

# PROCEDURAL LAW. PROSECUTOR SUPERVISION

# ПРОЦЕССУАЛЬНОЕ ПРАВО. ПРОКУРОРСКИЙ НАДЗОР


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Research Article

## Enrico Ferri on the criminal process

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**Abstract.** The article examines the views of the outstanding Italian criminologist Enrico Ferri on various issues of criminal justice, expressed in “Criminal Sociology”. It analyzes his arguments concerning the goals of justice, stability of the criminal code, the need for unity of civil and military justice. The article offers counterarguments against Enrico Ferri’s list of exceptions to the principle of the presumption of innocence. At the same time the views of the thinker concerning the expediency of abandoning the principle of collegiality and the jury trial are of certain interest. His ideas on three types of sentences (acquittal, indictment and under suspicion) and on the need to reason the final act of justice have been considered. Enrico Ferri’s thoughts on the amnesty and pardon, rehabilitation, revision of acquittals, possibility of stricter sentence in verification proceedings, etc. are obviously enriching the science of the criminal process. This article may be of interest to anyone who is engaged in the issues of criminal procedure, criminal law, and criminology, as well as the history of these legal sciences.

**Key words:** Enrico Ferri, criminal procedure, principle of publicity, jury trial, sentencing, execution of the sentence, reformation in peius

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Научная статья

## Энрико Ферри об уголовном процессе

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**Аннотация.** Автор рассматривает взгляды выдающегося итальянского криминолога Энрико Ферри на различные вопросы уголовного судопроизводства, высказанные им в «Уголовной социологии». Проанализированы его рассуждения о целях правосудия, о проблеме стабильности уголовного кодекса в контексте его применения в уголовном процессе, о необходимости единства гражданской и военной юстиции. Приведены аргументы против предложения Энрико Ферри предусмотреть перечень исключений из принципа презумпции невиновности. Любопытны взгляды мыслителя о целесообразности отказа от принципа коллегиальности и от суда присяжных. Рассмотрены взгляды данного ученого на три вида приговоров (оправдательный, обвинительный и оставление под подозрением) и на необходимость мотивировать итоговый акт правосудия в каждом уголовном деле. Обогащают современную науку уголовного процесса и не теряют своей актуальности рассуждения Энрико Ферри об амнистии и помиловании, о реабилитации, о пересмотре оправдательных приговоров, о допустимости поворота к худшему в проверочных производствах. Данная статья может быть интересна всем, кто интересуется проблемами уголовного процесса, уголовного права и криминологии, а также историей этих юридических наук.

**Ключевые слова:** Энрико Ферри, уголовный процесс, суд присяжных, постановление приговора, исполнение приговора, поворот к худшему

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### Introduction

The outstanding scientist, thinker, public figure Enrico Ferri (1856—1929)<sup>1</sup> is known in Russian science primarily as a criminologist<sup>2</sup> and specialist in Criminal

<sup>1</sup> In Italian: Enrico Ferri.

<sup>2</sup> Paradoxically, the textbook on criminology of the Faculty of Law of Moscow State University does not mention Enrico Ferri in the historical reference to this science, see: (Kuznetsova & Luneev (eds.), 2004).

Sociology<sup>3</sup>. We also know him as Cesare Lombroso's<sup>4</sup> disciple, as well as one of the developers of the Criminal Code of Italy adopted in 1930.

In our opinion, Enrico Ferri has heavily contributed to the development of criminal procedure law and formation of the theory of criminal procedure. Many of the ideas formulated by him more than a century ago have not lost their relevance and are of certain interest in the 21st century. It should be noted that currently there are no autonomous works in Russian that are specifically devoted to Enrico Ferri's views on the criminal process. In contrast, foreign scholars study them in sufficient detail.

The Italian thinker expounds his procedural views in the fundamental work "Criminal Sociology" (1883) devoted to a wide range of legal issues. In Russian, it was first published in 1908 with an introductory article by Professor S.V. Poznyshev (Poznyshev, 2009) and then republished in 2009 in the series of books "Library of a Criminologist" with an introductory article by Professor V.S. Ovchinsky<sup>5</sup>.

