengthen them more and more*⁵⁷.

- 49 Britto was specifically addressing the National Constituent Assembly, which, in fact, confirmed the outlawing of the death penalty (except on military law) with article 113, §29, of the 1934 Constitution – an achievement that the dictatorial 1937 Constitution would reverse with its article 122, §13, which allowed the death penalty in various cases (especially political crimes).
- 50 Alcântara Machado, in his 1938 draft statement of reasons of 1938, even if criticizing and refusing to adopt some technical solutions from the Italian Code, considered it within a clear superiority position in comparison with all the other mentioned foreign codes and drafts.
- 51 Between 1938 and 1939, the problem of the Italian Code as a model was at the center of a heated debate involving Alcântara Machado and two future protagonists of penal codification in Brazil: Antonio José da Costa e Silva and Nelson Hungria⁵⁸. Both were to serve on the commission responsible for revising Alcântara Machado's draft (whose work resulted in the 1940 Penal Code): Costa e Silva as a kind of external consultant and Hungria as a leading figure within the commission. For them, the prestige of the Italian Code was justified, but as good Germanophiles, the beacon of criminal law should be sought in Germany. However, by this time, the Nazi regime had not only risen to power, but had also produced its own penal doctrine,

57 BRITTO, LEMOS (1934): A proposito da pena de morte, in Revista de Direito Penal, 30 jun. 1934, p. 252.

58 On this debate, but with different emphases from what I would like to develop here, see SILVEIRA, MARIANA DE MORAES (2011): Vida e morte de um “projeto bandeirante”: uma história da elaboração do Código Penal de 1940, Belo Horizonte, pp. 74-78; QUEIROZ, RAFAEL MAFEI RABELO (2007): A modernização do direito penal brasileiro: sursis, livramento condicional e outras reformas do sistema de penas clássico no Brasil, 1924-1940, São Paulo, Quartier Latin, pp. 213-218.

especially the so-called Kiel school⁵⁹, which the two Brazilian Germanophiles rejected⁶⁰. Even so, for Nelson Hungria, the model to be imitated was that of Germany, because »everything that does not conform to the teaching of the German authors [...] is in need of rectification«, with the exception, however, of »the excesses resulting from the authoritarianism of the Nazi party«⁶¹.

52 The tone of Costa e Silva's and Hungria's criticism was predominantly technical. On most occasions, the solutions of Alcântara Machado's draft were accused of copying even the bad solutions of the Italian Code, which were often compared with those of other codes. Occasionally, the criticism was accompanied by some adjective attached to the Italian Code – "fascist code" or "Mussolini's code" – especially in Hungria's texts. In addition, the political impurities of the Italian Code (and its surroundings) were invoked by Hungria in the conclusion of one of his texts:

53 *The illustrious designer has already given us notice of a forthcoming modified edition of his work and from here I make a fervent appeal to him, so that he does not remain statically genuflecting before the Code he has taken as his model – the fascist code, emanating from the scientific authoritarianism of Benito Mussolini's jurists, within an environment of oppression of thought, in which even Enrico Ferri, the vexed genius of the scuola positiva, had to repudiate ideas with which he had served the cultural heritage of humanity [despite the word "genius" to refer to Ferri, it is worth remembering that Hungria was a noisy opponent of the scuola positiva⁶²]. The prestige of the Rocco Code cannot go so far as to overlook the errors that*

59 See, for example, VORMBAUM, THOMAS (2014): A Modern History of German Criminal Law, Berlin, Springer, pp. 172-207; PIFFERI, MICHELE (2021): Crisis del liberalismo penal y auge del derecho penal autoritario. La cultura penalística de entreguerras, in MARTÍN, SEBASTIÁN; FERNÁNDEZ-CREHUET, FEDERICO; ARAGONESES, ALFONS (eds.), Saberes jurídicos y experiencias políticas en la Europa de entreguerras. La transformación del Estado en la era de la socialización, Sevilla, Athenaica, 2021, pp. 393-451.

60 COSTA E SILVA, ANTONIO JOSÉ DA (1938): O novo projeto de código criminal, in Revista de Direito Penal, 1938, p. 80; HUNGRIA, NELSON (1937): O direito penal autoritário, in Revista Forense, pp. 435-441, 1937.

