


1920

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Recommended Citation

Enrico Ferri, Nomination of a Commission for the Positivist Reform of the Italian Penal Code, 11 J. Am. Inst. Crim. L. & Criminology 67 (May 1920 to February 1921)

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THE NOMINATION OF A COMMISSION FOR THE POSITIVIST REFORM OF THE ITALIAN PENAL CODE¹

ENRICO FERRI²

I. The nomination of a commission, presided over by Henry Ferri, for the reform of the Penal Code of 1889, by royal decree, September 14, 1919, is an event of great scientific importance and of real satisfaction to all who struggled and worked for the affirmation of criminological positivism.

The Italian Positive School began in 1878 with the second edition of "The Delinquent," by Cæsar Lombroso; with the "Theory of Imputability" and "New Horizons of Penal Rights," by Henry Ferri; with the "Positive Criterion of Penalties," by Raffaele Garofalo. Thus it completes its historical cycle—quite rapidly in comparison with the Classic School, which had to wait more than fifty years for its proposed reforms to be legally sanctioned, obtaining the official recognition of the Italian state after being proposed and carried in triumph in many congresses and foreign countries, and entering the decisive phase of the realization of its practical conclusions.

Forty years of research, of experience, of proposals, of scientific propaganda—the chief instigator of which was Henry Ferri—had shown up the defects of the Italian Code of 1889, produced as a transitional formula between two opposite tendencies, too late for the traditional doctrines and too early for the positivist doctrines, and the insufficiency of the central criterions which this inspires, its inability to meet the criminal phenomenon, which, without proper contrasts, came to assume terrible shapes and proportions. Then the war did not fail to influence crime directly, but certainly not in a beneficent sense.

While official statistics stated and lamented in doubtful words the progressive increase of crime, and Holtzendorf proclaimed the bankruptcy of the penal system almost as a tragical contrast, penal doctrines reached their highest perfection theoretically, men of law, such as Carrara and Pessina, raised their legal constructions as far

¹For more ample information see the review "*The Positive School in Doctrine Jurisprudence, Penal Legislation*," Director Enrico Ferri, Rome (the University), year 1919, page 289.

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from the exigencies of social life as they were magnificently made from a logical and formal point of view.

Out of this state of uneasiness and under the spur of reality arose a fragmentary movement of legislative reforms consisting of single considerations for habitual offenders, for those under age and for alcoholics, improvements quickly adopted in some foreign countries, but nearly all still projects only in Italy.

But as empirism dominated it, and it lacked the central vision of the criminal phenomenon as symptom in the personality of the offender, a still greater uncertainty and not a few contradictions resulted.

So it happened that in Italy arose a desire for a complete and organic reform which should be the source of new and precise criteria in methods. Urgent appeals to the government for a substantial reform in permanent institutions have not been wanting on the part of the very judges called to apply the laws.

Besides this, the Positive School, in recent years, had prepared all the elements of a reform, as it had studied the legal and formal aspects of the various problems and had been able to construct the real "legal system" and to formulate an entire code, i. e., the International Code, by Raffaele Garofalo.

The reform, then, which the above mentioned authorized commission of Ludovico Mortara should seek, ought to be complete and organic, guided by the central criterion, that the fulcrum of the new legislation ought no longer to be the crime, but the criminal. The very relation which precedes the decree of September 14 affirms the necessity that "the defense against the delinquency be rationally coordinated with a general system which first takes into account the personal conditions of the criminal, as well as the matter of the criminal acts.

Such a criterion being considered by the keeper of seals in forming the commission has exercised its influence on the choice of persons, so that biologists and psychologists, such as Sancte de Danctis, Salvatore Ottolenghi, Giulio Cesare Ferrari, and pathologists and specialists in alcoholism and other degenerative factors, as Alessandro Lustig, have been called to co-operate with the men of law.