Enrico Ferri's reflections on justice attracted attention of Russian scientists in the second half of the XIX-early XX century. In fact, he was quoted in writings by I.Ya. Foynitsky and V.K. Sluchevsky. However, in modern times, interest in the works of this criminologist declined. Although he was a Socialist deputy of the Italian parliament, he belonged to the anthropological school of criminal law, shared the theory of a born criminal<sup>6</sup>, denied the existence of free will in humans (Ferri, 2009:53), wrote a treatise on animal crime<sup>7</sup> and believed that "*criminal justice reduces to the biopsychological study of the defendant*" (Ferri, 2009).

The purpose of this work is to analyze Enrico Ferri's views on the criminal process, estimate their advantages and disadvantages, and then, by looking at the Criminal Procedure Codes of several foreign countries (Italy, Germany, Switzerland, and some others), investigate which of his ideas have been adopted by modern legislators, and which have not passed the test of time. In our opinion, some of the proposals of the Italian scientist can be used to refine current Russian legislation (as practical aspect of this article). At the same time, we will put aside Enrico Ferri's anthropological views concerning the *born criminal*, their physical and moral degeneration, so that they do not distract us from the focal point of this article.

Apart of general scientific methods, the research employed historical-legal, comparative-legal, and formal-legal techniques.

<sup>3</sup> Enrico Ferri subdivided Criminal Sociology into *criminal anthropology, criminal statistics, and criminal law*. The latter is divided into material and procedural.

<sup>4</sup> D.A. Dril directly writes about this in *Crime and Criminals* (Dril, 2010:478).

<sup>5</sup> Also, the following works by Enrico Ferri were published in Russian: *Socialism and Positive Science* (Ferri, 1908) and *Criminal Types in Art and Literature* (Ferri, 1906).

<sup>6</sup> With the reservation that a born criminal, under favorable circumstances, may not commit a criminal act (speech by Enrico Ferri at the Amsterdam Congress of Criminal Anthropology in 1901).

<sup>7</sup> This work, written by Enrico Ferri, is mentioned by his famous French colleague and opponent (Gabriel De Tarde, 2009).

## Key theoretical issues and discussion

**The purpose of the criminal process**, according to Enrico Ferri, is “to establish whether the defendant is really the culprit of the act under consideration, as well as what his motives and circumstances of the criminal act are” (Ferri, 2009:53). Basically, the scholar writes about the fact at issue in a criminal case. At the same time, he advocates an active role of the court, which is fully responsible for establishing the substantive truth based on scientific methods used during investigative and other procedural actions. If this authority properly exercises its powers, regardless of the degree of professionalism of the prosecutor and the defence counsel, then “there will be a significant reduction in such sentences, which now seem, and indeed are, a game of chance for both the criminal and society” (Ferri, 2009).

As we can see, the concept of an active court, albeit softened by the possibility of concluding various *agreements* within the framework of consensual (negotiated) justice, continues to be the fundamental basis of the criminal proceedings of continental legal systems (Germany, Switzerland, Austria). It should be noted that the Principality of Liechtenstein is the only state (known to the author of this article) where plea deals in any form and confession of the accused do not have any impact on the structure of ordinary court proceedings (Trefilov, 2020:543).

**The influence of the Criminal Code instability on the criminal process.** Enrico Ferri notes that continuous and haphazard reform of criminal legislation inevitably entails negative consequences. The scholar is trying to “convince legislators of the need to *engage less in reforms of criminal laws and more in the transformation of courts and prisons*” (Ferri, 2009:510). It makes sense because the constant amendments made to the Criminal Code lead to legislative inflation and indicate a crisis in criminal policy. Besides, judges, prosecutors, and defence counsels do not always have time to adapt to frequent changes in the Criminal Code. Finally, the reform of criminal legislation in isolation from criminal procedure and penal institution reduces the effectiveness of enforcing the norms of all three branches of law<sup>8</sup>.

