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Beyond the statute law: the "grey" government of criminal justice systems

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Summary

Abstracts

Massimo Meccarelli, *Outside society: political emergency, widening of the penal system and regimes of legality in the late Nineteenth century. A comparison between Italy and France*

The essay means to study the phenomenon of duplication of the levels of criminal legality between penal code and emergency law, comparing the Italian and French experiences in the repression of anarchist and socialist dissent at the end of the Nineteenth century. After having illustrated the legislative framework in the two countries, the analysis will then focus on the dynamics of expansion of the criminal system which originated from it. We wish, in such a way, to single out the specific fields of intervention and the relationship concretely established between emergency law and code law. We will then highlight the different approaches (and investigate the reasons) and we will consider the features common to the two experiences. With reference to the first aspect, it will be a matter of contextualising the systematic collocation of the exceptional measures with regards to the different story which characterises the codification process of criminal law in France and Italy. With reference to the second aspect, we will take three interconnected profiles into consideration: the systemic logic in the use of emergency measures; the tendency to produce convergence planes between ordinary and exceptional legality; the determination of a phenomenon of progressive reduction of the value of legality in a formalistic sense. The itinerary will end with a reflection on the links between constitutional foundations built on the principle of sovereignty and structural characterisations of the penal systems implemented by way of statue law.

Monica Stronati, *The exception that proves the rule. Pardon, judiciary and ministerial memoranda between the XIXth and the XXth century*

The aim of this contribution is to observe the "hazy" areas of the court system by adopting a specific point of observation: the "pardon".

The pardon lies at the crossroads of powers and functions of the State, a strategic position which makes the boundaries both among powers and the dimensions of politics and law more flexible.

The pardon cannot be trapped into definitions and rigid procedures. Its function is left to its practice, which is also documented by ministerial memoranda. They not only contain orders coming from the justice minister, but they also gather the requests made and the solutions found in the suburbs of the Kingdom.

The real functioning of the prerogative of the pardon shows the existence of an ambivalent system. It is theoretically founded on the principle of exclusivity of the legislative source, but pragmatically speaking, the theoretical principle can only work through the prediction of "safety valves" such as the pardon, which make the system flexible and allow other legal sources to enter.

Floriana Colao, *A "form of coercion" for the "intermediate zone between crime and madness". Origins of the criminal lunatic asylum*

After the Unification the problem of delimiting with "fix lines" the "hazy area" between crime and madness, criminals and madmen – with the *Insane Offender's Act*, a model of psychiatric prison – tired Verga, Livi, Tamburrini and Tamassia's pheniatry, Lambroso's criminal anthropology, Beltrani Scalia's "penal science" and the criminal law. The latter, in the name of the principle of "madmen in madhouses, criminals in prison" (Lucchini), considered the indefinitely confinement of acquitted madmen and semi-unsound minds as a "judicial heresy" (Pessina). Carrara suggested a perfect solution for the liberal order: a "form of coercion" placed outside the penal circuit, in a "second level" of law; Zanardelli's code did not provide for that measure in the name of the liberal principle of irresponsibility of the non-imputable, but the implementation rules delegated the freedom of dangerous subjects to the administrative authority. At the same time the legislator, on Virgilio's – of the "house

of convicted people" of Antwerp – and Beltrani Scalia's suggestion, had corrected that "legislative gap" with institutive ministerial decrees of psychiatric prisons of Antwerp and Montelupo Fiorentino. They were "administrative provisions" lacking of "substance in law" (Ferri).

Moreover, the Prison Regulation of 1891 put into the system the "psychiatric prisons"; an implementing memorandum where the practitioner and the responsible for the prison were asked to list "the symptoms" of the "convicted people" to move there. While waiting for a "fundamental regulatory law", Lucchini blamed "the indefinitely confinement of the poor madman"; Saporito – the responsible for Antwerp, the advocate of the psychiatric prisons to transform into «General Hospitals of delinquency – consciously admitted that the existing institutes of that time had always been "awful prisons […] an extremely strict, harsh house».

