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Preamble

Public Order and Prisons in a Liberal Legal Order: The Juridical and Institutional Framework

After Italian unification, national cohesion did not emerge spontaneously but was pursued through the gradual and uncertain construction of the new State. This process was explicitly oriented toward overcoming the institutional legacies of the *anciens régimes*. Post-unification governments therefore engaged in a sustained effort to confront the forces of the old order, which remained resilient and influential. These forces were capable not only of resisting political change but also of slowing reform through compromises between inherited structures and new institutional arrangements.

In this context, law and order became central instruments of governance. They were conceived as essential to stabilising a political and social system still exposed to the risk of regression. Citizens' freedom was perceived as vulnerable to violence and to threats against personal safety and property. Safeguarding liberty within the limits defined by law thus became a core objective of liberal political programmes. Criminal law, in particular, played a decisive role by defining the boundaries of legitimate conduct. The successive projects for reform of the penal code, culminating in the Zanardelli Code, testify to the determination of post-unification governments to translate Risorgimento ideals into concrete legal institutions and to shape a nation capable of positioning itself among the main European powers.

Following the introduction of the new codes and the reforms they entailed, social control became an explicit aim of the administration of justice. This objective was pursued through a dual strategy. On the one hand, it relied on persuasion and on encouraging conformity to legal norms. On the other, it depended on the legitimate organisation of coercive force charged with enforcing the law. Liberal legality reached its first formal consolidation in 1865, with the juridical and administrative unification of the new State. M. S. Giannini famously described this State as "monoclasse," in that it sought to aggregate around an emerging bourgeoisie those elites

that had found a common political purpose during the Risorgimento (Giannini, *Diritto amministrativo*, 1970, vol. I, pp. 43–48).

Law no. 2215 of 2 April 1865, which entered into force on 18 April, introduced a system of codifications modelled on the Napoleonic tradition and already familiar to many pre-unification states. The new legal order was thus structured around a civil code (the so-called "Pisanelli Code"), a commercial code, codes of civil and criminal procedure, and a code governing the merchant marine. Shortly beforehand, Law no. 2248 of 20 March 1865 (the "Lanza Law") had unified state administration by extending Piedmontese regulation to the entire Kingdom. Later that year, Law no. 2959 of 25 June regulated expropriations for works of public utility. Judicial unification followed with Legislative Decree no. 2626 of 6 December 1865, which established a unified judicial hierarchy and assigned to the Court of Cassation the task of ensuring the uniform observance of the law (art. 122) and of providing authoritative guidance in civil, commercial, and criminal jurisprudence. The Court operated through four regional seats: Turin, Florence, Naples, and Palermo.

Penal codification, however, remained unresolved and represented the most contentious aspect of legal unification. The delay was due to strictly technical reasons, reflecting the difficulty of reconciling deeply divergent legal traditions in a field marked by issues of high political and symbolic sensitivity. Central among these was the question of capital punishment, abolished in the Grand Duchy of Tuscany but retained in the other pre-unification states. Parliamentary commissions and doctrinal debates dominated the first decades after unification, until a compromise was reached with the Penal Code of 1889. A fully unified system of civil and criminal jurisdiction, however, was achieved only in 1923, following the suppression of the regional Courts of Cassation (P. Calamandrei, *La Cassazione civile* [1920], in *Opere giuridiche*, ed. M. Cappelletti, 1976, vol. VI).

As this brief overview of the legal framework shows, governments equipped the new Kingdom with normative instruments designed to foster a climate of individual behaviour that was both free and aligned with the values of an emerging national spirit. Consolidating this framework required a high degree of uniformity in legal norms and in their application, in order to ensure the maintenance of public order within a liberal constitutional system. The delay in introducing a new penal code consistent with doctrinal principles and liberal ideals arguably represented one of the most significant problems at the level of institutional organisation and legal governance. In a liberal order, there is no inherent antinomy

between security and liberty, provided that security does not cease to be a guarantee and instead become a means of suffocating freedom.

This balance required continuous and careful mediation between the demands of order and those of liberty, both within civil society and the penal system itself, where liberty was necessarily restricted for detainees—whether awaiting trial or serving definitive sentence. Even in such circumstances, respect for personal dignity was not meant to be suspended. The ruling class was well aware that the administration of justice constituted a critical node in the process of unification, not only of institutional structures but also of the judicial bodies inherited from the former states. Justice thus emerged as a pressing and central issue, essential for providing the country with norms and procedures capable of ensuring social control and securing the loyalty of both the judiciary and the penitentiary system.

