

The Enemy Within:
Criminal Law and Ideology in Interwar Romania

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INTRODUCTION

In 1930, an imprisoned Antonio Gramsci wrote with regard to the ‘crisis of authority’ which befell European polities at the end of World War One : ‘[t]he crisis consists precisely in the fact that the old is dying and the new cannot be born; in this interregnum a great variety of morbid symptoms appear.’¹ In these lines, one easily comes to grips with a fundamental self-reflection of the troubled times following the Great War. If nowadays this epoch stays under the aegis of upheaval, emergency and radical shifts in the ways of understanding politics and society, it is also imagined as being marked by the two cataclysms which chronologically limit it. Thus, this age is now retrospectively conceived as being the *interbellum* to such an extent that the fundamental distinctive trait one relates with this time is the experience of war.

However, for Gramsci, the question at stake in the European crisis is that of

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¹ Antonio Gramsci, “Wave of Materialism” and “Crisis of Authority” in Quentin Hoare and Geoffrey Nowell Smith (eds), *Selections from the Prison Notebooks*, trans Quentin Hoare and Geoffrey Nowell Smith (New York, International Publishers, 1971) 276.

authority which is somehow suspended between the old and the new. The interwar was understood by its contemporaries as *interregnum*, as a space and time between two distinct regimes of power. And, according to his reading, it is this very transition which conjures strange political forms and phenomena in the life of power.

As Roger Griffin observes, the interwar is marked by

the general belief [...] that Western history was itself at a turning point from which it could either collapse into terminal barbarism and anarchy amidst social breakdown and war, or give birth to a new type of society beyond the current age of chaos and decadence.²

The interwar is caught by an ‘ethos of crisis’,³ it calls for ‘paligenetic rebirth’.⁴ It wants both to accelerate time and to suspend it. It disdains history and still wants to engage in historical endeavours. It enacts both fantasies of radical change and returns to embellished forms of the past. In this way it exposes the divisions and paradoxes of modernity itself. For inasmuch as modernity brings into the fore the question of *anomie* and alienation, it also tries to create its own ‘panacea’.⁵

Yet the concept of ‘interwar’ is also an expression of a legal crisis or of a crisis of legal thought in itself inasmuch as law is marked by the uncertainties and

² Roger Griffin, ‘Political Modernism and the Cultural Production of “Personalities of the Right” in Inter-war Europe’, in Rebecca Haynes and Martyn Rady (eds), *In the Shadow of Hitler : Personalities of the Right in Central and Eastern Europe* (London, Tauris, 2011) 20-37 at 23.

³ Ibid.

⁴ Ibid. See also, Roger Griffin, *The Nature of Fascism* (New York, Palgrave Macmillan, 1991) 32-36.

⁵ As Griffin writes with regard to fascism, ‘[u]ltra-nationalism offers its believers a solution to the modern crisis of identity, an instant “grand narrative” within which to locate the trajectory of the self, a panacea to anomie’: Roger Griffin, ‘Modernity Under the New Order: The Fascist Project for Managing the Future’, in Matthew Feldman (ed), *A Fascist Century* (Basingstoke, Palgrave Macmillan, 2008) 24-45 at 44.

ambiguities reigning in the realm of culture and politics. The epitome of this crisis is the state of exception, or the suspension of the law. Indeed, since World War One, forms of the suspension of law, either under the guise of suspension of constitutional guarantees or of the whole legal framework, emerge or multiply prolifically. On the authoritarian side of the political spectrum such recourses to the unbridled force of the state are celebrated as a regenerative turn able to cure what was perceived as a decadent legality devoid of political pathos. In Carl Schmitt's words, '[i]n the exception the power of real life breaks through the crust of a mechanism that became torpid by repetition'⁶. Thus the law is redeemed of its lifeless normative existence, inasmuch as 'the exception reveals most clearly the essence of the state's authority'⁷. But the status of legality during the interwar is not contested only by the emerging 'autocracies'⁸ and their supporters. In a paradoxical move, the militant democracies of the time also call for a suspension of the law. As '[a] virtual state of siege confronts European democracies', democratic polities are to renounce to their basic foundations, as long as '[s]tate of siege means, even under democratic constitutions, concentration of powers in the hands of the government and suspension of fundamental rights'.⁹

According to Giorgio Agamben 'World War One (and the years following it) appear as a laboratory for testing and honing the functional mechanisms and

⁶ Carl Schmitt, *Political Theology*, trans George Schwab (Cambridge, MIT Press, 1985 [1933]) 15

⁷ Ibid., 13.

⁸ Karl Loewenstein, 'Autocracy Versus Democracy in Contemporary Europe I' (1935) 29 *American Political Science Review*, 571-593.

⁹ Karl Loewenstein, 'Militant Democracy and Fundamental Rights I' (1937) 31 *American Political Science Review* 417-432, 432.

apparatuses of the state of exception as a paradigm of government'.¹⁰ The results of these practices would prove themselves disastrous, for what is questioned through the state of exception is the very possibility of law to articulate itself and to be distinguishable from mere assertions of power. In this sense, the state of exception appears as a return of anomie in the very mechanism of the law: '[s]ince "there is no rule that is applicable to chaos", chaos must first be included in the juridical order through the creation of a zone of indistinction between outside and inside, chaos and the normal situation — the state of exception'.¹¹

Exploring the politico-legal nosology of the interwar – of which fascism is a central experience – calls thus for an investigation of the dissolution of legality and of the intellectual, social and cultural mechanisms at work in this process. The aim of this chapter is to construct a critical analysis of the uses of criminal law in the context of the royal dictatorship and the rise of fascism in Romania during the 1930s. It explores the effacement of traditional categories of legality entailed by the emergence of the Criminal Code of 1936 by focusing on the notion of crimes against the constitutional order and its intricate relation to the socio-political context of the time. In this sense this chapter investigates critically and historically the relation between criminal law, constitutional law and the rise of fascism in Romania while stressing three crucial and overlooked elements: the ideological tenets of the Code present both in its substantial and formal structure, the politico-legal significance of

¹⁰ Giorgio Agamben, *State of exception*, trans Kevin Attell (Chicago, University of Chicago Press, 2005 [2003]) 7.

¹¹ Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans Daniel Heller-Roazen (Stanford, Stanford University Press, 1998 [1995]) 19.

the Code in the historical moment of its enactment, and the effacement of classical forms of legality determined by the Code's ideological appropriation. Consequently, this chapter engages with the historical situation of Romanian criminal law by placing it in a broader socio-political context marked by the rise of fascism as well as with the theoretical aspects of its ideological appropriation. Moreover, it tackles the question of continuity between democratic legislation and authoritarian law.

As a traditional repository of state's internal sovereignty and the most perceptible site of state's repressive powers, criminal law played a central role in the reconstruction of state power in its dialectics of reception and opposition to fascist ideology. Given that at the level of criminal legislation one can grasp the values founding the normative order that it aims to protect, I seek to bring to light the ambiguities at the core of the conservative authoritarian project of containing fascism through legal means which were already impregnated by this ideology.

In order to analyse this issue, I will try to approach the relation between text and context, while drawing on the Foucauldian concept of archaeology as an attempt at linking the semiotic to the semantic.¹² Following this line of argument, my aim is to examine some of the basic discursive formations of Romanian legal order of the time which find themselves at the core of the process of the dissolution of legality, namely the category of crimes against the constitutional form of the state.

¹² 'Archaeology (...) does not imply the search of a beginning; it does not relate analysis to geological excavation. It designates the general theme of a description that questions the already-said at the level of its existence: of the enunciative function that operates within it, of the discursive formation (...) to which it belongs': Michel Foucault, *Archaeology of Knowledge*, trans Alan Mark Sheridan-Smith (London, Routledge, 2002 [1969]) 148.

Accordingly, I attempt to respond to the Foucauldian call 'to grasp the statement in its exact specificity of its occurrence; determine its conditions of existence, fix [...] its limits, establish its correlations which other statements it may be connected with'¹³. In short, my main focus is to examine forms of thought embedded in the criminal and constitutional legal framework, responding to their respective discursive constraints, but still parts of wider socio-political context.

In a first part I shall engage with a reading of the Romanian historical context in order to situate the conditions of possibility of these discursive formations. At this stage, my main focus is represented by the radical change befalling sovereignty in the context of the interwar as well as by the rise of fascism. By moving toward the legal provisions of the Code, I shall insist on the textual, doctrinal and strictly legal dimension of the subject matter I address. In doing so, I intend to operate a first level of contextualization by insisting on the specificities of Romanian legal discourse and legal thought of the time. In a last part, I shall proceed with a critical interpretation of the historical context, in order to examine the hidden utterances of legal discourse and the historical significance of the politics of suppressing dissent through criminal law.

¹³ Ibid. 30.

