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Lehrbuch des deutschen Strafrechts (1899):
a History of Cultural Translation between
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The Brazilian Translation of Franz von Liszt's *Lehrbuch des deutschen Strafrechts* (1899): a History of Cultural Translation between Brazil and Germany*

Nathália Nogueira Espíndola de Sena**

Ricardo Sontag***

1. Introduction: an editorial event

The book hadn't even come out of the press from Briguier publishing company. Months before the arrival of José Hygino's translation of the *Lehrbuch des deutschen Strafrechts* (*Tratado de direito penal alemão*) by Franz von Liszt at the bookstores, the *Revista de Jurisprudência* had already published some excerpts from the work. The same journal (in the fifth volume of 1899) "offered" the preface of the translator in first-hand to its readers. The magazine *Minas Geraes: Organ Oficial dos Poderes do Estado*, published in the City of Minas (now Belo Horizonte), in the edition of 14th of April 1899, had announced that "the next installment of the *Revista de Jurisprudência* will publish dr. José Hygino's preface to his translation of Franz von Liszt's book, which has produced so much success in the legal world" (p. 6).

Briguier was not only a publisher, but also a bookstore. The owner was a French immigrant, Ferdinand Briguier, who had been one of the assistants to the French publishing house and bookstore Garnier,¹ one of the most famous in Brazil in the 19th century². French

* This research was carried out within the framework of the following projects: *L'influence de la révolte positiviste sur le droit pénal au tournant des XIXe et XXe siècles: un état de la discussion en Europe et en Amérique latine* (Groupe Européen de Recherche sur les Normativités); Programa Institucional de Auxílio à Pesquisa de Docentes Recém-Contratados da Universidade Federal de Minas Gerais (edital 5/2016); *História do Direito Penal Brasileiro em Perspectiva Comparada entre os Séculos XIX e XX* (FAPEMIG, edital demanda universal 1/2017); and *Las influencias extranjeras en la Codificación penal española: su concreto alcance en la Parte Especial de los Códigos decimonónicos* (ref. DER2016- 78388-P), financed by the Spanish Ministerio de Economía y Competitividad. The authors would like to thank Alba Salles for her contribution in the first steps of this research and professors Mariana de Moraes Silveira and Diego Nunes for their helpful suggestions.

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¹ HALLEWELL (2012) 277.

² HALLEWELL (2012) 219-250.

publishers and bookstores have been very important in the Brazilian market since the first half of the 19th century.³ Briguier was established in 1893⁴ and soon became famous as an international bookstore.⁵ Historiography has not yet detailed either Briguier's editorial style or its commercial *modus operandi*, then it is difficult to determine the weight of legal titles (and, therefore, in part, of *Lehrbuch*'s translation) for the publishing house. It is possible to affirm, however, that part of the incomes from this type of book came from the sale to public institutions, such as courts.⁶

Until the end of the 1890s, the situation of the book market in Brazil was not one of the best.⁷ But in 1899 Briguier gave clear signs of health when reporting the reform⁸ of its imposing building⁹ in the famous Ouvidor Street in Rio de Janeiro, which is one of the most traditional streets of the ancient capital since the nineteenth century, famous for being a meeting place for intellectuals also because of its numerous bookstores.

José Hygino translated a German book. Nowadays, it is extremely common in the daily life of Brazilian criminal law scholars to make use of translations of criminal law books from Germany. Indeed, many criminal law scholars would probably say: "there will be a possibility to reach the peak of the debate in the area if only there is a dialogue with the German legal-criminal culture". Very few jurists nowadays would deny the importance, at least, of the dialogue with Germany in criminal matters. Beyond this assertion that we do not want to try to refute, it is quite true that it is possible to make the history of the construction of the Germany's image as a kind of "mecca" of criminal law. At the end of the 19th century, an Italian *connoisseur* like João Vieira de Araújo considered the German criminal law inferior to the Italian one.¹⁰ In the opposite pole, about the same time, Tobias Barretto took the German authors much more seriously. Barretto despised Francesco Carrara as an unhelpful metaphysician. Cesare Lombroso would have had some interest, but the alleged "novelties" of the Italian *scuola positiva* did not excite our germanophile.¹¹ Araújo and Barretto were, in fact, professors of the Law School of Recife and never appreciated each other.¹² In the first half of

³ HALLEWELL (2012) 219-221.

⁴ HALLEWELL (2012) 277.

⁵ HALLEWELL (2012) 297.

⁶ Several official notes in newspapers between 1893 and 1899 reported payment authorisations for Briguier because of the supply of books to courts. Cf., for example, the note published within *O Fluminense* in the 8th of June 1898 (p. 2).

⁷ HALLEWELL (2012) 277-285.

⁸ The *Jornal do Commercio* of the 30th of November 1899 published the announcement regarding the "great transformation" of Briguier's building (p. 10). The famous writer João do Rio, in an article published in the 6th of December 1903 at the *Jornal do Recife*, stated that all great booksellers that he had visited in Rio de Janeiro "*têm instalações magníficas, vastos edifícios modernos e pomposos. A última casa a reformar-se foi a dos srs. Briguier & C.*" (DO RIO (1903) 1).

⁹ The building was demolished in the 1950s (HALLEWELL (2012) 297).

¹⁰ ARAÚJO (1884) VI.

¹¹ About Carrara in Tobias Barretto's thought, cf. VAREJÃO (2005) 423 and SONTAG (2014a) 65-67. About Barretto's germanophilia, cf. LOSANO (2000).

¹² It is very clear in a letter written by Barretto to his friend Sylvio Romero in the 2nd of January 1888, p. 92.

the twentieth century, German criminal law literature became an imperative reference point for the Brazilian criminal law scholars. Even when disagreeing, it was not possible anymore to ignore what was being written about criminal law in Germany.

The José Hygino's translation is the starting point of this history. In the 1890s, translations of foreign criminal law texts into Brazilian Portuguese were rare. In addition, the Brazilian translation of the *Lehrbuch* is also the pioneer of all the languages for which such book would be translated.¹³ However, the cultural enterprise of José Hygino has not yet been the subject of a specific study, neither by the Brazilian legal historiography, nor by the foreigner.

In 1899, when the Brazilian translation of the *Lehrbuch* was published, Franz von Liszt was forty-eight years old and was an important jurist – who was moving from the Law School of Halle to that of the capital, Berlin – of significant international projection. On the front page of the translation, he was introduced as a professor at Halle. Franz von Liszt was one of the founders, in 1888, of the *Internationale Kriminalistische Vereinigung* (International Union of Criminal Law) which, in less than a year, regrouped more than 200 members and held its first international congress in Brussels.¹⁴ The Union lasted 25 years and was interrupted by the outbreak of the 1st World War. During this period, 12 international congresses were held.¹⁵ Participation in these events was an important part of the development of a scientific career.

Observing the position taken by von Liszt during such congresses, one realizes that he intended to have a redefinition of the relationship between the individuals and the society. The priority of individual liberty that characterized “classical” nineteenth-century liberalism and liberal criminal reforms of the 19th century would be transformed in favor of a greater consideration of the interests of society as a whole,¹⁶ which is also evident in the criminal policy guidelines of the *Lerhbuch*.¹⁷

Our translator, Hygino, is of the same generation as Franz von Liszt – he was fifty-two years old when *Lehrbuch's* translation was published – and he became an important character in the Brazilian legal world not only because he taught at one of the two legal faculties of the Empire (the one in Recife), but also because of the political world, having held several important positions (among them, Minister of Justice and Judge of the Federal Supreme Court). In addition of being a jurist, Hygino was also a historian of the Dutch occupation phase in Pernambuco in the colonial period. Unlike some cases of translation of German texts through other translations (from French, for example), Hygino knew the German language

¹³ The French and the Spanish translations were published more than ten years after the Brazilian Portuguese one: 1911 and 1913 (first and second volume of the French one); 1914, 1916 and 1917 (the three volumes of the Spanish one).

¹⁴ STOLLEIS (1995) 382.

¹⁵ WETZELL (2016) 214.

¹⁶ WETZELL (2016) 220.

¹⁷ VORBAUM (2014) 118. It does not mean that there were not several commitments with the precedent criminal law tradition within Franz von Liszt works. A. M. Hespanha even said, possibly exaggerating, that the *Lehrbuch* “*representa um padrão da dogmática criminal típica do Estado de Direito liberal oitocentista*” (HESPANHA [2011] 370). For an overview about Franz von Liszt writings, cf. FRISCH (2017).

