

**“The Italian Contribution to European Penal
Law in the late 19th Century”**

by Reiner Schulze

Translation by the Hon Justice K.A. Cullinane

COMMENTARY

The attached article, originally written in German and translated into Italian, which I have translated in English, was presented by the author (a distinguished German jurist and author) at the 55th Congress of the History of the Italian Risorgimento at Sorrento in December 1990.

Professor Cadoppi makes some reference to this article in The Zanardelli Code and Codification in the Countries of the Common Law.

Although relatively brief, Schulze's paper provides a useful context within which one can view the Italian influence in Europe and beyond at the time Griffiths looked to the Zanardelli code as a source, perhaps the major source, of inspiration for his code.

Schulze's article focuses on the two major Italian influences in the field of penal law at the end of the 19th century: firstly, positivism (to which a good deal of the article was devoted) and associated with this the writings of Cesare Lombroso in the field of criminal anthropology, particularly "Uomo delinquente" (Criminal man). Secondly, the Zanardelli code, a product of the classic school. Whilst Zanardelli's code was reformist, even radically so, it was strongly opposed by the positivists who saw it as an obstacle to their more radical reforms.

The extent to which the Zanardelli code influenced codes in the common law is traced by Professor Cadoppi in his article. In this article the influence of that code and positivism in other parts of Europe are examined.

The Zanardelli code had its greatest influence as a model, not in the old world but in the new world. Apart from those codes which, through the Griffith code, drew their inspiration from it, one sees that codes throughout hispanic America (Venezuela, Chile, Argentina, Cuba and Argentina) in the late 19th and early 20th centuries were to a greater or lesser extent based on the Zanardelli code. When one adds to these and the common law countries, countries such as modern Israel and Japan one sees just how wide the reach of its influence was.

According to Wahlberg, the flowering of anthropology and law making in the Italy of the late 19th century, represented by the positivist school and the Zanardelli code and the extensive research which preceded it, can be attributed to the "particularity and originality of Italian culture".

That these developments should have taken place in a country which had just come to nationhood is extraordinary.

It is also worth noting that whilst many scholars attribute the commencement of comparative law as a separate subject of study to the International Congress of Comparative Law of 1900 in Paris, Dr Schulze points out that comparatists existed in Italy prior to this and as Professor Cadoppi in his article notes the Zanardelli code had been preceded by an extremely wide comparative study of penal systems throughout much of the world.

This brief article helps in the understanding of the nature and extent of the great Influence which a country like Italy was in its very early and formative years, able to exert in the legal systems of the world an influence which, as Professor Cadoppi has demonstrated, endures in our own State.

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REINER SCHULZE

THE ITALIAN CONTRIBUTION
TO EUROPEAN PENAL LAW
IN THE LATE 19TH CENTURY

I. ITALIAN IMPULSES TO PENAL JURISPRUDENCE AT THE END OF THE CENTURY.

"It seems to be written in the book of fate that the fatherland of Angelo Aretino and Guilio Claro, of Cesare Beccaria and Francesco Carrara (and how many other names would it be possible to cite!) should always be a fertile stimulus and a goal to be emulated for every branch of penal science".¹ This homage to Italian penal jurisprudence, a homage which was made by way of introduction to a full discussion² of the Zanardelli Draft of 1887,³ was made by no less a person than Franz Von Liszt.⁴ Liszt, moreover, is certainly not the only person in the legal literature of the German language to concern himself closely with the Italian penal law of those years. In addition authors such as Holtzendorff,⁵ Seuffert,⁶ and Wahlberg⁷ - to mention only the most significant - devoted comprehensive analyses to the Zanardelli Draft.

1. F. von Liszt, *Der italienische Strafgesetzentwurf von 1887*, in *Abhandlungen des kriminalistischen Seminars zu Marburg*, I/1, 1888. Subsequent citations of the same are taken from the *Raccolta* (Collections) of his *strafrechtliche Vorträge und Aufsätze 1875-1891*, Berlin, 1905, vol. I, pp. 253 ff (reprint Berlin 1970) (Tr. d. A.).
2. F. von Liszt, *op. cit.* n. 1, pp. 252 ff.
3. The draft had been fully reproduced in *Rivista penale di dottrina, legislazione e giurisprudenza*, (*The penal Review of doctrine, legislation and jurisprudence*) Turin, 1887, vol. XXVII, pp. 10-268; Amongst the best known and most accurate commentators on the Zanardelli Draft we remember G. Crivellari, *Introduzione al Commento del nuovo Codice penale italiano*, (*Introduction to the commentary on the new Italian penal code*). Milan, 1890, pp. 150-160 and E. Pessina, *Enciclopedia del diritto penale italiano*, (*Encyclopaedia of Italian penal law*) Milan, 1906 vol. II, pp. 733-735.
4. Franz Von Liszt was born at Vienna on 2/3/1851. From 1882 he was professor at Marburg, he founded in 1888 the "kriminalistisches Seminar"; lecturer at Halle from 1889, he founded the "internationale kriminalistische Vereinigung". Professor ordinary at Berlin from 1889 to 1916. He died in 1919.
5. F. von Holtzendorff, *Die Strafandrohungen im neuesten italienischen Strafgesetzentwurf*, in *Der Gerichtssaal*, Stuttgart, 1888, vol. XL, pp 321 ff.
6. H. Seuffert, *Mitteilungen aus dem Entwurf eines Strafgesetzbuches für Italien (1887)* in *Festschrift für Rudolf von Gneist zum fünfzigjährigen Doktorjubiläum*, Breslau, 1888, (reprinted Aalen 1974).
7. W.E. Wahlberg, *Der Strafgesetzentwurf (Zanardelli) von 1887 für Italien*, in *Juristische Blätter*, n. 45, 1888 pp. 531-535. A. Buccellati, *Entwurf des StGBs für das Königreich Italien von Minister Zanardelli*, in *Der Gerichtssaal*, vol. XL, 1888, pp. 441 ff.; S. Mayer, *Der Entwurf eines Strafgesetzes für das Königreich Italien (Zanardelli)*, in *Archiv für Strafrecht* (founded by Goldammer) Berlin, 1887, pp. 337 ff.; A. Suchsland, *Das neue italienische Strafgesetzbuch*, in *Der Gerichtssaal*, vol. XLL, 1889, pp. 321 ff.

And to attract the interest of the studious Germans towards Italy there was not only such a Draft of a new code, but also, at least in equal measure, the complex of theories expounded in the eighties and nineties of the century by the medico Cesare Lombroso on "criminal man"⁸ and the so called "positivist school"⁹ which derived its impetus from such theories.

If then, in the course of this wide German interest in the "positivist school" and the Zanardelli code, we have referred to Liszt before any other person this finds its explanation both by reason of the importance of this author to the subsequent development of criminal law in Germany¹⁰ as well as because of the analogy subsisting, both chronologically and in terms of the contents thereof, between his criticism of "classic" penal law and the strenuous efforts and attempts to reform the same, which were conceived in Italy¹¹. Shortly after the publication of Lombroso's work, Liszt had in fact, through the Marburg Programme¹², laid down the foundations of the "modern school" of penal law in Germany. And in the very same year in which Liszt, analysing the Zanardelli Draft, proposed to take advantage of it to enliven the discussion in Germany with new impulses there also saw the light (it was 1888) his famous "Kriminalistisches Seminar"¹³ (seminar of criminal law) which would exercise great influence on the next generation of great German penal jurists. Amongst these we will mention two names: Eberhard Schmidt,¹⁴ still today considered one of the most eminent historians of German penal law, and Gustav Radbruch,¹⁵ leading reformer and minister of justice in the Republic of Weimar.

8. Lombroso, *L'uomo delinquente (Criminal man)*, 1st Ed. Milan 1876, translation in German published by M.O. Fränkel 1887-1890, 2 vols.
9. Amongst the works of the "positivists" we recall E. Ferri, *La Scuola criminale positiva* (The positivist criminal School), Naples 1885; *Del limiti fra diritto penale ed antropologia criminale* (on the limits between penal law and Criminal Anthropology) Turin 1881; *Appunti al nuovo Codice penale*, (Notes on the New Penal Code,) Published by C. Lombroso, 2nd Ed. Turin 1889.
10. See E. Schmidt, *Einführung in die Geschichte der deutschen Strafrechtspflege*, Göttingen, 1985 (3rd Edition), Chapters 308 & 309; G. Kleinheyer/J. Schröder, *Deutsche Juristen aus fünf Jahrhunderten*, Heidelberg, 1989 (3rd Edition) pp. 169 ff.
11. See Silvio Ranieri *Franz von Liszt und die positive Strafrechtsschule in Italien, Franz von Liszt zum Gedächtnis*, Berlin, 1969, pp. 156 ff.
12. F Von Liszt *Marburger programmschrift, Der Zweckgedanke im Strafrecht*, in ZStW, 1883, vol. 3 pp. 1-47, now also in H. Ostendorf, *Von der Rache zur Zweckstrafe: 100 Jahre "Marburger Programm" von Franz von Liszt (1882)*, Frankfurt on Main, 1982.
13. See E. Schmidt *op cit* (n. 10.-Chap. 308).
14. Eberhard Schmidt born at Jüterborg on 16 March 1891; professor of penal law and legal history in the University of Breslau, Kiel (1926), Hamburg (1929), Leipzig (1935), Göttingen (1945), Heidelberg (from 1948), then from 1959 Professor Emeritus. Died at Heidelberg 17 June 1977.

