



THE CRIMINAL IMPUTABILITY OF THE MINOR OFFENDER IN TOBIAS BARRETO: NA ANALYSIS IN THE CONTEXT OF THE HISTORY OF IDEAS IN BRAZIL

A inimizabilidade penal do menor infrator em tobias barreto: uma análise no contexto da história das ideias no brasil

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ABSTRACT

The present study aims to analyze, in the context of the study of the history of ideas in Brazil, the theme of criminal incrimination of the minor offender, in the thought of Tobias Barreto, in “Menores e Loucos”. For that, it presents the author's education, the main influences in the construction of his thought and the ideas against which he rose. It seeks to demonstrate how the author uses original arguments in defense of this non-imputability, based mainly on Brazilian long distances, both geographical and social.

Keywords: History of Ideas – Tobias Barreto - Originality - Criminal Inimputability - Minor Offenders.

RESUMO

O presente estudo tem por objetivo analisar, no contexto do estudo da história das ideias no Brasil, o tema da inimputabilidade penal do menor infrator, no pensamento de Tobias Barreto, em “Menores e Loucos”. Para tanto, apresenta a formação do autor, as principais influências na construção de seu pensamento e as ideias contra as quais insurgiu. Procura demonstrar como o autor utiliza argumentos originais em defesa dessa inimputabilidade, fundamentados principalmente nas grandes distâncias brasileiras, tanto geográficas quanto sociais.

Palavras-chave: História das Ideias - Tobias Barreto – Originalidade - Inimputabilidade Penal – Menores Infratores.

INTRODUCTION: HISTORY OF IDEAS IN BRAZIL AND THE SEARCH FOR BRAZILIAN LEGAL THOUGHT

The present article is the result of studies conducted on the history of legal ideas in Brazil, which seek to identify in historical sources, what could be called "Brazilian legal thought". With this, it seeks to demonstrate the existence of new ideas in Brazilian legal culture, valuing its legacy and unveiling its influences up to the present day.

The study of the history of ideas in Brazilian legal thought has as its object the past, but it goes a step beyond the study of historical chronology and philosophical ideals. It searches for Brazilian legal thought in the various areas of the humanities in which they may have arisen. Thus, there is room for research not only in law, but also in literature, poetry, politics or journalism, always focusing on the Brazilian legal experience (ADEODATO, 2015, p. 29).

The present work analyzes the thought of Tobias Barreto de Menezes, exponent of the Recife School, the multifaceted author who fits in all the areas mentioned above. Politician, journalist, orator, law professor, arts critic, writer, he left a legacy of countless texts, books, speeches and even poetry that allow a wide analysis of his work during the period of Brazil's Empire.

With a diversified and instigating work, here the analysis will be based on the book "Menores e Loucos em Direito Penal" (Minors and Madmen in Criminal Law) released in 1884. This work was chosen considering that the question of the criminal liability of minor offenders is still the subject of heated discussions even almost 200 years after the publication of the Criminal Code of the Empire of Brazil, legislation criticized by Tobias. For this reason, the present article is justified as an attempt, taking into account the context of the history of Brazilian legal ideas, to seek what is genuine about the subject in the legal thought produced in Brazil.

By questioning whether, under those conditions, there is originality in the work "Menores e Loucos" by Tobias Barreto, especially regarding the theme of the criminal liability of the minor offender, this paper aims to present biographical data that form the personality and thought of Tobias Barreto; to present and analyze the work "Menores e Loucos em Direito Penal"; to identify the originality of his thought; to relate it to the contemporary relevance of the theme.

Using the rhetorical methodology, the article is developed from the presentation of the historical context and relevant facts lived by the jurist under analysis, the material rhetoric. The strategic rhetoric is used to demonstrate how Tobias Barreto's arguments were used to transform the reality in which he lived. Finally, with the analytical rhetoric, it is intended to demonstrate the existence of originality in Tobias Barreto's thought and its unfoldings today (ADEODATO, 2015, p. 24).