In this regard, there are authors in the modern Russian legal literature who rightly raise the issue of a moratorium on amending the Criminal Code norms (Serebrennikova, 2017), since there is no doctrinal concept of such reform in Russia, and the amendments that are currently being introduced lack a single logic-based approach. This is especially evident when the legislator first decriminalizes the *corpus delicti*, and after a short time introduces it again<sup>9</sup>.

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<sup>8</sup> In this respect the German criminologist Krone remarked: “If we have the best laws, the best judges and the best sentences, but bad prison staff, then the laws can be thrown into the basket, the judges can be dismissed, and the sentences can be burned” (Dril, 2010).

<sup>9</sup> For example, at first deformation was excluded from the Criminal Code of the Russian Federation (Article 129), then returned (Article 128.1).

Enrico Ferri believed that “a bad law applied by good judges will give much better results than a law excellent from a theoretical point of view, but applied by incompetent judges” (Ferri, 2009:540), and “for the effective functioning of the judicial system, *scientific training of judges and their independence are crucial*” (Ferri, 2009:541). This idea is no less relevant now than during the life of the Italian criminologist.

**Unity of military and civil justice.** Enrico Ferri strongly suggests abandoning military courts, thus abolishing the dualism of civil and military justice, which has historically formed in many States<sup>10</sup>. He gives a concrete example: “Legal errors and abuses of military justice have always existed and still represent a daily phenomenon; but it still needed a lot of noise caused by the Dreyfus<sup>11</sup> process to detect them with such clarity” (Ferri, 2009). In his opinion, it is harder for the accused to exercise his procedural rights in military criminal proceedings.

Currently, it is possible to detect a tendency to abandon military justice in many European countries. So, on July 1, 2014, it was completely liquidated in *Belarus* (the Military Collegium of the Supreme Court and lower military courts were abolished). There are no military courts in *Ukraine* either. In *Italy*, the birthplace of Enrico Ferri, “in connection with the liquidation of military tribunals (and the corresponding military prosecutor’s offices) in Turin, Padua, Cagliari, Bari, and Palermo, prescribed for the purposes of rationalization of expenses, active military tribunals remained only in Verona, Rome, and Naples” (Barabanov, 2019). In Austria, Germany, Sweden, and Japan the activity of military courts is limited only by wartime (Golovko (ed.), 2020).

There is also a discussion concerning the abolition of military justice in Swiss legal literature. For example, Daniel Jositsch, a professor at the University of Zurich, notes that military courts are extraordinary, specialized courts and, at least in peacetime, their existence is not consistent. Moreover, civilians should not be subject to its competence (Brun, 2011:5). The proceduralist Brun asserts that the debate about the abolition of military justice in Switzerland is fueled by a similar discussion in neighboring Germany (Brun, 2011:6).

As we can see, more and more countries are abandoning the dualism of civil and military justice, since in peacetime the existence of the latter is not caused by practical necessity.

**Presumption of innocence.** Enrico Ferri expresses a non-standard view of the relationship between criminal law and criminal procedure in the *in dubio pro reo* text: “The Criminal Code is a code intended for scoundrels, whereas the Statute of Criminal Proceedings is for the protection of innocent people brought to court, but not yet recognized as criminals” (Ferri, 2009). According to V.K. Sluchevsky, who

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<sup>10</sup> It may be recalled that in Russia the Cathedral Code of 1649 and the Military Article of 1715 were in force at the same time.

<sup>11</sup> This refers to the case of the French General Staff officer Alfred Dreyfus (December 1894), who, in the wake of anti-Semitic sentiments in society, was accused of spying for Germany based on falsified evidence. When the forgery was revealed, he was acquitted.

drew attention to this saying, “The Criminal Code is *the code of the criminal population*, and the Code of Criminal Procedure is *the code of honest people*” (Sluchevsky, 2014:9).

The Italian criminologist emphasizes that *the criminal process* is between crime and punishment. In this regard, until the guilty verdict of the court stating violation of the Criminal Code norms by the accused has entered into force, he must be considered a respectable person.

According to Enrico Ferri, the logical basis for the presumption of innocence is “the fact that criminals (including undetected ones) make up a very small minority compared to the total number of honest people” (Ferri, 2009); it agrees both from a sociological and legal points of view.