In 1888 and 1889 then, whilst in Italy the Zanardelli code was presented to the Parliament and to the King and finally approved,¹⁶ Liszt founded, together with the Belgian Prins and the Dutchman van Hamel, the "Internationale kriminalistische Vereinigung"¹⁷ (International Criminology Association), organising it thus in an international form and opening to a reciprocal exchange of ideas and experiences the movements for the reform of the existing criminal laws of Europe. His ideas were received into German legislation, in a substantial way, only in 1933 with the reform of the penal code and later with the wide reforms carried out in the penal field in the last 30 years when a strong current of thought among German penal jurists adopted the ideas of the enlightenment and those of the "modern school" of Liszt introducing them by way of a policy to be developed, an ideal consonant with the needs of the changed times.¹⁸ With as much in common with the "modern school" in Germany as with the "positivist school", born from the premises of Lombroso in Italy, they had not only the desire to use methods of empirical analysis – methods from which modern criminology was born – but also rejected as a matter of principle some of the philosophical premises characteristic of the "classic school" in both countries.¹⁹

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15. Gustav Radbruch was born at Lübeck on 21 November 1878. Professor ordinary at Königsberg from 1914, at Kiel from 1919. Elected social democratic deputy to the German parliament in 1920. Minister of Justice from 26 October 1921 until 1922 and again in 1923. Resumed academic activity at Kiel and Heidelberg (1926). He left teaching in 1933 to resume in 1945 until 1948. He died at Heidelberg on 23 November 1949.
 16. On the origins of the Zanardelli code see E. Pessina, *Enciclopedia (Encyclopedia)* (n. 3), cit., pp. 733-743, and E. Brusa, *Die Wissenschaftliche Leistung Italiens auf dem Gebiet des Strafrechts während der letzten zwei Jahre*, in *ZStW*, vol. 1, 1881, pp. 130 ff.
 17. See E. Schmidt, *op. cit.*, (n. 14) chap. 308.
 18. See Claus Roxin, *Franz von Liszt und die kriminalpolitische Konzeption des Alternativentwurfs*, in *ZStW*, vol. 81 (1969) pp. 611-649; on the reformers of the penal law generally, see H. Rüping, *Grundriss der Strafrechtsgeschichte*, Mr Schönke-Schröder, *Strafgesetzbuch Kommentar*, on the recent developments in penal law by way of introduction H. Achenbach, *Kriminalpolitische Tendenzen in den jüngeren Reformen des Besonderen Strafrechts und des Strafprozessrechts*, in *JUS*, 1980, pp. 81 ff.; Heike Jung, *Fortentwicklung des strafrechtlichen Sanktionssystems*, in *JUS*, 1986, pp. 741 ff.

In the "classic" conception, the purpose of punishment was not to be sought in a framework of interests or social ends. Rather, the guilty person was punished in so far as "he has committed a crime"²⁰ according to the assertion of Immanuel Kant. The guilty, an individual gifted with free will and capable of autonomously distinguishing between good and bad, must entirely and exclusively answer for the act alleged against him. The "just" sentence in this context, was to be fixed – without variations of "more" or "less" – in a manner rigorously proportional to the crime (whatever criteria applied, on the basis of metaphysical principles, to determine what was proportional or just.) Already before the seventies of the last century such a "classic" conception underwent profound changes, without however ceasing to be identifiable in principle.²¹ From the doctrine of Feuerbach on the "psychological compulsion"²² that the imminent penalty imposes and until one arrives at a determination, according to Rossi, of a suitable penalty relative to the conservation of social order and to the rehabilitation of the guilty²³ the author of the crime remained in the ultimate analysis, the individual gifted with the free will of the philosophic ideal.

19. See H. Rüping, *op cit.* (n. 18) pp. 87 ff.; H. Welzel, *Das deutsche Strafrecht* (14th edition) Berlin, 1969, pp. 12 ff. on the representatives of the German "classic school" see G. Kleinheyer/J. Schröder, *Deutsche Juristen aus fünf Jahrhunderten* (2nd edition), Heidelberg, 1983, pp. 38, 168, 323 ff. Amongst the representatives of the "classic school" we cite Francesco Carrara with his *Programma del corso di diritto criminale* (of the course of criminal law) (last edition Florence, 1902) and Giovanni Carmignani, *Elementi di diritto criminale* (*Elements of Criminal Law*) Milan 1863; (Theory of the laws of social security), Pisa 1831.
20. I. Kant, *Metaphysik der Sitten*, 1st part, *Metaphysische Anfangsgründe in Recht*, Königsberg, 1797 p. 196. (Tr d. A.).
21. A detailed description of the different penal theories can be found in C.L. von Bar, *Geschichte des deutschen Strafrechts*, with notes and observations of L. Schnorr von Carolsfeld, Aalen, 1974 chap. 85 ff. See also the exposition of synthesis of U. Eisenhardt, *Deutsche Rechtsgeschichte, Grundrisse des Rechts*, Munich, 1984, pp. 315 ff.; H. Rüping *op cit.* at n. 19, p.13. In the Italian language the following works have been translated. Liszt, *La teoria dello scopo nel diritto penale* (*The theory of the purpose of criminal law*) published by A.A. Calvi, Milan 1962; Welzel, *Diritto naturale e giustizia materiale*, (*Natural law and substantive justice*) published by G. De Stefano, Milan, 1955.
22. See H. Müller, *Begriff der Generalprävention im 19 Jahr hundert von P J A Feuerbach bis Franz von Liszt*, In *Frankfurter Kriminalwissenschaftliche Studien*, vol. 9, 1984, pp. 66 ff.
23. P. Rossi, *Trattato di diritto penale*, (*Treatise on penal law*) vol. I, Milan, 1852, pp. 130 ff.

The "positivists" radically opposed this concept in the last quarter of the century.²⁴ They dedicated themselves to an analysis, using an empirical-systematic method, of the circumstances which, beyond that of free will, caused a man to become a criminal. In the place of free will, they substituted a wide criteria of determinative factors founded – wholly or partially – on the circumstances of a person's physiological or social life; the philosophy of law, metaphysics, yielded to the empiricism of medicine and sociology. The "just" punishment, proportional and not determined by considerations of purposes or aims, had been substituted in the minds of the new theorists, by a scientific punishment dedicated and conceived, for the very purpose, of achieving social ends. Thus, their program of penal reform aimed at the elimination of sentences of brief duration for criminals of a petty kind or those without any prior criminal history, because those sentences were "useless" as measures for the "resocialisation" of offenders and came also to postulate the elimination of recidivist offenders and "Incorrigibles" (elimination, or neutralization, by achieving it, for example, through perpetual preventative custody).²⁵

The offensive of scientific positivism against the "citadel" of "classic" penal law had been launched in 1878 by the Italian Lombroso with "criminal man" – a point of reference, almost a beacon so to say, of the scientific debate throughout all Europe. Its attempt to identify the "criminal" on the basis of specific physiological elements²⁶ – shape of the face, hair, or even the size of toes – was destined to fail, and even today excites amazement and surprise. However it had the effect of initiating, by way of a challenge launched, on the intellectual level, and, let us say it, as a somewhat disturbing provocation, a move towards a change of scientific direction from the metaphysics of classic penal law to the positivism of the new school. And very soon beside or directly in the place of the limited medico-naturalist conceptions of the Lombrosians – which in the course of the twentieth century were to be taken up in a manner ever more problematical by the theories, contrary to the dignity of man, of German national socialism, but not only by it – were disseminated those of a sociological nature and from that grew modern criminology and criminal policy which would become the starting point of multiple reforms of European penal law.