The second section presents relevant biographical elements for Tobias Barreto's formation and highlights the influence of factors such as where he was born, his skin color, and the historical moment Brazil was going through in the construction of his ideas and personality. The third section exposes how French and English thinkers brought positivism, naturalism and determinism, the main ideas in vogue in Brazil in the 19th century. The third section presents the work "Menores e Loucos em Direito Penal", highlighting the legislation in force at the time in counterpoint with the originality of the author's thought. Finally, in conclusion, the hypothesis is presented that there is originality in relation to the doctrine and practice of the time, to his masters, highlighting that the social conditions of his time remain in Brazil today.

1. OF MIXED ORIGIN AND SELF-TAUGHT IN THE GERMAN LANGUAGE: THE INTELLECTUAL FORMATION AND COMBATIVE PERFORMANCE OF TOBIAS BARRETO.

Tobias Barreto de Menezes was born in 1839 in the village of Campos, a municipality that today bears his name, in the interior of the state of Sergipe. Of black and poor origin, he began his studies at home with his mother, learning Latin at a very young age. In his youth, he spent a brief period in Salvador, from March to December 1861, possibly where he was preparing to be a student at the Bahia School of Medicine (BARRETO, 1994, p. 316).

In the following year, at the age of twenty-three, a young Latin teacher, he arrived in Recife and started his studies in Law School (BARRETO, 1994, p. 333). At this time, the church's influence on education was very strong, as it controlled the production of knowledge. Religion, the guardian of morality, was considered the only one capable of guaranteeing true order (BARRETO, 1994, p. 10).

At the age of thirty, in 1871, he moved to the city of Escada, also in Pernambuco, on the occasion of his marriage. In this city he practiced law, was curator of orphans and slaves, substitute judge and elected provincial deputy in 1878, for the liberal party.

At the age of forty-two, he returned to Recife to teach at the Law School. His avant-garde thought, marked by the rupture of paradigms, is highlighted by Luiz Antônio Barreto (1994, p. 27):



The Tobias Barreto contest, in 1882, represents, in the unanimous opinion of the historians of the ideas of the last century, a formal rupture with the backwardness, with the dominance of the old moldy theories in the textbooks, by professors who drank in the traditional Catholicism the immutable "truths" that they transmitted to the young Northeastern scholars.

Supported by the students, his ideas built this movement of rupture and breaking of paradigms in legal education in Brazil and became known as the Recife School.

He died on June 26, 1889 at the age of fifty, after a bedridden period in which he did not stop writing.

Tobias Barreto worked in the most diverse areas of the humanities. As a journalist, art critic, philosopher, politician and jurist, Tobias positioned himself about most of the social questions of his time. As a teacher and journalist, he faced the Church's domination over the education of young people. As general curator of orphans and slaves, he denounced the misery condition, the lack of citizenship of Escada's inhabitants, besides having obtained the freedom of dozens of slaves. As provincial deputy, he defended women's education and the revolutionary permission for women to be admitted to college.

He confronted at several passages the hegemony of the Catholic Church existing in press publications, education and culture. Influenced by his Germanic studies in Ewald's "History of the People of Israel", he published "Notas de Crítica Religiosa" (Notes on Religious Criticism), "Os Livros Mosaicos, ou Assim Considerados" (The Mosaic Books, or Thus Considered) and "Uma Excursão de Dilettante pelo Domínio da Ciência Bíblica" (A Dilettante's Tour through the Domain of Biblical Science). In this way, "Tobias uses Ewald to set his new horizons in the interpretation of religious texts" (BARRETO, 1994, p. 20).

With this, he questioned the intellectuals of the time who not only supported the Church, but also used catechism to explain social and philosophical phenomena. Among these, the figure that stood out was Dr. José Soriano de Souza, who had published in 1871 the book "Lições de Filosofia Elementar; Racional e Moral" (Lessons in Elementary Philosophy; Rational and Moral). In this work Soriano presented philosophy subordinated to theology, defending that political power came from God, among other ecclesiastical teachings. He confronted him vehemently, Tobias saw him as "the incarnation of the old doctrines" (BARRETO, 1994, p. 19).

In the period in which he lived in Escada, in the interior of Pernambuco state, a city that was a microcosm of the Brazilian reality as a whole, considering that the power was in the hands of the owners of large mills and the population was mostly miserable, "Tobias is capable of rebelling against the contempt with which the magnates of Escada treated the locality, which he expresses with concrete

examples and not with recourse to liberal discourse, exalting democratic values in theoretical terms" (BARRETO, 1994, p. 19). (HORA, 2015, p. 191).

