

THE FLOGGING MACHINE
ROMAGNOSI IN SEARCH OF THE PERFECT PUNISHMENT

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Abstract: In 1806 Luosi submitted its draft penal code to Romagnosi, which wrote a new draft code, the *Progetto sostituito*, and wrote the *Motivi*. In this essay I'll examine an instrument ingenious and terrible, the flogging machine, and the philosophy of punishment that prevailed in the first decade of the nineteenth century in Italy. In that period the achievements of the Enlightenment mingled with emerging repressive maneuvers.

Keywords: Romagnosi, Gian Domenico; Progetto sostituito; Criminal law; Flogging machine; Penalties

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1. *Utilitarianism, proportionality and repressive effectiveness of the punishment.*

Gian Domenico Romagnosi, major protagonist in 17th-18th century legal culture, is particularly identified with the 1807 Code of Criminal Procedure. It was the only 'national' code to be adopted in the years when Napoleonic Imperialism was imposed on Italy with weapons and laws. He was the expression of that fertile Po Valley breeding ground, which in the second half of the 18th century onwards directed men and ideas to set up new Italian criminal laws: the fervor of Verri and Beccaria had left worthy heirs, who between 1790 and 1810 were active in conciliating the great tradition of the past with the new instances of the present.

Many of the laws written in those years, which were very different from each other in content and political inspiration, bear the authoritative imprint of their author: it is what happened with the *Progetto sostituito* of the penal code written by Romagnosi in 1806, a document, as Friedman states that is not entirely unknown to scholars of criminal law history¹. However, still today it has not been fully analyzed², which is the reason why in this short essay we will delineate a few considerations on the topic of exacerbation of penal sanctions, since, as expressed by Romagnosi in his

¹ G. S. Tempia, *Il progetto di codice penale di G.D. Romagnosi*, in «Rassegna Nazionale», 20, 4 (1884), pp. 611-620; F. Luzzatto, *Giandomenico Romagnosi. Suo soggiorno a Milano e sua collaborazione al Progetto di codice penale del Regno Italico (1806-1814)*, in «La Scuola Positiva», n.s. XV, 1 (1935), pp. 393-412; M. Roberti, *Milano capitale napoleonica. La formazione di uno Stato moderno. 1796-1814*, vol. II, Milano 1947, p. 81; E. Dezza, *Il codice di procedura penale del Regno italico (1807). Storia di un decennio di elaborazione legislativa*, Padova 1983, pp. 247-255; Id., *Appunti sulla codificazione penale nel primo Regno d'Italia: il progetto del 1809*, in Id., *Saggi di storia del diritto penale moderno*, Milano 1992, p. 236; A. Cadoppi, *L'albero genealogico dei codici penali italiani. Spunti di riflessione dal codice penale del Canton Ticino del 1816*, in *Codice penale della Repubblica e Cantone del Ticino (1816)* S. Vinciguerra (ed.), Padova 2006, p. CLXXV; E. Dezza, *Multa renascentur quae iam cecidere. La plurisecolare vicenda del Progetto sostituito di Giandomenico Romagnosi*, in *Criminalia*, 2009, pp. 157-187.

² R. Isotton, *Il Progetto sostituito di codice penale per il Regno d'Italia di G.D. Romagnosi (1806). Prima trascrizione*, in «Diritto penale XXI secolo», anno V, 1 (2006), p. 120. For the origin and structure of this project see pp. 119-130.

Motivi that accompanies the *Progetto sostituito*³, it is the sanctions, intended as the truly operational part of the code, that determine the positive or negative outcome of a penal law⁴.

It is difficult to explain the Romagnosian conception of punishment in a few words: he partly takes refuge in what Pessina defined as *the absurd hypothesis of the social contract*⁵ of the Beccarian school⁶

sostituendovi la dottrina che lo stato sociale è il vero *stato di natura* dell'uomo come quello ch'è fondato nella necessità di fatto della natura umana (substituting the doctrine that the welfare state is the true *natural state* of man, like that which is founded on the basic needs of human nature)⁷

and generates a theorization in which opposing forces merged and were reconciled, such as the general-preventive goal to be achieved through exemplarity, respecting utilitarian criteria and efficacy and the rigorous observance of principles of proportionalism and retribution⁸.

Far from any humanitarianism, Romagnosi writes that in order to achieve such results, the punishments must be characterized by certainty and rigor and that prevention leads to

³ The two part manuscript is preserved at the Biblioteca Nazionale Centrale of Florence (*Fondo Nazionale* 1806, II, IV, 189). The first part is the *Progetto Sostituito, parte prima. Disposizioni Generali*, tit. I-XII with 240 articles [from now on, *Progetto sostituito*]. The second part is the *Motivi delle Note marginali e del Progetto Sostituito* [from now on, *Motivi*]. The transcription of the *Progetto* by R. Isotton is used in this essay, (nt. 2), pp. 131-177. The *Motivi*, instead, has not been transcribed yet.

⁴ *Motivi* (nt. 3), *Appendice al titolo delle pene*, All'articolo XLII, Sezione Prima § 1, f. 26.

⁵ E. Pessina, *Letteratura del diritto criminale*, in P. Rossi, *Trattato di diritto penale*, Torino 1859, p. 566.

⁶ On common and contrast points between Romagnosi and Beccaria see R. Ghiringhelli, *Introduzione a Genesi del diritto penale (1791)*, Milano 1996, pp. 93-98.

⁷ Pessina, *Letteratura* (nt.5), p. 566.

⁸ Cfr. G. Tarello, *Storia della cultura giuridica moderna. Assolutismo e codificazione del diritto*, Bologna 1976, pp. 383-392.

trattare il colpevole (che è sempre un essere umano) come un mezzo per un fine – l'esempio dato agli altri, l'intimidazione a scopi di difesa sociale e di lotta alla criminalità – che è a lui estraneo ed è proprio della società intesa come ente collettivo (treating the offender (who is still a human being) as a means to an end - the example given to others, using intimidation as a social defense mechanism and for fighting crime - which is alien to him, with society understood as a collective entity)⁹.

At the same time, the search for an appropriate proportionalist ideology allows to mitigate the negative consequences inherent in the acceptance of the idea of exemplary punishment, which often risks, if used for responding to the mere objective of prevention, to appear excessive respect to the seriousness of the offense.

However, it is the utilitarian inspiration which our author believes is victorious, through the establishment of a quantitative relationship between crime and punishment, well expressed by terminology borrowed from the vocabulary of arithmetic.

If from Beccaria on, the intent of the 'modern' penal lawyer was to maintain the difficult balance between protection of civil liberties and statism, compensating social defense with the protection of individual rights (and thus balancing contractualism with utilitarianism), Romagnosi breaks this symmetry suppressing

uno dei due termini dell'equazione e ponendo l'accento esclusivamente sull'esigenza della difesa sociale, con risultati potenzialmente inaccettabili per chi professa una visione liberale e garantistica del diritto penale (one of the two terms of the equation, and exclusively focusing on the need for social defense, with potentially unacceptable results for those who profess a liberal and protective view of civil liberties in penal law)¹⁰.

