Xenia Chiaramonte

The Right to Freedom of Assembly under the Test of Criminal Evidence

An Italian Case of Political Justice

Criminal evidence

The issue of evidence is not a new one. On the contrary, we might affirm that "theorizing about evidence has a rich and complex history that stretches back at least as far as classical rhetoric".[1]

In more recent times, evidence has become less and less an argumentative exercise, as it was in ancient Greece, to the point of being exclusively framed as a logical issue. The Anglo-American tradition especially dealt extensively with the topic and developed a rationalism by reflecting upon the concept of evidence in a way that we might describe as optimistic. In particular, the post-Enlightenment culture remarkably explored crucial points of different conceptions of truth and rationality in the process of fact-finding.

The reference is to two of the major scholars of this great tradition: Bentham[2] and Wigmore.[3] These scholars never expressed a "whisper of doubt about the possibility of knowledge" but rather showed "confident assertion, pragmatic question-begging or straightforward ignoring" as primary responses to the controversial issues concerning any possible comprehensive theory of evidence.[4] A more sceptical approach might reveal some moot points in respect to the optimistic rationalism typical of the eighteenth-century judicial procedure's scholarship.

A theory of evidence is, first of all, a theory of probability which arises from an inductive process of knowledge. This process has always been exposed to the disadvantages of real occurrences.

> A properly conducted evidential argument [...] constitutes an inductive extension of the range of our information. Evidential reasoning, then, can go beyond the assertive content of its premises. This, however, is clearly a matter of degree,

[1] W. Twining, *Theories of Evidence: Bentham & Wigmore*, London, Butler & Tunner, 1985, p. viii.

[2] Bentham's most famous book on evidence is *Rational of Judicial Evidence* (1827).

[3] Wigmore wrote a weighty volume on the topic: *Treatise on the Anglo-American System of Evidence in Trials at Common Law* (1904-1908) and the classic treatise *The Principles of Judicial Evidence* (1913, 1931).

[4] W. Twining, *Rethinking Evidence: Exploratory Essays*, Evanston, Northwestern University Press, 1994 [1990], p. 75.

depending upon how far the conclusion departs from its evidential basis.[5]

Moreover, this issue is not specific to legal theory since an appropriate conception of evidence is also necessary for scientific understanding. The hard part of the process of finding pieces of evidence consists precisely in the fact-finding: we may embrace the exhortation "[F]ind the fact and the law is usually easy".[6]

Nevertheless, as any prosecutor would recognize, fact-finding is not a natural or mechanical matter, especially considering that, based on those findings, committed actions and proved facts will be transformed into penal violations. In other words, care and legality in collecting pieces of evidence are crucial for the process of translating actions into crimes. The turning of actions into imputations, that is, the fact into law, is not at all as simple as it might seem following the stimulus of Langbein[7]. However, it must be acknowledged, as underlined by this scholar, that initially the most challenging task is to reconstruct the fact.

Perhaps it is not a coincidence that the meaning of "trial" in English is both "legal process" and "experiment" (or better, experimental attempts but also clinical testing), as in the expression "by trial and error", that is, experimentally. "By trial and error" is one of the principal methods of problem-solving characterized by repeated attempts to achieve an aim or solve a controversy. This method is grounded on the idea that learning from mistakes is a way to improve knowledge. In the case of legal proceedings, reasoning is based on proving a theory and then proving the opposite theory, testing and testing again, or testing and evaluating, in a dialectical way of reasoning that employs the tools of rhetoric – a classical rhetorical skill that is endorsed by modern science.[8]

Judicial evidence follows the same path: trial and error. We expect to be supported – as always in the juridical discipline – by a technical framework, which, even if shared with other fields of knowledge, assumes a specific meaning in the legal field. However, in the case of evidence, we must change our minds. There have been very authoritative attempts to construct a concept of legal evidence that can solve the problems that a vast and non-technical notion generates.[9] Yet, the construction of a boundary between the concept of evidence as a reality and the concept of evidence as a technical term remains profoundly complex. As in the case of Evidence law, "the law remains silent on some crucial matters. In resolving the

---

[5] R. Nicholas & J. Carey, « Evidence in History and in the Law », *The Journal of Philosophy*, vol. 56, nº 13, 1959, p. 562 [https://www.jstor.org/stable/2022710].

[6] J.H. Langbein, « Historical Foundations of Law of Evidence: A View from the Ryder Sources", *Columbia Law Review*, vol. 96, p. 1168-1202 [https://digitalcommons.law.yale.edu/fss_papers/551/].

[7] *Ibid.*

[8] See S.C. Sagnotti, « Prova, diritto, verità », in A. Bargi, A. Gaito and S.C. Sagnotti, *Teoria e prassi della prova: profili processual-filosofici*, Torino, UTET, 2009.

[9] See J.H. Wigmore *Science of Judicial Proof, as Given by Logic, Psychology, and General Experience and Illustrated in Judicial Trials*, Boston, Little, Brown and Co., 1937; T. Anderson, D. Schum and W. Twining, *Analysis of Evidence*, Cambridge, Cambridge University Press, 2009.

factual disputes before the court, the jury or, at a bench trial, the judge has to rely on extra-legal principles".[10]

Nevertheless, our task is to try to elucidate the concept of evidence in the juridical context, which, in any case, has distinctive features.[11] Although evidence remains too closely tied to fact, rather than tamed by the technique of law, there is a specificity of evidence in the legal field that differs (and must differ) from other disciplines because it is a guarantee for the individual.

The concept of probability itself must be used carefully. There are precise rules provided by our legal codes. "It is doubtful that evidence of a person's character and past behaviour can have no probabilistic bearing on his behaviour on a particular occasion; on a probabilistic conception of relevance, it is difficult to see why the evidence is not relevant".[12] From the point of view of other fields of knowledge, the notion of evidence assumes precise meanings; from the legal point of view, some of those meanings that apply to other disciplines cannot be considered valid. Essentially, according to the Western tradition of criminal law, only acts and not the ideological positions of the subjects may be punished. Our law, as it is based on the committed facts, does not conceive a piece of evidence that would be based on the characteristics of the subject.

In particular, the central area of interest that this paper deals with is evidence in the field of criminal procedure as "[C]riminal Evidence remains the most important area of controversy. Here the disagreements are primarily political".[13]

This article will put the right to freedom of peaceful assembly in relation to criminal evidence. After a review of the forms in which this fundamental right is recognised, this paper will provide a series of empirical cases to show how lack of evidence can lead to the denial of personal liability and thus concretely limit the right to freedom of assembly.