24. On the dispute between the "absolute" and "relative" penal theories and the classic and modern schools in Germany see H. Rüping, *op. cit.* at n. 18 pp. 87 ff. A.F. Berner *Lehrbuch des deutschen Strafrechts* 18th ed, Leipzig, 1898 H. Müller *op. cit.* at note 22 pp 298 ff.; 338 ff.; On the convergences and the differences of direction of these schools see Silvio Ranieri, *op cit* at n. 11 pp. 164.

25 F. Von Liszt, *Lehrbuch des deutschen Strafrechts*, (13th Ed) Berlin 1903, chapter 15 and relevant references.

26 See n. 18; for further treatment of the "criminal" see Silvio Ranieri *op cit* at n.11 p 159 with many references.

In Italy itself we encounter the opposition, in the eighties of that century, between the "positivist school" with Enrico Ferri²⁷ and Raffaele Garofalo²⁸ as the leaders, and a strong and dynamic "classical school"²⁹ which had in the *Rivista penale* (Penal Review) its central inspiration and cornerstone. The potential for efficiency and modernization which in those years the Italian classic penal law demonstrated that it possessed is testified to by legislative activity. It took its guiding light, even in the sixties, from "classic" principles and its great achievement, the object of vast attention even internationally – the Zanardelli Draft penal code of 1887, of which we have spoken at the beginning of this article, did not distance itself, in its principal sources of inspiration, from the "classic" penal tradition; on this point its opponents of the "positivist school" as much as its defenders of the "classic school" agree.

This tradition welcomed nevertheless a series of innovations, which not only constituted a step forward with respect to traditional dogma but also contained ideas for a reform of the penal law which coincided with the theses of the supporters of the "positivist school"; for example, the differentiation of the types of penalties and of the levels of responsibility of those who commit crimes; the introduction, in a general way, of attenuating circumstances; the division of offences into two categories only (crimes and contraventions)³⁰ and not into three, according to the French and German traditions.

27. See for the works of this author note 9.

28. Amongst the works of Garofalo we recall: *Criminologie*, (*Criminologies*) first edition, Turin, 1881; *Della mitigazione delle pene nei reati di sangue* (*On Mitigation of Punishments in Crimes of Blood*) in *Giornale napoletano di filosofia e lettere*, (*Neapolitan Journal of Philosophy and Letters*) Naples 1887; *Di un criterio positivo della pena* (*Of a positive standard of punishment*) Naples, 1880.

29. See at n. 19.

30. See G. Zanardelli, *Relazione a S.M. il Re del Ministro Guardasigilli nell'Udienza del 30 giugno 1889 per l'approvazione del testo definitivo del Codice penale*, (*Report to His Majesty the King of the Minister for Justice in the Audience of 30 June 1889 for the approval of the final text of the penal Code*), Rome 1889 p.12 ff. On the consequences of tripartition which Zanardelli judged as "regrettable and damaging" see *Relazione* cit., pp. 24 ff.

That which most attracted public attention, however, was the abolition of the death penalty³¹, a controversial subject from the beginning of the legislative activity in the area of reform of criminal law in a united Italy.³² Italy achieved in this field, alone amongst the great countries of Europe, a reform objective amongst the most important in the field of doctrine in modern penal law. Already forcefully supported on one side by the penal jurists of the Enlightenment, the object of passionate discussion amongst the legislators of revolutionary France (who did not succeed in achieving it) the abolition of the death penalty formed part of the baggage of requests and demands advanced during the "European Revolution" of 1848/49 and remained the order of the day for penal reforms in various European countries without however being realized. Inserting it in black and white in the new Penal Code, Italy demonstrated that it was possible to achieve the abolition of this extreme penalty in the ambit of a penal law of "classical" orientation, strictly linked to the principles of the liberal and enlightenment traditions.

II TOWARDS A EUROPEAN HISTORY OF LAW IN THE AGE OF NATION STATES

The Positivist school and the Zanardelli Code: Here are the two important contributions by Italy to the history of European penal law of the late nineteenth century. In this article it is not possible, unfortunately, to analyse the genesis and the importance of such contributions in Italy itself nor their development, or rethinking, in the following century. We must in fact limit ourselves to their resonances amongst its contemporaries, upon the basis of further examples which we will shortly expose. Such echoes and resonances, we must not forget, evidence both some of the results of which science and (Italian) penal legislation after unification demonstrated themselves capable of as well as the intense exchange of ideas and experiences amongst the European judicial cultures; a dimension which existed notwithstanding the claims and achievements of the nation states.

31. The abolition of the death penalty had been intensely discussed not only in the political sphere but also in the scientific in post-unitary Italy; see F. Benevolo, *L'unificazione della legislazione penale e la pena suprema (The unification of the penal legislation and the supreme penalty)* Turin 1890; Carlo Francesco Gabba, *Il pro ed il contro nella questione della pena di morte. Considerazioni critiche, (The for and against on the subject of the death penalty; a critical discussion)* Pisa 1866. On the penalty of death in Italy see Cesare Beccaria, published by Gerhard Deimling, Heidelberg, 1989, pp. 55 ff.

32. For an analysis of the problem in the German language, see F von Liszt, *op.cit.* at n. 1 pp. 257, 258.

The phenomenon of a national contribution to a European and international line of development of law and juridical culture – in an era, like ours, of ever greater convergences in the systems and juridical institutes at the level of European integration – explains the particular interest with which both the scientific and legislative results achieved by Italy in the late nineteenth century are viewed. Before moving to speak of the echo of Italy abroad we will then touch upon the problem of the fact of and the nature of, this common history of the law in the period of nation states.

Even if we are speaking of a very specific sector of the law, one feels it important always to affirm that the development of the nation State in the course of the nineteenth century did not rent the fabric of a common european development in the legal field. It has given it, at the most, a new form, if we keep in mind the following elements which are able to validate our thesis; the age of the nation State is at the same time an age of mutual interchanges in national³³ juridical cultures and an age of circulation in Europe of juridical concepts and proposals for legal reform.³⁴ To borrow from Nietzsche, it is an age of "european comparison". Such an exchange of ideas and solutions was nourished, then, from existing affinities at the level of legal education and of its *forma mentis* and by the return to the epoch of the tradition of a common law, from the natural law and the Enlightenment, but it also nourished itself and took impetus from the necessity to provide answers to problems and common challenges arising at that time.

In the second half of the nineteenth century Italy was ahead of its time in finding new forms and dimensions of international juridical comparison - comparative law and its associated disciplines – which replaced the old tradition of a common law. It is sufficient to recall the name of Amari³⁵ in the field of comparative law and comparatists generally and of Mancini³⁶ and Anzilotti³⁷ in the field of private international law.³⁸

33. See the Introduction of Reiner Schulze in *Deutsche Rechtswissenschaft und Staatslehre im Spiegel der italienischen Rechtskultur während der zweiten Hälfte des 19 Jahrhunderts*. (published by R. Schulze) pp. 3 ff., 12 ff.

34. See specifically Cristina Vano *Hypothesen zur Interpretation der "vergleichenden Methoden"*, in R. Schulze *op. cit* at n. 33 pp. 225 ff. particularly p. 242.

As much as has already been said is enough to consider the Italy of the second half of the nineteenth century not as a mere "recipient" in comparison with the German "juridical pole" or with the other important European countries such as France. It would be necessary, moreover, to analyse beside the major centres of European juridical diffusion – France, Germany, England – the development and the creative interchange of new ideas and juridical conceptions in the territories located at the periphery or at the cross-roads, with respect to such centres; for example in the Low Countries, in Belgium, in the French and German Rhine and particularly in Italy. The coming into contact of external influences with the juridical traditions more specifically and genuinely national, in a context wholly Italian, can be considered as the necessary pre-condition to the further fruitful contributions of Italy, in an original manner, to the circulation in Europe of conceptions and normative models already mentioned. Some of these Italian scientific contributions have been the subject of research by Aldo Mazzacane³⁹

