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# THE REFORM OF PENAL LAW IN ITALY

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Italy has always been to the fore in the "sad and severe discipline of crimes and punishments." From the "Libri Terribiles" of the Roman Digest to the "Parvus Libellus de Maleficiis" of Rolandino dei Rolandi, published in the thirteenth century, from Cesare Beccaria to Cesare Lombroso, in criminal science Italy has undoubtedly always been in the front rank.

Through the initiative of the Keeper of the Seals, Ludovico Mortara, an illustrious jurisconsult and formerly First President of the "Corte di Cassazione," the new Italy can place herself in the vanguard also in the realm of practical penal legislation, especially since, in many European and American countries during the last twenty years, laws have been promulgated or proposed for social defense against criminality, which although fragmentary, inorganic and sometimes contradictory, are the expression of an ever increasing powerful confirmation of that current of ideas about crimes and criminals which, for about forty years, the Italian school of criminal anthropology has maintained in the scientific lists.

The Decree of September 14th, 1919, which institutes the Royal Commission for the reform of penal laws, indicates as cardinal points in the reform of penal justice in Italy, the two fundamental conceptions which for forty years the positive criminal school has been affirming in the field of thought. These two cardinal points are the defense of society and the perilousness of the criminal.

The defense of society is understood to mean the daily practical duty of the functions of the state outside and above philosophical doctrines, religious beliefs and scholastic polemics. The state, administering penal justice, cannot pretend to work out a philosophical system, a religious belief or an academic doctrine. The state has a positive function of preserving and defending the community from crime, which is one of the many social diseases that endanger and offend the binding ties of civil society.

This then is the first fundamental conception with which this decree is inspired. And the inaugural speech on the work of the

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commission by the minister confirms and illustrates it in a clear and evident manner.

The second point is that, while up to the present, in traditional classic doctrine and in the majority of penal laws, penal justice in its concrete form of the sanction established by the judge in his sentence, is proportionate to the greater or less gravity of the crime as material and anti-judicial fact, henceforth on the other hand penal justice in its form of sanction of the law and especially of judicial sanction, while it should indeed start from the crime committed as anti-judicial fact, should be adapted and proportioned to the personality of the criminal, without whom the crime could not take place. Crime is not a natural phenomenon such as lightning or a flood or an earthquake which disturb the conditions of social existence by natural forces beyond control. Crime is always the work of a man and is the symptom revealing the personality of the criminal.

These two fundamental criteria which the decree gives as the compass pointing out the way to the work of the commission instituted by it, are the official recognition of the formal criteria of the positive criminal school which in the sphere of criminal anthropology owes its foundation to Cesare Lombroso, and in penal law to Garofalo and others.

This decree, with these aims clearly developed, has certainly caused surprise among the learned in criminal science and also among philosophers in general and philosophers in jurisprudence in particular. For the opinion had been slowly forming that with the death of Cesare Lombroso had died also his doctrines and especially that most essential feature in them, the Galileo-like method of observing the criminal world, which with the true genius that inspired him he donated to humanity.

That some particular doctrines of Cesare Lombroso are destined to disappear, and have already perhaps disappeared, there is no doubt.

No man can, in the field of thought, leave a legacy of scientific affirmations which remain unaltered in the course of centuries; but some of these doctrines fall because they do not respond to the successive observation of facts, or because they no longer respond to the conditions of the intellectual and social atmosphere of each successive period.

But what a man of thought can leave as an indelible rule to humanity, is above all a method of study, a method of investigation.

The positive method, the method—that is to say—of observation and of experiment, is the light of thought and scientific method revealed to us through the agency of Galileo Galilei in his admirable dialogue "Saggiatore," and from the Italian renaissance onwards has received the most enlightened confirmation. The Galileo method of observing the criminal is a Lombrosian innovation not destined to perish.

That opinion, that the Italian positive criminal school was dead or about to disappear, naturally had exterior reasons which could apparently justify it. It is only forty years since the positive criminal school of Italy asserted itself with "The Criminal," by Lombroso, the second edition of which was published 1878, with "The Positive Criterion of Punishment," published by Garofalo in the same year and with my "Negation of Free Arbitration and Theory of Imputability" (1878) and "New Horizons of Penal Law" (1879). In these forty years of the positive criminal school, since the scientific schools are natural and living phenomena, which have their natural laws of birth and development, the first twenty years was a period of scientific production truly wonderful in the frequency and abundance of new ideas and discoveries and was a twenty years of polemics against the academical misoneism which opposed the new outlook of criminal science. In the second twenty years that even flow of scientific production and polemics could not continue; this was rather a period of slow and less stormy infiltration into the public conscience of the fundamental truths of the scientific school.

That the criminal, to say nothing of cases of evident and declared madness, is an abnormal being, is a conviction which it is not going too far to say has taken root in the public conscience precisely owing to this infiltration of ideas and scientific observations of the Lombrosian school. And it is a concept which has penetrated also into the conscience of the magistrates who saw their functions being more and more reduced to a sterile and material dosimetry of punishments according to the scale of the crimes with no insight whatever into the criminal who, cynic, rebel or mere luckless wretch, as the case might be, only too often reappeared before them with half a score of useless condemnations.