As an example of this struggle, not only theoretical, but applied to his practice, is the work he did to free slaves and the defense of the organization of society by the economy based on free labor (BARRETO, 1994, p. 85). When he freed all the slaves he had inherited from his father-in-law, his house was surrounded by the police for the crime of press and he had to return to Recife. As well was his performance as a lawyer and slave curator, since he had to face many times the justice dominated by the slavocrats (BARRETO, 1994, p. 98).

One of the highlights of his performance as provincial deputy was his defense of female education. This fact occurred on the occasion of the debates for the approval of scholarships for two women to study abroad. See that, in 1879, through his arguments, he refuted the affirmation of female inferiority presented by doctor Malaquias Antônio Gonçalves, which guaranteed the benefit to the young women.

Defender of intellectual equality between women and men, Barreto also presented the Law Project n. 129 for the creation of the Partenogógio do Recife, a feminine school inspired in German models. Featuring a College, the project sought to liberate women through a complete education, not only related to arts and languages. Advanced for the minds of the time, the project was never approved (BARRETO, 1994, p. 339-340).

Although he participated in several movements as a journalist, art critic, diffuser of ideas and of Germanic culture in Brazil, here we are more interested in Tobias Barreto's performance as a jurist and philosopher of law.

How then, in this scenario, was it possible for the jurist to have access to so many innovative ideas? One of the possible answers lies in the access to the German language.

The study of the German language opens the doors to another Europe, far beyond the traditionalism of the Coimbra School, with other theoretical bases and thoughts very different from those previously practiced. This channel of access to new, fresh and avant-garde theories makes Tobias responsible for the introduction of German philosophy in Brazil (HORA, 2015, p. 196).

Tobias' ideas, against Auguste Comte's thought, were the precursor of a line of opposition to French positivism. It sought new foundations for the philosophy of Law. In the lessons of Luiz Antônio Barreto (1994, p. 25):

Charles Darwin, Ernest Haeckel, Rudolf von Jhering, Hermann Post, Eduard von Hartmann began to exert a decisive orientation on Tobias, from which, in all the fields in which he works, he will expose the set of new ideas.

Of the various Germanic authors on whom Tobias based himself, in Law, Immanuel Kant and Rudolf von Jhering are the most important. With this, he leaves scholasticism and blind positivism and brings the law from heaven to earth, defending that law should go beyond the legislation and that dogmatism should not blind the jurist.

It is not too much to say that, with these ideas, the contest for professor at the Recife School, in 1882, in which Tobias Barreto was approved, entered the history of Brazilian legal education. In the words of Fontes de Alencar (2003, p. XIV):

One could say then that, in that famous competition for professor in the old House, "the flames of Febo" set fire to old doctrines and theories and ignited new ideas in the field of Law, far removed from Conimbrian dogmatism.

Tobias was admired by the students, whom he inspired with his new ideas. On the other hand, he had many disagreements with the professors who defended the old school maintained by the Congregation. In the contest, he disserted on the most varied subjects, but what stands out is his defense of law as a cultural production, a human creation, resulting from the socially installed way of living, being subject to evolutions, adaptable to the historical moment, produced by the social reality of a time, as highlighted by Graça Aranha (ALENCAR, 2003, p. XVIII).

This paradigm shift produced so many philosophical transformations that it became a movement beyond Tobias Barreto's domain, "it produced a generation of abolitionists, republicans, democrats, socialists, agnostics and materialists that, back to their states, followed with the demolition of all the old structures (BARRETO, 1994, p. 27).

2. POSITIVISM, NATURALISM AND DETERMINISM: THE PREVAILING IDEAS OF THE 19TH CENTURY

Tobias Barreto's fifty years were lived during the Brazilian Empire, under the regency of D. Pedro II. Born in the countryside of Sergipe, far from the crown, the landscape was filled with large sugar mills and cattle farms based on the slavery economy. There was hegemony of the Catholic Church, in all areas of social life, especially in the control of knowledge. The schools belonged to the congregations and the leisure was to attend masses, theaters or poetry soirées.

In the Northeast there was still the air of separatist revolts, but especially the Pernambuco Revolution of 1817, which, with the addition of republican ideals, was triggered by the serious economic and social problems of the region, added to the dissatisfaction with the presence of the Portuguese Crown in Rio de Janeiro, which burdened the population with tax increases.

