The American Series
of
Foreign Penal Codes

23
Italian Penal Code

The

ITALIAN

PENAL CODE

Translated by
EDWARD M. WISE
Wayne State University

in collaboration with

ALLEN MAITLIN
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Introduction by
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FOREWORD

The publication of Volume Twenty-three of the American Series of Foreign Penal Codes marks the first presentation in the Series of a Code with an explicitly fascist basis.

The Italian Penal Code of 1930 has long been a center of interest and controversy among legal scholars, penologists, and officials of government in Western Europe and the United States. With good reason. Conceived in the ferment of criminological positivism, and born during the pre-World War II fascist regime of Benito Mussolini, the Code has been variously admired and castigated on all sides for reasons of principle and politics, intellectual coherence and practical consequences.

As Professor Wise makes clear in his admirable Introduction, the Code bears the unmistakable—some would say, unwieldly—stamp of eclecticism. The Code includes the positivist emphasis upon the criminal and not the crime, the behavioral reality and not the legal categorization of that behavior. The protection of society from the dangerousness of an offender's behavior became the avowed prime purpose of this Code, a theme of social defense which other Codes were later to incorporate in their own fasion. But the Italian Code did not abandon, as the extreme logic of positivism would demand, neoclassicism's concern with fitting punishment as precisely as possible to the contours of the individual offender and the particular circumstances of his/her offense. Similarly, it retained other "anachronisms," such as: the concept of moral fault (i.e., *mens rea*) as the essential predicate of legal culpability; and the classical principle of legality, *Nullum crimen nulla poena sine lege.*

The Code raises fundamental issues for those interested in criminal law theory, policy and practice. First, is the principle of legality a barrier to legal oppression? Acknowledging that its absence facilitates violation of human rights, does it follow that adherence to the principle bars legal oppression? It seems not. This Code both

affirms the principle of legality and embodies, *inter alia*, the spirit and approach of Mussolini's fascism. The principle is necessary but insufficient. Second, is the requirement of moral fault *(mens rea)* a barrier to legal oppression? Clearly not. The Code adheres to the *mens rea* requirement and incorporates into it a fascist dimension. Lastly, is the positivist emphasis on social protection of the community by the State an adequate objective of criminal law? The answer is manifest in the utility of this objective to the fascist regime. The emphasis on "social protection" from traditional "criminals" became ironic in a few years as fascist Italy wrought devastation upon the Ethiopian people, allied Italy with Hitler's expansionism, and ultimately brought horror to the Italian people during World War II. Social protection needs to be reformulated to include a prime focus on state-inflicted harms, a broader definition of "criminals" and a supporting theory and practice. In short, what is required is a new criminal jurisprudence.

I am pleased to acknowledge the important contribution of Allen Maitlin of the New Jersey Bar who prepared an initial draft of the translation; and to acknowledge the extensive efforts by Professor Edward Wise of the Wayne State University Law School who refashioned the translation. The product is a tribute to both. Professor Wise's Introduction reflects an impressive mastery of the evolution of Italian penal laws within a rapidly changing historical, political and social context. It is clear, scholarly, and insightful, a trinity seldom achieved.

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The CLEAR Center wishes to acknowledge that the copyright of the German Text of the *Alternative Draft German Penal Code* is owned by the Publishing House of J.C.B. Mohr (Paul Siebeck) Tübingen. This acknowledgment should have appeared in the English language translation of the *Alternative Draft German Penal Code* which was published as Volume 21 of *The American Series of Foreign Penal Codes*. The CLEAR Center regrets the earlier omission.

PREFACE

The basis for this translation was a draft prepared by Allen Maitlin, of the New Jersey Bar, which by and large brought up-to-date (and also into line with the conventions of this Series) an English version of the *Penal Code of the Kingdom of Italy* published by the British Foreign Office in 1931. I have completely recast the translation to suit my own predilections—relying all the while on Mr. Maitlin's draft. My old friend Judith Green vetted long tracts of the translation and helped to improve them markedly; Professor Giuliano Vassalli graciously gave advice on some of the more difficult points, and has also allowed me to crib parts of the Introduction from my translation of his article on "The Reform of the Italian Penal Code" which appeared in 20 *Wayne Law Review* 1031 (1974). Nevertheless, no one but myself has yet had both the opportunity and the patience to read the entire translation straight through and for the blunders it still contains, I alone have to bear responsibility.