THE ROMANIAN INTERREGNUM: STATE, POLITICS AND THE RISE OF FASCISM

Two major historical dynamics extend beyond what we traditionally understand as the legal discourse of the time and determine its inner structure. First of all, one may note the radical territorial and demographic change in Romanian state morphology as a consequence of World War One. Unlike Hungary, Austria or Germany, and even Italy, Romania was 'easily the biggest winner'¹⁴ of the Paris Peace Conference in terms of territorial gains. Not only did the surprising collapse of the German western front open the possibility for Romania to mobilize again and circumvent the dire provisions of the Peace with the Central Powers, but also Romania's participation in the diplomatic negotiations seemed to have been fruitful.¹⁵ Ultimately, much to the surprise of many, the once small kingdom in south-eastern Europe found its territory and its population doubled. As a result, Greater Romania encompassed 296 000 square kilometres and counted more than sixteen million inhabitants.¹⁶ Despite the national enthusiasm accompanying it, such a territorial and

¹⁴ Michael Mann, *Fascists* (Cambridge, Cambridge University Press, 2004) 238.

¹⁵ Defending the Romanian position within the Peace Conference in Paris was anything but an easy task for the diplomats entrusted with this mission due mainly to Romania's poor performance during the first stages of its participation in the war, Romanian Armistice with the Central Powers signed in early 1918 and to Romanian intervention in Hungary in 1919. See, Charles Upson Clark, *United Roumania* (New York, Dodd, Mead and Co., 1932), 221-250. On the legal and political ambiguities entailed by Romania's status on the diplomatic front, see Glenn E. Torrey, 'Romania in the First World War: The Years of Engagement, 1916-1918', (1992) 14 *The International History Review* 462-479.

¹⁶ As opposed to approximately 140 000 square kilometres and eight million inhabitants before the war: Vlad Georgescu, *Romanians : A History*, trans Alexandra Bley-Vorman (Columbus, Ohio State

demographic shift was at the origins of major political struggles, administrative convolutions and legal debates following the war. It arguably entailed the dissolution of the old political consensus and thus opened the way to various forms of populism and authoritarianism.¹⁷

The experience of the world war as well as the Russian revolution and the European civil war,¹⁸ did not fail to leave traces on Romanian politico-legal practice. Actively taking part in the regime change in Hungary after the unfortunate adventure of the short-lived Hungarian Soviet Republic¹⁹ the renewed state symbolically placed itself as a defender of the national and regional status quo. Such a position substantially fuelled nationalist ideology and contributed to the creation of an important myth of a state under constant siege which will recur during the interwar period.²⁰ Incidents such as the Senate plot of 1920²¹ or the Tatar Bunary uprising of 1924²² in the newly acquired Bessarabia, did not fail to exaggerate the

University Press, 1991) 189-91 and Keith Hitchins, *Rumania 1866-1947* (Oxford, Oxford University Press, 1994) 290.

¹⁷ Hitchins, *Rumania 1866-1947* above 379-425 ; Georgescu, *Romanians : A History* above 192-98. See also, Zigu Ornea, *The Nineteen Thirties: The Romanian Extreme Right* (Boulder, East European Monographs, 1999) 41-58.

¹⁸ The term was coined by Nolte's controversial statement on understanding fascism as a reaction to bolshevism: Ernst Nolte, *Der europäische Bürgerkrieg, 1917-1945* (Frankfurt, Herbig Verlag, 1989).

¹⁹ Hitchins, *Rumania 1866-1947* above 281-88. See also, Dan Dinot, *Cataclysms: A History of the Twentieth Century from Europe's Edge*, trans William Templer and Joel Golb (Madison, University of Wisconsin Press, 2008) 77-85.

²⁰ This will be one of the foundational myths of Romanian fascism. See, e.g., Zigu Ornea, *The Nineteen Thirties: The Romanian Extreme Right* above 280-281 ; Radu Ioanid, *The Sword of the Archangel : Fascist Ideology in Romania*, trans Peter Heinegg (Boulder, East European Monographs, 1990) 98-100.

²¹ Rebecca Haynes, 'Corneliu Zelea Codreanu: The Romanian "New Man"', in Rebecca Haynes and Martyn Rady (eds), *In the Shadow of Hitler : Personalities of the Right in Central and Eastern Europe* (London, Tauris, 2011) 169-187 at 171.

²² See, Charles Upson Clark, *Bessarabia, Russia and Roumania on the Black Sea* (New York, Dodd, Mead and Co., 1927) 223-31.

dimension of the external and internal threat of bolshevism. As Romanian authorities recalled with regard this issue,

[Bolsheviks] treated our country and especially Bessarabia with the outmost attention. There they made strong efforts to provoke the revolt of the population against the Romanian regime, taking advantage of all the animosities, of all the asperities and of all the conflicts of the first years of transition following the union.²³

These major dynamics did not fail to affect significantly the life of the polity, rendering the interwar perhaps one of the most politically charged timeframes in Romanian modern history. Accordingly, the 1930s represent the culmination of a series of social, economical and cultural shifts which have slowly undermined the democratic promises of the project of rebirth steered by the state at the outcome of the Great War. Indeed, the introduction of the universal male suffrage in late 1918,²⁴ the land reform of 1921²⁵ as well as the constitutional reform of 1923²⁶ could all be read as signs attesting at least a formal commitment to the tenets of parliamentary democracy and modern constitutionalism. Moreover, the socio-economic reconstruction, doubled by a relative increase in industrialization and the overall modernization of the country also participated in building a sense of a new beginning which was eventually stalled only by the crisis of 1929.²⁷

But whereas this movement toward a new Greater Romania was a definitive trope of the time, continuities with the problematic constitutional practices at work

²³ Zaharia I. Husărescu, *Mișcarea subversivă în Basarabia* (Chișinău, Atelierele Imprimeriei Statului, 1925) 24.

²⁴ Art. 1, Decree Law for the election of deputies and senators through universal, mandatory, equal, direct and secret vote under proportional representation, *M.Of.*, 16th of November 1918.

²⁵ Statute of the 17th of July concerning the land reform, *M.Of.*, 17th of July 1921.

²⁶ The Constitution of Romania, *M. Of.*, 29th of March 1923.

²⁷ Georgescu, *Romanians : A History* above 198-99. On Romania's reconstruction after the war see Joseph Aulneau, *Histoire de l'Europe Centrale* (Paris, Payot, 1926) 524-532.

before the war as well as the emergence of new political trends limited the scope of these democratic endeavours. Not unlike its predecessor, the new Romanian state was a constitutional monarchy in which the King retained an important amount of royal privileges as regards both the legislative process and the concretisation of the rules of law. Primarily, the Constitution of 1923 granted the King extensive legislative powers amounting to a right to veto which could be exercised discretionarily.²⁸ The King was also granted the prerogative to issue regulations (*regulamente*) necessary for the enforcement of laws,²⁹ which entitled him to be an interpreter of the law and to hold a pre-eminence over the executive.

Moreover, the practice of switching parties to power – largely used under the constitution of 1866 – continued to be common currency until the instauration of the dictatorship in 1938 and its suppression of pluralism. By the right conferred to the King to name the Prime-minister, the rotation in office was assured as the party chosen by the King to form the new government had the advantage of organising elections and thus that of indirectly influencing the results through illegal means.³⁰ As Hitchins points out, ‘unlike parliamentarism in Western Europe, where the government was a creation of legislature, in Rumania the parliament continued to be an extension of the government’.³¹

²⁸ art. 34. of The Constitution of Romania above.

²⁹ Ibid. art. 88.

³⁰ C. D. Booth, ‘The Political Situation in Southern-Eastern Europe II: Romania and Bulgaria’ (1929) 8 *Journal of the Royal Institute of International Affairs* 445-447, 446 where the author notes: ‘The never-failing assistance of the *gendarmérie*, the ingenuity of the functionaries entrusted with counting votes (...) resulted as a rule in a majority of votes being given to the government in power.’

³¹ Hitchins, *Rumania 1866-1947* above 379.

The degree of political fragmentation and the limits of parliamentary representation should also not be neglected when analysing Romanian interwar. Long standing political forces such as the landed aristocracy represented by the Conservative Party disappeared in the new political landscape as a result of the shift in the electoral basis, the land reform and arguably due to their Pro-German stand during the war.³²

A fragile Left, fragmented over the question of the communist revolution and the imperialist foundations of Greater Romania, as a consequence of the establishment of the Communist International,³³ was merely surviving state repression. Indeed, the Social Democratic Party, banned during the war due to its pacifist politics, reorganized itself in 1918 and prepared to join the Comintern as early as 1921. However, already in 1920, one could observe a strong division inside the Party between the moderates – who were defending a gradual approach as regards transition towards socialism – and the radicals who followed Moscow's revolutionary line. As a result of the intestine fight, the radical faction withdrew in 1921 and founded the Communist Party of Romania which was banned in 1924 and continued to act in the underground until 1944.³⁴ The moderate faction reorganized only in 1927 as the Social Democratic Party uniting all non-revolutionary socialist movements in Greater Romania under the leadership of Constantin Titel Petrescu

³² Ibid. 398-400.

³³ Georgescu, *Romanians : A History* above 193.