But, leaving on one side the names of those who form the commission and the fact that they represent the principal figures in the modern direction, also for other aspects, the Commission of Reform of the Penal Code assumes a clearly positivist aspect. The relation, in fact, cuts short the divergencies of schools and assumes as base

of penalties the criterion of the "social defense," and emphasizes "criminal dangers" as the criterion on which should be founded the new system of sanction and of means of social defense.

The same relation distinguishes particularly two fundamental categories of criminals—occasional and habitual—showing the necessity for different treatment in each case, according to the fundamental opinions of positivism.

So, with banners unfurled, the study and valuation of the "psycho-anthropological entity" of the criminal enters the conception of the magistrate of tomorrow, by which penal justice may attain the double purpose of a better social defense against crime and of a more humane treatment of the criminal.

II. Here is the text of the Relation of the Keeper of Seals, prefixed to the Royal Decree:

"Sire! Very often, by means of requests addressed to the Government in Parliament, the promulgation of legislative and efficacious measures to provide society with a safe and sure defense against habitual crime has been demanded. The much-felt need of the measures asked for is due to the fact that the rules of the Penal Code for crime in general and for its repetition in various forms, including relapses, has been proved to be inadequate for this defense.

"A scientifically and practically exact conception of habitual crime and of the best defense of society against the same, necessarily presupposes the determination of exact scientific and practical criteria about the phenomenon of crime, remembering the purpose of social defense which should inspire and guide the legislator in considering the criminal and in providing for the repression of his dangerous activity.

"The defense of civilized society against crime should be carried on by repressive measures as well as with wise and foreseeing prevention, but they should be adapted with prudent discernment to a double purpose. For the majority of occasional criminals not actuated to crime by base motives, it is better to study and apply humane treatment, which helps to keep them from relapses and to facilitate their recovery and rapid return to useful co-operation in civilized life. For crime of a really habitual character, measures should be taken to separate them from honest citizens on whom these perverted members exercise a fatal disintegrating and corrupting influence. The insufficiency of the actual legislation to these high and difficult aims, confirmed by thirty years' experience, shows the necessity of a wide revision in order that the defense against habitual crime may be ra-

tionally co-ordinated to a general system which considers first of all the personal conditions of the criminal as well as the material of the facts of the crime.

“There is also no doubt that the assurance of the delinquency, and especially of the habitual ones, demands a great improvement in the methods of investigation on criminal acts and of their authors to diminish the excessive number of crimes which at present escape the action and even the knowledge of justice, attesting the deficiency of the organs and the insufficiency of the activities with which the state finds out and follows up the crimes.

“From these considerations emerges the necessity not to delay any longer the solution of these very important problems, and to concrete the proposal for legislative reform under the authorized guidance of a commission to whose learned work may be called to contribute the various schools and scientific discipline in which the postulates of the doctrine and experience are seen to be mature and ready to furnish the legislator with the most useful counsels.

“I therefore take the liberty of respectfully begging your Majesty to be pleased to approve the enclosed scheme of a decree, trusting that this initiative marks the first step on the way to an auspicious improvement in the conditions of civilized life, seconding the desires of all honest people. The authority of the above persons, their impartiality in the criterion of choice, are guarantees of a fruitful and careful work which will obtain for the commission the gratitude of the Italian people as well as that of the Government.”

III. The Royal Decree of September 14, 1919, N. 1743, published in the *Official Gazette* of September 29th, N. 231, reads:

“Art. I. At the Ministry of Justice is instituted a commission appointed to suggest the necessary reforms in the system of penal legislation to obtain, in harmony with the principles and rational methods for the defense of society against crime in general, a more efficacious and sure defense against habitual delinquency.

For this purpose the commission will examine:

1. If such modifications will be needed in the permanent rules on crimes and the punishability of their authors; whether some forms of crime not included in the Penal Code or in other laws should be considered, whether some of those included should be excluded, or differently defined, or submitted to different sanctions with respect to the changed conditions of social life.