Other revolutions of a libertarian nature, such as the Equator Confederation and Praieira, gave Recife, as a regional metropolis, "an atmosphere of non-conformism and liberal tradition, synthesized in the metaphor that gives it the nickname 'Lion of the North'". (HORA, 2015, p. 192).

Besides the regional reality, within the continental dimensions of Brazil, the period in which Tobias Barreto lived was marked by the abolitionist struggle, by the Paraguayan War, by the modernization of the country with the Baron of Mauá's railroads, by the cultural ebullience in the arts, literature, theater and also in Law, which culminated in the Proclamation of the Republic, coincidentally in the year of his death.

As said, education was dominated by the Catholic Church, both ideologically and as the owner of the schools, seminaries, and educational institutions that existed in the 19th century. Moreover, "throughout the colonial period, only ideas coming from Portugal reached Brazil, as the other foreign influences were always filtered by the Portuguese culture" (ADEODATO, 2015, p. 30).

In this sense, what predominated in legal education was the natural law of St. Thomas Aquinas and St. Augustine, being scholasticism the main method (HORA, 2015, p. 192).

Notwithstanding the strong presence of the Lusitanian vision, it is also worth noting the predominance of French and English thought in philosophy and law. To exemplify, it is interesting that, with the advent of the Constitution of the Empire in 1824, there was the birth of a constitutionalism, forged "not only with the importation of Portuguese and French works, but also with the production of Brazilian publicists of Coimbra formation" (PENNA; ENGELMANN, 2017, p. 187).

Another factor that contributed to the massive diffusion of European thought in this period was the presence of French publishers in Brazil in the 19th century, such as: De Plancher, Villeuneve, Laemmert, Garnier, Brigueit-Granier, Lombaerts, Louis Mongie, Casa Garraux (PENNA; ENGELMANN, 2017, p. 192).

It was a time when positivist reason, determinism and racial theories, based mainly on the evolutionist ideas of Auguste Comte and Herbert Spencer, meant that social phenomena were explained within naturalistic dimensions (BARBOSA, 2012, p. 49).

In this sense, it is worth clarifying the importance of the Frenchman Auguste Comte (1758-1857), whose main work is the "Course of Positive Philosophy", which comprises six volumes published from 1830 onwards and is considered the founder of positivism. The Comtean system was structured around three basic themes: the philosophy of history, science based on positive philosophy, and sociology. For the philosophy of history, all sciences and the human spirit develop in three stages: the theological, metaphysical and positive.

For Comte, in relation to positive thinking, there were laws governing observable phenomena and that these were immutable. In other words, just as in physics or chemistry, psychological phenomena, for example, were governed by unchanging relations. In this way, the causes of phenomena were not taken into consideration and there was a strong presence of the idea of predictability, the motto of positivism being "see to predict". Words such as certainty, reality, indubitable, determinate and useful translate well the positivist ideals.

It is important to note Comte's concept of sociology, which was very broad. It encompassed part of psychology, ethics, political economy and philosophy of history. In his theory, the author differentiated social statics and dynamics: the first is composed of the constant conditions of society and would be related to order, while the second would be related to laws and uninterrupted development, whose principle was progress (GIOANNOTTI, 1978, p. VIII-XI).

It is impossible not to mention how important these ideas were for the formation of the Brazilian Republic, proclaimed in 1889, leading these words to be printed on the national flag.

In a comparative study on positivism in Brazil and Mexico, Szabo and Horváth (2005, p. 12) discuss how this philosophical trend was striking in the third part of the 19th century in Latin America. They state that, among Brazilian political groups, the conservatives were supporters of order, aiming to maintain the Brazilian geographical unity.

At that time, the positivists believed that it was necessary to put an end to anarchy and political conflicts, while maintaining order and interest in progress, which would be the basis for gradual industrial development. In this new stage, it would be the scientists who would help direct the State, which should be strong and even dictatorial to maintain order. Harmony and evolutionary development would put an end to revolutions. In this way, the three-state theory was accepted in both countries. They even believed that society would support the need to move to the positive state and, therefore, justified the political prominence of the positivists (SZABO e HORVÁTH, 2005, p. 13).

