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Giulio Battaglini

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# THE FASCIST REFORM OF THE PENAL LAW IN ITALY

GIULIO BATTAGLINI<sup>1</sup>

## *Defense of the Personality of the State*

The Italian Penal Code of October 19, 1930 (in effect since July 1, 1931) assumes a significance of first rank among all the legislative results of the Fascist Regime. It deals with one of the greatest attributes of sovereignty, that is to say, the power to punish.

The law, in common with the realities of history everywhere, must adapt itself to political ideas, to economic exigencies, and to the social needs of a given country. The theory of government is reflected particularly in the penal law, because that is the most powerful legal means which the government has at its disposal to achieve its political objectives. It suffices to open the new Code and to glance at Title I of Book II, with the heading "Crimes against the Personality of the State." The new crimes here defined (publication of prohibited news, anti-national activity abroad, seditious associations, etc.) show that the Legislature has aimed to guard not only the minimal interests which, in codes of other countries, bear the name "safety of the State," but also, all the entirety of fundamental political interests represented by the State's personality.

Moreover, penal law has also a close relation to the moral law. A penal code has been called "the moral code of a nation." That is true, in the sense that the greater part of man's conduct which the penal law considers (beyond those commands which help to enforce the will of the State) represent disobedience to the moral precepts. The State cannot do less than elevate (within limits) some moral rules into legal rules, for a minimum of social morality is indispensable for the existence of the State. The typical and permanent nucleus of the penal law is thus composed of those precepts which are not only declared by the State, but also are found written in every person's conscience and are held sacred and inviolable in social life. The perpetration of crimes which deny the essential dictates of morality arouses a reaction characteristic of the nation's conscience. This moral reaction is not apparent in other crimes, especially in those

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<sup>1</sup>Professor of the University of Pavia, Editor of the "Rivista Italiana di diritto penale."

known as misdemeanors, which represent often only an injury to certain interests which the Legislature for purposes of social order deems to need the most active legal protection. The distinction between these two groups of crimes has always been present. Even in primitive societies, where there had not arisen a separation between law and religion, crimes of a profoundly immoral nature are regarded as affronts to the gods and are to be atoned for with religious rites.

### *Responsibility in the New Code*

In the enforcement of the penal law, there is one problem which profoundly touches the nature of human action and the moral life: is a person who commits a crime the master of his actions and therefore morally *responsible*, or is he an abnormal being? Should repression of such acts be the main consideration, or should the law try also earnestly to remove the causes of the crime? Around these points all the discussions of the penologists of the 19th century have been centered. As Italians, we can take pride in claiming that the rivalry between the Classical and the Positive schools in Italy (the former represented by Luigi Lucchini, the latter by Enrico Ferri) has been responsible among scholars and legislators throughout the world for reconsidering the troublesome and difficult problems of crime and punishment, and for pointing to new and more effective protection against the destructive social acts of criminals.

The new Italian Penal Code marks a stage of capital historical importance in the world-wide legislative movement, for it gives original, clear, and safe solutions to the problems which for half a century have harassed the scientific world. Our law, by tradition, is a creation of juristic theory tempered by practical experience; whereas the Anglo-American law is a product of empiricism enlightened by rational principles. Nor has the Fascist reform of the Penal Code parted from the method of penal legislation hitherto used. In all this extensive and complicated task, as a reformer, the Minister of Justice, Alfredo Rocco, wisely accepted the criterion that tradition embodies truths of experience, which cannot be destroyed without destructive consequences, but which should be developed and adapted to the new needs of State and society. Thus the method of penal legislation continued to be that of choosing, from among all possible categories, a series of actions which are to be estimated from an ethico-legal point of view, having the principle of responsibility as the basis. In reality, only certain external actions of man are injurious to social life

—and not particular subjective qualities of character conceived as existing in themselves.

It is here that the fundamental difference emerges between this new Code of Rocco and the Draft Code of Ferri of 1921. Ferri's Draft Code of 1921 met very active opposition because it eliminated the principle of *moral* responsibility for human actions. The fundamental basis of Ferri's reform scheme was Article 18, which read: "The principals and accessories in a crime are always legally responsible, except in cases where there is a justification for the act." Among the penologists on the Code Commission (nominated by Chancellor Mortara) two distinguished university professors, Alessandro Stoppato and Emanuele Carnevale, voicing public opinion, opposed the maxim of Article 18; failing to secure its rejection, they resigned from the Commission. But Ferri, who was the soul of the movement for revision, and had a majority of followers in the Commission, could not abandon that principle of the legal responsibility of all persons, without distinction between imputable and not imputable persons (e. g., the insane); otherwise his code would no longer represent the positivistic philosophy. For a positivistic penal code *must* deny the moral character of human action. The positivism of the 19th century had preached to us, to satiety, that the freedom of our acts is an illusion. According to positivism, we are what our temperament, our physical make-up, our environment make us. We have not power within us to free ourselves from the pressure of external phenomena and to master them. Thus, according to Ferri's Draft, crime was nothing but the natural result of the complex of psychic, corporal, and social conditions.