The focus will be on four criminal trials against several inhabitants of the Susa Valley (Piedmont, Northern Italy) and activists of the Italian social movement called "No Tav", namely the mobilization that has been struggling against the project of the Turin-Lyon high-speed train for 30 years, and which I have observed during a two-year judicial ethnography.[14]

In particular, through that analysis, the aim is to shed light on the procedural nonchalance through which the due element of evidence is circumvented. The data held by the magistrates is that of the participation of a multiplicity of subjects (of law) to public demonstrations where criminal actions have occurred; the transformation of this fact (participating in a protest) into law (committing a crime) cannot be immediate. On the one hand, it is necessary to turn these actions into specific

[10] H.L. Ho, « The Legal Concept of Evidence », in E.N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy*, Palo Alto, Stanford University Press, 2015 [https://plato.stanford.edu/archives/win2015/entries/evidence-legal/].

[11] R. Nicholas & J. Carey, « Evidence in History and in the Law », *op. cit.*

[12] H.L. Ho, « The Legal Concept of Evidence », *op. cit.*

[13] W. Twining, *Rethinking Evidence: Exploratory Essays*, *op. cit.*, p. 209.

[14] X. Chiaramonte, *Governare il conflitto: la criminalizzazione del movimento No Tav*, Milano, Meltemi, 2019.

crimes; on the other hand, there is an even more delicate process: to find out who committed the crimes.[15]

The article will thus show that what is not proved is the participation of people to the crime, but only their involvement in the protest, and it is precisely starting from this illegitimate deficiency that the right to freedom of assembly is emptied.

Freedom of assembly and its regulatory limitation

As recently recognized,

> *La liberté de manifester connaît aujourd'hui une très forte actualité, et ce dans le monde entier. Pourtant, elle doit subir de très fortes limitations aussi bien dans les pays en transition démocratique que dans les pays occidentaux. Depuis Hong-kong, jusqu'aux pays d'Afrique du Nord (Printemps arabes), à la Turquie, à l'Ukraine, aux États-Unis et au Royaume-Uni avec Occupy, au Canada, à l'Espagne avec les Indignés, et à la France, partout cette liberté connaît des revers. L'état d'urgence, l'ordre public immatériel, la privatisation de l'espace public, la volonté de faire payer les manifestations pour les dégâts qu'elles génèrent, et les nouvelles méthodes policières constituent autant de menaces.*[16]

Italian Constitution guarantees the right to freedom of assembly under article 17. The assemblies must respect specific criteria: they must be peaceful and without arms. Peaceful assembly means that the collective gathering shall not disturb public order. Advance notice is not required for assembly in a place open to the public,[17] whereas for those in a public place, notice must be given, at least three days in advance, to the authorities, who may prohibit them only for proven reasons of safety or public safety.

In other words, the Constituent Assembly aimed at making the freedom of assembly a constitutionally guaranteed right, through a provision that, on the one hand, protects public order and, on the other hand, protects this freedom as an inviolable human right, that is expressly provided for by art. 2 of the Italian Constitution. The ECHR provides for the right to "freedom of peaceful assembly and association" (art. 11).[18] The same principle was subsequently provided by art. 12,

---

[15] See P. Ferrua, *La prova nel processo penale*, vol. 1, *Struttura e procedimento*, Torino, Giappichelli, 2017, for a treatrise on the evidence in criminal law.

[16] A. Duffy-Meunier & Th. Perroud, « La liberté de manifester et ses limites : perspective de droit comparé : Introduction », *La Revue des Droits de l'Homme*, vol. 11, 2017 [https://journals.openedition.org/revdh/2956]. See in particular the chapter by Karine Roudier: K. Roudier, « La liberté de manifestation aujourd'hui en Italie. Quels problèmes, quelles perspectives ? », *La Revue des Droits de l'Homme*, vol. 11, 2017, p. 57-68 [https://journals.openedition.org/revdh/2956].

[17] It is the case of privately owned places, where people can enter under certain conditions set by the owner or manager.

[18] Article 11: Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests. – No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. this article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

paragraph 1, of the Charter of Fundamental Rights of the European Union, according to which

> [e]veryone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.

Given that this is one of the rights that mostly acts as a litmus test of respect for democratic freedoms, the United Nations has long established a special rapporteur on the rights to freedom of peaceful assembly and of association.[19]

Therefore, this right is protected at the highest legal level: constitutional and supranational. Moreover, it has been one of the cornerstones upon which European legal systems have been based since the French Revolution.

The constitutional recognition is based on the idea that citizens shall always be allowed to exert pressure on political power. The genealogy of the right to freedom of assembly can be traced to an amendment of the French Constitution (1791) and to the American Constitution (1789). While in the American Constitution, the right was limited to the petition, the French constitutional "Dispositions fondamentales garanties par la Constitution" enshrines the freedom of peaceful assembly: "*La liberté aux citoyens de s'assembler paisiblement et sans armes, en satisfaisant aux lois de police*".

On the contrary, some doubts emerge if we consider that there is no real definition of the concept of assembly in the Italian Constitution. In fact, "the Italian Constitution expressly affords the right of assembly to the citizens but does not define it, thus leaving to the interpreter the arduous task of constructing an adequate notion".[20]

At any rate, it is agreed that the right in question not only covers the right to freedom of expression – a right provided for by article 21 of the Italian Constitution – but also the right of being physically together.[21] As opposed to simply gathering (e.g. a line in front of public establishments, that is an occasional gathering), an assembly exists when people intended to be together. The voluntary physical co-presence of several people enables one to distinguish assemblies from unexpected forms of union.

Whatever the purpose is – the Constitution makes no mention of this –, the right of assembly is an individual freedom that can only be exercised collectively.

---

[19] In October 2010, the Human Rights Council adopted resolution 15/21 [https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/15/21] establishing the mandate of the Special Rapporteur. The Council extended the mandate in September 2013 (resolution 24/5 [https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/24/5]) and June 2016 (resolution 32/32 [https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/32/32]).

[20] F. Ciannamea, « Libertà di riunione e possibili limitazioni. Con uno sguardo al Decreto Minniti e alla direttiva del Ministero dell'Interno sulle manifestazioni urbane », *Giurisprudenza Penale Web*, nº 10, 2017, p. 2 [http://www.giurisprudenzapenale.com/2017/10/07/liberta-riunione-possibili-limitazioni-uno-sguardo-al-decreto-minniti-alla-direttiva-del-ministero-dellinterno-sulle-manifestazioni-urbane/]. My translation of: "*la Carta costituzionale italiana riconosce espressamente il diritto di riunione ai cittadini, ma non ne dà una precisa definizione, lasciando quindi all'interprete l'arduo compito di costruire una nozione adeguata*".

[21] A. Pace, *Problematica delle libertà costituzionali, Parte speciale*, Padova, CEDAM, 1992, p. 299.