2. What standards, more suitable to the purpose of social de-

fense, should be adopted to emphasize the danger of criminals, especially in the form of habitual crime.

3. What provisions, discipline and institutions are necessary to adopt for criminals under age.

IV. What modifications of a particular kind should be made in the permanent rules.

(a) In the punishability of crimes committed abroad.

(b) In the measures of punishability in relation to age (greater age to the penal effects).

(c) In the punishability in relation to the state of drunkenness.

(d) In the state of infirmity of mind.

(e) In the relapse, frequency, in the continuation or permanency of crimes, in the accumulation of punishments.

(f) In the institutions of pardon and grace.

(g) In the exercise of penal action (necessity for prosecution, specially for crimes against persons).

(h) In the suspension of the execution of sentences in relation to the application and to the results of the institute in the practice of the law."

The commission may also make proposals about every other part of the present legislation the reform of which is known to be necessary to better carry on the social defense against crime in general and against habitual crime in particular.

V. What reforms should be introduced with respect to the organs of policy and judicial instruction, the respective attributions and their working, to make the investigation of crimes committed immediate, quick and sure in their results, with the affirmation of the authors and the collecting of material and personal proofs.

"Art. II. The commission is composed of:

"Enrico Ferri, professor of the University of Rome, president; Raffaele Garofalo, procurator-general of the Court of Cassation of Turin, vice-president; Alessandro Lustig, professor of the Royal Institute of Higher Studies in Florence; Agostino Berenini, professor of the University of Parma; Alessandro Stoppato, professor of the University of Bologna; Enrico de Nicola, lawyer; Augusto Setti, procurator-general at the Court of Appeal of Geneva; Raffaele de Notaristefani, advocate-general at the Court of Cassation of Rome; Emanuele Carnevale professor of the University of Palermo; Piero Alberici, counsellor of the Court of Appeal of Rome; Raffaele Majetti, counsellor of the Court of Appeal of Rome; Dr. Sante de Sanctis,

professor of the University of Rome; Giulio Cesare Ferrari, professor of the University of Bologna; Salvatore Ottolenghi, professor of the University of Rome; Eugenio Florian, professor of the University of Messina.

“Art. III. The commission will be assisted by a secretarial office composed of the following gentlemen: Filippo Grispigni, professor of the University of Camerino, chief secretary; Giulio Ricci, judge of the tribunal of Bologna; Alfred Spallanzani, director in the Ministry of Justice; Arturo Santoro, secretary in the Ministry of Justice; Mario Piacentini, secretary in the Ministry of Justice.

“Art. IV. The commission may add to its numbers temporarily persons competent in special discipline for collaboration in particular researches necessary for the execution of its task.

“Art. V. Commissioners, secretaries and other members should be paid traveling expenses, first class, and a daily indemnity according to Art. 4 of the decree of September 14th, 1918, N. 1311.”

VI. On October 8th last, with the aid of His Excellency the Minister and Keeper of the Seals Mortara, the work of the commission was inaugurated with due solemnity.

In speaking, the honorable minister said:

“Permit me to inaugurate this work, not with an opening speech, for I do not consider myself capable before the members of this commission, but simply to do my duty by thanking you for having accepted the request to collaborate in the solution of some problems of our penal legislation which I do not hesitate to call fundamental and urgent. The unanimous support given me by the members of the commission shows that they agree in the necessity and urgency of a study which logically implies the revision of each systematic base of the present legislation.

“That penal laws cannot suppress crime is a truth common to all times. But the fact of the complete inefficacy of the penal laws to check crime in an advanced civilization is certainly an indication of a serious defect, if not of some chronic organic vice which paralyzes its functions. Now in Italy there is a common feeling of the absolute inefficacy of the present legislation in the pursuit of that moderate purpose which has been assigned with the greatest moderation of pretext. Judicial statistics reveal to the inquirer the deep reality of this sentiment.