The reasoning by which Ferri sought to obtain approval of his Draft, even by those who believed in the freedom of human actions, was most insidious. He reasoned most cleverly. He asserted: "The ascertainment and measure of moral responsibility are not realizable by a human judge born of woman; it would require divine omniscience applied to every individual." This reasoning obtained widespread acceptance, especially in Latin-American countries, where science, because it is too new, still lacks the advantages of experience and criticism.

For no one can maintain that Ferri's truth is verified by exact science. It is an illusion of criminal positivism. The fact is rather that even if several years were taken for trying a law-case (which in itself would defeat the needs of justice, where promptness is required), one could never reach the truth, in the sense of mathematical

exactness. That is because the subject of public justice is altogether different from that of the physical sciences. And even if we deny the moral character of human actions, as do Ferri and some of the South American codes, and concede that the delinquent is not a morally *culpable* being to be punished, but a socially *dangerous* one to whom society merely applies corrective or therapeutic or eliminative measures, are we any better off? Can this criminal "dangerousness" of an individual be determined and graduated with the same accuracy with which one can establish a principle of physics? Not at all. For whether our basic principle is responsibility or dangerousness, judicial truth can never have an absolute value; it can have only empiric value. Dangerousness (the Ferri key-concept) is after all a concept subject to our limitations and ignorance. Not being able to *know* what a man may do tomorrow, we are forced (to be sure, perhaps inferring from certain facts) to estimate what his future conduct will be—as, when the sky is covered with clouds, we say that it may rain.

Popular opinion undoubtedly makes a clear distinction between the culpable and the dangerous person. We may admit, of course, that this idea of blame, which goes back to ancient myths and sagas, and which nowadays still constitutes a basic idea of our civilization, may be no more than a naïve anti-scientific notion, destined to disappear in the beginning of our fourth millenium. But the idea of blame, which we still attribute to some persons as guilty of crime and not to others, is a fact which the legislator must take into account; otherwise he would be making a penal code which would be the expression of the scientific conviction of a school, but would not satisfy the public conscience and the needs of the State and society.

However, one may argue that the judge could at any rate inquire and ascertain, in each case, whether the particular accused person, at the moment in which he committed a crime, were in fact free or not free to act as he did. But that is not the question which the judge has to decide. For him the question is much more simple and, at the same time, much more practical. The judge, to apply the penalty has simply to find out whether and at what point the crime is attributable to an act of the will, or on the contrary to the intervention of other elements which eliminate or lessen its voluntariness. If he find that the act is voluntary, he imposes the penalty. In doing so, he has impliedly posited freedom (of the will) since the Legislature cannot rationally concede the right of punishment except on the assumption that will equals freedom. And the public conscience, of

which the legislator represents an expression, rebels at the infliction of punishment on a subject who could not but do what he did do.

How impossible it would be to compose a penal code on any principle other than the moral (or voluntary) causation of the offender, is seen in that very draft Code of Ferri of 1921; for, though starting with the conception of crime as a purely physiological action, yet when he came to the concrete rules of detail, the author found himself compelled to go back to the voluntary conception of human action. Thus, in Article 12 of that draft the classical distinction between criminal intent and fault is reproduced; and Ferri in his report explained that voluntariness alone is not sufficient; the act must be done with intent.

The new Code decidedly inclines to the principle of fault and punishment. Without being carried away by the theories of any one school, it adheres, with great shrewdness, to the safe data of public sentiment, which regards the principle of blame as a necessity in the maintenance of the moral and legal system. And it may be added that Ferri approved Rocco's first draft in 1927, and even conceded the necessity of maintaining the principle of moral responsibility, out of deference to the facts of public sentiment, in his lecture at the University of Rome on November 22, 1927.

The new Code is based on the principle of individual responsibility, and on the distinction between responsible and irresponsible persons. Article 85 states: "No one shall be punished for an act defined by law as a crime if he was not responsible at the time he committed the act. A person is responsible who has the capacity to intend and to will." No man can, by his own act of will, determine to select among several purposes, unless he is already acquainted with them. "*Nil volitum nisi praecognitum.*" Here the difference between the capacity to intend and that to will becomes apparent.