Thus, although the political purpose is not expressed and does not even constitute the only possible finality, the right of assembly is widely recognized as a precondition of democratic life and political activity itself.[22]

In a democratic and pluralistic context, the freedom to be physically together should be an essential element of a dialectic open to the broadest and most diverse possibilities of participation. It thus defeats the old principle of defence from the dissent that was granted by the old Albertine statute.[23]

As stated in the art. 17, paragraph 3, of the Italian Constitution, if the assemblies are held in a public place, notice must be given to the authorities, which can prohibit them only for proven reasons of safety or public safety.

The governing body that presides over the conditions of the concrete exercise of the right of peaceful assembly is the Prefect. In the Italian administrative system, the Prefect is a monocratic organ of the State, representative of the territorial government, who is in charge of an office dependent on the Ministry of the Interior. In particular, the Prefect exercises the power of ordinance through which (s)he takes decisions about space and time of protests.

The power of ordinance is the instrument through which the Prefect can compensate for any deficiencies in the legal system faced with absolutely unforeseeable needs of public interest. A prerequisite for the exercise of this power is urgency and serious public necessity: exceptional situations that require prompt protection of the public interest.

The application of this rule, formulated before the Constitution entered into force, must today be read in a constitutionally-oriented way. Therefore, it is necessary to bear in mind the direction taken by the Constitutional Court in sentence n.8, 1956. The latter expressly states that the ordinances must have: limited effectiveness in time, adequate motivation, efficacious publication (when the ordinance does not have individual character) and conformity to the principles of the legal system.

Only apparently the Prefect has exclusively administrative powers since the power of ordinance might be exercised in a general and abstract way, as it should be the case of the law rather than a government official's power. Thus, an ordinance can limit the exercise of the fundamental right of assembly. The aforementioned Constitutional Court's decision highlights the potentially dangerous side of the power of ordinance. Moreover, a few years later the Constitutional Court clarified that the art. 2 TULPS (*Testo unico delle leggi di pubblica sicurezza*)[24] was illegitimate since "it attributes to the Prefects the power to issue ordinances without respecting

---

[22] See *ibid.* and A. Pace, *La libertà di riunione nella Costituzione italiana*, Milan, Giuffrè, 1967.

[23] A. Schillaci, « Libertà di riunione », in *Treccani encyclopedia*, 2017 [http://www.treccani.it/enciclopedia/liberta-di-riunione_%28Diritto-on-line%29/].

[24] Issued in 1931 (the same year as the Italian penal code came into force) during the fascist regime, TULPS is the central nucleus of Italian police law and contains the rules aimed at preventing disturbances and guaranteeing public order and security. Through the Constitutional Court and legislative activity in the Republican era, various articles of the TULPS have been modified or cancelled.

the principles of the legal order" (n.26, 1961). However, these constitutionally-oriented judicial decisions were not able to limit the overwhelming power of which the Prefect can take advantage. In particular, as Algostino points out:

> The discretion of the Prefect remains wide, especially where there is no precise legal reserve for any rights restrictions. Even if the ordinances cannot modify any norm but merely provide for a specific and temporally limited situation, the dismay remains for a way of ruling that endows a monocratic organ, hierarchically incardinated in the Executive, with such extensive powers towards of citizens. To this it must be added that, although the situations are specific and given, "security" and "public order" are open if not *passepartout* concepts, that are flexible according to the dynamics of society but above all conformable to the logic of power.[25]

A recent case that raised the question of the Prefect's power concerns the protest against megaprojects. In particular, it is necessary to look at the ordinances that have forbidden the demonstrations in Susa Valley, Piedmont. That is the area on which the Turin-Lyon high-speed train should arise. Against the activists of the No Tav movement – that is the protest against the project – several ordinances were issued.

Demonstrations against the megaproject are generally held in the area where the train construction site is located. However, a series of ordinances have forbidden people from protesting in the area near the construction yard. As clarified above, ordinances must have limited effectiveness over time in order to be constitutionally admissible. The right to freedom of peaceful assembly cannot be restricted otherwise. Conversely, the exception by ordinances continues over time through the issue of renewed ordinances that replace one another containing the same prohibition.

Here, "the limitation, abstractly envisaged about a geographical area, affects, in the specific historical circumstance, a specific category of physical persons united by political reasons".[26] Despite the art. 16, paragraph 2, of the Italian Constitution, according to which political reasons can determine no restriction, here it is evident that the objective is precisely to contain the political expression of this movement and its right to oppose public decisions. As a consequence, through the abuse of the prefectural power, the right to freedom of peaceful assembly is denied.

Admittedly, Turin Prefect's ordinances themselves mention the dangers associated with demonstrations by the No TAVs (or the potential dangers to which the

---

[25] A. Algostino, « Vietato avvicinarsi al cantiere. La libertà di circolazione in Val di Susa secondo il prefetto e il TAR », in A. Chiusano *e. a.*, *Conflitto, ordine pubblico, giurisdizione: il caso TAV*, Torino, Giappichelli, 2014, p. 38-39. My translation of: "*La discrezionalità del Prefetto rimane comunque ampia, specie laddove non vi è una precisa riserva alla legge delle eventuali restrizioni dei diritti. Se pur le ordinanze non possono modificare alcuna norma, ma si limitano a provvedere in una situazione specifica e temporalmente limitata, resta lo sconcerto per un modo di provvedere che dota un organo monocratico, gerarchicamente incardinato nel potere esecutivo di poteri così estesi nei confronti dei cittadini. A ciò è da aggiungersi che, se pur le situazioni sono specifiche e determinate, 'sicurezza' e 'ordine pubblico' sono concetti aperti, se non proprio* passepartout*, flessibili rispetto alle dinamiche della società ma soprattutto conformabili alle logiche di potere*".

[26] *Ibid.*, p. 42. My translation of: "*la limitazione, astrattamente prevista in relazione ad una area geografica, interessa, nella circostanza storica specifica, una determinata categoria di persone fisiche accomunate da ragioni politiche*".

workers of the area can be exposed) up to indicate the protest itself as a danger, rather than as a right:

> it is sufficient the fact that "protests are expected, with predictable presence of participants" (ordinance of November 30, 2011); furthermore, in certain occasions the announced performance of marches leads to the adoption of more restrictive *ad hoc* ordinances, aimed at removing the protest from the construction site (e.g., with the ordinance of October 20, 2011 the access is also forbidden "to all the paths and to the grassland and forest areas of the Municipalities of Giaglione and Chiomonte, which lead to the construction site").[27]

What idea of security does this abuse of ordinances convey?

It could be described as a *terrible* security since it is a form of security meant to protect power and not to guarantee the exercise of a constitutional right such as the right to freedom of assembly.

