GLOSSAE
European Journal of Legal History

ISSN 2255-2707

Citation
Michele Pifferi, "The Theory of Social Defence and the Italian Positive School of Criminal Law", *GLOSSAE. European Journal of Legal History* 17 (2020), pp. 22-46 (available at http://www.glossae.eu)

The Theory of Social Defence and the Italian Positive School of Criminal Law*

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Received: 10.3.2020
Accepted: 1.5.2020

Abstract
This paper focuses on the contents and implications of the principle of social defence elaborated by the adherents of the Italian positive school of criminal law and on its criticism by the advocates of a more classical approach. This school was the cornerstone of a new criminological theory radically different from penal classicism, and its corollaries of denial of free will, social dangerousness, preventive means of social defence, the individualization of punishment and the extension of judicial powers are analysed. The penal code project drafted by Enrico Ferri in 1921 and never enacted is examined as a model of positivist codification. Finally, the unresolved constitutional tensions raised by the principle of social defence are considered.

Keywords
Social defence; Italian Positive School; dangerousness; individualization of punishment; criminal responsibility; preventive justice; Ferri's Project

1. Introduction

Eugenio Florian, a leading advocate of the Italian positive school of criminal law and one of its most finely trained jurists, in writing the entry for "Social defence" in the 1943 *Dictionary of Criminology*, argued that "social defence fully coincides with social interest: this is the only rationale and the unique foundation of criminal law. On this basis, criminal law radically changed its nature: the principle of social defence transformed it in theory and in practice"[1]. In this paper, I will investigate (I) why the notion of social defence was considered the cornerstone of the positivist theory and why its meaning was presented as original and ground-breaking by the adherents of the new school, (II) what are its corollaries and how it has affected the entire structure of

* This work has been undertaken in the context of the International GERN Seminar (Groupe Européen de Recherches sur les Normativités) organized by Yves Cartuyvels (University of Saint-Louis – Bruxelles, Belgium) and Aniceto Masferrer (University of Valencia, Spain), and of the research project entitled "Las influencias extranjeras en la Codificación penal española: su concreto alcance en la Parte Especial de los Códigos decimonónicos" (ref. DER2016-78388-P), funded by the Spanish 'Ministerio de Economía y Competitividad' (2017-2020) and by the Groupe Européen de Recherches sur les Normativités (GERN) Interlabo (2019-2020).

[1] Florian, E., "Difesa sociale", *Dizionario di criminologia* (E. Florian, A. Niceforo, N. Pende eds.), Milano, 1943, p. 259.

criminal law and criminal procedure, and, finally (III), what were its consequences—if any—in terms of legal reforms implemented in Italy between the 1880s and the 1930s and in particular, if the fascist Rocco code enacted in 1930 was truly based on the positivist notion of social defence.

The ideas proposed by the new school, as well as its contributions to the criminal law debate, have already been examined by legal historians[2], such as in the biographies of its founders and main adherents[3], and yet the problem of its legacy for 20th-century Italian criminal law is still disputed. Precisely, the notion of social defence seems particularly controversial, both in its innovative character and its influence upon the prefascist criminal law doctrine, as well as in its correlation with the authoritarian view of the defence of the State.[4] This paper is focused on the theoretical construction of the principle of social defence and the pragmatic compromises that positivists have accepted or proposed in drafting pieces of legislation or penal codes as well as in commenting on the enactment of the Rocco code to achieve, according to an evolutionist view, a gradual realization of their ideas. Even though this contribution is mainly concerned with Italian legal culture, it is worth noting that the increasing significance of a social defence criminal policy has been an international matter characterizing the "criminological wave" of "penal modernism"[5], a consequence of the new role played by the rising welfare states in the fields of criminalization and punishment, and an effect of both the "move from individualism to individualisation" and the shift "from the forms of legal prohibition and penalty to a new mode of normalisation" pointed out by David Garland[6]. As shown by the other articles discussed in this section, and as I have tried to elaborate elsewhere[7], it would be misleading to separately examine national penal reforms and it would provide only a partial representation of the story to study individual reformers such as Ferri, Franz von Liszt or Adolphe Prins without considering their mutual influence and exchanges and without

[2] See, e.g., Sbriccoli M., "La penalistica civile: teorie e ideologie del diritto penale nell'Italia unita" (1990), *Storia del diritto penale e della giustizia. Scritti editi e inediti (1972– 2007)*, Milano, 2009, pp. 493–590; Colao, F., "Le scuole penalistiche", *Enciclopedia italiana di scienze, lettere ed arti. Il Contributo italiano alla storia del Pensiero – Diritto.* Ottava appendice, Roma 2012, pp. 349-356; Neppi Modona, G., "Diritto penale e positivismo", *Il positivismo nella cultura italiana* (E.R. Papa, ed.), Milano 1985, pp. 47-62; Dezza, E., "Zanardelli, un codice positivista?", *Il codice penale per il Regno d'Italia (1889)* (S. Vinciguerra, ed.), Padova, 2009, pp. XLV-LIII; Miletti, M.N., *Un processo per la terza Italia: il Codice di procedura penale del 1913*. 1. *L'attesa*, Milano, 2003.

[3] See, among the more recent contributions, Colao, F., "Ferri Enrico", *Dizionario biografico dei giuristi italiani (XII-XX secolo)* (I. Birocchi, E. Cortese, A. Mattone, M.N. Miletti, eds.) Bologna 2013 [hereafter *DBGI*], I, pp. 849-852; Stronati, M., "Ferri, Enrico", *Enciclopedia italiana…Diritto*, pp. 371-37; Colao, F., "Florian, Eugenio", *DBGI*, pp. 878-879; Marchetti, P., "Lombroso, Cesare", *Enciclopedia italiana…Diritto*, pp. 366-370; Velo Dalbrenta, D., "Lombroso, Cesare Ezechia Marco", *DBGI*, pp. 1189-1192; Frigessi, D., *Cesare Lombroso*, Torino 2003; Miletti, M.N., "Longhi, Silvio", *DBGI*, pp. 1193-1195.

[4] Garfinkel, P., *Criminal Law in Liberal and Fascist Italy*, Cambridge 2017, esp. pp. 448 ff.; Colao F., "«Un fatale andare». Enrico Ferri dal socialismo all'«accordo pratico» tra fascismo e Scuola positiva", *I giuristi e il fascino del regime (1918-1925)*, (I. Birocchi, L. Loschiavo, eds.), Roma, 2015, pp. 129-157.

[5] See Whitman, J.Q., "The Case of Penal Modernism: Beyond Utility and Desert", *Critical Analysis of Law*, 1:2 (2014), pp. 143-181.

[6] Garland, D., *Punishment and Welfare. A History of Penal Strategies*, Aldershot, 1985, quotation at pp. 28 and 29.

[7] Pifferi, M., *Reinventing Punishment. A Comparative History of Criminology and Penology in the Nineteenth and Twentieth Centuries*, Oxford, 2016.

assessing the impact of international congresses, commissions and associations in which all of these leading figures shared and elaborated common ideas and proposals[8].

2. Social defence as positivist theory's cornerstone

Enrico Ferri was "the most radical cantor of social defence"[9]. In his opinion, "the classical school r[ose] in the name of individualism to vindicate the rights suppressed by the State during the Middle Ages, so the positive school now limits the sometimes excessive predominance of individualism and re-establishes the equilibrium between the social and individual elements"[10]. By applying the experimental method to seek "the natural causes of the phenomenon of social pathology which we call crime", Ferri's proposal for this new school of criminal law was to follow the same "scientific tendency" of other social sciences like political economics, namely, "to temper an exaggerated and metaphysical individualism by the introduction of the social element in a juster proportion"[11]. Whereas penal liberalism, from Beccaria and the Enlightenment to the sophisticated and abstract doctrinal constructions of the 'classical' school, had rightly centred its theory on the protection of individual rights from State and public officials' abuses as a reaction against the late-medieval misuse of justice, the positive school was now looking for a new balance between the safeguards of the individual, even the accused and convicted, and the protection of society from criminals. Criminal law should no longer be considered as a cluster of rules and limitations on public powers to defend the indicted (and even convicted) individual as a victim of the state but as a key apparatus for the preservation of social security from dangerous criminals.