Naturally this idea which all have more or less, even the public who only read the papers, especially with regard to the strange or ferocious crimes or those most obstinately repeated by habitual criminals, this idea, that the criminal is not a man like all others, even

if he is not in a state of clinical mental alienation, is an idea which germinates in the traditional ground of the common conscience with reference to the moral guilt that is his.

For thousands of years humanity has not believed in the moral liberty of man, in free will. All the mystic East and Greece before Socrates were convinced that "Ananke"—"Fatum"—was the great power which hurried along willingly or unwillingly both men and gods. But, with the post-Socratic philosophy and especially with the moral doctrines of Christianity, has taken root in the common conscience of western civilization the conviction of the moral sin in the man who commits a crime and therefore of his moral responsibility before the authority of the state, which exercises the function of penal justice.

This traditional foundation of thousands of years of our conscience still lives, through a psychological stratification, together with the idea born only a few decades ago that the criminal is really an abnormal being. And from this inmost contrast are derived all the difficulties and all the timidity of contemporary penal legislators in forming new projects of penal codes in civilized countries.

The new penal code of Japan of 1910, the modifications in the penal code suggested in Germany, in Austria, in Switzerland, in Servia, in the Argentine Republic and in Sweden, waver between this traditional sentiment of the moral offense of the criminal and the positive and objective criterion of the perilousness ("pericolosita") of the criminal quite apart from the judgment of moral offense.

I hold that the Italian commission for the reform of penal justice will be able to take the logical and straightforward step of putting the sanction of penal laws and the provisions of penal justice on a basis quite apart from philisophical doctrines and religious beliefs as to the moral guilt of the criminal.

To measure, to weigh, to punish the moral offense of the criminal is not a function of the state. The state, acting through its functionaries, the magistrates, has no means of weighing and of knowing the moral offense of a human being. And this explains, for instance, why in the first international congress of crimnal anthropology at Paris and at Brussels we had not only help in our work, but the cordial and open support of the Keeper of the Seals of Belgium, Le Jeune, who was a sincere believer and member of the Catholic party; we had in those congresses declarations of open adhesion to criminal anthropology, from Abbot De Baete, for instance, who was professor of moral philosophy in the Catholic University of Louvain. And this

again, as it seems to me, explains why, for example, when some years ago the Anglican clergyman Morrison asked my consent to publish in English my "Criminal Sociology," he published it leaving out the first chapter on the "Theory of Imputabilty," because for him, holding as he did spiritual doctrines, and a clergyman by profession, it was too heterodox; but in the preface he approves enthusiastically of my conclusions on criminal anthropology and on criminal statistics, and especially of my practical proposals for penal justice in the defense against criminals. And it is for the same reason, that, a few months ago, some universities of the United States decided to adopt, as scholastic text for the teaching of criminology, the recent North American translation of my "Criminal Sociology," but they made explicit reservations on the premises of positive philosophy which are in my book, because these premises do not agree with the idealistic spirituality which dominates in the North American people. But these same universities approve "toto corde" and unreservedly, the practical proposals of penal justice which that book contains.

Religious belief in the moral sin of man is foreign to the function of penal justice, because both Catholic and Protestant believers know that there is a word and a precept of great wisdom in the Bible which says "Judge not." And there is the word of Jesus, too, that no man can judge another. And this belief is perfectly logical. To measure and weigh the offense of a human being, nothing less than the omniscience of God is needed. To know through what hereditary vices of past generations arise in the soul of a living creature the instinct of blood, or of arson, or of violation, to know by what changes of his life, intro-uterine and extra-uterine, by what conditions, family or social, that man has brought himself to commit homicide, arson, violation is not a question that the limited mind of a judge, born of woman, can decide. To claim this, is to claim omniscience. It needed not to be repeated that the problem of proportioning the punishment to the crime has never been solved and several criminalists, such as Ellero, Conforti, Tissot, frankly declare it insolvable. And hence it is that the Christian says: "The moral offense of the sinner is judged only by the Divinity." The word of the Bible and the word of Jesus tell us that one man cannot judge another, but a man face to face with another man can but defend himself and take measures for his own security.

A reform of penal justice carrying out the ideas of the positive criminal school—social defense and perilousness of the criminal, wholly

apart from all research and measure of moral offense of the accused—does not therefore oppose, nay is in full accordance with these religious beliefs, which as to the moral offense of the criminal have doctrines of their own, which we have here neither opportunity nor means of judging.

And these criteria of the criminal anthropological school do not contradict philosophical doctrines either, for they are on two different planes.

During the first twenty years of the present century there has appeared in contemporary philosophical thought an evident recourse to spiritualism opposed to the triumphal and torrential affirmation of positive thought from 1860 to the end of the nineteenth century. It is, then, easy to understand how this revival of spiritualistic thought in philosophy seems at first sight in irreconcilable antagonism with the data and conclusions of the anthropological criminal school.

