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Global Criminology and National Tradition:
The Impact of Reform Movements on Criminal Systems
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Michele Pifferi

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I. The global criminological revolution

This article focuses on the international movement towards individualization of punishment between the 1870s and the 1930s as a model to study how legal theories developed in a global scientific dialogue have been differently shaped according to national traditions. Even if interpreted in different ways, the common idea shared by prison reformers, exponents of the new criminological science and a large part of public opinion in Europe, United States and Latin America necessitated a radical change from repression to prevention. The main focus shifted from crime as an abstract entity to criminals as natural, social human beings immersed in a complex network of environmental, social, economic conditions which affected their behavior. Nonetheless, the 'criminological wave' between the 1880s and the 1930s was not a uniform international parenthesis, but reflected in its variety the differences between American and European legal cultures and their notion of the principle of legality.

One of the main innovations suggested and experimented by criminologists was the indeterminate sentence, i. e., a notion of punishment fixed neither by the law nor by the judge, but delegated to a board of experts charged to fit the treatment to the individual criminal. Since each delinquent man commits a crime for different reasons, determined by different social, economic, biological, anthropological causes, and since the very purpose of a penalty ought not to be retribution but social security via rehabilitation and prevention, punishment (an old idea to be replaced with the broader notion of treatment) cannot be predetermined by law according to an abstract degree of seriousness of the act or an abstract evaluation of guilt. Nonetheless, the essence of 'indeterminateness,' considered the best

mean to individualize punishment, was openly in sharp contrast to the principle of *nulla poena sine lege*. The liberal criminal justice system both in Europe and in the United States was grounded on the ideas of determinateness and fixity of law, limited judicial discretion, and the retributive and deterrent aim of punishment, which were all incompatible with the calls for rehabilitative treatment advocated by radical criminologists as well as by prison reformers. Hence, the more the notion of an indefinite sentence developed, the more it turned out to be an infringement of the classic principle of legality, forcing the doctrine to reshape the rule of law according to the new priorities of penal policy.

Beyond comparative studies, the international criminological congresses, the hybridization of models and the circulation of the means to individualize punishment (indeterminate sentence, conditional release, parole, suspension of sentence, juvenile treatment etc.), the constitutional tenets of the rule of law and the *Rechtsstaat* shaped differently the criminal systems in France, Germany, Italy, United Kingdom, Ibero-American countries and the United States. The different mindset of each legal culture, based on different views of the past and on different theories on the rationale of punishment, assigned the *nulla poena* principle a peculiar value in the legal systems of the Old and New World. However, the enactment of the progressive penological ideal, with its two-faced approach of prevention and rehabilitation, led to different solutions: While the indeterminate sentence was finally held constitutional by the U.S. courts and the doctrine was accepted as compatible with the principle of legality by reason of distinguishing between the criminal trial in the guilty phase and sentencing phase, the European observance of strict legality stressed the 'jurisdictionalization' of any measure of safety. Thus, for different reasons the *nulla poena* was not dispensed with in Europe, in the United States and in Latin America, but its historical configuration was changed and its meaning modified.

As recent studies have shown, the rule of law, as a general theory and in criminal justice as well, has never been an invariable concept, but rather a flexible rule assuming different characteristics according to historical institutional balances and political needs.[1] The historicizing analysis of the principle of legality in relation to the influences of the criminological

1 See, e. g., Lacey (2007a); Palombella (2009a); Palombella (2009b); Costa (2002); Costa (2007).

theories of social defense, dangerousness, and prevention offers the opportunity to investigate how the same concepts have been interpreted in different contexts. The rise of criminology as a scientific method fostered a global reform movement that developed a deep cultural exchange based on translation and comparison,[2] and affected the project or the enactment of penal codes (called criminological codes, rational penal codes) and the passing of special laws (Prevention of Crime Act, 1908, in the UK; Lois Bérenger, 1885 and 1891, in France). The widespread call for the individualization of punishment in the 20th century was partially changing its scope the more the emphasis of reformers shifted from correctionalism to social control,[3] from individual rehabilitation to individual incapacitation, assuming specific features in conformity with national political tenets and with the concrete implementation of the formula.

