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## Fascism and Criminal Law in Italy: an outline

### 1. The Duce's Law: new answers for old questions

After the great interest shown in the Seventies of the XX century and the long oblivion that followed, in the recent years legal historians have come back to again engage in a debate that seemed to be settled: the relationship between the Fascist regime and the Italian legal science and in particular if it can be said that law (and in particular the criminal law and, more generally, criminal justice) elaborated during Fascism and *crystallised* by the Rocco Code, can be defined as “authentically Fascist” and, accordingly, what should be the real nature of “Fascist criminal law”. In other words, legal scholars are wondering again whether a “legal revolution” occurred after the “Fascist Revolution”<sup>1</sup> as the years of Fascism’s birth in Italy was emphatically defined by Fascist intellectuals and politicians (like Gentile, Rocco and Mussolini himself). After the Special Issue of the review *La Questione Criminale*<sup>2</sup> on the 50<sup>th</sup> anniversary of the Rocco Code (1981) and seminal work of Mario Sbriccoli (1999) on the legal science after the Regime in the terms of ideological continuity and discontinuity with democratic system<sup>3</sup> it was a sort of revival on these topics which led Italian scholars to study the hottest topics of Fascist legal science. First of all, the involvement of individual jurists who have surrendered to the temptation of the regime or who have visibly resisted it, recently subject to a recent collective record. Other crucial themes have been the relationship between the ordinary magistrates<sup>4</sup> and the Fascist regime as well as the role played by the Special Tribunal for the Defence of the State<sup>5</sup>, the race legislation<sup>6</sup> and the transitional justice.<sup>7</sup> Moreover, there were also other relevant studies more specifically on criminal procedural law<sup>8</sup> and on the

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<sup>1</sup> G. Mosse, *The Fascist Revolution: Toward a General Theory of Fascism*, New York 1999; L. Klinkhammer, *Was There a Fascist Revolution? The Function of Penal Law in Fascist Italy and Nazi Germany*, in: *Journal of Modern Italian Studies* 15:3 (2010), pp. 390-409.

<sup>2</sup> VvAa, *Il codice Rocco cinquant’anni dopo – Special Issue in: La questione criminale* 1 (1981).

<sup>3</sup> M. Sbriccoli, *Le mani nella pasta e gli occhi al cielo. La penalistica italiana negli anni del fascismo*, in: *Quaderni fiorentini per la storia del pensiero giuridico moderno* 28 (1999), pp. 817-850.

<sup>4</sup> A. Meniconi, *Magistrati e ordinamento giudiziario negli anni della dittatura*, in G. Melis (Ed.), *Lo Stato negli anni Trenta. Istituzioni e regimi fascisti in Europa*, Bologna 2008, pp. 183-200; A. Meniconi, *Storia della magistratura italiana*, Bologna 2013.

<sup>5</sup> J.C.S. Torrisi, *Il Tribunale speciale per la difesa dello Stato: il giudice politico nell’ordinamento dell’Italia fascista (1926-1943)*, Bologna 2016.

<sup>6</sup> G. Speciale, *Giudici e razza nell’Italia fascista*, Torino 2007; G. Speciale (Ed.), *Le leggi antiebraiche nell’ordinamento italiano: razza diritto esperienze*, Bologna 2013.

<sup>7</sup> G. Focardi, C. Nubola (Eds), *Nei tribunali: pratiche e protagonisti della giustizia di transizione nell’Italia repubblicana*, Bologna 2015; A.M. Di Stefano, *Da Salò alla repubblica: I giudici e la transizione dallo stato d’eccezione al nuovo ordine (D. lgs. Lgt. 249/1944)*, Bologna 2013.

<sup>8</sup> F. Colao, *Caratteri originari e tratti permanenti del processo penale dal codice «moderatamente liberale», al codice «fascista», al «primo codice della Repubblica»* in: F. Colao, L. Lacchè, C. Storti (Eds), *Giustizia penale e politica in Italia tra Otto e Novecento. Modelli ed esperienze tra integrazione e conflitto*, Milan 2015, pp. 181-220; M.N. Miletta, *La scienza nel codice. Il diritto processuale penale nell’Italia fascista*, in: L. Garlati (Ed.),

*juridical culture* of Fascism.<sup>9</sup> Of a wider scope has been, indeed, the work recently published in Italy on the multifaceted nature of criminal justice and penal law under Fascism or rather the edited book by Luigi Lacché<sup>10</sup> that collected essays on different aspects of judicial system and fascist repression. However, this debate has not been relegated within Italian borders, having also involved many legal historians from other countries. The most important effort, especially for its innovative and comparative approach, is the collection of essays edited by Stephen Skinner<sup>11</sup> where the question of continuity and discontinuity between democratic legal system and dictatorship is one of the *leitmotiv* of the book. In addition, it is noteworthy the recent and original monograph by Paul Garfinkel<sup>12</sup> who retraced many elements of continuity between penal legal system in Liberal era and in the Regime that the Author defined as “moderate social defense” attempting to resize the importance of Positivist School for Fascist regime.