61 HUNGRIA, NELSON (1938): O projeto do código criminal: critica, in Revista de Direito Penal, 1938, p. 108.

62 See SONTAG, RICARDO (2009): Código e técnica. A reforma penal brasileira de 1940, tecnicização da legislação e atitude técnica diante da lei em Nelson Hungria, Dissertação (mestrado em Direito), Universidade Federal de Santa Catarina, Florianópolis, pp. 70-92.

*afflict it. And no one doubts that Mr. Alcântara Machado, as a talented artist, will know how to disguise the model's aesthetic flaws*⁶³.

54 Alcântara Machado replied to his opponents arguing that it was not a problem to consider the Italian Code as a model because it was indeed technically superior. Several times, he emphasized the excellence of the Italian Code, in order to justify the borrowing (with or without adaptations) of its legislative solutions. As for security measures, the discourse remains the same: the model cited by Alcântara Machado is the Italian one, which, according to him, »did a superior job to the draft and texts of later codes«⁶⁴. In a 1939 article, Alcântara Machado also argued that taking the Italian Code as a model for certain aspects did not mean falling into »servile and reprehensible imitation«⁶⁵.

55 In addition, Latinity and the similarity between authoritarian political regimes would justify the use of the Italian Code as a model for Brazil. The political affinities between Brazil and Italy would be manifested

56 *by the reinforcement of the authority of the State in the present constitutional organization of both countries and by the special care that both consecrate to certain institutes and values, such as the health of the scion, the family, the popular economy, public credit, probity in the execution of contracts, imperfectly protected by other legislations*⁶⁶.

57 This approximation also generated criticism by those that aimed to distinguish the Brazilian dictatorship (the *Estado Novo*) from the Italian one: that is, the Alcântara Machado draft, besides its attempt to be faithful to Brazilian regime, did not sufficiently take into consideration the Brazilian specificities.

58 Among those who made such criticisms was Roman Poznanski, a Polish legal scholar naturalized in Brazil who dealt with public law, but not specifically with criminal law. (The little-known but important figure of Poznanski would require a specific research: a few years after arriving in Brazil, he joined the *Partido Social Progressista* in 1932, declaring himself a non-

63 HUNGRIA, NELSON ([1938] 1939): Em torno do anteprojeto do Código Criminal [out. 1938], in *Revista Forense*, mar. 1939, p. 430.

64 D'OLIVEIRA, JOSÉ DE ALCÂNTARA MACHADO (1938): Código criminal brasileiro: exposição de motivos do ante-projeto da parte geral, in *Revista de Direito Penal*, 1938, p. 164.

65 D'OLIVEIRA, JOSÉ DE ALCÂNTARA MACHADO (1939): O projeto do código criminal perante a crítica, in *Revista Forense*, nov. 1939, p. 62.

66 D'OLIVEIRA, JOSÉ DE ALCÂNTARA MACHADO (1939): O projeto do código criminal perante a crítica, in *Revista Forense*, nov. 1939, p. 62.

revolutionary socialist⁶⁷ and expressing anti-communist positions on several occasions⁶⁸; he became the international relations editor of the newspaper *A Batalha*, directed by Júlio Barata, at the time a member of *Ação Social Brasileira*, »a fascist-inspired political movement«⁶⁹; Poznanski ardently supported the 1937 coup and Getúlio Vargas' new dictatorial Constitution of 1937 on the grounds that the country's "current situation" required a strong State, no longer legislative, but administrative⁷⁰.)

59 Poznanski's discourse did not go into the technical details of the Alcântara Machado draft but instead addressed the relationship between the draft and the 1937 *Estado Novo* Constitution. Unlike the tone of Costa e Silva and Hungria's criticisms, Poznanski's entire speech revolved around the relationship between law and politics. Poznanski was critical of the fact that Alcântara Machado's explanatory memorandum made only very general references to the 1937 Constitution. As a result, Alcântara Machado had been unable, according to Poznanski, to »invoke the existence of the indispensable link between them [the penal precepts] and the constitutional precepts«. The study of doctrines and legislation "from civilized countries" in criminal matters would have occupied the designer too much, to the detriment of the »prior and indispensable analysis of the *Estado Novo* guidelines«⁷¹. The result was a draft that was too inspired by the Italian model. Poznanski contested the argument – used by Alcântara Machado – of adapting this model to the Brazilian reality, saying that the draft nevertheless failed to take into account the differences between the guidelines of the *Estado Novo* and those of Fascism⁷².