Although the Statuto formally guaranteed the irremovability of judges, article 199 of the judicial system allowed their transfer for reasons of service. Judicial independence was therefore far from firmly established. The public prosecutor was conceived as an expression of the executive power within the judicial sphere, and therefore required to comply with ministerial directives (art. 129). Political power and judicial power, particularly within the higher administrative levels, were thus characterised by reciprocal influence, overlap, and internal tensions. Only under the tenure of Giuseppe Zanardelli as Minister of Justice (1887–1891) did Italy finally adopt a new penal code, accompanied by a reform of judicial recruitment in 1890. Prior to this reform, access to the judiciary could occur either through a competitive examination for trainee judges or through ministerial appointment. The reform introduced a mandatory and more rigorous competitive examination, thereby curtailing ministerial discretion.

Public order was frequently interpreted as the repression of political dissent through police action. Here too, a process of purging the old apparatus proved necessary in order to create forces loyal to the new order, respectful of civil and political freedoms, and trained in the fight against crime. The rise of mass movements represented a particularly sensitive terrain for the liberal State. It should be recalled that between unification and the advent of Fascism, a state of siege was proclaimed on ten occasions, on the basis of the Pica Law (15 August 1863, no. 1409), originally introduced to suppress brigandage in the southern provinces following the uprisings of 1862 in Sicily and the Neapolitan territories. Under the state of siege, jurisdiction was transferred to military tribunals, removing cases from the ordinary judiciary, which was considered more protective of

rights, more moderate, and less expeditious. Post-unification unrest thus contributed to delaying for decades the adoption of a penal code with a distinctly liberal orientation. Even in the 1890s, military tribunals were employed to repress socialist and anarchist movements, including through the imposition and immediate execution of death sentences.

The administration of the penal system was shaped by the broader set of challenges confronting the new unitary State: ongoing economic transformation, chronic financial difficulties, the emergence of new social movements articulating demands from below, and the persistence of anti-system opposition within the most conservative sectors of society. Luigi Lacché has emphasised the ineffectiveness of ordinary instruments of public order, pointing to the excessive duration of trials and the widespread use of preventive detention as structural weaknesses (*La giustizia per i galantuomini*, 1990). Even the Zanardelli Penal Code of 1889—among the most advanced liberal codes of its time—contained provisions aimed at curbing the most radical forms of political dissent and the economic claims advanced by workers' movements.

The penal question, together with the administration of prisons, thus occupied a prominent place in political debate and cultural reflection, consistently framed by the need to strike a balance between public order and individual freedom, including the freedom of association within legally permitted forms of dissent and political or social coalition. Mario Sbriccoli has observed that the "conflict between order and freedom," pervasive in nineteenth-century penal thought, placed a political good—the security of citizens and social tranquillity—against the inalienable right of the individual to personal freedom. The practical predominance of the former, particularly in policing practices, and the recurring attempts to reaffirm the latter remained a constant feature of public life and legal debate (*La penalistica civile*, in *Storia del diritto penale e della giustizia*, 2009, p. 501). The tension often manifested itself in the gap between the guarantees formally provided by the law and illegal practices. Sbriccoli further identified a structural "imprinting" of the Italian penal system, shaped by this persistent imbalance between order and legality. In matters concerning public order and political security, criteria of expediency and convenience tended to prevail; extraordinary measures were justified by the exceptional nature of circumstances; suspicion acquired the value of proof; moral certainty replaced legal certainty; and police authority came to outweigh judicial oversight (ibid., p. 524).

In his 1888 report to the Senate, Zanardelli defended his draft code

against accusations of theoretical abstraction and excessive permissiveness in political and social matters. He rejected proposals for deportation and justified the role assigned to judges even in cases of political crime, within a legal order intended to safeguard freedom of thought, association, and assembly. He emphasised the centrality of evidence and adversarial proceedings, implicitly acknowledging that political conflict possessed forms of legitimacy that could not be indiscriminately conflated with conspiracy or subversion. Social peace, in this view, could be achieved by channelling conflict within a legal framework that protected the freedoms of dissent and public demonstration. As Sbriccoli aptly noted, Zanardelli's was "a liberal code for an Italy that was scarcely liberal" (p. 541).

Nevertheless, the code resolved long-standing disputes over the classification of offences by affirming the principle of the "legal objectivity of the act." In the sphere of punishment, it addressed discrepancies between statutory penalties and actual terms of imprisonment, introduced the unification of custodial penalties, and reduced their overall number. The reform envisaged limiting cellular isolation to nighttime hours, combined with daytime labour, and mitigated penal severity through the introduction of conditional release, alongside a general reduction in the afflictive character of punishment and of the periods of solitary confinement and enforced silence.

Zanardelli may also have seized a politically opportune moment to enact the new code, just before the dramatic events that would mark the end of the century. Public opinion had begun to shift, increasingly recognising that rising crime rates did not stem from penal leniency or from a weakening of repressive measures, but rather that crime reduction could be pursued within a framework of legality, through policies aimed at alleviating hardship, addressing the root causes of social injustice, and improving conditions of extreme deprivation linked to persistent areas of economic backwardness.