The aim of the article is to investigate the heritage of these reforms on criminal concepts and the definition given in different contexts to similar institutes such as measure of security or indeterminate punishment: How did scientific criminology impinge upon legal systems? How was the rehabilitative ideal enacted? The analysis is neither a comparative history of criminology nor a history of criminal law reforms or punitive systems at the beginning of the 20th century. Assuming the wider notion of criminalization suggested by Nicola Lacey as a "conceptual framework within which to gather together the constellation of social practices which form the subject matter of criminal law on the one hand and criminal justice an criminological studies on the other" and as an idea which "captures the dynamic nature as a set of interlocking practices in which the moment of 'defining' and 'responding to' crime can rarely be completely distinguished and in which legal and social (extra-legal) construction of crime constantly interact,"[4] the article studies the criminalization process at the beginning of the 20th century.

Being a complex concept determined by manifold factors, criminalization was inevitably shaped by the different constitutional contexts within which it took place, had an unlike impact on the balance of powers according to the legal culture on which it impinged and was supported or contrasted by

2 Petit (2007).
3 Garland (2001).
4 Lacey (2007b).

varying legitimizing legal discourses. Thus, the investigation of the influences of criminology on criminal laws and criminal codifications discloses a wide range of key issues about the history of criminal law in Western countries, the exploitation of different penal policies and the role of legal reasoning in promoting or contrasting reforms. In so doing, the paper applies the historical analysis of criminal law as pointed out by many legal historians[5] to the study of the Janus-faced rise of global criminology, based, on the one hand, on common targets and methodology but concretely forged, on the other, in different ways according to the resistance of legal traditions,[6] the forms of individual guarantees and the perspectives on the role of the legislative, judicial and administrative powers.

Given the momentous impact of the principle of individualization of punishment on both the European and the American criminal systems from the end of the 19th century up to now, the specific focus on the history of the indeterminate sentence is representative of how it has been differently enacted in different countries and also suggests further possible explanations for the reasons behind the comparative variations in the sentencing phase today.[7]

II. Local peculiarities in the history of criminalization

The hypothesis assumed in this paper is that the fundamental tenets of criminological science, shared a global dimension (at least in the Western World) because grounded on the idea of a universal scientific and progressive knowledge but were differently applied in the concrete legal systems, due to the resistance of constitutional balances. By applying to our subject the path-dependency concept of modernization in criminology, i. e., the idea that trajectories of modernity in crime policies are not driven by a single engine but are the complex outcome of different political conditions, traditions, models,[8] the criminalization process of the 1880s–

5 Farmer (1997); Dubber (1998); Dubber (2000); Sbriccoli (2009).

6 On the mutual advantages for both criminology and legal history given by an historical analysis of criminal law, see, e. g., Godfrey/Lawrence/Williams (2008) 6–23 and Lawrence (2012).

7 Whitman (2005); Tonry (2010); Tonry (2011).

8 Karstedt (2002).

1930s can be construed in terms of the encounter between a globalizing movement and different national peculiarities, and sheds light on the *longue durée* resistance of legal institutional habits in the face of radical reform attempts. If, in other words, the engine of criminology (its scientific-based knowledge) was surely 'global,' its actual impact on criminal law was affected by 'local' factors (national legal frameworks).

At the end of the 19th century criminology surely had a widespread international growth founded on absolute faith in scientific knowledge: because science, unlike law, was exactly the same everywhere, based on the same experimental methodology and arriving at the same outcomes, criminology seemed to be designated to have the same revolutionary impact on all the criminal law systems. As a matter of fact, the unusual international dimension of the criminological debate is unquestionable: the foundation of the International Union of Criminal Law in 1889 and its following congresses and publications, the *Modern Criminal Science Series* translations of European criminologists' works made by the American Institute of Criminal Law and Criminology, the International Congresses of Criminal Anthropology, the International Prison Congresses and the diffusion of specialized journals are signs of the globalizing rise of criminology. This reformative movement of criminal law and penology had an impressive impact on legislations, forcing the enactment of new laws in order to face the problems of recidivism, habitual offenders, juvenile delinquency, reformative detention in the light of the new leading principles theorized by the Italian positive school of criminal law, such as individualization of punishment, social defense, dangerousness of the offender, special prevention.