Such a reversal in perspective, shared by many reformers since the turn of the century[12] and espoused as a tenet by both the International Union of Penal Law[13] and, later, the International Association of Penal Law[14], was brought about by social, technological and economic transformations that resulted in, according to the reformers' narrative, a dramatic increase in criminality. The transformation from a rural society based on agricultural economy into an urbanized and industrialized nation also changed the perception and fear of crime: dangerous classes of habitual and professional criminals poured into the cities looking for new prey, and thanks to both legal technicalities and easy mobility, they were able to escape criminal trials and

[8] See, e.g., Bellmann, E., *Die Internationale Kriminalistische Vereinigung (1889-1933)*, Frankfurt a M., 1994; *Criminals and their Scientists. The History of Criminology in International Perspective*, (P. Becker, R. Wetzell, eds.), Cambridge 2006; Radzinowicz, L., *The Roots of the International Association of Criminal Law and their Significance. A Tribute and a Re-assessment on the Centenary of the IKV*, Freiburg, 1991.

[9] Colao, "«Un fatale andare»", p. 130.

[10] Ferri, E., *Criminal Sociology*, Boston, 1917, p. 19.

[11] *Ibidem*.

[12] See, e.g, Prins, A., *La défense sociale et les transformations du droit pénal*, Brussels and Leipzig, 1910, pp. 139-140; Pound, R., "The Causes of Popular Dissatisfaction with the Administration of Justice", *Annual Report of the American Bar Association*, 29 (1906), pp. 395-417; Pound, R., "The Individualization of Justice", *The Year Book 1930. Probation Juvenile Courts Domestic Relations Courts Crime Prevention*, New York, 1930, pp. 111-112: "People now feel very acutely the demands of general security. A century ago the stress was upon the individual life, upon humanity, not upon security. Men now are afraid of anything that seems to have any flavour of humanity".

[13] See the statute of the IUPL in *Mitteilungen der IKV*, 1 (1889), pp. 1-6.

[14] Lewis, M., "The History of the International Association of Penal Law, 1924-1950: Liberal, Conservative, or Neither?", *Historical Origins of International Criminal Law*, 4 (M. Bergsmo, C. Wui Ling, S. Tianying, Y. Ping, eds.), Brussels, 2015, pp. 599-660.

punishments. Worse still, the short-term prison sentence that was characteristic of the classical penal system turned out to be completely ineffective in containing and reducing criminality[15], as the high rate of recidivism unequivocally revealed[16]. This distressing account of the Italian criminal justice system's faults was, in Ferri's view, unambiguously demonstrated by criminal statistics[17] and was mainly due to the failures of penal classicism. Rather than studying crimes as abstract and 'juridical entities', grounding the state's right to punish on metaphysical and philosophical arguments and formally considering all persons (offenders included) to be normally reasonable and accountable for their acts, subjected to equal punishments fixed in advance by the law—as was masterfully done by the leading proponent of the traditional school, Francesco Carrara, in his *Programma*—Ferri suggested using the data and scientific evidence on criminal anthropology, sociology, statistics, and physio-psychology to pursue a double aim. "In practice", the proposed object of his new school was "the diminution of crimes, which always increase rather than diminish; and in theory, in order to secure this practical object it propos[ed] the complete study of crime, not as a juridical abstraction, but as a human act, as a natural and social fact"; accordingly, the study of the criminal, i.e., of his anthropological and physical characteristics, character, behaviour, inclinations, background, etc., became pivotal[18].

Ferri's approach implied adherence to a utilitarian theory of punishment opposed to the retributive theory upheld by Carrara, Pessina and the other classicists. Of course, Ferri was aware that he was not the first jurist to emphasize a functionalist and teleological view of criminal law and that many others before him had already based the right to punish on notions such as 'social utility', 'direct defence', 'indirect defence', 'self-preservation', and 'political necessity'[19]. However, what made the positivist notion of social defence radically different from any previous doctrine was the rejection of free will and moral responsibility:

> "the essential difference between these theories and that of the positivist school consists in the fact that Beccaria, Bentham, Romagnosi, Comte, Martin, Schulze, Thiercelin and Carmignani always had in their system the idea of the moral culpability or responsibility of man, as a test and condition superior to the idea of social necessity, while we exclude it from the juridical and social field (…) Even with the contemporaneous classical criminalists, although the part played by the idea of social utility becomes larger, this idea remains, however, subordinate to the ethical test of human culpability."[20]

This was the very transformation theorized by Ferri and his school, a "revolution *ab imis fundamentis*" perceived by his opponents not just as a cultural or philosophical conflict but as a destabilizing risk of crisis and of the destruction of the whole criminal

[15] See, e.g., Von Liszt, F., "Die Reform der Freiheitsstrafe. Eine Entgegnung auf Adolf Wachs gleichnamige Schrift" (1880), *Strafrechtliche Aufsätze und Vorträge*, I (1875 bis 1891), Berlin, 1905, pp. 511-536; for a general overview, see Padovani, T., *L'utopia punitiva. Il problema delle alternative alla detenzione nella sua dimensione storica*, Milano, 1981, esp. cap. II, pp. 41 ff.

[16] Marchetti, P., *L'armata del crimine. Teoria e repressione della recidiva in Italia. Una genealogia*, Ancona, 2008.

[17] Ferri, *Criminal Sociology*, pp. 168-177.

[18] Ferri, *Criminal Sociology*, p. 18.

[19] Ferri, *Criminal Sociology*, p. 318, nt.1.

[20] *Ibidem*.

law system[21]. Even before Ferri's lecture on the *New Horizons of Criminal Law and Procedure* in 1880[22], Carrara had already demolished the rationale of the social defence system: based exclusively on utility, "it makes the human being an *instrument* in the hands of society", which uses and torments the citizen's body to intimidate other citizens and deter them from violating social laws[23]. In Carrara's opinion, 'utility' was such an elastic and variable word that it could be filled with whatever meaning the user desired and could easily lead to the violation of sacred human rights, legitimating any excess of power on the part of the state to the detriment of individual rights[24]. After the first publications of the new school, classicists reacted, criticizing even more severely the principle of social defence. Luigi Lucchini, founder of the journal *Rivista Penale* in 1874 and leading opponent of Ferri's school, argued that the idea of social defence was absurd because only individuals and not society as a body—which was an abstract and intangible entity—had to be defended: it was a "rhetorical device conceived of to justify every abuse and arbitrariness suggested by human passions veiled under the mask of the public good"[25]. Moreover, Lucchini added, the positivistic principle confused society with the state and confused their respective goals[26].

Despite criticisms, advocates of penal positivism continued to elaborate on Ferri's theory[27]. Grounding his discourse on naturalistic and evolutionistic arguments, Ferri argued that "the natural evolution of punishment prove[d] by fact that penal justice should have no other function than that of the defence or preservation of the conditions of social existence (individual or collective)"[28]. By tempering a purely selectionist point of view[29] with the Lamarckian notion of adaptation to the environment, "so that in the pathogenesis of crime, the influence of the social environment must be of great weight, whether we consider the social sanction against crime or the readaptation of the criminal to social life", Ferri proposed a "preservative clinic of crime" in which the separation of

[21] Pessina, E., "Storia della crisi scientifica del diritto penale nell'ultimo trentennio del secolo XIX. Prolusione al corso di Diritto penale nella R. Università di Napoli nel dicembre 1905", *Discorsi varii*, VI, Napoli, 1915, *passim*, quotation at p. 217.

[22] Ferri, E., *I nuovi orizzonti del diritto e della procedura penale*, Bologna 1881; from the third revised edition in 1892 Ferri changed the title into *Criminal Sociology*.

[23] Carrara, F., "Dottrina fondamentale della tutela giuridica", in Carrara, F., *Opuscoli di diritto criminale*, 6 ed., I, Firenze 1909, p. 282.

[24] *Ibid.*, p. 283. His system of legal protection (*tutela giuridica*) was rather based on a doctrine of natural law, namely on the idea of rights and moral duties given to all human beings by the eternal and unchangeable law of God which formed an external legal order, whose violation was the only justification of the right to punish (see, among others, De Francesco, G., "Funzioni della pena e limiti della coercizione: caratteri ed eredità del classicismo penale", *Quaderni fiorentini*, 36 (2007), esp. pp. 620-625; Catteno, M.A., "Francesco Carrara: filosofia del diritto penale e cattolicesimo liberale", *Francesco Carrara nel primo centenario della morte*, Milano, 1991, pp. 210 ff.).

[25] Lucchini, L., *I semplicisti (antropologi, psicologi e sociologi) del diritto penale*, Torino 1886, p. 11.