⁹ M.A. Cattaneo, *I principi dell'illuminismo giuridico penale*, in *Diritto penale dell'Ottocento. I codici preunitari e il codice Zanardelli*, Padova 1999, p. 17.

¹⁰ Isotton, *Il Progetto sostituito* (nt. 2), p. 129. «Il principio della difesa può apportare, nelle sue rigorose applicazioni, a tragiche conseguenze (si può sacrificare l'innocente per

The theoretical substrate of the composite is the raw material with which the author shapes his belief: for Romagnosi only the punishments giving the impression of physical pain were effective, and therefore useful, in the belief that man is able to become accustomed to anything (hard work, lack of food, and loss of freedom), but the prospect of real, acute, periodic and repeated suffering will always be unbearable.

This is what emerges from *Genesi del diritto penale*, the work of a lifetime, which was first published in 1791, but as is well known, it took Romagnosi other thirty-two years to complete it¹¹. And it is also what emerges from the analysis of the *Progetto sostituito*. It is the first significant element: it reveals, in fact, close consistency between the speculative Romagnosi and the Romagnosi legislator. Not only. It is undeniable that he saw an opportunity in the occasion offered to him by Luosi to render his philosophy of law patrimony into normative precepts, which in light of the experience he had acquired in the editing of his' penal code¹², made the draft a training ground for experimentation of the doctrinal construction¹³.

un interesse di difesa) e [...] ad applicazioni saltuarie di ingiustizia» (G.F. Falchi, *Il pensiero penalistico di G.D. Romagnosi*, Padova 1933, p. 48).

¹¹ «Qual è la regola giustificante l'uso delle pene? La sola *Necessità*» (*Genesi del diritto penale*, Pavia 1791 libro II, capo I, § 470). «Col dire, che la pena è *necessaria* a reprimere il delitto, cosa si suppone egli? Non sembra egli, che dir si voglia, ch'ella sia mezzo *efficace* ad ottenere un tal fine?» (libro II, capo I, § 473). «L'*Efficacia* della pena sull'anima del delinquente è in generale il *Risultato* de' rapporti, che passano fra il dolore o minacciato, o irrogato, e l'anima sensibile, e ragionevole, cui s'intima, e si fa sentire [...] Dunque l'efficacia della pena, in ultima guisa, risulta in ragion *composta* della natura, e forza del dolore, e della natura, e forza dell'anima umana assieme *combinata*» (libro II, capo III, § 496). Siamo ai primi cenni di elaborazione della teoria della spinta criminosa, destinata a rappresentare «una delle più acute intuizioni nella storia del diritto penale» [Ghiringhelli, *Introduzione* (nt. 6), p. 49, ma in generale cfr. pp. 46-63]. E la «storia, formalmente assente dall'impostazione generale, entra di prepotenza» nel penale [P. Nuvolone, *Delitto e pena nel pensiero di G.D. Romagnosi*, in «Studi parmensi», 10 (1961), p. 182, ma si vedano pp. 175-183].

¹² Romagnosi, not satisfied by the draft of the law presented by Luosi, guilty, in his opinion, of having limited himself «passare grossolanamente e rapidamente in rivista i delitti e tassarli con una pena qualunque», drew up an alternative «col quale ho riformato, rifiuto e aggiunto quanto mi pareva mancare nel progettato codice». The text of Luosi's

The topic of exacerbation of punishment, while representing only a fragment of the entire picture on regulations, is still able to offer significant insights.

It is necessary to make a first consideration: stiffer penalties responded perfectly to the values preached by the mature enlightenment. The doctrinal and legislative works of the time show that humanitarianism with which we usually consider the vision of penal law of the *philosophes*, in reality only leave a mark on a period or, rather, involve only some of its exponents. In fact, there is another side, equally significant, that fully adheres to the rigid rationalism of punishment and which re-presents it from a conservative viewpoint, fitting in with the general climate of regression which affects society, institutions, and legal policy. Adherence to this second consideration reaches its *zenith* in the years of frantic transition from the old to the new system, when that exasperated *esprit de géométrie* is recovered from the penal justice system during the enlightenment, functional to the new repressive demands, with disconcerting results at times.

It is what happened with Romagnosi: Romagnosi liked little or nothing about the correction (penal) building erected by Luosi. He criticized the lack of effectiveness, as well as the absence of any possibility for the ranking and proportionality of the sanctions. At the basis of the system, Romagnosi sustained, a sentence of absolute value was necessary, which could serve as the foundation for the evaluation of all the others, with which to exacerbate, increase, combine, or transform the punishment to fit the multitude of practical cases¹⁴. The words of Luosi, instead, were limited to

commision according to Romagnosi was a «rapsodia dei Codici longobardi, borgognoni, ripuai e un affare tutt'al più di semplice a b c della legislazione penale»; it was unable to represent the "new" and uniqueness that Italian civilization deserved [lettera di Romagnosi del 26 agosto 1806, edita in Tempia, *Il progetto* (nt. 1), pp. 617-619, in Luzzatto, *Giandomenico Romagnosi* (nt. 1), pp. 396-398 e in *Lettere edite ed inedite di G. D. Romagnosi*, a cura di S. Fermi, Milano 1935, lett. n. 63, pp. 96-99].

¹³ «Questo manoscritto inedito ad occasione di applicare alla legislazione i principi della *Genesi*, rappresenta l'espressione del maturato pensiero del Romagnosi; e non è forse senza fondamento il congetturare che per questo egli pensasse più tardi ad un rifacimento della *Genesi*, nel quale di tutto si sarebbe tenuto il debito conto, onde ne nascesse un vero e proprio trattato di diritto penale» [Luzzatto, *Giandomenico Romagnosi* (nt. 1), p. 399].

