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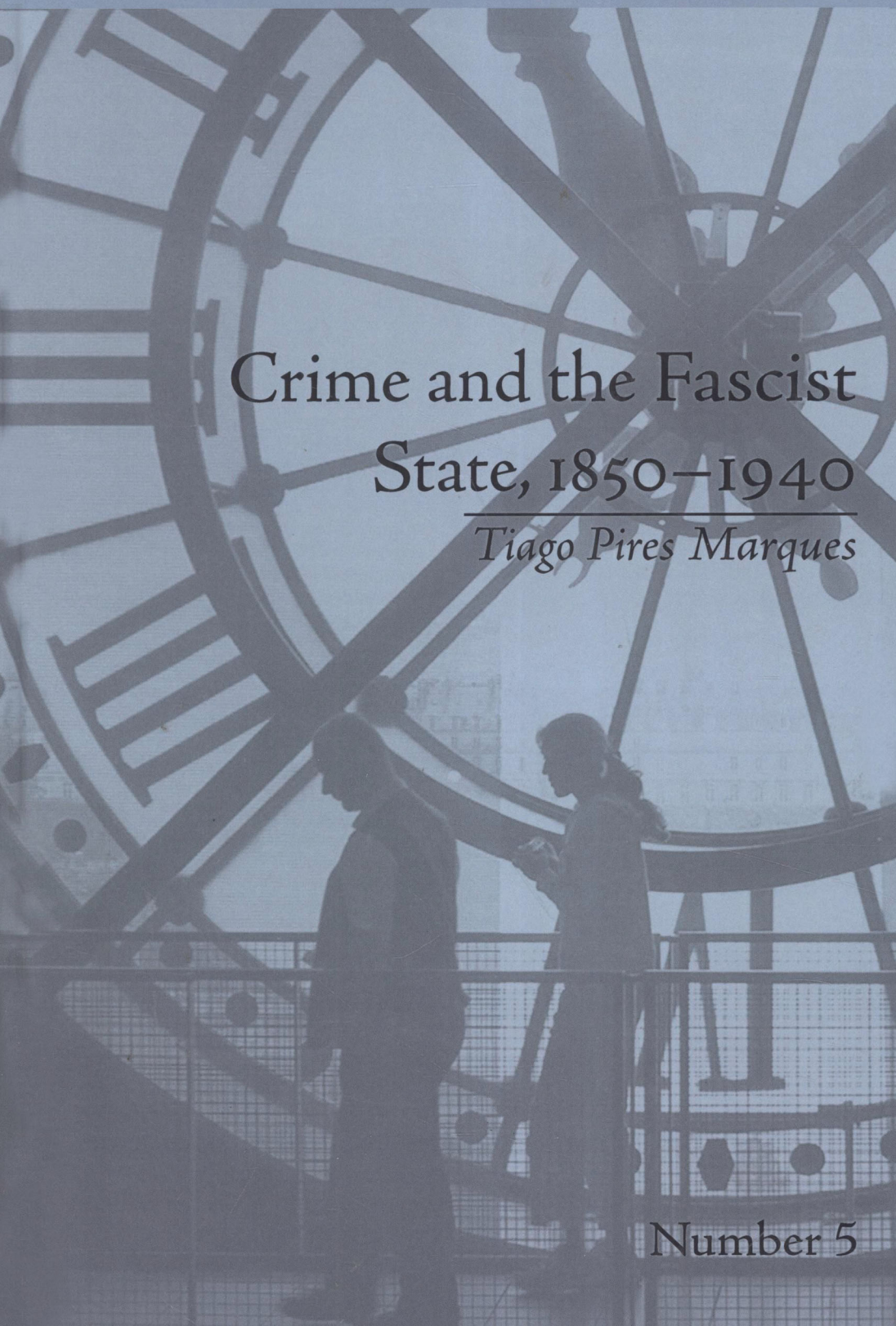