[26] *Ibid.*, pp. 12-20. The principle of social defence, according to which individual claims were overshadowed by the collective interest in security, jeopardized both the substantial and procedural liberal system of criminal law; see Nobili, M., "La teoria delle prove penali e il principio della 'difesa sociale'", *Materiali per la storia della cultura giuridica*, 4 (1974), pp. 417-455; Pifferi, M., "Problemi costituzionali del diritto penale tra riformismo e ascesa del paradigma autoritario (1920-1940)", *Quaderni fiorentini*, 48 (2019), pp. 315-322.

[27] See the polemical volume Lombroso, C., Ferri, E., Garofalo, R., Fioretti, G., *Polemica in difesa della scuola criminale positiva*, Bologna, 1886.

[28] Ferri, *Criminal Sociology*, p. 323.

[29] According to Garofalo's social Darwinism, born criminals should be put to death, see Garofalo, R., *Criminology*, Boston, 1914, pp. 376-382

'degenerated criminals' from the social environment does not necessarily mean their physical elimination:

"Penal justice, first deprived of any other character than that of a function of social preservation, must view crime as the effect of individual anomalies and as a symptom of social pathology necessarily postulating the removal of anti-social individuals by isolating the infectious elements and disinfecting the environment in which the germs develop."[30]

The notion of social defence was the cornerstone of the positivists' architecture because in it were embedded all the ideas and beliefs that made their theory so original and disruptive. However, the most significant and ground-breaking point was the denial of free will and the assumption that criminal actions, like all other human behaviours, were determined by external factors. While Lombroso in his first works limited these crimino-genetic factors to anthropological and organic factors, Ferri and other positivists also insisted on the relevance of physical and, above all, social forces. "Positive psychology has demonstrated that the pretended free will is a purely subjective illusion"[31] claimed Ferri. Therefore, if "the recognition of the punitive agency as a function, purely defensive or preservative, of society" constituted the first part of the same fundamental principle of criminal law, the second part "which [wa]s novel as an explicit affirmation and on that account firmly contested (…) consist[ed] in the independence of this function with respect to any condition of moral liberty or moral culpability in the delinquent"[32].

3. The revolutionary corollaries of the principle of social defence

Such a twofold essence of the social defence principle—preservation of society and determinism—entailed corollaries and components, which involved both substantive and procedural criminal law. They were, of course, intertwined but could be summarized in a sort of thematical and logical sequence.

3.1. Legal responsibility

The positivist refutation of the principle of moral culpability, on which the retributive theory of justice was based, did not require any renunciation of punishments nor did it imply any leniency towards criminals. According to classical liberal theory, a lack of volition excluded imputability and, therefore, the legitimacy of penal sanctions: juveniles, lunatics, inebriates, and persons affected by psychiatric disease or personality disorders were considered to be not responsible for their violations and consequently not punishable, though they could be subjected to possible administrative measures (lunatic asylum, house of correction). Free volition, so to say, determined the perimeter of criminal law. This system, in the positivists' view, was both theoretically untenable because psychiatric studies had proven the non-existence of free will and practically ineffective, as it often left society defenceless against the more dangerous subjects. Ferri suggested replacing the old notion of moral responsibility with the modern notion of

[30] Ferri, *Criminal Sociology*, pp. 350-351.
[31] *Ibid.*, p. 38.
[32] *Ibid.*, p. 321.

"legal responsibility": leaving aside any reference to free choice and moral imputability, he founded penal accountability on material imputability together with "social and juridical accountability" based on the idea "that man is materially responsible for his acts by the mere fact that he lives in society."[33]

It has been argued that this approach to criminal sanctions by penal reformers in the late 19th century was part of (and was attributable to) the more general move towards a risk society, in which the effort of the state was directed towards minimizing and preventing damage and accidents caused by dangerous activities and behaviours. Before permeating the field of criminal law, risk assessment had already begun to change the civil notion of responsibility in the face of the new problems posed by industrialization and industrial accidents (such as strict liability for employers and mandatory insurance for industrial accidents)[34]. In its radical version, the reshaping of the criteria of penal responsibility was not a simple adjustment to new emerging social needs but rather a complete rebuilding of the penal system on new philosophical and methodological pillars, a theorized change that, if accepted, would affect all the tenets as well as the constitutional safeguards of the liberal model.

3.2. Social dangerousness

The classical retributive tenet of individual liability, with its corollary of moral imputability, was substituted with what Foucault defined as "the scandalous conception, in terms of penal theory, of dangerousness"[35]. In 1880, Raffaele Garofalo identified the concept of the 'temibility' of the criminal as the new criterion of penal law. The purpose of punishment was not to make the offender suffer but exclusively to provide for public security by reducing crime and preventing recidivism. Therefore, the delinquent's dangerousness, ascertained via the objective criterion of the seriousness of the crime and the subjective criterion of the crime's intensity, the offender's persistence, and the reproducibility of the criminal's motives should serve as the rationale for punishment[36].

The positivist denial of free will did not imply human beings' subjection to the fatal domination of external material forces but was intended to bring human volition into the domain of the scientifically knowable, recognizing the imperativeness of the principle of causality. Therefore, the reformers' attention to the *motives* of criminal conduct did not refer to the free volition of the offender but to the different causes and determining factors of the offender's conduct: "The innovation which I have introduced on the theory of determinative motives," Ferri maintained, "consists, above all, in this, that it is a substitution of a qualitative criterion of the anti-sociality or anti-juridicity of determinative motives of action, or of their sociality or juridicity in place of the

[33] Ferri, *Criminal Sociology*, pp. 340, 362; Ferri, E., "Polemica di Enrico Ferri", in *Polemica in difesa della scuola*, p. 94; see Stronati, M., "«Un'oncia di pratica»: Enrico Ferri e gli esordi della rivista «La Scuola Positiva»", *Una tribuna per le scienze criminali. La 'cultura' delle Riviste nel dibattito penalistico tra Otto e Novecento* (L. Lacchè, M. Stronati, eds.), Macerata 2012, pp. 114-115.

[34] See, e.g., Foucault, M., "About the Concept of the 'Dangerous Individual' in 19th Century Legal Psychiatry", *International Journal of Law and Psychiatry*, 1 (1978), pp. 15-6; Marchetti, P., "La Scuola Positiva e i 'nuovi orizzonti' del diritto penale tra pericolosità criminale e rischio sociale", *Diritto penale XXI secolo*, 15.2 (2016), pp. 350-78; Cazzetta, G., *Responsabilità aquiliana e frammentazione del diritto comune civilistico (1865-1914)*, Milano, 1991, pp. 275-93.

[35] Foucault, M., *La verità e le forme giuridiche*, Napoli, 2007, p. 109.

[36] Garofalo, R., *Di un criterio positivo della penalità*, Napoli, 1880, p. 54.

quantitative criterion to which the classical school has always held in its study of the relations between emotions (in which I include passions more or less vehement) and crime"[37]. Therefore, penalties should not be applied to offenders simply because they were morally responsible for their crime, nor should they be imposed on those who had simply *mechanically* caused the offence, but only criminals who, through their crime, had proven to be dangerous because their actions were driven by illegal and antisocial motives should be punished.[38]

The definition of dangerousness was quite flexible and based on uncertain standards. The kernel of the concept rested on the feared risk of recidivism: offenders should be labelled 'dangerous' when, due to their inclinations, character, education, and physiological or psychological traits, the perpetration of future crimes was thought to be likely to the extent that it aroused a social feeling of insecurity.[39] One of the most controversial points yet was the relationship between the commission of a crime and the dangerousness assessment. To positivists, the offense ought not to be considered as the necessary precondition for punishment but should stand simply as a symptom of the offender's dangerous inclinations; the penal sanction should be neither founded on nor justified by the material act, legally and technically defined as an offence by penal norms, but should instead be based exclusively on preventive needs relative to the personality of the individual criminal.[40] Nonetheless, without the materialization of the criminal character through lawbreaking, it would be problematic to legitimize the resort to penal measures. Ferri sought to solve this conundrum by distinguishing between "social dangerousness" and "criminal dangerousness": the former excluded the commission of a crime and the application of criminal law, with its substantial and procedural safeguards, and referred to the administrative area of policing, whereas the latter always presupposed the commission of a crime. In addition, the former referred to preventive defence and implied the danger of a crime, whereas the latter applied to repressive defence and entailed the risk of recidivism.[41] Ferri's argument rested on two features of dangerousness, namely, that it was inherent and embodied in every crime and therefore characterized every individual delinquent and that it was a criterion for determining sentences. However, as argued by other reformers, this theory betrayed the principles of positivism: it made the mistake of folding dangerousness into the offence and, as a result, what should be recognized as a subjective personal condition based on a comprehensive evaluation of the individual offender's character and lifestyle "disappeare[d], evaporate[d], [wa]s nothing but a name"[42]. No differently from the classical view, the crime was again more important than the criminal, and the offence represented the predominant element that imbued the criminal with the indelible mark of dangerousness. This was not the only inconsistency of the dangerousness principle that significantly limited its complete adoption and implementation[43]. It is worth noting,

[37] Ferri, *Criminal Sociology*, p. 424.