¹⁴ *Motivi* (nt.3), *Appendice al titolo delle pene*, All'art. XLII, Sez. Seconda, § 1, f. 29.

finding the sanctions in traditional apparatus, aimed at affecting freedom, substance or honor, more often ineffective and therefore useless:

per chi non ha sostanze la classe della pena pecuniaria è nulla; e il numero maggior dei delinquenti è fra quelli che non posseggono nulla. Per chi non conosce il sentimento della riputazione o si è avvezzato a sprezzarlo, l'infamia di fatto è nulla: e la riputazione non ha luogo che fra gente onesta. La perdita della libertà per chi trae una vita dura ed uniforme o è nulla, o presto diviene nulla e non colpisce la fantasia degli spettatori come convien ad una pena. Rimangono le fatiche corporali e i dolori fisici positivi. Le prime non affettano quasi mai con quel terrore che fa d'uopo alla punizione. I secondi poi (a riserva della morte) è d'uopo ottemperarli in maniera che nel mentre in cui possano incuter timore e servir di correzione non attentino all'esistenza e non lascino rotture corporali permanenti onde ridurre un uomo nell'impotenza di usare in appresso delle sue membra (for those without property, the class of the pecuniary punishment means nothing; and the greatest number of offenders is among those who possess nothing. For those unfamiliar with the sentiment of reputation or are accustomed to scorning it, infamy is in fact nothing: reputation has no place except among honest people. The loss of liberty for those who lead a hard and flat life is either null or will soon become null and does not capture the imagination of the audience as a punishment behooves. Bodily fatigue and positive physical pain remain. The first one almost never instills the terror that is necessary in a punishment. The latter (subject to death) is then necessary so that they can infuse terror and serve as a form of correction. It does not make an attempt on his life, nor leave permanent physical damage that would leave a man without the power to use his limbs afterwards)¹⁵.

It was therefore necessary to devise something that would serve as a perpetual supplement, which was corrective to the imperfections present

¹⁵ *Motivi* (nt.3), *Appendice al titolo delle pene*, All'art. XLII, Sez. Seconda, § 1, ff. 29-30.

in any kind of punishment. But such a remedy, according to Romagnosi, already existed and it was flogging, to be applied with a special machine he had designed¹⁶, capable of transforming the “engineering of penal law” of the author into engineering *tout court*¹⁷.

In these pages we will deal exclusively with the discipline of flagellation designed for punishments of criminal sentences, divided into major and minor criminal penalties¹⁸ (for which sentences of the local police came after), a classification coordinated by the jurisdiction of the different courts¹⁹.

The punishments for the worst crimes corresponded, in Luosi’s version, to the sentences for serious felonies²⁰: there were eight in both normative texts, and notwithstanding the different classificatory labels, they totally overlapped. The lists began with the death penalty, moving on to shackles, penitentiary, prison, the pillory, the posting of the notice, permanent disqualification from holding public office or from the exercise of an art or trade, ending with exile²¹. The first four were major and not cumulative; the last four were accessory and used for increasing the basic sanction²².

Even death, which in the legislative proposal of Luosi would seem aseptically imparted by beheading²³, in reality, forms of exacerbation were

¹⁶ «L’esacerbazione delle pene si fa a colpi di verghe sul dorso denudato da infliggersi con una data macchina decretata dalla legge. § I. Questa macchina è fatta in guisa che si possa graduare la forza dei colpi a piacere. § II: Presso tutti i Tribunali aventi giurisdizione criminale esiste la macchina del flagello» [*Progetto sostituito* (nt. 3), tit. VIII, art. 151, p. 162 ed. cit.].

¹⁷ Isotton, *Il Progetto sostituito* (nt. 2), p. 129.

¹⁸ Cfr. *Motivi* (nt. 3), Tit. II, All’Art. XI, § 2, f. 13.

¹⁹ *Progetto sostituito* (nt. 3), tit. V, art. 103, p. 154 ed. cit..

²⁰ Correctional punishments and those of the local police came afterwards (*Progetto del Codice penale pel Regno d’Italia col rapporto che ne contiene i motivi*, tit. II, art. 11, in *Collezione dei Travagli sul Codice Penale del Regno d’Italia*, vol. I, Brescia 1807 [d’ora in poi *Progetto (1806)*]. See also *Rapporto che contiene i motivi del progetto del Codice penale*, in *Collezione dei Travagli*, pp. 139-150 [d’ora in poi *Rapporto*]).

²¹ *Progetto (1806)* (nt. 20), art. 12; *Progetto sostituito* (nt. 3), artt. 104, § 1 e 113, pp. 154 e 156 ed. cit

²² *Progetto (1806)* (nt. 20), art. 13; *Progetto sostituito* (nt. 3), art. 114, pp. 156-157 ed. cit..

²³ *Progetto (1806)* (nt. 20), art. 16 § 1; *Progetto sostituito* (nt. 3), art. 116, p. 157 ed. cit..

found as an exception in order to satisfy proportionalist-remunerative demands.

2. “False pretenses of humanity”: rethinking capital punishment.

The Luosi draft, in fact, ‘limited’ itself to asking for a more impressive apparatus for the execution of the death penalty (the so-called *morte specialmente esemplare*) in the case of particularly serious crimes, the determination of which was strictly left to the law. Once a beheading took place, the head was hoisted up on a pole with a sign indicating the name and country of the offender, title and aggravating quality of the crime: the macabre trophy was displayed for an entire day²⁴.

On this point, in fact, Luosi contradicted his previous draft of 1801²⁵, which in part was modeled on the lines of those in the arsenal of sanctions²⁶, however varying the punitive strategy.

In the 1801 draft, death did not experience any exacerbation or *ex post*²⁷ theatricality. The afterthought, a few years later, can perhaps be

²⁴ *Progetto (1806)* (nt. 20), art. 16 §§ 2-3. «La pena di morte deve riguardarsi per la più terribile e la più imponente nella sua intensità. E’ perciò ch’ella deve infliggersi senza esacerbazione né addizione di altra pena. Noi abbiamo adottato per l’esecuzione di questa pena il taglio della testa: e sebbene costretti a introdurre una specie di morte esemplare, più imponente cioè nell’apparato, per estendere in qualche modo la gradazione delle pene, col seguire, ma senza ferocia, i gradi di malvagità dei più consumati delinquenti, ci siamo però guardati dall’inasprire coi tormenti l’ultimo fato di chi è pur uomo, quantunque della più turpe scelleraggine macchiato. Vi ha un confine anche nella pena, dove l’umanità arresta la spada della Giustizia. Rimangono per sempre condannati all’esecuzione di chiunque ha palpito di cuore quei feroci Legislatori che con brutale compiacenza gareggiarono nel trovar nuovi modi per esacerbare la pena di morte, e variar lo strazio de’ sciagurati colpevoli» [*Rapporto* (nt. 20), pp. 151-152].

²⁵ Cfr. A. Cavanna, *Codificazione del diritto italiano e imperialismo giuridico francese nella Milano napoleonica. Giuseppe Luosi e il diritto penale*, in Id., *Scritti (1968-2002)*, II, Napoli 2007, pp. 904-918. On the figure of Luosi see *Giuseppe Luosi, giurista italiano ed europeo: traduzioni, tradizioni e tradimenti della codificazione a 200 anni dalla traduzione in italiano del Code Napoléon*, Modena 2009.

²⁶ *Progetto di codice penale (1801-1802)* [from now on *Progetto (1801-1802)*], edito in A. Cavanna - G. Vanzelli, *Il primo progetto di codice penale per la Lombardia napoleonica (1801-1802)*, Padova 2000, pp. 239-342. Refer to § 35, p. 252.