Here, the law is used as a tactic – as Foucault traced amongst other governmental aspects: the use of tactics rather than laws, or the use of laws as tactics is increasing.[28] A perfectly legal and last-minute tactic, always specific and efficient, is precisely that of the prefectural ordinances. We must not look after speeches or beyond words since the words themselves testify a *prêt-à-porter,* conception of the law. As mentioned by the judge for preliminary investigations (GIP) about the prefectural order:

> *Precisely in order to cope with this situation* on June 22nd, the Prefect had issued an ordinance [...] relating to the "availability of police forces near the construction site of La Maddalena, Chiomonte," that forbade the circulation in the streets surrounding the area of La Maddalena. Also, it was forbidden for anyone to enter and remain in the square in front of the Archaeological Museum and the one surrounding the winery (GIP ordinance, Turin 1/20/2012).[29]

Freedom of assembly and criminal evidence

The case of the Susa Valley and the No Tav movement qualifies as a real criminalization laboratory. After seeing how the entire area has been substantially tied to a security or public order regime, let us analyse how it has become a criminal issue. This analysis will serve to come back to the main issue: the relationship between the criminal evidence and protection of the fundamental right to assembly.

---

[27] *Ibid.*, p. 42-43. My translation of: "*è sufficiente il fatto che siano in previsione 'manifestazioni di protesta, con prevedibile nutrita presenza di partecipanti' (ordinanza del 30 novembre 2011); in talune occasioni, inoltre, il preannunciato svolgimento di cortei porta all'adozione di ordinanze* ad hoc*, più restrittive, tese ad allontanare la protesta dal cantiere (con l'ordinanza del 20 ottobre 2011, ad esempio, è vietato l'accesso anche 'a tutti i sentieri e alle aree prative e silvestri dei Comuni di Giaglione e Chiomonte, che comunque conducano all'area di cantiere')*".

[28] M. Foucault, *Sécurité, territoire, population. Cours au Collège de France (1977-1978)*, Paris, Gallimard/Seuil, 2004; Italian trans.: *Sicurezza, territorio, popolazione. Corso al Collège de France (1977-1978)*, Milano, Feltrinelli, 2005, p. 80.

[29] My italics; My translation of: "*Proprio per fare fronte a tale situazione il 22 giugno il Prefetto aveva emesso un'ordinanza ai sensi dell'art. 2 TULPS relativa alla 'assegnazione disponibilità forze di polizia aree in prossimità del sito di cantiere in località La Maddalena di Chiomonte', con la quale veniva interdetta la circolazione nelle vie circostanti l'area della Maddalena e vietato a chiunque l'ingresso e lo stazionamento nel piazzale antistante il Museo archeologico e nell'area circostante l'azienda vitivinicola*".

The ongoing series of criminal proceedings against the No Tav movement today consists of 51 criminal trials and over 1,500 people involved (suspects and defendants included). However, it is not only a quantitative matter; the quality of these trials presents dubious shortcuts, likely undertaken to avoid the evidential difficulties.

(a) We may start from the ordinance of the Turin GIP that precedes the so-called No Tav Maxi Trial, criminal proceedings against 53 activists of this social movement. It related to the dates of 27 June and 3 July 2011, in which there were clashes between the police and protesters in various areas close to what will become the Tav construction yard.

Chronologically the police record comes first (7 November 2011), then there is the Public Prosecutor's examination, the (potential) request for the application of precautionary measures and finally the screening of a second magistrate with judicial functions, that is the judge for preliminary investigations.

Reading these acts means being in front of documents that copy those that preceded them without any screening, which the criminal procedure would require. The Public Prosecutor follows the police records, essentially transferring them to a different document that arrives in the hands of the GIP, which generally confirms it.

For the subjects, there is a description that counts more adjectives than facts. The GIP defines them as "the troublemakers" or "the violent," whose actions generate "an explosion of unusual violence".

There are no specific data that allow a criminal relevance in the singular, depending on individual conduct, as the principle of personal liability would require (Article 27 of the Constitution). Even more seriously, we note that even the magistrate with judicial functions (GIP) follows with no check theories promoted by those who have only investigative functions (the Public Prosecutor), just as the latter had drafted the act according to the police record.

However, the most problematic issue is that this consensus reached not only the first procedural acts but continues until an advanced stage of the trial, that is after the dispute. In this way, it ends up by rendering vain the dispute and leaving the construction of the fact exclusively to the police. However, as highlighted above, in criminal trial the most challenging task is to reconstruct the fact.

In support of this observation, it is worthwhile to show an "authentic" evidence. In the so-called No Tav Maxi-trial, there is a typing error that betrays the police record's copy and paste made by the Public Prosecutor. The time in which the defendant M.N. would have thrown the stone is 2.30 pm, which corresponds to the one shown in the picture taken by the operator. The time is the one indicated in the police annotation, but it is wrong, and during the dispute it had emerged.

Through the videos, it is clear that the alleged crimes against M.N. do not take place at that time. Furthermore, two witnesses confirm the error of the operator's camera and, in any case, the forensic police operator himself declared that his camera was settled an hour back due to an error.

Returning to the ordinance of the GIP: here it is first proposed that interpretation that will cover the entire trial. The main argument is that participation in a demonstration implies committing offences. This theory will also be adopted by the court of first and second instance in their decision.

Taking for granted that participation in a protest implies delinquency is not an indicator of a constitutionally-oriented interpretation since protesting makes the right to freedom of assembly effective.

On the contrary – following the judge's argument – given that the participation as such demonstrates already the necessary elements of the complicity in crime (*concorso*), it is not necessary to prove the causal link between the psychological or material assistance of the accomplice and the offence.

In fact, in the ordinance of the GIP it is stated that:

> the participation to similar, imposing and violent clashes necessarily implies and shows the existence, upstream, of a prior acceptance of developments and outcomes detrimental to the physical integrity of others, as a consequence of the event itself, that is not only highly probable but indeed almost inevitable.[30]

For this reason, the judge of the preliminary investigations can go as far as to argue that it is entirely

> superfluous to identify the specific object that reached and injured each police officer, as well as the demonstrator who launched it. All the participants in the clashes must account for all (planned or even only foreseeable) crimes committed in that situation in the place where (s)he was.[31]

The same approach is confirmed by the judicial decision of the first instance, where the judge explicitly agrees with

> the principle according to which, in order to have liability, evidence of the direct causal derivation of the injury by a defendant's specific violent action, individually determined, is not at all necessary. It is sufficient that the accused has provided with his conduct a concrete assistance to the aggressive collective action and/or reinforced the criminal other's purpose.[32]

Ultimately, they will punish the defendant who was in the place where the police officer suffered the injury on a time coinciding with or later than the hours declared by the public official himself. Also, this decision is based on the argument offered by the judge, according to which

> all the defendants, when they put stones, fire extinguishers or sticks in hand to hurl them at the police, they expressed – both materially and psychologically – their direct tension towards illegal results […] [and] the fact that those injured agents were not able to identify the perpetrators […] is irrelevant: all the defendants who carried out […] launchings must answer for the overall damaging result

---

[30] My translation of: "*la partecipazione a simili, imponenti e violenti scontri implica necessariamente, e dimostra l'esistenza, a monte, di una preventiva accettazione di sviluppi ed esiti lesivi dell'altrui integrità fisica, quale conseguenza non solo altamente probabile, ma, addirittura, pressoché inevitabile, della manifestazione stessa*".