[38] See Fioretti, G.,"Polemica di Giulio Fioretti", *Polemica in difesa della scuola*, pp. 245, 250; Fioretti, G., *Il Nuovo codice penale italiano annotato*, Napoli, 1891, p. 64.

[39] Florian, E., "Note sulla pericolosità criminale", *La Scuola Positiva*, 37 (1927), p. 401.

[40] Grispigni, F., "La pericolosità criminale e il valore sintomatico del reato", *La Scuola Positiva*, 30 (1920), pp. 97-141.

[41] Ferri, E., "Funzione giuridica del criterio di pericolosità criminale", *La Scuola Positiva*, 36 (1926), pp. 433-46.

[42] Florian, "Note", p. 404.

[43] See Pifferi, M., "From Responsibility to Dangerousness? The Failed Promise of Penal Positivism", *The Limits of Criminological Positivism. The Movement for Criminal Law Reform in the West, 1870-1940* (M. Pifferi, ed.), Abingdone, 2021 (forthcoming).

however, that the idea of *état dangereux* stood at the heart of international penal modernism[44] and has somewhat influenced the development of criminal law up to the present time[45].

3.3. Prevention and repression

The justification of punishment based on the concepts of dangerousness and social defence exalted the preventive function of justice. The classical school, as Ferri pointed out, "ha[d] reduced the function of social defence to penal and repressive measures" and considered preventive means against insane delinquents "as aids, however, which had not a strictly juridical character". Moreover, the classicists had created "an essential difference between civil and criminal law", believed civil compensation for damages consequent upon crime "as entirely accessory", and continued to think that "the principal consequence of crime, that which is by far of greatest interest, and which alone interests the public, is punishment"[46]. By contrast, the positivist theory insisted on the practical and logical necessity "of collecting in a single system all the different means of defence":

> "So far from separating in an almost irrevocable manner the civil and the criminal, the preventive and repressive, the defensive and the punitive means, it coordinates them in an organic whole and uses all of them for the defence of society against crime".[47]

Of course, the old school recognized the existence and utility of preventive measures (such as *domicilio coatto*—forced residence—or other police measures applied to vagrants and idlers[48]), but it firmly believed that they were excluded from the field of criminal law, governed by strict legal safeguards and above all by the principle of legality[49], and belonged to the area of administrative law, characterized by officials' discretion and the lack of (or at least the diminution of) individual guarantees.

[44] The various implications of *état dangereux* were intensely debated in congresses of the IUPL: for instance, in Hamburg in 1905 (three reports and the general assembly discussed the extension of the notion of *état dangereux* to specific categories of recidivists in substitution of the too limited concept of the criminal act), Brussels in 1910 (the question discussed concerned the possibility of substituting the notion of *état dangerous* for that of criminal act and under which conditions this substitution was compatible with the safeguards of individual freedom), and Copenhagen in 1913 (the question discussed concerned the criteria on which the law adopting measures of social security against dangerous offenders should be based); see *Mitteilungen der IKV*, 13 (1906), pp. 425-70; 17 (1910), pp. 403 ff.; 20 (1913) pp. 369 ff.

[45] See, e.g., Tulkens, F., Digneffe, F., "La notion de dangerosité dans la politique criminelle en Europe occidentale", *Dangerosité et justice pénale. Ambiguïté d'une pratique* (C. Debuyst, ed.), Genève, 1981, pp. 191-205; Pelissero, M., *Pericolosità sociale e doppio binario. Vecchi e nuovi modelli di incapacitazione*, Torino, 2008.

[46] Ferri, *Criminal Sociology*, p. 411.

[47] *Ibid.*, p. 412.

[48] See, e.g., *Il domicilio coatto. Ordine pubblico e politiche di sicurezza in Italia dall'Unità alla Repubblica*, (E. De Cristofaro, ed.), Acireale-Roma, 2015; Campesi, G., *Genealogia della pubblica sicurezza. Teoria e storia del moderno dispositivo poliziesco*, Verona, 2009; Martone, L., "La difesa dell'ordine. Il dibattito parlamentare del 1888 sulla legge di pubblica sicurezza", *Giustizia penale e ordine in Italia tra Otto e Novecento* (L. Martone, ed.), Napoli, 1996, pp. 165-239; Neppi Modona, G., "Quali detenuti per quali reati nel carcere dell'Italia liberale", *Cesare Lombroso cento anni dopo* (S. Montaldo, P. Tappero, eds.), Torino, 2009, pp. 83-97.

[49] See, e.g., Pessina, E., "La legge penale avvisata in sé e nella sua efficacia", *Enciclopedia del diritto penale italiano* (E. Pessina, ed.), III, Milano, 1906, esp. pp. 6-12; Guidi, G., "Legge penale (efficacia della)", *Il Digesto Italiano*, XIV (1902-1905), esp. pp. 386-388.

According to Carrara, the scope of criminal law should not be confused with that of preventive policing because there is an abyss between them: policing is based on utility and does not require the commission of a wrongdoing before intervening, while criminal law is grounded on the supreme principle of justice. The risk of blurring this dividing line by founding criminal law on prevention is to enlarge discretion to the detriment of justice, and "by giving to human punishment the only foundation for defence, the restriction of non-wicked deeds is permitted under the circumstance of public utility; social authority is allowed the tyranny of arbitrariness"[50]. To classicists, it was a matter of boundaries, of clear-cut separation between what was considered properly *penal* in terms of both substantial requirements (such as the *nullum crimen nulla poena sine lege* principle and the prohibition of *ex-post facto* decisions; the need for fixed penalties predetermined by the law) and compliance with basic 'continental' due process rules (e.g., the right of defence, the need for a judicial decision whenever individual freedom was at stake; the limitations of judicial discretion by the law), and what was thought of as falling within the jurisdiction of police, administrative law and the field of political opportunity or public order-oriented legitimate discretion[51].

By contrast, in Ferri's opinion, "prevention and repression are only two phases of one and the same function affected by the same organ of society, with one and the same end. This end is the preservation of society; the problem, the study of the most efficacious and useful means of obtaining protection both for society and the individual. Of course, the criteria are different for prevention and repression; but distinction does not mean separation"[52]. Not only was prevention, for the first time, put on the same level as repression, but it was also assumed to be the main purpose of the *ius puniendi*, in particular in terms of special prevention, namely, taking all possible measures to avoid the perpetration of further crimes by the same offender, either by rehabilitating or incapacitating him or her. Retribution and prevention were, according to Longhi, two intersecting circles: against dangerous offenders, such as habitual or professional delinquents, their area overlapped, whereas mere retribution was applied to non-dangerous offenders, and pure prevention was applied to those dangerous criminals who were not sensible to retributive sanctions, such as inebriates or lunatics. What he called the "present criminal law" (*diritto penale attuale*)—one of the eclectic theories that was essentially positivistic but tried to retain some points of retributivism—comprehended both the repression of committed acts as well as the prevention of feared acts[53].

3.4. Means of social defence

This broadened conception of criminal law, including repression and prevention, implied the recognition of a cluster of penal measures that was not simply limited to

[50] See, e.g, Carrara, F., *Programma del corso di diritto criminale. Parte generale*, Lucca, 1867, pp. 15-24, quotation at p. 16; see also Lucchini, L., "Giustizia e Polizia", *Rivista penale*, 20 (1884), pp. 94-109.

[51] For a further elaboration, see Pifferi, M., "Difendere I confine, superare le frontiere. Le 'zone grigie' della legalità penale tra Otto e Novecento", *Quaderni fiorentini*, 36 (2007), pp. 743-799.

[52] Ferri, *Criminal Sociology*, p. 412. Similarly, Longhi, S., *Repressione e prevenzione nel diritto penale attuale*, Milano, 1911, p. 800, argued that "retribution and prevention are two phenomena of a unique manifestation: the *protection of interests*".

