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“Between disgrace and death”. Female imputability and infanticide honoris causa in Italy (1810-1930)

Abstract

The aim of this essay is to analyse the legal debate on the crime of infanticide honoris causa focusing on doctrine and legislation in force in Italy before and after its unification. For this purpose, it will be firstly investigated the doctrinal debate on sensibility/insensibility of women that were the basis of the interrelated legal problem of women’s imputability (capacity to deliberately choose good or evil) that recall the ancient principle of infirmitas sexus borrowed from the tradition of Roman Law. Secondly, it will be analysed the changes in the definition of infanticide in different penal codes in force in Italian peninsula, from pre-unitarian codes to Zanardelli (1889) and Rocco Code (1930) in order to underline the importance of feeling of maternal honour and its relevance in the repression of infanticide. In conclusion, the essay will focused in which way infanticide as a crime was paradigmatically able to encompass many questions beyond the legal realm, including questions of gendered relationships, private and social emotions, and sexuality, all of which have obvious political and social implications; moving from private family dramas to the public stage of trial, the infanticidal mother took on the characteristics of the quintessential mater dolorosa that well had characterized the troubling shift from nineteenth and twentieth century in Italy.

1. The ‘weaker sex’ before the law

For centuries, even though individual women have been punished for transgressing gender norms, the studies on female crime has been almost totally inexistent: criminal law was shaped wholly by and for men¹. 1

However, since the end of the nineteenth century, in Italy legal scholars and alienists (as early psychiatrists called themselves) began debating the criminal responsibility of women. Although the inferiority of women is an element that was not born in the nineteenth century, thanks to Cesare Lombroso (1835-1909) and his school, with the advent of a new way of understanding the criminal law, the emphasis shifted from an abstract criminal law (indifferent to the person who committed the crime) to a criminal law focused on the criminal. Officially established in 1876, with the publication of “Criminal Man” [*L’uomo delinquente*], the Positivist School’s aim to deconstruct criminal law, shifting the primary focus from the crime to the criminal and creating an individualised system of punishment inspired by biological and socio-psychological characteristics of the offender². This involved concentrating studies on the individual perpetrator and surrounding environment. The principal purpose of Lombroso’s approach was making criminal law a real social science, in contrast to the earlier criminal law-Enlightenment rationalism represented by the various doctrinal currents generically called the Classical School. This earlier model considered a crime the mere consequence of the breach of a legal rule, and as an event arising from the free and voluntary human being’s choice. In contrast, the Positivist School was strenuously opposed to this abstract and ahistorical 2

¹ M. SBRICCOLI, Deterior est condicio foeminarum. La storia della giustizia penale alla prova dell’approccio di genere, in: G. CALVI (Ed.), *Innesti. Donne e genere nella storia sociale*, Roma 2004, p. 73.

² See generally F. COLAO, *Le scuole penalistiche* (entry), in: *Enciclopedia Italiana di Scienze, Lettere ed Arti*. VIII Supp. Diritto, Roma 2012, pp. 349-356.

rationalism, which led to an “immutable law” separated from context. Furthermore, Lombroso and his followers saw the primary intent not only to deny scientifically the existence of free will, but also to expunge any “metaphysical” element from the criminal justice system, thereby delivering “the law in the real life”³.

The main impact of the Positivist School was in questions relating to the philosophical foundations of criminal responsibility, and the relationship between crime and punishment. In focusing not on the crime but on the criminal, this new approach also contributed to growing interest in examining female offenders; in particular, mothers charged with infanticide. Such women were considered criminal because they violated prescribed gender roles in the *fin de siècle* society. They were labelled as evil because they chose to give in to their sexuality and emotions.

In this changed context, it became important to distinguish whether a crime had been committed by a man rather than a woman like never before. In particular, legal scholars tackled the difficult problem: could women choose between evil and good? Given the assumed inferiority of women, the legal debate was focused on the possibility of including the female gender as a cause for exclusion of or a reduction in a woman’s capacity to be imputable, recalling the old institution of *infirmetas sexus* in force in Roman law⁴. Legal scholars, already involved in the long-standing problem of the existence of free will as the basis of criminal responsibility, were also divided on this issue⁵. On the one hand, there were experts who supported the full legal equality of men and women before the law, despite their evident biological differences. On the other hand, precisely because of the physical differences between the sexes, some experts believed women had a lesser or different degree of legal capacity. An example of this second position is the well-known legal scholar Giovanni Carmignani (1768-1847), who argued for the introduction of an exonerating circumstance for women offenders in criminal matters, akin to the one already existing in civil law. Even so, Carmignani’s position differed from a consolidated doctrinal approach that excluded or reduced the eligibility of women, thereby uniting such case with those of a lesser ability for discernment as a result of organic defects (*imbecility of intellect*); he argued that incidence of female gender could be more appropriately assessed in the emotional sphere (*rush of affection*)⁶.

Some experts argued that gender differences should be taken into account, but they should not be compared to other causes of diminution of responsibility, such as youth. Rather, gender should constitute a mitigating circumstance. Tancredi Canonico (1828-1908), jurist and politician, supported this position, arguing that being a woman was akin to other qualities—advanced age,

³ U. SPIRITO, *Storia del diritto penale italiano da Cesare Beccaria ai giorni nostri*, Firenze 1974³, p. 25.

⁴ See M. GRAZIOSI, *Infirmetas sexus. La donna nell’immaginario penalistico*, in: *Democrazia e diritto* 2 (1993), pp. 99-143; S. DIXON, *Infirmetas Sexus: Womanly Weakness in Roman Law*, in: *Tijdschrift voor Rechtsgeschiedenis* 52 (1984), pp. 343-371 and R. QUADRATO, *Infirmetas sexus e levitas animi: il sesso “debole” nel linguaggio dei giuristi romani*, in: F. SINI, R. ORTU, (Eds), *Scientia iuris e linguaggio nel sistema giuridico romano*, Milano 2001, pp. 154-194.