35. E. Amari, *Critica di una scienza delle legislazioni comparate* (A critical view of the science of comparative legislation) Genoa, 1957; See E. Jayme, *Emérico Amari (1810-1870) diritto comparato e teoria del progresso* (Comparative law and theory of progress) In *Rivista del diritto civile* (Review of civil Law) n. 1 part one, Padua 1989.
36. See P.S. Mancini *La nazionalità come fonte del diritto delle genti*, (Nationality as a source of the rights of the people) Turin 1850; *Diritto internazionale. Prefazione con un saggio sul Machiavelli*, (International law; Introductory Lecture with an article on Machiavelli) Naples 1873; *De l'utilité de rendre obligatoires pour tous les Etats, sous la forme d'un ou de plusieurs traités internationaux, un certain nombre de règles générales du droit international privé pour assurer la décision uniforme des conflits entre les différentes législations civiles et criminelles*, In *Clunet*, (Journal de droit international privé), 1 (1874) pp. 291-299.
37. See D. Anzilotti, *La codificazione del diritto internazionale privato, Discorso letto nel R. Istituto di Scienze-Sociali "Cesare Alfieri" in Firenze il giorno 12 Novembre 1893 per la solenne inaugurazione degli studi*, (The codification of private international law, A discourse read in the Royal Institute of Social Sciences (Cesare Alfieri) in Florence on the 12th Nov. 1893 for the solemn inauguration of its research.) Florence 1894. Id., *Studi critici di diritto internazionale privato*, (critical studies of private international law) Rocca S. Casciano, 1898; Id *Il diritto internazionale nei giudizi interni*. (International law in domestic judgments), Bologna, 1905; Id.; *Corso di diritto internazionale privato* (Course of private international law) 1925.
38. See H.P. Mansel Mancini, v. Savigny und die Kodifikation des deutschen internationalen Privatrechts von 1896, in R. Schulze op. cit. at n. 33 pp. 245 ff; E. Jayme, *Dionisio Anzilotti und das deutsche internationale Privatrecht*, *ibid* pp. 297 ff.
39. See A. Mazzacane, *Die Rechtskultur in Deutschland und Italien nach der nationalen Einigung - Anmerkungen zu einem Forschungsprojekt*, in R Schulze op. cit at n. 33 pp. 55 ff.; Id., *I giuristi e la crisi dello Stato Liberale in Italia fra Otto e Novecento*, (Jurists and the crisis of the liberal state in Italy between the 1800s and 1900s) Naples, 1986; Id., *L'esperienza giuridica di Emanuele Gianturco*, (The juridical experience of Emanuele Gianturco), Naples 1987. Aldo Mazzacane/Pierangelo Schiera, *Enciclopedia e sapere scientifico. Il diritto e le scienze sociali nell' Enciclopedia giuridica italiana*, (Encyclopedia and scientific knowledge. The law and the social sciences in the Italian juridical Encyclopedia) Bologna 1990.

III The resonance of Italian penal law of the late nineteenth century in Germany and Austria.

We now turn to Germany and Austria to examine what the resonance of Italian penal jurisprudence had been in those countries. And here we are able to immediately ask ourselves: what is the role which Liszt, at the commencement of the "modern school" of German penal law, attributed to Italy, in the area of development of the penal jurist? Essentially the function of a vanguard, of an intellectual challenge for the rest of Europe; and this is the most fascinating aspect of the Italian science of that era. After the great scientific and political disputes of the eighteenth and half of the nineteenth centuries on penal law, prison systems, and criminal policy, the penal law had become, he affirms, "a particular and exclusive occupation of professors in the subject, of whose lessons and of whose writings no one took any notice, except for their closest colleagues."⁴⁰ Alone in raising themselves to prominence in this general silence were "the Italian criminal jurists with their ardent, youthful and bellicose battle cry."⁴¹

And when Liszt amongst these mentions "theoretical and practical, jurists and doctors"⁴² he is clearly alluding to Lombroso⁴³. But there is not only this: Liszt also recognised the capacity of Italy to transform into legislative practice the impulses of "a rejuvenated penalistic science."⁴⁴ The Zariardelli Draft represented in his words "a milestone in the history of penal legislation" and its provisions were such as to "attract the universal attention of statesmen even beyond Italy."⁴⁵

"Reform and unify"⁴⁶: This was for Wahlberg, in the same years, the dominant⁴⁷ motive of Italian science and penal legislation, almost, with a view to giving them the value of an example and paradigmatical model.

40. F. Von Liszt *op. cit.* at n. 1 p. 252 (Tr.d.A.)

41. *Id.* pp 252, 253 (Tr.d.A.)

42. *Id.* P. 253 (Tr.d.A.)

43. On the position of Liszt with regard to the doctrine of Lombroso; see F. Von Liszt, *Lehrbuch des deutschen Strafrechts*, *op. cit.* at n. 25 chap. 15; *Marburger Programmschrift*, *op. cit.* at n. 12, p. 4. E. Schmidt *op. cit.* at n.11. pp. 165 ff.

44. F. von Liszt *op. cit.* at n. 1 p. 253 (Tr.d.A.)

45. *Ibidem* (Tr.d.A.)

46. W. E. Wahlberg *op. cit.* at n. 7 p. 531 with information on the different drafts of penal codes and in particular on that of 1887, pp. 533 ff.

National unification and reform of the law, to be pursued at the same time, were the two objectives that German juridical science and legislation, on the conceptual level, offered if also through the image reflected by the Italian experience. And here we are able to draw a parallel between the histories of the two countries:⁴⁸ together they arrived "late" at national unification when compared to their neighbours of western Europe since they reached it only in the second half of the nineteenth century. The new codifications hence assumed in both countries, in this last thirty years of the last century in which new realities and economic and social trends emerged, a particular significance: they embodied the unification of juridical relations and social life and at the same time symbolised the national unity which had been achieved. And here the legislators were faced with a choice of methods: was it more appropriate to unify the law making use of existing laws – pre-unity laws inspired by the Napoleonic legislation of a half century earlier – and therefore to gain time, or instead to develop and to embody in new laws new conceptions reforming the existing laws but at the price of substantial delays? Italians and Germans gave to this question two different answers according to different branches of the law; whilst Italy quickly created a civil code which had as its model the *Code Civil* of France, Germany adopted one only in 1900 and after long discussions; that was because of the progress made and of the influence achieved by the pandectists in that country. In the field of penal law the opposite occurred; Germany quickly adopted a unitary code (as early as 1871 and under pressure from Bismarck who considered it an integral part of unification)⁴⁹ while in Italy the discussions and the drafts of a new penal code would continue until 1889.⁵⁰

47. W.E. Wahberg *op. cit.* at n. 7 p. 531.

48. R. Schulze. *Introduzione, (Introduction)* in R. Schulze *op. cit.* at n. 33 pp. 3 ff.; C. Dipper, *Italien 1861 bis 1915 - Nationalstaat ohne Nation*, *Ibid.*, pp. 355 ff.

49. On the genesis of the German penal code of 1871 see W. Schubert, *Der Ausbau der Reichseinheit unter dem Norddeutschen Bund*, Bielefeld, 1983; E. Schmidt *op. cit.* at n. 10 chap. 297; H. Rüping, *op. cit.* at n. 18, p. 81.

50. Amongst the works in the German language on the subject see in particular, F. Von Liszt *op. cit.* at n. 1 pp. 255 ff; H. Seuffert, *op. cit.* at n. 6 pp. 80 ff.; in the Italian language of the same period, see G. Crivellari, *op. cit.* at n. 3; E. Passiria, *op. cit.* at n. 3.

From similar starting points came different later developments: and the Draft of the Italian penal code would become, in Germany, an instrument of criticism of the penal legislation of 1871 itself. The proposals for reform advanced by the "modern school" were useful as topics orientated towards the exploitation of the national spirit. So, Zanardelli with his Draft not only gave impetus to the juridical unification of Italy but also "refused to use the instrument so convenient and familiar represented by the the *Code pénal* of 1810 [...] and satisfied the aspirations of the Italian juridical world by turning to the *Italian* creative spirit".⁵¹ This evaluation demonstrates the critical attitude of Liszt towards the German penal code which, "unfortunately",⁵² heir to the prussian tradition, would still have as its model the *Code Pénal* of 1810. And also in Germany the realisation of an authentic national legislation would be had only with the "definitive liberation from the yoke of the *Code Pénal*" according to Liszt.⁵³

Without descending into the details of the evaluation, carried out by this or that author on the Zanardelli Draft, one can be permitted to recall two elements which, in Germany, contributed notably in distinguishing the discussion on the Draft in Germany from that in Italy. Firstly, one notes how positive was the judgment on the Zanardelli Draft on the part of Liszt who was proudly opposed to the "classic" penal law and founder of the "modern school"⁵⁴ whilst in Italy the critics of the "classic school", commencing with Ferri and Lombroso, lined themselves up decisively against the Draft itself⁵⁵. Seen from Germany, the supporters of the Zanardelli Draft and the followers of the positivist school, in so far as they were both initiators of penal reform seemed much closer than what the polemics which raged in Italy would lead one to think. In reality the same situation in fact was able to have an influence in a different way according to the country concerned when seen against the different national juridical cultures: the Zanardelli Draft, which in Italy seemed to some reformers to block the way to more radical modifications and reforms became in Germany – where not long before there had come into existence a codification along the lines of the earlier franco-prussian tradition – a reason to request and demand a profound transformation of the existing laws.