³⁴ Hitchins, *Rumania 1866-1947* above 400.

and acted within the confines of the parliamentary system before being outlawed in 1938.³⁵

New authoritarian-leaning movements such as Marshal Averescu's People's Party were organizing themselves around the ideological creed of 'honest and efficient government, to be achieved by strict adherence to the Constitution'.³⁶ They ended up by securing an important role in the established political sphere as Averescu came to power twice, in 1920 and 1926, and was one of the artisans of the land reform as well as the initiator of Romania's renewal of diplomatic relations with Fascist Italy.³⁷ One of the supporters of the nascent fascism under the guise of the Guard of National Awareness and head of government during the crackdown of the Socialist strike of October 1920, the 'hero of Mărăști'³⁸ was arguably also one of the first modern mass politics saviour figures in Romania. As Lucian Boia notes, 'Averescu appeared as the potential reformer of Romanian society, the only one capable of setting the country on a new historical course'.³⁹

For their part, the new democratic forces gathered around the NPP (National Peasants' Party) were nonetheless hoping that 'on the ruins of capitalism a new form of state shall be built in the image and according to the likeness of the Romanian

³⁵ Ibid. 401-402.

³⁶ Ibid. 396.

³⁷ Joseph S. Rouček, 'The Political Evolution of Roumania' (1932) 10 *Slavonic and East European Review* 602-615, 610.

³⁸ As a general leading the Second Army in Moldavia's defence of 1917, Averescu has stopped the Austro-German advancement in the battle of Mărăști. He was ever since praised during the interwar as a war hero of mythical proportions: Lucian Boia, *Myth and History in Romanian Consciousness*, trans James Christian Brown (Budapest, Central University Press, 2001) 210-212.

³⁹ Ibid., 210.

worker, which is the peasant'.⁴⁰ A result of the fusion in 1926 between the Peasants' Party from the Old Kingdom and the National Party in Transylvania, the new political organization struggled in the first place to mitigate the divisive lines of two distinct ideological standpoints and constituencies. On one hand, the Peasant's Party occupied during the early 1920s a rather radical stand, inasmuch as it embraced a non-Marxist conception of class struggle inspired by the Narodnik movement in Russia.⁴¹ The Peasant's Party relied mainly on peasantry and rural intellectuality and was committed to social reform and the enlargement of political rights.⁴² On the other hand, the National Party had acted before as a promoter of Romanian communities' interests in the Austro-Hungarian Empire. It relied especially on the middle classes and the Romanian bourgeoisie in Transylvania and its ideological stand was infused by late 19th century nationalism.⁴³

An unlikely fusion for many a contemporary, the National Peasant Party came to dominate political life only two years after its establishment, in an attempt to confine the growing authoritarian practices fostered by the National Liberal Party (NLP).⁴⁴ The latter, an inheritor of the 19th century Romanian politics, continued to be the most prominent political force during the interwar, mitigating somehow problematically liberal ideological creeds and political practice. As such,

⁴⁰ Ioan Scurtu, *Istoria României între anii 1918-1944* (Bucharest, Editura didactică și pedagogică, 1994) 7.

⁴¹ For an account on the work of one of the initial ideologist of the Peasant's Party, Constantin Stere, see Michael Kitch, 'Constantin Stere and Romanian Populism' (1975) 53 *Slavonic and Eastern European Review* 248-271.

⁴² Hitchins, *Rumania 1866-1947*, above 391.

⁴³ *Ibid.*

⁴⁴ Rebecca Ann Haynes, 'Reluctant Allies? Iuliu Maniu and Corneliu Zelea Codreanu Against King Carol II of Romania' (2007) 85 *Slavonic and East European Review* 105-134, 107.

the liberalism practised by the liberal Party differed substantially from that in the West. In politics the Liberals used whatever means they had to in order to assure victory at the polls: they mobilized the police, the civil service and the all-powerful prefects in order to further their ends.⁴⁵

In short, Romanian political life during 1920s and early 1930s was characteristic of a 'semi-authoritarian regime',⁴⁶ that is, of a polity which 'tried to hold on to late nineteenth-century methods of rule'.⁴⁷ In Mann's words, such a regime is 'essentially a "dual state" in which an elected legislature and a nonelected executive both wielded considerable powers'⁴⁸ and where 'pressure from below was deflected by manipulating elections'.⁴⁹ . However, this state of affairs was already caught by the ethos of crisis, as most of the political forces were dramatically marked by the radical territorial, demographic and cultural changes entailed by the war. One could thus conclude, following Stanley Payne, that post-World War One political landscape showed troubling signs:

the basic habits of politics were altered, as the secular trend toward liberal democracy and greater representative government was challenged and in some areas reversed. The consequence was a brutalization of political life which made the recourse to political violence seem natural and even normal.⁵⁰

Political uncertainty would be furthered by a series of public scandals related to Prince Carol's estrangement from his wife. As a result, the royal heir was forced to sign his abdication in early 1926 at the insistence of the leader of the NLP, Ion I. C. Brătianu. The death of King Ferdinand, followed by that of Brătianu himself in 1927

⁴⁵ Hitchens, *Rumania 1866-1947* above 390.

⁴⁶ Mann, *Fascists* above 44.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Payne, *A History of Fascism* above 71.

brought a new wave of political instability which the National Peasant Party government was not able to appease.⁵¹ The return of Prince Carol in June 1930 with the initial support of Iuliu Maniu,⁵² at that time president of the NPP and prime-minister of the country, ended up with the Parliament annulling the edict issued by the Crown Council with regard to the Prince's renunciation of the throne.⁵³ Since his return to the throne, Carol II did not fail to express his disdain for democratic institutions while the practice of appointing governments of national union became the norm rather than the exception.⁵⁴

Historians of the interwar seem to agree on Carol's malignant influence over political life in Romania. As such, Payne paints Carol II in rather stark colours as 'the most cynical, corrupt, and power-hungry monarch who ever disgraced a throne anywhere in twentieth-century Europe,'⁵⁵ while Romanian historian Lucian Boia notes that 'even in the monarchist discourse of the present day his personality is passed over quickly.'⁵⁶ Whilst the accrual of authoritarian tendencies in Romanian politics could be already observed during the first years of Carol's rule, it should also be noted the ambivalence of his reign, as economically the fourth decade was one of growth both in terms of employment and industrialization. In his attempt to

⁵¹ Georgescu, *Romanians : A History* above 192.

⁵² Maniu favoured Carol II's rule over the reign of the Regency Council. However he conditioned the Princes's return to the reconciliation with Princess Helen of Greece, which the latter refused: Haynes, 'Reluctant Allies? Iuliu Maniu and Corneliu Zelea Codreanu Against King Carol II of Romania', above 108.

⁵³ Clark, *United Roumania* above 323-330.

⁵⁴ Georgescu, *Romanians : A History* above 196. See also, Mann, *Fascists* above 264.

⁵⁵ Payne, *A History of Fascism, 1914-45* above 278

⁵⁶ Boia, *Myth and History in Romanian Consciousness* above 205.

attain hegemony under the guise of the new style of authoritarianism already rampant in Europe, he nonetheless encountered the opposition of Romanian fascism which was working already for at least a decade in order gain a dominant status in the authoritarian nationalist milieu.

Described as 'the most unusual mass movement of interwar Europe,'⁵⁷ Romanian ultra-nationalism embodied by the Legion of Archangel Michael – later known as the Iron Guard – still continues to puzzle historians and political scientists alike. Payne terms the Legion as belonging to one of the 'four major variants of fascism'⁵⁸ inasmuch as in Romania 'fascist-type movements came to play an important role'⁵⁹. While stressing its particularities – such as the insistence of the religious tropes in the discourse it promoted – other historians understood the Legion's ideology as a form of 'clerical fascism'⁶⁰. The undeniable religious thrust of the legionary ideology prompted a historian such as Eugen Weber to describe this movement as essentially a reaction to modernity specific to a backward society.⁶¹ At a closer look, 'the only "fascist" movement outside Italy and Germany to come to power without foreign aid'⁶² appears as professing a form of sacralisation of politics

⁵⁷ Payne, *A History of Fascism, 1914-45* above 279-80.

⁵⁸ Ibid. 245.

⁵⁹ Ibid.

⁶⁰ Roger Eatwell, 'Reflections on Fascism and Religion', (2003) 4 *Totalitarian Movements and Political Religions* 146-66.

⁶¹ Eugen Weber, 'Romania' in Hans Rogger and Eugen Weber (eds) *The European Right : A Historical Profile*, (London, Weidenfeld and Nicholson, 1965) 96-105 at 96. See also, Eugen Weber, 'Men of the Archangel', (1966) 1 *Journal of Contemporary History* 101-126 at 103.

⁶² Eugen Weber, 'Men of the Archangel' above 103.

pertaining to a Romanian version of modern palingenesis⁶³ which glorified the Nation and its past and identified the Jewish population as the agent of the dissolution of society.⁶⁴

As a 'distinct sub-type'⁶⁵ of fascism entangled in the ambiguities of counter-revolution, Romanian ultra-nationalism would affirm itself as a political force as early as the beginning of the 1920s in the context of social and political unrest marked by strikes and authoritarian responses to social conflicts.⁶⁶ Arguably a product of the reactionary politics of suppressing dissent employed already by state authorities in early 1920s, the movement would organize itself to the point of asserting itself as an open contestator of State's sovereignty. Built around Corneliu Zelea Codreanu, a charismatic leader⁶⁷ with strong ties in the ultranationalist milieu,⁶⁸ the fascist movement took initially the form of a nationalist trade-union based ephemeral organisation known as the Guard of National Awareness.⁶⁹ At this time it participated in quelling strikes during 1919 and 1920 in Moldavia, affirming itself as primarily an anti-Communist movement. After a period of activism within

⁶³ Constantin Iordachi, 'God's Chosen Warriors: Romantic Palingenesis' in Constantin Iordachi (ed), *Comparative Fascist Studies: New Perspectives* (London, Routledge, 2010) 316-357 at 320.