(as well as Dutch). At the time of *Lehrbuch*'s translation, he had already retired from his duties as a professor in Recife and as a judge of the Federal Supreme Court.

Ascertaining Hygino's theoretical affiliation in criminal law is even more difficult compared to Franz von Liszt because he has published just some few books and articles, even though less about law and on criminal law.¹⁸ In any case, what he appreciated in von Liszt was a kind of "equidistance" in relation to those who stood at the two opposing poles of criminal law at the end of the nineteenth century: the *scuola classica* and the *scuola positiva*. For Hygino, von Liszt would be a representative of the *terza scuola*¹⁹ – but we will have to put on hold the discussion on the correction of the use of such Italian categories to qualify the work of a German author.

Our focus is to understand historically the translation itself, the book published by Briquet in 1899 as a cultural good. The vicissitudes of a translation, from this point of view, crosses not only the alleged transpositions between words and phrases from German to Portuguese, but the book as a whole. Beyond the aforementioned preface, José Hygino also added to the original text an ample apparatus of notes. Could we, therefore, speak of cultural translation?²⁰ Could we say, then, that Hygino is an intellectual mediator? In addition, we intend to contextualize the book in the universe of the eighteenth-century Brazilian translations of legal texts and the international dialogues of Brazilian criminal law science, which are the points by which we will begin our journey.

2. *The translation of a German Lehrbuch into nineteenth-century Brazilian criminal law literature*

When we hear that a book is a translation, we are reminded of the image of an object with which we are accustomed. However, the cultural good materialized by a translation can vary widely. To stay only in legal historiography, Filippo Ranieri, in the early 1970s, had already tried to identify typologies of translations of legal works in Europe at the nineteenth-century, including the interventions of translators who, at times, modified the original text.²¹

Coming back to Brazil in the nineteenth-century, let's examine some examples.

Airton Ribeiro da Silva Júnior's thesis on the history of the teaching of international law in Brazil has identified that, since the 1850s, there were textbooks about this issue signed by Brazilian jurists. However, they were, actually, translations of the German jurist Johann Ludwig Klüber from the French version of his book on *Droit des gens moderne de l'Europe*. The

¹⁸ What was not strange to the pattern of nineteenth-century Brazilian legal science (ADORNO 1988; FONSECA 2006).

¹⁹ HYGINO (1899) XXXIII.

²⁰ For a legal historian analysis of translations beyond the concepts of reception and transplant, cf. VANO (2016).

²¹ RANIERI (1977).

Brazilian jurist Pedro Albuquerque was the first to translate it, without giving due credit to the German jurist.²² Albuquerque's translation, to make the book more accessible to the Brazilian public, suppressed all references to the foreign practice from the original text. A kind of double decontextualization: by suppressing some information that specifically referred to the non-Brazilian context of the original text and by suppressing the reference to the authorship of the translated text. Of course, the passage from one cultural good to another always implies some degree of "decontextualization". Silva Junior's research very well reported particularly radical cases of such a process.

Brazil did not have its own civil code until 1916. Therefore, several sources that went back to the period of Portuguese colonization continued to be in force. It was not by chance that Portuguese civil law books circulated in Brazil at the nineteenth-century for their practical utility. Many of them, however, were published by Brazilian publishers and edited by Brazilian jurists. On the one hand, the translation of Portuguese language of Portugal to that of Brazil's was unnecessary;²³ on the other hand, translation in a broad sense, that is, mediation between cultures, continued to be useful and necessary. The legal context, once again, helps us to understand what was at stake. Besides the old Portuguese sources and after independence in the 1820s, the new Brazilian state legislated on private law (even though such legislation did not form a code throughout the 19th century) and the jurisprudence of the Brazilian courts sometimes adopted different interpretations in comparison with the Portuguese courts, even when interpreting the same legal source. This is what encouraged Brazilian lawyers and publishers to publish Portuguese private law texts "accommodated to the Brazilian legal practice" (*acomodadas ao fôro do Brasil*).²⁴ This could mean: i) as the same as we have already seen in the case of international law textbooks, the deletion of excerpts from the original (for example, the exclusion of the chapter on noblemen [*fidalgos*], knights [*cavalleiros*] and plebeians [*plebeos*] from Paschoal José de Mello Freire's *Instituições de direito civil lusitano*²⁵ because this division between people has been incompatible with the equality inscribed in the 1824 Brazilian constitution);²⁶ ii) to insert explanatory notes containing the specificities of Brazilian law, which is the strategy used, also, by José Hygino. By the way, our translator came into contact with these private law books. The aforementioned Mello Freire's book, for example, was quoted thirty times in Hygino's notes.

Finally, it is necessary to highlight one of the very few German criminal books translated into Brazilian Portuguese in the nineteenth century: the Treaty of proof in criminal matters, or comparative exposition of the principles of evidence in criminal matters, etc., and of their

²² SILVA JÚNIOR (2017) 127-129.

²³ We did not find differences regarding the language itself within the books that we analysed.

²⁴ Cf., for example, FREIRE (1851); TELLES (1865 and 1880); SOUSA (1879); PINTO (1881).

²⁵ His book, indeed, was "adapted" (*adaptado*) to the "institutions of our country" (*instituições da nossa cidade*) by the Brazilian jurist Lourenço Trigo Loureiro. About the nineteenth century Brazilian private law literature, cf. ROBERTO (2016).

²⁶ FREIRE (1851) 14. About the complicated issue of the nobility on nineteenth century Brazilian legal culture, cf. FONSECA (2018).

various applications in Germany, France, England, etc. (*Tratado da prova em materia criminal, ou, exposição comparada dos princípios da prova em matéria criminal, etc, de suas applicações diversas na Alemanha, França, Inglaterra, etc.*) by Carl Joseph Anton Mittermaier, which was translated by Alberto Antonio Soares. The first edition of this translation was published in 1871. In the “translator’s note” (*advertencia do traductor*), Soares laments that he has managed to insert only some few notes of his own and recalls that the notes of the French translator were kept, that is to say, the version consulted was probably French and not German. In the Brazilian legal culture of the nineteenth-century, the best-known foreign language was French, the diplomatic language of the time. In fact, as Soares explains, the translation was requested by a Brazilian bookseller because the French version was out of print, that is, until then Mittermaier’s book was read by Brazilians in French.²⁷ In the revised second edition of 1879, Soares increased the apparatus of notes. A new edition of Soares translation arrived in 1917 which puts “abreast of doctrines and accommodated by notes to the current legislation, the Brazilian legal practice [*foro brasileiro*], as well as to jurisprudence and praxis” by the famous Brazilian scholar Pontes de Miranda. The single page of Soares’s translator’s note does not compare with the various pages of Hygino’s preface, but the editorial structure of the *Lehrbuch* translation is not much different from that chosen for the translation of Mittermaier’s book since its first two editions: preservation of the original text and addition of separate translator’s notes. Mittermaier is quoted many times in José Hygino’s notes, therefore he knew the Soares’ translation.²⁸

Mittermaier’s book was only about a specific aspect of criminal procedure, whereby José Hygino’s translation – in addition to starting directly from the German text – concerns criminal law, the whole substantive criminal law. Thus, the route was opened for much broader dialogues between the Brazilian and the German criminal law literatures.

In another aspect, the type of book we are analysing was a novelty for the Brazilian legal literature of the nineteenth century. The main texts of criminal law in Brazilian Portuguese at that time were comments on the 1830 criminal code. In fact, the relatively early elaboration of a modern and unitary criminal code – unlike what happened, for example, in Italy²⁹ – stimulated the commentary genre.³⁰ Until the end of the nineteenth century, there were only some few monographic books. From the last decades of the nineteenth century, emerged articles in journals that sometimes seems like legal opinions on very specific application points of some legal norms, and sometimes lifted flights beyond the current legislation, with some variations between these two extremes. Sometimes articles were published in newspapers with wide circulation, that is, periodicals that were not specifically legal. We could also add the small doctoral thesis, which in no way resemble the current thesis, since they were short

²⁷ SOARES (1871) 2.

²⁸ Hygino mentioned not only the Brazilian translation of Mittermaier’s books, but also works written in German.

²⁹ About the delayed criminal unitary codification in Italy, that was completed only in 1889, cf. LACCHÈ (2014).