The capacity to *intend* comes into existence at that stage of knowledge where an individual realizes the significance of his act as harmful to certain interests protected by the penal law. It is analogous to the "discernment" of Article 54 in Zanardelli's old code, defining the responsibility of a minor between nine and fourteen years. It represents an intellectual capacity, not a moral one. Moreover, for responsibility in Article 85 of the new Penal Code, a capacity to understand the *moral* significance of his conduct is not necessary; thus, a person lacking a moral sense is responsible.

The capacity to *will* is not the philosophic-moral question of free-

will. It is the freedom of will as a fact of public conscience, independent of its philosophic basis. The law must be in accord with the sentiments and conscience of the people, for it exists to satisfy the social exigencies. Now no one can deny that, while science has by no means demonstrated the freedom of the will, on the other hand the popular conscience would rebel at penalizing a person who was forced to do an act. The capacity to will, in the Code, is that normal condition of the mind in which, according to common conscience (for absolute truth cannot be attainable here, as I have already pointed out) a sufficient will power exists to resist impulses which may urge him to commit punishable actions.

This distinction between the intelligential and the volitional elements of responsibility has a central value in the new Code, and is reflected in the specific provisions. For example, in Article 43, defining the criminal intent, it is provided that the harmful and dangerous result must be "foreseen and willed by the actor as a consequence of the very act or omission." That "foreseen" does not mean "premeditated," but means the foresight of the consequence, even though for a single moment, as in impulsive homicide. Another example: the original draft of 1927 omitted the idea of a continuous offense; however, it was restored in the second draft, and it is preserved in the new Code. On the other hand, Article 79 of Zanardelli's earlier code treated as a single offense several violations of the same law, though done at different times, if done in execution of the same *decision of the will* (theory of Mori, the author of the Tuscan penal code). The new Code defines in Article 81 the continuous crime as a series of acts done in execution of the same *criminal design*. In the repealed Zanardelli code this provision had in mind the volitional and deliberative element; in the new Code, the criterion is the intelligential element. The latter seems more exact. A servant, for example, takes repeatedly every Sunday some cigars from his master's cigar box; this is continued theft, because the thefts, which would objectively be many, become only one from a subjective point of view, due to the same criminal design; and yet, each time the servant steals cigars needs a new act of the will.

In most cases, the responsible person is also the dangerous one. But then dangerousness is absorbed by responsibility; that is to say, the fulfilment of the penalty serves also the purpose of repressing the dangerousness. The principle of dangerousness assumes a value in itself whenever dangerousness cannot be absorbed by responsibility, *i. e.*, where responsibility does not exist (*e. g.*, insanity) or where

circumstances require an additional and specific repression of dangerousness (*e. g.*, habitual crime).

### *Public Safety*

This brings us to that part of criminal law which we treat under the term Public Safety.

One needs to distinguish between a dangerous persons and a merely suspicious person. "Dangerousness" implies a judgment of probability with respect to anti-social acts, while "suspicious" (which figures only in certain police measures, *e. g.*, Article 4, law of Public Safety of June 18, 1931), is based on the mere possibility of such acts. That the Penal Code, as far as it concerns itself with safety measures (upon which I must pause a moment, after having spoken about penalties), is dealing exclusively with dangerousness in a narrow sense, and not also to mere suspicion, is plainly seen in Article 203, where it is expressly stated that a person is socially dangerous "when it is probable that he may commit new actions which are defined by law as crimes." The limit thus placed on the concept of dangerousness, to the plain exclusion of mere "suspiciousness," calls in practice for a prudent consideration of all circumstances of the concrete case. Note that the Code does not make the quality of dangerousness depend on the existence of individual anomalous traits. Otherwise, why could we not demand an examination of the skull of a delinquent, since criminal anthropologists affirm that in that way they could find signs of propensities for the crime? But one would have to kill the accused first, in order to find out, according to more or less doubtful tests of science, if he were dangerous or not!

If the Penal Code does not prove efficient enough for delinquency, one need not conclude that the penal law is futile, and that it would be better to replace it with a prophylactic and therapeutic regime of hospitals and health resorts! We may rather ask, "Will not the penalties perhaps be too light?" This is just the question that Minister Rocco asked himself. So, pursuant to the increased authority of the State, the draftsman believed it prudent to adopt a more severe criterion in fixing the maximum and minimum punishments. The increases of penalties have been adopted not only on those considerations of political and social protection which might be suitable in any State whatsoever; they rest also on the whole political, moral, religious, and social concept of Fascism. Thus, for example, the new code justly emphasizes more vigorous protection of the moral values of the family, which (as is known to all) went through a critical period of

danger just after the war. With this emphasis in mind, Article 559 does not seem excessive in imposing two years (maximum) of imprisonment for living in adultery (as distinguished from a mere act of adultery). This might seem too severe, judged by the former democratic and divorce-favoring standard; for adultery was regarded as a customary and negligible matter in modern society (it was even encouraged in the French comedy-literature), and was expected to be eliminated from the criminal code and treated merely as a ground for divorce.