⁶⁴ Philip Morgan, *Fascism in Europe 1919-1945* (London, Routledge, 2003), 45.

⁶⁵ Stanley Payne, 'The NDH State in Comparative Perspective' (2006) 7 *Totalitarian Movements and Political Religions* 409-415 at 411.

⁶⁶ Haynes, 'Corneliu Zelea Codreanu: The Romanian "New Man"' above 171.

⁶⁷ Constantin Iordachi, 'Charisma Religion and Ideology: Romania's Interwar Legion of the Archangel Michael,' in *Ideologies and National Identities*, ed. John R. Lampe and Mark Mazower (Budapest, Central European University Press, 2004, 19-53.

⁶⁸ Codreanu's father was already a member of the National Democratic Party in 1920 and a close friend to A.C. Cuza, at that time the informal leader of the ultranationalist movement: Ornea, *The Romanian Extreme Right* above 265.

⁶⁹ Ornea, *The Romanian Extreme Right* above 265; Corneliu Zelea Codreanu, *Pentru legionari* (Sibiu: Totul Pentru Ţară, 1936) 9.

universities against the provisions of the new Constitution recognizing full citizenship rights to minorities,⁷⁰ Codreanu joined his mentor A.C. Cuza in founding the League for National Christian Defense - LANC (*Liga Apărării Național-Creștine*).⁷¹ Within its structure he established a network of radical groups named the Brotherhoods of the cross.⁷² In the subsequent period, the militancy of the ultranationalist group took the form of social activism devised in building a direct relationship with its potential constituency.⁷³

The paramilitary style and radical stand of the nascent movement did not pass unnoticed by the state's authorities. It was thus opened the series of conflicts with the state, the ultranationalists shifting from a vigilante organisation operating against international communism, to an insurrectional group aiming for a political takeover. As early as 1923, the core members of the future Legion were arrested on suspicion of plotting the assassination of NLP members of government. They were acquitted on the ground that the legislation of the time did not criminalise preparatory acts to a crime, but only attempts.⁷⁴ During the proceedings, one of the leaders, Ion Moța, shot his former fellow, Ion Vernichescu who had been exposed as an informant. Moța was acquitted for having acted in self-defense.⁷⁵

The movement's political activism took the peculiar populist form of organizing work camps and thus allegedly addressing in a non-mediated manner

⁷⁰ Ornea, *The Romanian Extreme Right* above 266.

⁷¹ Ibid.

⁷² Mann, *Fascists* above 265.

⁷³ Haynes, 'Corneliu Zelea Codreanu: The Romanian "New Man"' above 176.

⁷⁴ Ornea, *The Romanian Extreme Right* above 266.

⁷⁵ Ibid.

people's 'authentic' problems. Such a work camp was banned by the chief of police of Iași in 1924 and clashes between students and the police ensued. Acting as a lawyer in the trial opposing the students to the state's authorities, Codreanu shot to death the chief of police in the Magistrate's Court. He was acquitted in 1925 on the same ground of having acted in self-defense⁷⁶.

A celebrated hero of the ultranationalist circles, and having finished his doctoral studies in Grenoble, Codreanu founded the Legion of Archangel Michael in 1927 by reuniting the radical factions inside the LANC.⁷⁷ A constant instigator and perpetrator of anti-Semitic violence during the first years of the next decade, the fascist movement took advantage of the political division brought inside the democratic camp by the return of Carol II. Therefore, in 1931, notwithstanding the party's banishment,⁷⁸ Codreanu was elected a member of the Parliament, which paved the way for a full scale conflict with the state institutions.⁷⁹ By the end of the 1930s, the movement, changing its name and organization several times, ended up by gaining third place with 15 per cent of the votes in the parliamentary elections of 1937 (after the NLP and NPP), thus posing a real threat to the political system itself.

In response to the fascists' rise to power and after an abortive attempt to gain control over it, King Carol II tried to completely suppress the Legion. However this move was rather directed by *realpolitik* interests than by ideological creeds. As

⁷⁶ Ibid. 267.

⁷⁷ Ibid. 268.

⁷⁸ As a result of a failed attempt to assassinate the Secretary of State of the Ministry of Interior perpetrated by a member of the Iron Guard: Ibid. 273-274.

⁷⁹ Payne, *A History of Fascism* above 282.

Haynes rightly observes, the Legion was at its origins 'a pro-monarchist organisation'⁸⁰ and King Carol sought to 'gain advantage of the Legion's growing influence over the country's nationalist youth'⁸¹ as much as he wished to co-operate with the Legion. It was only the stark opposition to the King's camarilla and the consequent anti-Carolist position of the fascist movement which determined its repression. In a last attempt to mitigate the rise to power of fascist groups, King Charles II appointed a government from the one of wings of the ultra-nationalist movement, namely the National Christian Party under the rule of Octavian Goga, a noted Romanian nationalist poet and politician from Transylvania.⁸² As the Goga government failed to provide the sought appeasement, the king decreed a dictatorship. Significantly for the purpose of this investigation, the instauration of dictatorship in 1938 was preceded by the adoption of the Criminal Code and the drafting of the new authoritarian constitution.

In devising their reaction, not only did the defenders of the status quo employ tactics and ideological tropes present in the Legion's ideology, but they also built a new regime of legality for the state-sanctioned violence. It is these legal and historical dynamics that I wish to further explore in relation to the enactment of the Criminal Code of 1936.

⁸⁰ Haynes, 'Reluctant Allies?' above 110.

⁸¹ Ibid.

⁸² Hitchins, *Rumania 1866-1947* above 419-20.

DEFENDING THE STATE: CRIMINAL LAW, LEGAL THEORY AND IDEOLOGY

The Criminal Code of 1936, known also as the Carol II Criminal Code⁸³ was in force until 1969⁸⁴ and is considered by the Romanian interpretive community as having laid the foundations for future criminal legislation.⁸⁵ The project of drafting a new Code started as early as 1920 with the appointment of a Commission within the Ministry of Justice. A first version of the Code was rejected by the Legislative Council on the grounds of not differing significantly from the Code already in force. The work for a completely revised version started in 1921 and it involved a constant and often uneasy collaboration between the Ministry of Justice and the Legislative Council.⁸⁶ The text was thus a collective enterprise, which was definitely influenced by leading figures of the legal world of the time such as Vespasian V. Pella, an international criminal law specialist, or Ion Ionescu-Dolj, the president of the

⁸³ By virtue of the Statute on the nomination of the Codes for unifying legislation. See, Statute no. 577, *M. Of.*, 27th of March 1936.

⁸⁴ The Criminal Code of The Socialist Republic of Romania entered in force on the 1st of January 1969: see The Criminal Code of the Socialist Republic of Romania, *B. Of.*, 21st of June 1968, art. 363. After the regime change in 1947, the Code was modified in 1948 by a statute whose aim was to align the Code to the new constitutional context without changing its structure and substance: See Statute no. 5 modifying certain provisions of the Criminal Code, *M. Of.*, 19th of January 1948.

⁸⁵ The Statement of purpose opening the draft of the New Criminal Code to enter into force on the 1st of January 2014, affirms that 'in valuing the tradition of our criminal legislation, it [the legislative drafting] has started from the provisions of the Criminal Code of 1936, most of them already maintained in the Code in force': Ministry of Justice of Romania, *Statement of purpose of the legislative draft of the Criminal Code*:

http://www.just.ro/Sections/PrimaPagina_MeniuDreapta/noulcodpenal/tabid/940/Default.aspx.

⁸⁶ Jean Radulesco, 'Le Projet de Code pénal roumain' in *Bulletin mensuel de la Société de législation comparée* no. 1-3, 1928, 543-544.

Legislative Council and professor of criminal law.⁸⁷ However, the highly collaborative dimension and the constant political intricacies in which the drafting was entangled, meant at the same time the Code was strongly embedded in the legal world of the interwar. A first draft was submitted to the Parliament in 1928 and second one in 1933, both of them being withdrawn by the following government as a result of the political division between the National Peasants' Party and the National Liberals.⁸⁸ Only a third draft succeeded, being approved by the two Chambers of Parliament in 1936. King Carol's support for the draft did not pass unnoticed inasmuch as 'the word of His Majesty (...) put an end to certain enmities which could have become damaging.'⁸⁹

The Code's explicit aim was to fulfill a legal unification of the various regions of Romania, by replacing the Romanian Criminal Code of 1864⁹⁰ as well as Austrian, Hungarian and Russian criminal legislation in force in Transylvania, Bukovina and Bessarabia⁹¹ – Romania's recently acquired provinces. It thus placed itself in a line of state-steered politics of unification with strong nationalistic undertones. As one of the members of the Romanian Academy claimed, 'the legal unification is necessary (...) for achieving the spiritual unity of the nation, for strengthening further national consciousness.'⁹² The Code was thus aimed to be part of 'a uniform legislation

⁸⁷ Ibid., 545.