Thus, positivism was constituted by "doctrines and perspectives that were based on the assumption that the cultural nature of phenomena was subject to certain types of determinisms and imprisoned to involuntary dimensions" (BARBOSA, 2012, p. 52).



Another philosopher who marked the thinkers of the time was the Englishman Herbert Spencer (1820-1903), who was also a biologist and anthropologist. Inspired by the 1859 work "The Origin of Species", he used Charles Darwin's theory of evolution to explain human societies, constituting what became known as "social Darwinism".

For Marilena Chauí (2018, p. 297), Spencer took the biological theory to the place of the philosophical explanation about the essence of society. In this way, he transformed a scientific theory into an evolutionist ideology, because he applied in a generic way, to the whole society, results from a specific area of knowledge. Moreover, for the philosopher, Spencer used data related to natural facts in the field of social facts, putting nature on an equal footing with society. This fact led to the creation of the evolutionist ideology and, with it, evolutionism became a theory of history and a scientific mythology of human progress.

It is important to clarify that in the criminal sphere, the presence of positivism, evolutionism, and determinism was also remarkable in this period. The penal positivism, in counterpoint to the Classical School of Francesco Carrara, started in the middle of the 19th century and had as its main exponent Cesare Lombroso with "L'uomo Delinquente".

This work, marked by criminal anthropology, was later updated with a sociological-positivist bias, with the criminal sociology of authors such as Enrico Ferri and Raffaele Garófalo (SANTOS, 2014, p. 7).

As can be noted, the interference of other sciences in the legal sphere was another important point of the thinking in vogue. Criminal positivism itself, in its early days, had a strong biologist character, only taking sociological paths later. Medicine and psychiatry influenced the legal doctrines of the time, with a large participation of doctors in the reality of Criminal Justice. Thus, the doctrines of a medical-naturalistic nature occupied a relevant role in the criminal sciences of the 19th century.

For positivism, the criminal was an individual with an innate predisposition to delinquency, since criminality was an atavistic issue, that is, an inheritance of behavioral, psychological and intellectual characteristics. Thus, it was the dominant understanding that the subject was born with a distorted human nature, thus "nothing would be more natural than to defend the punitive control for all those who were naturally delinquent, due to the serious danger to society". (SANTOS, 2014, p. 9).

For this reason, the criminal imputability of minor offenders was also explained with biological and deterministic bases. With this, there was an increase in the severity of the penalties imposed on children and adolescents at the time, and an expansion of punitive control.

Therefore, the selection of the fit and normal could not be made from some social institutions, such as asylums for the mentally ill, the sick, and laws to aid the indigenous (BARBOSA, 2012, p. 56).

Worthy of note is also the issue of the dissymmetry between the genders, considering that it was also based on the argumentation of deterministic and biologically based background. Going back to the issue of female studies and the fight waged by Tobias Barreto in favor of female studies, facing the arguments of the physician Dr. Malaquias, it is important to highlight that "Deputy Malaquias intended to demonstrate the inferiority of women and attest their perpetual dependence on men, especially by imputing to women the condition of unfit for serious studies. All this inscribed, as he supposed, in the female brain itself (BARBOSA, 2012, p. 52-53).

3. TOBIAS BARRETO AND THE CRIMINAL IMPUTABILITY OF MINOR OFFENDERS IN " MENORES E LOUCOS EM DIREITO CRIMINAL" (MINORS AND MADMEN IN CRIMINAL LAW)

The first edition of "Menores e Loucos em Direito Criminal" is from 1884, but the second one, which is the one used here, is from 1886 and contains the appendix "Fundamento do Direito de Punir" (Foundation of the Right to Punish). This addition refers to the dissertation Tobias presented at the time of his competitive examination for professor at the Recife Law School. In the initial warning the Typographia Central already highlights that the appendix was "the first cry for the reform of our old juridical intuition, putting it in accordance with contemporary philosophy in what it has of more elevated."

The book deals with the analysis of art. 10 of the Criminal Code of 1830, elaborated in attention to the Constitution of the Empire of 1824, which in art. 179, inc. XVIII, gave the command: "A Civil, and Criminal Code will be organized as soon as possible, founded on the solid bases of Justice, and Equity".