⁵ E. MUSUMECI, *Cesare Lombroso e le neuroscienze: un parricidio mancato. Devianza, libero arbitrio, imputabilità tra antiche chimere ed inediti scenari*, Milano 2012, pp. 151-173.

⁶ G. CARMIGNANI, *Teoria delle leggi della sicurezza sociale*, Pisa 1831, vol. II, p. 175.

infirmity, previous imprisonment, and multiple sentences— as a reason to decrease the degree of punishment⁷.

Even the eminent professor of criminal law and leading figure of the Classical School, Francesco Carrara (1805-1888), substantially adhered to the ideology of the organic inferiority of women, on account of their “moodiness, nervous excitability and greater sensitivity,” but he refused to support the application of the *infirmitas sexus* in criminal law in order to avoid the introduction of a sort of privilege or immunity in favour of women⁸. Without denying that a woman was less intelligent than a man, Carrara said that this could not be invoked in any case as a cause for decreasing the criminal responsibility of the female offenders, given that they were provided with a “lucid and orderly enough intelligence to keep them capable of understanding the debt with regard to religious law and morality, as well as to state law”⁹. No importance in fact, according to Carrara, nor the loss of enjoyment of political rights and freedoms of the woman nor the physical weakness (*frailty of constitution*), being the “morality of the action”¹⁰ could be completely decoupled from both the political wisdom and physical force.

The debate reached its peak soon after the publication by Cesare Lombroso, in collaboration with his pupil Guglielmo Ferrero (1871-1942), of *The Criminal Woman* (1893)¹¹. This book was an immediate, international success that dealt, for the first time, specifically with female offenders, a topic that had been underexplored¹². In it, Lombroso and Ferrero used the same techniques of empirical observation already adopted for the study of the criminal man, corroborating their thesis with data reported in charts and tables. They catalogue all anatomical, anthropometric, and psychological features of different types of women; they highlighting the differences between *normal* women, female criminals, and prostitutes.

The biggest challenge, according to Lombroso, was how to explain the lower frequency of female crime despite the supposed lower evolutionary level in women, a problem he contrasted with the theory of the criminal man as *atavistic* or primitive, which had already been formulated. In order to overcome this apparent contradiction that seemed to undermine his entire theoretical framework, the Italian criminologist portrayed not only the crime, but the entire female world, as something totally detached from the male universe: “the lesser frequency of the criminal type among female criminals” actually confirms the fundamental principle of theory of born criminal because “it is linked to women’s lesser frequency of degeneration of cortical epileptic irritation” or rather, the

⁷ T. CANONICO, *Introduzione allo studio del diritto penale*, Torino 1866, p. 304.

⁸ F. CARRARA, *Programma del corso di diritto criminale. Parte generale*, Lucca 1867³, p. 143.

⁹ F. CARRARA, *Programma del corso di diritto criminale*, Lucca 1863, p. 115.

¹⁰ *IBIDEM*.

¹¹ On the scientific and cultural biography of Lombroso see D. FRIGESSI, *Cesare Lombroso*, Torino 2003 and, more recently, P. KNEPPER, P. J. YSTEHEDE (Eds), *Cesare Lombroso Handbook*, London 2013 and P. MARCHETTI, *Cesare Lombroso* (entry), in: *Enciclopedia Italiana di Scienze, Lettere ed Arti. VIII Supp. Diritto*, Roma 2012, pp. 366-370.

¹² See M. GADEBUSCH BONDIO, *La tipologizzazione della donna deviante nella seconda metà dell’Ottocento: la prostituta, la criminale e la pazza*, in: M. BERETTA, F. MONDELLA, M. T. MONTI (Eds), *Per una storia critica della scienza*, Bologna 1996, pp. 283-314.

basis of the crime¹³. This would be explained simply by a difference between women and men in which atavism and “male ardour” are replaced by another form of born criminality, mainly female, namely prostitution, equivalent in all respects to the crime. “Prostitution and criminality,” Lombroso and Garofalo wrote, “are analogous or, one might say, parallel phenomena, to such an extent that they meet at their extremes”¹⁴. For this reason, they considered the prostitute to be a criminal; even if she had not committed a crime, on the basis of her physical weakness or low intelligence, as was evident and confirmed by the numerous physical and mental *abnormalities* (e. g., the smaller skull, the masculine voice, the short hair, etc.) found on prostitutes.

2. The comeback of *infirmitas sexus*

By the last decade of the nineteenth century, despite the failure to include female sex among the causes excluding or limiting imputability under the Zanardelli Code (1889), the first penal code of unified Italy, the legal debate about female criminal responsibility showed no sign of ending¹⁵. The organic inferiority of woman, and especially the question of her excessive or absent sensitivity, led some scholars to believe that female sex should still be considered as a mitigating circumstance¹⁶. In one of the many handbooks published immediately after the approval of the new Code, the author, Francesco Scarlata, a lawyer from Messina, Sicily, argued that “a woman has a more sensitive and gentle fibre than a man and she cannot stand the rigor of certain penalties [...] in comparison to the male sex, stronger and more vigorous. This is why certain penalties are imposed on the, with a special treatment, which makes them appropriate to the mild organic constitution of women”¹⁷. Scarlata’s opinion was not rare since the existence of an attitude towards women characterized by a feeling halfway between pietism and paternalism very common especially among legal scholars and alienists in the late nineteenth century. Hence, despite the nascent movement in favour of women’s emancipation, the law was not exempt from vulgar clichés about the inferiority of women, rooted in society for centuries and now masked by a pseudo-scientific objectivity. However, these trivial prejudices notwithstanding, the discussions showed that, regardless of the different approaches, all are agreed that what distinguished men from women was the *emotionality* of the latter (to the point of becoming almost synonymous with femininity), or rather, the deep conviction a woman “*feels much more than she understands*”¹⁸. In this vein, Salvatore Ottolenghi (1861-1934), a pupil of Lombroso and founder of the Italian forensic police (*polizia scientifica*), published a pamphlet

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¹³ C. LOMBROSO, G. FERRERO, *Criminal Woman, the Prostitute, and the Normal Woman*, Durham 2004 [Or., *La donna delinquente, la prostituta e la donna normale*, Torino 1893], p. 36.