[53] Longhi, *Repressione e prevenzione*, p. 812.

traditional punishments[54]. The most important addition was that of security measures, forming the so-called dual track system. It is worth emphasizing that the adoption of security measures for social defence in addition to or in place of punishments was one of the most discussed themes of international penal reformism and that long before the Rocco code of 1930, many pieces of legislation had been implementing this model since the beginning of the 20th century[55]. Italian positivists contributed, together with other European scholars such as Carl Stoos or Gerhard van Hamel, to the conceptualization of security measures and their differentiation from punishment. Punishment was retributive and past-oriented, punished an act committed by a responsible subject, and presupposed a legally defined offence, and its method of execution and duration were fixed by the law with no (or very little) room for judicial discretion. By contrast, measures of security were future-oriented, operated as preventive devices against the dangerousness of subjects, whose acts were simply symptoms of their personalities and attitudes, did not follow any act that was strictly defined by law, nor did it proportionately correspond to the act's seriousness but rather depended on the condition of the subject. The duration of such measures rested on the purpose and outcome of the treatment and was, therefore, indeterminate[56].

An important contribution of the Italian positivists concerned, in particular, two theoretical issues: the individual safeguards to be necessarily applied to all of the means of social defence and the confluence and integration of all those means into a new and comprehensive notion of 'criminal sanctions'. As to the first point, positivists insisted that preventive measures, as well as repressive measures, had to be (1) applied exclusively on the precondition of the commission of a formally and legally defined offence, excluding the possibility of sanctioning dangerousness without crime; (2) legally defined by the law; and, finally, (3) always imposed by a judicial body, which granted much more impartiality and fairness than any administrative agency[57].

With regard to the theorization of a broader notion of "criminal sanctions" including all the means of social defence, either repressive or preventive, the underlying idea was to overcome the 'limited' concept of punishment by widening the horizons of criminal law. By assuming the defence of society as the target and special prevention as the rationale behind criminal law, the rigid classical distinction between 'true' punishment and other measures excluded from the perimeter of penal intervention became meaningless and misleading. Depending on the offender's personality and dangerousness, whatever measure could be conveniently applied to rehabilitate 'reformable' delinquents or neutralize persistent and non-assimilable delinquents, has a 'penal' character and is therefore included in the notion of "criminal sanctions"[58]. Rather than the substantial distinction between punishments and security measures—a

[54] It's worth noting that radical positivists or adherents to more eclectic approach (see Stefano Vinci's article in this journal), often suggested the labels "*diritto criminale*" or "*sistema di diritto penale*" instead of the traditional one "*diritto penale*" to express the new enlarged system encompassing penal measures different from punishments (see. e.g., Carnevale, E., "Il sistema di diritto penale e la misura di sicurezza", *Il Foro Italiano*, 61 (1936), pp. 227-278; Longhi, *Repressione e prevenzione*, pp. 14-15.

[55] See Pifferi, *Reinventing Punishment*, pp. 86-142.

[56] See Longhi, *Repressione e prevenzione*, pp. 942-956; Ferri, E., "Pene e misure di sicurezza", *Studi sulla criminalità*, Torino, 1926, pp. 665-676.

[57] See Longhi, *Repressione e prevenzione*, pp. 13-14; 964; Longhi, S., *Per un codice della prevenzione criminale*, Milano, 1922, pp. 51-60.

[58] Grispigni, F., "La sanzione criminale nel moderno diritto repressivo", *La Scuola Positiva*, 1920, pp. 390-446.

distinction that in positivists' view was destined to disappear due to the gradual overlapping of the two means, both devoted to the cause of preventive social defence[59]—what most mattered was the jurisdictionalization of all these legal instruments, so as to distinguish the penal field from the administrative or police field[60].

Of course, the reformers were aware that to truly achieve a social defence policy, 'criminal sanctions' were not enough and that other administrative measures had to be adopted to affect crimino-genetic conditions. Ferri's theory of "penal substitutes" or "equivalents for punishment" was based on a comprehensive sociological analysis of the causes of crime[61]. In considering penal sanctions as the "last and indispensable obstacle to the inevitable and sporadic manifestations of criminal activity", the equivalents for punishment served as "particular antidotes against the social factors of crime" and were a "point of departure in passing to a social order very different from that of today"[62]. Ferri summarized their target as follows:

> "It is necessary, in legislative dispositions (political, economic, civil, administrative, and penal), from the great institution down to the slightest details of its existence, to give the social organism an orientation such that human activity, — instead of being uselessly threatened with repression shall be constantly guided in an indirect manner into non-criminal ways, and such that a free overflow shall be offered to the energies and needs of the individual whose natural tendencies will be hurt as little as possible and who will be spared as much as possible the temptations and occasions of crime."[63]

Overall, Ferri's system, by questioning the chasm between civil and criminal law, was made up of "four different forms of social reaction against anti-juridical acts", corresponding to four classes of defensive measures: preventive, reparative, repressive and eliminative[64]. The more prevention became part and parcel of criminal law, the

[59] Florian, E., "Confluenza delle pene e delle misure di sicurezza", *La Scuola Positiva*, 1930, pp. 337-340.

[60] Grispigni, "La sanzione criminale", p. 408.

[61] Ferri, *Criminal Sociology*, p. 242: "It being established that punishment, far from being the convenient panacea which it seems to classical criminalists, legislators, and the public, has but very limited power to combat crime, it is natural, therefore, that the criminal sociologist should seek other means of defense from the positive observation of facts and of their natural origin". See also Latini, C., "I 'segni' della devianza e la criminalità dei poveri. Pena e prevenzione nel pensiero di Enrico Ferri, un socialista *fuzzy*", *Historia & Ius*, 11 (2017), paper 10, pp. 4-6.

[62] Ferri, *Criminal Sociology*, pp. 244-245.

[63] *Ibid.*, p. 245. Chapter V of *Criminal Sociology* (pp. 242-277) provides details and examples of penal substitutes, which should operate within different orders (economic, political, scientific, civil and administrative, religious, family, educational) and ranged from favoring free trade instead of permanent industrial monopoly to prevent crimes against property, to freedom of emigration as "a real safety valve which frees the country from elements easily drawn into crime, through poverty and badly balanced energies" (p. 247). For Lucchini's critique to Ferri's theory of penal substitutes, accused of expanding too much the power of the state and the police, see Sbriccoli, "La penalistica civile", pp. 554-555.

[64] Ferri, *Criminal Sociology*, pp. 414-420: preventive means are the penal substitutes and measures of direct and present police; reparative measures, used when the anti-juridical fact has already been effected, are the suppression of the anti-juridical state, the nullity of the effects of the anti-juridical acts, and the reparation of damages caused by such acts; repressive means are temporary punishments such as imprisonment, farming colonies for adults and minors, enforced rustication, fines payable by work, and suspension from trade or profession; eliminative means, such as capital punishment, asylum and farming colony for the criminal insane, tend to prevent recidivism and should be employed only against the most criminal acts, either for the seriousness of the offence (homicide, rape, arson) or for the dangerousness of the offender (borne, insane or habitual delinquents). Resorting to the comparison with biological medicine, Ferri concluded that "in sociological medicine, the great classes of hygienic measures (preventive means), therapeutic remedies (reparative and repressive means), and surgical

more its rigid liberal boundaries became blurred. Lucchini, in his polemical pamphlet, criticized the positivists' muddling up of private and public law, reunited under a "hypothetical social defence", as the result of a "deficient understanding" of both of them, a consequence of their superficial observation of social and legal phenomena[65].

3.5. Individualization of punishment and procedure

The individualization of punishment was the formula used by international penal modernism to express the shift from the retributive idea of punishment, based on the principle of legality and measured against the seriousness of the offence, to the preventive idea of criminal sanctions, flexibly adjusted to the offender's temibility[66]. Two specific contributions of the Italian positivists to this subject concerned the classification of criminals and the individualization of the trial. Ferri argued that the individualization principle should not be taken as a claim for different penalties for each individual criminal but in terms of specific sanctions for categories of criminals. To avoid the faults of administrative individualization, that is, to avoid leaving punishment decisions to incapable penitentiary officials, it was "necessary to substitute for the unreliable theory of individualization the criterion of classification, which [gave] the merits of the other principle a more easy and practical realization", namely, "a penal discipline suited to each bio-sociological class or subdivision of delinquents"[67]. Therefore, Ferri's five categories of criminals, that is, the criminally insane, born criminals, habitual delinquents, criminals through passion and occasional criminals, should have found a parallel in different forms of punishment/treatment. Accordingly, in relation to the offenders' psychological types, modern criminal sanctions should be intimidating, rehabilitating, eliminative, or curative[68].