Thus, on December 16, 1830, D. Pedro, by the Grace of God, sanctioned the Criminal Code of the Empire of Brazil. Article 10¹, which is the subject discussed here, also states that criminals shall not be tried: those under fourteen years of age; the insane of all kinds, unless they have moments of

¹ Art. 10. Likewise, criminals shall not be tried: 1º Those under fourteen years of age. 2º The insane of any kind, unless they have lucid intervals, and commit the crime. 3º Those who commit crimes violated by force, or irresistible fear. 4º Those who commit crimes casually in the exercise, or practice of any lawful act, done with ordinary intention.

lucidity and commit the crime; those who commit a crime violated by irresistible force or fear and, finally, those who commit crimes casually in the exercise of a lawful act. This device remained in effect until 1891, when the Penal Code of 1890, the first of the republicans (ALENCAR, 2003, P. XVIII).

The work is divided in fourteen chapters, besides the introduction, and the author faces, well in his style, relevant issues for sociology and philosophy of law, going far beyond the issues of criminal law. He distances natural rights from social science, deals with social inequality and its relation to criminal law enforcement, defends civil equality between men and women, defends the study of psychiatry for forensic purposes, and makes blunt criticism of Lombroso. For the purposes of thematic delimitation, what is studied here is that which refers to the criminal minority.

Answering the question about the relevance of natural and original rights in social science studies, already in the introduction, the author tries to vehemently reject them. In this way, he demarcates the point from which his thesis starts: the non-existence of natural law. Adopting the concept of law as a social construction and not as something that fell from the sky, he defends man as a historical being in development.

Based on R. von Jhering, he explains that universal law would be like a universal prescription to all patients (MENEZES, 2003, X).

Here it is necessary to literally transcribe the author's words, as a way of presenting the demarcation of his whole idea:

Since the idea of law included the idea of struggle, since law appears to us no longer as a gift from heaven, but as a result of combat, as a conquest, the intuition of a natural right fell to the ground. As well as the arts, as well as the sciences, law is a product of human culture; outside this, in whatever degree, no law, no discipline of social forces. The so-called natural and original rights, such as the right to life, to liberty, and a few others, never existed outside society; it was society that instituted and consecrated them. It seems absurd, I know, to express myself this way; but it is not so. The right that was very well defined by the illustrious R. von Jhering as a complex of existential conditions of society, ensured by a public power, the right, I repeat, was born the day society itself was born (MENEZES, 2003, XI) (free translation)

Based on this concept of law as a social construction that evolves with time, at the same pace that society changes, Tobias Barreto constructs his criticism to the criminal legislation under study.

About the Criminal Code as a whole, the author starts by criticizing the Brazilian legislator for making use of what he calls "poor man's psychology", which would also be practiced in other countries, that would consist in copying the institutes without questioning the weight and legitimacy (MENEZES, 2003, p. 6).

Regarding the theory of imputation, he puts as an empirical fact the statement that when the subject reaches a certain age, legally established, having acquired the necessary maturity and capacity to understand the legal consequences of his actions, there can be criminal liability. From this, he lists the fundamental conditions for criminal imputation: knowledge of the illegality and the agent's power to deliberate on the action or omission (MENEZES, 2003, p. 7).

In addition, he uses the concept of imputation by the German jurist Zachariae: "to impute is to judge the author of a certain fact, i. e., to judge him as the cause of a certain effect, according to the laws of freedom" (BARRETO, 2003, p. 8). One can notice in the concept of imputation chosen by Tobias Barreto, besides the influence of Germanic authors, the absence of any citation related to the will of God, the possibility of the existence of supernatural, spiritual or metaphysical influences on the individual's power to act. The very concept is based on the laws of freedom of choice in acting within the limits of the law.

Interesting definition of Law strongly influenced by Darwinian theories: "law is the discipline of social forces, the discipline of legal selection in the struggle for existence". And continues based on monism and modern science: "the process of adapting human actions to public order, to the welfare of the political community, to the general development of society" (MENEZES, 2003, p. 11). It is from this definition that Tobias sees the meaning of the application of punishment: the individual's need to adapt freely to the demands of social dynamics.

For the author, to be considered criminal the individual must pass through four stages of consciousness, namely: consciousness of self, of the external world, of duty and of right. For him, those of tender age and who have not attained sufficient development are fitted into the absence of conscience of duty and, in some moments, absence of the conscience of right.