¹⁴ LOMBROSO, FERRERO, *Criminal Woman, the Prostitute, and the Normal Woman*, p. 221.

¹⁵ Despite the contemporary distinction between “gender” and “sex”, in Nineteenth century, all penal codes and legal issues always used the term “sex” [sesso] with a meaning all-encompassing and different from the current one.

¹⁶ See, among others, F. PUGLIA, *Manuale del diritto penale*, Napoli 1890, p.149.

¹⁷ F. SCARLATA, *La imputabilità e le cause che la escludono o la diminuiscono*, Messina 1891, p. 49.

¹⁸ M. MANFREDI, A. MANGANO, *Alle origini del diritto femminile. Cultura giuridica e ideologie*, Bari 1983, p. 19) *italics added*.

entitled *The Sensitivity of the Woman* [*La sensibilità della donna*] (1896) focusing on the following question: “Do women feel more or less than men?”¹⁹ Legal scholars and scientists of different tendencies converged with their answer to this question. According to these experts, the sensitivity of woman was evident on all fronts; from anatomy to physiology, all elements proved woman’s “delicate complexion”²⁰. In other words, the “woman question” became a problem that was not only psychological; it was also social and patho-physiological, or, in a word, *organic*²¹. For this reason, huge importance was given to the sexual element so to create a strong demarcation between genders, even at the psycho-physical boundary, especially connected to their reproductive system. Obviously, this approach was not an innovation of the nineteenth century but only a revival of a very old and deep-rooted belief derived from the medical and philosophical knowledge of ancient Greece. As is well known, women’s features were presumed to be intimately linked to their wombs, according to an ancient tradition that dates back to the Greek conception of the female body. In the Hippocratic Corpus²², many diseases of women were explained by the theory of the movable or “travelling uterus” that, according to the medical knowledge of the time, which was often inextricably mixed with “low” knowledge and popular superstitions, was like an animal able to travel within the body of the woman (from the liver to the hip, up to the head and feet), causing difficulty in breathing or speech²³.

Despite major advances in medical science during the Enlightenment, academics continued to debate how the influence of female reproductive organs on women’s behaviour—in other words, how was it that they could “think with their womb”? The issue was so controversial that even Giacomo Casanova intervened in the debate with a satirical pamphlet entitled, not surprisingly, *Split Hairs* [*Lana caprina*] (1772) (as he considered the debate only a futile scholarly question). Here the notorious seducer mocked two professors at the University of Bologna who argued that women were victims of uterine fury, observing, with his usual irony, that it could equally be said of men that they are the victims of their “spermatic infirmity”²⁴. Somehow, the causticness of Casanova seemed to paradoxically anticipate, the tendency to identify a disease with a gender, as it would happen in the following century with hysteria. Despite the success of Casanova’s pamphlet, it did not detract in the least from this secular belief; the old principle is cited repeatedly in the nineteenth century medical treatises, including *propter solum uterum, mulier est, id quod est*, expressed by the Flemish psychologist Jean Baptiste van Helmont (1579-1644)²⁵. The belief that woman was both a “lacking

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¹⁹ O. OTTOLENGHI, *La sensibilità della donna*, Torino 1896, p. 3.

²⁰ T. VIGNOLI, Note intorno ad una psicologia sessuale, in: *Rivista di filosofia scientifica* 6 (1887), p. 422.

²¹ See G. GAMBAROTTA, *Inchiesta sulla donna*, Torino 1899.

²² See *amplius*, P. MANULI, *Fisiologia e patologia del femminile negli scritti ippocratici dell’antica ginecologia greca*, in: M. D. GRMEK (Ed.), *Hippocratica. Actes du Colloque hippocratique de Paris* (4-9 septembre 1978), Paris 1980, pp. 393-408.

²³ V. ANDÒ, *Modelli culturali e fisiologia della maternità nella medicina ippocratica*, in: G. FIUME (Ed.), *Madri. Storia di un ruolo sociale*, Venezia 1995, pp. 33-44.

²⁴ G. CASANOVA, *Lana caprina. Epistola di un licantropo* [1772], Roma 2014, p. 30.

²⁵ “Donna” (entry) in: AA.VV., *Dizionario compendiato delle scienze mediche*, Venezia 1828, VI, I, p. 245.

male”²⁶ and, above all, a victim of the tyranny of the womb²⁷ (which was considered her “second brain”²⁸ because of the close correlation between the uterus and the brain)²⁹ persisted within the medical and legal fields into the nineteenth century.

These issues were the cultural background of the major theme that would occupy much of the psychiatric and psychoanalytic debate during the nineteenth and twentieth centuries: the controversial nosological category of hysteria³⁰. This kind of mental illness, construed as quintessentially feminine because it featured a general irritability and nervousness, mingled with the presumed natural fickleness and fragility of woman. In this context, hysteria was “considered peculiar to the female organism, entirely dominated by emotions”³¹.