[31] My translation of: "*superflua l'individuazione dell'oggetto specifico che ha raggiunto ogni singolo appartenente alle forze dell'ordine rimasto ferito, come lo è l'individuazione del manifestante che l'ha lanciato, atteso che tutti i partecipanti agli scontri devono rispondere di tutti i reati (preventivati o anche solo prevedibili) commessi in quel frangente, nel luogo ove si trovava*".

[32] My translation of: "*il principio secondo cui, per aversi responsabilità, non è affatto necessaria la prova della diretta derivazione causale della lesione da una specifica azione violenta di un imputato, individualmente determinato, in quanto è sufficiente che l'imputato, con la sua condotta, abbia fornito un concreto apporto all'azione aggressiva collettiva e/o abbia rafforzato l'altrui proposito criminoso*".

> […] as well as, *mutatis mutandis*, all the members of a "fire group" must answer for the lethal event caused.[33]

In other words, while the consensus among legal practitioners seems broad, the narrow path of proving the causal link is abandoned. In the name of the so-called theory of the posthumous prognosis, the judge considers any conduct that *ex ante* may facilitate the realization of an offence as an actual complicity in crime (*concorso*).

There are three main threads of legal doctrine regarding the *concorso*. According to the theory of conditionality, an act is criminally relevant only on condition that without it, the crime would not have been carried out "with those modalities".[34] According to the theory of "facilitating causality", it is "criminally relevant not only the necessary aid – which cannot be mentally eliminated without the crime disappearing – but also the aid that facilitates or makes the achievement of the final objective easier".[35] Finally, according to the theory of the posthumous prognosis, any conduct that is *ex-ante* able to facilitate the realization of the crime contributes to it, even if *ex-post* proves to be useless or harmful. The latter is the thesis that prosecutors and judges preferred.

However, "the theory […] according to which it would not be necessary for the atypical conduct to contribute causally to the achievement of the material act committed by others is *contra legem*; according to that theory, it would be sufficient if the conduct appeared to be ex-ante suitable to increase the likelihood of carrying out the crime, even if ex-post proved to be irrelevant".[36] The defence adopts the theory of conditionality according to which the assistance must be evaluated in practice. That applies to a material fact (physical assistance), which would not have been produced if it had not been for the assistance that the accomplice provides to the principal perpetrator. But it also applies to the psychological assistance to the principal's action: the influence must be ascertained on a case-by-case basis, with due rigor, because even the psychological assistance requires a proven influence on motivational processes that led others to the commission of a criminally relevant fact.

(b) To the vision of the *concorso* as emerged in the Maxi-trial, further shifts must be added, which minor proceedings can illuminate. Among the practices of the No

---

[33] My translation of: "*tutti gli imputati, nel momento in cui misero mano a sassi, estintori, bastoni ecc. per scagliarli sulle forze dell'ordine, espressero – sia materialmente, sia psicologicamente – la loro diretta tensione ai risultati illegali* […] [*e*] *che gli agenti feriti non siano stati in grado di identificare gli autori* […] *è irrilevante: tutti gli imputati che effettuarono lanci* […] *devono rispondere del risultato lesivo complessivo* […] *così come, tutti i componenti di un 'gruppo di fuoco' devono rispondere dell'evento letale cagionato*".

[34] G. Marinucci & E. Dolcini, *Manuale di diritto penale. Parte generale*, Milano, Giuffrè, 2006, p. 358.

[35] G. Fiandaca & E. Musco, *Diritto Penale, Parte Generale*, 4th ed., Bologna, Zanichelli, 2010, p. 505. My translation of: "*penalmente rilevante non solo l'ausilio necessario, che non può essere mentalmente eliminato senza che il reato venga meno, ma anche quello che si limita ad agevolare o facilitare il conseguimento dell'obiettivo finale*".

[36] G. Marinucci and E. Dolcini, *Manuale di diritto penale. Parte generale*, *op. cit.*, p. 358-359. My translation of: "*è* contra legem *la tesi* […] *secondo cui non sarebbe necessario che la condotta atipica abbia causalmente contribuito alla realizzazione del fatto concreto da parte di altri*" and "*sarebbe sufficiente che la condotta apparisse ex ante idonea ad aumentare la probabilità di realizzazione del fatto, anche se* ex post *si è rivelata ininfluente*".

Tav movement there are the demonstrative actions: in particular the "nocturnal walks" at the construction site and the symbolic cutting of a small part of wire mesh.

On one of these occasions, two women are arrested and reported for violence against a public official and injuries. Only one of the two will be sentenced and only for the first offence to eight months of imprisonment (with conditional suspension). In this case, both Public prosecutor and judge of precautionary measures demonstrate a conception of the *concorso*, which is a further development of the approach analysed in the case of the Maxi-trial.

The case regards a defendant who claims not to have thrown anything against the policemen; the evidence being only in the fact that the police affirm it. The judge considers "reasonable that if G. had intended to limit himself to demonstrate peacefully, as soon as the demonstration has assumed a violent nature, he would have moved away" (Ordinance Tribunal Turin, 9/22/2011).

In sum, although the latter decision explicitly mentions the right to freedom of assembly as constitutionally guaranteed in a democratic state, *de facto* this right seems not to count if one is present in a context in which others perform acts considered as violent. Not to mention that there is no evidence of violent action, but only of symbolic and even explicitly accomplished protest. Usually, these minimal cuts to the meshes are made in front of police cameras or journalists to demonstrate the transparency of the political gesture.

(c) Another shift can be noticed in the trial for the facts of July 19, 2013 – it was another "nocturnal walk" – in which the GIP seems to assert the same thesis above mentioned and even to expand the scope of that. The GIP indeed stated that as those who continue to demonstrate were able to know in advance and to see that others were performing violent acts against police agents they can only be considered – it is argued – as taking part in these violent acts. Therefore, there was no need to seek and prove their causal contribution.

(d) An even more dubious type of complicity in crime is defined as "adherence to the facts" in the so-called Geovalsusa trial (Tribunal Turin 22474/2012), a company that cooperates in the Tav project. According to this judicial invention, people who illegally entered the company are charged for violating private property and for a presumed raid to its computer system. Although there is no evidence of the informatic attack, any participant in the sit-in was accused of it. Basing on a concept that the Italian criminal code does not contain, and without any evidence of the causal contribution, all demonstrators turn out to be punished for "adherence to the facts".