60 Alcântara Machado did not completely identify the Brazilian *Estado Novo* with Italian Fascism. Poznanski, however, criticized the approximation between the guidelines (the "spirits") of Fascism and the *Estado Novo*. This criticism therefore touches on the gradualist conception that

67 Em torno do Partido Social Progressista [entrevista com Roman Poznanski], in *A Batalha*, Rio de Janeiro, 1º jul. 1932, online: <http://memoria.bn.gov.br/DocReader/175102/5776>.

68 POZNANSKI, ROMAN (1937): *Chronica Internacional*, in *A Batalha*, Rio de Janeiro, 7 fev. 1937, online: <http://memoria.bn.gov.br/DocReader/175102/12364>.

69 Barata, Júlio [verbete], in *Dicionário Histórico-Biográfico Brasileiro*, Fundação Getúlio Vargas, online: <https://www18.fgv.br/cpd/doc/acervo/dicionarios/verbete-biografico/julio-de-carvalho-barata>.

70 POZNANSKI, ROMAN (1938): A proposito de um livro sobre a Nova Constituição, in *A Batalha*, Rio de Janeiro, 22 jan. 1938, online: <http://memoria.bn.gov.br/DocReader/175102/14558>.

71 POZNANSKI, ROMAN (1938): O código criminal e o Estado Novo, in *Revista de Direito Penal*, jan. 1938, p. 72.

72 POZNANSKI, ROMAN (1938): O código criminal e o Estado Novo, in *Revista de Direito Penal*, jan. 1938, p. 72.

circulated at the time about the relationship between the Nazi, Soviet, Fascist and Brazilian authoritarian regimes. For Poznanski, the difference was not merely quantitative, but qualitative. Clearly different “spirits” animated Italian Fascism and Brazilian *Estado Novo*. To back up these assertions, Poznanski used a speech by Getúlio Vargas which rejected the “two extremist currents” that sought to impose themselves “by deceit or force”. These two currents were Communism and Fascism.

61 As for Communism, since the so-called 1935 *Intentona Comunista* and the subsequent approval of the National Security Law, anarchist and communist enemies as elements of legitimization for the Vargas regime were already common⁷³. As for right-wing extremism, Vargas’ speech probably referred to Integralism. Brazilian historiography has shown several times the differences between Brazilian Integralism and Italian Fascism; however, the integralists were often seen as the Brazilian version of Fascism. For the success of the 1937 coup, Vargas had the support of the integralists, especially Plínio Salgado. After the establishment of the dictatorship, however, the regime tried to disengage itself from the uncomfortable allies, »ignoring the commitments made to Plínio Salgado«⁷⁴. These tensions culminated in the so-called integralist *putsch* on May 11, 1938, a few months after the publication of Poznanski’s article.

62 Because of the difference in “spirit” between the *Estado Novo* and Fascism, the appropriateness of adopting the Italian Penal Code as a model was questionable. According to Poznanski, this problem arose during the discussions about the draft code. There was an excessive concern with “the respective institutes in the light of penal science”, instead of »seeking the necessary harmony between the precepts of the future criminal or penal code and the legal order established in our country and the Constitution of November 10«⁷⁵. Quoting the Italian criminal law scholars Saltelli and Romano di Falco, Poznanski pointed out that »the Rocco Code is fascist and the maximum expression of the totalitarian regime of Mussolini’s Italy« while »the Brazilian criminal code must satisfy the real requirements of the *Estado Novo*«⁷⁶. In Poznanski’s opinion, in order to guarantee the authority of the State, the Italian model even offered adequate remedies, but that was not enough: the individual was missing. The specific nature of the *Estado Novo* required particular

73 See DAL RI JÚNIOR, ARNO (2006): O Estado e seus inimigos: a repressão política na história do direito penal, Rio de Janeiro, Revan, pp. 276-277; NUNES, DIEGO (2014): Le “irrequietas leis de segurança nacional”. Sistema penale e repressione del dissenso politico nel Brasile dell’Estado Novo (1937-1945), Tesi di dottorato, Università degli Studi di Macerata, Macerata, pp. 75-150.

74 BRANDI, PAULO. Getúlio Vargas [verbete], in Dicionário Histórico-Biográfico Brasileiro, Fundação Getúlio Vargas, online: <https://cpdoc.fgv.br/sites/default/files/verbetes/primeira-republica/VARGAS,%20Get%C3%BAlio.pdf> p. 21.