In contrast to this concept of women’s hypersensitivity, an opposing idea about the loss of the “merits” of femininity (e.g., women’s alleged kind, loving, and caring dispositions) developed. This approach, initially attributed to Giuseppe Sergi (1841-1936) and later developed by Lombroso and Ferrero, paradoxically resulted in the theory of women’s lower sensitivity or insensitivity as compared to men³². According to this opinion, which was supported by supposed “empirical” and objective data, not only woman’s sensitivity was weaker than that of man’s, but also women were characterized by a “greater dullness”³³ or rather her apathy.

On the basis of Sergi’s studies, Lombroso and Ferrero argued that the mistaken belief that women were more sensitive than men derived from a fundamental confusion between sensitivity and irritability or excitability; the latter was the real characteristic of women, but because of external symptoms, it was wrongly judged as sensitivity. According to this line of thinking, excessive irritability, which characterized cases of hysteria, was more accurately diagnosed as “hyper excitability”. Accordingly, woman’s insensitivity was evident in her endurance of physical and psychic pain, a general limitation of the five senses, and the minor or absent “sexual sensitivity” as demonstrated by things like refractoriness, frigidity, and indifference, or even annoyance, in response to male sexual arousal. The lack of sexual desire (frigidity) would be accompanied by a greater “sexuality”, which coincided with the maternal instinct and women’s alleged need for protection.

²⁶ See V. GAZZANIGA, *La medicina antica*, Roma 2014, pp. 119-121.

²⁷ O. MOSCUCCI, *The Science of Women. Gynaecology and Gender in England (1800-1929)*, Cambridge 1990, pp. 32-34.

²⁸ L. PELT, *Cenni storico-medici intorno al morocomio femminile, giuntavi una memoria sulla pellagra localmente trattata e la statistica delle alienazioni negli anni 1844-45-46*, Venezia 1847, p. 40.

²⁹ V.A. BERARDI, *La donna e la imputabilità giuridica*, Bari 1881, p. 9.

³⁰ See at least, F. DUBOIS, *Storia filosofica sulla ipocondria e sull'isterismo*, Milano 1836; I. VEITH, *Hysteria. The history of a disease*, Chicago 1965; M. FOUCAULT, *History of Madness*, London 2006 [Or., *Historie de la folie à l'âge classique*, Paris 1972]; E. ZARETSKY, *Secrets of the Soul: a Social and Cultural History of Psychoanalysis*, New York 2004 and more recently, A. SCULL, *Hysteria. The disturbing history*, Oxford-New York 2009 and S. ARNAUD, *On Hysteria. The invention of medical category between 1670 and 1820*, Chicago 2015.

³¹ A. TAGLIAVINI, *La «mente femminile» nella psichiatria italiana dell'Ottocento*, in: P. ROSSI (Ed.), *L'età del positivismo*, Bologna 1986, p. 482.

³² See M. GIBSON, *On the Insensitivity of Women: Science and the Woman Question in Liberal Italy, 1890-1910*, in: *Journal of Women's History*, 1990, 2, pp. 11-41.

³³ LOMBROSO, FERRERO, *Criminal Woman, the Prostitute, and the Normal Woman* (nt. 13), p. 61.

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Lombroso and Ferrero synthesize this combination, quoting the illustrious obstetrician Giordano: “man loves the woman for her vulva, while woman loves man as a husband and father”³⁴.

Beyond the opposite orientations in this debate regarding woman’s sensitivity or insensitivity, there was also a clearly emerging implication regarding the strict division of gender roles. According to the terms of this debate, the man is still a rational human being, determined and well balanced, without excessive or deficient sentimentality, and is therefore *naturally* intended to perform both manual and intellectual work³⁵. On the contrary, the woman is an unstable and unpredictable person, more suggestible and hypnotisable³⁶, with the singular destiny of being a mother, a human being “biologically destined to motherhood [...] minor than man in subjectivity and thought”³⁷. This gender role, which encompassed her entire emotional life, inevitably was reflected in the concept of feminine deviance, oscillating, as we will see, between evil and insanity.

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3. The Juridical relevance of female honour

Although literature on infanticidal mothers in the second half of the nineteenth century was well developed, particularly in England and France, the Italian context deserves separate examination because of how social and legal mandates developed under the influence of the Catholic Church³⁸. Unlike many other countries, in Italy the concealment of pregnancy or of an illegitimate birth was not considered a crime in itself. On the contrary, driven by the social and religious dictates of the time, a pregnant single woman had the *duty* to maintain secrecy, giving up her rights to new-born illegitimate offspring by leaving them at foundling homes, religious institutes, or pious orphanages for unwanted infants³⁹. These organizations served social, familial, and legal needs because they “protected family honour and Christian souls and acted as a safety valve against criminal impulses”⁴⁰.

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³⁴ LOMBROSO, FERRERO, *Criminal Woman, the Prostitute, and the Normal Woman* (nt. 13), p. 60.

³⁵ On gender roles according to medical science in nineteenth century see, G. ARMOCIDA, *Donne naturalmente. Discussioni scientifiche ottocentesche intorno alle “naturali” disuguaglianze tra maschi e femmine*, Milano 2011, pp. 57-62.

³⁶ On the debate on the relationship between hypnosis and crime cf. P. MARCHETTI, *L'inconscio in tribunale. Azioni incoscienti e diritto penale. Da Charcot alle neuroscienze*, Milano 2014.

³⁷ V. P. BABINI, *Le donne sono antropologicamente superiori, parola di una donna di genio*, in: A. VOLPONE, G. DESTRO-BISOL (Eds), *Se vi sono donne di genio. Appunti di un viaggio nell'antropologia dall'Unità d'Italia a oggi*, Roma 2011, p. 13.