As we can understand from this “state of the art” the question of the real nature of criminal law and the role played by legal scholar under Fascism is still nowadays an open problem. For this reason, it could be useful tentatively sketch some critical remarks on such burning issue.

## 2. The ‘edification’ of the Fascist Criminal Code

In 1910, Arturo Rocco, the brother of the future Fascist Minister of Justice, during his inaugural lecture at the University of Sassari, addressed ‘the problem and the method of the science of criminal law’.<sup>13</sup> He declared that it was necessary to get rid of the legacy of the Positivist School established by Lombroso, which was guilty of having ‘tainted’ the ‘purity’ of criminal law, through the interference of other disciplines. Hence, the aim of Arturo Rocco’s proposal was to adopt a technical-legal doctrine of criminal law capable of going beyond the debate between the Classical and Positivist Schools, which had monopolised discussion in the field of criminal law over the previous 30 years. This well-known lecture is considered not only the ‘manifesto’ of a new technical-legal approach to criminal law, but also the theoretical basis of the Rocco Code, which according to some interpretations preserved the Code from taking on too much of a totalitarian guise. Yet what was the real contribution of the technical-legal doctrine to the Rocco Code? Was it really able to go beyond both the Classical School and the Positivist School?

In reality, scholars still wonder about the true extent of Arturo Rocco’s technical-legal approach, so much so that in 2010, on the occasion of the centenary of his lecture in Sassari, distinguished

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L’inconscio inquisitorio. L’eredità del Codice Rocco nella cultura processualpenalistica italiana, Milan 2010, pp. 57-107 and G. Chiodi, «Tornare all’antico»: il codice di procedura penale Rocco tra storia e attualità, in: Garlati (Ed.), *L’inconscio inquisitorio*, pp. 305-322.

<sup>9</sup> A. Mazzacane, *La cultura giuridica del fascismo: una questione aperta*, in: Mazzacane (Ed.), *Diritto, economia e istituzioni nell’Italia fascista*, Baden-Baden 2002, pp. 1-12 and I. Stolzi, *Fascismo e cultura giuridica: persistenze ed evoluzioni della storiografia*, in: *Rivista di Storia del Diritto Italiano* LXXXVII (2015), pp. 257-285.

<sup>10</sup> L. Lacché, (Ed.), *Il diritto del duce. Giustizia e repressione nell’Italia fascista*, Rome 2015.

<sup>11</sup> S. Skinner (Ed.), *Fascism and Criminal Law: History, Theory, Continuity*, Oxford-Portland 2015.

<sup>12</sup> P. Garfinkel, *Criminal Law in Liberal and Fascist Italy*, Cambridge 2017.

<sup>13</sup> A. Rocco, *Il problema e il metodo della scienza del diritto penale*, in: *Rivista di diritto e procedura penale* 1 (1910), pp. 497-521 and pp. 561-582.

professors of criminal law debated the significance and legacy of his thought. Far from being a mere academic disquisition, unravelling the contribution made by Arturo Rocco might shed light on the true nature of the Rocco Code and its relationship to Italian criminal law doctrines, since Arturo Rocco was the president of the committee of experts appointed by the Minister of Justice to draw up the preliminary draft of the penal code and supervise the final project. The two main interpretations of Rocco's lecture come to completely different conclusions. According to a 'rehabilitating orientation',<sup>14</sup> the attempt by Rocco to escape a crisis that seemed irreversible is reasonable; the conditions of criminal law were miserable at that time, reduced by the Classical School to an 'absolute, immutable, universal, and divine'<sup>15</sup> law, and by the Positivist School to a 'criminal law ... without law',<sup>16</sup> especially because the social sciences that were spuriously blended with law, like anthropology, psychiatry and criminal psychology, were 'reduced to scientific matters for directors of asylums ... and charlatans'.<sup>17</sup> According to this view, Rocco's approach, with the perspicuity that always characterised his thought, was (a plausible) appeal to restore the centrality of the positive criminal law's object, not in order to make a fetish and passive cult of it, but to explore its roots, implications and organization in an open and flexible perspective, as long as the boundaries of positive law are the positive law itself, without leaks or evasions.<sup>18</sup>