After criticizing the fact that the Criminal Code has gathered in a single article the various types of criminal irresponsibility, the author goes on to analyze the situation of criminal liability of those under 14 (fourteen) years of age.

In relation to the provisions of art. 13, which embraces the theory of discernment, the author disagrees with its application. The cited article affirmed that, if it was proven that the minors had discernment when committing the crime, they would be taken into correctional facilities, for as long as the judge determined, with a limit of seventeen years of age. For the author, this exception could open space "to much abuse and give rise to more than one painful spectacle". (MENEZES, 2003, p. 14).

Having overcome this issue, the author goes on to discuss the need to determine a certain age from which it is possible to apply the imposed penalty. For Tobias, despite being present in other criminal legislation around the world, the legal establishment of an age for criminal imputation was not a consensus among jurists of the time. With this, he recognizes the relevance of the argument of those who affirm the impossibility of fixing an age, considering the particularities existing in the development of each individual. Nevertheless, he takes a contrary position.

For Tobias Barreto, it would be worse to leave the definition of the existence of childish bad faith to the judges (whom he adjectivates as "ignorant and capricious spirits") than those problems caused by the delimitation of the age of majority in criminal matters. For him, it would be more just to let a junior high school student that already makes "his little verses" go unpunished "than to expose himself to the danger of seeing stupid and wicked judges condemn a ten-year-old child, that may have made an art, according to the family phrase, and that only to give way to a vendetta" (MENEZES, 2003, p. 15).

He recognizes the possibility of a serious case being covered up by the lack of responsibility, as well as the risk of there being people over fourteen years of age who would need this protection being left unprotected, but, even so, he is in favor of this measure.

He points out that in a country the size of Brazil, a penal age should be adopted in which all provinces, with different degrees of development, could be covered. He considers that the great distances in Brazil, from the coast to the backlands, the climatic, social and environmental differences would influence the psychological development of individuals.

In view of this, he criticizes the age chosen by the legislator, pointing out the age of 16 (sixteen) as the most salutary. In concluding this issue, he highlights the inequality existing between the working boy on a farm and the studied youngsters in the city, which could lead to different interpretations of the same situation:

a poor little boy of the same age, whose greatest degree of education consists in stretching out his hand and asking for blessing from all the elders, especially from the vicar of the parish and from the colonel who owns the land where his father grows the manioc, if by chance he perpetrates a crime of the same nature, if for example he kills with a knife to remove thorns the rich young man of the big house, whom he found kissing his unmarried sister, whether or not he has discernment, he will be judged as a criminal! (MENEZES, 2003, p. 17)

Another issue that intrigued Barreto and that he chose to deal with in this part of his work is the mismatch between the civil and criminal capacity of women. How would it be possible for a woman to be incapable of managing her life, to study, to own property, to participate in politics and, in a contradictory way, to be imprisoned, be capable of understanding the illegality of her acts?

Barreto exposes that, for those who believe in the dogma of women's physical and psychic difference, to the point of exempting them from certain rights, it would be the "apex of inconsequence and injustice" not to recognize this difference also in the criminal sphere (MENEZES, 2003, p. 27).

Despite this, Tobias does not defend that women should not be criminally liable; on the contrary, he highlights the need for women's equality in the civil sphere:

Whatever the reason may be, the truth is that our country, as well as all other countries, whether cultured or semi-cultured, still maintain almost on the same footing, where the ancient civilization left it, the civil and political inequality of women in relation to men. This is not the proper place to raise new protests against this anomaly, which has culminated in the absurdity of denying women even the right to education, and in which, therefore, modern society, in its majority, is far behind the medieval church (MENEZES, 2003, p. 29).

Finally, he insists that the legal measure of female capacity must be one, avoiding that on the one hand the woman finds herself looking like a child and on the other like a man.

4. CONCLUSION: CULTURE AS ANTIDOTE.

The study of the history of ideas seeks to find in the context of the time when a certain text was written not only a basis for its interpretation, but an understanding of the author's intention. In the field of political discussions, the figure of Quentin Skinner, English historian of the Cambridge School, stands out.