In other words, all the people present were indicted for every crime committed within the walls of the Geovalsusa company. Their crime was their presence: the accessorial liability is never proved.

Without any evidence of the causal contribution of the single person, in open violation of the constitutional principle according to which criminal liability can be exclusively personal (art. 27 of the Italian Constitution).

Criminal liability is no longer personal. It cannot remain so when the goal becomes to punish the phenomenon, and not the individual actions, as liberal criminal law would admit.

Collective liability highlights the political nature of the trial, as a case of *political justice*[37] that does not appeal to the individual but to a "criminal crowd".

During the hearings, it was frequently mentioned that the object of judgment is not the entire social movement but those individual criminal actions performed by each protester.

Nevertheless, public prosecutors' reasonings contradict that justification.

Admittedly, there is always room for general considerations about the social movement's progress, its history, and its composition. These assessments are not even oversights, but constants, that reminds what, for a different case, Ferrajoli had defined "a mega historical-political investigation into Italian subversion with open object and indeterminate boundaries".[38]

The best example of this attitude is provided by the indictment of the maxi-trial, where reference is made to the "precedents" of the No Tav movement. Referring to events that occurred many years before the crimes subject to judgment, the following excerpt demonstrates an interest in the social phenomenon rather than in individual offences:

> it was not the first serious unrest that occurred in the area, since previously, for the same purposes of contrasting the installation of the construction site there had been demonstrations that resulted in violent actions, and there were initiatives in blatant violation of the law in the area.
> In the order of the Questore of Turin of 6/21/11 prot. 8014, in the chapter entitled 'protest initiatives', all the actions to contrast the realization of the work starting from November 2005 with the first survey activities are listed and described. Actions that progressively became more frequent but above all more dangerous for public order and public safety…[39]

Clearly, the right to freedom of assembly has a limit: the peaceful nature of the assembly. However, the problem here is different. Here the magistrates affirm that in order to punish these illicit behaviours, there is no other way than by broadening the range of validity of the concept of complicity in crime. Given that it is complicated to reconstruct the criminally relevant actions carried out individually, their

---

[37] Political justice can be defined as that action carried out by the judiciary which is characterized by political ends; as remarkably defined by the greatest scholar of the topic, "[P]olitical justice is the utilization of judicial proceedings for political ends. The political end, thus pursued, may be revolutionary or conservative, necessary from the community viewpoint or frivolous. It is not its legitimacy or illegitimacy with which we deal here, but only that it is pursued via the judicial process" (O. Kirchheimer, « Politics and Justice », *Social Research*, vol. 22, nº 4, 1955, p. 377).

[38] L. Ferrajoli, « Il caso 7 aprile. Lineamenti di un processo inquisitorio », in *Dei delitti e delle pene*, vol. 1, 1983, p. 181. See also D. Fiorentino & X. Chiaramonte, *Il caso 7 aprile*, Sesto San Giovani, Mimesis, 2019, for a reconstruction of the political justice from the famous 7 aprile case – to which Ferrajoli makes reference – to the No Tav criminalisation.

[39] My original indictiment's transcription: "*non si trattava dei primi gravi disordini accaduti nella zona, poiché già in precedenza, per le stesse finalità di contrasto ai lavori per la costruzione dell'opera vi erano state manifestazioni sfociate in azioni violente e nella zona erano in corso iniziative in palese violazione della legge*". – *Nell'ordinanza del Questore di Torino del 21.6.11 prot.* 8014 *nel capitolo intitolato 'iniziative di contestazione' sono elencate e descritte tutte le azioni di contrasto alla realizzazione dell'opera a far data dal novembre 2005 con le prime attività di sondaggio. Azioni che progressivamente erano divenute sempre più frequenti ma soprattutto più pericolose per l'ordine pubblico e l'incolumità pubblica…*"

choice is to punish everyone. For this reason, the old positivist criminological solution of the collective liability of the delinquent crowd comes back to mind.

Reading Sighele, we can see this trend:

> Science feels that the irresponsibility for crimes committed by a crowd cannot be proclaimed because science knows that the social organism – just like any other organism – always reacts, in this case just as in any other, against anyone who threatens its conditions of life. To be the object of this reaction means to be responsible: if the reaction is, therefore, fatal and necessary, so, too, is the responsibility.
> But who is responsible?
> […] [C]ommon sense responds: the entire crowd must be responsible. And science, after attempting to unravel the mysterious complexity of causes that determine the crimes committed by a crowd, and after seeing how these causes are so interrelated and blended that their individual values cannot be determined, is also forced (if it is to remain accurate and sincere) to give the same response as common sense: the entire crowd must be responsible.
> The response cannot go beyond this collective name for the crowd, this vague and undetermined entity, given that only the crowd contains all of the anthropological and social factors that participate in the production of crimes committed by its members. It seems that to attribute the responsibility to a more determined and precise entity – the individual – would be an error; because all the elements of these crimes do not exist in the individual: the individual would only be one of the causes rather than the whole set of causes.
> But is it possible for the crowd to be responsible? Is this collective responsibility a possibility in today's world?
> In the past, collective responsibility was the only form of responsibility.[40]

In other words, the judges should have respected the doctrine that interprets the assistance in a constitutionally oriented way. Instead, the judges choose the *contra legem* theory of posthumous prognosis and therefore consider every action as an effective assistance even if it could only be considered as potential. Instead of evaluating the assistance concretely, they consider it in a nonmaterial way. In doing so, they violate the principle of materiality of the penalty (art. 27 of the Constitution) according to which committed facts, not only potential, must be punished. In doing so, the judges do not care to evaluate the individual causal contribution. Indeed, they avoid doing it because they have no evidence. Therefore, by not proving the causal link, they punish subjects of which they have only a certain kind of evidence, that is, that they were demonstrating. Here is the link between the lack of evidence and the denial of the right to freedom of assembly.

Evidence is not pure logic

The No Tav case is far from being just a *unique* case; it is instead an experience that is as local as it is exemplary. The post-Enlightenment project from which this essay starts is not confirmed.

Here the words of Massimo Nobili reaffirm the point:

---

[40] S. Sighele, *The Criminal Crowd and Other Writings on Mass Society*, ed., intro. and notes N. Pireddu, trans. N. Pireddu and A. Robbins, fore. T. Huhn, Toronto, University of Toronto Press, 2018, p. 56-57.