³⁸ For a comparative framework on infanticide, including the different influences of religion on the perception of this crime, see M. JACKSON, (Ed.), *Infanticide. Historical perspectives on child murder and concealment, 1550-2000*, Aldershot 2002. For a deeper research in the British context see A. -M. KILDAY, *A History of Infanticide in Britain, c. 1600 to the Present*, London 2013; for interesting remark on infanticide in France, R. LALOU, *L'infanticide devant les tribunaux français (1825-1910)*, in: *Communications* 44 (1986), pp. 175-200.

³⁹ Cf. D. DE ROSA, *Il baule di Giovanna. Storie di abbandoni e infanticidi*, Palermo 1995; D.I. KERTZER, *Sacrificed for Honor: Italian Infant Abandonment and the Politics of Reproductive Control*, Boston 1993 and, more recently, F. LOMASTRO, F. REGGIANI (Eds), *Per la storia dell'infanzia abbandonata in Europa. Tra Est e Ovest: ricerche e confronti*, Roma 2013.

⁴⁰ S. STEWART-STEINBERG, *The Pinocchio Effect. On Making Italians, 1860-1920*, Chicago 2007.

The woman/mother reduction became a model even in its negative form, emerging perfectly in the crime of infanticide, a model that fails to encompass the question of the relationship between man and woman, between private and social feelings or issues related to sexuality: “*atrocior* crime, inexcusable and incomprehensible, infanticide indeed meant more and more exclusively maternal crime”⁴¹. Not by chance, since the second half of the nineteenth century a lively debate arose around the crime of infanticide, the female crime *par excellence*, or better, around the infanticidal mother, developed.⁴² Under this new scrutiny, the private family dramas of these mothers moved to the public stage of the trial⁴³, where the women soon took on “all the features of a *mater dolorosa*”⁴⁴. Even though there were some cases of infanticide committed by men⁴⁵, infanticide *honoris causa* was “a rare case of indulgence”⁴⁶ towards women or rather towards mothers.

In the context of nineteenth-century Italian jurisprudence, there was an element that clearly distinguishing between two categories of women; as judge Lino Ferriani (1856-1921) claimed, the honour, like a divine ray illuminating the dark life of women, was the *discrimen* that separated *lost women* from *honest women*⁴⁷. Thanks to the valorisation of maternal honour, the crime of infanticide gradually underwent a significant change from the legal tradition of previous centuries, in which the crime was generally⁴⁸ defined as murder and sometimes punished with harsher penalties⁴⁹. In the nineteenth century by contrast, infanticide came to be seen as a separate crime, committed only by a mother and increasingly focusing on the feeling of honour. This change can be tracked through the work of Cesare Beccaria (1738-1794), who in his famous *On Crime and Punishments*, defined infanticide as the result “from the unavoidable conflict in which a woman is placed if she has given in to weakness or violence”⁵⁰, questioning “how could one who finds herself caught between disgrace and the death of a being unable to feel what harms it, not prefer the latter to the certain misery to which she and her unhappy fruit would be exposed?”⁵¹. This crime, included

⁴¹ A. PROSPERI, *Dare l'anima. Storia di un infanticidio*, Torino 2005, p. 18.

⁴² Cf. V. P. BABINI, *L'infanticida tra letteratura medica e letteratura giuridica*, in: P. ROSSI, (Ed.), *L'età del positivismo*, Bologna 1986, p. 453.

⁴³ On trials for infanticide through the words of infanticidal mothers see, R. SELMINI, *Profili di uno studio storico sull'infanticidio: esame di 31 processi per infanticidio giudicati dalla Corte d'Assise di Bologna dal 1880 al 1913*, Milano 1987, pp. 78-85.

⁴⁴ S. STEWART-STEINBERG, *The Pinocchio Effect. On Making Italians, 1860-1920*, Chicago 2007, p. 185.

⁴⁵ P. GUARNIERI, *Men committing Female Crime: Infanticide, family and honor in Italy, 1890-1981*, *Crime, Histoire & Sociétés / Crime, History & Societies* 2 (2009), pp. 41-53.

⁴⁶ N. CONTIGIANI, *Uccidere in famiglia. La lesione dei vincoli di parentela e la difesa dell'ordine civile nella riflessione italiana del primo Ottocento*, Macerata 2008, p. 110.

⁴⁷ L. FERRIANI, *La infanticida nel codice penale e nella vita sociale*, Milano 1886, p. 114.

⁴⁸ Infanticide was punished as autonomous crime for the first time according to *Constitutio Criminalis Carolina* (1532). In this sense, see, G. TINUNIN, *L'amore tragico: abbandono e infanticidio nella tarda età moderna*, in: L. ACCATI (Ed.), *Madri pervasive e figli dominanti. Dinamiche sociali e violenza nella Controriforma*, Firenze 2003, p. 154.

⁴⁹ On the history of infanticide in a comparative way see also T. PEDIO, *La soppressione del neonato per causa di onore*, Milano 1954, pp. 1-20.

⁵⁰ C. BECCARIA, *On Crime and Punishments and Other Writings*, 4a ed. (Edited by R. BELLAMY) Cambridge 2003, p. 81.

⁵¹ *IBIDEM*.

by Beccaria in the category “crimes difficult to prove”, although a serious offence, its punishment was considered too excessive for the psychophysical situation and the related social implications. Similarly, the renowned jurist and philosopher Gian Domenico Romagnosi (1761-1835) wondering whether infanticidal mothers were really evil women or not, clarified that infanticide originated “from an admirable feeling, but wrongly employed”⁵². In other words, the sentiment of purity and sexual honour, were inverted like in a perverse mirror game.