75 POZNANSKI, ROMAN (1938): O código criminal e o Estado Novo, in Revista de Direito Penal, jan. 1938, p. 73.

76 POZNANSKI, ROMAN (1938): O código criminal e o Estado Novo, in Revista de Direito Penal, jan. 1938, pp. 73-74, author’s emphasis.

attention to the individual, so as not to absorb him completely into the State. It was an argument that circulated at the time in different ways; in Poznanski's case it was inserted into a framework that sought to draw a stronger distinction between the Fascist and *Estado Novo* regimes, and consequently between their penal codes⁷⁷.

63 In the view of the positivist Correa de Araújo, endorsing the words of Alcântara Machado, it was natural for Brazil, with the advent of the *Estado Novo*, to take part in the reaction to liberal criminal law carried out by European dictatorships (Italy, Germany and Russia). In the Brazilian case, however, the impact of this reaction on the reform of the penal code, according to Araújo, would be »tempered and discreet« »in accordance with our customs and our present economic and political-social conditions«⁷⁸. A balance that the Alcântara Machado draft had achieved by preserving the fundamental principles of classic criminal law, »as a legal guarantee and security of individual rights against possible abuses, stemming from the arbitrariness of judges, and, above all, of the executive and legislative powers«⁷⁹. In Araújo's conception, similar to that of Alcântara Machado, the problem of the relationship between the criminal law of the Brazilian authoritarian State regime and the criminal law of totalitarian regimes like Italy's was one of degree, not quality.

64 Within both Alcântara Machado draft and 1940 Penal Code statements of reasons, the Italian Penal Code is the most mentioned, but the authors always tried to highlight technical differences attempting to avoid the criticism of "subservient imitations". Anyway, the inspiration of many choices of the Brazilian Penal Code was from the Italians. Sometimes, the Italian Penal Code was only an example among many others (for example, the 1921 Argentinian Penal Code – and therefore I would like to highlight the most neglected dialogue between Brazilian and Argentinian legal cultures, a dialogue pointed out by the legal historians Mariana de Moraes Silveira and Ezequiel Abásolo⁸⁰).

77 POZNANSKI, ROMAN (1938): O código criminal e o Estado Novo, in *Revista de Direito Penal*, jan. 1938, p. 75.

78 ARAÚJO, J. A. CORREA DE (1939): O projeto do código criminal do Brasil, in *Revista Forense*, abr. 1939, p. 7.

79 ARAÚJO, J. A. CORREA DE (1939): O projeto do código criminal do Brasil, in *Revista Forense*, abr. 1939, p. 7.

80 See SILVEIRA, MARIANA DE MORAES (2018): Desloca(liza)r o direito: intercâmbios, projetos partilhados e ações públicas de juristas (Argentina e Brasil, 1917-1943), Tese (doutorado em História), Universidade de São Paulo, São Paulo; ABÁSULO, EZEQUIEL (2015): Os "Comentários à Constituição" de Carlos Maximiliano Pereira dos Santos e a repercussão da cultura jurídica argentina no Brasil durante a primeira metade do século XX, in *Cadernos do Programa de Pós-Graduação em Direito – PPGDir/UFRGS, Porto Alegre*, vol. X, n. 3, 2015, pp. 43-45.

- 65 In one situation, the Italian Penal Code became a model because of its pre-eminence in comparison with other codes regarding a whole sector of the codification: it is the case of the security measures. Nevertheless, it was a relative model within a single sector (for example, Brazilian Code did not adopt the possibility of application of *ante-delictum* security measures)⁸¹.
- 66 If, on the one hand, the 1930 Italian Penal Code was seen as a balanced legislation when compared to Ferri's draft, or, even worse, Soviet or Nazi legislation, on the other hand, the Fascism of the Italian Penal Code made it part of the list of exaggerations that should be avoided in Brazilian penal codification, even though in a lesser degree. (Stephen Skinner also found almost the same degree classification of Italian, Soviet and Nazi penal legislation within jurists of that epoch from United States, Great Britain and France⁸².)
- 67 Lastly, the nexus between the Italian Penal Code and Fascism and the political similarities between Brazil and Italy were avoided within 1940 Brazilian Penal Code statement of reasons, and by this way ignoring a debate among Brazilian jurists developed about this issue in the years before (also every reference to national political context was avoided, as pointed out by Mariana de Moraes Silveira⁸³). This silence was probably one of the conditions for the revision commission to work together. The political and legal differences between its members were great: the commission was headed by Minister Francisco Campos, known for being sympathetic to Fascism; among its members, we find Nelson Hungria, perhaps a Catholic liberal-conservative, who even fiercely criticized Fascism; and Roberto Lyra, a left-wing figure.
- 68 Despite the differences between Roberto Lyra and the other members of the commission (especially with Francisco Campos and Nelson Hungria), there were also legal and political-criminal points of convergence that allowed them to work together. Unfortunately, it is very difficult to detail these points due to the lack of minutes of the revision commission. In any case, Roberto Lyra's memoirs about the commission's work almost always emphasize the serenity with which the meetings were carried out⁸⁴. On the other hand, in these same memoirs, it is possible to find traces of Roberto Lyra's different political commitments during the discussions. One