At the same time, the Italian criminologist suggests limiting the scope of application of criminal procedure principle in certain cases. The presumption of innocence, in his opinion, should not have legal force:

1) if the accused is detained directly at the scene of the crime (*in flagrante delicto*),

2) if, considering the gravity of the accusatory evidence, he voluntarily admits his guilt,

3) if this is a repeatedly convicted recidivist, that is, an incorrigible criminal (“*homo delinquent*”)<sup>12</sup>.

Enrico Ferri also suggests differentiating the consequences of equally divided jury’s votes when they reach a verdict: if a “random criminal” is charged, he should be acquitted, and if a “habitual criminal” is charged, he must be convicted. According to the scientist, in the above cases, the accent is laid on the probability of guilt; with the habitual criminal the probability of his *guilt* is higher than the probability of his *innocence*.

It seems that in modern legal realities the exceptions to the presumption of innocence proposed by Enrico Ferri do not correspond to the purpose of criminal proceedings (Article 6 of the Code of Criminal Procedure of the Russian Federation), principle of equality before the law and the court, as well as the right to a fair trial (Article 6 of the ECHR of 1950). In this regard, they may not be of any interest to the Russian legislator and law enforcement officer<sup>13</sup>.

**Access to justice.** According to the scholar, if the state does not protect the interests of the victim, there is a possibility that he will try to lynch the accused under the influence of emotions. Enrico Ferri quotes Italian criminologist Filangieri: “When the sword of justice does not defend a citizen, he resorts to the dagger of the

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<sup>12</sup> This approach, among others, was criticized by A.F. Koni, who believed that the very fact of singling out a special type of criminal person “runs counter to the moral tasks of the state and human dignity” (Koni, 2006:143), “for there is no such a criminal, in whom the human image would be irrevocably obscured” (Koni, 2006:31).

<sup>13</sup> At the same time, it should be noted that the Code of Administrative Offenses of the Russian Federation, which is along the lines of criminal mater, still contains exceptions to the presumption of innocence (note to Article 1.5). They relate to the desire of the legislator to simplify the proof in cases of violations of traffic rules and landscaping.

murderer” (Ferri, 2009). Thus, the inaction of the criminal justice authorities can push a desperate citizen to commit a crime, even if he has never violated the law before (recall the movie “Voroshilov Strelok”). In this regard, according to the Italian criminologist, the task of the State is to provide the maximum possible assistance to the person against whom the criminally punishable act has been committed, because, as the criminologist Barzilai argues “the freedom and life of the victims have also risen in value in our time” (Barzilai, 1883).

Enrico Ferri’s interesting thought concerning the appearance of the first private detective agencies (for example, the Pinkerton agency in the USA) reflects the impotence of criminal justice bodies that cannot cope with their direct official obligations. If the victim could sufficiently protect his rights and legitimate interests in the criminal process, there would be no need for such agencies (Ferri, 2009).

**Criticism of the collegial composition of the court.** Enrico Ferri is a strong supporter of *the sole* administration of justice in all categories of cases and in all types of legal proceedings. First, “it is necessary that each magistrate bears responsibility not only technically, but also morally and socially for his sentences” (Ferri, 2009). With a collegial composition, such responsibility is objectively reduced. Secondly, “by grouping rational individuals, you can form an assembly that will not be rational” (Ferri, 2009); the Romans also said: “*Sanato res bon i viri, sanatu — sautem mala bestia*” (senators are good people, the senate is an evil animal)<sup>14</sup>.

The scientist believed that unfortunately the moral and intellectual qualities of the judges who make up the panel are not (as a rule) summed up, and therefore each of them individually would have coped more successfully with the tasks assigned to the court.

Currently, in most European countries, including Italy (Barabanov, 2019:60—61), the overwhelming number of criminal cases are heard by a *single judge* in the court of first instance. At the same time, the rejection of collegiality is not related to the arguments of the Italian thinker, but to the procedural economy and optimization of the burden on the judicial system. A rare exception is the Principality of Liechtenstein, where as a rule a case is tried by a panel of 5 judges<sup>15</sup>.