This transition influenced the promulgation of nineteenth-century penal codes in which there was the problem of including the cause of honour as a consequent mitigation of punishment of infanticide. Unlike the honour killing⁵³ (usually a wife-murder committed by her husband to revenge the “injury of his honour” after a betrayal), in the case of infanticide, the cause of honour, is a sort of “shield” used by the woman to protect her sexual purity⁵⁴ and to hide her dishonour with an retroactive and redemptive effect, converting the act from a private sin into a collective drama in which the infanticidal mother who had “saved” her honour by suppressing her illegitimate offspring become, paradoxically a heroic figure. In other words, the crime itself was proof of the honour of the woman who had committed it. So, the infanticidal women often were sentenced depending on their social class or level of “social respectability”. For example, an unmarried girl of a good family, “seduced and abandoned”, who had killed her child to hide her dishonour, was punished in a clement way or was acquitted; on the contrary a prostitute, being already a “dishonoured woman” or rather, a women already without honour, was harshly judged. Thus, the concept of female honour ultimately became the key to defining the crime of infanticide itself, so much so that *honest* women could commit infanticide while other offenders—mere *evil* women—are defined as common criminals and as such were to be punished more severely. For this reason, the honour that pertained to infanticide is a sort of weapon capable of being reintegrated in the society: the woman who had lost her honour could see it given back only through marriage or, surprisingly, through a criminal act cancelling the proof of her lost honour⁵⁵.

This assumption was well underlined in the position of Francesco Carrara who was firmly convinced of the need to separate the crime of infanticide *honoris causa* (the possibility that a woman committed infanticide in order to protect her honour) from murder and also that the natural maternal feeling can only exists only within a legitimate marriage and family and, outside of which, maternal feeling must necessarily perish at the prospect of the shame deriving from an extramarital pregnancy. In any case, according to Carrara the assessment of motive is the key to mitigation, in order to distinguish those cases in which the woman has actually acted to defend her honour from

⁵² G. D. ROMAGNOSI, *Opere di G. D. Romagnosi riordinate ed illustrate da Alessandro De Giorgi*. Vol. VII. *Scritti sul diritto penale*, Palermo-Napoli 1874, p. 285, f. 1.

⁵³ On honour killing (the assassination of a woman committed by her husband) between nineteenth and twentieth century as “the last seal of patriarchy” cf. M. CAVINA, *Nozze di sangue*. Storia della violenza coniugale, Roma-Bari, pp. 199 ss. (digital edition).

⁵⁴ On the juridical relevance of female purity cf. G. CAZZETTA, *Praesumitur seducta*. Onestà e consenso femminile nella cultura giuridica moderna, Milano 1999.

⁵⁵ SELMINI, *Profili di uno studio storico sull'infanticidio* (nt. 43), p. 35.

those in which she has acted from purely selfish reasons⁵⁶. In short: not all emotions of infanticidal mothers are considered equal by Italian criminal law.

If this was the thesis generally supported by the followers of the Classical School, on the contrary, according to Positivist School of Criminology, it was also necessary to reform the definition of infanticide albeit on different assumptions. One of the legal scholar belong to the Positivist School, Scipio Sighele (1868-1913), for example, emphasises the extremely social nature of this crime in which the woman faces the “brutal dilemma”⁵⁷ of having to choose between two opposite feelings namely compassion and honour, or rather two forms of love: the *private love* for the unborn and the *public* one for society.

According to the Positivistic School, it was especially important to highlight the social origins of this crime. Lombroso, in his studies on the criminal woman, argued that infanticide was driven by a “social passion” (honour) become a “passion for the society”. For this reason, in his list of “crimes for pure love” Lombroso included not only sexual crimes and infanticide, but also suicide and murders of passion committed by female criminals-by-occasion or criminals-by-passion, such as the infanticidal mother. This kind of female criminal, in Lombroso's theory, was the result of a mix of private and public emotions, embodying “maternity and sexual desire, love and passion, but also care and devotion”⁵⁸. Lombroso's characterization of the infanticidal woman was therefore oscillating from commiseration and progressivism: on the one hand, he considered her biologically and psychologically inferior⁵⁹ to man, even if not delinquent, for her physical and mental immaturity made her similar to a child⁶⁰. On the other hand, Lombroso believed the woman to be oppressed by social taboos and injustices, and he advocated for social and legal changes, including more tolerant marriage customs and less restrictive divorce laws⁶¹. In other words, according to Lombroso, an unwanted pregnancy was not only a sort of ineluctable fate to be suffered by woman but also a social injustice to be repaired.

4. Inside penal codes

However, even as the concern about the growing phenomenon of concealment of children by single mothers, especially in the new teeming metropolises of the first Industrial Revolution, was spreading across Europe, the sanctioning answer to this phenomenon was not quite homogeneous. The Napoleonic penal code (1810) punished infanticide with the death. Similar dispositions are found in the codes in the German-speaking countries, likely due to the inevitable influence of the

⁵⁶ CARRARA, Programma del corso di diritto criminale (nt. 9), p. 253.

⁵⁷ S. SIGHELE, Sull'infanticidio, Archivio Giuridico 42 (1889), p. 199.

⁵⁸ BABINI, L'infanticida tra letteratura medica e letteratura giuridica (nt. 42), p. 459.

⁵⁹ LOMBROSO, FERRERO, Criminal Woman, the Prostitute, and the Normal Woman (nt. 13), p. 56.

⁶⁰ V. P. BABINI, Un altro genere. La costruzione scientifica della natura femminile, in: A. BURGIO, (Ed.), Nel nome della razza. Il razzismo nella storia d'Italia 1870-1945, Bologna 1999, pp. 475-489.

⁶¹ C. LOMBROSO, L'uomo delinquente in rapporto all'antropologia, alla giurisprudenza ed alle discipline carcerarie, 5^a edition, Torino 1897, vol. III, p. 338.