Rather than waiting for the end of the criminal trial, still modelled on liberal traditional principles that did not provide any information about the personality of the accused, to individualize punishment, Italian positivists suggested individualizing the whole process of criminal judgement from its initial phase. The trial should not be targeted to the investigation of the crime but to the analysis of the defendant's character[69]. Bruno Franchi—chief editor of *La Scuola Positiva*—for instance, theorized that individualization could truly become "the unitary principle governing the entire criminal procedure through the coordinated activity of all of the bodies of social defence (i.e., the police, investigating magistrate, judge, experts, and sentencing authorities)"[70]. Unlike other European reformers who advocated the unification of penal jurisdiction and administration or the bifurcation of the judicial process into guilt and sentencing phases following the US pattern, Franchi proposed the introduction of mechanisms to

operations (eliminative means) form the arsenal which enables society to face the permanent necessity of its own preservation" (p. 420).

[65] Lucchini, *I semplicisti*, p. 183.

[66] On the international significance of the debate over the individualization principle, see Pifferi, *Reinventing Punishment*.

[67] Ferri, *Criminal Sociology*, p. 517.

[68] Grispigni, "La sanzione criminale", pp. 416-418.

[69] See Ferri, *Criminal Sociology*, p. 443: "The duty of a criminal judge is not to determine the degree of moral responsibility of a delinquent but his material guilt or physical responsibility, and this once proven, to fix the form of social preservation best suited to the defendant according to the anthropological category to which he belongs".

[70] Franchi, B., "Il principio individualizzatore nell'istruttoria penale", *La Scuola Positiva*, 10 (1900), p. 649.

render the ordinary procedure concretely suitable to collecting reliable and scientific information on the offender, leading to an individualized judgement tailored to the convict's characteristics and inclinations gathered *during* the trial (not *after* it, as in the United States). Therefore, he suggested the individualization of the preliminary investigation as a method for shifting to the pretrial phase the examination of all of the defendant's characteristics (biological, psychological, socioeconomic) that could condition the entire course of the trial up until the verdict. In the investigative hearing, with the cross-examination of the counsel and the contributions of the experts but without the publicity of a hearing, all of the necessary information for individualizing the sentence could be gathered in light of state-of-the-art criminology[71]. What he defined as the "anthropological integration of criminal procedure" should combine anthropological, criminological and psychiatric evidence[72] with the safeguards of a judicial decision regarding the offender's dangerousness[73].

The natural consequence of individualization was the indeterminate sentence. However, the Italian positivists, like other European reformers, did not follow the US model[74]: the means of social defence had to be relatively indeterminate, especially the measures of security that were subjected to periodic revision, but the conditions for their application had to be defined by the law and their application always judicialized[75].

3.6. Role of the judiciary

For Italian reformers, individualizing criminal law and procedures meant that the punitive power of the state was extended in order to include the evaluation of the offender's dangerousness, as well as the application of preventive measures. Such an enlargement of horizons should not curtail the role of the judge but, rather, strengthen it because it required broadening judicial jurisdiction beyond the borders of the traditional notion of punishment. As Florian argued, while in the classical system "condemning or acquitting were the Pillars of Hercules for the judge", now the judge's competencies also encompassed all of the dispositions dictated by the reasons for social defence, including surrogates for punishment (such as suspended sentences) and measures of

[71] Franchi, "Il principio individualizzatore"; Franchi, B., "Procès pénal et anthropologie criminelle", *Congrès international d'anthropologie criminelle. Compte rendu des travaux de la cinquième session tenue à Amsterdam*, (J.K.A. Wertheim Salomonson, ed), Amsterdam, 1901, pp. 155-174.

[72] On the key procedural role of the board of experts in the positivists' theory, see Rotondo, F., "Un dibattito per l'egemonia. La perizia medico legale nel processo penale italiano di fine Ottocento", *Rechtsgeschichte*, 12 (2008), pp. 139-173; Miletti, M., "La follia nel processo. Alienisti e procedura penale nell'Italia postunitaria", *Acta Histriae*, 15.1 (2007), pp. 321-346.

[73] Franchi, B., "La dottrina e l'esecuzione delle pene prima e dopo Cesare Lombroso", *La Scuola Positiva*, 16 (1906), pp. 149-170, 273-285, 385-423, 598-620; Franchi, B., "Di un sistema relativo di pene a tempo indeterminato", *La Scuola Positiva*, 10 (1900), p. 473. For more details, see Pifferi, *Reinventing Punishment*, pp. 186-188.

[74] On the different approach to individualization and indeterminacy of punishment between European and American criminology, see Pifferi, *Reinventing Punishment*; Pifferi, M., "Indetermined Sentence and the Nulla Poena Sine Lege Principle. Contrasting Views on Punishment in the U.S. and Europe Between the 19th and the 20th Century", *Legality Principle in Western Legal History*, (H. Pihlajamäki, G. Martyn, M.D. Dubber, eds.), Berlin, 2013, pp. 387-406.

[75] Franchi, "Di un sistema relativo"; Ferri, *Criminal Sociology*, pp. 503-509: Altavilla, E., "Il Primo convegno della Società Italiana di Antropologia, sociologia e diritto criminale e la segregazione a tempo indeterminato", *Rivista di diritto e procedura penale*, 6 (1915), pp. 80-93.

security[76]. The role of the judge was rethought, and the separation of powers was reshaped but never completely overcome. Again, the views of Italian positivists were not isolated on this point and were shared by many other reformers. The French criminalist Paul Cuche claimed in 1905 that "the modern history of criminal law could have a chapter entitled 'the progressive abdication of lawmakers into the hands of the judiciary', and currently, such abdication is almost complete"[77], and the Spanish criminologist Bernaldo de Quirós similarly noted that in reaction to the anti-jurisprudential spirit characterizing the European penal culture from Beccaria and the French Revolution onwards, "judicial discretion [wa]s regaining what it had lost, and rid itself of its unfortunate note as the magistrate gained in science and conscience"[78].

Nonetheless, Ferri and his school never rejected the principle of legality entirely, nor did they question the need to balance social defence and individual guarantees. The broader boundaries within which the judge was meant to work were always defined by the law, and the jurisdictionalization of any criminal sanction was theorized as a new constitutional feature of punitive power because in the modern state based on the division of powers, the autonomy of criminal law compared with administrative law was ensured solely by the intervention of the judge as a safeguard against executive power[79]. Moreover, two radical reforms were suggested to allow judges to properly carry out their new tasks: first, the scientific knowledge of magistrates had to be improved through specific criminological training; second, the complete independence of criminal judges from influence by the executive powers had to be guaranteed[80].

4. Ferri's Project of 1921

With the Royal decree of September 14, 1919, n. 1743, the Minister of Justice Ludovico Mortara appointed Enrico Ferri as the chairman of a Commission "entrusted with the task of proposing the reforms needed in the system of penal legislation in order to ensure, in harmony with the principles and rational methods of the *defence of society* against crime in general, a more effectual and secure defence against habitual delinquency"[81]. In the report prefixed to the Royal Decree, Mortara outlined a two-fold aim that repressive measures oriented to social defence had to achieve, namely, the rehabilitation of occasional offenders and the "detachment" of habitual offenders from the body of honest citizens. Moreover, when the Minister inaugurated the labour of the Commission, he referred even more explicitly to the positivistic framework by

[76] Florian, E., "Sulla natura giuridica di talune nuove facoltà del giudice penale", *Rivista di diritto e procedura penale*, 1 (1910), p. 737.

[77] Cuche, P., *Traité de science et de législation pénitentiaires*, Paris, 1905, p. 21. See also Jimenéz De Asúa, L., "El concepto moderno del Derecho penal y las garantías de los derechos individuales. Cuarta conferencia", *El nuevo código penal argentino y los recientes proyectos complementarios ante las modernas direcciones del derecho penal. Conferencias pronunciadas en la facultad de derecho de la Universidad de Buenos Aires durante los meses de junio, julio y agosto de 1923 y agosto de 1925*, Madrid, 1928, p. 131.

[78] De Quirós, B., *Modern Theories of Criminality*, Boston, 1911, p. 177.

[79] See, e.g., Grispigni, "La sanzione criminale", pp. 407-408; Florian, E., "Le nuove esigenze del processo penale", *La Scuola Positiva*, 24 (1914), pp. 62-66.

[80] Ferri, *Criminal Sociology*, pp. 473-476.