This interpretation takes a positive view on Arturo Rocco's intervention, considering it almost a duty, and focusing on a conception of criminal law as a science, which puts dogmatic research at its centre, accompanied by the exegetic tools and systematic logic of the fundamental principles of positive law, but which despite criticism is not a sort of legal formalism.<sup>19</sup> In support of this view are the words of Rocco himself, who several times in his lecture advised against being a follower of 'empty as well as dangerous legal formalism'<sup>20</sup> and advocated not a divorce, but only a separation, between law and other disciplines.<sup>21</sup> Despite the fascination of this argument, it does not convince.

The opposite interpretation<sup>22</sup> of Rocco's manifesto, seeking to expose its real political implications, appears more valid for the following reasons. Despite Rocco's claim that he intended to avoid 'the hurdle of formalism',<sup>23</sup> it is precisely that into which he stumbled. Two key elements emerge from reading his lecture: a cultural mentality that was cramped and stifled; and a constant ambiguity. First, cleaning up the study of law from mingling with other disciplines (sociology,

<sup>14</sup> See M. Sbriccoli, *La penalistica civile. Teorie e ideologie del diritto penale nell'Italia unita*, in: M. Sbriccoli (Ed.), *Storia del diritto penale e della giustizia: scritti editi ed inediti (1972-2007)*, Milan 2009, v. I, pp. 573-583.

<sup>15</sup> Rocco, *Il problema e il metodo*, p. 500.

<sup>16</sup> Rocco, *Il problema e il metodo*, p. 504.

<sup>17</sup> Sbriccoli, *La penalistica civile*, p. 579.

<sup>18</sup> T. Padovani, *Lezione introduttiva sul metodo nella scienza del diritto penale*, in: *Criminalia* (2010), p. 235.

<sup>19</sup> See M. Donini, *Tecnicismo giuridico e scienza penale cent'anni dopo. La prolusione di Arturo Rocco (1910) nell'età dell'europeismo giudiziario*, in: *Criminalia* (2010), pp. 127-178.

<sup>20</sup> Rocco, *Il problema e il metodo*, p. 511.

<sup>21</sup> Rocco, *Il problema e il metodo*, p. 518.

<sup>22</sup> Compare A. Malinverni, *La scuola dogmatica del diritto penale*, Vercelli 1939; E. Gallo, *Una politica per la riforma del codice penale*, in: *La Questione Criminale* 1 (1981), pp. 49-65, and, more recently, G. Fiandaca, *Rocco: è plausibile una de-specializzazione della scienza penalistica?*, in: *Criminalia* (2010), pp. 179-206.

<sup>23</sup> Rocco, *Il problema e il metodo*, p. 577.

criminology, criminal policy) appears illusory as well as hypocritical, because it is impossible to separate the juridical purpose and political aim of a specific incriminating norm, relegating these issues to the sphere of competence of criminal policy. Furthermore, although Rocco's openings to other disciplines were always made with great caution (made evident in the constant use of formulations such as 'up to a certain point', 'but only in this way', 'to some extent', 'within certain limits', 'although only in a subsidiary way'), his wish to take them into account was apparent and also made clear by his programmatic statement, inspired by the principles of legal formalism:

it is always true that strictly and narrowly legal investigation must be kept distinct from philosophical and political inquiry, if we want to avoid *an illicit and dangerous intrusion and mingling of philosophical and political elements in the logical clarity of legal research*.<sup>24</sup>

To conclude, the technical legal approach advocated by Arturo Rocco was nothing more than a moderately sweetened variety of legal formalism that enhanced the isolation of law from other spheres, entirely separating it from reality, in order to serve the alleged neutrality of the jurist. In that neutrality, under the cloak of 'technical' analysis, is hidden the inevitable subordination of the law to political power, as actually occurred under the Fascist regime.

If the criminal law scholar Arturo Rocco was responsible for the fundamental 'legal' footprint of the nascent Rocco Code, the most important 'political' imprint was provided by his brother, Alfredo Rocco, the regime's Minister of Justice.<sup>25</sup> The contribution of these two of the four Rocco brothers (the other two brothers, Ugo and Ferdinando, were respectively a professor of civil procedure in Naples, and a judge and Chair of the Council of State) can in fact be read as two sides of the same coin.