Many criminological codes inspired by these principles were drafted or enacted, thanks to the impulse to reform penal policies. Yet the reformatory character of the first phase shifted toward a more conservative exploitation of criminological ideas, hiding repressive aims behind the mask of the most suitable treatment for the criminal. In this process, the European jurists' legal reasoning, willing to defend the *nullum crimen* and *nulla poena* as unavoidable foundations of the *Rechtsstaat*, refused the more subversive idea of rehabilitation and adopted the virtually unlimited repressive scope of the social defense. In some European countries (Italy, Germany) some criminological proposals were modified to reconcile them with the repressive needs of the totalitarian regimes. Some Latin American criminological codes, mostly influenced by the Italian positive school of criminal law, adopted

the dual-track system of punishment and measure of security, based on the twofold notion of criminal liability and dangerousness.[9]

The risk of this eclectic compromise turned out to be a failure of the rehabilitative ideal: The entanglement between American and European doctrines and the search of a theoretical basis by the former, fostered by the wide diffusion of European theories in American culture, seem to have curbed the most revolutionary reforms supported by criminologists. Moreover, after the first emphasis on similarities and affinities in the punitive strategies of European and American countries at the end of the 19th century, the first decades of the 20th century saw the birth of marked peculiarities and different theoretical foundations of criminal law.

Let us turn to tracing some of these constitutional peculiarities in regard to the application of the indeterminateness principle. The proposal of an absolute or relative indeterminate sentence, as recommended by the U.S. prison reformers such as Zebulon Brockway, Warren Spalding, Frederick Howard Wines, called for lessening both the legislature and judiciary's role in determining punishments (its manner as well as its duration) for crimes: because the scope of punishment was rehabilitation of the offender, and because each individual offender ought to have been treated and reformed in different ways according to their character, background and dangerousness, the idea of a fixed, predetermined and uniform penalty was illogical and ineffective. Neither the legislature nor the judiciary had the necessary knowledge and expertise to decide the fittest treatment for the criminal, and the time needed for rehabilitation could not be fixed once and for all at the end of the criminal trial but had to be determined and periodically revised by observing the convict's behavior while serving the sentence. This task was entrusted to a body of experts in criminology and prison discipline, that was an administrative agency.

This system questioned many criminal law tenets. Let us focus on four of them, the doctrine of the separation of powers, the *nulla poena* principle, the role of the judiciary and the 'administrativization' of criminal justice.

9 De Asua (1946).

III. The separation of powers

The liberal philosophy of punishment of the Western countries, after Beccaria, Montesquieu and the French revolution, was strictly connected with the idea that the legislature only could fix penalties and that the judiciary, *bouche de la loi*, had the simple duty to apply them mechanically. This framework was a reaction against the arbitrary power of judges in the *Ancien régime* and was considered a fundamental guarantee of individual freedom against possible encroachments of law enforcement and as a bulwark of equality before the law.

This rule was strictly applied in the European penal codes, and in countries such as France or Italy there was a great doctrinal debate on the scale of penalties in order to define the right mathematical proportion between crimes and penalties. In the U.S., where each state and territory had its own criminal code and where penalties were mostly a state rather than a federal competence, the distribution of powers was different: As Wines pointed out, codes with fixed penalties like the French one "accept, on behalf of legislative branch of the government, the responsibility of apportioning punishment to supposed guilt, the majority of our codes throw this responsibility upon the judicial department, but in varying measure."[10] The outcome of this different approach was that criminal law was unequally applied in the U.S. and that a reform was needed in order to avoid prejudices and discriminations.

Given that the theory of adjustment of penalty to guilt, according to rigid criteria, was a myth, a figment of the imagination, the remedy suggested by Wines was exactly a revision of the doctrine of powers: "of the three coordinate branches of the government, two have attempted to establish and secure penal justice, namely the legislature and the judiciary. Neither had succeeded. Obviously, the only remaining alternative is to impose this duty upon the executive department."[11] Such a claim for a delegation of power to a prison board was therefore justified by the dissatisfaction with the administration of justice and the rise of a new rationale of punishment: the more the basis of punishment shifted from retribution to social self-defense, a wider notion encompassing the redemption of the offenders as well as

10 Wines (1895).
11 Wines (1904).

their incapacitation or neutralization in case of irreformable criminals, the more the strict boundaries between powers were emasculating.