Claudia Storti, *Justice and criminal trial: independence of judges and ministerial policy in Italy between 1861 and 1930*

It is common knowledge that the principle of the division of powers was not perfectly enforced in the charter conceded by Charles Albert in 1848. As a consequence of this, between 1861 and 1945, the Italian government could have a large control upon judges and the judicial system, also preventing the principle of legality from being enforced under several points of view. In the meantime, the decisions of the highest court (the supreme Court of Cassazione) weakened the citizens' right of defense, thus anticipating and preparing the legislative policy of fascism.

The research goes over various provisions enacted by Ministers of Justice according to their power of ordinance, and so not as rules of law or decrees, but as internal and /or disciplinary rules, or ministerial memorandums in order to interpret the criminal code, to favour particular forms of the penal procedure, to strengthen the role of Public Prosecutors and to support career and promotions of those judges – and, among these, chiefly those Public Prosecutors – who were most faithful to the governing party and, subsequently, to the fascist regime.

Maria Letizia Zanier, *The Legality Principle within the Italian Criminal Justice System: Normative Principles and Practical Adaptations*

With my paper I will make a contribution to the discussion about the relevant issues of compulsory prosecution and functional alternatives to the legality principle in the Italian criminal justice system. The aim is to analyse prosecutorial and judicial practice rather than the "black letter" legal rules. In so doing I will present empirical data. The analysis intends to cast light upon prosecution, specialisation in prosecutorial offices and courts, the use of the so-called riti *alternativi* (short proceedings) and the impact limitation of actions (i.e. *prescrizione*). All these aspects are important to a better understanding of the relationship between law and practice in enforcing law.

Carlo Sotis, *Amphibologie du gris: crise de la loi ou triomphe de la loi? Le discours européen*

Ces pages analysent un typique laboratoire postmoderne de gouvernement d'un système judiciaire au-delà de la loi: le discours européen. L'Union européenne, en effet, même si dépourvue d'une compétence directe exprime une politique criminelle significative à travers des stratégies de manigance de la réserve de loi. Avec la récente approbation du Traité de Lisbonne, les techniques de gouvernement d'un système judiciaire au-delà de la loi sont ultérieurement perfectionnées. Donc, l'objet et le but de ces pages est celui d'offrir une lecture des dispositions dédiées au droit pénal prévues dans le nouveau texte fondamental de l'Union. Afin de comprendre ses nouveautés, on analysera les rangements actuels du soi-disant droit pénal européen, pour envisager successivement les dispositions les plus significatives du point de vue pénal; notamment les articles 83 et 86 du Traité sur le fonctionnement de l'Union européenne (TFUE). En particulier, après avoir exprimé nos perplexités concernant le mécanisme de position des obligations européennes de tutelle pénale prévu dans l'article 83 TFUE, on essaiera de comprendre si l'article 86 TFUE prévoit l'attribution d'une "vraie" compétence pénale directe du ressort de l'Union. Notre conclusion est que l'Union, avec cette loi, devient définitivement capable de prévoir avec un règlement européen, donc à travers des normes applicables, les préceptes pénalement importants. Cependant, elle ne peut pas établir les sanctions correspondantes.

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The juridical project of modernity cannot do without the concept of statute law and its ideological centrality. Still beyond this façade, there are yet other issues. So *beyond the statute law* intends to raise the question of the co-presence and integration in penal systems between the formal theory of the sources and the actual existence of «grey areas» which contributed to rule (and do they still rule?), for certain aspects, strategic sectors. The principle of legality, often represented as a mono-bloc, must face, since its very beginning, different operative levels which subject the "liberal" codes and the devices of derogation and exception to tension, ending in restraining rights and guarantees. This volume, collecting the papers of a 2010 seminar, proposes an exemplifying path directed to showing certain critical knots of the Italian experience considered in a historical and theoretical perspective.

Beyond the statute law identifies also the procedure that brings the statute law towards hybrid tools, in the border area between statute law and administration, between the "shine" and publicity of the statute law and the opaqueness of regulatory and administrative acts. An area of interest – little studied, at least in Italy – is precisely that of circulars, instructions, notes, accepted practices, etc. Therefore, sources of regulations which should define the most minute details of the execution or regulate only administrative operations, contribute, instead, to defining, in a direct way, law policies in strategic sectors of the criminal law system.

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