Nevertheless this is not the case, as it would not be just to conceive of an antagonism between criminal anthropology and religious beliefs. And I have a clear and notable proof of this in the critique which Professor Gentile, an illustrious representative of this current of spiritualistic revival, wrote in 1909 in the "Critica" of Benedetto Croce with a monographical study of philosophy in Italy since 1850, when speaking, in a certain chapter, of the Italian school of criminal anthropology. Professor Gentile in his criticisms of the school of criminal anthropology makes two remarks: The first is that the anthropological criminal school has studied and seen only the body of the criminal and knows nothing of his soul, "the interior world" from which, nevertheless, the crime comes forth.

To this criticism of Professor Gentile's I might answer by pointing to the fact that the criminalist anthropologists have studied not only the body of the criminal in its anatomical and physiological forms but have made much more extensive and intensive studies on criminals with regard to the psychological element of their nature—sentiments, ideas, will. But Professor Gentile might justly reply that even studying criminal psychology with our Galileo method, we are, to say the least, agnostics, if not deniers of that premise of an "inner world" in the absolute spiritual sense.

But what is important in the criticism of Professor Gentile is this: That after having pointed out this, according to him, theoretical defect, he studies and examines the school of criminal anthropology on practical grounds, that is on the ground of its proposals for social

defense against crime, and on this ground, in the words of Professor Gentile himself, "the Italian criminalist anthropologists are deserving of the highest praise," which means, then, that it is in the name of spiritualistic belief that Professor Gentile makes all his observations and all his objections against the philosophical premises of the positive criminal school, but that he approves, like the Catholic minister, Le Jeune, and the Abbot and Professor De Beats, the conclusions of criminal anthropology and its practical proposals for social defense against criminals.

If, then, this is the position, the commission instituted by Ludovico Mortara for the reform of penal justice in Italy may calmly and surely set about the application of the practical proposals of anthropology and criminal sociology without worrying about philosophical doctrines or religious beliefs, which, in a field foreign to the action of the state, may be apparently, antogonistic to the proposals of the new school.

Finally, this commission may, directly and securely, proceed to apply the proposals which for forty years the Italian positive school has been placing on a scientific basis, without troubling about that current of criminological scientific thought which is represented by some contemporary Italian criminalists; and which, I maintain, is a methodical aberration. They study crime as a judicial factor and "dogmatically"—it is their word—fashion with the sole guide of abstract logic, doctrines and legal rules about crime; but they completely and intentionally ignore the criminal, whereas in the reality of life, through the agency of magistrates, the penal law is applied not to the crime, for "factum infectum fieri nefas," but to the criminal by whom that crime has been committed.

It is evident that such a method with regard to crime as a judicial factor is foreign to the practical world of daily life and to the positive function that the state should perform.

True it is that in Italy and in all civilized countries we are witnessing this striking phenomenon: from the middle of the nineteenth century up to the present day penal legislation has been technically perfecting itself; it is the formulation of criminal doctrines always more perfect from a theoretical point of view. Cesare Beccaria published anonymously for the first time his wonderful pamphlet "On Crimes and Punishments" in 1764 at Leghorn; but Cesare Beccaria was not a jurist. Cesare Beccaria raised a cry of protest of tormented humanity against the tyranny of the penal justice of the middle ages,

and that is why his voice had such a formidable echo in all Europa, from the encyclopedists of Paris to the Empress Catherine of Russia, from Joseph II of Austria to Leopold of Tuscany. Cesare Beccaria died thirty years later in 1794 almost forgotten. And fifty years more had to pass after his death before many of his proposals were realized in the penal laws of civilized countries.

But while on the one hand, these penal laws, brought to the high level to which Cesare Beccaria raised them borne on the wings of his genius, were being theoretically and technically perfected, on the other hand this phenomenon became clear: that crime increased and is increasing in all civilized countries of the world. In other words, we have on the one hand the (I might say) academic perfection of penal laws and hence of the regulations of penal justice, and on the other hand complete bankruptcy of the practical function which these regulations should exercise in defending the majority of honest people from the minority of criminals.

This means, then, that the foundation on which the traditional doctrines were placed is wrong. They have strayed from positive ideas and the throb of daily life which still vibrate and make us shudder when reading the pages of Beccaria, but are completely forgotten in the arid manifestation of that dogmatic criminal theory which I mentioned above and which was an unfortunate imitation of the doctrinal constructions of Germans, more or less unknown. So that, when in 1911 we were able at last to hold an international congress of criminal anthropology in Germany (at Cologne), whereas formerly this had always been opposed because a victorious affirmation was refused to Italian science, Professor Lintz, the well-known criminalist of Berlin University who died a few months ago, on this occasion asked me in surprise why in the world young Italian criminalists should trouble to translate, to examine and to criticise publications of Germans whom they, in Germany, had never heard the names of!