As in Italian editions, amendments to the Code since 1930 have been incorporated into the text of the translation (and references to the death penalty, Italian colonies and the Kingdom of Italy, which became obsolete at the end of the last World War without the Code being formally amended, have—depending on context—been either deleted, enclosed in brackets, or else replaced by references to life imprisonment and to the Republic. The dates of all amendments are indicated in square brackets following the articles affected, with one exception: throughout the Special Part, fines and monetary penalties have been silently revised to reflect the increases in amounts adopted across-the-board on July 12, 1961. As in this Series generally, special laws enacted apart from the Code are not included in the translation, although in a number of instances (*e.g.*, in connection with prostitution and narcotics offenses) such special laws have effectively superceded the pertinent articles of the Code. An asterisk preceding an article or paragraph

indicates that it has, at least in part, been held to be invalid by the Italian Constitutional Court.

E. M. WISE

INTRODUCTION

The Italian Penal Code is forty-five years old. It was promulgated on October 19, 1930, and took effect on July 1, 1931. Mussolini had come to power eight years earlier and the code was greeted at the time of its adoption as a distinctively fascist product. While Mussolini's regime collapsed in 1943, its Penal Code is still in force, having survived largely intact through twelve years of fascism and more than thirty-two years of democratic and supposedly anti-fascist government. Obviously, any general discussion of the Code must deal not only with its background and basic characteristics but also with the reasons why it has even been permitted to live on into a not quite respectable middle age.

I

Italy formally became a unified country in March, 1861, no longer the mere "geographical expression" Metternich had disparagingly called it. Like other new countries, it immediately set about manufacturing new codes of law. A civil, civil procedure and commercial code were all adopted in 1865. However, it took nearly three decades and twelve successive drafts to produce the first Italian Penal Code, the so-called Zanardelli Code of 1889. In the meantime three different regional codes remained in effect: those of Sardinia, the Two Sicilies, and Tuscany.

Most of the northern part of the country (Piedmont, the former Austrian territories of Lombardy and Venetia, the former duchies of Parma and Modena, and the former Papal States) came under the Sardinian Penal Code of 1859. It seems odd, perhaps, to think of the island of Sardinia ruling the rest of Italy. In fact, the Kingdom of Sardinia included Piedmont, since both were ruled by the House of Savoy. The dukes of Savoy naturally preferred their grander title of Kings of Sardinia and so, when Italian unification came about under the auspices of the enterprising Piedmontese, it formally

consisted of annexing the rest of the country to the Kingdom of Sardinia.

The Sardinian Code was really produced in Turin. Although Count Cavour, the guiding genius of Italian unification, was temporarily out of office at the time it was adopted, it can be seen, perhaps, as an extension of the series of reforms by which he sought to convince potential allies and himself that Piedmont-Sardinia was truly an efficient, modern, progressive state. Like all nineteenth-century penal codes it was greatly influenced by the liberal and classical tradition in criminal law which derives from Beccaria. Like many, including the Code Napoleon of 1810, its classicism was considerably diluted by conservative political concerns. An earlier Sardinian Penal Code of 1839 had been largely copied from the French. The Code of 1859 made moderate improvements: it was relatively more relaxed with respect to political offenses, punishments and extenuating circumstances, technically more advanced in its treatment of complicity and attempt. Nonetheless, it failed to come up to the standard set by the law of other Italian states, particularly Tuscany, and it continued to attract the three most opprobrious epithets in the vocabulary of the nineteenth-century Italian classical school: harsh, un-Italian, and empirical.

In Naples and Sicily a modified version of the Sardinian Code was put into effect. The former Kingdom of the Two Sicilies had been annexed to the dominions of the King of Sardinia as a result Garibaldi's conquest in 1860. The Piedmontese officials who swarmed into Naples after the Bourbon collapse tended to regard the south as a semi-colonial dependency. It was questioned whether it would even be possible to apply the law of Piedmont to such a remote, seemingly backward country. In the north, Piedmontese law was hastily imposed by executive decree on each territory that became part of the nascent Italian state, largely to forestall debate about the possibilities of regional autonomy. It was feared that such autonomy, or even protracted talk about it, would threaten the survival of the new nation.

Arguably the south presented a special case, or so it seemed in the latter part of 1860 when a commission of distinguished southerners was asked to suggest what changes in northern legislation would be required to adapt it to indigenous conditions. Within months, however, renewed fears about what regionalism might produce prevailed with the cabinet in Turin. They took alarm at reports of disorder in the south (and possibly at the example of the civil war then about to break out in the United States) and ordered legal unification to be completed without waiting for a study of local exigencies. Thus, in February 1861, only days before parliament was due to convene, a series of decree-laws was rushed into print extending the public law of Piedmont to the south of the peninsula (and in June 1861, similar provision was made for Sicily).