In the U.S. legal culture the movement towards individualized justice and social security policies legitimized the creation of administrative bodies charged with deciding on the duration of detention, kind of treatment, conditional release on parole and final liberation of convicts. The dispute on the constitutionality of the indeterminate sentence laws enacted in many states of the Union finally sanctioned that these kinds of sentences were absolutely consistent with the tripartite genius of the American institutions and did not infringe the separation of powers.[12] The legislative function was filled by providing the sentence which was to be imposed by the judicial branch upon the determination of the guilt of the offender, the judicial branch was entrusted with the function of determining the guilt of the individual and of imposing the sentence provided by law for the offense to which the individual was found guilty, and, only "the actual carrying out of the sentence and the application of the various provisions for ameliorating the same [were] administrative in character and properly exercised by an administrative body."[13] The discretion of the prison board was considered the most efficient method of individualization and rehabilitation, because it rested on professional criminological skills lacking in both the legislative and the judicial branch. The powers of the board "while neither judicial, legislative, nor executive (…) belong to that great residuum of governmental authority, the police power, to be made effective, as in often case, through administrative agencies" (*Woods v. State*, 130 Tenn. 100, April 1914, p. 114).

It is worth noting how the rehabilitative ideal, strengthened by the belief in the potentiality of science to govern and modify human behaviors by controlling the body as well as the mind of human beings, reshaped the sense of constitutional balances in criminal law. The new priority was not to protect individual life, but to preserve social security, and this change caused a comprehensive rethinking of the traditional rationales of punishment: as Pound stated, "'unconstitutional' is ceasing to be a word to conjure with" and "as to State constitution (…) we are likely to see change become quite easy enough in the near future when there is anything which reasonably

12 Gatens (1917); Kerr (1921); Lindsey (1925); Pifferi (2011).
13 *In re Lee*, 177 Cal. 690, March 8, 1918, Supreme Court of California, p. 693.

demands it".[14] This flexibility with regard to constitutional constraints and separation of powers was not accepted by the European legal culture.

The *Rechtsstaat* was deemed such a fundamental achievement of Enlightenment and of the Revolution, at least for the French influenced nations, that its architecture was to be retained at all costs. The exaltation of abstract formulas in order to defend individual rights was giving way to a social-oriented legal system and an individualized administration of justice, implying the growth of bureaucratic administrative agencies charged with evaluating the different situations on a case by case basis, instead of the judges' duty to apply general rules uniformly. In criminal law this transformation took the form of flexible concepts (e. g., dangerousness, habitual criminal), derogations – not to say violations – of the principle of legality, mergence of legislative and executive functions, weakening of the boundaries between justice and administration. The fear that the *Rechtsstaat* would be absorbed into an administrative state (*Vervaltungsstaat*) prompted the European jurists to keep endorsing the tenets of the liberal penal system, to support the centrality of the law as a unavoidable guarantee for individual freedom and to insist upon strict and defined penal rules.[15] Because the core of individualization, and of indeterminateness above all, was a "steady, progressive abdication of the lawmaker in the hands of the judge and of the administrative power,"[16] the great majority of European jurists were very skeptical about the real effect of correctionalism.

The gap separating the American and the European approach to the individualization of punishment was rationalized in terms of different customs and traditions relating to the balance between state and citizens, between power to punish and individual safeguards.[17] The institutional equilibrium was based on the egalitarian premises that, especially in criminal law, neither biases nor differences were tolerated and that the same welfare state that had the duty to guarantee the safety of society also had to be the only legitimate actor to handle crime and punishment. The divestment of state authority in the administration of penal sentences represented one of the major obstacles toward the acceptance of the indeterminate factor in the

14 Pound (1911) XVIII.
15 Drost (1930a); Drost (1930b).
16 Rapoport (1904).
17 Hartmann (1911); Ingenieros (1913).

Old World, because it was intended as a breaking element of the virtuous balance achieved in the liberal scheme – a balance not only between the retributory, deterrent, and reformatory purposes of punishment, but also between the legislative, judicial, and executive branches. Continental jurists wanted to preserve the "old-fashioned European formula" so that the Old World "was not prepared to go as far as America in this respect."[18] The unconditioned application of the indefinite sentence was perceived as a distortion of the harmonious principles of public law that tended towards the safeguarding of individual freedom against any arbitrary invasion; the hypothesis of a discretionary sentence immediately evoked the resurgence of the unlimited administrative power of the pre-revolutionary era.[19]