On the other hand, in spite of a basically more severe attitude, the new Code, in all cases where there is reason to be indulgent, has been made more mild than the former one. What has happened is that numerous classes of special circumstances are made to reduce or even to eliminate the penalties, by taking better account of human nature, so as to loosen the rigidity of general rules and allow the judge to deal with individual cases by a liberal application of equitable principles.

A penal code which is formulated after a period of revolution or rebellion, is always obliged to consider the question of the death-penalty. The long history of the question of capital punishment is known to all, so I shall not repeat it. One's opinion hereon is largely determined by individual temperament. But it is certain that the legislature of any particular period may well, for high reasons of public order and common welfare, deem it necessary to preserve that penalty. No one can deny that capital punishment is capable of being efficient. In the new Code, the death-penalty is retained as a measure applicable to certain deeds estimated from an ethico-legal point of view, on the basic principle of responsibility.

#### *The Penalty as a Preventive*

The Ferri Draft of 1921 did not use the terms "penalties" or "measures of safety," but only "sanctions." These famous "sanctions" were nothing else than measures of safety, that is, coercive means of cure and correction which were to replace the classical "punishment." Even the "Zweckstrafe" (purposive punishment) proposed by Liszt in Germany (but not accepted in any of the various drafts for reforming the German penal code) is not a punishment in the real sense of the word, but only a precaution of law. Minister Rocco, in his speech in the Senate of 1925, said, "I believe in the legal and social necessity of penalties, for *penalties are not made only for delinquents*. Penalties are made for all, because their essential

function is to hold in sight of all citizens a threat of consequences, which operates powerfully as a psychologic motive, and does cause most citizens to observe the law." Certainly the idea of crime as a disease to be cured, in different ways according to the subject, undermines the stern rigor which the social order needs for checking evil inclinations and for aiding weak virtues. The Code penalties, therefore, cannot cease to be a means of punishment. If they did so, *they would not be penalties anymore, but only a method of cure and correction.* In that event, there would no longer be any penal code (O happy days!!), but only a sort of hygienic measure of criminal prophylaxis and therapeutics.

It is true that, in the opinion of most criminalists and experts in prison matters, one finds more and more emphasized, in modern times a tendency, in the employment of penalties (while preserving the idea of punishment), to regard as *most important the idea of specific prevention*, that is, of the reformation and moral regeneration of the offender. Reformation cannot be the only aim of penalties, else they would no longer be penalties and would no longer serve the purposes of social discipline. But the correct solution of the problem is to consider reformation of the individual as a secondary purpose of penalties. The general object is to obtain the observance of certain rules of conduct essential for social life by all those persons (we know not exactly how many they are) who would not obey the State if the State merely formulated certain rules, but did not enforce them with appropriate measures.

The regulation for Penal Institutions, approved by Decree of June 18, 1931, No. 787 (highly important for the study of the Italian penal system), was based on a larger attention to the reformation principle, and effected a complete renovation of our penitentiary system by basing it on the idea of work and moral assistance. The Rocco Code, in dealing with prison penalties, endeavored specially to obtain good moral results by combining penalties and measures of safety in such a way as to render possible the application of both methods for the same individual. It is of course necessary that the transition from penalty to measure of safety should be not hasty, sudden, and inconsistent. In the new system, *the penalty must aid in attaining the purposes of the measure of safety.*

Our penal reform has faith in the moral regeneration of the criminal. While it is severe, it is at the same time human, and treads safely the path of modern needs in penitentiary methods. Worthy of special mention is the improvement in sentences to the penitentiary,

the "tomb of the living," in the old Zanardelli Code. Article 22 of Rocco's Code, marks a progressive step of greatest historical importance for civic progress: "A person condemned to the penitentiary who has served at least three years of the sentence may be allowed to work outside. This permission to work outside is subject to the decision of a new judicial functionary, the "Supervisory Judge," to whom the new law assigns specifically the administrative supervision of prison penalties.

A salient feature of the new Penal Code is to render more flexible and therefore more efficient the repression of crime, *increasing the discretion powers of the trial judge*. The judge has the power to increase the fine for those who are financially able; to add a fine to imprisonment for crimes committed for the sake of gain; to lessen the penalty, where more than one person is involved in the crime, for the less culpable of those involved; to choose in many cases between fine and imprisonment; to combine penalties, in suitable cases; etc., etc. These discretionary powers are particularly broad in the employment of "measures of safety."