³⁰ About this issue, cf. SONTAG (2016) 23-96 and SONTAG (2016a) 49-52.

texts on pre-defined points that the bachelors submitted to the evaluation of a commission, which would give him the right to bear not only the bachelor's title, but also of the doctor's. If we do not wish to enter the vast world of jurisprudence and administrative literary production, criminal law literature is limited to the genres referred above. What we would like to emphasize is that the great absentee is the treaty (*tratado*) genre. In 1894, with some measure of anachronistic evaluation, the jurist Viveiros de Castro, who declared himself to be an adept of the *scuola positiva* (in a broad sense, not exclusively Italian), when looking at the previous Brazilian criminal law literature, did not find a great "classic" author to counter.³¹ So, in his view, it was like a great emptiness. Obviously, Castro's reading was biased by his objectives of affirming the "new school," but if we understand this "void" as an absence of great treaties, it tells us something relevant. In Italy, the birthplace of the *scuola classica versus scuola positiva* categorization, is unthinkable that a scholar like Enrico Ferri should think in this way about the criminal law literature that preceded him. The shadow of the great *Programma del corso di diritto criminale* written by Francesco Carrara, which despite the title linked to teaching was still an enormous treaty, would not allow it. Not coincidentally, the term *scuola classica* was, in fact, ambiguous in the Ferrian discourse: in the most combative texts and in propaganda texts, the pejorative sense prevailed;³² in deeper texts, it is noticeable that the mention "classic" also involved a form of respect for something majestic, but whose historical time would remain encased in the past.³³ Before 1899, in the nineteenth-century Brazilian criminal law literature, there was nothing like Francesco Carrara's treatise.

Franz von Liszt's book, in fact, was called *Lehrbuch*, whose most accurate translation would be *manual*, a book intended for teaching, a handbook, a textbook. However, the German *Lehrbuch* was quite extensive and covered all matters of substantive criminal law.³⁴ And most of times it was not shallow. These features really justified the option for the word Treaty (*Tratado*) in the Brazilian version. In the 1940s, jurists like Nelson Hungria³⁵ and Aníbal Bruno³⁶ realized that José Hygino's translation also extended the list of literary genres available in Brazilian criminal law literature: for the first time, we had a treaty. We do not intend to subscribe to the apologetic tone of the speeches of Hungria and Bruno about José Hygino, however, behind the celebration, they identified something relevant: a shift in the history of Brazilian criminal law literature.³⁷

³¹ CASTRO (1894) 8-12.

³² Cf., for example, FERRI (1885).

³³ For this ambiguity, cf., for example, FERRI (1928) 26 36 39-40 64 66 414.

³⁴ FRANZ VON LISZT's endeavor began with didactic goals, but throughout the various editions of the book, it changed course (FRISCH [2017] 4).

³⁵ HUNGRIA (1940) 365.

³⁶ BRUNO (1942) 251.

³⁷ Certainly, the treaty genre is a historical construction also in Europe. A history intertwined with the central place that systematic ideas achieved in modern legal culture. For a synthesis on the history of the legal system idea, cf. CAPPELLINI (2010).

3. *The José Hygino's notes*

3.1 *Cultural translation and the translator's interventions*

Cultural bridges between Brazil and Germany. In the nineteenth-century Brazilian private law world, dialogues with the German legal culture were frequent, starting with the main Brazilian jurist of private law at the time, Teixeira de Freitas. In criminal law, the situation was different. The legal historian Rafael Mafei, for example, attempted to trace the presence of Feuerbach's important works among eighteenth-century Brazilian jurists and could not find it, although typically Feuerbachian themes were discussed in the Brazilian criminal law literature of that time, as they were fundamental themes for the construction of the modern criminal law.³⁸ More than Feuerbach's absence, Mafei's research showed the sparse dialogue with Germany in general. One of the first exceptions is the previously mentioned germanophile Tobias Barretto in the 1870s: an exception in a panorama – as has already been pointed out by the historiography – tendentially francophone.³⁹ Portuguese jurists were sometimes still read (apparently, much less than in the private law universe); some Italians, especially Cesare Beccaria (mainly in French translations) and Pellegrino Rossi (though Italian, his criminal law treaty was written in French). At the end of the 19th century, Italian criminal law jurists gained space, by being read directly in the original language or thanks to translations into Brazilian Portuguese that began to appear. It is the time of expansion of the so-called *scuola positiva*.⁴⁰

As we have already seen, Hygino seems to have used in his preface typical Italian categories to situate the works of Franz von Liszt – we call “typically Italian” to draw attention to the fact that the opposition between *scuola classica* and *scuola positiva* (and related categories as *terza scuola*) was born and developed because of a very specific clash⁴¹ and whose use for so many different legal cultures must be seen as problematic. However, analysing the whole book, Hygino turned his attention to German criminal law jurists, as expected.

It is interesting to detail a little more of this aspect, because we are still trying to contextualize the *Lehrbuch's* translation. The contexts of a text are not only sociological or political facts, but also other texts (which nevertheless have a dimension of facts, events, too). The relevant contexts for a text, among the potentially infinite facts that surrounds it, can be determined, first, by the indications of the text itself.⁴² And if we are concerned with the entanglements among legal cultures, for our purposes, the historical comprehension of José Hygino's translation demands the mapping of the texts of other jurists mentioned in their notes and in the

³⁸ MAFEI (2013).

³⁹ Cf. REALE (1959) 105-107; FREITAS (2002) 283; SONTAG (2015) 215-218.

⁴⁰ Cf. FREITAS (2002) and SONTAG (2015).

⁴¹ For a critique of these categories as historiographical tools (with an important proposal to move away from it), cf. SBRICCOLI (2009).

⁴² As a result, inside and outside the text are not so easily discernible. For a complexification of these relationships between text and context, cf. LACAPRA (1980) 247-248 and BURKE (2002).

preface. If we want, we could call them intertexts. From the point of view of the historical dynamics of a text, the determination of its intertexts is constitutive, unavoidable.⁴³

Before delving deeper into this aspect, we would like to return to the concept of translation. This way we can better measure the relevance of the translator's notes to the way we would like to analyse the Brazilian version of *Lehrbuch*.

In contemporary translation theory, to shed a text from one language to another is never a simple transposition.⁴⁴ What is at stake is always a kind of mediation between cultures.⁴⁵ Focusing only a linguistic aspect, Nilo Batista, in his article on the history of crime theory, gives us an example of this type of mediation in José Hygino's translation:

"José Hygino sought to adapt the Lisztian theoretical language to the Brazilian real language options. Was not the crime, according to article 7 of our Code, *violação imputável e culposa da lei penal*? So this violation of the law suggests that *das Verbrechen als rechtswidrige Handlung* must be translated as *violação imputável e culposa da lei penal* and *antijurídica* or *ilícita*), as well as *rechtswidrigkeit* for *ilegalidade* (and not *antijuridicidade* or *ilicitude*); in the same way, this *violação culposa* will suggest that *das Verbrechen als schuldhaft Handlung* must be translated as *o crime como ação culposa* (and not *culpável*), etc."⁴⁶

In this case, we are talking about two legal cultures that are part of the family of the civil law, that is, legalistic and codified. So, it is not a case of translation between radically different legal cultures. In the points emphasized by Batista, the difference that was in question involved the technical language of law. In legalistic cultures, such as those of the nineteenth century, the legislation of the state has a very important constitutive weight for legal language, although, the legislative language has not been able to exhaust the language of legal science. The legal difference embodied in the technical legislative language, in Batista's example, required the translator's mediation. In addition, the very choice of which works are worthy of translation indicates what one culture considers to be of interest in the other, as Peter Burke emphasized, which in itself is already an action.⁴⁷ The "influence" of the German criminal law literature on the Brazilian, therefore, is not a simple process of "diffusion" of the ideas of German jurists. It is also an effect of cultural choices in the Brazilian polo. So, perhaps, it is more precise to speak of intertwined legal cultures (and not "influences"), to avoid sender-centric perspectives.⁴⁸

These two aspects are enough for us to agree with the contemporary legal historiography that has been emphasizing that it is narrow to evaluate the relations between legal cultures in

⁴³ For a very interesting use of this category in legal history, cf. HESPANHA (1993).

⁴⁴ For a classical wording of this theory, cf. BENJAMIN (2011), although there are two points that make his approach very different from ours: a) his matter concerns pieces of art conceived as non-purely communicational works, whereas we are dealing with law embodied in communicational networks; b) he presupposes a "pure language" for which translator and original text aim at.