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Tiago Pires Marques

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BY

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INTRODUCTION

On 7 April 1926 Violet Gibson, an Irish woman in her early fifties, waited for Mussolini at the *piazza del Campidoglio* in Rome, where he had just inaugurated an international congress of surgeons. Having positioned herself near the passage through which the *duce* would leave the site, she raised the pistol with 'firm and straight hand' and shot at the *duce*'s head. According to the eminent criminologist Enrico Ferri, soon before the attempt a group of students started to sing the fascist anthem, la *Giovinezza*. Had Mussolini not raised his head 'in a mystical gesture so characteristic of his personality', he would have been shot in the head. Instead, he escaped with only a small injury to his nose and Italy was saved.[1]

Besides a hardening of the xenophobic feelings fostered by the fascists, this attempt on Mussolini's life was in itself of little political consequence.[2] Yet it made a profound impression on the now ageing Enrico Ferri, who had previously expressed great shock to his students when a conspiracy against Mussolini's life was discovered in early November, 1925. Ferri's interest in the attempt was now clearly centred on the person behind it, whom he accepted to become the defence advocate. In 1927 he published an article on Violet Gibson in the *Revue Internationale de Droit Pénal*, developing an analysis of her personality in line with the conceptual framework of the criminological school to which he himself had made such significant contributions – the *Scuola Positiva*.[3] However, the most significant part of the article is the episode that Ferri narrates in the closing pages. Indeed the criminologist tells us that, in the aftermath of the shooting, he joined the examining magistrate, the public prosecutor and a forensic expert on a visit to Mussolini's office in order to verify whether his nose was healing well. According to Ferri, during this visit Mussolini took him aside for a more private conversation. Fearful of losing the favour of the *duce* – as he later confesses in the text – Ferri was presented with an opportunity to explain that he was to defend Violet Gibson, at the request of her sister, but that he undertook to do so only because he was fully convinced that she was 'alienated'. To his surprise Mussolini told him that he was confident that, with Ferri, she would be defended with the 'serenity of science'. It was thus with enthusiasm and optimism that Ferri concluded his article.[4]

Ferri was right to be optimistic. Indeed, two experts declared Gibson mentally ill – concretely, suffering from 'systematized delusion' (or in another formulation 'chronic paranoia with hallucinations').[5] This was on the basis of a previous failed attempt committed by Gibson against a girl and a suicide attempt just the year before: allegedly she wanted to 'repeat Isaac's sacrifice'.[6] These incidents proved sufficient to dismiss both the political and religious reasons that Gibson claimed as having motivated her action.[7] Science had stopped Mussolini's punishing hand, and thus it was possible that Violet Gibson, after shooting the *duce*, be sent to England in the care of her family and then to an asylum for the mentally ill. Although it is likely that diplomatic pressure played a significant part in this episode and that Ferri overestimated the role of science in the upshot of Gibson's case, its evocation by Ferri is revealing of the fascist regime, the evolution of criminal law and of the positivist school of legal thought. The most immediate observation to be made is that, despite the fact that penal positivism had initially been associated with politically progressive ideals – with some of its most pre-eminent members belonging to the Socialist Party – in the late 1920s there was a movement of convergence between fascism and the positivist school of penal thought. On the one hand, more than revealing Mussolini's interest in science, this episode shows us that for the *duce* the way of science and that of reason of state could, at least sometimes, cross. Furthermore, it revealed that in his eyes the positivist school embodied a certain ideal of science and that Enrico Ferri was still one of its foremost advocates.

This book addresses issues that, at first sight, would appear quite heterogeneous – the codification of penal codes, fascist ideology, scientific concepts of criminals and their sanctioning by different agencies of the state, theories on the connections between the judicial machinery and the police and the development of a few international institutions working on penal matters. It argues that, despite the revolutionary rhetoric of fascism, the 'fascist revolution' was, to a great extent, developed from within the structures of the state itself. This is not a novelty, at least since the studies of Renzo De Felice on the Italian politic elite of the period and the importance of legal reforms in the construction of the fascist state. However, this book adds on this view by arguing that the new penal code served symbolically as the political constitution that, formally, the regime never had. Breaking with social contract theory, fascist penal law condensed the notion of the state as a super-person opposed to individuals through a characteristically private relationship. In addition, the reform of repressive institutions allowed the construction of a virtually totalitarian system of repression without breaching the law. Another crucial argument of the book is that penal reform in Italy rooted in a transnational criminological culture and was tightly entangled with the wave of penal reforms observed in the interwar period. Juridical institutions such as the 'habitual delinquent', 'dangerousness' and the corresponding indeter-

minate sentences, as well as preventive arrest and custody in police prisons, were then brought into the core of juridical codes and were thus fully legitimized. The main objective of this study is to shed light on the ways fascism and penal reform related in both authoritarian and democratic countries in the interwar period.