**Balance of interests of the guilty and the victim.** Enrico Ferri notes with regret that in the established judicial practice, the claim for compensation for damage incurred is “a platonic wish and an additional part in criminal sentences that does not matter” (Ferri, 2009). Such a situation violates the balance between the interests of the person who committed the crime and the interests of the “society of honest people” (Ferri, 2009).

In this regard, Enrico Ferri makes a non-standard proposal, by virtue of which compensation for damage caused by a crime should be considered not as a tortious civil obligation under the norms of *jus civilis* (in his opinion, this is immoral), but as an independent criminal punishment established in *jus criminalis*. His reasoning is

<sup>14</sup> One can draw an analogy with the statement of his contemporary: “A crowd, consisting of people who are mentally healthy enough, easily becomes one madman” (Dril, 2010:66).

<sup>15</sup> See more: (Trefilov, 2020).

rather interesting: “It seems to us simply immoral to identify the obligation to compensate for the damage caused by crime with the obligation arising from the breach of contract” (Ferri, 2009).

On the one hand, Enrico Ferri’s views do not correspond to the classical doctrine of the correlation between the State’s right to punishment and the victim’s right to compensation for the damage incurred; on the other hand, his proposals are aimed at improving the effectiveness of restorative justice and making amends for the harm caused by crime. It should also be noted that the developers of the Criminal Code of Turkmenistan of June 12, 1997, paid due consideration to the Enrico Ferri’s proposal and classify the obligation to compensate damages *as an independent criminal punishment*<sup>16</sup>, both basic and additional (paragraph *a*, Part 1 of Article 44). Moreover, the legislator puts it at the top of established punishments. This fact is discussed in the Russian legal literature (Endoltseva & Podustova, 2021).

**Proof.** In the legal and epistemological context Enrico Ferri offers a very original classification of the development stages of this procedural institution:

1) *The primitive phase* is the phase when “proof is subordinated to the naive empiricism of personal feelings.” We are talking about the earliest period of the development of the state and law in the countries of the Ancient World.

2) *The religious phase* suggests “intervention of the deity to identify the perpetrator of the crime.” In fact, the author refers to an accusatory trial of the times of Salic Law (507-511) and Russian Pravda (about 1016) in the Middle Ages.

3) *The legal phase* is the phase when “the value of the evidence is established by the law itself.” There is a formal theory of evidence evaluation as the basis of inquisitorial criminal proceedings. An example is the criminal trial of the times of the Carolina in 1532 and the Cathedral Code of 1649, which were adopted in the late Middle Ages.

4) *The sentimental phase* is the phase of “inner conviction when one goes to the opposite extreme, freeing the conscience of the judge and jury from any obligation with regard to evidence” (recall the opinion of Kant who believed that the sanity or insanity of a person should be determined by philosophers, not doctors)<sup>17</sup>. We are talking about the theory of free evaluation of evidence, which has been established in Modern times together with a mixed model of criminal procedure. Example: The French Code of Criminal Investigation, 1808.

5) The last scientific phase is “characterized by expertise, that is, a coherent methodological assessment of experimental data on the material circumstances of the crime” (Ferri, 2009); at the same time, “conclusions should be mandatory for judges, at least in their essential and technical part” (Ferri, 2009).

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<sup>16</sup> In accordance with this rule, the obligation to make amends for the harm caused consists in the direct elimination of the harm caused, compensation for material and moral damage and a public apology to the victim. Such punishment can be imposed in the case, when the court, considering the nature of the harm, real opportunity to make amends for it and identity of the perpetrator, admits that he can eliminate the harm caused.

<sup>17</sup> The German philosopher is quoted by D.A. Dril in Crime and Criminals (Dril, 2010).



It should be noted that relying on the concept of total experimentation and believing in the progress of science, Enrico Ferri somewhat exaggerated the significance of the examination, considered it *apriori* the most important evidence and opposed all other instruments (including testimony). In fact, this approach denies two principles of criminal procedure: independence of judges (Article 8.1 of the Code of Criminal Procedure of the Russian Federation) and freedom to evaluate evidence (Article 17 of the Code of Criminal Procedure of the Russian Federation). Fortunately, the development of justice in the 20<sup>th</sup> and even in the 21<sup>st</sup> century has not turned the examination into a “scientific verdict”. In most legal systems, it is still considered as one of the proofs; however, it is not given a higher legal force compared to all the others.