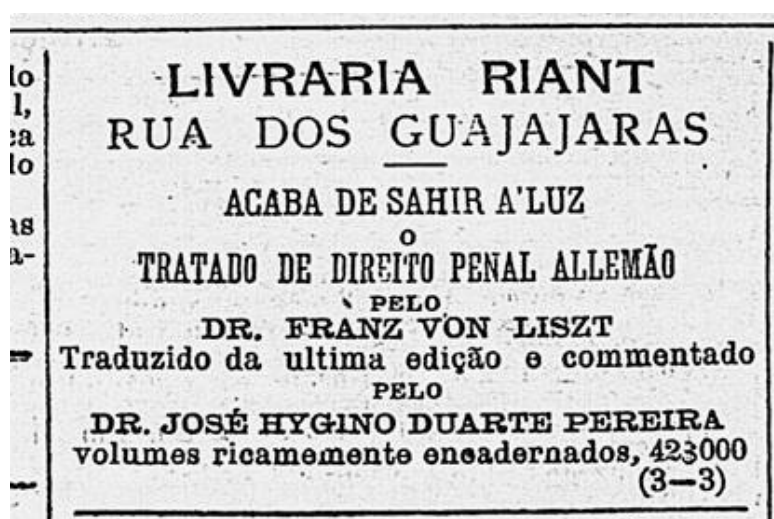
⁴⁵ Cf., for example, BURKE (2009, 2015).

⁴⁶ BATISTA (2004) 2.

⁴⁷ BURKE (2010) 71.

⁴⁸ For a criticism of the sender-centrism in legal history, cf. DUVE (2014) 58-59; FOLJANTY (2015); FLORES/MACHADO (2015).

a unidirectional way. But it is possible to go forward on that path. In the case of the book that we are analysing, the aforesaid mediation must be observed in the cultural good as a whole, that is, including the notes of the translator. It is not by chance that the notes of José Hygino were mentioned in the advertisements of the Treaty. Searching for the expression “*Tratado de direito penal allemão*” in the rich collection of newspapers and magazines of the Digital Library of the Brazilian *Biblioteca Nacional*, we found four advertisements of the book. They all made a point of recording the existence of translator notes. On the 10th of June 1899, the *Minas Geraes: órgão oficial dos poderes do Estado* reported that “the *Tratado de Direito Penal Allemão* by Dr. Franz von Liszt has just been published, translated from the last edition and commented by Dr. José Hygino Duarte Pereira, volumes richly bound” (p. 4).



Minas Geraes: Orgam Oficial dos Poderes do Estado, 10 de junho de 1899
(available at: <http://memoria.bn.br/docreader/291536/16424>)

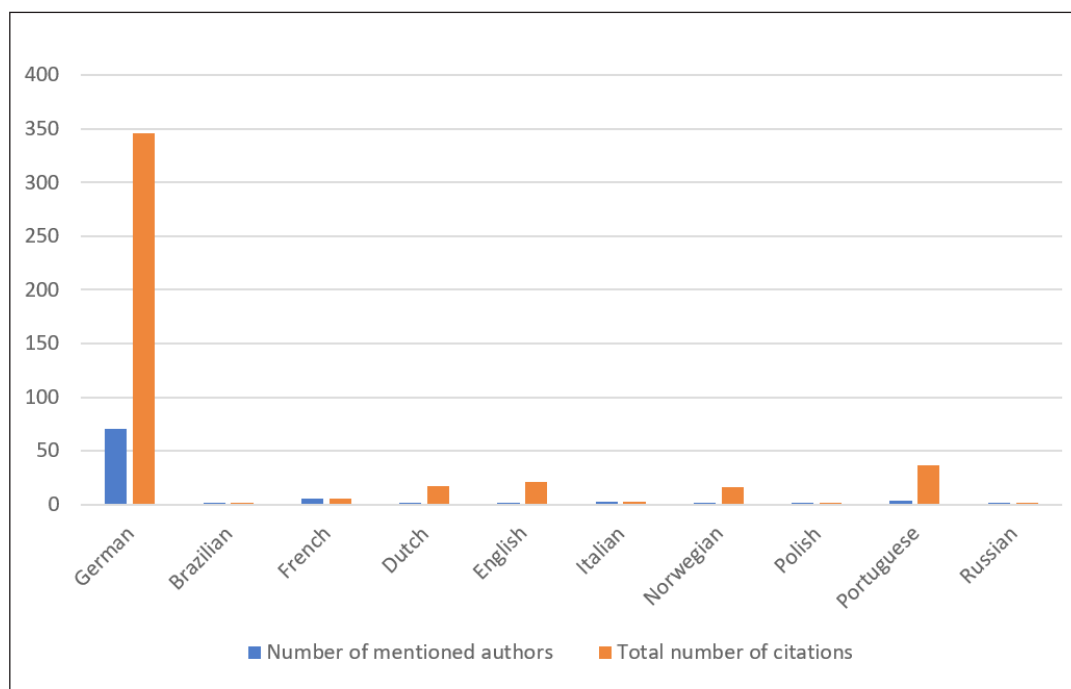
The City of Minas (now Belo Horizonte), a new and planned capital of the state of Minas Gerais, had been inaugurated in 1897. In 1898, the Law School of Minas Gerais (current Law School of the Federal University of Minas Gerais, of which the authors of this article are part) moved from the old capital, Ouro Preto, to the new one. Since 1897, the Court of Appeal of the State of Minas Gerais was already in the City of Minas. Naturally, it is possible to imagine that lawyers, for example, also began to settle in the vicinity of the court and the faculty, which were in the same region of the center of the city. The Riant bookstore, which sold the translation of the *Lehrbuch*, located on Guajajaras Street, was not far from these two circulation centers of potential buyers. In Rio de Janeiro, which was the federal capital at the time, the book was available, for example, in the famous Ouvidor Street, in Brigueit's own bookstore, as reported in the *Jornal do Commercio* at the 21st of October 1899 (p. 10).

But going back to our point, the notes, in fact, were important to promote the bridge between the Brazilian reader and the original German text. Of course, we can say that we have two juxtaposed texts (considered as knowledge), one by von Liszt and the other by Hygino, whose meanings are to some extent autonomous. From the point of view of the cultural good produced by the editorial project of the Briguiet publishing house, Hygino's notes mainly modified the meaning of the original object by transforming it into a bridge between the German and Brazilian legal culture.

As we have already pointed out, recent historiography, including legal history, has emphasized how reductionist it is to evaluate the relations between legal cultures in a unidirectional way, as if there was an – active – emitter and a – passive – receptor. In our case, the intertexts of the notes of Hygino are choices, actions, of the pole, in theory, recipient of the cultural relation that we are analysing.

3.2 *Hygino's intertexts*

Let us then deepen this constitutive aspect of the historical dynamics of José Hygino's notes, as well as his editorial project as a cultural translation. To do so, we have mapped all the references of the translator to authors other than von Liszt himself. As our point is relationships between different “national” legal cultures, we classified the references according to the nationality of the authors. Here are the results:



Graph 1: Authors quoted by José Hygino by nationality

To see exactly the numbers on the chart, let's look at the same data in the table below:

NATIONALITY	NUMBER OF MENTIONED AUTHORS	PERCENTAGE	TOTAL NUMBER OF CITATIONS	PERCENTAGE
GERMAN	71	78,02%	346	77,22%
BRAZILIAN	1	1,09%	1	0,22%
FRENCH	6	6,59%	6	1,33%
DUTCH	1	1,09%	17	3,79%
ENGLISH	2	2,19%	21	4,68%
FRENCH	3	3,29%	3	0,67%
NORWEGIAN	1	1,09%	16	3,57%
POLISH	1	1,09%	1	0,22%
PORTUGUESE	4	4,39%	37	8,25%
RUSSIAN	1	1,09%	1	0,22%
TOTAL	91	100%	448	100%

Table 1: Authors cited by José Hygino by nationality

In all the notes throughout the two volumes of the *Lehrbuch*, Hygino mentioned ninety-four scholars, in addition to von Liszt. Some of these authors were quoted only once (such as Clóvis Beviláqua, Cesare Lombroso and Cesare Beccaria), while others (such as Binding, Merkel and Olshausen) were mentioned on several occasions.