51. F. Van Liszt, *op. cit.* at n.1, pp 253-54 (Tr.d.A.)

52. *Ibidem*

53. *Ibidem*

54. *Ibid.* pp. 252-254 and 288-289. Also A. Suchsland, *op. cit.* at n. 7 and H. Seuffert *op. cit.* at n. 6 express positive judgments on the Zanardelli code.

55. See n. 9

The different attitudes assumed in relation to the Zanardelli Draft by the Italian positivist school and the German modern school is, however, also proof of the profound divergences in scientific character which ran between the two currents of thought. Liszt did not share absolutely the unilateral naturalist approach of Lombroso;⁵⁸ naturalist influences are present in his theories but only in an indirect way, as for example the evolutionary concept of the link between a person and his obligations⁵⁷. Profound differences subsisted in the concept of prevention which, for Lombroso, was a problem of policing and the rapidity in disposing of trials,⁵⁸ a rapidity which should have been disturbed as little as possible by appeals – and above all by that presented for “purely formal reasons”.⁵⁹ For Liszt, however, and for the “modern school”, the theme of prevention was linked with that of the safeguards for the accused, and to aims of a social nature he clearly preferred the aims of a liberal character of the “classical school” – even to considering the penal code as a type of “magna carta of the criminal”⁶⁰; one cannot fail to see how also on this issue Liszt was closer to the concepts found in the Zanardelli code itself than to the themes of the “positivist school”.⁶¹ The contrast between these two schools, in Italy and Germany, has probably had the result that the tradition of the modern school – and the concepts of positivism which were transmitted by it into the penal law – even today in Germany carries greater prestige than is the case in Italy, amongst jurists, for the theories of the “positivist school”.⁶¹

56. N. 25 – S. Raneri, *op. cit.* at n. II pp. 167 ff.

57. F. Von Liszt; 1907, *Das "richtige Recht" in der Strafgesetzgebung*, in *ZStW*, 1907, vol. 27 p. 93 see E. Schmidt *op. cit.* at n. 10 chap. 313.

58. C. Lombroso, *Troppo presto*, (*Too soon*) in *Appunti (Notes)*, *cit.* at n. 9 pp. 67-68.

59. *Ibidem*.

60. F. Von Liszt *Gutachten für die Internationale Kriminalistische Vereinigung*, 1893; E. Schmidt *op. cit.* at n. 10 chap. 310.

61. See M. Sbriccoli, *La penalistica civile (The civil penalist)* in Aldo Schiavone, *Stato e cultura giuridica in Italia dall'Unità alla Repubblica*, (*The state and juridical culture in Italy from Unity to the Republic*) Bari, 1990, pp. 203 and 208-209. On the negative influences of the “positivist school” on the Rocco code, see M. Sbriccoli, *ibid.* p. 228, G. Neppi Modona - Luciano Violante, *Poteri dello Stato e sistema penale*, (*Powers of the State and the penal system*). Turin 1978, pp. 178 ff. and *Diritto penale e positivismo*, (*Penal law and positivism*) in E. R. Papa, *Positivism e cultura italiana*, (*Positivism and Italian culture*) Milan, 1985, p. 50 ff.

The fact that many of the approving comments and analyses from Germany on the new Italian penal legislation were concerned with particular aspects of the penal system rather than with the greater themes such as the abolition of the death penalty, included in a, let us say, pioneering way in the new penal code would have surprised the Italian observer. The fact was that in Germany Bismarck had the justification that demands came from some national-liberals for the abolition of this form of punishment⁶² as well as the fact that in response very few of the intellectuals and penalists raised their voices to request its elimination⁶³. Amongst those favourable to the maintenance of this penalty, there coincided then the opinions of the positivist jurists⁶⁴ who favoured the substance of the existing provisions of the 1871 penal code and those of the "modern school" for whom it was necessary to "neutralize" incorrigible criminals.⁶⁵ For Liszt such a neutralization could be reached both by carrying out the death penalty and also by sentencing criminals to prison for life ("ergastolo") as the Zanardelli code provided.⁶⁶ He however leant more towards the "liberating sword" which would be "more benign and humane than burying human beings in a perpetual imprisonment".⁶⁷ The course which German penal law would have to follow would still be a long one before the Fundamental Law of the German Federal Republic of 1949, by article 102, would solemnly sanction at a constitutional level – having passed through the tragic experience of the "Third Reich" – the abolition of the death penalty⁶⁸. Instead what was of great interest for the "modern school" were the laws of the Zanardelli Draft which concerned the assessment of penalties and recidivism as a cause of aggravation of penalty⁶⁹, since in these the followers of this school believed there could be found proof and confirmation of their theories on the finality of punishment and on the distinction between different types of offenders or "categories of criminals".

62. See E. Schmidt *op. cit.* at. n. 10 chap. 297.

63. H. Seuffert, *op. cit.* at. n. 6 pp. 115 ff and 119. A. Suchsland *op. cit.* at. n. 7 pp. 373-375; F. Von Holtzendorff *op. cit.* at. n. 5 pp. 322 ff.

64. See H. Rüping *op. cit.* at. n. 18 pp 70 ff and 80, 90; G. Kleinheyer/J. Schroder *op. cit.* at. n. 10 p. 41.

65. F. Von Liszt *op. cit.* at. n. 1, p. 262.

66. *Ibid.* pp. 261-262.

67. *Ibidem.*

68. On the penalty of death and discussions on the subject in Germany up until the present see A. Elster/H. Lingemann/R. Sieverts/H.-J. Schneider, *Handwörterbuch der Kriminologie*, vol. 3. (2nd Edition) Berlin, 1975; Maunz-Dürig, *Grundgesetz Kommentar*, vol. IV (art. 91a-146), Monaco, 1987, art. 102 RdNr, 1, 13; Schmidt-Bleibtreu-Klein, *Kommentar zum Grundgesetz*, (7th edition), Neuwied, 1990 art. 102 GG, with many references and documentation.

IV THE RESONANCE OF ITALIAN PENAL LAW IN FRANCE AND SPAIN

The novelties coming from Italy found a welcome in France even more rapid and intense than that in Germany. Not only the writings of Lombroso and the other scientists of penal law were translated in french, but there had been printed three translations in that language of the Zanardelli code itself in the year of its coming into effect.⁷⁰ It is not possible to discuss here, for reasons of time and because the theme ought to be the subject of a separate study, the manner in which the code was debated in France and the influence which it exercised on the development of french criminal jurisprudence. As to the interest with which the french reacted to the innovations coming from Italy these are testified to by the references by Bourne, in *Archive de l'Anthropologie criminelle*⁷¹ to the immediate resonance which the theories of Lombroso provoked in the courts.

And here it is necessary, if only briefly, to emphasise two differences with respect to Germany: first of all, the abolition of the penalty of death in Italy found a much stronger resonance in France because of the lively discussion that there had been in France on the subject.

69. F. Von Liszt, *op. cit.* at n. 1 pp. 263, 266, 278, 284; F. Von Holtzendorff *op. cit.* at n. 5 pp. 322 and 331; H. Seuffert *op. cit.* at n. 6, pp. 180 ff.

70. E. Turrel, *Code pénal italien* Paris 1890. This publication also offered an explanatory introduction to the Italian penal code: *Introduction au Code pénal italien, Recueil des Lois Nouvelles* (15 March 1890); a review of the work of Lacointa by Ch. Petit in *Revue Pénitentiaire et de droit pénal*, vol. 15, 1891 pp. 68-73. A new translation of the code with commentary appeared in 1892 in the work of Louis Paoli; *Le Code pénal d'Italie et son système pénal*, Paris 1892.

71. A. Bournet, *Chronique italienne*, in *Archive de l'Anthropologie criminelle*, 1891 pp. 296 ff; Bournet (*op. cit.* p. 297) observed that the Zanardelli Code had earned the support of the greater part of the French judges and advocates.