81 SONTAG, RICARDO (2014): "Código criminológico"? Os projetos de código penal brasileiro Virgílio de Sá Pereira (1927-1937) e os modelos codificatórios italianos, in WOLKMER, ANTONIO CARLOS; FONSECA, RICARDO MARCELO; SIQUEIRA, GUSTAVO SILVEIRA (orgs.), História do Direito CONPEDI/UFSC, Florianópolis, FUNJAB, 2014, pp. 197-198.

82 See SKINNER, STEPHEN (2020): Fascista de nome, fascista por natureza? O código penal italiano de 1930 em comentários acadêmicos (1928-1946), in DAL RI JÚNIOR, ARNO; NUNES, DIEGO; SONTAG, RICARDO (orgs.), História do direito penal: confins entre direito penal e política na modernidade jurídica (Brasil e Europa), Florianópolis, Habitus, 2020, p. 211.

83 SILVEIRA, MARIANA DE MORAES (2011): Vida e morte de um "projeto bandeirante": uma história da elaboração do Código Penal de 1940, Belo Horizonte, p. 52.

84 LYRA, ROBERTO (1975): Direito penal normativo, Rio de Janeiro, José Konfino, pp. 102-104.

example is the case of strikes: in the final text, only violent strikes were criminalized, whereas, given the tendencies of the *Estado Novo*, much stricter legal treatment was to be expected. Roberto Lyra pointed out that his personal political commitment led to this less severe result⁸⁵.

69 However, there was a clear anti-liberal turn in the Brazilian penal law⁸⁶. The 1940 Brazilian Penal Code statement of reasons evidenced this issue when justifying, for example, some alterations in legal values underlying some crimes in order to withdraw the code from liberal ones (“crimes against freedom of work” to “crimes against work organization” and “crimes against religious freedom” to “crimes against religious sentiment and against respect for the dead”, just to mention a few examples). However, it would be historiographically simplistic to understand this anti-liberal turn as the result of an influence of the Fascist Penal Code of 1930. Tracing this history with the notion of influence overlooks two important aspects: i) the existence of a common (anti-liberal) background between Italy and Brazil (and other countries); ii) the complexity of the relationship between Brazilian jurists and the Italian 1930 Code.

85 LYRA, ROBERTO (1956): *Novíssimas escolas penais*, Rio de Janeiro, Borsoi, p. 105. About this issue, see SOARES, MOISÉS ALVES (2008): *A greve na codificação penal de 1940: marco do autoritarismo?*, in DAL RI JÚNIOR, ARNO; SONTAG, RICARDO (orgs.), *A construção do Direito Penal e do Processo Penal Modernos*, Anais dos Encontros de História do Direito/Jornadas do IBHD, Florianópolis, Fundação Boiteux, 2008; and SILVEIRA, GUSTAVO SIQUEIRA; RODRIGUES, JÚLIA DE SOUZA (2019): *Os significados do conceito de greve na legislação no Governo Vargas (1931-1945)*, in *Passagens: Revista Internacional de História Política e Cultura Jurídica*, vol. 11, n. 3, 2019, pp. 336-338.