“I hold that the wearisome and sad work of schedules and statistical tables could be suspended if, after five or ten years, they presented with dreary immobility the same high number of crimes committed, of criminals left unpunished, of sentences inflicted without

any other effect than the small and not always just one of social vengeance.

"These statistics do nothing for the perfecting of the methods and means by which the penal laws may try to diminish crime and make it less dangerous; they show nothing, nor can they show anything, for the inefficiency of those laws makes it impossible that anything should arise from their number but the warning of the necessity of submitting them to accurate revision and of placing the social magistracy on a new foundation.

"I remember that in the past I, as procurator-general of the Court of Cassation, together with several other members of this commission, among whom was Professor Stoppato, manifested their ideas upon the task of the Italian Law School.

"The commission has not been called to proclaim the downfall of free arbitration, or, vice versa, to ratify the bankruptcy of science confronted by a victorious insurrection of spiritualism. The work of the legislator is never done by a priori method, and even when he is the victim of error he acts and insists on acting with the positive method in legislation. The positive method and scientific positivism are neither synonymous nor identical.

"I must affirm this, not to contest scientific positivism, which is and has been my guide since the day I began to think about law and its social function, but to properly distinguish the doctrinal tendencies of each one from the harmonious direction of a sincere collaboration in legislative work. It matters little whether the individual members of the commission move from different philosophical supposition if, in the examination of the phenomena of social life, and particularly in discerning those of crime, they are agreed in the recognition of the means and methods to diminish or to prevent, as far as possible, that this constitutes a permanent cause of changes in the peaceful life of non-criminal men. Perhaps this is the first time that the government, working carefully on a law against crime, has resorted to a council, dignified by well-known masters of pathology and psychiatry, and shows their reasons.

"In the relation which precedes the royal decree instituting the commission, the principal lines on which the commission itself works have been traced; there the danger of criminals and the punishableness of their acts are treated without mentioning imputability. But it must be observed that non-punishability has a legal importance in regard to the single act violating the law; the fear or dangerousness of the criminal, on the other hand, is of the greatest importance as

guide to the legislator and then to the judge in providing the restoration of social security which that act has violated.

"The degree of the offense which the laws of civilized life suffer from a criminal act are not measured by the imputability but by the fear or dangerousness of the author.

"With regard to the working out of the various points and themes of study indicated in the decree instituting the commission, I refer to the relation. Such indications should especially be valuable in delineating the vastness and importance of the task entrusted by the government to the commission. In case any of my personal opinions or tendencies should appear through this, I declare that I intend to submit myself to the judgment of the commission accepting, with joyful and reverent spirit, every correction which will be of great value in the perfecting of the work which the country awaits with absolute confidence.

"And I express the wish that, using the facility conceded by the decree, the commission will ask the help of Italian journalism, in its most authorized representations, to study the reform of general and special legislation in the liberty of the press, and in the crimes committed by means of the press. From the edict of 1848 to the code of 1889, this matter of importance has not yet had the rules which it needs as a powerful factor in social life.

"It is a source of great satisfaction to me to have, as co-workers in directing this noble undertaking, Enrico Ferri and Raffaele Garofalo, two names already inseparable in the memory of our flourishing years when the red light of dawn illuminated the new horizon of penal law. Perhaps these two great men were separated from politics; today they are brought together by the consciousness of a high mission to which they both bring with the mature fruit of long studies the same ardent enthusiasm which made the old alliance beautiful and radiant."

VII. The president, Hon. Ferri, replied as follows:

"I am sure that I interpret the feeling and thought of my colleagues in thanking Ludovico Mortara cordially, not only for the honorable mention he has made of us, but especially for the task which he, as a high-minded and powerful attorney, has entrusted to this commission. This task is clearly stated in the decree and in the relation which accompanies it, and has now been lucidly illustrated by the words of the minister. This task consists of presenting proposals for a practical reform of the penal laws inspired by the principles and methods for social defense against crime, especially with respect to the dangerousness of criminals.