⁸⁸ Valeriu Pop, 'Prefață', in Constantin Rătescu *et al.*, *Codul Penal Carol al II-lea adnotat*, Vol I (Bucharest, Editura Librăriei Socec, 1937) vii-xiii at ix.

⁸⁹ Ibid.

⁹⁰ See, Criminal Code (of the United Principalities), *M. Of.*, 30th of October 1864.

⁹¹ Pop, 'Prefață' above vii.

⁹² Andrei Rădulescu, *Unificarea legislativă* (Bucharest: Cultura Națională, 1927) 6.

devoted to the spiritual unification of the masses.’⁹³ Furthermore, the Code was deemed to accomplish also another less explicit political project, inasmuch as it aimed to align repression in Romania to the one existing in ‘all the states which aspire to calm, order and constructive work inside their boundaries.’⁹⁴

Inspired by the 1930 Italian Rocco Penal Code as well as by French criminal law, the Romanian Code does not strike the reader *prima facie* as an authoritarian legal mechanism, despite the fact that it continued to be in force during one of the most troubled periods in modern Romanian history. Thus, it reiterates the principle of legality of punishment and of security measures,⁹⁵ it introduces a fairly developed system of individualization of punishments,⁹⁶ as well as a strong distinction between crimes, felonies and misdemeanors.⁹⁷ Moreover, the Code, in its original form, does not comprise any reference to the death penalty. In this sense, it follows the constitutional provisions of the time which stated that the ‘death penalty shall not be reinstated except for the cases provided by the Military Code of Criminal Justice in time of war.’⁹⁸ The death penalty appears as an exceptional measure, one which is instituted outside the regime of the Criminal Code. In this respect, it seems that the Code did not in itself introduce any radical break with regards to the fundamental principles of instituting and regulating repression existent prior to its entry into force. However, on closer inspection, based on an exercise of close-reading combined

⁹³ Ibid.

⁹⁴ Pop, ‘Prefață’ above xi.

⁹⁵ The Romanian Criminal Code, *M.Of.* no. 65, 18th of March 1936, art 1.

⁹⁶ Concerning punishments, see : *ibid.*, arts 22-27. Regarding security measures, see : *ibid.*, arts 71-85.

⁹⁷ *Ibid.* art 95.

⁹⁸ See, The Constitution of Romania, *M. Of.*, 29th of March, 1923, art. 16.

with a systemic interpretation of the Code and the criminal legislation of the time, both the Code's content and its function appear to be more problematic.

In what follows, my focus will be on the offences punished under Title I, Chapter 2, Section I and II, Articles 207-211, namely crimes and felonies against 'the person of the King, the royal family and the constitutional form of the state'⁹⁹ and 'against the internal security of the state.'¹⁰⁰ My interest in these legal provisions which sought to punish acts directed either against the constitutional form of the state or against internal security is underpinned by the hypothesis that it is at this level that authoritarian ideology was linked to the legal structure of the State. My assumption is that the discursive formations sustaining this form of repression opens the possibility of grasping the dialectics between fascist and conservative-authoritarian ideological stands.

Article 207 punishes the crime of undermining the constitutional order, which consists in 'violent acts with the aim of changing the constitutional form of the State, the lawful succession to the throne [...], incit[ing] the inhabitants to rise against the King's authority or against the constitutional powers of the State.'¹⁰¹ Article 208 institutes punishments for preparing such acts. Of paramount importance for this investigation, appears to be article 209, defining as a felony of 'conspiring against the social order'¹⁰² six types of actions consisting in : '1. carrying propaganda in favour of instituting, through violence, the dictatorship of a class over another, or in favour of

⁹⁹ The Romanian Criminal Code above Part 2, Title 1, c 2, § 1.

¹⁰⁰ Ibid. Part 2, Title 1, c 2, § 2.

¹⁰¹ Ibid. art 207.

¹⁰² Ibid. art 209.

suppression, through violence, of a social class, or, generally, in favour of overthrowing, in a violent manner, the social order existing inside the State'¹⁰³; '2. founding or organising secret associations [...] regardless of *their international nature*'¹⁰⁴ ; 3. 'acting, through *violent* means, in order to produce terror, fear or public disorder, with the aim of changing the economic and social order in Romania'¹⁰⁵ ; 4. 'contacting a person or an association with international character abroad or within the country with the aim of receiving instructions or any form of help for preparing a *social revolution*'¹⁰⁶ ; 5. 'helping by any means, an association from abroad or from within the country which would have as a goal to fight, through the means described at point 1 and 3, against the economic and social order in Romania'¹⁰⁷ and 6. 'affiliating oneself with, or becoming a member of one of the associations described above at points 2 and 3'¹⁰⁸. Article 210 defines and represses the crime of rebellion, consisting in 'arm[ing] the inhabitants or incit[ing] them to arm themselves one against another, or to commit assaults and murders'¹⁰⁹ with the aim 'to provoke civil war'¹¹⁰. Lastly, article 211 punishes 'armed insurrection'¹¹¹ which consisted in

¹⁰³ Ibid.

¹⁰⁴ Ibid (emphasis added).

¹⁰⁵ Ibid.

¹⁰⁶ Ibid. (emphasis added).

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid. art 210.

¹¹⁰ Ibid.

¹¹¹ Ibid. art 211.

‘organis[ing] or determin[ing] the organisation of armed forces, or procur[ing] for them or aid[ing] the procurement of weapons or munitions’¹¹².

At first glance, these articles appear to be closely linked not only through their mere proximity in the Code’s structure, but moreover in the way they build the symbolic core of the State that is to be protected. One cannot fail to grasp the emphasis put by the authors of the Code on the need to protect the constitutional order in its monarchical guise as well as in its statist stand. The text also appears to be devised as a response to social dissent which the framers originally understood as being provoked mainly by communist and socialist agitation. Moreover, following a classical distinction between the formal constitution and the material structure of the state, the Code stands for the defence of the overall social *status quo*, in both its economic and purely social form, to which article 209 bears witness. Accordingly, these articles tend to protect the constitution in its totality and distinguish themselves as a strategy of repression aimed at preventing radical political upheaval. By repressing different forms of organization of armed forces, the Code reasserts the traditional form of the state as the ‘monopoly of the legitimate use of force’.¹¹³ In this sense, articles 207-211, seem to play a key role not only in devising the state’s defences against radical politics, but also in articulating an ideological narrative on the values to be protected. Here, one could easily retrieve echoes of the classic topoi

¹¹² Ibid.

¹¹³ ‘A compulsory political organization with continuous operations will be called a “state” insofar as its administrative staff successfully upholds the claim to the *monopoly* of the *legitimate* use of physical force in the enforcement of its order’: Max Weber, *Economy and Society*, ed Guenther Roth and Claus Wittich (Berkeley, University of California Press, 1978 [1922]) 54 (original emphasis).

of the conservative-authoritarian discourse specific to the Eastern-European interwar: king, state, order, and society, which are all to be defended with the full power of the state.¹¹⁴

Not least, at a formal level, articles 207-211 bear as a specific imprint the recurrence of indeterminate, *open-textured* concepts such as: ‘violence’, ‘social order’, ‘economic order’, ‘civil war’ and ‘social revolution’. These terms, inscribed with a high degree of indeterminacy and rhetorical power, seem to blur the otherwise coherent legal narrative the Code offers. Indeed, the meaning of violence, as in ‘violent act’, or ‘through violence’, would not only make the difference between crime and lawful action, but also between politically significant action and anti-constitutional offense. Against the background of an interpretive community traditionally relying on state-sanctioned authoritative definitions of legal terms,¹¹⁵ such open-ended notions seem to leave a thorough discretion to the interpreter, who is called to decide upon the meaning with very little discursive constraint. Moreover, given the matter at stake in such an interpretation, the interpreter is called to act as a very defender of the constitution.

For the legal historian, these concepts appear as the crack in law’s symbolic framework through which historical context permeates the legal discourse, thus linking the textual structure to manifold social phenomena and the movements of

¹¹⁴ See Rebecca Haynes, ‘Introduction’, in Rebecca Haynes and Martyn Rady (eds), *In the Shadow of Hitler : Personalities of the Right in Central and Eastern Europe* (London, Tauris, 2011) 1-20 at 4.

¹¹⁵ As Pierre Legrand would note with regard to the civilian tradition, to which Romanian law belongs, ‘[t]he civil law is a law of the Text’: Pierre Legrand, ‘Antiqui Juris Civilis Fabulas’, (1995) 45 *University of Toronto Law Journal* 311-362 at 317.

history. Indeed, such statements bring before us the question of the relation between law and context inasmuch as they refer to a reality which appears to be structurally outside the Code's normative scope. By their presence in the text of the Code, indeterminate concepts like violence, social/economic order or social revolution, signal the presence of an outside which is yet to be explored. In a topology of law and violence, they represent their point of juncture as well as the paradoxical trait of being both inside and outside the sphere of the law. Accordingly, in order to trace their latent meaning and to approach the overall strategy of organizing repression through punishing sedition in the context of Romania's interwar period, one should take into account their immediate conceptual environment.