In 1887 there had in fact been created in France a Commission which had the aim of submitting the text of the *Code Pénal* of 1810⁷² to radical reform. The penalty of death still appeared amongst the proposed penalties in the draft⁷³ of the Commission but this topic would certainly become the topic of lively discussion; on the 10th March 1888 the observations of Zanardelli concerning the abolition of the penalty of death had been presented for examination by the "Académie des sciences morales et politiques" to then become an integral part of an "alternative" draft of a penal code which was called "Projet de Code pénal concernant la proposition d'abolition de la peine de mort" and was published in a notable criminal review.⁷⁴ Secondly, the opinions of Lombroso had been the subject in France of a critical study which, even more intensely than in Germany with the writings of Liszt, underlined and emphasised the *ambiente sociale* as a decisive element of each criminological analysis. As many doctors such as J. Alexandre Lacasagne⁷⁵ as jurists like Gabriel Tarde⁷⁶ opposed the theories of Lombroso basing their criticisms on arguments of social order and soon in France there was formed a "sociological" school which together with the "positivist school" in Italy and the "modern school" in Germany determined the tone of radical reform of European penal law whilst each of the three schools maintained, as is obvious, distinctive characteristics. The "sociological school" in France - born in the furnace of the discussion of Lombrosian theories and in a strict rapport of ideas with the "modern school" through the International criminological association, as mentioned before - had a great and lasting influence in the development of penal science in other countries in Europe such as for example, Spain.

72. K. Sessar, *Die Entwicklung der Freiheitsstrafe im Strafrecht Frankreichs*, Bonn, 1973, p. 93.

73. The draft was reproduced in *Revue pénitentiaire et de droit pénal*, vol. 17, 1893, p. 188.

74. See Ch. Lucas *op. cit.*, 1888, vol. 12, pp. 253 ff. Also Lacointa, who in June 1888 was widely involved with the Zanardelli code and devoted attention to the penalty of death; see *op. cit.* Pp. 793 ff. and 800 ff.

75. See Lacassagne, *Marche de la criminalité en France de 1825 à 1880*, in *Revue scientifique*, 1881, pp. 674 ff.; *La criminalité comparée des villes et des Campagnes*, in *Bulletin de la Société d'anthropologie de Lyon*, Lyon, 1882; (Introduction to) E. Laurent, *Les habitués des prisons de Paris*, Paris, 1891.

76. Amongst the most important works of Tarde are, to enumerate them: *La criminalité comparée*, Paris, 1886, 1924, and *La Philosophie pénale*, Lyon, 1890. From 1888, Tarde published with Lacassagne the *Archives de l'anthropologie criminelle et des sciences pénales*; see K. H. Haring, *Der Weg der Kriminologie zur selbstständigen Wissenschaft*, Hamburg, 1966 (in *Kriminologische Schriftenreihe*, vol. 23), p. 97

In this country it was Maestre who placed emphasis on social themes, whilst at the same time there was formed, always strongly begrudging the French influence, the so-called pragmatic school of Spain. We now turn our attention to this country. Here the resonance of juridical-penal positivism and the disputes to which it gave rise penetrated (at a somewhat later time) in a manner not "pure" but already under the influence of theories and intellectual suggestions originating in other countries. A typical example of this Spanish "mixture" is Dorado Montero who in his doctrine, combined elements of correctional theory⁷⁷ (until then separate and distinct from other approaches such as the classic)⁷⁸ with elements drawn from positivism. Influenced by the master Mariano Ares ("el ultimo Krausista"⁷⁹) he came in contact with the positivists on the occasion of two visits to Bologna in 1885 and 1886 where he studied the theories of Lombroso, Ferri and Garofalo and published diverse articles on these⁸⁰. In accord with the "positivist school" Montero started from the determination of and the identification of the offender; the penal law in this area must according to him, assume the function of "derecho protector de los criminales".⁸¹ Even closer to the positivists was Rafael Salillas, a medico and member of the "Direction general de prisiones"⁸², an exponent of that which, at the end of last century, called itself the "basic school"⁸³ and involved an attempt to create a true and proper profile of the Spanish offender.

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77. On the model of the "reformist" theory of Roeder, as well as the influence of the so-called "Krausismo" we recall here Ginez de los Rios, professor of legal Philosophy at the University of Madrid.
78. Amongst these we recall J.F Pacheco, professor of penal law at the University of Madrid from 1837, appointed as a member of the commission charged with preparing a new penal code for Spain and a protagonist of its birth in 1848. Pacheco published, amongst other things, a commentary in three volumes on the penal code: *Comentarios al código penal*, vol. 3, Madrid, 1848-49. In addition J. Montes (1865-1932), Augustinian monk and professor of penal law at the University of Escorial.
79. Sainz Cantero *La ciencia del derecho penal y su evolucion*, Barcelona, 1975, p. 150. On "Krausismo" one sees in a general way, Briesemeister, *Spanische Geistesgeschichte und Philosophie in Handbücher der Auslandskunde*, published by G. Haensch and P. Hartig, Frankfurt a.M., 1975, vol. 3, pp. 41 ff.; M. Rivacoba, *Krausismo y derecho*, Sante Fé (Argnt.) 1963.
80. See Dorado Montero, *La antropologia criminal in Italia*, Madrid, 1889; *El positivismo en la ciencia jurídica y social italiana*, Madrid, 1891. One also sees J.A. Oneca, *La utopia penal de Dorado Montero*, Salamanca, 1951.
81. According to the title of one of the works of Montero, *El derecho protector de los criminales*, Madrid, 1915.

In this area he favoured both the anthropological as well as the social approach (the social environment of the offender's background).

This "Italian" line of the Spanish penal jurist, in which one also recognises however the influence of the French sociological school, stood beside another, not less important, called commonly "pragmatism"⁸⁴ in which one notes - as in the case of the doctrine of Saldana - beside and even before the Italian influence that of the thinking of Franz von Liszt.

The later development of positivism, now marked, exercised then in its turn influence in Italy - and here one finds confirmed our theory of "European circulation" of the juridical culture. A series of scientists, accepting in large part the French theories of the "milieu social" thought of being able to follow an autonomous "third way" between the classic school and the positivist school. They defined it a "third school" or "school of critical positivism" and its protagonists were first of all Emanuele Carnevale (with his writing on the "third school of penal law in Italy"), Vaccaro, Alimena. Others followed them.⁸⁵

The chorus of voices which then were raised to challenge the autonomous character of this third school testifies to how international the debate in penal law had become. Puglia, Fioretti, Ferri, and Lombroso in Italy, Liszt, Tarde, Prins, van Hamel and Benedikt elsewhere; all authors who denied that there was any possible room for a third school or a third way, between the classic theories of metaphysical inspiration on one side and those modernizing, positivistic anthropological or sociological theories of the positivist school on the other.

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82. On Salillas and his work, see also L.J. De Asua *Rafael Salillas, sus precursores y discipulos*, in *El Criminalista*, 1949, vol. III, pp. 33 ff.
 83. R. Salillas, *El lenguaje, estudio filológico psicológico y sociológico, con dos vocabularios jergales*, 2 vols., Madrid, 1898; Id., *La Teoria basica*, 2 vols., Madrid, 1898.
 84. See Q. Saldana, *Moderne Strafrechtsauffassungen in Spanien (Die pragmetische Strafrechtstheorie)*, (2nd Ed.), Heidelberg, 1923; *Adiciones al Tratado de Derecho Penal de v. Liszt*, Madrid, 1914; *La criminologie pragmatca, (Pragmatic criminology)* Madrid, 1923; *El pragmatismo penal*, Madrid, 1929.
 85. E. Carnevale, *Una terza scuola di diritto penale in Italia, (a third school of penal law in Italy)* in *Rivista di discipline carcerarie, (Review of prison discipline)* Rome, 1892, vol. 21. Amongst his earlier writings we recall: *La pena nella scuola classica e nella criminologia positiva ed il suo fondamento razionale, (punishment in the classic school and in positivist criminology and its fundamental rationale)* in *Rivista di filosofia scientifica (Review of scientific philosophy)* Milan, 1886; *La questione della pena di morte nella filosofia scientifica, (The question of the death penalty in scientific philosophy)* Turin 1888. See also Mario Angela Vaccaro, *Genere e funzione delle leggi penali, (types and function of penal laws)* Rome 1889. Bernadino Alimena, *La premeditazione in rapporto alla psicologia, al diritto, alla legislazione comparata, (Premeditation in relation to psychology, law and comparative legislation)* Turin 1887.

In each case whether the third school is considered a new product of Italian science, or only a more moderate and mitigated variant of sociological positivism in the penal field, one fact can be observed: in the brief space of just a decade and a half the new theories on punishment and penal law had assumed a European dimension and, even in Italy, went beyond the positions and points of view expressed in the "criminal man" of Lombroso.