IV. The nulla poena sine lege principle

The *nulla poena sine lege* principle was seriously affected by the criminalization of the 19th and 20th centuries, but its transformation was dissimilar in the U.S. and in Europe or in the countries influenced by the European legal system. Given that fixed penalties systems were considered neither useful to reform offenders nor efficient in protecting society against recidivism and habitual criminality, the American reform movement chose to divide the legality principle, retaining on the one hand the *nullum crimen* but abandoning on the other the *nulla poena*. If the definition of a crime was confirmed as a specific inalienable prerogative of legislature, conversely the sentencing phase was delegated to the prison board without any predetermined provisions by law. Legality of punishment was a heritage of the Enlightenment whose legitimacy had been overcome because the new scientific reformative rationale of punishment prompted the indeterminate sentence. Indefinite penalties were not a violation of any individual right, and were also claimed to be an achievement for the personalized treatment of criminals.

In the U.S. legal system, legality was reshaped by neatly dividing the criminal process into two phases, the guilty one and the sentencing one. If the former was still governed by traditional rules of free will and criminal liability, the latter fell within the competence of a body of experts in

18 Ruggles Brise (1911).
19 Prins (1899).

criminology. The citizens' safety was guaranteed against possible abuse by the judges thanks to the *nullum crimen*, whereas the individualization principle dominated the sentencing phase. Of course this bifurcation had an impact on criminal procedure as well, because the rules of the verdict phase were completely different from the ones of the treatment. Until the late 1920s this scheme was accepted by the American legal culture and upheld as constitutional by the courts. Then the first open criticism of the abolition of *nulla poena* arose, blaming the individualization of punishment for the erosion of the rule of law and stressing that *nullum crimen* and *nulla poena*, as two sides of the same coin, had to be inextricably interwoven because legality of punishment "provides a sieve through which can flow not only humanity and science but also repression and stupidity."[20]

In Europe, apart from Nazi legislation, and in most of the Latin American countries, the notion of the individualization of punishment had a different impact on *nulla poena*. Most of the codified systems retained the principle as a fundamental tenet, even if mitigated by the possibility of a judicial evaluation of extenuating or aggravating circumstances: the historical argument against any arbitrary power of an administrative body prevailed over the rehabilitative ideal and promoted a more conservative and less experimental sentencing system, at least apparently. Even in the English penal system, where, far from being applied in a formal meaning, *nulla poena* was intended as a prohibition for the judge to invent new punishments or exceed the statutory maximum,[21] penal policy was only partially struck by the notion of individualization. Above all, the indefinite sentence as proposed by American advocates was refused because "in striking contradiction to the principles that [had] hitherto, at least in Europe, regulated the punishment of crime," namely that for punishment to be effective it should be certain and definite, that the sentence of the court should be the final arbitrament of the case, and that the prerogative of pardon was an essential attribute of sovereignty.[22]

What was not accepted in the U.S. indeterminate laws was the delegation of sentencing powers to the administrative branch, because the same reformative purpose could be reached by the more traditional means of

20 Hall (1937).
21 Williams (1961).
22 Ruggles Brise (1901).

conditional liberation accorded by judiciary.[23] Moreover, in the face of the state duty to guarantee social security stood the criminals' right to be punished: legality of punishment had to be declined also in terms of predictability of an objective penalty, because the unlimited discretion of a public body to treat offenders until their moral reform rested on the very dangerous premise that the state had the duty to uniformly educate the deviant citizens.

From a comparative and historical point of view, the problem of *nulla poena* is not one of abstract observance of the maxim, but of concrete balances of powers and of legal mechanisms suited for protecting the individual against any possible discretionary violation of their rights.[24] The great majority of European thinkers, both of common and civil law, feared that the abolition of the *nulla poena*, in its different forms, could lead to the abolition of criminal law itself, with tremendous consequences for political democracy.[25]