A starting point for my exploration could be set up in the legal treatment of the offences defined and repressed through articles 207-211 offered by the 1936 Code itself. Following this enquiry, one may find striking the fact that, in spite of the overt political content these offences point to, they do not fall a priori in the category of 'political crime'¹¹⁶. Accordingly, by virtue of Article 27 of the same Code, offences 'which aim at either changing the foundations of any social organisation or only Romania's foundations of social organisation'¹¹⁷ shall not be considered 'political'¹¹⁸. From this vantage point, it seems that the Romanian legislator's choice was to exempt from the political sphere actions that could have endangered the normative and material constitutional core of the State.

¹¹⁶The Romanian Criminal Code above art 27.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

At this juncture, it is also worth noting that in other Codes of the time, the political character could have acted either as an aggravating circumstance per se – like in the case of RSFSR (Russian Soviet Federative Socialist Republic) Criminal Code¹¹⁹ – or as a mitigating circumstance, as in the case of France.¹²⁰ The Romanian Code's position is rather equivocal with regards to this question, as the political character of a crime is a matter related to the individualization of the punishment, which does not touch either the *actus reus* or the *mens rea* of the offence, but is to be determined by the judge in the process of deciding a punishment.

As the commentary on the article attests, the origins of this legal treatment are to be found in the so-called 'Belgian clause'¹²¹ – a concept borrowed from the international criminal law of the time – which treated as a common crime assassination attempts directed against chiefs of state.¹²² However, as the same commentators point out, the concept of 'political crime' tends to be theoretically uncertain,¹²³ hence the decision operated by the legislator to define by negation its

¹¹⁹ Such is the case of article 46 and article 58 of The RSFSR Criminal Code of 1926, defining counterrevolutionary crimes : Harold J. Berman and James V. Spindler, *Soviet Criminal Law and Procedure*(Cambridge, Harvard University Press, 1966) 22-23.

¹²⁰ The French Criminal Code of 1810 in force at that time did not expressly state the political character of a crime as a mitigating circumstance in its article 463. However, it was widely accepted that the political nature of an offence could so operate should the judge consider it appropriate to take it into account. See René Garraud and Pierre Garraud, *Précis de droit criminel* 14th edn (Paris, Sirey, 1926) 226.

¹²¹'the last paragraph is only a textual consecration of the [...] Belgian Clause' : Ion Ionescu Dolj, 'Origina textului', in Rătescu et al., *Codul Penal Carol al II lea adnotat*, Vol I (Bucharest, Editura Librăriei Socec, 1937) 83.

¹²² Following an assassination attempt directed against Emperor Napoleon III, the Belgian kingdom introduced in 1856 an amendment to the Belgian extradition law 'stipulating that murder of the head of a foreign Government or of a member of his family, should not be considered a political crime': Lassa Oppenheim, *International Law: A Treatise*, ed Ronald F. Roxburgh (Clark, Lawbook Exchange, 2005 [1920]) 517.

¹²³ The author considers the definition of political crimes to be 'so uncertain in scientific terms' : Ionescu-Dolj, 'Origina textului' above 83.

conceptual core. Thus, by an exclusion of the ‘political’ signification of such acts with respect to the constitutional order, the limits of the political sphere itself are constructed.

What one witnesses here is not only a form of raising statist defences against political competitors who risk undermining the state apparatus, but also an inscription of politics in the sphere of the law. Politics is going to be henceforth a dimension which can be subjected to regulations and can be understood as a domain of application or of investment for various repressive strategies. In order to grasp the ambiguity of the signifier “political” in the framework of the criminal legislation of the time, it should be noted that other crimes, such as electoral offenses and some press offenses, may benefit from the alleviated legal treatment determined by their political character. In this sense, political agency as well as political subjectivity is to be recognized as a determinant factor in perpetrating a crime inasmuch as it does not aim to destabilize and counter the constitutional discourse itself.

If article 207 – labelled ‘undermining the constitutional order’ – reiterates to some extent article 78 from the 1864 Code, it also tries to individualize the object of the offense (constitutional foundations, order of succession, etc.). Moreover, it introduces a qualification for the material element of the offense, which is the perpetration of acts ‘through violence’. As the authoritative commentator on the article states, the introduction of this clause was needed in order to ‘defend the State [...] in response to new movements in which *violence* has become the weapon of

struggle for many a party, faction or political group.’¹²⁴ At this juncture, it should also be noted that the trend had already been set by the Statute for the defence of state order dating from 7th of April 1934. This latter text was devised to dissolve

all political factions [...] which in their ideological propaganda or in the accomplishment of their programme will prepare or carry out acts of organised *violence* [...] or will preach the *violent* destruction of the State’s political order or of the social order.¹²⁵

Even more ambiguous is article 209 repressing the felony of ‘conspiring against the social order’. The legal precedent to this offence had been established by Article 11 of the Statute for the Repression of new offenses against public peace of 18th of December 1924¹²⁶. At the time of its drafting, the latter did not fail to spark controversy, inasmuch as it also punished preparatory measures to these actions. It introduced a break with the interpretive doctrine set up by the 1864 Code which criminalized only actual attempts and acts. Thus, the act of conspiring against the social order had been termed as being an ‘exceptional felony,’¹²⁷ which was enforced in consideration of the ‘higher interest of the state.’¹²⁸ While in both forms the statement appears neutral, being directed against any political faction, the preliminary works in the drafting cannot be more specific about the enemy to be repressed. As such, the legal prescription was to serve as a security measure against

¹²⁴Ion Ionescu-Dolj ‘Comentare’ in Rătescu *et al.*, *Codul Penal Carol al II lea adnotat*, Vol II (Bucharest, Editura Librăriei Socec, 1937) 54-55 at 54.

¹²⁵ art 1 of the Statute for the defence of state order, *M. Of.*, 7th of April 1934, (emphasis added).

¹²⁶ Statute for the repression of new offenses against the public order, *M.Of.*, 19th of December 1924, art 11.

¹²⁷ See, Ioan Gr. Periețeanu and Alfred Fulga, ‘Comentariul la articolul 1 din l[egea] l[iniștii] p[ublice]’, in Rătescu *et al.*, *Codul Penal Carol al II lea adnotat*, *Codul Penal Carol al II lea adnotat*, vol II (Bucharest, Editura Librăriei Socec, 1937) 272-315 at 289.

¹²⁸ Ibid.

‘revolutionary communism’, which ‘represents nowadays the most serious threat to international public order.’¹²⁹

For their part, articles 210-211, directed at rebellion and armed insurrection, are mere reiterations of articles 81 and 82 of the Criminal Code of 1864 reinforcing state protection against either civil war or armed resistance. They appear as classical repressive mechanisms against major social upheaval which would undermine the state’s basic functions through the use of force as well as through the organization of paramilitary forces directed against State authority.

To sum up, articles 207-211 present the paradox of repressing ordinary crimes through overt exceptional means. Their presence in the Code’s framework responds both to a time-fashioned logic of repressing any assertion of sovereignty competing with the established authority of the State as well as to a newer conception of containing violent dissent. Their distinctive mark resides in the recurrent use of indeterminate concepts as well as their appeal to higher values, such as the protection of the State or of the Constitution.

The interpretation of these legal provisions takes place in a specific legal culture and inside a more encompassing legal framework, which determines the ways in which meaning is stabilized. As such, it is important to stress that modern law operates through a process of reducing complexity and thus limiting the floating

¹²⁹ Ibid. 277.

of signification.¹³⁰ In Luhmann's words 'law needs to be as predictable as possible or an instrument whose effects should be calculated in advance'.¹³¹ In our case, whereas criminal law-specific doctrines of interpretation and commentaries on the Criminal Code offer a limit to the plurality of meanings, this formal limitation is not all-encompassing. Core concepts such as state and constitutional organisation are to be sought at the level of legal theory or state theory, which offers the rational façade of legal interpretation as well as the ideological justifications for the interpreters' choices. This is the reason why, before critically engaging with the statements enclosed in articles 207-211, in an attempt to render them meaningful for a thorough analysis of law and fascism, it is important to take into account the specific characteristics of Romanian legal thought of the time.

In 1930 in a *Treatise of General Theory of Law*, one of the most influential Romanian legal theorists of the time, Chair of Legal Theory at the University of Bucharest and one of the authors of the Code, did not find any theoretical impediment whatsoever in writing that the law 'seeks to find preventive measures in order to eliminate evil through special measures of social hygiene'.¹³² Such utterances, as strange as they may sound now coming from a nowadays-celebrated neo-Kantian philosopher and member of the National Liberal Party of the time, do indeed echo the pre-eminence granted to the state, the social collective and

¹³⁰ Niklas Luhmann, 'Le droit comme système social', *Droit et Société*, 1994, no 11-12 at 60-61.

¹³¹ Niklas Luhmann, *Law as a Social System*, trans Klaus A. Ziegert (Oxford, Oxford University Press, 2004 [1993]) 61.

¹³² Mircea Djuvara, *Teoria generală a dreptului* (Bucharest, All Beck, 1999 [1930]) 106.

biopolitics in Romanian legal thought of that period. Indeed, as the same author ventures to decree: '[s]ociety [...] and thus the State [...], constitutes the material from which the fundamental reality of each of us is woven into our soul.'¹³³ Moreover, according to this *collectivist* stand, 'there is no opposition between State and individual, but a link which melts them together'¹³⁴, these two elements being nothing less than 'two [...] faces of the same reality'¹³⁵.