French Code on the other coeval codes, in which this offence is punished with greater severity than the codes of the pre-unification states. For example, in the code of the Kingdom of the Two Sicilies (1819), although in articles 349 and 352 n. 3, infanticide was punished, as in the Napoleonic Code “with death”, the *causa honoris*, was already inserted, article 387 providing that “in the infanticide, capital punishment will be diminished to the third degree of irons, in the only case in which it was intended to conceal the cause of honour by an illegitimate offspring”. Explicit reference to the protection of the mother’s honour is also to be found in the regulations concerning crimes and punishments in the Papal States (1832), in which a distinction is made between murder, always punished with “torture until the last day” (article 275), and an infanticide. According to article 276 § 7, “committed by the mother, in order to conceal a feeling of honour over an illegitimate birth” which is punished by life imprisonment.

Likewise, the criminal code for the Duchy of Parma, Piacenza and Guastalla (1820) and the Sardinian Penal Code (1839) provided for a milder treatment, but only if the act was committed by the mother. The same limitation of benefits in relation to the offender is found in the Code of the Grand Duchy of Tuscany (1853), famously inspired by the Enlightenment and in which for the first time there was a significant reduction of the sentence if infanticide was committed directly by mother. In this code, infanticide was disciplined not only as an *ad hoc* crime, finally separated from the crime of murder in which it had been until then joined, but the code also included a detailed provision (articles 316-321) assigning different penalties based on the diversity of the condition of the woman in labour (for example, the penalty was more severe if the woman decided to commit infanticide “before she was surprised by the pain of childbirth” and milder in the opposite case), the subjective element (with malice or blame), and of offspring (whether still alive or not).

In this complex legal framework, article 318 stood out, stating that a different sentence applies when voluntary infanticide was committed by the mother “to avoid overhanging suffering”. This innovative formulation replaces the old *causa honoris* but at the same time, given its vagueness, covered a much broader range of factors, which hypothetically include honour. A return to greater severity occurred with the new Sardinian Penal Code (1859), which echoed the 1839 code by confirming capital punishment for infanticide (a punishment also reserved for the crimes of patricide, poisoning, and assassination), with the exception of a possibly lighter sentence for the mother (i.e., the reduction of sentence from one to three degrees) if the victim was defined as “illegitimate offspring” (article 532).

The change in sanctions through the various penal codes (from the death penalty to the introduction of the cause of honour) should not be construed as an advantage for the women: the apparent mildness of the sentence involved a confirmation of her inferior status and this will have a noticeable impact also on the representation of the evil woman. The sinful woman (a legacy of the ancient representation of infanticidal woman as damned or witch) that was punishable by death was converted here to a kind of pitying infanticidal mother who, if she had acted to be reintegrated in the society (causes of honour) could be forgiven and nearly redirected to the right path. Of the ancient vindictive mothers moulded on the myth of Medea remained only an invisible

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spectre: the “unnatural mothers” in the courts of the nineteenth century, arouse a mixture of pity and condemnation rather than fear and dismay.

By the end of the nineteenth century, with the promulgation of Zanardelli Code (1889) in the unified Italy, the definition of infanticide was very different from the protective and innovative model introduced by the Tuscan code, being the latter mainly influenced by Enlightenment values. The most important change was the existence of a crime only if committed, as stated by article 369, “to save the offender’s own honour or that of offender’s wife, mother, daughter even if adoptive, or sister”. In other words, in all the circumstances encompassing the “illegitimate offspring” as provided in the Sardinian Code of 1859, here become indispensable elements of the crime. Infanticide was therefore characterized according to two features: infanticide is viewed as an attenuated hypothesis of murder rather than a distinct crime and the *honoris causa*, related with a lighter sentence, can be invoked by a number of subjects and not only by the mother, with an expansion of the feeling of honour from *maternal* to *familial*. This decision was justified by the Minister of Justice, who clarified that the dismay and serious discomfort experienced by a woman who gave birth to an illegitimate child was also transmitted to the closest relatives, thus justifying the extension of “dishonour”⁶² to the rest of the family.

With the Zanardelli Code we witness once and for all the identification of *causa honoris* as the sole motive for infanticide⁶³ that will take on a new look with the approval of the Code Rocco in 1930, during the Fascist Regime. In this code infanticide *honoris causa*, defined in article 578 (which will remain in force until it is repealed by Law 442/1981) become an autonomous *figura criminis*. Simultaneously, crimes *honoris causa* (such as homicide; injury and abandonment of newborns) were included in the 1930 Code, as a sign that the honour⁶⁴, now disengaged from the previous conception of the infanticidal mother, had now expanded in concentric circles to take on a different socio-cultural feature, untied from the specific references to female sexuality (*sexual honour and purity*)⁶⁵ that had prevailed for most of the nineteenth century. With the advent of the Fascist Regime indeed the previous hierarchy of emotions, to be considered by law was totally inverted e reconsidered, with obvious implications also on the representation of the criminal woman. Crimes were defined in terms of the protection and supremacy of the state; individual rights were protected only in connection with injury to the public sphere; and so there was, in other words, a “publicisation” of individual interests. For example, sexual freedom was protected only as a reflection of the public life of every citizen. Thus the crime of rape was not an offence against the person, but against “public morality and decency”. Moreover, it was certainly significant that the Code included crimes relating to “the protection of the integrity and health of the race” [*stirpe*] and “family protection”, which were fully functional to a Fascist model of society and family, with

⁶² G. ZANARDELLI, Relazione a S.M. il Re del Ministro Guardasigilli per l’approvazione del testo definitivo del Codice Penale, Torino 1890, p. 295.

⁶³ See E. M. AMBROSETTI, L’infanticidio e la legge penale, Padova 1992, p. 25.

⁶⁴ On honour in Italian criminal law see at least, E. MUSCO, Bene giuridico e tutela dell’onore, Milano 1974.