Passing quickly from nationalism to Fascism, Alfredo Rocco soon became the architect of the radical transformation of institutions in an authoritarian way<sup>26</sup> and, consequently, also of the construction of the legal system that could support and defend the dictatorship. The authoritarian transformation of criminal law began in 1925, with the promulgation of the so-called ultra-Fascist laws, which outlined the framework of an authoritarian State. Among those laws were 'laws of defence' concerning secret societies, bureaucracy and the defence of the State, and 'rules of constitutional reform' regarding the legislative power of the executive body and the powers of the head of government. Also significant for the configuration of Fascist criminal law was Law No 2008 of 25 November 1926, which reinstated the death penalty and established the Special Tribunal for

<sup>24</sup> Rocco, *Il problema e il metodo*, p. 520 (*italics added*).

<sup>25</sup> On the importance of Alfredo Rocco as the 'legislator of the Fascist regime', as well as for his political and cultural biography, see P. Ungari, *Alfredo Rocco e l'ideologia giuridica del fascismo*, Brescia 1963; M. Sbriccoli, *Rocco Alfredo*, in Sbriccoli (Ed.), *Storia del diritto penale*, pp. 993-1000 and, more recently, G. Simone, *Il Guardasigilli del regime. L'itinerario politico e culturale di Alfredo Rocco*, Milan 2012, and lately G. Chiodi, *Alfredo Rocco e il fascino dello Stato totale*, in: I. Birocchi, L. Loschiavo (Eds), *I giuristi e il fascino del regime (1918-1925)*, Rome 2015, pp. 103-127.

<sup>26</sup> Cf. F. Lanchester, *Alfredo Rocco e le origini dello Stato totale*, in: E. Gentile, F. Lanchester and A. Tarquini (Eds), *Alfredo Rocco: dalla crisi del parlamentarismo alla costruzione dello Stato nuovo*, Rome 2010, pp. 15-38.

the Defence of the State<sup>27</sup> as a supplementary instrument to the ordinary courts, against potential opponents of the regime and ‘anti-Fascist subversives’. In the same manner, Law No 1848 of 6 November 1926 on public safety strengthened and expanded police powers of preventive and repressive intervention. These laws were the harbingers of the new Fascist style of criminal law, opening the way for the Rocco Code and its approach to crime in the name of defending society, and introducing what would become the cornerstones of the new penal system: an exasperated statism and the gradual elimination of individual rights. According to Mussolini’s well-known motto, ‘all within the State, nothing outside the State, nothing against the State’, one of the fundamental ideas of Fascism was the centrality of the State, and the legal reform undertaken by Alfredo Rocco, with the support of Arturo Rocco and other jurists, such as Vincenzo Manzini, was directed precisely towards strengthening this idea.

### 3. The ‘Fascist’ Principle of Legality and the risk of a “degenerated law”

The Rocco Code was not merely a hybrid of two opposing doctrines with the necessary characteristics for the Fascist revolution. Since 1945, Italian legal scholars have debated the nature of Fascist criminal law, or rather, whether a criminal justice system could, for its intrinsic and extrinsic characteristics, be defined as exclusively adherent to Fascist ideology, and whether a penal code in force under a dictatorship could be compatible with a constitutional democracy.<sup>28</sup> Beyond the complex disquisition on the continuity or discontinuity<sup>29</sup> between the Zanardelli and Rocco Codes, the most significant element invoked is the presence in both cases of the principle of *nullum crimen, nulla poena sine lege*,<sup>30</sup> ie legal certainty, or the principle of legality, clearly inspired by the Enlightenment. The presence of this principle has been evoked by scholars who argue that there is continuity between the two codes, especially in their general part (relating to the principles and basic concepts of criminal law).

First, it was argued that the existence of the principle of legal certainty could mitigate the authoritarianism of the Fascist-inspired Code, creating a bridge between the criminal law of the Enlightenment tradition and constitutional principles. Accordingly in 1945, when Italy was faced with the problem of having to reform the Penal Code compromised by the Fascist regime, Giovanni Leone argued that ‘the Rocco Code had not broken away from the line of tradition (and, therefore, from liberal theory) regarding its political inspiration’.<sup>31</sup>

<sup>27</sup> See E. Gallo, *Il Tribunale Speciale per la Difesa dello Stato e il suo ambiente politico-culturale*, Rome 1980 and, for a comparative perspective, W. Eder, *Das italienische Tribunale Speciale per la Difesa dello Stato und der deutsche Volksgerichtshof: ein Vergleich zwischen zwei politischen Gerichtshöfen*, Frankfurt am Main 2002.