²⁷ *Progetto (1801-1802)* (nt. 26), § 37, p. 252.

attributed to a political and ideological change: after the revolutionary code²⁸ and following the end of the Terror experience, Benthamite utilitarian-style philosophies began to take root in France, sending the principles expressed by Beccaria²⁹ to the background and almost to eliminating any memory of them. Anthropological pessimism spread skepticism on the possibility of entrusting the objective of social rehabilitation of the offender to the sentence.

Il diritto penale è quindi riscoperto e rivalutato unicamente nelle sue potenzialità terroristiche dissuasive, cioè quale argine al dilagare dei delitti e come strumento atto a presidiare la pubblica sicurezza e le istituzioni politiche costituite. In tal modo ritorna in auge la teorica dell'esemplarità della pena (di cui Bentham è appunto uno dei moderni profeti) (Penal law was therefore only rediscovered and re-evaluated as a potential terrorist deterrent, ie as a barrier to the spread of crime and as a tool for protecting public security and the established political institutions. In this way, the theoretical exemplary sentence came back into vogue (for which Bentham is one of the modern prophets.)³⁰

Already the draft of the *Code criminel* elaborated in France in 1801, which inspired the future Code of 1810³¹, contemplated a gruesome

²⁸ The 1791 penal law stated that the death penalty consisted *dans la simple privation de la vie, sans qu'il puisse jamais être exercé aucune torture envers les condamnés (Loi du 25 septembre 1791. Code pénal, parte I, titolo I, art. 2).*

²⁹ On common points between Bentham and the *idéologues* and the perfect harmony of his philosophy with the expectations and the unrest of the post-termidorian society, see S. Solimano, *Verso il Code Napoléon. Il progetto di codice civile di Guy Jean-Baptiste Target (1798-1799)*, Milano 1998, pp. 69-87. Sull'influenza del pensiero di Bentham nella codificazione penale francese e sulle relative critiche a Beccaria v. pp. 147-157.

³⁰ G. Vanzelli, *Il primo progetto di codice penale per la Lombardia napoleonica (1801-1802)*, in A. Cavanna - G. Vanzelli, *Il primo progetto* (nt. 26) p. 59, nt. 123.

³¹ On the exact dates of this project, completed in 1802, see, cfr. Solimano, *Verso il Code Napoléon* (nt. 29), p. 149, nt. 141 and bibliography ivi citata; M. Da Passano, *Emendare o intimidire? La codificazione del diritto penale in Francia e in Italia durante la Rivoluzione e l'Impero*, Torino 2000, pp. 101-112; Id., *I tribunali francesi e il progetto Target. La parte*

scenographic framework accompanying the extreme sentence, reserved for those who had committed the most heinous crimes, such as parricide, uxoricide, murder, arson, poisoning and sadism. In this kind of theatre *pièce* next to the red tunic of revolutionary memory, not missing was the public display of the convicted person for an hour, the placard of infamy, the amputation of his right hand before the death sentence itself³²: a choreography in part maintained in the final 1810 version³³.

A further step came with the Act of 25 February 1804³⁴: despite having achieved a modest objective compared to the original ambitious program of the unification of criminal law, this measure assumed great political and legal importance, showing how

«tra il legislatore repubblicano e i principi umanitari dell'illuminismo penale si fosse scavato un solco incolmabile» («between the Republican legislator and the humanitarian principles of penal enlightenment an impassable chasm had been dug»)³⁵.

generale, in *Codice dei delitti e delle pene pel Regno d'Italia (1811)*, rist. anast., Padova 2002, pp. XXXV-LXVII; S. Solimano, *L'edificazione dell'ordine giuridico napoleonico: il ruolo di Guy Jean-Baptiste Target*, in *Codice dei delitti e delle pene pel Regno d'Italia*, rist. anast., Padova 2002, pp. LXIX-XC; A. Cavanna, *Storia del diritto moderno in Europa. Le fonti e il pensiero giuridico*, 2, Milano 2005, pp. 590-592.

³² Solimano, *Verso il Code Napoléon* (nt. 29), p. 151, nt. 151.

³³ Cfr. M. Da Passano, *La pena di morte nella Francia rivoluzionaria e imperiale*, in «Materiali per una storia della cultura giuridica», 27 (1997), pp. 379-426.

³⁴ *Sugli omicidj, le ferite, e li furti, e sulle prove, e sull'applicazione delle pene tanto ne' delitti suddetti, quanto in tutti gli altri delitti (25 febbraio 1804)*, in *Bollettino delle leggi della Repubblica italiana*, pt. I, Milano 1804 pp. 86-112. The 1804 law established that for six crimes, defined as very atrocious (parricide, poisoning, homicide, treason, homicide united with armed robbery or accompanied by robbery, art. 4, p. 88), death must be *specialmente* exemplary, executed by decapitation, with the head exhibited afterwards «sopra un'asta con cartello indicante nome, cognome e patria del reo; il titolo del delitto, e la qualità di parricidio, latrocinio, o altra che abbia reso atrocissimo l'omicidio, e vi si conserva esposta per le rimanenti ore del giorno» (art. 5, p. 88. Sul punto cfr. C. Danusso, *Carlo Bellani: valori etici e pragmatismo di un magistrato al servizio della giustizia*, in *Ius Mediolani*, Milano 1996, pp. 841-842). On the *iter* compiled on this law see, Vanzelli, *Il primo progetto di codice penale* (nt. 30), pp. 129-135.

³⁵ Vanzelli, *Il primo progetto di codice penale* (nt. 30), p. 135.

The law aimed to bring back repressive characteristics and ferocious intimidation to punishment, combined with the fulfillment of the demand for proportionality and exemplarity. If Luosi did not fail to criticize it at first, he instead seemed to follow certain postulates in his draft in 1806, in line with the main issues of criminal policy that were unraveling in France. It could not be otherwise, given the institutional and administrative interdependence between the two territorial realities, on one side and on the other of the Alps.

The comments accompanying the Luosi draft of 1806 show some regret for having again included death among the sentences:

ai piedi dell'altare della Giustizia [...] dovemmo fare il duro sacrificio de' liberali nostri principi, e impor silenzio ai voti del nostro cuore, allorché convinti da una fatale esperienza con linee di sangue vergammo noi pure fra le pene quella di morte (at the foot of the altar of Justice [...] we had to make the hard sacrifice with 'our liberal principles, and impose silence to the votes of our heart, when convinced by a fatal experience, with lines of blood we also wrote the death sentence among the others)³⁶.