⁶⁵ See G. FIUME (Ed.), Onore e storia nelle società mediterranee, Palermo 1988.

its emphasis on a strong leaders and breadwinners and submissive and subordinate wives⁶⁶. In this context, the honour of infanticidal mothers was also translated from individual sphere to collective and familiar one. Every humanitarian implication of the *causa honoris*, as in Cesare Beccaria's view, was definitively lost.

5. The crime that embarrassed legal scholars

It is possible from these brief remarks, to understand the emphasis placed on the most social of the emotional pulls of the infanticidal mother to commit the crime, victim of a hostile society and icon of a new kind of sexual behaviour. The ancient conception of a crime committed against nature nevertheless remains, rooted in the idea that “the purpose of the social-physiological existence of the woman is procreation and motherhood: *mulier autem familiae suae caput et finis est*, because she must be not only a wife, but also a *mother*, and here is the whole secret of her existence”⁶⁷.

According to this approach, maternal feeling should always be alive in the woman; otherwise she would be an unnatural mother, as rhetorically branded by Lino Ferriani,⁶⁸ already known for having published in 1886 an essay on infanticidal mothers⁶⁹ halfway between law and literature, in which women guilty of having killed their children, are paraded one after another like, as the theatrical characters (the teacher, the maid, the seamstress, etc.) parading one after the other like in a *feuilleton* in which each emotion and action reflects the social class to which they belong.

In addition to this traditional and moralizing approach, between the end of nineteenth and the beginning of the twentieth century there was also the medical approach, in intent on turning infanticidal honour from a *social passion* (as interpreted by Lombroso) into a pathological passion⁷⁰. According to this approach, pregnancy is a form of disease: “when the woman is about to become a mother, the abnormality of her psychological state increases diminishing her moral and criminal responsibility [...] the pregnant woman is easily changeable, irritable, evil, capricious, tending to the disgust and sadness”⁷¹. The crime in this case was the direct effect of various pathological conditions derived from moral emotions caused by puerperal mania and the madness of lactation⁷² or other disorders of pregnancy, such as eclampsia⁷³. In this sense, infanticide occurred not during (or immediately after) pregnancy but *because of* it. The organic and functional changes typical of maternity (from conception to breastfeeding) were the basis of infanticide, according

⁶⁶ Cf. V. DE GRAZIA, *How Fascism ruled Women: Italy, 1922-1945*, Berkley-Los Angeles 1992 and E. MUSUMECI, *The Positivist School of Criminology and The Italian Fascist Criminal Law. A Squandered Legacy?* in: S. SKINNER (Ed.), *Fascism and Criminal Law: History, Theory, Continuity*, Oxford-Portland 2015, pp. 35-58.

⁶⁷ A. STOPPATO, *Infanticidio e procurato aborto. Studio di dottrina, legislazione e giurisprudenza penale*, Verona-Padova 1887, p. 36.

⁶⁸ L. FERRIANI, *Madri snaturate: (studio psichico giuridico)*, Milano 1893.

⁶⁹ FERRIANI, *La infanticida nel codice penale e nella vita sociale* (nt. 47).

⁷⁰ FIUME (Ed.), *Onore e storia nelle società mediterranee* (nt. 65), pp. 83-117.

⁷¹ Vierordt quoted by A. STOPPATO, *Infanticidio e procurato aborto* (nt. 67), p. 36.

⁷² G. ZIINO, *La fisio-patologia del delitto*, Napoli 1881, p. 211.

⁷³ L. BRUNETTI, *Dell'eclampsia delle gravide, partorienti, e puerpere*, Pavia 1840.

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to some gynaecologists. In particular, Muzio Pazzi founded an actual gynaecological criminology on this assumption, arguing that infanticide, along with abortion, should be renamed “murder of offspring” [prolecidio] because inherent in the nature of woman, and the real risk of each pregnancy occurs due to an inversion of the maternal instinct⁷⁴. But this was a not really popular approach and applied in trials only few times, considering that the stereotype of the “evil mother” who selfishly kills her child, especially if conceived out of wedlock, has a prominent place in the history of criminal law and not only: “infanticide, defined as the elimination of unwanted infants, it is a fact that accompanies as a deaf background noise of the history of the species”⁷⁵. Between the nineteenth and twentieth century, as we have seen, the focus shifted from the crime of infanticide to the infanticidal mother, her emotions, her passions, her alleged insanity, so much that tracing a history of this crime must mean inevitably to examine also the history of emotions⁷⁶, or rather gendered ideas of criminal emotions that have characterized this act that is considered heinous, unacceptable, and perhaps the most evil act that we can imagine.

This kind of obsession for the crime of infanticide marked the new approach to criminal law adopted by Positivist School, testing on bodies the signs of an innate deviance, with a new representation of evil woman. The infanticidal mother, as well as the adulteress and the prostitute, with her dangerous sexualities and her subversive emotions, filled the void left by the studies on criminal man. Thus, every unmarried woman could be a potential criminal to be controlled and disciplined, considered a latent child murderer, at risk as a woman first and then as a mother then, of being tarnished by this unforgivable act, sin and crime that embarrassed and confused legal scholars⁷⁷, being torn between the abyss of insanity and the darkness of evil incarnate.

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⁷⁴ Cf., *amplius*, M. PAZZI, La responsabilità giuridica della donna nello stato di maternità e particolarmente in rapporto all’aborto criminoso e all’infanticidio, Bologna 1913.

⁷⁵ PROSPERI, Dare l’anima (nt. 41), p. 20.

⁷⁶ Cf. E. MUSUMECI, Emozioni, crimine, giustizia. Un’indagine storico-giuridica tra Otto e Novecento, Milano 2015.

⁷⁷ A. ALESSI, Le gravidanze illegittime e il disagio dei giuristi (secc. XVII-XIX), in: G. FIUME (Ed.), Madri. Storia di un ruolo sociale, Venezia 1995, pp. 221-245.