But, this first step taken, we must also have a second clear conception of the task which awaits this commission. It is called to reform penal laws; therefore it is not called to solve the whole problem of crime.

Crime has causes which produce it and effects which it produces. To eliminate the causes of crime, penal laws deal in only, or in part, with the effects of crime, are not competent.

For forty years I have affirmed, and I am never tired of repeating, the remedies for the causes which spur men on to commit

crime are nine-tenths of them outside the penal law—they are in the civil code, in economic legislation, in the better regulation of family, in the systematization of the school and of education, in all those precautions of social life which eliminate or attenuate the causes which make men commit crime.

If we wish to have a complete idea of the problem of crime, we can make a kind of guiding plan of what the action of the state against crime should be.

The first part of this guilding plan, which demands very powerful and watchful agents, concerns what might be called the social prevention of crime: indirect and remote prevention which finds out and studies the causes of crime and indicates remedies to eliminate it if possible or to weaken its malignant power.

All these are laws which concern the conditions of the physical and moral existence of the individual in society, beginning from his birth and going on to the hygiene of infancy, to scholastic and educative rules, to the conditions of labor, to family life, material and moral.

A municipality which builds houses cheaply for the people does much more to prevent crimes against good morals than one which doubles the penalties for these crimes, while continuing to allow parents, children, brothers and sisters to sleep in the same room in a cramped confusion of human organisms.

Besides this function of social and indirect prevention of crime, there is also that of direct prevention, which is generally called police prevention, in other words, immediate, prompt upon the manifestation of the crime. And here also I think that radical reforms, which experience has been calling for decades, should be made in our country.

The abolition, for instance, of the old police methods, which are inefficacious and harmful, such as admonition, surveillance, compulsory confinement, will, in my opinion need no long consideration on the part of our commission, for these methods when opposed to the modern methods of crime are like so many flint muskets. But for these we shall have to substitute disciplinary measures of preventive defense for minors, beginning for instance with the elementary schools. Imagine what power the modern state has in the regulation of the instruction of the people to get to know all the individuals who make up the nation. Every citizen, of whatever sex, must pass

through the elementary school, then the state could make its own anthropological census of the population.

In some countries, especially in North America (for the Anglo-Saxon countries are those where practical applications are most easily made without being lost sight of amid academic discussions), this has already been partly done. In Italy we have a partial application of the system of school doctors.

We believe that in the elementary schools of the future every pupil will have his anthropological chart on which the doctor will mark the characteristics of his body and of his psychology, of his hereditary precedents and of his school conduct, and this will serve as a preventive scrutiny for all those pupils who, morally deficient, are candidates for crimes.

I had an opportunity to bring this out clearly when at the Court of Assizes in Rome I defended Antonio D'Alba, the regicide, and showed that if there had been these institutions for scholastic prevention this crime might have been avoided, as this unfortunate youth from the first years of his interrupted and forcedly incompleted school life had manifested an abnormal personality.

Besides all this, there remain the provisions for habitual drunkards, idlers by profession, vagabonds, the criminal classes, etc., all those who are either candidates for or reduced to crime; and all the precautions against dangerous industries and sales, such as arms, of poisons, etc., and the measures against gambling houses, etc.

And all this mass of rules for police action is exercised by the State without any consideration of moral guilt, with the sole criterion of perilousness.

But when in a state all the rules are applied in every branch of legislation for the social and direct prevention of crime, crimes will still be committed. Even when the greatest source of crime—i. e., misery—is dried up, there will always be crimes, if from no other cause than an explosion of mental alienation or through an impulse of erring passion. It is necessary, then, for the state to exert a repressive action on crimes committed.

But for crimes committed, too, various are the branches of that plan for social defense which I mentioned a while ago.

Before all there is, especially for our country, the problem of judicial circumscriptions, and there is the problem of the personnel, for the laws are what the functionaries are who apply them. As to the personnel, it is necessary to modernize above all the recruiting, technical instruction, guaranties and responsibility in the judicial

police as well as in the magistrates who judge and in the personnel who execute the sentences of the magistrates.

And this is why I have maintained for a long time that the Management of Prisons, instead of being under the Minister for Home Affairs (no one knows why) should be under the Minister of Justice, if, as is the fact, the Management of Prisons represents the last step in the action of the state against crime, that action which, beginning with judicial police, runs its course through all the wire-drawn processes that have to be wrought out from the notification of the crime to the action of the investigating and judging legal authority, until the execution of the sentence.

In Italy we have made an attempt at improvement in this personnel, both in the magistracy with several partial reforms, and also in the personnel of the executive administration.

We may mention, for instance, the reform effected by the former Director-General of Prisons Doria, who, in cases of correction of criminal or dissolute minors, substituted elementary school teachers for prison warders—a wise reform but one which stands alone amid all the rest of state action. We also recall a law of June, 1904, on the employment of the condemned in work out of doors, which has also remained unapplied owing to the unpropitious atmosphere which pervades the entire penal code, inspired as it is by the prison system of cell isolation.