86 See, for example, QUEIROZ, RAFAEL MAFEI RABELO (2007): *A modernização do direito penal brasileiro: sursis, livramento condicional e outras reformas do sistema de penas clássico no Brasil, 1924-1940*, São Paulo, Quartier Latin, pp. 218-222; SONTAG, RICARDO (2009): *Código e técnica. A reforma penal brasileira de 1940, tecnicização da legislação e atitude técnica diante da lei em Nelson Hungria*, Dissertação (mestrado em Direito), Universidade Federal de Santa Catarina, Florianópolis, pp. 49-51; SILVEIRA, MARIANA DE MORAES (2010): *De uma República a outra: notas sobre os Códigos Penais de 1890 e de 1940*, in *Revista do CAAP*, vol. 16, n. 2, pp. 109-125, 2010; and PRANDO, CAMILA CARDOSO DE MELLO (2013): *O saber dos juristas e o controle penal: o debate doutrinário na Revista de Direito Penal (1933-1940) e a construção da legitimidade pela defesa social*, Rio de Janeiro, Revan, p. 166. Even though there are very respectful voices on the other side, highlighting the liberal character of the 1940 Penal Code – for example BATISTA, NILO (2016): *Apontamentos para uma história da legislação penal brasileira*, Rio de Janeiro, Revan, pp. 94-99, who is right to point out that we should not automatically deduce the character of the penal code from the government that decreed it. In fact, the relationships between code and State are complex.

5. Conclusions: “Cultural Transplants” or Towards Non-Unidirectional Legal History Narratives

70 About the adoption of foreign ideas in the penal codification process, in his aforementioned 1934 Argentinian public lecture, Sá Pereira, on the one hand, praised the “universality of intellectual work” that is “instantly incorporated within common heritage of humankind”, and, on the other hand, he praised the “cultural transplants” (“*transplantação de culturas*”). Nevertheless, transplant did not mean a mere copy, but a cooperation, that is, “to receive” the foreign object and make it fruitful in the new land:

71 *in the American experience what excites us is precisely the phenomenon of the transplantation of culture, the process by which our milieu has accepted, acclimatized or rejected ideas and institutions from other sources. [...] There was a time when we were, in the face of the old world, in the position of mere copyists; today we collaborate on the text and sometimes even dare to correct the wording. Let's not lose touch with the movement of ideas in Europe, but above all let's keep an eye on our own institutions, and I am referring not only to the autochthonous ones, but also to the alien ones, which, welcomed by the environment and nationalized by it on our soil, have taken root and borne good fruit*⁸⁷.

72 In a 1933 text on comparative law, Sá Pereira had already dealt with “cultural transplants”. For him, foreign influence – duly acclimatized to the new environment – helps a nation’s law to achieve the technical perfection possible at a given time. Therefore, the role of the discipline of comparative law would lose its meaning in the conception according to which law would be a necessary reflection of a people. In this conception, comparative law would be reduced to mere dilettantism⁸⁸. (The elements of Sá Pereira’s reflection on the relationship between the science of comparative law and transplantation reminds us of the debate between Alan Watson and Pierre Legrand on legal transplants, but we will not be able here to delve into the specificities of these two moments in the history of the science of comparative law.)

73 The international dimension was always present within Brazilian legal historiography since its origins in the late nineteenth century (the nationalist legal historiography was never as strong in Brazil as it was in Europe). Notwithstanding, these narratives were virtually always based on the unidirectional concept of influence. Therefore, its depiction of historical dynamics of Brazilian legal culture was quite poor. The cultural transplant concept – that we have found in Sá Pereira’s

87 SÁ PEREIRA, VIRGÍLIO DE (1934): O systema penal no projecto brasileiro, in *Justiça: doutrina, legislação, jurisprudência*, Porto Alegre, nov. 1934, p. 419.

88 SÁ PEREIRA, VIRGÍLIO DE (1933): A fase embrionária do direito comparado, in *Revista Jurídica. Órgão cultural da Faculdade de Direito da Universidade do Rio de Janeiro*, vol. 1, jul./dez. 1933.

lectures – reveals to us that the actors of that time had a more articulated representation about cultural entanglements than the concept of influence would allow us to perceive – even when these actors were using also the word influence.

74 Recently, Brazilian legal historiography is trying to overtake unidirectional depictions of our history. But the path is still long because there are not yet many works adopting this perspective. My research is an endeavor to explore a possible trail of this more general path that seems very fruitful for renovation of the Brazilian legal historiography.

75 The international dimension itself, within codification processes of countries considered central or peripheral, can take on different colors: this is the conceptual key I have been proposing here, based on the Brazilian case and its relationship with Italy between 1928 and 1940.