<sup>28</sup> See especially, S. Skinner, *Tainted Law? The Italian Penal Code, Fascism and Democracy*, in: *International Journal of Law in Context* 7 (2011), pp. 423-446.

<sup>29</sup> Cf. M. Sbriccoli, *Caratteri originari e permanenti del sistema penale italiano (1860–1990)*, in: Sbriccoli (Ed.), *Storia del diritto penale*, v. I, pp. 591-670.

<sup>30</sup> On the ‘thin boundary lines’ of this principle, see M. Pifferi, *Difendere i confini, superare le frontiere. Le “zone grigie” della legalità penale tra Otto e Novecento*, in: *Quaderni fiorentini per la storia del pensiero giuridico moderno* 36 (2007), pp. 743-799.

<sup>31</sup> G. Leone, *Contro la riforma del codice penale*, in: *Archivio penale* (1945), p. 277.

Indeed even today, while acknowledging the obviously illiberal nature of several articles of the Rocco Code, many scholars insist on valuing the contribution of Arturo Rocco and the jurists who collaborated in drafting it (eg Filippo Grispigni) as commendable, not only for the quality of their legal skills, but also for their inclusion of the principle of legal certainty. This was seen as an indispensable guarantee that made the Rocco Code appear to be the result of an elaborate and cunning legal alchemy, rather than a penal code fit for the dictatorship's purposes. Hence the reference to the existence of a 'dogmatic brake',<sup>32</sup> or rather a positive role played by legal scholars and academics under the Fascist regime. According to this view, which was asserted by some commentators after the war,<sup>33</sup> the law and lawyers in general somehow held back the excesses of Fascist politics, and avoided forms of 'degenerate law',<sup>34</sup> such as those issued by the Nazi regime.<sup>35</sup>

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However, the 'brake' theory seems unconvincing, as does the aim of many legal scholars who were active during the time of Fascism to entrench themselves in a supposed position of 'neutrality' by adhering to the technical-legal approach. Such action amounted to a kind of legal formalism<sup>36</sup> adopted by Rocco, that can be considered a sort of loophole, or shelter behind which they could hide, in order not to be tainted by the horrors of the regime; in other words this was 'an alibi, an excuse to turn their eyes to heaven avoiding having to see what Fascism was doing to Italian criminal science'.<sup>37</sup>

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On a distinct front, and with different assertions, but reaching more or less the same conclusions (a thesis for the generic prevalence of 'continuity'), it has been claimed that the Rocco Code did not mark a real break with the past, because it lacked an autonomous cultural development, a lack which consequently prevented the formation of an original and independent doctrine of criminal law. Therefore, the Rocco Code not only adopted the principle of legal certainty, but also 'rested on dogmatic scaffolding with a predominantly liberal basis',<sup>38</sup> even if limited by the 1926 introduction of the Special Tribunal for the Defence of the State, with jurisdiction over political offences.

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In fact, it seems more relevant to warn against viewing legal certainty and its corollaries (prohibition of analogy and non-retroactivity of criminal law unfavourable to the accused) as a sort of lifeline capable of saving the Rocco Code from its involvement with the dictatorship, even

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<sup>32</sup> M. Sbriccoli, *Il problema penale*, in: Sbriccoli, *Storia del diritto penale*, v. I, p. 693.

<sup>33</sup> T. Delogu, *L'elemento politico nel codice penale*, in: *Archivio Penale* (1945), pp. 161-195.

<sup>34</sup> Cf. B. Rütters, *Entartetes Recht*, München 1989.

<sup>35</sup> On the experience in other countries, like Nazi Germany or Vichy France, see I. Muller, *Hitler's Justice: The Courts of the Third Reich*, Harvard 1992; M. Stolleis, *Law under the Swastika: Studies on Legal History in Nazi Germany*, Chicago 1998; R. Weisberg, *Vichy Law and the Holocaust in France*, New York 1996; Z. Sternhell, *Ni droite, ni gauche: L'idéologie fasciste en France*, Paris 1983.

<sup>36</sup> On the debate between formalism and anti-formalism, see generally R. Cavallo, *L'antiformalismo nella temperie weimariana*, Turin 2009.