**Criticism of the jury trial.** Enrico Ferri is one of the most famous opponents of this form of administration of justice. His main arguments in general terms are as follows.

Firstly, the criminal procedural activity of the court should be strictly scientific; it requires special legal knowledge from persons administering justice under the norms of the Criminal Code and the Code of Criminal Procedure.

Secondly, justice is an important function of the state, which is dangerous to entrust to non-professionals: “Whereas in the most insignificant areas of everyday life they resort to the services of various specialists, in the case as important as court, they are not afraid to deviate from this rule of reason” (Ferri, 2009). In other words, everyone should do their job without going beyond the limits of professional competence.

Thirdly, “the distinction between fact and law is *chimerical*; ... fact and law in criminal proceedings are inseparable, like the face and the underside in matter” (Ferri, 2009), and even if they could be separated, “the judgment of fact is more difficult than the judgment of law” (Ferri, 2009), since it presupposes deep knowledge of formal logic studied at universities<sup>18</sup>.

Fourth, the trial by jury under Napoleon was transferred at the stroke of a pen from England to the European continent without any historical and legal grounds<sup>19</sup>. According to Enrico Ferri, this institution can and should be liquidated similarly at the stroke of a pen.

Fifthly, in a jury trial, figuratively speaking, “scales are grasped from the hands of justice and replaced with an urn” (Ferri, 2009), into which representatives of the people, entrusted with one-time official powers, cast their question sheets.

Currently, there is a steady trend on the European continent towards rejection of jury trials either in the form of complete abolition (for example, in Switzerland

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<sup>18</sup> One of his well-known compatriots was of the same opinion: “About each crime, the judge must draw a correct conclusion; the major premise is the general law, the minor premise is an act that is contrary or in accordance with the law, the conclusion results in freedom or punishment” (Beccaria, 2004).

<sup>19</sup> Highlighting the foreign origin of this institution, the well-known opponent of the judicial reform of 1864, Prince V.P. Meshchersky emphasized that “a jury suits Russia like a saddle for a cow” (A.D. Popova Let truth and mercy reign in the courts (from the history of the implementation of the judicial reform of 1864).

since 2011), or through its substitution for other forms of lay participation in administering justice (for example, the Assise Court in Italy<sup>20</sup>, the Scheffen Court in Germany<sup>21</sup>, or the Court of People's assessors in Belarus<sup>22</sup>). Only a few countries retain the jury trial in its classic format (USA, UK<sup>23</sup>, and Russia), but even there it is involved in a small number of criminal cases.

**Types of sentences.** Enrico Ferri “offers to give the court the right to pronounce verdicts other than guilty or not guilty” (Ferri, 2009). As an example, he refers to Scotland, where the jury has the right to declare “*not proven*” if they find the provided evidence weighty enough but insufficient to convict a person. In this case, the person remains under suspicion and the case is postponed<sup>24</sup>. Even his ideological opponent Gabriel de Tarde (Ferri, 2009) agreed with Enrico Ferri on this issue. Similar views were previously expressed by Cesare Beccaria: “Apparently, those accused of the most serious crimes, whose guilt is very likely, but not proven beyond doubt, should be subjected to exile” (Beccaria, 2004) (the probabilistic nature of the court's conclusion).

It is relevant to draw an analogy with *the ostracism* procedure that existed in ancient Athens: according to the results of the popular vote, citizens identified a person potentially dangerous to the state system and subjected him to exile for 10 years. At the same time, he was not recognized in any specific crime — ostracism was a preventive, not a criminal-legal measure.

It seems that the doctrinal idea discussed above has now lost its relevance. Firstly, being kept under suspicion is a feature of the inquisitorial (investigative) criminal process. Secondly, it is not clear what to do in this case with the measures of procedural coercion and the appeal against a court decision. Third, such an act of justice contradicts the doctrinal principle of legal certainty. Fourth, the very essence of the presumption of innocence suggests that if the defendant's guilt has not been sufficiently proven and there are irremediable doubts in his favor, he should be acquitted.