V. THE RESONANCE IN ENGLAND

We now leave continental Europe and take a look at England. In the first place, it is necessary to bear in mind the particularity of English law,⁸⁶ as well as the particularity of its procedural system which originated from the transformation of the old Institutes of the medieval German tradition (typically English is the so-called "trial of parties" by which the new Italian Code of Criminal Procedure of 1988 was inspired)⁸⁷. In addition the absence of written codes, the constant reference to judicial precedent, and a substantial fundamental pragmatism in procedural practices are integral parts of the English juridical system⁸⁸. In this context, it does not surprise to find that English interest in the Italian penal codification was less than that in continental Europe especially since a few years before Zanardelli presented his draft of 1883, the most recent attempt to bring about a penal codification in the British Isles themselves had failed.⁸⁹

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86. By way of an introduction to the differences which exist between english and continental law see K. Zweigert/H. Kötz, *Einführung in die Rechtsvergleichung I*, (2nd Edition), Tübingen, 1984, pp. 210 ff.
87. See C. Marx/A. Grilli, *Der neue Italienische Strafprozess*, in GA, 137 (1990), pp. 495, 502 ff.
88. Zweigert/Kötz, *op. cit.*, at n. 86, p. 211; see Gustav Radbruch, *Der Geist des englischen Rechts*, Göttingen, 1956, pp. 33 ff.; M. Weber, *Wirtschaft und Gesellschaft*, (4th Edition), Tübingen, 1956, pp. 457 ff. On the function of judicial role in England and on the historic-social significance of the role of the judiciary see N.C. Courakis, *Struktur und Auslegungaspekte des angelsächsischen Strafrechts*, in GA, 128 (1981), pp. 533, 536 ff.
89. More particularly: W. Teubner, *Kodifikation und Rechtsreform in England*, Berlin, 1974, pp. 157, 159 ff.

On the other hand the theories of Ferri and Lombroso had a wide resonance in England.⁹⁰ This resonance, however - according to the analysis carried out by Radzinowicz/Hood⁹¹ - occurred later than on the continent and found expression principally in criticism and the taking of a contrary position.⁹² Only in 1890 Havelock Ellis seems to have turned his attention - on the impulse of the review *La criminologie comparée*⁹³ of Tarde - to the french sociological school and the Italian positivist school.⁹⁴

Already the philosophical premises militated against an English reception of the positivist theories. The nineties of that century saw in fact the maximum development in England of neohegelian Idealism, the so-called "anglohegellianism"⁹⁵, whose principles corresponded, in the field of the penal law, to exactly those of the "classical school" on the continent. To Lombroso there was directed the objection, forming itself into a formula commonly expressed and generalised, according to which respect for human dignity did not permit one to assess even the worst offender as a "patient" rather than an "agent".⁹⁶ One section of neohegelian thought, whilst strongly maintaining the rejection of the principle, took, however, some steps in the direction of positivism.⁹⁷ From such an opening there would then develop a criminological -anthropological line of thought which would influence English penal law in the direction of a greater attention to the themes of particular preventative measures and the finality of sentence with the aim of the rehabilitation of the prisoner.⁹⁸ So - and it is not the only example - Courtney Kenny, professor at Cambridge, declared that, even for all of the criticisms that could be laid against him, Lombroso had left "treasures of great value".⁹⁹

90. See la Relazione al Congresso Internazionale di antropologia criminale di Roma (the report to the International Congress of criminal anthropology of Rome) in the Law Magazine and Review XI (1886) pp. 279 ff.

91. L. Radzinowicz / R. Hood, *A History of English Criminal Law*, vol. 5: *The Emergence of Penal Policy*, London, 1986, pp. 1-33.

92. Idem, pp. 16 ff.; amongst others we cite J. Salmond, *Jurisprudence*, (7th edition), London, 1927, 123 ff. for jurisprudence, see W.R. Kennedy, *The State Punishment of Crime*, in *The Law Magazine and Review*, XXV (1889), pp. 1-20 and 4 ff.

93. G. Tarde, *La criminalité comparée*, op. cit. at n. 76.

94. H. Ellis, *The Criminal*, New York, 1890; (in german: *Verbrecher und Verbrechen*, Leipzig, 1894, pp. 40 ff.)

95. Radzinowicz/Hood, op. cit. at n.91, p. 18.

96. Ibidem.

97. A hint for this proposition in H. Ellis, op. cit. at n. 94, p. 53.

98. Radzinowicz/Hood op. cit. at n. 91, pp 576 ff. with many references especially to an enquiry on prison conditions of 1895 (Gladstone Report).

And so he did not contradict totally the famous affirmation of van Hamel for whom "former lawyers bade men study justice but Lombroso bids justice study men". He limited himself simply to affirm in a conciliatory manner "each precept is good. But better is the combination of the two".¹⁰⁰

As well it was in England itself that at the beginning of our century, there was found worthy of merit the thesis which was the starting point of the positivist school and where there was carried out perhaps the widest criminological analysis amongst those undertaken up until then. Charles Goring - encouraged by Karl Pearson - analysed and interrogated around four thousand prisoners across various social groups and established ninety-six different points of enquiry. The result, published with the title *The English Convict*¹⁰¹, constituted a refutation of the lombrosian theses: — "no evidence has emerged confirming the existence of a physical criminal type, such as Lombroso and his disciples have described."¹⁰² "The English Convict" initiated new discussions, both in England and on the continent not only on the theses originally advanced by Lombroso but also on the perspective of a future development of positivism and in particular on the utility of statistical methods in their application to criminal science. And Italy was, and felt itself to be, called to the cause yet again. Enrico Ferri¹⁰³, S. Sergi¹⁰⁴ and Sante de Sanctis¹⁰⁵ were very critical of the "English Convict" and were, in any case, right in seeing in the English questioning, a confirmation of just how effective and stimulating the impulses and ideas coming from Italy had been.

99. C.S. Kenny, *Outlines of Criminal Law* (1st Edition) Cambridge, 1902, pp. 502 ff (Tr. d'A.)

100. See Radzinowicz/Hood, *op. cit.* at n. 91, p. 17.

101. Ch. Goring, *The English Convict, A Statistical Study*, London, 1913.

102. *Idem.* P. 173.

103. E. Ferri, *The Present Movement in Criminal Anthropology à propos of a Biological Investigation in the English Prisons*, in *Journal of Criminal Law and Criminology*, 5 (1914/15) pp. 207-223.

104. S. Sergi, *Osservazioni di tecnica antropologica intorno all'inchiesta sui condannati inglesi*, (Observations on the subject of anthropological technique concerning the enquiry on english prisoners) in *La Scuola positiva*, (The positivist school) 1914, pp. 577-593.

105. S. de Sanctis, *An Investigation of English Convicts and Criminal Anthropology* in *Journal of Criminal Law and Criminology*, 5 (1914/15), pp. 228-240; by the same author *Un'inchiesta sui condannati inglesi e l'antropologia criminale*, in *La Scuola positiva*. (An enquiry into english prisoners and criminal anthropology in The Positivist School) (1914) series 3 vol. 5 S.177-193.

VI. THE RESONANCE IN OTHER COUNTRIES OF EUROPE

The examples which we have provided up until now do certainly not exhaust the theme which we have undertaken, of the resonance which Italian law had in Europe. It made itself heard also in Belgium and Holland (countries in which the Italian experience had been transmitted and made known by van Hamel and Prins mentioned earlier) and in Scandinavia (where the same function had been assumed, also towards England, by the Dane, Harold Hoffding).¹⁰⁶ Here we will limit ourselves, in the interests of brevity, to recall that also in eastern Europe, whose common interests with the rest of the continent are being rediscovered today, there was no lack of interest in Italian penal law. It was not only in the Russian scientific world that the Lombrosian theses found a vast resonance - in a spiritual context of a quest for new horizons and visions; one recalls the pages of Dostojewsky dedicated to the criminal type, the antithesis of and distinct from the person condemned for political reasons.¹⁰⁷ Western Europe soon came to know the intensity with which Russia concerned itself with the doctrines of the "positivist school". It had been in the first place, Italian positivists who drew attention to the debate under way in Russia, not least, perhaps because they aimed at a constant and wide diffusion of Lombrosian theories.¹⁰⁸ Those who were closest to the Italian positivists on the intellectual plane were probably Dimitri Drilli and R. Minzloff; beyond those Garofalo mentioned as supporters of positivism in Russia Sergejewski and - to a certain extent - Taganzeff. The last mentioned had been a member of the Commission which at the beginning of the eighties had prepared a draft penal code for the Russian empire.¹⁰⁹ These indications, very plainly, provide a clear example of just how widely Italy had stimulated debate on the penal system (and the penal law) in Russia.

106. Radzinowicz/Hood. *op. cit.* at n. 91, p. 19.

107. A. Frassati, *Die neue positive Schule des Strafrechts in Russland*, in *ZStW*, 1890, vol. 10, p. 611.

108. See R. Garofalo, *Di una nuova scuola penale in Russia*, in *Archivio di psichiatria*, (Of a new penal school in Russia in *Records of Psychiatry*) 1884, vol. 5, p. 328; Gretener, *Ausländische Rundschau*, 14 *Russland*, in *ZStW*, 1884, pp. 297 ff.; A. Frassati, *op. cit.* at n. 107, pp. 41 ff.