For Skinner, it would be necessary to take into "consideration the events and the debates with the political questions formulated in his own time by other thinkers. Thus, the text assumes the dimension of a conscious response, a dimension of a linguistic act, which reveals its political meaning when focused in contrast with its own epoch" (LOPES, 2004, p. 85-86).

In this sense, to understand a text from the past it is important to confront it with the historical time in which it was produced, seeking information about the author's social position, what was the role of religion in his life, his political opinions and the economic factors in which he was inserted, for example. This would be a scope, a framework to unveil the meaning of his idea when writing a certain text (SKINNER, 1969, p. 3).



In this study, this assumption was adopted for the interpretation and understanding of Tobias Barreto's ideas, understanding that the text, autonomously, would not provide the key for the understanding of what the author wanted to say when he wrote "Menores e Loucos em Direito Penal".

It is observed that the rhetorical view coheres with this understanding, as it accepts that ideals follow the events of the time they belong to, considering that "they are influenced by those events of the historical environment (material rhetoric), but also return to it to modify it (strategic rhetoric)" (ADEODATO, 2015, p. 34).

Tobias Barreto's originality in interpreting the art. 10 of the Criminal Code of the Empire was investigated here in counterpoint with the most influential thinkers of his time.

Tobias Barreto did not believe in determinism, he clearly stated that the individual, upon reaching a certain age, which would be imposed by law, would already be able to decide whether to act according to or against the law. In this way, he defended free will, the existence of freedom was "a postulate of social order". (MENEZES, 2003, p. 27).

Contrary to the naturalistic theories of crime, because of the strong influence of Jhering, Tobias Barreto believed that the human being was a product of the culture in which he was inserted. For this reason, he demonstrates in the work under analysis that the behavior of the "matutinho" (little boy) was different from that expected from the literate young man of the city. He recognized the existence of the great Brazilian backlands and that this was a determining factor for the production of an inequality in the stages of human development.

Tobias Barreto used the theme of penal imputability of the minor offender to expose an enormous contradiction in the naturalist theories: the discrepancy and incoherence in the legal and social treatment given to the civil capacity and the penal capacity of women. He thus exposed one of the weak points of the determinist doctrine: he demonstrated that the human being is a cultural being.

In face of this, he defended that the main difference between men and women of the time was in the fact that men were given the right to study, and women were not. This issue was fundamental to Tobias Barreto. For the author, the prohibition of access to education for women was the reason why many women were more immature than the men of the time. On the other hand, evolutionists and supporters of naturalist theories understood that women's brains were less developed than those of men.

For all this it is possible to realize that in Tobias Barreto culture was understood as something that was built in an artificial way and was "used in the combat against the bad weather imposed on the human condition, there emerges the possibility of identification in the universe of social relations, the key to understanding this inequality". (BARBOSA, 2012, p. 53)

In Tobias Barreto it is possible to notice that, against evolutionism and determinism, the author develops the idea of culture as an antidote against the Brazilian ills of the 19th century: against the tyranny of the Church, against illiteracy and poverty, against the powerful slavocrats, against the Brazilian social structure that produced inequalities and exclusion.

The author was not on the side of those who defended that enslaved people had no soul; on the contrary, he believed in free labor and that the way wealth was produced depended on the choice of the powerful. He understood that delinquency was a cultural product, arising from extreme poverty, from the lack of education of the population, from the imposition of the power of the plantation owners and farmers on the great mass of poor and illiterate population. He refuted, with this, the thought that tried to prove, based on biology, that there were human beings predestined to crime, in which there was the understanding that some were already born prone to crime. For Tobias, the Law and justice were not in God's hands, they were in the choices produced as an unfolding of the culture of a time.

Finally, besides Tobias Barreto's originality, the reverberation of his ideas over time should also be highlighted. Notwithstanding the revolution created by the thinkers of the Recife School in legal education as mentioned above, it is important to highlight that, for the reasons pointed out above, the positivism practiced by these thinkers was considered culturalist and differed greatly from the orthodox positivism disseminated in the Southeast of the country (SANTOS, 2014, p. 3).

It is thus that until the very recent days, thinkers like Miguel Reale and Antônio Paim (PAIM, 1995, p. 31 ff.), among others, present themselves as heirs of culturalism and try to expand the bases set by Tobias Barreto and his most immediate disciples.

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