The Code of the 'Fascist Revolution' and the Transnational Criminological Culture

Before starting our analysis, it is helpful to underline the interest of the fascist government in criminal law, which, albeit having an autonomy and a consistency of its own, was part of a more embracing interest in law in general, as will become clear later on in this study. For Ferri this interest was easy to understand: in 1927, in a lecture on the project of a new penal code, named the Rocco Code after Alfredo Rocco, Mussolini's first Justice Minister, he argued that penal codes were the highest expression of the state's political power. They manifested such power not only symbolically but in everyday life, functioning as a practical guarantee of the good order of society.[8] Furthermore, in his view, the regime, which he vigorously supported, acting out of the same presupposition, made the code project a blueprint of the fascist ideological orientation.[9]

Following this line, criminal law was related with the state in terms of a mediation of its will, on the one hand, and of discipline and rationalization of its power, on the other. Mediation was thus, first and above all, a translation of a state project for society. In reality, this idea appears to have been widely shared, extending to penal actors placed outside the positivistic circles in which Ferri moved. For example, Bruno Franchi, a jurist and director of the penitentiary of Florence, viewed in the penal legislation of 1926 'not a simple reform, but the code of a new order'. Similarly, the Justice Minister, Alfredo Rocco, formulated very clearly the same idea: 'penal laws are the most direct expression of State power ... a basic notion for all and unquestioned by the doctrine'.[10]

Throughout the codification debate, this idea was indeed expressed by many jurists. For example, Mariano D'Amelio, president of the Court of Cassation, senator, vice-president of the Senate and president of the parliamentary commission for the reform of the penal code, echoed Rocco's words when he mentioned that the reform of penal codes is always a consequence of a particular historical event, generally linked to great wars. The Napoleonic codes, the German penal code – which followed the Franco-Prussian War – and Italy's *Statuto* and codes of 1866 stood as the irrefutable examples of this. In the same line of thought, the then ongoing reform was tightly linked to the First World War and was about to give Italy a juridical unity that the 'unified fatherland' did not yet have.[11] Again, Enrico Ferri was more straightforward when discussing the relation between the penal reform and the new political regime: 'Each and every revolution has its

own penal code', he declared in a speech on the penal code project delivered at the University of Rome.[12] He added that just as the Napoleonic Code reproduced the characteristics of the aftermath of the French Revolution, the new Italian penal code consecrated the conquests of the 'fascist revolution'. And both shared with the Soviet Penal Code of 1921 the crucial characteristic of virtually all post-revolutionary codes, that is, the aggravation of penalties as a means of strengthening the authority of the state and enforcing the new social order.[13]

It is known that the fascist regime produced no formal constitution, and that even the fundamental text of *Carta del Lavoro* was not vested with juridical force. Could not it, then, be the case that the penal code was accorded the function of formalizing juridically the *raison d'état* of the regime? In other words, was the Rocco Code meant to stand as a sort of fundamental code of the fascist state? A sheer positive answer to these questions collides with the notion, current in legal history, of the force of the juridical traditions. In the Italian case, in particular, it contradicts what is known about the many continuities of the penal system throughout the history of modern Italy. In addition, penal reform in Italy was well rooted in an international criminological culture. As a matter of fact, not long before Gibson's attempt against Mussolini, on August 1925, more than 600 people from 57 countries gathered in London to discuss the ways in which states should deal with the problem of crime. The occasion was the ninth International Penitentiary Congress and the first of this kind to be held since the beginning of the First World War. Its participants hailed from a considerable variety of professions and activities, ranging from jurists (magistrates and lawyers) and ministerial officers to prison governors, chaplains and doctors, and from law and medicine professors to prison wardens and representatives of philanthropic associations. The presence of dignitaries of the host states and some high-rank official representatives of other participant states, as well as the locations in which these meetings took place, testified to the political importance of the congresses. Eventually, Ferri hailed this congress as the international consecration of the positivist penal doctrines that he had defended for decades. In subsequent meetings, the approved resolutions for penal reform pointed out, as a main reference, the Italian penal reform in the making. Even in the heyday of the fascist regime, Italian penologists and criminologists were not isolated from the international networks of penal experts that had formed, with variable degrees of institutionalization, in Europe and America since the nineteenth century. This applies both at the level of institutional and inter-personal relations, and at that of the exchange and joint fashioning of criminological and penal concepts.