Once this personnel, which applies the penal laws, is organized and established, what presents itself in our regulating plan, the more particular work confided to the new commission is this, the work of reform the penal code and also of the code of penal procedure, especially with respect to judicial police and judicial examination, which are more intimately connected with and dependent on the reform of the penal code. And after this, that regulating plan is completed with rules for prisons, for it is not sufficient to write prison rules in the penal code, but they must be applied and put into practice.

Besides the regulations for prisons, this regulating plan, it seems to me, demands a last field of action of the state, and this is state measures of control and vigilance over those set free from prisons to help them to readapt themselves to the social life of free and honest labor.

For the state cannot open the prison doors to one who has been years inside them and expose him to all the difficulties and temptations of free, modern life and then rest satisfied simply with increasing the penalty for his legal relapse.

In any case, in this full and complete regulating plan, we can now see precisely what position will be occupied by the work which the recently instituted commission has to do.

It is, then, a question of reforming the penal code, especially in its general rules, for evidently the second part of the penal code, in which are the enumeration and definition of crime, is the part which will be touched least, first of all because it is technically more perfect through the labors of jurists of the Italian classic school, and through the assiduous control of practical jurisprudence, but especially because the general rules of Book I of the penal code are those which establish this system of social defense against crime.

I would not, nor can I, anticipate and prejudge the work and the proposals of the commission of which I have the honor to be president; but this I can say that, given the two fundamental principles laid down by the decree which institutes the commission, social defense and the perilousness of the criminal, certain logical and inevitable consequences follow.

The first is this: that in the rules of the penal code it will be necessary, from now on, to make two clear and preliminary distinctions. The first consists in the distinction and division between common criminals and political-social criminals. Modern civilization has seen in the field of political crime new forms unknown to past centuries; for crime is the shadow which follows the body of civilization and therefore with the variations of civilization the forms of crime also vary.

No matter what the outward form, sometimes noble and respectable, sometimes repugnant and terrible, of this political-social crime, we cannot possibly forget or put aside this fact: that a common crime is always caused by an egoistic sentiment in the man who commits it; be it an egoistic sentiment more or less brutal, such as vengeance, hatred, covetousness; or an egoistic sentiment more or less excusable, nay, even pardonable, as is the case of impulse of the passions of love or of honor; but they are always crimes caused by selfish motives. On the other hand, political-social crime, although it may assume repugnant, violent or sanguinary forms, is always actuated by an altruistic sentiment; an erring altruism, maybe, but altruism none the less.

When Ravachol kills the old hermit to carry off the scanty sum he has saved, he may afterwards pose as a political criminal as long as he likes; but as his crime was actuated by selfish motive, he has committed a common crime. But when, on the other hand, Caserio

wounds and kills President Carnot, or Felice Orsini throws the homicidal bomb at Napoleon III, we have, it is true, political criminals of different types certainly, but they act not for a selfish purpose but through the aberration of an altruistic idea.

I think, then, that in a penal code, in order to give the sentences of the magistrates the moral and suggestive force of the consent of the public conscience, this first fundamental distinction should be made: rules for common crime, rules for political-social crime.

I say political-social because, as is well known, especially on account of the great competition of an economical social order that the second half of the nineteenth century has left as a heritage to the twentieth, the altruistic motives for which a man may infringe the law are not only those of strictly political character which prevailed until the middle of the nineteenth century, but they may also have a reforming purpose and a social and economic development.

In a preliminary and partial scheme of a penal code which I had the honor to present to the commission, I have proposed two forms of punishment for political-social criminals: exile and simple imprisonment. Exile from the state for the less dangerous political-social criminals, those, for instance, who have not committed an act of violence on persons or things; for the less dangerous criminals repeat; otherwise foreign states naturally would not accept the gift of its criminals that another state might make to them.

It must be remembered that a political criminal may be dangerous in one state and not in another. A republican who in Italy makes a conspiracy to overthrow the monarchy and found a republic becomes an orthodox citizen if we send him to Switzerland or to France. Just as a French monarchist would become if he came to Italy.

If, on the other hand, the manifestation of the political-social crime is of the more dangerous type, because it is accompanied by acts of violence against persons or against things, it seems to me, there should be a punishment of prison segregation, but with a different discipline from that used for common criminals. It may be a simple detention, such as we have now in France, where those condemned for less serious political crimes undergo a simple confinement with the right to receive visits from persons of their family and with the right to read books, newspapers and so on.

This particular régime, in my judgment quite distinct from the methods of defense against common crimes (and the decree which institutes our commission calls particular attention to this)—should, in my opinion, be applied also to those who are condemned for press

crimes, when this press crime is caused by zeal for the public interest, though obviously when the press crime is on the other hand committed from an egoistic motive, revenge or hatred, spite or avarice, it can no longer be considered as a political-social crime.