The personal attainments of the magistrate will now have to be notably broadened. He will need qualities of culture, of sagacity, of penetration, in a greater degree than before, in order to assemble wisely all the considerations that affect his duty under the new Code. He must, in short, be something like the English judge. Juristic culture and mentality he must have most of all. Technical legal knowledge, though indispensable, will alone not suffice for his new function in penal justice, for this is more complex and difficult than civil and commercial justice. Crime must be studied in many aspects other than the legal categories; morality, psychology, sociology, medicine, etc., all have a bearing. Under the new Code, the judge must possess in the highest degree technical aptitude and knowledge in the auxiliary fields of penal law.

### *Measures of Safety*

The so-called "measure of safety" forms one of the most prominent features of the new code; it may be termed the question of the period in our affairs. Rocco's Code devotes to it all of title VIII of Book I. The "measure of safety" is based on the principle of "dangerousness," in the sense above explained. It is applicable in those cases where the principle assumes an intrinsic value, distinct from that of responsibility. A penalty is a reaction against particular acts estimated from an ethico-legal point of view according to the degree

of guilt, and becomes thus a problem of justice. A "measure of safety" is an administrative precaution that does not seek to settle a question of justice, but serves only as a defense of society against some danger arising from particular persons because of their abnormal subjective conditions. This means of indirect prevention against crime was also found in the old Zanardelli Code (committal to an asylum, or to a house of correction, or to an inebriate asylum, etc.); but its use was very limited. The new Code has the merit of treating this method in a separate organic part, with precise definitions and wider use, governed by special rules. In these days, only countries lacking the necessary technical apparatus (psychiatric, pedagogical, etc.), as, for example, China (which adopted a new penal code in 1928 but still possesses only learned penologists), can afford to let their criminal code remain based exclusively on penalties.

This system of "measures of safety" may be regarded as the one useful remnant taken over from the positivist School's Code. It is based on the fact that there are many cases of socially dangerous acts against which the classical system of penalties does not give sufficient protection. It suffices to recall that there are persons who have been convicted as many as fifty times, and that these persons, under the old Zanardelli Code (which thus is really philo-criminal), would continually be restored to social life. The soundness of a code may be tested by its treatment of recidivists. The casual offender is humiliated by the penalty; he may regain his self-respect; he may find, in the remembrance of the offense, a strong motive to remain honest, and, perhaps, to be better than others. Not so, necessarily, the habitual offender. In the Rocco Code, the habitual delinquent, after having served a penalty increased for his prior offenses, is subjected to a measure of safety (farm or labor colony) for a period of two years at least. The code is plainly not fatalistic, but has faith in moral regeneration. The "measure of safety" ceases upon a reconsideration of the offender's dangerousness by the Supervisory Judge. The offender may then be given his liberty, subject to supervision or to giving security for good conduct. In Australia, after the adoption of an analogous system for habitual delinquents, the diminution in all crime figures was such that the prison population was reduced by about twenty per cent. This shows that the active defense of society against its most harmful elements, by means of the two-fold system of penalties and measures of safety, results in a definite decrease of the expense of prison administration.

With this inclusion of "measures of safety" in the Code, the scope of the penal or criminal law is not widened in any way. It remains what it always has been, that is, a system based on the principle of responsibility, absolutely homogeneous and without any intrusion whatsoever of any foreign elements. Eclecticism, in the method followed by Minister Rocco, is excluded. What it does is this: Alongside of the rules of penal law is placed a system of measures of criminal prophylaxis, forming (by definition of the legislator himself), a part of administrative law. The "measures of safety" are best placed in the Penal Code, rather than in a special law, because of their close relation and the convenience of putting them under the same judicial authority that has jurisdiction of the crimes.

These "measures of safety" belong really to the police power, which is a branch of the administrative; they are precautions of police safety that consist in indirect prevention. They have the same legal status as the measures of indirect prevention contained by the Law of Public Safety; but they are distinguished from the latter through their limited and specific object, which is that of indirectly preventing crimes, not unlawful acts of any sort whatsoever. The above mentioned Regulation for Penal Institutions of June 18, 1931, illustrates best, from the practical point of view (which is the most important thing), the distinction between penalties and measures of safety. This is not the place to elaborate its details; it may be noted merely that persons detained as a "measure of safety" are called by their surnames (not by a serial number); that the work assigned them is of a special character (suited to fit the object of their detention); that they may be given leaves of absence; and that in other ways their status is distinctly marked.