In sum, this is a study on institutional and conceptual design taking place in various sites. One of its basic arguments is that the events described apropos of the attempt against Mussolini's life, although referring to a specific political setting, are linked to a transnational scene through concrete, identifiable, threads.

Accordingly, the specific thematic and chronological boundaries of this work are defined along the lines of this configuration: that is, taking into account the intersection between the Italian penal history in the 1850s and the late 1930s, broadly considered, and the dynamics of the international penal movement. As far as the Italian case is concerned, this engenders a focus upon the making of the penal code and its links with the various coercive institutes linked to it. Chronologically, the focus is placed mainly upon the period spanning the years 1925 to 1935. While the former marked both the start of the codification process in Italy and the organization of the London Penitentiary Congress, the latter date refers to the Berlin Penal and Penitentiary Congress (these congresses will hereafter be designated IPPC). Indeed, as we will see in the final chapter of this study, this congress signalled an internal divide within the transnational scene, a divide rendered evident by the irreconcilable positions taken vis-à-vis the more aggressive topics of the discourse on social defence and the open demise of the legality principle carried out by the Nazi regime. As this same divide was verified in the Italian penal field in the closing years of the 1930s, it would certainly be interesting to follow these shared developments. However, the latter would demand another type of fashioning of the historical object. Virtually, with this broad transnational scene losing its cohesion, a more symmetrical model relating the Italian and the German cases would be better equipped to address these issues than would the asymmetrical configuration placed, here, at the core of the analysis.

This implies that some crucial aspects of the fascist penal legislation, such as the anti-Semitic laws of 1938 and the judiciary reform of 1941, cannot be considered here. Further, other important issues are given a secondary importance in the economy of this study, not on account of any consideration of their intrinsic importance, but because they also call for another form of historical objectification. It is namely the case of the code of criminal procedure, which, with all its practical importance, stayed at the shadow of the debates regarding the substantive penal law, both in Italy and in the agenda of the international penal movement. In the same way, the important question of the racist laws organizing the penitentiary system of colonies must be left untreated, as this entered neither the agenda of the lawmakers involved in the Italian codification process, nor in those of the analysed international organizations.

Criminal Codification as a Historical Object

The relations between juridical tradition (together with the institutional procedures linked to it) and politics form a recognizable tension, which constitutes the subject of this study. Indeed, when we take into account the heavy ideological investments of the fascist government in the penal domain, this entanglement

of the Italian penal reform in a widely shared penal culture cannot but generate some questions. First of all, did fascism create a new penal regime reflecting its ideology? If the answer to this question was affirmative we could expect Italy to have stayed at the margin, rather than at the centre, of the international penal movement. However, all evidence points in exactly the opposite direction: in the years of the Rocco reform, Italian penologists sought to reinforce their links and position within the international networks formed to deal with the penal question. While Italy had been central to the classical juridical tradition and the positivist movement in the nineteenth century, after a period of decay and loss of prestige, in the 1920s it appears to have recovered much of that prestige and furthermore to have emerged as an inspiration for other countries. Should we then conclude that the discourses of the fascist politicians on the *fascistization* of the penal system were almost purely rhetorical and that, despite a few touches on the façade of the juridico-penal building, the changes of the penal system derived ultimately from transformations that occurred within the liberal, and thus also transnational, juridical tradition? In this case, how deep were these transformations really?