"These are the words of the decree, and from them is derived a

double order of preventive and repressive measures for occasional criminals, who are in the majority, and for habitual criminals. To realize this purpose the commission will certainly resort not to theoretical and scholastic discussions, but to a special examination of legislative measures in accordance with the social conditions of the present Italian life.

“Without entering at present into the particulars of our work I think that this should be guided by two leading criteria. The first is that, to avoid the inconveniences already experienced in Italy and abroad of fragmentary and often contradictory reforms, those which we propose should respond to a general direction and to an organic system, which, as the relation says, considers above all the personal conditions of the criminals as well as the material of the criminal acts. That is to say, we shall try to bring the fulcrum of the law from the crime to the criminal.

“At this point I feel that to the mind of all our colleagues will be recalled the personality of the scientist Cesare Lombroso, who gave to Italy the glory of the application of the Galilean method to the study of the criminal.

“The second guiding principle is that the reforms proposed by us should guarantee individual rights at the same time as social rights. We shall do progressive work, consolidating the irrevocable conquest of modern civilization by legal guarantees of the three chief actors in the penal justice, namely: the criminal, society, and the party injured by crime.

“With the guidance of these methodical principles I have full confidence that our commission, not only with the enthusiasm derived from the depths of our scientific convictions and from the nobility of the social aim which has moved the honorable minister, but also with relative rapidity, will be able to do efficacious work, presenting a summary of legislative measures which will bring honor to our country and benefit to society.”

VIII. The commission immediately began work as soon as the minister withdrew.

The idea being accepted that first some fundamental problems should be examined, and only in process of time accessory and side reforms (such as the institution of prosecution, crimes committed abroad, the limits of under age, the institutions of pardon and amnesty, the rules on the concurrence of crimes and penalties), Mr. Ferri proposed, and the commission discussed and approved, the proposal to nominate four fundamental sub-commissions, which should show the principal types of criminals and allot the relative measures to

each category of these. Then the expediency of the nomination of two other sub-commissions is conceded, which should respectively work on the co-ordination of the penal legislation of the restored territory with that of Italy and with the reforms at the institution of judicial police.

The sub-commissions, numbering six in all, will be composed thus:

- I. Study of Occasional Criminals:
Garofalo, president; Barenini, Stoppato, De Nicola, De Notaristefani, Alberici, De Sanctis, Grispigni, secretaries.
- II. Study of the Habitual Criminals:
Carnevale, president; Garofalo, Ottolenghi, Florian, Santoro, secretaries.
- III. Study of Abnormal Criminals (lunatics, inebriates):
Lustig, president; Garofalo, De Sanctis, Ferrari, Piacentini, secretaries.
- IV. Study of Criminals Under Age:
Setti, president; Majetti, De Sanctis, Ferrari, Ricci, secretaries.
- V. Co-ordination of the Legislation of the Restored Lands to the Italian Legislation:
Berenini, president; De Notaristefani, Florian, De Nicola, Spallanzani, secretaries.
- VI. Reform of Judicial Police:
Stoppato, president; Ottonlenghi, Alberici, Majetti, Ricci, secretaries.

On October 9th, then, the I, II, III, and V sub-commissions met in the presence of President Ferri, who, in order to ensure unity of direction and co-ordination of proposals, has reserved to himself the privilege of attending and directing the discussion and study of each sub-commission.

The first two assemblies the commission has dedicated not only to the administrative work of the distribution of tasks, for in these they have proceeded to determine that accord, that preliminary exchange of ideas which is indispensable in assemblies of men who, having a more or less different scientific individuality, are called to co-operate on practical ground.

And the accord was not difficult, and from the discussions immediately sprang up unity and clearness of conception on the various problems, which forebodes a fruitful and relatively rapid conclusive activity of the commission.