[81] Royal Decree of September 14th, 1919, art. 1, quoted in Ministero della Giustizia, Commissione reale per la riforma delle leggi penali, *Relazione al Progetto preliminare di Codice Penale Italiano (Libro I)*, with official English translation *Report and Preliminary Project for an Italian Penal Code (First Book)*, Roma 1921, p. 371 [emphasis added].

maintaining the offenders' dangerousness rather than their imputability as the criterion by which to measure the gravity of criminal acts and their punishment[82]. The Project for a Penal Code presented in 1921 (limited to the general part), known simply as Ferri's Project, was the most elaborate attempt to implement the views of the positive school and to adopt a real positivistic code[83]. However, as is known, it was never enacted. It raised, nonetheless, a remarkable level of international interest; it was either praised or criticized[84] and served as a model for other foreign codifications.

As Ferri explained in the report, the Project was based on positivistic criteria: the centrality of the offender rather than the offence; the dangerousness of the offender; the psycho-anthropological classification of offenders; the distinction between adult offenders and criminals under 18 years of age; the distinction between ordinary offenders (driven by egoistic sentiments) and social-political offenders (driven by altruistic sentiments)[85]; the notion of legal responsibility; the rejection of "any pretence whatsoever of inflicting a chastisement proportionate to a moral fault" in favour of the idea that sanctions "should provide only for the most effective social defence against dangerous offenders, and for the most rapid and sure redemption and re-utilisation of less dangerous offenders, who are in the great majority"[86]; indeterminate sentencing[87]; the inclusion among repressive sanctions of measures of protection, which are "withdrawn from the arbitrariness of the administrative power and are placed under the power of the Courts, as any other form of sanction whatsoever"[88]; the admission of a great variety of sanctions for the purpose of better adapting them to the different categories of offenders; and the abolition of daily isolation in cells.

One of the key points of the Project was the legal definition of the criteria for appraising the dangerousness of the offender to a greater or lesser extent, provided for in arts. 20-22. Ferri argued that judicial individualisation of the penal norms should have "its boundaries defined in a precise and concrete manner in the sentence" and therefore it was necessary to lay down "the rules by which the judge, in applying (…) the sanctions, shall precisely define the form, the gravity, and the duration of the condemnation"[89]. Of course, Ferri recognized that "when the protection of society and

[82] *Ibid.*, p. 372. Ferri, in replying to Mortara, beside stressing once again the principles and the methods of social defence, indicated as the two guiding ideas of the Commission the shift from the crime to the criminal and the balance between individual rights and social rights. Given these premises, and due to Ferri's leadership, the Commission's approach was markedly positivistic, so that Alessandro Stoppato and Emanuele Carnevale, who had been appointed in the Commission but had different views, resigned soon after the beginning of the works. For more details, see Ferri, E., "The Nomination of a Commission for the Positivist Reform of the Italian Penal Code", *Journal of the American Institute of Criminal Law and Criminology*, 11.1 (1920), pp. 67-76.

[83] See Ferri, E., "The Reform of Penal Law in Italy", *Journal of the American Institute of Criminal Law and Criminology*, 12.2 (1921), pp. 178-198. See Garfinkel, Criminal Law, pp. 362-388; Sigismondi, F.L., La "funzione pratica della giustizia punitiva". Le prolusioni romane di Enrico Ferri, *Historia et Ius* 4 (2013) paper 11, esp. pp. 10-12.

[84] Critical remarks were made, e.g., by Collin, F., *Enrico Ferri et l'Avant-Projet de Code Pénal Italien de 1921*, Bruxelles, 1925, esp. pp. 176-193.

[85] Sanctions had to be different accordingly, see Manna, A., "Le sanzioni penali nel Progetto Ferri", *Diritto penale XXI secolo*, 10.2 (2011), pp. 280-282.

[86] *Relazione al Progetto preliminare*, p. 383.

[87] *Ibid.*, 384: "In place of the traditional system of prison penalties for a fixed period, must therefore be substituted segregation for a period relatively or absolutely unlimited, while the necessary guarantees for individual rights are secured".

[88] *Ibid.*, p. 385.

[89] *Ibid.*, p. 422.

the dangerousness of the offender [were] made the basis of and criteria for penal justice, it [was] inevitable that greater powers should be conceded to the judge"[90]. However, he also claimed that judicial discretion could not be unlimited, in order not to jeopardize individual safeguards: "the discretionary power of the judge cannot and must not surpass the limits which, as a guarantee for society and for the citizens at one and the same time, the law has previously set up"[91]. The outcome of such a theoretical compromise was the legalization of the dangerousness criteria, namely, the legal definition of the circumstances of greater (art. 21) or less (art. 22) dangerousness. The American criminologist Sheldon Glueck criticized this solution in Ferri's Project, as it provided "a sort of penal mathematic by which the judge [wa]s more or less mechanically bound"[92]. In so doing, Glueck argued, the Italian jurist was betraying the rehabilitative ideal because there was no individual study of the criminal during the execution of the sentence. Ferri's choice to exclusively emphasize the offender's dangerousness was considered "unjust", "unscientific", and "uneconomical" because, by relying too much on social interest in "general security", it nevertheless excessively underestimated the rehabilitative potential of the offender[93]. The American criminologist's analysis pointed out an inherent theoretical contradiction in Ferri's project in reconciling legality and dangerousness[94].

5. The problematic legacy of social defence

The Project remained the most thorough expression of the positivist credo and, at the same time, it marked the progressive decline of the school. Its non-enactment should be attributed to the rise of a new technical method opposed to the interdisciplinary approach of Ferri's school rather than to the resistance of the advocates of the classical school. When Arturo Rocco, in his inaugural lecture at the University of Sassari in 1910, founded the technical legal method (*tecnicismo giuridico*), his main purpose was to restore the criminal law to its legal scientific autonomy as a reaction against the positivist project to merge (and to enrich) criminal law into other branches of knowledge such as anthropology, sociology, statistics, psychiatry, etc.[95] The fascist

[90] *Ibid*, p. 422.

[91] *Ibid.*, p. 423.

[92] Glueck, S., "Principles of a Rational Penal Code", *Harvard Law Review*, 41 (1928), p. 472 nt. 24.

[93] *Ibid.*, p. 469. Therefore, Glueck, on the one side, suggested substituting Ferri's notion of dangerousness with the broader concept of "personality", namely, a more complex and dynamic phenomenon in constant development, of which temibility was simply one important (but not exclusive) symptom. On the other side, he proposed a revised version of the US indeterminate sentence system, in which the law only determined "broad penological standards and [left] to trained judges, psychiatrists, and psychologists, forming a quasi-judicial treatment body, the application of those standards in the individual case" (p. 470).

[94] See Seminara, S., "Einführung: Der Vorentwurf eines italienischen Strafgesetzbuches von 1921", *Vorentwurf zu einem italienischen Strafgesetzbuch über Verbrechen von 1921 ("Progetto Ferri"). Text und Kommissionsbericht* (T. Vormbaum, ed.), Berlin, Munster, 2014, pp. xxvi-xxxi.

[95] See, e.g., Sbriccoli, "La penalistica civile", pp. 577-578; Grossi, P., *Scienza giuridica italiana. Un profilo storico 1860-1950*, Milano 2000, pp. 83-88; Garlati, L., "Arturo Rocco inconsapevole antesignano del fascismo nell'Italia liberale", *I giuristi e il fascino del regime*, esp. pp. 204-209; De Francesco, G., "Rocco, Arturo", *Enciclopedia italiana…Diritto*, pp. 376-380; Donini, M., "Tecnicismo giuridico e scienza penale cent'anni dopo. La prolusione di Arturo Rocco (1910) nell'età dell'europeismo giudiziario", *Criminalia* (2010), pp. 130-134; Seminara, S., "Sul metodo tecnico-giuridico e sull'evoluzione della penalistica italiana nella prima metà del XX secolo", *Studi in onore di Mario Romano*, 1, Napoli 2011, pp. 575-616.

penal code was the product of this new method, and legal historians have examined the characteristics of this approach as well as its ambiguous relationship with the fascist regime[96]. The theoretical influence of criminological positivism on the Rocco Code, however, is still a matter of historiographical debate[97]. In explaining the underlying theory of the code, Alfredo Rocco, Minister of Justice of the fascist regime and brother of Arturo, pointed out that it embodied neither the positivist nor the classical credo, but, being grounded "on the real needs of collective life, that is social demands and political opportunities and conveniences", it "had taken from each school only what was good and true in them"[98]. In contrast, Ferri praised the draft of the Rocco Code as the realization of his school's ideas after more than forty years of unheeded proposals: between fascism and the positive school, he saw a relation of "apparent antagonism but final consensus" and argued that despite the fact that fascism claimed to be an anti-positivist movement, there was a theoretical as well as practical agreement on the most important issues[99].