The first point that emerges clearly from the table above is the absolute predominance of German jurists, who account for almost 80% of all the mentions. The data is relevant because it indicates an unusual pattern in the nineteenth-century Brazilian criminal law literature, which prioritized dialogue with the French and Portuguese legal culture and, from the end of the nineteenth century, also with the Italian, as we have already seen. Even Brazilians are underrepresented, and it is quite interesting especially considering that the notes often dealt with Brazilian criminal legislation. Although Brazilian criminal legislation was frequently

present in the notes, the almost absence of Brazilian criminal doctrine reveals that it did not seem necessary for Hygino to resort to the theoretical framework formulated by the Brazilian doctrine. It should be noted, however, that a new penal code had been emanated in Brazil in 1890. Thus, in 1899, there was in fact no lengthy list of texts and commentaries on the new code that Hygino could avail. Moreover, in the context of the purely theoretical framework for the analysis of the legislation, the option for dialogue with respected foreign jurists, rather than seeking Brazilian jurists who wrote before the 1890 code, seemed better to him. The quality of much of the precedent Brazilian literature may have been questionable, but it is not for us to enter into this merit. So, this kind of gesture shows, in any case, how important it was to participate in an international debate. The French doctrine even continue to appear in second place in mentions (both in the number of authors quoted, and in the absolute amount of references), but at an enormous distance from the first placed Germans.⁴⁹

One detail worth noting is that, often, José Hygino merely referred to the same authors previously quoted by Franz von Liszt in the *Lehrbuch*. Thus, most likely, Hygino accessed some of the German authors through von Liszt himself.⁵⁰ In addition, considering the great number of quotations of the most diverse German authors, it is possible to raise the hypothesis that many of his quotations were indirect. Situations like that of the jurists Lilienthal and Eisenmann, seldom mentioned by Hygino and always with the same content of the quotations previously made about them by von Liszt, lead us to believe that the translator might not have directly accessed their texts. On the other hand, authors like Holzendorff, Olshausen, Binding, among others, were in fact widely studied by José Hygino, which is clearly perceived by the depth discussions on their ideas.

About Karl Binding, specifically, in-depth contact with his work is evident. Franz von Liszt cites Binding only by disagreeing with him, most likely because of the great academic clash between them.⁵¹ This is the case when von Liszt exposes and criticizes Binding's theory of norms,⁵² while Hygino emphasizes on several occasions the points, in which he agrees with Binding's view, or that it outstrips that of other authors.⁵³

Classifying – in a schematic but useful way for our purposes – Hygino's quotations according to his positioning on the presented idea, it is interesting to note how Binding and the Germans appear. Of the four hundred and forty-eight references, in four hundred and ten it is possible to affirm that it was an authoritative quotation, that is, that Hygino, in a certain

⁴⁹ Certainly, our accounting do not pretend to affirm all possible dialogues within Hygino's discourse production, because some of them could be invisible, even for our wider concept of quotation that included every single mention – despite the form – of another text or author. However, the enormous distance between German quotations and the other ones allows us to consider invisible dialogues marginal for our purposes.

⁵⁰ In this sense, we would say that von Liszt was – residually – a mediator between Hygino and German legal culture, even though it was not the sense of von Liszt's cultural action when writing his *Lehrbuch*.

⁵¹ The academic clash between Franz von Liszt and Karl Binding has already been extensively studied. About the subject, cf. LACAZE (2010), VORBAUM (2014), WETZELL (2003).

⁵² LISZT (1899a) 97-98.

⁵³ HYGINO (1899) 14.

way, agrees with the mentioned idea. A result that perhaps indicates a pattern present in certain legal texts, in which doctrinal consensus is fundamental for establishing categories and forms of law enforcement. On twenty-one occasions, Hygino merely quoted the idea of some author in which it was impossible to identify any judgment. In the great majority of them, it was only a question of comparing the work of von Liszt. The largest absolute number of disagreements refers to Karl Binding (three occurrences). However, these three divergences are inserted in a set of twenty-five convergences and three mentions that, apparently, only served to contextualize von Liszt's ideas. Hygino still disagreed with ideas from two other German authors (Wilhelm Hartmann and Schopenhauer). However, considering the total number of mentions to Germany, this is almost irrelevant.

The other two divergences that were explained by Hygino are very important, as they reached two Italian jurists: the heralds of the *scuola positiva* Cesare Lombroso and Enrico Ferri. In his preface, Hygino praised Franz von Liszt for overcoming the so-called German *scuola classica*, which proposed insufficient means for fighting crime. However, the main errors of the *scuola positiva* would be: i) indetermination of the boundaries of the subject of legal science (founded on the *Sollen*, which included criminal policy) and other disciplines, such as criminology (founded on the *Sein*); ii) indistinction between punishment and other means of social defense. From these two points, dangerous consequences would descend, including in terms of "radical reforms" dangerous to the autonomy of law and freedom. This is not to say that there were no interfaces between Hygino's ideas (which, in part, were also those of von Liszt) and the ones from the *scuola positiva*. Dangerousness (*temibilità/pericolosità*), distinction between amendable and incorrigible criminals, indeterminate punishment, for example, were requirements espoused by Hygino. Such requirements, by the way, are not very compatible with the image of the hero of freedom that the laudatory texts of that time made about Hygino.⁵⁴ For example, on the indeterminate punishment, a very important subject for many jurists on both sides of the Atlantic between the late nineteenth and early twentieth centuries,⁵⁵ Hygino admitted that it should be adopted for incorrigible offenders, without any upper limit previously established by law.⁵⁶

Security measures were not exactly a *scuola positiva*'s agenda. Several positivists approved and praised the advent of this institute, but Enrico Ferri, for example, considered it an intermediate step in the direction of the unified concept of sanction, which would treat all offenders according to their dangerousness, ignoring the notion of retribution.⁵⁷ José Hygino considered the security measures the great reform that still had to be carried out by all countries. Thus, all the codes of the time "incurred in severe censorship"⁵⁸. The result of this debate in Brazil was the chapter specifically devoted to security measures in the 1940 penal

⁵⁴ Cf., for example, his obituary published in the *Revista de Jurisprudência* (1901).

⁵⁵ Cf. PIFFERI (2013).

⁵⁶ HYGINO (1899) 62-63.

⁵⁷ Cf. FERRI (1893) and his 1927 criminal code draft (FERRI [1928] 809 ss.)

⁵⁸ HYGINO (1899) 65.

code.⁵⁹ We can not detail here all the reforms that Hygino considered necessary in Brazilian law, but it is interesting for our purposes to evaluate how German and Brazilian criminal legislation were compared in his notes.

3.3 *Mediation of differences*

Let's review some basic data. The nationalization of legal systems characterizes legal modernity. It is not by chance that Paolo Grossi, in dealing with this passage, used the island metaphor to refer to modern legalistic system, predominantly a product of the state: "from the society of societies" to "insularity of the state".⁶⁰

However, in 1977, Filippo Ranieri, in the article already mentioned, pointed out that translations of legal books would be a re-creation, in a particular way, of the typical European intercommunication of *ius commune* – that previously happened because of the common language, Latin – at the time of the nationalization of law, that is, when the language unit of the *ius commune* was being lost. Yet isolating the element "European intercommunication" with the aim of seeking a kind of continuity with the old *ius commune* seems a narrow historical analysis. In other words, it seems more correct to focus on the different ways in which these intercommunications between different cultural contexts take place within the legal field. In modernity, such intercommunications can legitimately be qualified, at least in part, as transnational, since now we are, beyond any doubt, facing an institutional scenario made up of nation-states. Several important consequences were derived from this primordial datum. The first one is the simple fact that the dialogues between legal cultures depend heavily on translations between different languages, which is not a mere extrinsic detail, unless we want to abstract the historical specificities of the concrete practices on which are based the legal ideas. If the historian, by duty of his profession, is the one who links the objects to their places,⁶¹ such specificities are fundamental. And also for a lawyer, as well as prosecutors and judges of that time, the differences between, for example, Brazilian and German criminal legislation are essential facts. The advertisements of the Brazilian translation of the *Lehrbuch* knew this very well. Hence the commercial significance of also publicizing, as we have already seen, the notes of José Hygino, as well as the translation itself of Franz von Liszt's book.