109. See R. Garofalo, *op. cit.* at n. 108 and Gretener, *op. cit.* at n. 108; D. Drilli, *Die jugendlichen Verbrecher, Studie zur Frage nach der Kriminalität, deren Faktoren*, Moscow, 1884; *Positivnaja scola ugolovnago i jeje protivniki*, ("The positivist school and its opponents") Moscow 1886; *Disput D.A. Drilla w'charivkovkom universitetje* (Conference held at the University of Krakow on 22.9.1885) in *Giuridiceschi estnix (Il gazzettino giuridico)*, 1885 n. 11, pp. 104 ff.; R. Minzloff, *Oso bennosti classa prestupnikovo* (The particularity of the offender) in *Il gazzettino giuridico (the juridical gazette)*, 1881, n. 10, pp. 216 ff., n. 11 pp. 355 ff.; n. 12, p. 577; Sergejewski, *Über das jus puniendi*, in *Il gazzettino giuridico, (the juridical gazette)* 1881, n. 3, p. 443; Taganzeff, *Kurs russcago ugolwnajo prava*, in *Il gazzettino giuridico (the juridical gazette)*, 1880, pp. 500 ff.

The Italian theories in fact penetrated into Russia and the Russian reception of these theories "rebounded" then successively in Italy (and in Germany). But there is another point to emphasise; as much as has been said on the links and the common themes of the history of *European* law holds good also, and not in a limited way, for the East of the "European continent". Even in the Polish language there is no lack of commentary: the *Gazzetta giudiziaria* (Judicial Gazette) of Warsaw of 1891 dedicated a great deal of space to the Zanardelli code¹¹⁰ with its system of differentiating punishments and the first signs of the theme of re-education of the convicted person.¹¹¹ We know that at that time Poland lacked its own national territory, and that the somewhat modest attempts at reform of Polish penal law of 1818 had been thwarted not commencing until 1847.

In so far as concerned, moreover, the Zanardelli code more directly there must not be forgotten the influence which it exercised on the legislation of countries even beyond Europe. "In an era full of attempts at reform of Latin American penal systems, what had happened in Italy was viewed with great interest. The Zanardelli code exercised great influence not only on the penal code of Venezuela but also on the Uruguayan (1909) Cuban (the draft of Gonzales Larza (1908) and Argentina (1891))."¹¹² Penal codifications inspired by it were the penal codes of different countries of Hispanic America such as Uruguay, Venezuela and Chile as well as the drafts of the penal laws of Cuba and Argentina at the end of the nineteenth century.

110. W. Mauersberg, *O Kodeksie karnym włoskim z dnia 30 Czerwca 1889 roku* ("The Italian penal code of 30 June 1889") in *Gazeta Sadowa*, 1891, pp. 828 ff.; H. Cederbaum, *Nowy projekt włoski kodeksu karnego*, in *Gazeta Sadowa*, 1889, pp. 761 ff.

111. See for example E. Krzymuski, *Lehrbuch des Strafrechts mit besonderer Berücksichtigung des österreichischen Rechts*, Krakow, 1887; as well as his writing in the *Gazeta Sadowa* ("Judicial journal of Warsaw") of 1889 regarding the panorama of the "positivist school" of Italy with particular reference to Garofalo; Rosenblatt, *Über die gegenwärtigen Strafrechtsschulen und deren Methoden*, Warschau-Lemberg, 1887.

112. By way of summary, see J.A. Jimenez de Asua, *Tratado de derecho penal*, 8 vols; Buenos Aires, 1957, particularly volume 1 (Tr. d. A.).

VII. CONCLUSION

We have seen that the Italy of the late nineteenth century contributed greatly, through both the positivist school and the Zanardelli code, to the development of penal law. The reformatory impetus which the "classic" penalistic tradition, on the one side, took control of and on the other, the challenge, almost provocative, of the positivist school on the basis of scientific criteria, created in the Italy of the late nineteenth century that fruitful atmosphere of intellectual tension which operated as a background to the Italian literature in the field of penal law of the era. It does not fall within the scope of this article to offer an analysis of the causes of this flowering of Italian science and legislation. Abroad it was attributed to the repeated convergence of principally two factors, namely - to use Wahlberg's description - "the particularity and originality of Italian culture" in a context of intense attention to and interest in "the progress and development of foreign legislation".¹¹³ Perhaps Italy, more than other countries, was inclined towards - or had a weakness for - openness towards, comparison with, and the reception of experiences and solutions coming from abroad. Such particular openness in relation to foreign ideas had then also been favoured - it must not be forgotten - by the fact that the Italy of the decades following Unity sought to give itself a national science and legislation of a reformatory orientation capable of integrating into the Italian social and juridical fabric the achievements and innovations of the legal systems beyond the Alps.¹¹⁴ An openness towards the outside world under the banner of unification and national reform: it was by starting from this base, that Italy was able, in the late nineteenth century, to considerably enrich what we have called "the European circulation" of juridical theories and normative solutions in the penal field. We have seen how effectively that came about after the publication of Lombroso's "Criminal Man". This work opened a new period of discussion and reflection on the subjects of punishment and the penal law; and the passionate commitment of the new Italian positivist school marked the triumph of new conceptions in a new era. With the aspiration to consider rationally and empirically punishment and offender, and to orient itself towards a greater emphasis upon the concepts of suitability and social utility this new scientific tendency was able to link itself to enlightenment thought and to Beccaria, even if clearly the great attempt at modernisation of European penal law carried out in the eighteenth century contained metaphysical and natural law themes completely alien to the reformers of the late 1800's and closer instead to naturalistic positivism first, so uncertain in its methods and their consequences, and then to sociological and socio-psychological positivism.

113. W.E. Wahlberg, *op cit.* at n. 7 p. 531.

114. See Souffert, *op. cit.* at n. 6 pp 91 ff.

There commenced thus from these premises, the long series of scientific disputes, still alive today amongst the many schools of thought originating from the positivist school or from the modern school and the penal jurist orientation of the so-called "neoclassical" type (which in its turn found an ally in juridical positivism, opposed to naturalistic or sociological positivism). Already by the last century there were even fewer, in the various European countries, of those who could define themselves as "pure" supporters of one or other of the two theories which had commenced to confront each other from the eighties. And always the history of penal law of the twentieth century has been in a great part a continuation of the themes and the controversies to which the discussion in the Italy of the late eighteenth century made such an important contribution. In the majority of the European countries the debates undertaken then continue even today to produce legislative fruit and penal reform on the practical level.

In the last decade there seemed to be born in Germany, and not only in Germany, a certain level of scepticism concerning the trends traced from the "modern school" and subsequently with the drying up of the last great wave of reform of the sixties and seventies. Even more than in the decades in which the modern school committed itself to opening up a passage in the penal law between the classic and positivist schools there seems today to be apparent, progressing, changing and developing the penal law, the knowledge and the fear that such progress and change takes place at the expense of a "classic" penal tradition which is worthy nonetheless of being preserved. The danger which one sees is that the concept of "elimination" of the incorrigible criminal dictated by reasons of a social nature (and which in Germany has led to the even more controversial institute of perpetual "preventative custody") just like on the other side, the tendency to re-education and rehabilitation, lead one to consider the author of a crime as a mere object, forgetting and ignoring the intrinsic value of his individual personality, a value never lost sight of, however, by the "classic" penal law, which was liberal and protective of civil liberties.

Under this analysis, the Italy of the late eighteenth century yet again reveals its contemporaneity. It was the homeland of that juridical document so much discussed and opposed, slow to reach publication, but internationally so rich in influence and inspiration - the Zanardelli code. The Italian penal legislation, the subject for decades of discussions and drafts resulting in the Zanardelli code, earned, deservedly, attention and esteem - notwithstanding the offensive of the positivist school - exactly because the whole series of modernisation and novelties in the penal law (abolition of the death

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penalty, the introduction of attenuating circumstances, the conditional suspension of sentences, a differentiation in punishment between a person of previous good character and a recidivist) came into existence and were put into effect in the wake of the "classic" tradition itself. The present level of development of this area of law in a great part of Europe, thanks to the impulses and initiatives of the modern, sociological positivist school, has registered new progress. But it remains the fact that the Zanardelli code, heir of liberal and garantistic thought and its successful expression, constitutes today an ideal patrimony which must not be lost.