V. The role of the judiciary

Thirdly, criminalization contributed to the modification of the role of the judiciary, although the direction was not the same everywhere. In the U.K., between the mid 1800s and World War I, there were different opinions and conflicts on questions of punishment: complaints about sentencing disparities and the call for curbing judicial discretion were followed by support for individualizing reforms.[26] The first movement was inclined to elaborate general rules of sentencing and sentencing standards (and it inspired the creation of the Court of Criminal Appeal in 1907), the second one exhorted the courts to use a wider range of sentencing refinements in order to better match punishment and offenders, especially professional recidivists. As Keith Smith puts it, "by 1914 the vast range of sentencing discretion enjoyed by the courts had been both substantially eroded and enlarged on several different fronts,"[27] but, from Du Cane to Ruggles-Brise, a conservative approach prevailed and, even if many reforms were introduced on the basis

23 Pessina (1912).
24 Grande (2004).
25 Ancel (1936).
26 De Vere (1911).
27 Smith (2010).

of criminological science, the rationale of punishment remained essentially retributive and deterrent, the judiciary was never deprived of its traditional authority and the American notion of the indeterminate sentence never applied.

In order to explain this choice, it is worth stressing the different institutional mood and the divergence in constitutional mindset between the U.K. and the U.S.: while American Progressives grounded their reforms on both the lack of public confidence in and the want of respect for the judicial branch, as well as on the great diversity in the states' criminal codes, the discretion of the English judges, never subjected to political pressure by the interested parties as were their elected American colleagues, was historically conceived as one of the most sacred principle of English criminal law.[28] Any effort to individualize sentences therefore had to be referred not to the prison boards but to the courts, whose role and duty were to interpret public sentiment about crime. Moreover, instead of neatly separating the guilty phase from the sentencing phase, such as suggested by the American reformers, the target of an individualized punishment could have been better achieved through a "close and intimate relation between the judicial authority that passe[d] the sentence and the prison authority that execute[d] it."[29]

The rehabilitative movement in the U.S. resulted in a significant contraction of the ordinary prerogatives of judges, justified by their lack of knowledge of behavioral sciences, criminal sociology, criminology etc.: their legal expertise was necessary only in the verdict phase but ended with the conviction, because the sentencing phase was the task of the new administrative board. The struggle against fixed penalties abstractly defined by law did not foster a wider discretion of the judiciary, but the belief that offenders could be effectively treated and reformed only through interdisciplinary scientific knowledge shifted the burden of sentencing to the executive. This was theoretically justified on the premise that science was neither arbitrary nor geographically differentiated, but rooted on an experimental truth always open to new progresses. Inefficiencies and failures of the indeterminate sentence laws were perceived not as a defeat of the principle, but only as temporary faults of the prison commissioners due to their inexperience and

28 Ruggles Brise (1899).
29 Ruggles Brise (1911) 360.

lack of criminological knowledge: the mechanism was not wrong, yet operators were not adequately educated.[30] Discriminations against convicts and the inequality of treatment from state to state, not to say from board to board, were regarded neither as consequences of an unfair sentencing method nor as violations of the equality principle, but rather as the effect of a not yet uniformly spread and not unequivocally developed criminological understanding of the offenders.

Also, in the civil law European countries the role of the judiciary was an issue. As Prins stated, the common belief was that in the 20th century, contrary to the *Ancien Régime*, judges did not disregard individual rights, but had developed a habit of respecting the rights and freedom of citizens.[31] Legal reasoning was engaged in shaping a new broader judicial function within the boundaries of legality, modifying the prerogatives of the three branches of powers without subverting the *Rechtsstaat* framework. The adherents to the positive school of criminal law interpreted the steady abdication of the legislature in the hands of the judiciary and of the executive as a sign of progress[32] and advocated wider judicial discretion, asserting that "Judicial discretion is regaining what it had lost, and rids itself of the unfortunate note as the magistrate gains in science and conscience".[33] Less radical reformers admitted the need for wider judicial power in order to individualize punishment according to the characteristic of the offender, but were also concerned about the mechanisms to balance and limit any absolute arbitrament.[34]

Even if it is recognizable that there existed a common trend in reshaping the role of the judiciary due to the impact of the criminalization process, it is likewise undeniable that this trend was not uniform at all: the variations are rationalized only in terms of different traditions, cultural heritage, peculiarities in legal mentality.