Nonetheless, as extended to the Two Sicilies, at least the Penal Code was somewhat revised to take account of changes which had been locally proposed. Most of these changes had little to do in fact with pressing local needs. They were derived, rather, from the provisions of the old Penal Code of the Kingdom of the Two Sicilies which had been adopted in 1819 during the comparatively halcyon period immediately following the post-Napoleonic Bourbon restoration. Naples had long had a rich legal tradition of its own, and the Code of 1819, which was a product of that tradition, was one of the best of its time. It was, on the whole, a fairly humane Code, which even in 1861 still seemed tolerably up-to-date and, in many respects, less backward that the Sardinian Penal Code which it preceded by forty years.

Tuscany too, although ruled by a Habsburg grand duke, had a developed legal tradition and a system of laws which in the middle of the nineteenth century was regarded (not least of all by the Tuscans themselves) as embarrassingly superior to that of Piedmont. The Tuscan Penal Code dated from 1853. It stood in line of descent from the earlier Tuscan law of 1786, which had largely incorporated Beccaria's ideas, and represented perhaps a purer strain of classicism than any of its con-

temporaries. It was widely acknowledged to be a model of mild and elegant legislation. Three days after the Tuscans expelled their grand duke in April 1859, the provisional government further amended it to abolish capital punishment (which had previously been abolished in Tuscany in 1786, but reintroduced in 1852).

Tuscany remained under its own provisional government for nearly a year before opting for union with Piedmont in March 1860. Partly for this reason, Sardinian law as such was not extended to Tuscany. Moreover, the abolition of capital punishment by the provisional government proved to be one of the chief obstacles to early adoption of a uniform Italian criminal code. When the question came up in 1865, the new Italian Senate was unwilling to abolish capital punishment for the country as a whole; at the same time it was felt it would be simply too incongruous for the new state, supposedly a symbol of independence and liberty, to reimpose the death penalty on a region which had voluntarily elected to abandon it. As a result, until 1889 (when the new Italain Penal Code which provided for the abolition of capital punishment was finally adopted) the Tuscans retained their own criminal law. They were not displeased to do so: ultra-civilized Tuscany may have been unable, it was thought, to avoid annexation by semi-barbarian Piedmont, but at least it had been spared the indignity—the "calamity" Franceso Carrara called it—of the Sardinian Penal Code.

The Code of 1889 (which entered into force on January 1, 1890) might well have been enacted earlier except for a parliamentary system based on transitory coalitions among cliques of deputies rather than on organized political parties, which virtually ensured a kaleidoscopic succession of cabinets. Governments were too short-lived to deal with any but the most urgent matters; ministers seldom remained in office long enough to carry through a legislative program. The Code was ultimately adopted during the first premiership of Francesco Crispi whose government (partly owing to Crispi's autocratic temperament) proved more successful

than most in enacting overdue reforms. The decisive impetus for its adoption was provided by the scrupulously liberal minister of justice (and future prime minister) Giuseppe Zanardelli who had been one of the chief proponents of penal reform during the preceding decade. But although he served as the eponym of the Code, Zanardelli himself was the first to admit that it was really a collaborative work, the product of the thought and labor of a whole generation of scholars, jurists, lawyers and political men.

The generation which produced the Zanardelli Code had been brought up in the teachings of the classical (or, by then, neoclassical) school of which, in the second half of the nineteenth century, Carrara was the foremost exponent. During the three decades preceding 1889, this school was at the height of its influence. Its liberal and systematizing tendencies coincided with two of the main intellectual impulses of the period. Not surprisingly, the Zanardelli Code gave practically perfect expression to neoclassical principles. Carrara saw a copy of the penultimate draft shortly before he died in 1888, and pronounced himself content.

In line with the dominant predilections of the generation which produced it, the Code was moderately liberal (at least by the standards of the day, and emphatically so in comparison to the Code which replaced it in 1931). Its treatment of political offenders was relatively restrained. It allowed resistance to unlawful acts of authority, admitted truth as a defense to crimes against reputation, abandoned the illegality of strikes as such (although this proved short-lived in practice); in provisions barring the clergy from meddling in politics, it reflected the anti-clerical bent of nineteenth-century liberalism. On the whole the Code aimed, as the classical tradition insisted it should, on a general reduction in the severity of punishment. To avoid consecutive sentences for multiple offenses, it prescribed a scheme of "legal cumulation" which increased punishment only marginally in proportion to the number of further offenses. It worked out a system for classifying offenses which for the most