With specific regard to the Italian case, these questions meet a long-running debate on the continuity and discontinuity of the fascist penal reform vis-à-vis the Italian juridical tradition. In the aftermath of the Second World War the issue of the continuity/discontinuity of the Rocco Code acquired some political urgency, as it became necessary to assess how 'fascist' the penal code was in the view of its possible substitution. Having kept the great principles of the liberal tradition – the principle of legality, the non-retroactivity of the law, the prohibition of incriminating by analogy and the principle of accountability based on personal responsibility – and benefiting from an aura of technical perfection, the Rocco Code managed to make its way through the Republican period.[14]

Thus placed in continuity with the classical tradition, criticisms of the code sought to underline that it had also included some truly positivist concepts. Security measures, for example, were sanctions that could be applied as an alternative or in complement to the sentence, characterized by the fact that their duration, instead of being prefixed at the moment of the sentence, depended on the recognition by a judge that the dangerous state had ceased. For the critics of the code, this and other institutes viewed as juridical novelties were combined with the above-mentioned classical principles, creating serious inconsistencies. In the late 1960s and in the 1970s, pressure to effect a profound reform of the penal code increased. But now criticisms emphasized precisely the elements of continuity of the Rocco Code with the authoritarian penal reforms of the late liberal period. From this moment, it is possible to schematize this debate into four significant periods:

(1) *Late 1960s and 1970s.* The historical analyses of the Rocco Code centred on the interplay of juridical technique, ideology and politics, and on the histori-

cal role of the technico-juridical school of penal thought. In general, this penal code was considered to develop the legislative trends of the late liberal period in Italy, albeit cancelling the more socially progressive elements that juridical socialism had then brought into the penal scene.[15]

(2) *Early 1980s*. The debate on the penal code of the fascist regime focused, now, on the relations between the guarantistic principles it maintained, fascist ideology and the logic of exceptions to legality. The Rocco Code was placed in a juridical continuum with the basics of the liberal penal system and its 'normal penal order'. Nonetheless, it was observed that the fascist penal legislation gave further development to the logic of exceptions already present in nineteenth-century Italy, either kept external to the code or incorporated into this as derogations to the legality principle.[16]

(3) *Early 1990s*. The theme of technique was again brought to the fore of the analysis of this code, but now in connection to the political and social role of penologists. On this account, the Rocco Code, even though formally keeping many continuities with the liberal juridico-penal tradition, was, by means of certain concept of technique, set open to political instrumentalization by penologists supporting the fascist regime.[17]

(4) *Late 1990s and early 2000s*. The question was now addressed within a considerably wider frame. One the one side, the Rocco Code was set in connection with the whole criminal politics of the fascist period; on the other, this period was placed within a broader chronological axis, an operation that aimed at apprehending the permanent traits of Italian penality. On these grounds, while at the systemic level and at that of the juridical tradition, the fascist penal legislation was still to be viewed as continuous to that of late liberalism, some significant changes in the Rocco Code, vis-à-vis its predecessor, were now brought to evidence. These resulted from the incorporation of norms hitherto articulated at the margins of the penal code (and amounting to such permanent traits of Italian penality); and the fabric of norms out of fascist ideology, the impact of which was now considered much more than a matter of inconsequent rhetoric.[18]

Before moving on towards a methodological reflection, I would like to make a few comments on this debate that spanned more than three decades. In general, it was fashioned by the question: how fascist was the Rocco Code and related penal legislation? Even when not explicitly formulated, this question constituted the running theme of these analyses. Ultimately, the later studies clarified that much of what the former authors had identified as the elements of continuity of the fascist penal code with the liberal penal order lay, not exactly in the penal code as such, but in its relation with other normative and institutional configurations, namely that of police and extraordinary legislation of an eminently authoritarian, anti-liberal, character. Additionally, traced back to pre-unitary Italy and remaining active in the post-war period, more than a specificity

of the fascist period, these constituted permanent traits of Italian penality. Yet here a new question emerges: how specifically Italian were these traits in which the fascist regime encountered the potential to develop a penal law suitable for its repressive needs? And, in this sense, were they really alien to the broader enlightened penal tradition? Expanding beyond the confines of the Italian case, the inquiry on the Rocco Code must now include these questions.