30 Lindsey (1922); Wright (1936).
31 Prins (1910).
32 Longhi (1911).
33 de Quirós (1911) 177.
34 Saleilles (1898).

VI. Administrativization of sentencing: legal rules and legal standards

As we have seen, one of the most disputed issues of the individualization of punishment and of the indeterminate sentence specifically, was the delegation of sentencing power to an administrative body. Legitimized on the basis of its scientific competence and justified by the need to go beyond an abstract formula and to take into consideration the individual offenders in all their multifaceted characteristics, the prison board clearly brought into question the tenets of the separation of powers and the role of the administrative in the welfare state. It is only one example of creation of new administrative agencies in the 20th century and can be read as part of the broader question concerning a new balance between the legislature and executive in order to better govern the complex social dynamics of industrialized modern societies. Once again the impact of criminology on criminal law tenets of the liberal state framework was different in continental Europe, in the U.S. and in the U.K. because of the different constitutional reaction to the rise of administrative bodies whose prerogatives were taken away from the legislative or the judicial branch. The problem of the legality of administrative power was clearly related to the legitimacy of the prison board: What were the limits of its action? How could the citizen be safeguarded against possible abuse of its power? Were the decisions of the board judicially reviewable? Was the sentencing phase covered by the due process clause? Different answers to these questions brought different attitudes towards the prison boards' role.

The rule of law and the *Rechtsstaat* had divergent notions of both administrative power and legality of administrative action;[35] moreover the rule of law was interpreted differently in the U.K. and in the U.S. in terms of the constitutional limits of the legislature. Dicey, as it is known, opposed the English notion of rule of law to the French *droit administratif*, because the continental prerogatives given to administrative power and governmental officials, especially with respect to the administrative tribunals, were inconceivable for the English idea of equal protection of the law and "fundamentally inconsistent with our traditions and customs."[36] Similarly the American constitutionalists stressed the equal protection of the law as

35 Sordi (2008).
36 Dicey (1902).

the national creation of a formula that embodied the purely English due process of law and stood as the antipole of the continental *droit administratif*.[37] But the 20th century even forced Anglo-American jurisprudence to recognize the rising growth of administrative law and agencies, and to investigate how to regulate them. Pound's remarks on the gradual shift from rules to legal standards in the American legal order suggested a new approach to the topic: in 1919 the Harvard Professor emphasized as mechanical application of strict rules, rigid forms and fixed principles, i. e., the means by which legal systems had sought to attain impartiality and certainty in the administration of justice since the Enlightenment, were no longer suited for regulating a much more complex modern legal system. By framing legal standards the legislature sought to balance flexible rules and the call for individualization of justice with the need of defined limits to discretionary decisions, because standards were "devised to guide the triers of fact or the commission in applying to each unique set of circumstances their common sense resulting from their experience."[38]

Thus, the problem became how these administrative agencies developed real techniques of individualization, how was their expertise verified and updated to scientific progresses and common sense adjustments, by what kind of legal mechanisms could administrative tribunals and officers be checked since they were not subject to ordinary court review. The danger of arbitrary conduct in the administrative application of legal standards, i. e., the conflict between rule and discretion, was therefore inextricably bound up with constitutional law, but the 'great society' of the 20th century, with its permeating influence of technology, large-scale industry, and progressive urbanization, asked for solutions different from the traditional ones. Felix Frankfurter suggested that safeguards to this necessary 'government by commission' could be achieved by an adequate technique of administrative application of legal standards, a flexible, appropriate and economical procedure, easy access to public scrutiny, and by an informed and spirited bar.[39] These protections for citizens' liberty neither referred to legality nor to judicial decision, but looked at a possible judicial review as a different balance to contrast potential misuse of authority.

37 Taylor (1917).
38 Pound (1919).
39 Frankfurter (1926–1927).

The sentencing power given to the prison boards was one of the many administrative powers delegated to agencies, and the criteria of their decisions, based on the notions of dangerousness, rehabilitation and social security, were nothing else but legal standards, such as 'unreasonable rates,' 'unfair methods of competition,' 'undesirable residents of the United States.'[40] It is worth noting as Sheldon Glueck, criticizing Enrico Ferri's Italian criminal code project (1921) because the Italian criminologist proposed the legislative prescription of detailed rules of individualization as a way out of the dilemma of free judicial discretion versus protection of individual liberty, recommended turning to a treatment board. The remedies to safeguard individual rights from the functioning of this administrative body were akin to the ones indicated by Frankfurter: "the definition of broad legal categories of a social-psychiatric nature within which the treatment board will classify individual delinquents; secondly, the safeguarding of individual rights by permitting the defendant to have counsel and witnesses (of fact and opinion), and to examine psychiatric and social reports filed with the tribunal, while at the same time avoiding a technical, litigious procedure, hidebound by strict rules of evidence; thirdly, provision for judicial review of the administrative action of the treatment tribunal when it is alleged to have acted 'arbitrarily' or otherwise unlawfully."[41]