Let's try to understand, from a historical point of view, the operation carried out by Hygino. On several occasions, our translator had to take into account the differences between German and Brazilian criminal legislation. At that time, the German penal code was that of 1871 and the Brazilian of 1890. In addition, in Brazil, the parliament was discussing the replacement of the almost non-prestigious 1890 code: the first draft was presented by the deputy and jurist João Vieira de Araújo in 1893; a substitute draft was approved for further discussion in 1896; the final version was approved by the Chamber of Deputies in 1899, but

⁵⁹ Cf. SONTAG (2014, 2016).

⁶⁰ GROSSI (2011).

⁶¹ For this way of characterizing the historiographical operation, cf. CERTEAU (1982).

the bill had practically no progress in the Senate. Therefore, in Hygino's notes, there was mediation between different legal contexts.

Considering the categories that have been employed by the intellectual history, how do we frame Hygino's work? On some situations, Hygino proposed reforms in Brazilian legislation. But the book was a specialized text and the proposals for reform were diluted. For these reasons, it does not seem possible to frame it in the concept of intellectual that has been so important for political historiography, whose center is the notion of engagement in the public sphere.⁶² But there is also a broader notion of intellectual, characterized by a specific social relation to the production and reproduction of knowledge, but not necessarily to the public sphere. José Hygino, like several other Brazilian jurists of that time, also had a political role: he became a provincial deputy and secretary of government in Pernambuco. But the book we're dealing with does not seem to be a chapter in that part of Hygino's biography. Therefore, we are most likely in the universe of the broader concept of intellectual.

Even the broader concept of intellectual, however, can be subdivided. To produce knowledge or to divulge it: from this well-known division of academic tasks, historiography has been discussing the concept of the intellectual mediator.⁶³ From this point of view, what has been put in focus is that the mediator also produces meanings by adapting, simplifying, making accessible certain knowledge to another public through a cultural good that is new, that has its peculiarities. Even from this perspective, the mediation operated by this type of intellectual far exceeds what we mean by scientific popularization. Thus, it is true that Hygino acted as a mediator, either in translating the German text of von Liszt into Portuguese,⁶⁴ or in writing his notes comparing Brazil and Germany, building a bridge between the original text and the Brazilian reader who was, in many occasions, a practitioner of law.

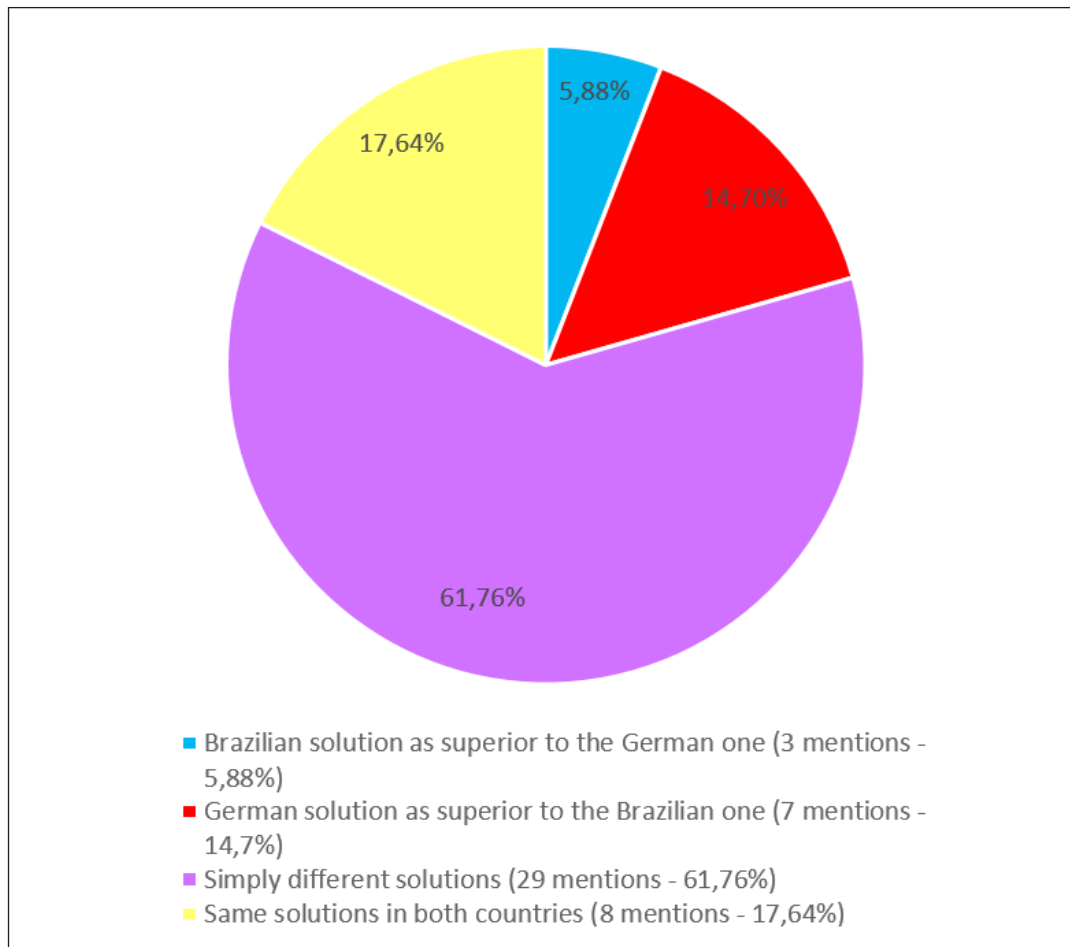
Moreover, how did José Hygino's notes mention German and Brazilian criminal law? Sometimes he argued that the German legislative solution was better than the Brazilian one; other times the Brazilian was superior; and in others, simply distinguished the technical solutions of the two countries. On some occasions, Hygino also made a point of focusing on the similarity between the two legislations, so that there would be no doubt.⁶⁵ Let's look at all these possibilities in a graph:

⁶² SIRINELLI (2003) 242.

⁶³ For a theoretical framework settled up with the aim of relativising the borders between these two kinds of intellectuals for historiographical researches, cf. GOMES/HANSEN (2016).

⁶⁴ About the translator as an agent of cultural mediation within the legal history framework, cf. FOLJANTY (2016).

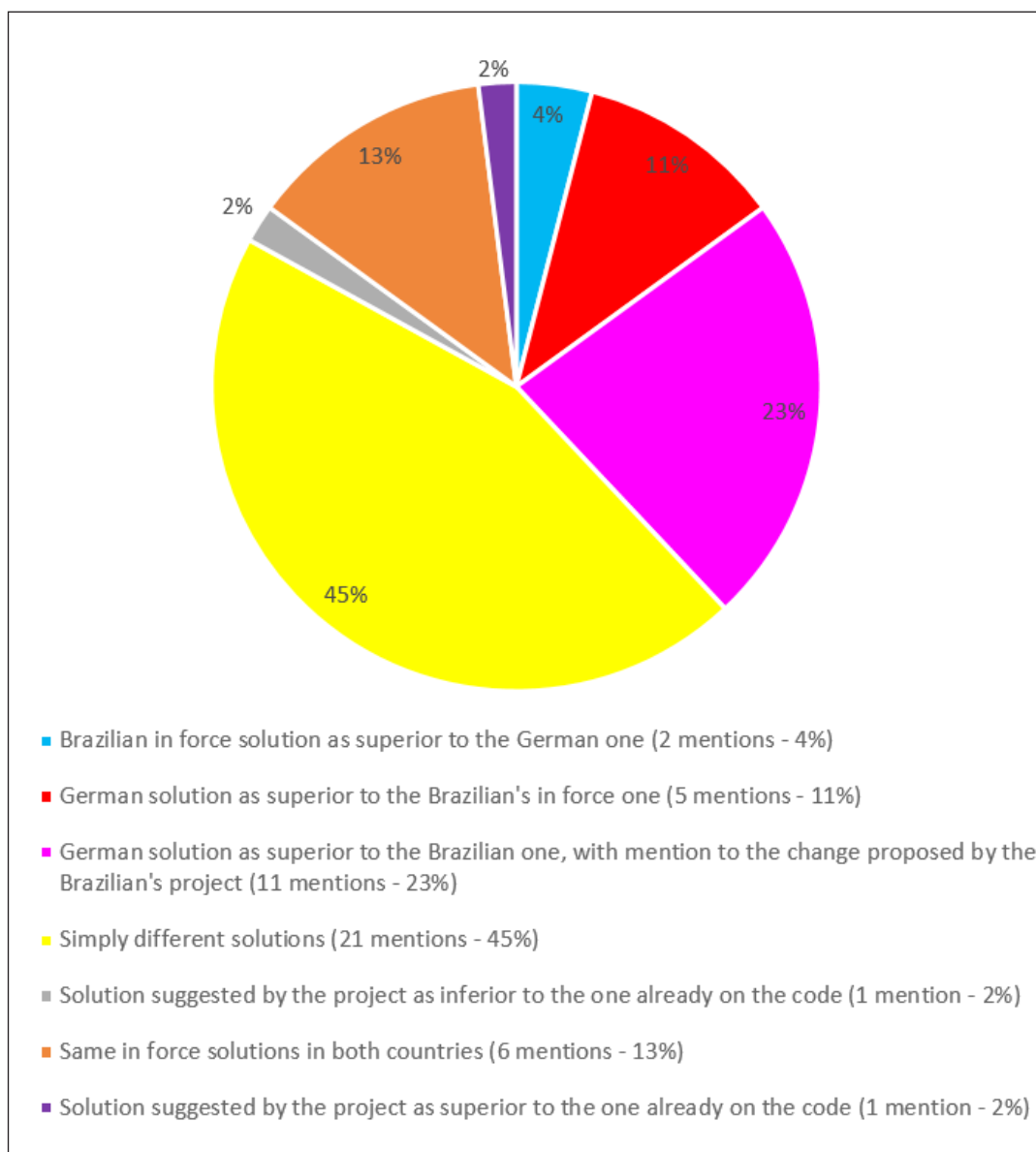
⁶⁵ Notwithstanding, it was not a guarantee of no confusion. As pointed out by Diego Nunes, sometimes "*la traduzione del Lehrbuch des deutschen Strafrechts di Franz Von Liszt, il quale, con l'aggiunta della prefazione e delle note di José Hygino, fu praticamente considerata come opera patria*" (NUNES [2014] 34-35), and, indeed, there were cases in which the Brazilian scholar took the – different – German legal arrangement as if it was Brazilian (NUNES [2014] 38-39).