The introduction of a detailed regulation of security measures into the new code, for instance, was seen by positivists as clear evidence of their influence. Apart from the theoretical inconsistency of two penal measures based on opposite rationales within the same code, namely, *retributive* punishments and *preventive* security measures, Florian argued that the positivist notion of social defence was able to include both kinds of sanctions in the field of criminal law. Even if the code accepted the difference (criticized by positivists) between indictable and the non-indictable delinquents (the first to be sanctioned with punishments, the latter with security measures), he claimed that "the principle of social defence, in the variety of modes and purposes in which it [wa]s realized, [wa]s perfectly appropriate to correspond to the growth of new developments that the legal fight against delinquency [wa]s assuming, by including in the field of criminal law those who [we]re called, in classical terms, irresponsible"[100]. In contrast, Longhi, who fervently adhered to fascism[101], provided a different interpretation of the dual track system adopted by the code, emphasizing how

[96] Sbriccoli, M., "Le mani in pasta e gli occhi al cielo. La penalistica italiana negli anni del fascismo", *Storia del diritto penale*, pp. 1001-1034; Garlati, "Arturo Rocco".

[97] See, e.g., Dezza, E., "Le reazioni del positivismo penale al Codice Rocco", *Diritto penale XXI secolo*, 10.2 (2011), pp. 421-440, who stresses the interpretive limits of the "schools paradigm"; Musumeci, E., "The Positivist School of Criminology and Italian Fascist Criminal Law: a Squandered Legacy?", *Fascism and Criminal Law: History, Theory, Continuity* (S. Skinner, ed.), Oxford, 2015, pp. 56–58; Ruggiero, G., "L'importanza del Progetto Ferri per il 'Codice Rocco'", *Rivista di storia del diritto italiano*, 84 (2011), pp. 287-310; Tavilla, E., "Ordine biologico e ordine morale. Appunti sulla riflessione criminologica italiana in tema di pena di morte (sec XIX)", *Historia et ius*, 10 (2016) paper 25; Marques, T.P., "La riforma penale fascista italiana: un modello internazionale", *Studi sulla questione criminale*, 3.1 (2008), pp. 73-105.

[98] Rocco, A., "Relazione a SM il Re del Ministro Guardasigilli (Rocco) presentata nell'udienza del 19 ottobre 1930-VIII per l'approvazione del testo definitivo del Codice Penale", *Codice penale e codice di procedura penale (RD 19 ottobre 1930-VIII) preceduti dalle rispettive Relazioni ministeriali*, Torino 1930, p. 9.

[99] Ferri, E., "Fascismo e Scuola Positiva nella difesa sociale contro la criminalità", *La Scuola Positiva*, 36 (1926), p. 241. For a description of these shared points (the reaction against the overemphasis on individualism; the substitution of the notion legal responsibility for that of moral responsibility; the priority of prevention over repression; the preference for judicial individualization rather administrative individualization), see Pifferi, M., "Criminology and the Rise of Authoritarian Criminal Law, 1930s-1940s", *Ideology and Criminal Law. Fascist, National Socialist and Authoritarian Regimes* (S. Skinner, ed.), Oxford 2019, pp. 109-112.

[100] Florian, E., *Parte generale del diritto penale*. 4th ed., Milano, 1934, p. 91.

[101] Miletti, M.N., "Longhi, Silvio", *DBGI*, pp. 1193-1195.

the inclusion of measures of security within the penal code represented one of the most characteristic points of a complete reform of a radical remaking of the penal system according to the new political views of the regime[102]. Rather than being specifically positivist or markedly fascist, the dual track system of the Rocco code was a compromise ascribable to a forty-year international debate on preventive means[103].

Beyond rhetorical strategies and opportunistic discourses[104], my view is that the continuity interpretation underestimates the radical political turn that occurred with the rise of fascism and oversimplifies the complex contribution of criminological positivism by reducing it to the repressive facets of social defence that were exploited by the fascist authoritarian regime[105]. Nevertheless, it is worth noting that the notion of social defence survived the fall of fascism[106] and brought to the attention of Italian jurists (and, more broadly, to that of European jurists[107]) the problem of its compatibility with the new constitutional framework. The challenge was to not forget the contributions of penal modernism in terms of attention to the personality of the offender and the individualization of punishment, while avoiding, nonetheless, the risks of jeopardizing individual rights. Giuliano Vassalli, for instance, claimed that the system of measures of social defence should be tempered with the fundamental rights of the individual: any penal classification of the offender's personality should, therefore, be exclusively used as a means to strengthen the same personality by applying the most appropriate treatment rather than as an instrument of inhuman oppression and social regression. Principles of freedom (such as the principles of legality, of the prohibition of analogy, and of the non-retroactivity of any penal law) should serve as limits to the social defence system[108]. A few years later, Pietro Nuvolone followed Marc Ancel's idea that the principle of social defence should be based on the moral and social rehabilitation of the criminal[109] and theorized the existence of a right to resocialization. Unlike Vassalli, he admitted that some traditional principles, and in particular the *nulla poena sine lege*, should be interpreted in a more flexible way. However, even though Nuvolone argued that the judge should be allowed a broader discretion in determining the duration of punishment (with the law providing for only a minimum and maximum) and in assessing the uncertain condition of the *état dangereux*, he suggested counterbalancing

[102] Longhi, S., "Fascismo e diritto penale", *Anticipazioni della riforma penale*, Milano, 1931, p. 143.

[103] See Pifferi, *Reinventing Punishment*, pp. 226-229.

[104] On Ferri's political opportunism in stressing the continuity between fascism and his theories, see Radzinowicz, L., *Adventures in Criminology*, London, 1999, p. 20; Rappaport, E.S., "Les deux faces de la carrière scientifique d'Enrico Ferri", *Le problème de l'unification internationale du Droit Pénal*, Varsovie, 1929, pp. 87-92; on the need of an in-depth historicisation of such supposed continuity see also Colao, "«Un fatale andare»", pp. 155-157.

[105] See Pifferi, M., "Criminology and the Rise of Authoritarian Criminal Law". Miletti, M.N., "Giustizia penale e identità nazionale", *Quaderni fiorentini*, 45 (2016), p. 702, though recognizing that fascism "recycled" some positivist repressive tools for its own purpose, maintains that the positivist conception of social defense was different from the fascist one. For an example of continuity-interpretation, see, e.g., Fontana, A., "Dalla difesa sociale alla difesa della razza", *Laboratoire italien* [En ligne], 4 | 2003, mis en ligne le 07 juillet 2011, consulté le 20 juillet 2020. URL: http://journals.openedition.org/laboratoireitalien/336; DOI: https://doi.org/10.4000/laboratoireitalien.336

[106] See e.g. Grispigni, F., *Diritto penale italiano*, I, Milano, 1947, p. 231.

[107] See, e.g., Radzinowicz, L., "Cesare Beccaria and the English System of Criminal Justice: a reciprocal relationship", *Atti del Convegno internazionale su Cesare Beccaria. Torino 4-6 ottobre 1964*, Torino 1966, pp. 56-66.

[108] Vassalli, G., "Limiti di diritto in un sistema di difesa sociale", *Rivista internazionale di difesa sociale* (1949), reprinted in Vassalli, G., *Scritti giuridici*, IV, Milano, 1997, pp. 183-204.

[109] See Ancel, M., *La nuova difesa sociale*, Milano, 1966.

these extended judicial powers with a reconceptualization of the legality principle, namely, with its meaning in terms of the jurisdictionalization of every measure of social defence, the principle of cross-examination and the right to defence[110].

Even the more democratic and human-rights oriented post-WWII version of the 'new' social defence principle had (and still has) to deal with its inherent tensions and contradictions[111].

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[110] Nuvolone, P., "Le principe de la légalité et les principes de la défense sociale", *Revue de science criminelle et de droit pénal comparé*, 2 (n.s.) (1956), pp. 231-242; see also Nuvolone, P., "Le misure di prevenzione nel sistema delle garanzie sostanziali e processuali della libertà del cittadino", in *Stato di diritto e misure di sicurezza* ,Padova, 1962, pp. 161-179; (1969) "Processo penale: legalità, giustizia e difesa sociale", *Trent'anni di diritto e procedura penale. Studi*, I, Padova, 1969, pp. 446-455.

[111] For an overview of the constitutional problems raised by the principle of social defence with regard to the criminal trial, see Negri, D., "Diritto costituzionale applicato: destinazione e destino del processo penale", *Nei limiti della Costituzione. Il Codice repubblicano e il processo penale contemporaneo*, (D. Negri, L. Zilletti, eds.), Milano, 2019, pp. 24-28.

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