He returns however, to impose a healthy and lucid realism that still gives space, albeit limited, to the 'mournful' remedy:

la fredda ragione ha soggiogato il sentimento. Ella colla verità di sua luce impedì ai nostri sguardi d'essere abbarbagliati da quei falsi lampi d'umanità, di filosofia, d'eloquenza che scintillarono sull'orizzonte di Europa nel secolo diciottesimo e strapparono al consenso di alcuni celebri e grandi Regnanti l'abolizione della pena di morte (cold reasoning has subdued feeling. With the truth of its light it prevented us from being dazzled by those false pretenses of humanity, philosophy and eloquence that glowed on the horizon of Europe in the 18th century and obtained consent for the abolition of the death penalty by several renowned and great Rulers)³⁷.

³⁶ *Rapporto* (nt. 20), pp. 150-151.

³⁷ *Rapporto* (nt. 20), p. 150.

Romagnosi used harsher tones, introducing the distinction between simple and qualified death, but did not indicate the concrete ways of enforcing it in the *Progetto sostituito*³⁸. However, it is inevitable that in the crimes in which the offender goes beyond the sentiments of natural instincts and good behaviour, or where an excess of evil passion is found, which can bring horror and indignation to the social collectivity, the legislature cannot, according to the Parmanese jurist, settle for an ordinary form of death. A punishment which is identical in the way it is enforced would induce the multitudes to equate the crimes of different types and to give the same reprehension to the murder of a villain as to that of a prince or equalize the killing of an outsider to that of one's own parents³⁹.

According to Romagnosi, therefore, even death should instill terror in its application, but in a different way than what was prepared by the European legislation of that time, which was not very able to fulfill that goal. The theatricality foreseen by the revolutionary code of 1791 did not seem appropriate: the red robes imposed on the murderers, the arsonists and the poisoners, the black veils with which they covered the face of the parricide⁴⁰, or the various symbolisms are more « propri a far ridere che a recar spavento (fit to make people laugh than to make them afraid)»⁴¹.

Article 5 of the Law of February 25, 1804, reproduced in the Luosi draft, showed instead according to Romagnosi, obvious confusion between the purpose of the publicity of the sentence and the reason that had induced the legislature to choose the fixing of the truncated head of the offender on a pole as exemplary death⁴². Therefore, a punishment capable of generating fear which was proportionate to the gravity of the crime was lacking⁴³, since the penalty is sought to be terrible in order to adequately

³⁸ *Progetto sostituito* (nt. 3), art. 116 § 1, p. 157 ed. cit..

³⁹ *Motivi* (nt. 3), Tit. II, All'Art. XVI, § 7, f. 17.

⁴⁰ *Loi du 25 septembre 1791* (nt. 28), parte I, titolo I, art 4.

⁴¹ *Motivi* (nt. 3), Tit. II, All'Art. XVI, § 7, f. 17.

⁴² *Motivi* (nt. 3), Tit. II, All'Art. XVI, § 7, f. 17.

⁴³ «La via la più naturale colla quale gli uomini manifestarono sempre la loro detestazione e il loro orrore per qualsiasi o reale o supposto misfatto si fu quella della grandezza e dello

fulfill its objective, which is to correct the offender (objective which Romagnosi does not believe in), but to prevent, in an intimidating prospect, the future commission of crimes. It is appropriate that the legislator is guided by sole necessity and utility (the two terms being constantly referred to), avoiding certain manners or not giving in to the lure of some sirens⁴⁴.

Bisogna anche guardarsi da una certa zerbineria legislativa che con un'aria plausibile ci trascina a far l'apoteosi d'una femminile ritrosia nell'irrogare i supplizi [...]. Ci vuol violenza, è vero, a dettar certe pene a sangue freddo, ma bisogna vincersi. Bisogna anche affrontare la pretesa umanità del secolo e dichiarare che il fine della punizione è quello di incutere terrore (It is important to look out for a certain legislative gallantry which with a plausible air leads us to make the apotheosis of a feminine reluctance in imposing the punishments [...]. It takes violence, it is true, to order certain punishments in cold blood, but this has to be accepted. We must also address the alleged humanity of the century and declare that the purpose of punishment is to instill terror)⁴⁵.

spavento dei supplici. Non istà in mano del legislatore il modellare i sentimenti naturali come a lui piace. Bisogna guardarsi che una malintesa dolcezza non li seduca suo mal grado, e non renda le sue leggi ludibrio del robusto e intraprendente malfattore» [*Motivi* (nt. 3), Tit. II, All'Art. XVI, § 7, f. 17].

⁴⁴ «Se parliamo delle pene che si applicano esse devono essere attinte non dai pregiudizi della moda o da una vaga e mal definita premura di dolcezza [...], bensì dalla cognizione solida delle cagioni del delitto, della sensibilità, delle abitudini e del temperamento comune dell'azione a cui si danno le leggi [...]. Se parlassi ad uomo meno superiore dell'E.V. io dovrei temere di naufragare contro i pregiudizi della moda che infetta anche le leggi penali, le quali non debbono avere altra norma che la necessità della cosa, necessità che delude tutte le zerbinerie dei piccoli legislatori e colla forza irrefragabile dell'esperienza costringe quel governo che si lasciò sedurre da loro ad una vergognosa respiscenza quasi sempre peggiore delle cattive leggi che adottarono» [*Lettera 26 agosto 1806, Corrispondenza Romagnosi-Luosi*, in Luzzato, *Giandomenico Romagnosi* (nt. 1), p. 397].

⁴⁵ *Motivi* (nt. 3), Tit. II, All'Art. XVI, § 7, ff. 17-18.

These arguments reappeared in the 1809 draft, entrusted to a commission of jurists, among which the name of Romagnosi stands out. After the failure to proclaim the treatise of 1806, work in the field of criminality resumed and three years after the *Progetto sostituito*, exemplarity and severity of the punishment became the trade-mark of the newly proposed legislation: an already tried terrorist apparatus not far from the transalpine legislation which was due to enter into force in 1811 and for which the Italian ruling class shared the centralist framework⁴⁶, and at the same time was in line with the continuity of the Romagnosian ideology.

3. *The flogging machine from juridical engineering to penal economy.*

In a society beset by the increase of crime and obsessed by the need to maintain public order, penal law is perceived as a 'military' defense of power, and not as a pedagogical tool.

Exemplarity is the watchword that can guarantee punishments aimed at achieving control of the society, or a cold social hygienism⁴⁷. More than the crime-punishment relationship, it is necessary to look at the offender-punishment relationship, based on a kind of psychic determinism: the sentence must win over the criminal tendency with its psychological pressure. If the sentences must instill fear, not as a result of the wickedness of the legislator-man, but as a cold calculation of need, then Romagnosi contrived the most bizarre punishment to do this, and at the same time was more cynically utilitarian than it is possible to imagine: the flogging machine.