Graph 2: Appraisal of legislative solutions

Most of the time, José Hygino only tried to differentiate the criminal legislation of the two countries. Perhaps Hygino simply did not have a well-formed opinion of each of the nineteenth-century German penal institutes; perhaps the simple differentiation already corresponded to the partially practical purposes of the work, since, for a Brazilian judge or lawyer, knowing the difference between the Brazilian legal system and the German legislation was enough. The practical goal was that Hygino on several occasions exemplified the way German institutes and theories operate in accordance with Brazilian law.

Until now we have been comparing legal systems in force. In the 1890s, however, a criminal code draft was under discussion in Brazil. Let us see, then, the graph with the quotations of the draft that was being debated in Brazil:



Graph 3: Appraisal of legislative solutions including the Brazilian penal code draft

Including the quotations of the draft, we have found the same pattern: for the most part, Hygino simply indicated the intended modifications. The compliments or drastic refutations of the novelties appeared in a rather low number and did not arrive at fundamental questions of the structure of a penal code, that is to say, they were quite technical and punctual aspects. Of course, Hygino's stance towards the code draft is a very small sample of the Brazilian criminal culture of that time, but it may serve as a clue to the understanding of the reasons

why the draft did not succeed.⁶⁶ Hygino's quotations of the draft indicates a high degree of indifference, that is, the modifications did not provoke either approval or disapproval. Adding to that some disapprovals and we can conclude that the draft was effectively failing to raise support from the legal community to move forward. Replacing a code is a tricky task. If the jurists themselves were not enthusiastic about the novelties brought by the new project to the point of justifying such an operation, it is unlikely that political forces would move to replace such a young code, despite all its lack of prestige. Between the conviction that a code is not good and the conditions necessary for it to be replaced, including the engagement of the political elite and the legal community, there is a trench. Taking this step is not a simple process. It was no accident that the discredited Brazilian 1890 penal code lasted almost ten years longer than the famous Italian 1889 penal code.⁶⁷

3.4 *Dialogue between peers*

In both graphics shown above, there was a number of Hygino's quotations in which there were no difference between Brazilian criminal law and that of Germany. In this case, is it possible to affirm that Hygino made a cultural mediation? Was it a simple way to stress to the Brazilian reader that, in that particular situation, the German theory could have been used without the dismay of provoking the national legislation? If our response to this question is positive, maybe, in fact, we could say that it did exist, though residually, some sort of cultural mediation even in these cases.

We said residual mediation because the prominent element is another one. In the analysed graphics, we were searching specifically the quotations to Brazilian legislation and that of the Germans within Hygino's notes. It does not mean, therefore, that we covered all the universe of the notes. Severally, Hygino builds up theories. In other words, our translator severally simply indicated the existence of different or similar opinions to that of von Liszt; severally, Hygino agreed or disagreed to such opinions, independently of the Brazilian or German legislation; and so on, and so forth. Is that a signal of the universality of science? We do not pretend to discuss this complicated philosophical issue, because it is enough for us to stress that we are dealing with a dimension in which certain borders become irrelevant for the discourse that we are analysing.

Now, our question is: was Hygino acting as an intellectual mediator in these cases?

The historians Ângela de Castro Gomes and Patrícia Hansen arrived to affirm that the typical mediation of this type of intellectual could even exist among peers.⁶⁸ Hygino was a jurist likewise von Liszt; Hygino was a professor or a practitioner of law likewise most of his readers. By this point of view, the relationship concerns peers and nothing forbids us to affirm that Hygino acted totally like an intellectual mediator. Yet, presupposing this

⁶⁶ When the draft was in the *Senado*, Hygino wrote an evaluation of it: cf. HYGINO (1901).

⁶⁷ For a broader analysis of this process, cf. SONTAG (2014a) 253-332.

⁶⁸ GOMES/HANSEN (2016) 21.

assumption, we would have a lot of difficulties to distinguish between the typical actions of an intellectual mediator and of a “non-intellectual mediator”. Notwithstanding Gomes and Hansen’s salutary warning about the porous borders between production and dissemination of knowledge, between these two types of intellectuals, and also about the innocuity of the historiographical hierarchization between them, the comprehension of certain phenomena always demands from our categories the capacity of making some kind of distinctions. In our case, the relevant distinction concerns the whole group of the intellectuals. In fact, it does exist mediation in any dialogue between subjects because there is always some difference between those individuals. Nevertheless, we are not dealing here with individuals, but with a specific type of cultural action of certain subjects that we need to differentiate from others. The same approach of Gomes and Hansen hints a possible solution: there is mediation when we discuss differences between cultural universes (scientists and laymans; adults and children; etc.). In other words, when, in the case of the analysed cultural good, we are not dealing with peers.⁶⁹

Whenever Hygino compared the German and the Brazilian legal orders, he acted, obviously, as an intellectual mediator. In this situation, the mediation concerns part of two national legal cultures, between the text of a German professor and Brazilian professors, lawyers, judges and attorneys. The difference is the prominent element: even the Brazilian readers that have the same profession of von Liszt are addressed as “non-peers”.

Thereby determining the concept of intellectual mediator, it is not necessary to deal with the historiographically intricate debate about what is “to create” something in order to establish what is an intellectual non-mediator.⁷⁰ In our perspective, the opposite of an intellectual mediator becomes a residual category, that is when the determinative element of the cultural good discourse is the similarity between the two cultural universes (emitter and receiver); more than that, when the cultural difference is irrelevant for labelling the communicative exchange process that the text at stake intends to carry out. Thence, everytime Hygino dealt with the differences between Brazil and Germany (implicitly) as irrelevants, it is not certain if he behaved as an intellectual mediator. Moreover, all times in which differences between Germany and Brazil were explicitly treated as irrelevants, when Hygino operated in a dimension in which seemed possible to ignore the differences between German and Brazilian legal culture, we are beholding typical operations of a regular intellectual (non-mediator). In other words, it was a dialogue between peers (intellectuals).

Most likely what putted forward the sales of the cultural good made by Hygino and the Briguier Publisher was the cultural translation, that is the mediation operations. Altogether, it was a product of an intellectual mediator. However, better determining what are the typical

⁶⁹ Gomes and Hansen’s aim have never been to wreck the difference between the two types of intellectuals. We just want to highlight that their assertion about the mediation among peers as a possible cultural process carried out by intellectual mediators seems to be a dead end to their own very interesting theoretical construction.