<sup>37</sup> M. Sbriccoli, *Le mani nella pasta e gli occhi al cielo. La penalistica italiana negli anni del fascismo*, in: *Quaderni fiorentini per la storia del pensiero giuridico moderno* 28 (1999), p. 849.

<sup>38</sup> G. Fiandaca, *Il codice Rocco e la continuità istituzionale in materia penale*, in: *La Questione Criminale* 1 (1981), p. 69.

after the end of World War II.<sup>39</sup> Indeed, the rule of law cannot be considered as ‘a magic label’ that automatically ensures the transition from a dictatorship to a democracy, as if it had some real ‘miraculous virtues’.<sup>40</sup>

Contrary to appearances, during the Fascist era the ‘glorified’ principle of legal certainty did not perform the same functions that it would have done in a democratic legal system. The principle provides that one cannot be subjected to penal sanctions unless these are previously provided for by law. During the Fascist regime, however, laws were issued without wide, democratic parliamentary debate, but instead as the will of a single party, the Fascist Party, which since the beginning of the dictatorship had trampled on every kind of political opposition. This then was the ‘law’ – legal, but not legitimate – to which the principle of legality referred. Although it was not formally abolished by the criminal justice system, it was as if the rule of law, like an imaginary pendulum, was ‘blocked on the pole of authority, rather than on that of the guarantee of rights’.<sup>41</sup> Above all, although legal certainty was formally guaranteed, it was openly violated from a substantive point of view, as demonstrated by the number of laws aimed at the protection of abstract legal interests or vague concepts, such as the crime of *vilipendio* (contempt, or vilification). For their intrinsic vagueness, they materially violated the principle of legality, giving judges ample authority for the application of criminal law to the needs of repressive political power. Furthermore, the judicial power that had to enforce the law was completely devoid of the most basic guarantees of autonomy and independence, being entirely subordinate to the government.<sup>42</sup> Hence, it is more appropriate to consider that the rule of law was useful for giving the Rocco Code a coat of ‘democratic paint’. That coating of formal legality has to be scraped away in order to understand how this principle was reinvented and instrumentalised by the regime.

Political violence, one of the key elements of the so-called Fascist revolution, was shrewdly disguised as Fascist law. As Rocco himself stated, emphasising the need to spread the new Fascist spirit throughout the legal system, ‘the old law would be replaced by the new law: Fascist legality’.<sup>43</sup> In fact, Giuseppe Maggiore, one of the most enthusiastic legal scholars of the regime, pointed out in 1939 that the principle of *nullum crimen sine lege*, according to which conduct cannot be a crime unless it violates a law extant at the time of its occurrence, had to be amended, adding that ‘every conduct offending the State’s authority must also be considered as a crime and deserving of punishment according to the spirit of the Fascist revolution and the will of the Duce, sole interpreter of the will

<sup>39</sup> On continuity and discontinuity between legal systems under dictatorships and after their downfall see especially, C. Joerges and N. Singh Ghaleigh, *Darker Legacies of Law in Europe: the Shadow of National Socialism and Fascism over Europe and its Legal Traditions*, Oxford 2003.

<sup>40</sup> G. Neppi Modona, *Principio di legalità e diritto penale fascista*, in: *Quaderni fiorentini per la storia del pensiero giuridico moderno* 36 (2007), p. 985.

<sup>41</sup> P. Costa, *Il principio di legalità: un campo di tensione nella modernità penale*, in: *Quaderni fiorentini per la storia del pensiero giuridico moderno* 36 (2007), p. 17.

<sup>42</sup> Cf. Neppi Modona, *Principio di legalità*, pp. 1001-1005.

<sup>43</sup> A. Rocco, *Legge sulla facoltà del potere esecutivo di emanare norme giuridiche* in A. Rocco (Ed.), *Discorsi parlamentari*, Bologna 2005, p. 257.

of the Italian people'.<sup>44</sup> Without this modification, Maggiore warned, the principle of legal certainty could have been a sort of '*magna carta* for criminals'.<sup>45</sup>

#### 4. A penal law for the Fascist Regime

If the Fascist connotation of the Rocco Code is clearly traceable in its general part, the authoritarian tone is even more evident in its special part, which sets out specific crimes and constitutes a 'litmus test' of the new Fascist ideology that was emerging in those years. In fact, as has been argued, 'in this matter ... the Rocco Code was undoubtedly the child of dictatorship'.<sup>46</sup>