This would seem to be a step backwards compared to what was asserted by members of the insurgents of jurists against flogging in Lombardia. It had an Austrian matrix, present in the Josephine Code of 1787⁴⁸ and later with the development of the Code of 1803⁴⁹, and was

⁴⁶ Dezza, *Il codice* (nt. 1), p. 159, for an overview see, pp. 140-178.

⁴⁷ A. Cavanna, *Il Codice penale napoleonico. Qualche considerazione generalissima*, in Id., *Scritti* (nt. 25), p. 1225.

⁴⁸ *Codice generale sopra i delitti e le pene*, Vienna-Rovereto 1787, parte I, cap. II, § 32 e parte II, cap. II, § 11.

⁴⁹ *Codice penale universale austriaco*, Milano 1815, parte I, sez. I, capo II, § 20 e parte II, sez. I, capo II, § 16.

considered shameful for a population of superior refinement and culture such as the Lombardy one.

In reality, the floggings were a remedy which were hated more in form than in substance, as confirmed by a number of previous projects completed in the Milanese area: the generalized contempt for this form of hardening of the sentence clashed with the need to scale the punishment not only in regard to the type of offense, but also to the social background of the offender, in clear opposition to the principle of equality of the legal subject who was the recipient of the law⁵⁰.

First Beccaria⁵¹, Luigi Villa⁵² and Peter Mantegazza⁵³ who had not spread an inflamed announcement, but had used caution: it was necessary

⁵⁰ Compare with *La 'magnifica ossessione'. Il sistema delle pene nel codice giuseppino: le contraddizioni di un sistema 'illuminato'*, in *Codice generale austriaco dei delitti e delle pene (1787)*, rist. anast., Padova 2005, pp. CLXIII-CLXVIII.

⁵¹ If in *Dei delitti e delle pene* Beccaria flawlessly sustained equality of punishments for all subjects without distinction (C. Beccaria, *Dei delitti e delle pene*, Edizione nazionale delle Opere di Cesare Beccaria, diretta da L. Firpo e G. Francioni, Milano 1984, § XXI, pp. 73-75), twenty years later, in his *Brevi riflessioni intorno al Codice generale sopra i delitti e le pene*, he urged to consider the differences of social class when imposing a political sanction: «si deve avere moltissimo riguardo alla condizione delle persone, perché il bastone che può correggere un facchino, avvilisce e annienta un nobile, un onesto negoziante, e qualunque civile persona, e involge tutta la loro famiglia nella più luttuosa ignominia» (C. Beccaria, *Brevi riflessioni intorno al Codice generale sopra i delitti e le pene, per ciò che riguarda i delitti politici*, in C. Cantu', *Beccaria e il diritto penale*, Firenze 1862, *Appendice*, p. 350).

⁵² Luigi Villa, the attorney general and tax lawyer who developed a project for the adaptation of the Josephine code of 1787 so that it could enter into force in the territories of Lombardia, sustained that if inflicted in private, the blows could be saved among the «rimedi correttori». Only in the case - added Villa - where the possibility of a revision of the charge of the offender and therefore a possible social recovery was ruled out in advance, was it possible to keep the flogging public. Further caution consisted of limiting the number of blows, in containing the number to fifty for men and thirty for women, not because of abstract evaluation of principles, but in consideration of the complex physical structure of the Lombards, who would not have been able to support more without seriously risking their health. (L. Villa, *Originale codice delle Leggi Criminali e Politiche rassegnato al R. Governo dal Procuratore Generale della Camera Ligi Villa nel 1787 7 Giugno*, edito in P. Rondini, *Il progetto di codice penale per la Lombardia austriaca di Luigi Villa [1787]. Pietra scartata o testata d'angolo?*, Padova 2006, p. 286. See also, pp. 121-122 and in particular nt. 169).

to restrict the use of the floggings to the lowest social classes (not having the honor that such a punishment risked offending), or, on the contrary, to extend the provision to all, but avoiding its enforcement in public in order to spare the person from consequent infamy.

Romagnosi, therefore, seemed to fit into the heart of Italian culture (Lombardia in particular), where tensions resumed and were taken to extreme consequences.

The proposed proportionalist model of enlightenment, in an attempt to objectify the criminal proceedings, structured the relationship between crime and punishment on formal logic criteria. The cases were classified according to a scale of severity of the values, which would have had to correspond to the sentences according to applicative automatism that were extremely simplified and impersonal. This scheme, however, was not enough to ensure compliance with the principle of proportionality, which descended from the general to the particular, to create an almost tailor-made sentence for each person, rather than entire criminal categories. If the idea of proportion is therefore the foundation around which the punitive system hinges, flogging, for Romagnosi, is the unit of measure.

The *Progetto sostituito* does not provide us with much useful information on the system of flogging. Here we find only cold and impersonal regulations. Article 115, in fact, limits itself to pointing out that flagellation may be used only as a supplement or exacerbation⁵⁴, with the sole exception for the local police punishments, which could increase to the rank of principal sentence in cases established by law⁵⁵, and did not ever constitute exacerbation of the death penalty⁵⁶.

Title VIII, devoted entirely to the subject, was composed of ten intricate provisions describing the implementation of the flogging. It could take place only in cases expressly provided by law, with regard to both men and women in life sentences, in penitentiaries, houses of correction or

⁵³ The reference is from my essay, *Nella disuguaglianza la giustizia. Pietro Mantegazza e il codice penale austriaco (1816)*, Milano 2002, pp. 96-111.

⁵⁴ *Progetto sostituito* (nt. 3), art. 115, p. 157 ed. cit.

⁵⁵ *Progetto sostituito* (nt. 3), art. 154, p. 162 ed. cit.

⁵⁶ *Progetto sostituito* (nt. 3), art. 155, p. 162 ed. cit.

fortresses, in the presence of the prison 'population'. When it constituted an increase in the sentence of shackling or in penitentiaries, for the first time it was executed in front of the entire community, except in the case of women or children under the age of twenty⁵⁷.

The last four long and complicated rules governing how the number of strokes were to be imposed in minute detail, as determined in practice by the courts from a minimum and a maximum set by the law, which also indicated the times of recurrence of the punishment. The calculation was extremely complex, and this is not the place to go into detail: it is sufficient to recall that the absolute maximum limit of possible lashings to be imposed in a single session was sixty and the minimum was six, to be repeated even once a week⁵⁸.

The real source of knowledge of Romagnosi's thinking was *Motivi*, which revealed a dark side of penal thought by an author who was often celebrated as the founder of modern and liberal criminal law. Proceeding by degrees, first with logical arguments and then juridical ones, according to a dialectical *pro* and *contra* scheme, the Emilian lawyer was first committed to demonstrating the falsity of certain critical statements against such a form of exacerbation, to then launch into a passionate defense of flogging, by proving both the need and the opportunity.