The American system of the indeterminate sentence between the 19th and 20th century endorsed the creation of an administrative agency (the prison board) charged with the sentencing phase, in order to fit the treatment to the offenders. The periodical decisions of the board on the dangerousness and rehabilitation of the convicts were final and not reviewable. The legitimacy of this method rested on the commissioners' technical skills lacking in both the legislature and the judiciary, and the question of checks to this administrative authority was originally eluded because constitutional courts stated that this technique was neither an infringement of the separation of powers nor a violation of the rule of law. Yet, after a first period of experimentation, problems of inefficiency and of unjustified inequality of treatment arose: solutions were sought either through a more rational definition of legal standards and uniform elaboration of the criteria

40 Pound (1914).
41 Glueck (1928).

for the predictability of treatment,[42] or through a claim for a return to forms of judicial control such as judicial review of boards' decisions or disposition tribunal.[43] Clearly enough, the reaction from administrative justice as the chief agency of individualization was stirred in the 1930s by the fear of what was happening in Germany with the Nazi criminal reforms, but in the 1910s and 20s the main reason was the alarm about the growing administrative absolutism. Once again, a comparison with the European (and European influenced) legal order reveals deep differences and could be useful for explaining different histories in penal policies.

As a matter of fact, European legal systems were much less disposed to abandon the *nulla poena* principle and perceived any administrative discretion about punishment as a dangerous reappearance of old ghosts. The English refusal of the U.S. indeterminate sentence seems to be rationalized in terms of a different political tradition. The role of the judges was never to be removed from the sentencing phase because it represented an undeniable safeguard for the citizen and, in case of the persistent dangerousness of the offender, preventive measures of indefinite duration could be applied only after having served the ordinary penalty (Prevention of Crime Act 1908). In continental legal orders the indeterminate sentence, even if advocated by radical reformers, was never enacted, too. The strong adherence to the principle of legality provoked the attempt to force the reformative rationale of punishment within the boundaries of a stricter respect of the separation of powers: penalties had to be determined by law (especially criminal codes) and applied by the courts. The verdict and sentencing phase were not neatly bifurcated and both the decision and the execution of sentences were judicially decided. The dual-track system, i. e., the possibility to apply measures of security to dangerous criminals after the expiation of the penalty, was the correspondent to the American indeterminate sentence in Europe (Norway 1902, Italy 1930) and in Latin American (Cuban Código de defense social 1936; Uruguayan code 1933; Brazilian Code 1940): security measures could be of indefinite duration, were related to the dangerousness of the offender and aimed at a complete rehabilitation or, in case of irreformable delinquent, at a social neutralization[44] (Stoos 1930; Rocco 1930). But, according

42 Glueck/Glueck (1929).
43 Cantor (1938).
44 Stooss (1910); Stooss (1930); Rocco (1930).

to the rigidity of the *Rechtsstaat*, preventive measures of security as well as the conditions of their application were always fixed by law and 'judicialized,' even if *de facto* administrative in their nature: they were a sort of hybrid in order to reach the same repressive purpose of the indeterminate sentence (keep dangerous offenders under control) without infringing legality or the distribution of powers.

The discussion of which system provided more effective protections to individual rights is not the subject of this paper. What is worth mentioning is, nonetheless, how a global history of criminology, tending to emphasize the worldwide rise of an individualizing scientific approach to criminals' behavior and personality, fails to explain the varying impact that criminology had on national legal systems due to historical peculiarities, legal traditions and habits, constitutional contexts. A more complex approach considering neither criminology nor criminal law independently, but trying to analyze historically and comparatively how these two disciplines reciprocally influenced and molded each other, sheds light on the roots of different developments in criminal law policies and offers possible clues to investigate why penal systems are still so different today.

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