The second preliminary distinction that should be made in the general rules of the code is that for criminals over 18 years of age and criminals under age. For those over 18 years of age the criterion of the greater or less perilousness of the criminal is of the greatest importance; for minors, on the other hand, the action of penal justice should aim above all at aid and moral and professional improved training, besides, of course, special provision for minors abnormal and defective.

Besides all this there are the rules for common criminals who are the most numerous and a small minority of whom constitute a real social danger.

For this purpose the new penal legislation, and therefore the reform of penal justice in Italy, should be inspired by a fundamental rule logically based on the two leading principles of social defense and of perilousness. The principle, namely, that when a human being has committed a crime he should always legally answer for it, no matter what his personal circumstances are, no matter what his age or sex, his mental alienation or habitual drunkenness, and so on.

The present judicial problem, according to traditional ideas, has these different phases: The judge has first of all to collect, discuss and decide on the proofs that the act has been committed; secondly, to establish that the act has the character of a crime legally defined in the penal laws; thirdly, and lastly, the judge has to prove that the accused has really committed or participated in the execution of the criminal act.

This judicial problem will evidently remain unaltered, even when our commission has made its proposals for the reform of penal justice in Italy, because it is the preliminary and constant work of every penal process.

But once the judge has ascertained by probatory tests that the accused is the actual author of a criminal act, the consequence will be that the accused must legally answer for it, except in cases where the act is apparently criminal, but substantially justifiable; in other words, only apparently "contra jus," as in the case of legitimate defense, state of necessity, and so on.

If I kill my unjust aggressor, apparently I am a homicide; but my act is only the exercise of my right of self-preservation. "Feci

sed jure feci." Except in these cases of justification of the act, whoever commits a crime must legally answer for it, whether he is of age or under age, man or woman, drunk at the moment of the crime or not; no matter in what condition he was, he must legally answer for it.

This seems a profoundly radical innovation, which the positive school has affirmed for 40 years and which it will now introduce into the reform of penal justice; but really it is not so far from the actual lines of contemporary penal justice as at first sight it may appear.

Our penal code, which had its birth on January 1st, 1890, came too soon to systematize the proposals of the criminal anthropological school, which was then at its dawn, came too late to be a rigid systematization of the rules of the traditional classic school, which was already at its setting, and so it stands midway between the old and the new. When in the first line of Article 45 of the Italian penal code it is laid down that the man who has been acquitted because he has committed a crime in a state of mental infirmity may be shut up in a lunatic asylum for an indefinite period if the judge thinks him dangerous, we have here a method for security against an individual who is declared morally irresponsible for the crime committed, but who, being dangerous to society, is isolated by the judge, in an institution which will have a different name, it will be called an asylum instead of a prison, but it will have chains and bolts as the latter has.

So that this idea that whoever commits a crime must legally answer for it, is not an innovation so different from the present state of things as to constitute an absolute novelty; it will be, on the other hand, a systematic application to all criminals of laws already existent.

The question will simply be, once the accused has been declared the author of the crime by the judge, to decide what is the best method adapted to his personality, according to his personal precedents, his preceding honest or dishonest life, his physical and psychical conditions, according to the material circumstances of the act, according to the family and social conditions of the criminal, according to the mode of committing the crime, in so far as this is a revelation of the greater or less moral insensibility of the criminal, and so on. It will be a question of adapting one form of punishment or another within the limits laid down by the law. But the criminal must always answer before the law, apart from every philosophical doctrine or religious belief, not because of the moral sin in the criminal act committed by him, but because of the perilousness that he has

revealed through the doing of it. It will be the fundamental principle that will place penal justice on a new basis, systematizing logically and therefore more efficaciously those provisions for social defense which, especially in Anglo-Saxon countries, have been established by the recent special laws for habitual criminals.

Then there will be the different forms of punishment to be assigned to this legal responsibility of the actual authors of a criminal act. These various methods of punishment will have for a minimum, for example, judicial pardon as has been proposed in some bills laid before parliament.

In France, for instannce, it has been proposed that when the crime is not grave and the criminal is not dangerous but has acted under really pitiable and excusable circumstances, the judge may state in the sentence that the criminal has committed a crime, but he may also at the same time give him judicial pardon. This will be the smallest and slightest form of legal sanction which may be extended as far as the most serious forms of isolation.

In my opinion, the form of prison confinement preferable for our country is the agricultural colony, which should not exclude the existence of reformatories where industries are carried on more or less connected with agriculture. Our country is always called the land of the sun; and it seems to me absurd that in the land of the sun prisons that are mere groups of cells should be constructed for men to be thrown into and buried alive, so that they come out of them ferocious and brutalized.

It is comprehensible that the countries in the north should have thought of such prisons: it is the consequence of their climate. Norwegians, for example, are for months and months of their long winter isolated and confined to their houses. But to adopt a cell system in sunny countries was really, as the first Anthropological-Criminal Congress in 1885 at Rome described it, "one of the errors of the nineteenth century."

Isolation must be obligatory only at night, for obvious reasons; but in the daytime there is only one hygiene for all criminals, mad or not mad, dangerous or not dangerous, and it is the hygiene of work in the open air.