> It has been frequently argued in the past, and not infrequently repeated more recently, that the theory of judicial trials rotates in a rarefied and undisturbed atmosphere with respect to the world of values and political conceptions of society and of the trial. According to this approach, the rejection of the so-called "neutrality" of law and legal interpretation, if it can ever be valid in general, certainly does not come to involve the discipline of judicial evidence, since it is a matter of "pure logic".[41]

On the contrary, this case shows how ideological conditioning can affect the (laborious) reconstruction of the facts. This Susa Valley criminalization workshop shows that the representations of society and politics modify the process of selection of evidence and their evaluation up to the judicial decision. The vision that was promoted by the magistrates in the various No Tav political trials seems to reveal the inquisitorial nature of the penal procedure. In addition, their conception of authoritarian and centralizing politics is tightly connected to the latter. First, I intend to clarify this second observation in order to come back to the inquisitorial legacy revealed by my casuistic analysis.[42]

This empirical analysis shows that government choices and above all, the economic policies of the State, cannot be concretely challenged by a group of inhabitants organized in the form of a social movement. The actual exercise of the right to assembly cannot jeopardize the institutional logic of pursuing certain goals, depicted as useful to the development of society.

Political negotiation is not admissible; thus, the choices with an impact upon the territory are a matter of exclusive *central* government, without any degree of respect for the constitutional principle of *subsidiarity*.[43] In other words, directly concerned people have no voice.

Once all possible ways for a search of protection have been tried,[44] the inhabitants organize themselves in the form of protest. This continues over time and is reiterated until it becomes stronger and more cohesive. In the confrontation, the State acts harshly, militarizing the Valley.

The mechanism does not stop there, because the problematic issue lies in the fact that negotiation is denied and that conflict is not conducted through political means. Instead, its place is taken by the judiciary, which becomes the main actor conducting the *criminal* government of the conflict.

---

[41] The original text says: "*Si è frequentemente sostenuto in passato e non di rado si è ripetuto più recentemente, che la teoria delle prove giudiziali ruota in una atmosfera rarefatta e imperturbata rispetto al mondo dei valori e delle concezioni politiche della società e del processo. Secondo questa impostazione, il rifiuto della cosiddetta 'neutralità' del diritto e dell'interpretazione giuridica, se mai può valere in via generale, certamente non arriva a coinvolgere la disciplina delle prove giudiziali, trattandosi di materia di 'pura logica'.*" (M. Nobili, « La teoria delle prove penali e il principio della "difesa sociale" », in *Materiali per una cultura giuridica*, 4, Bologna, Il Mulino, 1974, p. 419).

[42] For an historical reconstruction of the legacy of the Italian fascist code, see L. Garlati (ed.), *L'inconscio inquisitorio: l'eredità del Codice Rocco nella cultura processualpenalistica italiana*, Milano, Giuffrè, 2010.

[43] See A. Averardi, « Amministrare il conflitto: costruzione di grandi opera e partecipazione democratica », *Rivista Trimestrale di Diritto Pubblico*, 4, 2015, p. 1173-1220.

[44] See P. Mattone (ed.), *Tav e Valsusa: Diritti alla ricerca di tutela*, Napoli, Intra Moenia, 2014.

The judiciary feels legitimately entitled to defend society.

Where does this presumption of social defence draw from? Why should the judiciary punish some people without evidence? Perhaps, to defend society *from* dissent: through the penal sanctions that some must suffer, others are reduced in their potential participation in the protest. They face a deterrent. However, this also means that their right to assembly is prevented since protesting became equal to a quite high exposure to penalty.[45] As demonstrated above, for the judges, there is an equation between protesting and committing crimes.

Why punish without evidence?

The inquisitorial character of the criminal trial always tends to re-emerge, and history is full of examples in this sense. However, in recent times the "inquisitorial atavism"[46] has been awakened by a stream of thought which is still very close to our time: Positivist Criminology.[47]

The long-standing problem of recidivism that arose in the nineteenth century, together with wandering, brigandage, and danger of sedition, required a new way of punishing. The Positivist School promoted a new set of penalties: e.g., the invention of security measures and the burdening of the preventive measures devised a few decades earlier. In sum, society – which according to Beccaria's Classical scholarship must be protected from crime and only secondarily from the offender – must now be directly protected from delinquent subjects. A transition from the classical logic anchoring to facts to a subjective and crowd orientated liability cannot be without consequences.

> In the historical arc that runs from about 1880 to 1930, a political-juridical orientation has developed which, although not completely original, acted in a peculiar manner, leaving outcomes in the doctrine and especially in the jurisprudence of the successive decades, up to the present day.[48]

---

[45] According to the utilitarian theory, through punishment a mechanism of deterrence is always activated, potential illicit conduct is curbed, and from here the orientation of human behavior is addressed in the direction of lawfulness. The principle of deterrence has its roots in the mists of time. Already Seneca claimed that it is convenient to punish not in order to discount the sin committed in the past, but in view of future sins, *ne peccetur.*

[46] L. Lucchini, *I semplicisti (antropologi, psicologi e sociologi) del diritto penale. Saggio critico*, Torino, Unione Tipografico-Editrice, 1886, p. 260.

[47] Among several texts at least three are fundamental to understand the positivist "revolution": C. Lombroso, *L'uomo delinquente in rapporto all'antropologia, alla giurisprudenza ed alla psichiatria (cause e rimedi)*, Torino, Bocca, 1880; E. Ferri, *I nuovi orizzonti del diritto e della procedura penale*, Bologna, Zanichelli, 1881; R. Garofalo, *Criminologia. Studio sul delitto, sulle sue cause e sui mezzi di repressione*, Torino, Bocca, 1885. About the political crime see: C. Lombroso & R. Laschi, *Il delitto politico e le rivoluzioni in rapporto al diritto, all'antropologo criminale ed alla scienza di governo*, Torino, Bocca, 1890; C. Lombroso, *Gli anarchici*, Torino, Bocca, 1894.

[48] The original text says: "*Nell'arco storico che corre all'incirca tra il 1880 ed il 1930, si è sviluppato un orientamento politico-giuridico che, pur non completamente originale rispetto al passato, si atteggiò allora in maniera caratteristica, lasciando esiti nella dottrina e soprattutto nella giurisprudenza dei decenni sucessivi, sino ai nostri giorni.*" (M. Nobili, « La teoria delle prove penali e il principio della "difesa sociale" », *op. cit.*, p. 420.)

The most outstanding critic of positivist criminalists, Lucchini, highlighted that these scholars promoted "not the *certainty* of *evidence*, but the *sufficiency* of the *clues*".[49] Indulgent in punishing, for positivist jurists, clues were enough. As in the title of an article by Ferri, the criminal law had to play an eminently social function: preventing and punishing.[50] To this end the necessary resources could not be reduced: the corollary was the annoyance for the laborious reconstruction of the fact and in general for the respect of the due process of law, promoted by the jurists of the classical school of criminal law.

In fact, "in the mentioned period [...] a way of understanding the trial was enforced in which the weight of the inquisitorial phase is prominent [...], and the figure of the judge emerges as strengthened".[51]

While the erosion of *Magna Charta Libertatum* was undertaken by Positivist Criminology, a specific vision of politics – authoritarian and centralized at once – substituted Enlightenment's liberalism.