**The need to reason sentences,** according to Enrico Ferri, is a means of protecting the individual from the arbitrariness of criminal proceedings. He criticizes English judges (*the best in Europe* in his opinion), who “adjudicate without giving reasons for resolution and without even stating them in writing” (Ferri, 2009). His suggestion is as follows: “It is necessary to replace *the fatal influence of the stars* with another influence that stands above both evil will and good intentions” (Ferri, 2009). In other words, judges must explain their decisions every time (even without a petition of the parties) since in the absence of this elementary requirement, the

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<sup>20</sup> See also: (Barabanov, 2019:53).

<sup>21</sup> See also: (Donatsch, Hansjakob, Lieber & Summers, 2014; Liszt, Franz von, 1900; Lutz, Meyer-Goßner, 2008).

<sup>22</sup> See also: (Shostak, 2008).

<sup>23</sup> “In England alone, a jury is viewed as something irrevocable and organically merged with the entire structure of public life” (Koni, 2006:34).

<sup>24</sup> Roman law also allowed three types of sentences: *absolvo*, *condemno*, *non liquet*. The latter meant keeping the person under suspicion.

reasons for accusation or acquittal may stem from secondary and/or subordinate circumstances that are not related to criminal proceedings.

Enrico Ferri was not alone in his views. Zhan-Zhak Russo's response to this matter is not less emotional: "How can one justify oneself if a sentence is issued *without specifying reasons*?" (Russo, 1969). In the context of his philosophy, reasoning as an external expression of justification is a guarantee of the legality and fairness of the sentence. Otherwise, it is not clear how a person will be able to exercise his right to appeal. If the motives of the court of first instance are unknown, challenging the judgment in the court of second instance will become essentially *pointless*.

Current Russian legislation considers the ideas of these thinkers by establishing in Article 7 of the Code of Criminal Procedure of the Russian Federation that court rulings, decisions made by judge, investigator, inquirer, or prosecutor must be reasoned. Moreover, this norm is described as an integral part of the principle of legality: an act of law enforcement cannot be legal if it has no grounds, does not take into account the provisions and the circumstances of the case.

**Reformation in peius: pro et contra.** The possibility of stricter sentence is the cornerstone of the verification stages in the criminal process of any state. The discussion on this issue was conducted during the lifetime of Enrico Ferri and he actively participated in it.

Italian legislation of that time established that if the appeal was filed exclusively by the accused or his defence counsel, the court could not revise the court decision unfavourably for the accused. Enrico Ferry categorically disagrees with this approach: "...since in modern judicial proceedings the essence of an appeal is to correct possible mistakes made by the judges of the first instance, and since this correction with respect to the penalty can quite naturally result both in mitigating and aggravating a previous sentence, then preventing stricter measure for the accused who has initiated appeal clearly contradicts the very logic of things" (Ferri, 2009).

The scholar reasoned as follows. Firstly, the possibility of *reformation in peis* will keep the accused from filing unreasonable and litigious appeals and he will not abuse his procedural rights. Secondly, at verification stages, the court must also be active and maintain independence; decisions must be based on judge's belief and conscience.

At the same time, most modern legal systems did not accept this idea of Enrico Ferri since it contradicts the doctrinal principle of *favor defensionis* and principle of justice as the possibly stricter criminal penalty *de facto* turns into a sanction for realisation of the convict's constitutional right to appeal.

**Cancellation of an acquittal.** Enrico Ferri criticizes the legislative approach adopted in the Anglo-Saxon countries, by virtue of which the not guilty verdict of the jury cannot be reviewed under any circumstances. He writes: "An unfairly acquitted defendant in the face of the jury itself... can cynically declare his guilt with no fear of punishment" (Ferri, 2009). Moreover, "it may happen that he was acquitted only

because the prosecution, which does not possess the gift of omniscience and can only use what it received from the preliminary investigation, knew nothing about some important procedural document during the trial” (Ferri, 2009) (this is another case of the *reformation in peius*).