Yet another methodological issue is of paramount importance here. The question of how fascist is the Rocco Code? was always formulated, more or less explicitly, against the backdrop constituted by the concept of 'juridical tradition' (i.e. how new was the penal code of 1930 with regard to the juridical tradition?) However, and although central to the analyses above, this concept was never problematized in a historical way, that is, approached from the viewpoint of its construction, representation and mobilization by the penal actors. In contrast with these views, I would like to argue that this rather a-historical evocation of tradition, thereby suggested to act *ex machina* on the codification process, is, in reality, a reflex of the legitimizing devices of jurists, and that it impedes a full historicizing of the practices of juridical codification which is at stake here.

As far as the continuity of the juridical tradition throughout different political periods is concerned, other studies on penal codes in the universe of the civilian tradition have reached similar results, albeit not without a few internal contradictions. The work of Pierre Lascoumes, Pierrette Poncela and Piere Lenoël, *Au nom de l'ordre* (1989), an exhaustive study of the French revolutionary and Napoleonic criminal legislation, is a good example of this, and is interesting to compare with the analysis above. Building on the idea that the law can be understood as a system of values and interests protected by sanctions, in *Au nom de l'ordre*, incriminations are viewed as a means of protecting certain institutions and fundamental beliefs considered, in a given historical situation, as fundamental for the ordering of society. The historical study of law is thus equated with the analysis of the juridical formalization of values and interests to which the legitimate political power decides to accord a 'particular protection'.[19] In this case, this methodological orientation gave way to an analysis centred on incriminations (i.e. sanctioned patterns of behaviour) and respective sanctions (the system of penalties). While the latter was approached mostly in a descriptive manner, the analysis of incriminations deserved greater attention. Concretely it was carried out as an observation of the rationalities underlying them, through the uncovering of the principles of coherence and intelligibility that structure the legal texts. In practice, the rationalities underlying incriminations were determined on the basis of the values and interests they protected.[20]

As a consequence of the application of this methodology, the Napoleonic Penal Code elaborated between 1801 and 1810 was described as a reformulation of the preceding one and in continuity with it, despite having been authored by a

new generation of jurists and out of a quite different political programme. Even while the code of 1810 is described as an attempt to rethink its 'model' with a more practical orientation, the authors concluded that it introduced no significant reform. This 'fundamental continuity' was justified with the maintenance of the hierarchy of protected values and interests, with the identical categorization of offenses, and with the similar scale in the measuring of the gravity of sanctions.[21] All in all, this study of the French penal legislation implies that, once the model was set, the political investments on the penal order did not really originate significant ruptures in the juridical order. This becomes evident in the comparison of the 1791 penal code with the Napoleonic one: even when according a particular ideological matrix to each one of them – the former aiming at securing the triad 'democracy, laicism and perfectibility', the latter targeting the values of 'empire, family and business' – the authors viewed a substantial juridical identity linking the two texts.[22] In the end, their expressed objective of departing from the intentions and justifications stated by the lawgivers and ascertain the rationalities implied by the actual juridical norms resulted in the reinstatement of tradition as the main driving force within the juridico-penal field, and in its practical disengagement from the criminal policies that succeed the foundational moment of modern penality. Henceforth, the latter emerges as the only historical moment in which the political rationales were translated into substantive aspects of the penal system.

In the light of the above discussion on the Rocco Code, ultimately pertaining to the tradition set by the Napoleonic Penal Code, this search for its foundational moment has a somewhat disconcerting implication: that, notwithstanding the fact that the Rocco Code was so heavily invested by the fascist state to the point of being presented as a summoning of its values and a reaction to the classical school, it remains substantively a juridical embodiment of the values of enlightened jus naturalism.[23] From a historical point of view, these considerations allow us to highlight what seems to constitute the almost structural resistance of modern juridical codes to become an object of historical analysis, as this is limited to the moment of the paradigmatic foundation of a certain juridical order, usually associated with a political revolution.

This 'law of the code' thus remains substantially untouched by historical events. Viewed as a great bloc formed, in its essential aspects, once and for all, this concept of law calls for an origin, a moment of foundation of which it stands as a faithful memory. The code thus appears difficult to historicize, retaining a tradition in such a pure form that it does not belong to any historical time in particular. Drifting from model to model, willing to apprehend the code in all its historical connections, historians will eventually seek the supposed root cause of codified law – the first code, the *model*. This fits particularly well with many of the approaches on the Rocco Code. In matter of fact, and independently of