There is no longer a conception of freedom as individual autonomy and at the same time, personal liability in the face of a criminal conduct. As opposed to the Enlightenment, which forged criminal law, now the value of the State is considered higher than the one of the individual. Positivists rejected Carrara's warning, according to which punitive power must always be regarded with suspicion because it limits everyone's freedom. Also, to have the right to restrict freedoms, a judge must follow strict rules.[52] The cornerstone of the classical theory was the presumption of innocence.

Conversely, for positivists the defendant became an "instrument through which the 'punitive magisterium' of the State can be exemplarily realized; his subjective rights 'faded' and seemed to vanish, even in the field of fact-finding".[53] This essay aims at shedding light on the positivist legacy that accompanies today's punitive expansion.

The nonchalance through which a formula circumvents the laborious process of fact-finding that *de facto* is a collective liability recalls Sighele's intentions in *The delinquent crowd* (1894): for crowd crimes, we must punish everyone, because vice

---

[49] "non la *certezza* della *prova*, ma la *sufficienza* degli *indizi*" (L. Lucchini, *I semplicisti (antropologi, psicologi e sociologi) del diritto penale. Saggio critico*, *op. cit.*, p. 260).

[50] E. Ferri, « Il diritto di punire come funzione sociale », *Archivio di psichiatria, scienze sociali e antropologia criminale per servire allo studio dell'uomo alienato e delinquente*, vol. III, nº 1, 1882, p. 51-85.

[51] In the original text: "*nel periodo segnalato* [...] *si rinsaldò una maniera di intendere il processo, in cui risulta preminente il peso della fase inquisitoria* [...] *ed in cui la figura del giudice esce rafforzata*" (M. Nobili, « La teoria delle prove penali e il principio della "difesa sociale" », *op. cit.*, p. 420).

[52] Also one of the major scholars of the theory of evidence in the criminal trial, emphasizes that the purpose of the trial is to safeguard the citizen from the arbitrariness of the judge (see C.J.A. Mittermaier, *Teoria Della Prova Nel Processo Penale*, Milano, F. Sanvito, 1858).

[53] In the original text: "*strumento attraverso cui realizzare il 'magistero punitivo' dello stato esemplarmente; i suoi diritti soggettivi si 'affievolivano' e parevano svanire, anche nel campo dell'accertamento del fatto*" (M. Nobili, « La teoria delle prove penali e il principio della "difesa sociale" », *op. cit.*, p. 420).

versa – seeking the individual liability – no one would be punished. On the contrary, we must punish: to reaffirm the need for punitive power and to activate a deterrent against potential dissidents. The justification for this punitive power exists and was theorized at the turn of the nineteenth and twentieth centuries, with consequences still evident today.

According to Marc Ancel – who develops a pioneering work on the "new social defence" – "it is not necessary, in our age, to offer a justification for a book on social defence. Few notions are so currently evoked" and "these multiple uses ultimately demonstrate that the term 'social defence' corresponds to an authentic reality of our time".[54] In other words, he maintains that the principle of social defence is at the basis of criminal law and still serves as a justifying basis for it, even in an entirely tacit manner.

According to Baratta, social defence has become part of the "dominant philosophy in legal science and the common opinions not only of the representatives of the penal-penitentiary apparatus but also of the man on the street". The perception of contemporary jurists is that the principle of social defence is an achievement: "the sum of the major advances achieved by modern criminal law".[55]

Social defence would be based above all on the principle of legitimacy according to which the State would be the expression of society and therefore legitimized to punish the offender who acts against it. It is easy to read social defence in the sense of defending the State, once fascism comes to power. "The absolutization of the 'State that defends itself' stands out as a result of the cultural streams that reduce the citizen's public rights to reflected rights".[56]

The proof of this compatibility between the positive school and the defenders of the fascist State lies in the drafting of the 1930 Italian penal code, which is still in force.[57] The unitary theory of the fascist doctrine, which makes the State the center of the penal trial by eliminating the duality of interests (the repression for the State and his protection for the subject of law), is the procedural implication of social defence.[58] On the basis of the denial of individual interests before the State, the fundamental rights of the accused are denied.

Admittedly, – as stated by Sabatini in his *Teoria delle prove* – the new "scientific" and "rational" investigation on the evidence, promoted by positivist criminalists, resolved a typical *vice* of the accusatory system: its "inappropriate protection of the accused to the detriment of social defence".[59]

Foucault makes a critical remark on this when he says that judicial options conform to an external principle, namely "to a certain 'philosophy' of penal practice". It is the "very ancient idea" that society must be defended, which "is becoming –

---

[54] M. Ancel, *Social defence. A Modern Approach to Criminal Problems*, London, Routledge and Kegan Paul, 1965, p. 1.

[55] A. Baratta, *Introduzione alla sociologia giuridico-penale. Criminologia critica e critica del diritto penale*, Bologna, Università di Bologna, 1980, p. 44-45.

[56] F. Colao, *Il delitto politico tra Ottocento e Novecento. Da "delitto fittizio" a "nemico dello stato"*, Milano, Giuffrè, 1986, p. 342.

[57] T. Pires Marques, *Crime and the Fascist State 1850-1940*, London, Chatto, 2013.

[58] M. Nobili, « La teoria delle prove penali e il principio della "difesa sociale" », *op. cit.*, p. 439.

[59] G. Sabatini, *Teoria delle prove nel diritto giudiziario penale*, Catanzaro, G. Abramo, 1913, p. 190.

this is the novelty – an effective operating principle".[60] According to Tulkens, social defence was an (idealistic, unrealized) project of total governmentality, of governing the whole social body, a new philosophy of the role of the State and a new form of protection against social risks.[61] The purpose of investigating this genealogy is the attempt to understand broadly why criminal law today has a central role in managing social and political conflicts.

Xenia Chiaramonte

Xenia Chiaramonte (Palermo, 1987) is a jurist and sociologist of law. She graduated in law (University of Milan) and completed the master's degree in Sociology of Law at the Oñati Institute. During her PhD in Law and Society, she spent a semester in Berkeley (CSLS). She teaches Critical Criminology and has recently published her monograph on the judicial criminalization of social movements in Italy: *Governare il conflitto* (Milano, Meltemi, 2019).

[60] M. Foucault, « La stratégie du pourtour », *Le Nouvel Observateur*, nº 759, 28 mai-3 juin 1979, p 7 (M. Foucault, « La strategia accerchiamento » (1979), in S. Vaccaro (ed.), *La strategia dell'accerchiamento. Conversazioni e interventi 1975-1984*, Palermo, Duepunti, 2009, p. 114-115).

[61] F. Tulkens, *Généalogie de la défense sociale en Belgique (1880-1914)*, Brusselles, E. Story-Scientia, 1988.