76 As we have seen, exportation or importation as elements to legitimize codification have different weights depending on the cultural international position of the countries. In the case of a country considered peripheral like Brazil, the pre-eminence of the import vector was articulated with the unavoidable argument of “adaptation to the national reality”. In this way, the need to keep up to date, to keep pace with international penal trends (the import vector), became compatible with the nationalist climate of the time, particularly relevant in the context of Getúlio Vargas’ political discourse. Although the argument of national reality, in the Brazilian case, dates back at least to the nineteenth century, in the specific context we are analyzing, already in the twentieth century, it allowed the articulation between nationalism and the old legitimization by the import vector.

77 In both Brazil and Italy, innovations justified the complex process of codification, but the foundation of tradition was inescapable. In the Italian case, the tradition was the Italian tradition that was to become an export product, perfectly echoing the nationalist rhetoric of Fascism. In the Brazilian case, a large part of the tradition invoked as a basis for the code was not national. For this reason, the argument of “adaptation to national reality” became necessary.

78 In a 2012 lecture, Michael Stolleis opined that the history of codifications is whacked⁸⁹. Certain ways of doing the history of codifications are certainly unfruitful anymore; one of them probably is that which revolves around the concept of influence. But it may be possible to upset this historiographical platitude by turning the analysis to the way in which the actors of the time represented these influences. The discourse of influences, therefore, is not ignored. Instead of following the discourse of the sources, we look over their shoulders, trying to use this discourse to outline historically determined ways of dealing with the relationships between codes.

79 This brings us to the conceptual distinction between models, examples and anti-models.

89 STOLLEIS, MICHAEL (2013): Il quadro europeo, in SORDI, BERNARDO (a cura di), Storia e diritto. Esperienze a confronto. Atti dell’incontro internazionale di studi in occasione dei 40 anni dei Quaderni Fiorentini, Firenze, 18-19 ottobre 2012, Milano, Giuffrè, 2013, p. 38.

- 80 The 1921 Ferri draft, in the discourse of most Brazilian jurists, was an anti-model both for those who despised it and for those who admired it. Exaggerated or impractical (or both at the same time), the Ferri draft could only provide a few or several good examples, depending on the speaker's degree of positivism. For this reason, discourses around the Ferri draft oscillated between considering it an anti-model and saving it in some respects as a source of examples.
- 81 As for the 1930 Italian Code, the almost unanimous praise for its technical quality brought it closer to a model, but on several occasions it was also considered exaggerated, albeit at a lower level compared to the Ferri draft. After all, the Ferri draft was seen as a "school" draft (one of the fundamental traits of the exaggeration label), while the 1930 Code was not. So, there was no doubt that the 1930 Code would provide good examples. As for the long and articulate chapter on security measures in the Italian Code, given its complexity and the almost unanimous praise (despite occasional criticism), the word example sounds weak. Here we have part of a code that has become a model; a part that at the time was considered a "code within a code". That is why I prefer the word model to example when describing the attitude of Brazilian jurists towards the security measures in the Italian Code. The model is a higher level.
- 82 A higher level that derives from the prestige of a foreign code in a given legal culture. This prestige derives from the strength of the discourses, which can emphasize more or less the technical qualities of the code in question. Here we have studied a context in which the strength of the discourses of a community of jurists was decisive for the prestige of a code. But this may not be the case in all eras. A diachronic comparison based on this theoretical key would help us to understand the different dynamics of the public sphere in its relationship with normative production.
- 83 With this type of approach, codification is not simply contextualized, because what is at stake here is historicizing the very way in which codifications – through their main actors – establish relations with their contexts⁹⁰. The international legal context can take on different roles, both in the more general aspect (importation and exportation as tools for legitimization) and in the more specific ones (image of foreign codes, for example). Assuming fixed relationships between, for example, political context and codification can also lead to misunderstandings: hiding or illuminating the relationships between political regime and codification are gestures that deserve to be historicized.

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90 On doing the history of the different ways in which law relates to its contexts, see HEIRBAUT, DIRK; SONTAG, RICARDO (2024): *História do direito tradicional e história do direito contextual*, in MARTYN, GEORGES; DAL RI JÚNIOR, ARNO (orgs.), *Métodos da historiografia do direito contemporânea: olhares cruzados entre a Bélgica e o Brasil*, Belo Horizonte, D'Plácido, 2024, pp. 68-96.

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