For one thing, there was an increase in the quantity of offences (from 34 crimes punished by the Zanardelli Code, to 72 under the Rocco Code). Also, the layout of chapters reflected the hierarchy of values to be protected.<sup>47</sup> Not by chance, the first chapters addressed crimes against the personality of the State, the public administration, public policy, and all other crimes that were related to the public sphere of the State. One must turn to the 12th chapter to find crimes against the person, and after that, against property.<sup>48</sup> In addition, Fascist influence also appeared in the insertion of a series of crimes related to the 'Protection of the Official State Religion'. The Fascist State, indeed, had ceased to be secular, and created a strong Catholic and conservative moralism. Along with crimes related to private life were crimes connected more to the public life of 'citizens', such as offences against 'the public economy', and the whole system of political offences. From these offences clearly emerged the extremely importance role given to the State and its 'personality,' which was to be respected at all times, and in which citizens became silent subjects or, in the case of criminal conduct, 'enemies of the State'<sup>49</sup> to be eradicated by every possible means, including the most violent.

Along these lines were also instated crimes of 'anti-national activities by the citizen abroad' (so-called defeatism), 'subversive association' and 'subversive propaganda or apology', all seemingly abstract, but powerful means to silence any persons who expressed dissent against the regime. 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

<sup>44</sup> G. Maggiore, *Diritto penale totalitario nello Stato totalitario*, in: *Rivista italiana di diritto penale* 11 (1939), p. 160.

<sup>45</sup> Maggiore, *Diritto penale totalitario*, p. 158.

<sup>46</sup> Fiandaca, *Il codice Rocco*, p. 73.

<sup>47</sup> The principal provisions of the Code's special part were structured as follows: I Crimes against the Personality of the State; II Crimes against Public Administration; III Crimes against the Administration of Justice; IV Crimes against Religious Sentiment and against Piety to the Dead; V Crimes against Public Order; VI Crimes against Public Safety; VII Crimes against Public Faith; VIII Crimes against the Public Economy, Industry and Commerce; IX Crimes against Public Morality; X Crimes against the Integrity and Health of the Race; XI Crimes against the Family; XII Crimes against the Person; XIII Crimes against Property.

<sup>48</sup> See eg F. Colao, G. Neppi Modona and M. Pelissero, *Alfredo Rocco e il codice penale fascista*, in: *Democrazia e Diritto* 1-2 (2011), pp. 184–85.

<sup>49</sup> See also P. Marchetti, *Le "sentinelle del male". L'invenzione ottocentesca del criminale nemico della società tra naturalismo giuridico e normativismo psichiatrico*, in: *Quaderni fiorentini per la storia del pensiero giuridico moderno* 38 (2009), pp. 1009-1080; M. Donini and M. Papa (Eds), *Diritto penale del nemico. Un dibattito internazionale*, Milan 2007.

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 a strong leader and breadwinner and a submissive and subordinate wife.

Similarly, in regulating property crimes, while proposing the same crimes as in the old code, the Rocco Code gave greater protection to the assets of the individual, but as part of the community, due to the State’s interest in economic matters. This was evidenced by an expansion of the crime of fraud, the introduction of fraudulent insolvency, and the new crime of usury (previously abolished). The individual, in other words, was protected in his person and in his property only in the broader context of protecting the integrity of the ethical Fascist State, of which he was inextricably part.

22

## 5. Conclusion

In conclusion, criminal law under Fascism in Italy had peculiar characteristics so different from penal law under Liberal era. Under cover of the technical approach professed by Arturo Rocco<sup>50</sup> and his obsession with keeping law separate from other spheres, the precise political purpose that was realised not in an attempt to adopt the positivist thesis but, on the contrary, in the strenuous fight against it, was hidden. Protecting criminal law from any possible contamination by philosophy, human, social or other sciences, also shielded it from surveys and discussions that could have shed light on the authoritarian matrix of some institutions and principles, triggering or facilitating social and political processes that were among the main concerns both of the capitalist bourgeoisie (before) and Fascism (after).

23

Even though it is overly simplistic to see the authoritarian traces of the Rocco Code merely as a distortion of the positivist thesis, acknowledging that the Fascist regime itself is a complex and multi-faceted phenomenon, it is nevertheless true that many fundamental principles of the Positivist School (such as that of social defence) were adopted and used by the Fascist regime for its own ends. The Fascists took from this tradition only what they needed, eliminating all progressive and secularised instances and emphasising concepts and theories in an exclusively repressive way, in order to create with every available means a terrifying new legal machine suited to the regime. Not by chance it has been argued of a “squandered legacy”<sup>51</sup> of Positivist School.