Workhouses, agricultural colonies, isolation buildings for the most dangerous criminals, special houses for the victims of alcohol, for lunatics, for neuropathics, and so on, all should have work as the law of their daily life.

All these forms of imprisonment will have no fixed term, for this

is one of the conclusions on which the criminal anthropological school has insisted the most, namely, that it is absurd to fix beforehand the term when the condemned man shall leave the prison. As I said once at the International Congress of Paris in 1889, this is just as if a doctor stood at the door of the hospital and said to each patient: "You will remain a fortnight in the hospital." "But if I get well before that?" "You will remain a fortnight all the same." "And if at the end of the fortnight I am not well?" "It doesn't matter, you will leave all the same." This is an absurd system which cannot give good results. On the contrary, there should be arrangements for the abbreviation of criminals' imprisonment, according to the conditions of reducibility, of correction and of amendment which each criminal shows.

Incorrigible criminals are only a small minority in the great mass of crime; whereas the majority of criminals (the occasionals) may yet become useful citizens.

And even this imprisonment for an indefinite period will not be an absolute innovation in the state of our contemporary penal justice, for, in Italy for instance, when the judge condemns a homicide, say, to twenty years' imprisonment, that judge cannot be certain that the homicide in question will be twenty years in prison.

There is the right of grace, which depends only on the executive power and which can set him free when it wishes; there is the system of conditional liberty, by which, when the prisoner's conduct has been good he may, after two-thirds or three-fourths of his time, be freed, always by consent of the administrative authority.

We shall introduce, on the other hand, into this exemption from imprisonment, the jurisdictional power of the magistrate to give a greater guarantee to individual rights. And this is the last point I can touch on with respect to the reform of penal justice.

In this new reform of penal laws the power of the judge will evidently be more ample than it is now, as we see in all the recent penal laws and suggestions made for changes in them. The legislator establishes a method of punishment for a crime, but the judge's task is to adapt that method to the personality of the criminal, and some reformers of penal law wish also to give the judge the faculty of substituting one sanction for another, according to the more or less dangerous personality of the man who has committed the crime. The judge, then, will have powers much more extensive than he has now. The individualization of punishments, if it is, as I said years ago, an ideal not realizable by the legislator, who can only range in order

classes of criminals, can and should be the result of the work of the judge, who has living individuals before him. But, on the other hand, this increased power of the judge cannot and should not constitute a danger to that individual liberty which is the irrevocable conquest of modern civilization.

When in France, the name of Magnaud, the "good judge," was becoming celebrated, I ventured (it often happens in my life that I think differently from the majority) to say: "But I am against the good judge, because a good judge connotes the possibility of a bad judge. You admire Magnaud, my personal friend, who came to the Criminal Anthropological Congress at Turin in 1906 to bring the assurance of his scientific solidarity; I admire him as much as you do. But if we admit that he, to acquit an accused man, can violate the law and therefore create a new law in favor of those who were really under unfortunate and pitiful conditions, in so doing we admit the possibility that another judge may modify the existing law in the sense of a savage severity towards the accused and so suppress the guarantees of individual right. The judge should apply the law as it is and nothing more. It is the law which constitutes the guarantee of individual right, and it is the genuine application of the erroneous law which, by bringing its defects into relief, further facilitates and accelerates its reform.

It is indeed certain that in this reform of penal justice, in which the personality of the criminal is made the first consideration and is not left in the shade as up to now, the judge will have increased powers to adapt the form of punishment to the personality of the criminal.

But, as proposed in its first Congress in Rome in April, 1914, by the Italian Society of Anthropology and Criminal Law, we shall put side by side with such wide and necessary powers of the judge, greater guarantees for individual right. Penal justice should progress but we cannot allow the progress of penal justice to coincide with the diminution of individual guarantees and rights which modern civilization has irrevocably recognized and established.

Such guarantees may be found above all in the choice of judges, in their technical capacity, in their conditions of independence and correlative responsibility.

In the second place, we have the rules which will be fixed in the penal code to decide the conditions according to which the judge may exercise his powers for the judicial individualization of the repressive sanction.

My proposal, then, and my idea is this: While the criminalists

think that the provisions, for example, against criminals who are insane or habitual drunkards, are administrative provisions, measures of security, as they are called, different from the penalty, which, according to them, is moral retribution for the crime by means of punishment, my view is that there is no substantial difference between the penalty and the measure of security, and that the latter, instead of being administrative provisions should be jurisdictional provisions.

If my view prevails, when the criminal is not dangerous, the form of punishment will not be prison confinement. To put in prison for five, ten or fifteen days a criminal who has committed slight and not dangerous offenses, means putting him in a Pasteur stove for the culture of criminal microbes. And this is why we are against short prison penalties. There are other forms of punishment which will be enough and which I cannot now enumerate to you, but which, as the positive school has always held, will always be accompanied by the obligation to compensate for the damage caused by the crime. Such compensation every condemned person will make even in prison with his own labor, organized not only for an educational and hygienic purpose, but also for economic profit, with hours and salary equal to those in the open market.