⁷⁰ About the historiographical innocuity of this kind of theoretical settlement, cf. GOMES/HANSEN (2016) 13 ss.

actions of an intellectual mediator allows us to point out even the moments in which Hygino acted as a regular intellectual within the same composite cultural operation.

4. *Conclusions / post scriptum: an editorial event (cont.)*

The *Lehrbuch*'s translation is one of the last of José Hygino's cultural efforts. He passed away two years later during a diplomatic mission in Mexico. A few days later, a funeral eulogy was published by the same journal that anticipated the aforementioned Hygino's preface. In the scroll of the great achievements of the honoured, those authors did not forget to remind that Hygino "translated the von Liszt's classical book about Criminal Law, enriching it with his precious notes"⁷¹

Maybe for the teaching – *Lehre* – of criminal law, von Liszt's book was excessive for the *curricula* of Brazilian law faculties. Nevertheless, it was widely used by the Brazilian legal community since its publication. In the 1940s, Nelson Hungria wrote, maybe exaggerating, that the *Lehrbuch*'s translation was almost the only contact between Brazilian jurists and the "profound German criminal culture previous to that of Hitler"⁷² It is possible to find references to von Liszt (through Hygino's translation) since 1899 in judicial sentences,⁷³ doctrine⁷⁴ and as an important cornerstone of the 1913 Galdino Siqueira's criminal code draft.⁷⁵

João Vieira de Araújo – that had a contact with Franz von Liszt due to a received request to collaborate in the Brazilian part of the grand collection about the situation of the criminal legislation in the world⁷⁶ – enlisted José Hygino within the "few, but convinced followers" of *scuola positiva* in Brazil.⁷⁷ One of the mottos of the *Scuola Positiva* journal was to show an alleged diffusion and progressive acceptance of its ideas around the world. João Vieira, as a Brazilian correspondent of the journal, did what was expected of him in an article published in 1891 in Italian. What we beheld about Hygino's preface and about how Ferri and Lombroso's ideas were mentioned allows us to state that João Vieira clearly exaggerated. Nelson Hungria, in the aforementioned article, praised Hygino's preface considering it as "one of the best pages of our criminal literature."⁷⁸ In another conference, a few years earlier, Hungria rejoiced stating that finally, the studies of criminal law was withdrawing from the "tedious debate among the various criminal law schools". Only a few scholars were persisting

⁷¹ *Revista de Jurisprudência* (1901) 390.

⁷² HUNGRIA (1977) 300-301.

⁷³ For example, in two judicial sentences published by the newspapers *Jornal do Commercio* (RJ) in the 23rd of August 1899 (p. 4) and *A Província* in the 23rd of September 1902 (p. 1).

⁷⁴ For example, cf. MORAES (1904) 123 ss.

⁷⁵ SIQUEIRA (1913).

⁷⁶ ARAÚJO (1911).

⁷⁷ ARAÚJO (1891) 1.

⁷⁸ HUNGRIA (1977) 301.

“in bringing to the field of criminal law in a proper sense the endless school controversies”, which are “the faithful heirs of Ferri’s disdain against the advent of the *tecnicismo giuridico*, which after its victory in Germany due to the von Liszt’s lessons and his disciples, imposed itself definitely to the criminal law scholars in Italy.”⁷⁹ Franz von Liszt as a *tecnicista*? Here, we are about to talk of another topic, that is the history of the multifarious possible images of von Liszt’s work; and these various representations often correspond much more to the requirements of scientific affirmation of the author’s perspective (which is clearly the case of Nelson Hungria).

Anyhow, probably one of the keys of von Liszt success in Brazil lies in the fact that he does not seem to be “exclusivist”, which was a very common criticism among Brazilian jurists against the Italian *scuola positiva*. It is not a case that Franz von Liszt is mentioned severally in the 1913 Galdino Siqueira code draft *exposição de motivos* in this manner.

In the 13th of June 1899, the *Gazeta de Notícias* announced that “Dr. José Hygino Duarte Pereira, whose knowledge and legal sapience has been consolidating so brilliantly and for so many years in the mastership, in the parliament and in the magistracy, just translated from German, the classical criminal law treatise of Franz von Liszt”. Besides doing a brief review of the contents of the two volumes, the report highlighted that Hygino “executed not only a translation, a very difficult task in this kind of book”, but also “made a lot of notes”. By this way, the translator explained “assertions of the author that, writing to the Germans, subtends many things that are generally unfamiliar to us” (p. 2). The notes also operated as a bridge, that is, as a part of the cultural translation process, that we have also seen in the cases in which Hygino made explicit comparisons between German and Brazilian legislation. The book edited by Brigueit as a whole was a result of an intellectual mediation between two different legal cultures.

However, these legal cultures also had some features in common. Maybe residually, but Hygino also operated as a regular intellectual when his discourse rised to the criminal law science level in which the boundaries of the states legal orders were not discursively relevant. In this sense, it might be possible to affirm that the cultural good produced by Hygino was somehow hybrid: in the major part, it was mediation; in the minor part, it simply participates of a common cultural space.⁸⁰ Better saying, the *Lehrbuch*’s translation is also a part of the construction of a common (or entangled) legal culture space, because the empirical similarities are not enough to deploy sociocultural effects.

⁷⁹ HUNGRIA (1938) 37.

⁸⁰ Ângela de Castro Gomes, in a very interesting interview on the history of cultural mediators and the press, pointed out that “os intelectuais, eles estão mediadores culturais; eles estão no sentido de que eles estão desenvolvendo práticas de mediação. Muitos desses intelectuais são duplos: eles são tanto intelectuais, vamos dizer, à moda antiga”, and also mediators (cf. https://www.youtube.com/watch?v=DOgo-4F_p4c 16min40s). We would like to add here that mediation and dialogue between peers can be parallel dimensions not only of a single person, but also of a single cultural good.

In short, the bridge between legal cultures metaphor might have a double sense: in the one hand, a passage between two margins that remains different; on the other hand, an approachment between two spaces.

For this type of historical analysis of texts, the core of the concept of intellectual mediator is a difference. When the cultural operation presupposes a difference between cultural universes (in this case, between legal cultures), we are faced with the typical work of an intellectual mediator. This was an important conceptual adjustment that allowed us to perceive when José Hygino acted as an intellectual mediator or as an intellectual like any other.

Hygino's work, in the opinion of the jurist Aníbal Bruno in an article about the former professors of the Law School of Recife, "rendered accessible to our scholars, unfamiliarised with the German language, one of the most profound and brilliant expressions of the German criminal law thought".⁸¹ Prescinding of the panegyric tone of Bruno's discourse, we can withhold that, in fact, in a context that the German language was little known within the Brazilian legal community, Hygino's translation personified an important bridge and a significant displacement, together with a few others, with respect to Brazilian previous criminal law literature by opting for the dialogue with German scholars. Through Hygino's translation, von Liszt's *Lehrbuch* contributed to shaping Brazilian legal culture because it became a nodal point of reference for our criminal law literature through the first decades of the twentieth century. The features of these dialogues still need to be better studied.

As pointed out by Peter Burke, when an object travels from one culture to another, the cultural "transplant" brings along a cultural transformation because the destination-culture is a connected assembly (a kind of "system").⁸² Hygino's translation is a good example of what Burke stated, not only in the level of technical repercussions, but also in the literary genres of our criminal law culture: it was a treaty in a context that hadn't produced such kind of book.

In the 1940s, in a report published in the *Anuário Brasileiro de Literatura*, Paulo Barbosa emphasized the importance of the *Lehrbuch*'s translation as an editorial project of a French publishing house:

"in 1893, [Ferdinand Brigueit] began his work as an editor. He was a bold publisher, doing things considered true madness, given the possibilities of the market at that time. It is enough that we mention one of his first publishing enterprises: the superb edition of the von Liszt's Treaty of Criminal Law perfectly translated and with a preface written by José Hygino, considered a classical text in criminal law".⁸³

We will never know if it was really "madness", because, for that, we would have to determine if Brigueit knew that the German legal culture in criminal law was already gaining prestige in Brazil and that Franz von Liszt was not unknown to Brazilian jurists. Besides Barbosa's compliments, which is not the point that interests us either, it is quite true that, due to the

⁸¹ BRUNO (1942) 251.

⁸² BURKE (2015) 68.

⁸³ BARBOSA (1943-1944) 313.

repercussion of the work, José Hygino and Brigueit reached an editorial event in the Brazilian criminal law literature of the time.

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