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It is clearly well-founded to reject the thesis that Fascist legislation was a mere *parenthesis*<sup>52</sup> due to the numerous elements of continuity between the “liberal” period and the Regime.<sup>53</sup> However,

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<sup>50</sup> Cf. I. Stolzi, *L’ordine corporativo. Poteri organizzati e organizzazione del potere nella riflessione giuridica dell’Italia fascista*, Milan 2007, pp. 169-170.

<sup>51</sup> E. Musumeci, *The Positivist School of Criminology and The Italian Fascist Criminal Law. A Squandered Legacy?*, in: Skinner (Ed.), *Fascism and Criminal Law*, pp. 35-58.

<sup>52</sup> Cf. M.A. Livingston, *Criminal Law, Racial Law, Fascist Law: Was the Fascist Era Really a ‘Parenthesis’ for the Italian Legal System?*, in: Skinner (Ed.), *Fascism and Criminal Law*, p. 97.

<sup>53</sup> See M.N. Miletta, *Giustizia penale e identità nazionale*, in: *Quaderni fiorentini per la storia del pensiero giuridico moderno* 45 (2016), pp. 683-684.

it is also undeniable that Fascist Criminal Law had its own specificity, reflecting the universe of principles, values and cultural elements typical of the Fascist regime<sup>54</sup>: the idea of a strong and repressive State, the exaltation of virility and the hierarchy between the sexes, the myth of military courage and sacrifice for the Fatherland, the cult of physical strength and youthfulness, the phobia for the (internal and external) ‘enemy’, the fight against individualism, the predominance of community and family, and so on. Thanks to law<sup>55</sup> the Regime indeed penetrated and mobilized the private sphere<sup>56</sup> of Italian daily life<sup>57</sup>: the dictatorship’s totalitarian aspiration to inculcate values and beliefs, influence private behaviour and extend power over the domestic domain. In this sense, for example, the imposition in 1926 of a bachelor (or celibacy) tax on unmarried men, the aggressive policy aimed at increasing the birth-rate and the cult of the woman as mother and wife<sup>58</sup>. Far from being considered mere rhetoric of the regime, the creation of a ‘state machine’ with totalitarian vocations also reflected an attempt to establish a certain juridical culture<sup>59</sup> with a proper penal and procedural law in order to found a ‘justice system’ that was to be so pervasive as to be reflected even in the architecture of the palaces of Justice<sup>60</sup> built during the Fascist regime: “the spiritual Revolution is reflected in criminal justice for shaping the ‘new’ morality of the Italians”.<sup>61</sup>

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<sup>54</sup> Cf. Colao, Neppi Modona, Pelissero, Alfredo Rocco e il codice penale fascista, p. 175.

<sup>55</sup> About the idea that law and, especially penal law, declined in the term of a “criminal repression” could be used by Fascism as a weapon of political fight cf. G. Neppi Modona, M Pelissero, *La politica criminale durante il fascismo*, in: L. Violante (Ed.), *Storia d’Italia. Annali 12. La criminalità*, Turin 1997, p. 767.

<sup>56</sup> Cf. M.-S. Quine, *Population Politics in Twentieth Century Europe: Fascist Dictatorships and Liberal Democracies*, London-New York 1996, p. 40.

<sup>57</sup> See recently, J. Arthurs, M. Ebner, K. Ferris (Eds), *The Politics of Everyday Life in Fascist Italy. Outside the State?*, New York 2017.

<sup>58</sup> Contra see M. Freddosio, *The Fallen Hero. The Myth of Mussolini and Fascist Women in the Italian Social Republic (1943-45)*, in: *Journal of Contemporary History* 31.1 (1996), pp. 99-124 and A. Tarquini, *Storia della cultura fascista*, Bologna 2016<sup>2</sup>, pp. 158-162.

<sup>59</sup> Cf. Mazzacane, *La cultura giuridica del fascismo*, pp. 1-12.

<sup>60</sup> See E. Gentile, *Fascismo di pietra*, Rome-Bari 2007.

<sup>61</sup> L. Lacchè, *Tra giustizia e repressione: i volti del regime fascista*, in: L. Lacchè (Ed.), *Il diritto del duce*, p. XXXVIII.