Si è proclamata la dolcezza delle pene e si è declamato contro la loro severità. Ma dolcezza e severità sono due parole relative le quali non determinano nulla di preciso, non danno niuna direzione particolare; non esimono regola alcuna, non operano nulla, non dicono nulla. Il legislatore non conosce veramente che necessità e moderazione. La necessità viene determinata dalla ragione della pubblica sicurezza cui deve difendere dai danni dei facinoroso. La moderazione è lo spirito col quale egli non eccede i confini di questa necessità. La dolcezza degenera in debolezza allorché il freno contro il delitto non è abbastanza efficace a spegnere le cagioni. La severità degenera in tirannia allorché si tormenta al di là del bisogno della completa

⁵⁷ *Progetto sostituito* (nt. 3), artt. 150-153, p. 162 ed. cit..

⁵⁸ *Progetto sostituito* (nt. 3), artt. 156-159, pp. 163-164 ed. cit..

sicurezza (He proclaimed the mildness of the sentences and ranted against their severity. But mildness and severity are two related words that do not determine anything specific, nor give any particular direction, nor express any law, nor serve anything or say anything. The legislator knows nothing but necessity and moderation. The need is determined by reason of public security which must be defended from the damage of the ruffians. Moderation is the spirit in which one does not go beyond the boundaries of this need. Mildness degenerates into weakness when the deterrent against crime is not effective enough to extinguish the causes. A heavy hand degenerates into tyranny when it torments beyond the need of complete safety⁵⁹).

Therefore

farebbe d'uopo d'una tale pena che lasciasse una memoria salutare nella correzione, in vece di lasciare il confuso sentimento d'una privazione che svanisce troppo presto; e non agisce acutamente su la memoria di chi la provò, e su la fantasia di chi ne fu spettatore (such a punishment is needed that leaves a healthy memory in the correction, instead of leaving a confused feeling of privation that vanishes too soon and does not act acutely on the memory of those who experienced it, and the imagination of those who were spectators)⁶⁰.

Starting from these premises, Romagnosi believed that any criticism of flogging responded more to common approaches than to any real negative effects regarding it, with the result that a judgment which was legally impartial and neutral hid a misguided sense of ethics and morality⁶¹.

The author invites those who criticize such a solution, considering it barbaric and uncivil, to reflect on the commonly accepted opinion that the floggings are an excellent remedy for those individuals, such as street thugs, for whom traditional penalties are ineffective. Neither a fine nor

⁵⁹ *Motivi* (nt. 3), Tit. II, All'Art. XLII, Sez. Prima, § 7, f. 26.

⁶⁰ *Motivi* (nt. 3), Tit. II, All'Art. XLII, Sez. Seconda, § 1. f. 30

⁶¹ *Motivi* (nt. 3), Tit. II, All'Art. XLII, Sez. Seconda, § 2, f. 30.

imprisonment are an effective punitive response to offenders who usually are without property or are poor, ready to see prison not as an affliction but as a delight; exile would be excessive and suspension from a trade for those who do not have one would be impractical. All that can be done is to beat the thief with twelve or fifteen well-aimed lashes to quell any foolish ambition or criminal passion⁶². The echo of Kaunitz resonates here in a report from 17 May 1780, complaining about the action by the Senate for the ordinary sentences of boys who were lazy or addicted to petty theft, for which the chancellor suggested instead to adopt a summary and cursory procedure, in imitation of what was happening in Vienna: once captured, they had to be beaten, for one day or more⁶³.

Romagnosi also recalled that the beatings were a common tool of domestic discipline. In likening the sovereign or the government to the good father of a family, it would hence allow it to also imitate those private punishments⁶⁴.

The real motives for the support of flagellation are found in the reasoning of penal economy, which imposes the use of everything that could be helpful to achieve the goal. If the Penal Code is not a statute of chivalry, as noted by the jurist from Salsomaggiore, the law of necessity must follow⁶⁵, which requires the legislator to render the goal of prevention into legal precepts, including general and special penalties⁶⁶, identified on the basis of scalability to allow for a proportional adjustment to the crimes⁶⁷: it is the speculation of *Genesi* translated into practice.

Here, then, the flogging machine, simple and frightening at the same time, consists of a large wooden base « come quella che serve alle ruote colle quali si fa la corda (like that which serves the wheels to make cord

⁶² *Motivi* (nt. 3), Tit. II, All'Art. XLII, Sez. Seconda, § 3, f. 31.

⁶³ Cfr. G.P. Massetto, *Aspetti della prassi penalistica lombarda nell'età delle riforme: il ruolo del Senato milanese*, in Id., *Saggi di storia del diritto penale lombardo (Secc. XVI-XVIII)*, Milano 1994, pp. 365-368.

⁶⁴ *Motivi* (nt. 3), Tit. II, All'Art. XLII, Sez. Seconda, § 3, f. 31.

⁶⁵ *Motivi* (nt. 3), Tit. II, All'Art. XLII, Sez. Seconda, § 2, f. 30.

⁶⁶ *Motivi* (nt. 3), Tit. II, All'Art. XLII, Sez. Seconda, § 4, f. 31.

⁶⁷ *Motivi* (nt. 3), Tit. II, All'Art. XLII, Sez. Seconda, § 5, f. 32.

with)»⁶⁸, on which other boards are erected perpendicular to it, crossed by a twisted wood that moves by rotation. At one end of this wooden cross hangs a large iron rod that is used to turn the wood.

Of the wooden cross in object a hole is made at a certain distance from the opposite end of the highest part

Pel ricordato legno trasversale si pratici ad una certa distanza dall'estremità opposta a quella da cui pende il vette un foro» per inserirvi una corda di ferro e un bastone, munito di un globo mobile di piombo di vario peso

in modo che si possa levare a piacere. Il bastone sorta fuori dal globo, e all'estremità del medesimo pendono verghe di sanguine o di cornio, fissate in guisa da mutarle ad ogni opportunità (insert an iron cord and a stick, fitted with a movable lead ball of various weights so that it can be changed at will. The stick rises from the ball, and at the end of it dogwood or cornel rods, fixed in such a way that they could easily be changed)⁶⁹.

The description is accompanied by detailed calculations and measurements⁷⁰, which if adhered to allow the machine to act not as a means to inflict pain freely, but as a dispenser of fair and impartial punishment. The condemned man lies with bare shoulders at a distance sufficient enough to allow the ends of the rods to hit his entire back. From the part of the plank the lever is lifted a little more than a quarter of a circle and is set free, in order to move the rods, which will rise and lower with momentum that is proportional to the weight of the offender and that of the globe, striking blows with the force and the strength that is opportune to wield. This result is obtained by changing the weight of the movable ball placed at the end of the rod⁷¹.

⁶⁸ *Motivi* (nt. 3), Tit. II, All'Art. XLII, Sez. Seconda, § 6, f. 33.

⁶⁹ *Motivi* (nt. 3), Tit. II, All'Art. XLII, Sez. Seconda, § 6, f. 33.