Of this salary, half is to be destined to compensate the party injured by the crime, and half for the family of the condemned, and as a sum put by for himself; while the economic profit of prison work will go as indemnity to the public treasury. At Buenos Aires I saw the penitentiary, which is under the the superintendence of the Positivist Ballue, and which was not costing the state a single penny, nay, often yielding it a sum to the good as the residue of profit of the industrial business after having paid all the expenses of the inmates.

But when prison confinement is necessary we hold that the condemned and his family have the right, after, say, the half of the penalty, to ask the judge who pronounced the first sentence, to exonerate him from the rest of the penalty if in prison he has shown himself improved and has learned a trade which puts him in a position to live honestly in a life of liberty. And for this there should be a real and proper legal act. The judge should hear from him the management of the prisons about the conduct of that prisoner, for in the places of imprisonment, the anthropological chart should be organized, filled in with methodical observations by the prison doctor, who should be a criminal anthropologist, as the Minister Cruppi proposed in France eight or ten years ago, though I have not been told whether his proposal was accepted.

The management of the prison will say whether the individual is improved or not, whether readapted to a free life or no. The judge will hear the advocate of the state and the advocate of the condemned and the advocate of the injured party, too, who may present records and facts that may show whether the individual may be exonerated from the rest of his penalty or no.

And if the appeal is rejected, the judge will fix a date when the condemned may present a new appeal. It seems to me that in this way the power of the judge, more extensive though it be than it is at present, may find in the law and in these jurisdictional forms, the limits that guarantee the rights of the liberty of the individual.

And it is to this end that in one of its first meetings the commission for the reform of penal laws has expressed a wish which concerns the choice and career of magistrates, concerns the university studies of jurisprudence, and concerns the legal profession. The commission considered that the reform of penal laws could not be efficaciously and practically applied in Italy if there were not a homogeneous and favorable atmosphere, especially in those whose task it is to apply these forms of penal justice and help in their application.

As to the magistrates, the commission has repeated the wish that from now on, in the choice and career of magistrates, a clear division be made of civil judges and penal judges. To expect a magistrate to be an encyclopedia of law is to expect an absurdity. The mentality of the jurisconsult, of the student of private law, is a legal, logical mentality different from what is necessary in the penalist, who ought above all things to be a profound discerner of human psychology. Besides, this distinction between civil judge and penal judge was actually made in the days of the Kingdom of the Two Sicilies, and gave the very best results in that period before our nation was welded into one.

With regard to university studies, the commission has proposed that in the next university reform in the faculty of jurisprudence, after two years of the common instruction of all law students, the second two years should see the division, at the student's pleasure, between the studies of private law and the studies of penal law, the students of course having always the right to attend, if they willed, the courses in both.

But to obtain the degree of doctor in penal law, it will be necessary to add to the subjects now existing courses of practical exercises in anthropology, in psychology and in criminal sociology, in statistics, in legal medicine, and in the technics of the judicial inter-

rogatory. There should, therefore, be in the university special studies for penal justice to be continued, too, later on by lawyers during the practice of their profession. We have proposed that those who in future wish to be registered as lawyers must have a special certificate of competence in the defense of clients before the Court of Assizes and be inscribed in a special list; while to be so qualified to defend prisoners before the Court of Assizes, lawyers must, in the examination in professional practice, add to the usual subjects those special subjects of anthropology, criminal psychology, etc., which I have just referred to for the second two years of university studies.

I have, it seems to me, now very sufficiently demonstrated that we have a very organic and positive idea of what a reform of penal justice in Italy may be.

But although for forty years I have had a passion for studies of criminology, my insight is always sufficiently keen to force on me the profound conviction that no legal reform of civil justice or of penal justice can be applied or be useful in a country if it is not rooted in the ground of social justice. A progressive social justice, is, in my opinion, the necessary condition, if the application of civil laws and of penal laws is really to lead to that ameliorating elevation of humanity which is the aim of each one of us, no matter what our religious, philosophical or political belief may be.

I am thinking at this moment that forty years ago, in the November of 1879, when in the University of Bologna, succeeded to the chair of my great master in criminal law, Pietro Ellero, I held up to view with the audacity of youth "new horizons of penal law," thinking, too, that last October I was able to reassert those same ideas, in my reply to the Minister of Justice as president of the commission charged with this reform of penal justice in Italy.

A cycle of scientific existence this, which closes with an obvious personal satisfaction, not most assuredly from any personal merit in the initiator, but because on the one hand contemporary civilization has now a more accelerated rhythm and because, on the other hand, the experience of hard facts has spread abroad and rooted firmly the conviction of the truth of our proposals.

But great as is my personal satisfaction as a worker in this field from the days of my "new horizons" at the University of Bologna to my presidency of this commission, I trust that before the hour be come of my eternal sleep, my eyes may be illumined by the new horizons of a wise social justice, truly courageous and energetically efficient.