These arguments should not be treated as simple ideological assertions or purely theoretical speculations devoid of consequence. First, because the way one theorises the state would have tremendous practical consequences in the administration of criminal justice, inasmuch as in the Romanian legal tradition the State is thought always to be the derivative object of any offence. As such, a certain conception of the state would follow the interpreter of the law each time he applies the legal text. Secondly, these statements are not only translations of a fascination with organicist conceptions of state and nationhood grounded in politico-legal culture, but also epistemic standpoints. As Djuvara would note later in his work, law is not to be sought only in texts, for 'the effectively practised law is [...] something different from the law formulated through written legislation'¹³⁶. Moreover, 'the real constitutional law of a state is not the law solemnly inscribed on paper, but the law

¹³³ Ibid. 73.

¹³⁴ Ibid. 83.

¹³⁵ Ibid.

¹³⁶ Mircea Djuvara, 'Drept rațional, izvoare și drept pozitiv', in Mircea Djuvara, *Teoria generală a dreptului* (Bucharest, All Beck, 1999 [1934]) 455-595 at 548.

that recognised political organs practice effectively in their efforts to order and supervise the interests of a given society'.¹³⁷

To be sure, according to his view, the law is the monopoly of the interpretive community, as 'jurisprudential law is the real law, the living law.'¹³⁸ In this sense, legal interpretation is self-referential and is the product of a community whose boundaries with the State itself are blurred. The jurist called to apply the Code has to rely on the written text, but also on the existing practice and the overall functioning of the State. His decision will be an 'individual'¹³⁹ one, 'independent of the sources of the law',¹⁴⁰ but has to be given 'always in the name of a rational and superior principle.'¹⁴¹ Accordingly, legal interpretation is a 'creative act',¹⁴² one which is only relatively bound by the existing law and legal precedent. If the use of analogy is implicitly forbidden by the principle of legality of punishment (i.e. its legal certainty), the interpreter of the Code is called to act creatively in defending the higher interest of the State, which is understood as a 'legal reality [...] floating above us and dominating us.'¹⁴³

Defending the State and its structure through the means of criminal law appears to have been an extremely important and urgent matter, considering the various real or imagined threats which seemed to undermine the polity during the

¹³⁷ Ibid. 549.

¹³⁸ Ibid. 551.

¹³⁹ Ibid. 553.

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

¹⁴² Ibid. 555.

¹⁴³ Ibid. 73.

interwar period. It would thus be a comfortable and a historically accurate position to construe the legal treatment of crimes against the state as a *reaction* to what appeared as violent social unrest. Indeed, article 209 (and the Act dating from 1924), could easily be read as a legal response to communist ferment ranging itself in a whole series of measures through which the State sought to contain the threat raised by the Third International and by perceived Soviet irredentism. In this sense, it is worth noting that its origins can be traced back to the constant recourse to the state of siege between 1918 and 1928.¹⁴⁴ The 1934 Law and other articles from the Code could be read as a warning against strike action and fascist agitation inasmuch as they place themselves in the continuity of the decrees instituting the state of siege during 1933 and the years to follow.¹⁴⁵ These decrees were aimed at offering legal grounds for military intervention against the railway workers at Grivița workshops in Bucharest in February 1933 and for dissolving the Legion later that year as a consequence of the assassination of the NLP prime-minister I.G. Duca.¹⁴⁶ Under this light, the Code's defences of the constitutional order would appear just as a variation on the politico-legal theme of the State under siege. Such a reading however would not only place us in the ideological framework of the State terror that was soon to be unleashed, but also misses one essential point, the way in which law itself is changed

¹⁴⁴ Between 1918 and 1928 there will be issued no less than 12 decrees instituting or upholding the partial or general state of siege: V. Pantelimonescu, *Starea de asediu : doctrină, jurisprudență și legislație* (Bucharest, Cartea Românească, 1939) 32-45.

¹⁴⁵ The new series of decrees instituting at various moments the partial state of siege would start in 1933 and will end in 1938, when a general state of siege would be instituted : Dumitru Popescu, *Regimul juridic al stării de asediu* (Iași, Institutul de Arte Grafice Alexandru Terek, 1942) 47-67.

¹⁴⁶ Ibid. 40-47.

by responding to external violence. Therefore, in order to understand the legal, political and ultimately historical significance of the change which befell the legal discourse at this time, it is necessary to focus on the manifold ways in which it related to the context of its emergence.

THE RETURN OF THE SOVEREIGN

At this juncture, I aim to address the question of the place the legal framing of crimes against the state occupied in the authoritarian turn in Romanian politics. Following Gramsci's *dictum* opening this inquiry, these legal provisions are to be considered as *symptoms*, that is, socio-linguistic structures which bare the traces of a tension and a continuous semantic commerce with the material and intellectual history of the interwar. In this sense, these excerpts from the Code shall be read as being inscribed in the very interregnum separating the old liberal-conservative consensus and the brave new authoritarian world yet to be born. It is in this way that we can better apprehend their meaning in the politics of knowledge of the time.

From this vantage point, it seems worth noting that European legal discourse in the interwar period found itself both practically and intellectually at the crossroads between the classic formalist paradigm and new realisms. It also stood at the threshold separating constitutionalism and dictatorship. The emergence of dictatorial regimes – either as a consequence of revolutions such as in the case of the USSR, or as a consequence of political unrest, such as in Bulgaria, Poland, Yugoslavia, and Greece, or as a consequence of conservative authoritarian or fascist takeover, as in Italy, Spain, Portugal and ultimately in Germany – is not only a political phenomenon, but also a legal one. Not only had jurists to legitimize new structures of power, but they also had first to conceptualize them. In this sense,

works such as Carl Schmitt's *On Dictatorship*¹⁴⁷ or *Political Theology*¹⁴⁸, or Pashukanis's *Legal Theory and Marxism*¹⁴⁹ are the landmarks of new uses of legal discourse.

Law has entered into the logic of excess, being caught by the crisis of modernity. Legal categories specific to classical legality such as individual rights and constitutional guarantees are to wither away in front of the new foundations of the normative order which would lie within the sphere of the social collective and in the presupposed reality of the state. In the Romanian case, the process is however ambiguous, as the law enters the age of excess by trying to stop time in front of the coming maelstrom. If the fascist forces of palingenetic rebirth oppose the rigidity of the legal framework and overtly challenge it, the response of the state is also one which dissolves the very structure of the legal framework.

In order to fully understand the place and the symbolic function of the Codes provisions aiming to protect the constitutional order in the dialectical relation between conservative authoritarianism and fascism, it is crucial to explore the politico-legal dynamics following shortly its entry into force. The legal mechanism at the core of the institution of the royal dictatorship was, undoubtedly, the Constitution of 1938. Decreed by the King and brought to the 'good knowledge and consent'¹⁵⁰ of the Nation, the new fundamental legal text asserted the supremacy of the executive over the legislative and also secured a prominent role for the King in

¹⁴⁷ See, Carl Schmitt, *Die Diktatur* (Berlin, Duncker & Humblot, 1994 [1921]).

¹⁴⁸ Carl Schmitt, *Political Theology*, trans George Schwab (Cambridge, MIT Press, 1985 [1933]).

¹⁴⁹ Evgeny Pashukanis, 'The General Theory of Law and Marxism', in Piers Beirne and Robert Shalet (eds), *Selected Writings on Marxism and Law*, trans Peter B. Mags and John N. Hazard (London, Academic Press, 1980 [1924]) 37-132.

¹⁵⁰ See, The Romanian Constitution of 1938, *M.Of.*, 27th of Februray 1938 art 100.

the politico-legal framework. Accordingly, the 'King is the Head of the State'¹⁵¹ and – 'during the time while the Legislative Assemblies are dissolved and between the sessions'¹⁵² – he can issue 'Decrees vested with force of law in every matter.'¹⁵³ For their part, the civil and political rights of citizens are matched by 'duties'¹⁵⁴, a section which opened the second title of the Constitution. As such, Romanians 'have the duty to consider their Fatherland as the foremost foundation of their reason to live'¹⁵⁵ as well as 'to sacrifice themselves for the defence of its integrity, independence and dignity.'¹⁵⁶ Apart from these rather dramatic injunctions creating peculiar legal obligations for the citizens, the Constitution also contains a series of provisions which link directly to the subject matter investigated here. As such, article 15 opens the possibility for the Council of Ministries to apply capital punishment

also in time of peace for plots against the Sovereign, Members of the Royal Family, foreign Heads of State and State dignitaries for motives related to the exercise of the functions with which they have been entrusted, as well as for cases of *political assault and political assassination*.¹⁵⁷

It thus appears quite clear to which extent the ways in which the formulation and the strategy of repressing political dissent played a role in devising the emergence of the authoritarian state. The criminal legislation not only appears as being reactive to a political reality marked by violence and instability, but also prepares the ground for the full assertion of power of the King. From this vantage

¹⁵¹ Ibid. art 30.

¹⁵² Ibid. art 46.

¹⁵³ Ibid.

¹⁵⁴ Ibid. Title II.

¹⁵⁵ Ibid. art 4.

¹⁵⁶ Ibid.

¹⁵⁷ Ibid. art 15. [Emphasis added]

point, articles 207-211 are equally attempting to contain both communist and fascist activism and to affirm the full authority of the Sovereign who will ultimately suspend all traditional legal protections.