⁷⁰ Some examples, the perpendicular boards were five feet long and were about seven feet away from each other. The board on which the offender lay down on was half a foot below the machine and so on [*Motivi* (nt. 3), Tit. II, All'Art. XLII, Sez. Seconda, § 6, f. 33].

⁷¹ «Affinché poi nel discendere non oltrepassi la perpendicolare e faccia solamente la

The flogging machine, therefore, allows to mitigate the abstract equality of the sentences, which do not consider the impact of personal reflections and the dissimilar social harm procured by the execution of the punishments in the hands of anyone different from them for sex, age, education, but especially for their perception of their sense of honour⁷². The necessary relativism inherent in the nature of things cannot answer with the uniformity of the law, in order to not risk creating a penal law which is unfair, improvident and defective, even if it theoretically meets the principles of equity⁷³.

There is no shortage of information on how to fulfill and comply with the proportionalist principle in order to avoid monstrous aberrations. Thus, the punishment by flogging must be inversely proportional to the time of the principal penalty.

It should, however, also take into account the specific physical constitution of the condemned: so that each time that the flogging is imposed with a greater number of blows, a longer interval is established between the successive ones, in order to allow a complete recovery⁷⁴.

In accordance with the principle of proportionality, Romagnosi followed a generally accepted rule, i.e. the shorter the sentence time, the stronger, though more infrequent, must be the floggings

perché nella memoria più forti rimangono le rimembranze dolorose non in proporzione della ripetizione, ma in proporzione della forza

metà dell'oscillazione, senza di che egli tenterebbe anche di infrangere le verghe, si contrapponga alla direzione della perpendicolare un macigno, o grosso tronco fitto in terra contro il quale vada a sbattere il detto vette discendendo, e rimbalzi tosto. Acciocché poi il movimento sia più regolare, e intervenga il meno d'arbitrio possibile, si costruisca a fianco del detto vette un congegno di due legni alti un piede circa più della macchina, framezzo a' quali giri una carrucola. Una corda legata all'estremità del globo o bastone di ferro passi per questa carrucola. L'esecutore mediante questa corda alza il detto vette fin dove può giungere e lo lascia cadere tutto di un tratto. Il corpo del condannato non dovrà mai avere il capo volto verso la parte dalla quale si dà moto alla macchina» [*Motivi* (nt. 3), Tit. II, All'Art. XLII, Sez. Seconda, § 6, ff. 33-34].

⁷² *Motivi* (nt. 3), Tit. II, All'Art. XLII, Sez. Seconda, § 8, f. 34.

⁷³ *Motivi* (nt. 3), Tit. II, All'Art. XLII, Sez. Seconda, § 8, f. 36.

⁷⁴ *Motivi* (nt. 3), Tit. II, All'Art. XLII, Sez. Seconda, § 9, f. 37.

delle impressioni ricevute nell'atto della sensazione. Ora nella condanna di tempo minore più presto procurandosi la libertà del delinquente era d'uopo di preparare nell'anima di lui una più viva memoria salutare di castigo valevole a frenarlo dal ricadere nel delitto allorché fosse in libertà (because in the strongest memories the painful memories remain not in proportion to the repetition, but in proportion to the strength of the impressions received in the action of the sensations. Now in shorter sentences, in procuring the freedom of the criminal sooner it was necessary to prepare a strong memory of punishment in his soul, in order to stop him from committing crime when released)⁷⁵.

Each time that the flogging is prepared with the highest possible number of blows, it is expected to take place in the prison in the presence of all prisoners who have not been condemned to receive the same punishment:

ivi essendovi altri condannati che non furono assoggettati a così fatta pena, era d'uopo che allo spettacolo del dolore del paziente si avvezzassero ad associare l'idea del maggior dolore all'idea del delitto maggiore di quello ch'essi commisero (since there were other prisoners not subject to such a punishment, it was necessary that the exhibition of the victim's suffering would make them associate the idea of more intense suffering to the idea of a more severe crime than the one which they themselves had committed)⁷⁶.

In as much as this practice was reserved for the most heinous crimes, it was therefore very rare. Thus, inurement to the spectacle of suffering was avoided and the goal of leaving a strong impression on the soul of the spectator was reached.

Collo stabilire per tanto le sole pene comuni, altro non si fa che tessere la prima orditura della ragion criminale. Il compimento sta nella pena

⁷⁵ *Motivi* (nt. 3), Tit. II, All'Art. XLII, Sez. Seconda, § 9, f. 37.

⁷⁶ *Motivi* (nt. 3), Tit. II, All'Art. XLII, Sez. Seconda, § 9, f. 37.

supplementare di un valor certo e tale che si possa dividere in tutte le frazioni necessarie a pareggiare l'efficacia della pena. Avvi altre pene, fuorché quella che io ho suggerito, che soddisfaccia a questa mira? (With the establishment therefore of only the common sentences, it does nothing else but weave the first array of criminal reason. The fulfillment lies in the additional punishment of a certain value, which we can divide into all the fractions that are necessary to equalize the effectiveness of the punishment. Are there other punishments, outside what I have suggested, that satisfy this purpose?)⁷⁷

“E’ una macchina curiosa” disse l’ufficiale all’esploratore, abbracciando con uno sguardo in certo senso ammirato la macchina, che pur conosceva bene (“It ‘a curious machine,” said the officer to the explorer, embracing with a look, in some way admiring the machine, that he nonetheless knew well).

A machine consisting of a bed, boards, wheels and a glass harrow with needles embedded in it, was used to inscribe the name of the law violated on the body of the condemned. Everyone, through the window, could see how the inscription was written on the body: a long needle wrote and a short one sprayed water to wash away the blood and thus keep the writing clear. The needles embroidered the man’s back, deeper and deeper: it took six hours before the prisoner lost consciousness, twelve to die, and the sentence was finally executed.

Kafka, about a century after Romagnosi, in his short story “In the Penal Colony”⁷⁸, for one of those curious and perhaps inexplicable coincidences, blends fiction and reality. Its pages of hallucinated normality are most likely worthy for showing us how sometimes what appears as a choice that is rationally needed in the spasmodic search of the perfect punishment, can transform into a nightmare of horror through the intervention of a morbid human inclination.

⁷⁷ *Motivi* (nt. 3), Tit. II, All’Art. XLII, Sez. Seconda, § 8, f. 36.

⁷⁸ F. Kafka, *Nella colonia penale* [1914], in *Racconti*, ed Mondadori, Meridiani Collezione, Milano 2006, pp. 285-318.

We must perhaps give credit to artistic transfiguration to guess what the fate of the machine devised by Romagnosi would have been if it had been really used? The intuition of the literary genius helps us to reflect on the potentially devastating outcomes inherent in blind adherence to the canons of geometric rationalism of enlightenment memory.