Currently, only a few law enforcement agencies adhere to the approach that Enrico Ferri criticises. Basically, we are talking about the American states, which are very sensitive to the legal force of the jury verdict. On the contrary, in the countries of the continental legal family, legislators do not see any problems in the possibility of overturning an acquittal or verdict by a higher court<sup>25</sup>.

**Amnesty and pardon** as institutions of criminal procedure and criminal law. In my opinion, it is difficult to find such classic criminologist who would treat them favourably and Enrico Ferri was not an exception. The scholar believed that they distort the separation of powers, violate the balance of interests of the guilty and the victim, contradict the principle of justice, and negate the previous efforts of criminal justice bodies aimed at detecting and investigating crimes.

Similar ideas have been expressed before. According to Bentham, “the villains during this anniversary of crimes rush to the cities like wolves to the herd after a long fast” (Ferri, 2009). Cesare Lombroso also demonstrated a negative attitude towards the abuse of pardons and amnesties granted to criminals convicted of serious crimes<sup>26</sup>.

Nevertheless, these institutions, existing to this day, are still included into constitutions, criminal and criminal procedure codes of most modern states, since they are aimed at enforcing the principle of humanism and are part of modern criminal policy<sup>27</sup>.

**Rehabilitation.** Enrico Ferri briefly examines the history of this institution and writes that “*remuneration* for judicial errors has been used in certain cases as an exceptional measure since the XVII century” (Ferri, 2009). He cites an interesting fact: in 1781, the French Society of Arts and Literature *Chalons sur marne* announced a competition with a cash prize on the topic of compensation for judicial errors, which initiated a public discussion on this issue.

According to Enrico Ferri, the necessity of this institution cannot be seriously challenged. At the same time, the question *who has the right to rehabilitation* is highly debatable. The scholar believes that it should be granted only to:

- 1) those acquitted by the court of the first or verification instance,
- 2) persons who are released from investigation in the pre-trial proceedings for lack of *corpus delicti* or for not being involved in it.

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<sup>25</sup> In Russia, it is not uncommon for a jury to issue a verdict of not guilty, but a court of second instance, consisting only of professional judges may decide to cancel the acquittal and issue a guilty verdict (the Code of Criminal Procedure of the Russian Federation, clause 5, part 1, article 389.20).

<sup>26</sup> Cesare Lombroso’s views on mercy and amnesty are analyzed by his student Enrico Ferri in the mentioned monograph.

<sup>27</sup> In this context, A.F. Koni criticizes the anthropological school, which, giving preference to the court-specialist doctors, considers that “publicity, defence, appeal, possibility of mercy are not necessary” (Koni, 2006).

He claims that it should not be granted to anyone else. Apparently, the scholar excludes defendants whose cases were terminated on non-rehabilitating grounds (for example, when the statute of limitations expires).

For comparison, Cesare Lombroso, Enrico Ferri's teacher, proposed to deprive the right to rehabilitation of those persons "who, by mistake or by their actions, gave rise to accusations, or persecution for false statements that had nothing to do with reality" (Lombroso, 2020:212).

### Conclusion

The main conclusions are given in the relevant sections of this study. Finally, we note that the views of Enrico Ferri on various problems of justice in criminal cases, despite their ambiguous and largely critical perception in both Russian and foreign science, are of interest to modern proceduralists (including comparativists).

One cannot agree with all the proposals of the Italian scientist due to their radicalism and excessive categoricalness, but even in this context, his views provide food for thought and a certain reason for discussion, enriching the science of criminal justice and legal science in general.

If Enrico Ferri's proposals to establish exceptions to the presumption of innocence have not been embodied in the current legislation, then the rejection of the principle of collegiality and the trial by jury, the search for a reasonable balance between the interests of the accused, the victim and society, which he wrote about in the reviewed scientific papers, are defining the trends of justice development in many modern states, including Russia.

This article is a reason to continue the scientific dialogue on the identified problematic issues with experts in criminology, criminal procedure, criminal law and philosophy.

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