To be sure, the pre-eminence of the executive, as well as the practice of governing by decree were not new forms in the exercise of power in Romanian politics, as the appeal to the 'higher interest of the State', the recourse to emergency and exceptional measures were marks of legal life all through the interwar period. As a prominent Romanian constitutionalist of the time noted as regards the major changes in the uses of law, 'more important, more intense has been the influence of the world war which started in 1914 on Romanian public law.'¹⁵⁸ To these war-time measures one can trace back

the evolution of the authority of the government by the conferred right to declare the partial or general state of siege, the transfer of certain judicial attributions from the judiciary to martial courts, the extension of Military Authorities' [as well as] of the law of the state of necessity, owing to which the government could suspend, abrogate or create laws by decree.¹⁵⁹

To these practices of various forms of suspending or circumventing the traditional forms of legality, understood as an expression of the general will represented through constitutionally limited bodies, one could also add a constant presence of the military in public life. Once again, the recourse to martial measures

¹⁵⁸ Constantin Dissesco, 'L'évolution du droit public roumain', in *Les transformations du droit dans les principaux pays depuis cinquante ans: livre du cinquantenaire de la Société de législation comparée*, (Paris, L.G.D.J, 1922) 297-305 at 301.

¹⁵⁹ Ibid.

can be traced back to the responses taken by the Romanian authorities to the Russian revolution in early 1918.¹⁶⁰

The use of the state of siege in quelling strikes, rebellions or simply in acting as a deterrent for any attempt of undermining the social order should also be noted in this respect, inasmuch as the state of siege creates a militarization of the judiciary and blurs the fundamental normative categories of war and peace. Now, what we are witnessing in these manifold forms of responding to real or constructed threats, is the 'possibility of suspending the law'¹⁶¹, with its 'dire consequence [...] which is the change of meaning of [...] legality'¹⁶².

The Code of 1936 is thus a mechanism devised to police dissent, but at the same time it responds to a certain logic which goes beyond its implicit or explicit goals. As such, it is a by-product of a moment in legal history in which the force underlying legal discourse is in the process of being de-structured and the symbolic articulation of the law is pushed to its limits. As a part of the legal framework of the dictatorship, as an embodiment of the exception, it puts into question the basic relation between fact and norm. Its recourse to open ended concepts should be read thus as a structural feature which derives from the very impossibility of legal language to articulate historical facts. Indeed, the Code's strategy of limiting political subjectivities to a rigid stand, its banishment of revolutionary movements and radical politics, are, in the precise historical moment of its framing, nothing short of

¹⁶⁰ Clark, *United Roumania* above 173.

¹⁶¹ Dissesco, 'L'évolution du droit public roumain' above 301.

¹⁶² Ibid.

an attempt to stop time. The articles devised to protect the constitutional order appear as a reaction to the ideology of rebirth and regeneration professed by the Legionary fascists. They are thus a form of protecting the status quo which was already crumbling from various attacks. Inasmuch as fascism is connected to

a sense of 'metastasis', or rebirth, subjectively experienced as moving from a mere 'existence' of anomie and isolation into a qualitatively different time in which individual life and death itself is transcended by becoming merged with the eternity of the nation and race¹⁶³

the royal dictatorship would appear as a traditional legal defence which aims at suspending the constitution in order to preserve it.¹⁶⁴ In this sense, what we are facing both in legal as in political terms would be the stages of repressing a potentially revolutionary situation. This position could also be comforted by the ways in which the fascist movement portray itself as a revolutionary force,¹⁶⁵ situated on the left side of the political spectrum, preaching an anti-oligarchical and anti-conservative rebirth of the Nation. Accordingly, the legal framework would protect the constitutional order against a radical upheaval. But this perspective obscures the change in the structure of the legal framework itself. The law, is thus not only politicized by being complicit with the structure of power, but is also rendered secondary to the interplay between *raison d'Etat* driven politics and ideology. In this sense, the Code understood in its political situation in the framework of the royal dictatorship, occupies a place which is situated at the

¹⁶³ Griffin, "'I Am No Longer A Human. I Am A Titan. A God!': The Fascist Quest to Regenerate Time', in Matthew Feldman (ed), *A Fascist Century* (Basingstoke, Palgrave Macmillan, 2008) 3-23 at 15-16.

¹⁶⁴ Schmitt, *Die Diktatur* above 170-173.

¹⁶⁵ Mircea Platon, 'The Iron Guard and the Modern State. Iron Guard Leaders Vasile Marin and Ion I. Moța and the "European New Order"', (2012) 1 *Fascism* 65-90 at 69.

threshold between classic repression and new forms of (bio)political and ideological investment. Moreover, seen through these lenses, the royal dictatorship appears once again as a symptomatic last attempt to re-assert the classical tenets of state sovereignty. The emergence of the Code in a time of political, cultural and symbolic uncertainty, as well as its peculiar logic in criminalizing dissent, point towards a change of law's status in society. The theoretical framework already permeated by concepts with strong ultranationalist connotations, such as the organic understanding of society, attests to a passage towards an instrumental relation to law. In other terms, the law would be henceforth understood not as a form of rationalizing state power but its vector.

The criminal provisions under scrutiny here and the royal dictatorship may act rhetorically as a way of limiting the potentialities of time and preventing disaster, but underneath these attempts one may trace the core of the legal intricacies of the interwar, which are to be read as a form of the 'sense-making crisis.'¹⁶⁶ There would be no surprise to find out that the strategy of suppressing fascism and restating the status quo could not function under the specific historical circumstances inasmuch as the status of legality in itself was already problematic. Indeed, the fact that the Constitution limits all form of political participation and organizes the exercise of power around the central figure of the King, that it introduces in its conceptual framework the state of exception they all point to a radical break with modern

¹⁶⁶ Gerald M. Platt, 'An Alternative Theory', in Roger Griffin (ed.) *International Fascism*, (London, Arnold, 1998 [1980]) 204-215 at 208.

Romanian constitutionalism. As Vlad Georgescu notes, 'the 1938 Constitution resembled to the Organic Statutes [of 1830s] more closely than it did the constitutions of 1848, 1866 and 1923.'¹⁶⁷

For its part, the Criminal Code blurs the distinction between politics and criminal action as well as between lawful and unlawful through the recourse to open-ended concepts. Moreover, the theoretical structure of interpretation insists on the centrality of the state and of state power. Consequently, by the same act of containing what was perceived as revolutionary fascism, the legal discourse was itself 'revolutionized', opening thus the way to full assertions of power.

It is thus worth noting that The Iron Guard was to be unsuccessfully dissolved several times before the entry into force of the Criminal Code and the institution of dictatorship.¹⁶⁸ Its main leader was tried for treason and rebellion and killed in what historians describe as a staged shooting while trying to flee custody in late 1938.¹⁶⁹ In retaliation, the fascists proceeded to assassinate the Prime Minister and Minister of the Interior, Armand Calinescu¹⁷⁰. From this point on, law cannot contain historical violence anymore and the dictatorship will unleash the unbridled force of the state.

However, one would be wrong in understanding the overarching royal dictatorship only as mere attempt to prevent fascist upheaval. In many respects, the

¹⁶⁷ Georgescu, *Romanians: A History* above 207.

¹⁶⁸ Georgescu, *Romanians : A History* above 196, where he writes 'The Iron Guard was outlawed first in 1931 and again in 1933, but reappeared in 1935 under the name All for the Country'.

¹⁶⁹ Ibid. 208.

¹⁷⁰ Ibid.

Carol regime and its preceding authoritarianism is not only complacent or complicit in fascist ideology and its overtones, but also structurally close.¹⁷¹ Note in this respect the introduction of the unique party, the Front of National Rebirth,¹⁷² as well as the organisation of its structure and propaganda which mimicked the Legionary public spectacles. The royal dictatorship and its emergence thus appear as a series of extremely ambiguous moments which politically mark the passage from a limited democracy to open authoritarianism. From a juridical perspective, what we are witnessing is the dissolution of the old concepts of form and legality and the extension of force as a normal response to dissent. State violence, thus, permeates the very structure of the law and dissolves it. The Criminal Code is both an object and an archive of these dynamic inasmuch as it actively took part in the general historical process of the institution of dictatorship and in the later repression organised by the National Legionary State in 1940, continued by Antonescu's military dictatorship through World War II and arguably furthered deployed in the first years of the communist regime.

¹⁷¹ Also a historian such as Vlad Georgescu may think otherwise : 'The royal dictatorship was not, however, a fascist or Nazi regime. It was only moderately nationalistic and anti-Semitic': Ibid. Whilst Carol II himself wasn't overtly anti-Semitic, the first steps of the future anti-Semitic legislation date from the beginnings of the royal dictatorship under the cabinet Goga. See, e.g., Decree-Law no. 169 for the revision of the citizenship of Jews in Romania, *M. Of.*, 21st of January 1938. For a comparative analysis of the question of anti-Semitism in interwar Romania and Bulgaria, see William I. Brustein and Ryan D. King, 'Anti-Semitism as a Response to Perceived Jewish Power' (2004) 83 *Social Forces* 691-708.

¹⁷² Decree-Law no. 4321 for the institution of the Front of National Rebirth, *M. Of.*, 16th of December 1938.