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Edited by

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MILITARY JUSTICE AND CIVILIAN CRIMINAL JUSTICE IN ITALY DURING THE TRANSITION FROM FASCISM TO REPUBLIC (1943–1948)

By Raffaella Bianchi Riva[*]

Abstract

One of the main issues debated by liberal scholars after Italian unification regarded the extension of military criminal law to civilians. It is a well-known fact that, in the second half of the 19th century and first half of the 20th, the need to ensure rapid and rigorous justice in exceptional circumstances often led Italian governments to subject civilians to military jurisdiction, even though military criminal trials provided fewer guarantees for defendants than ordinary trials.
After the fall of fascism in Italy, one of the main issues to address was which courts would be called to punish fascist crimes.
Instead of extending the special jurisdiction of military courts, a complex system of relationships was created between military jurisdiction and civilian criminal jurisdiction, with the choice of jurisdiction depending on both the demand for punishment and the need for pacification that emerged during the transition from fascism to republic.
This paper provides insight into the interaction between ordinary courts and military courts when punishing Fascist crimes during the overthrow of illiberal rule by democracy.

1 Introduction

This paper focuses on the relationship between military justice and civilian criminal justice in Italy during the transition from fascism to republic – which necessarily entails a broader reflection on the issue of extending the scope of military law to include civilians – and the light it sheds on the overall intersection between justice and politics in the 19th and 20th centuries.[1]

The political nature of both substantive and procedural military law is undeniable.[2] Furthermore, it is a well-known fact that military law was widely used to punish political crimes in the 19th and 20th centuries, given the greater flexibility it offered in terms of the punishments that could be handed down.

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[1] On this issue, Carlotta Latini, *Cittadini e nemici. Giustizia militare e giustizia penale in Italia tra Otto e Novecento* (Le Monnier, 2010); Carlotta Latini, '"Una società armata". La giustizia penale militare e le libertà nei secoli XIX-XX', in Floriana Colao, Luigi Lacchè, Claudia Storti (eds), *Giustizia penale e politica in Italia tra Otto e Novecento. Modelli ed esperienze tra integrazione e conflitto* (Giuffrè Editore, 2015) 29-60.

[2] Giuseppe Ciardi, *Trattato di diritto penale militare*, vol 1 (Bulzoni, 1970) 30; Renato Maggiore, *Lezioni di diritto e procedura penale* (Renzo Mazzone Editore, 1973) 16; Vittorio Veutro, 'Diritto penale militare', in Guido Landi, Vittorio Veutro, Pietro Stellacci and Pietro Verri (eds), *Manuale di diritto e procedura penale militare* (Giuffrè, 1976) 121-125.

After Italian unification, the need to ensure rapid and rigorous justice in exceptional circumstances often led Italian governments to subject civilians to military jurisdiction, despite the fact that military criminal trials provided fewer guarantees to defendants than civilian trials.[3]

During the liberal period, Italian governments often resorted to the French notion of *état de siège* (state of siege) in order to cope with emergencies, despite the notion not being explicitly regulated. In other words, they used a military notion to address domestic political needs (state of political or fictitious siege).[4]

A state of siege entailed the suspension of constitutionally guaranteed rights and the establishment of courts-martial. In any case, it did not automatically result in civilians being tried for common offences before courts-martial: that was up to the government to decide on a case-by-case basis.

A state of siege was declared in order to suppress brigandage in the southern provinces following Italian unification,[5] thereby introducing what would become a constant feature of the evolving Italian criminal justice system;[6] one would then be declared in 1894 and again in 1898 in order to suppress public riots and maintain public order.[7] In 1908, after a disastrous earthquake struck Southern Italy, a state of siege was declared in the affected areas, thereby further extending its scope.[8]

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[3] On criminal military procedure in 19th and 20th centuries, Rinaldo Vassia, *Lineamenti istituzionali del nuovo diritto penale militare* (Cedam, 1943) 193-217; Renato Maggiore, *Diritto e processo nell'ordinamento militare. Contributo allo studio del processo penale militare* (Jovene, 1967) 161-258; Piero Stellacci, 'Procedura penale militare', in Guido Landi, Vittorio Veutro, Pietro Stellacci and Pietro Verri (eds), *Manuale di diritto e procedura penale militare* (Giuffrè, 1976) 501-716; Vittorio Garino, *Manuale di diritto e procedura penale militare. Parte generale* (Cetim, 1985) 243-407.

[4] Giovanni Motzo, 'Assedio (stato di)', in *Enciclopedia del diritto*, vol 3 (Giuffrè, 1958) 250-268.

[5] Carlotta Latini, 'Tribunali militari e repressione del brigantaggio nell'Italia dell'Ottocento', in Maria Pia Paternò (ed), *Figure dell'altro tra politica, storia e diritto. Alterità e politica dei diritti dall'esperienza giuridica romana all'età contemporanea* (Nuova Arnica Editrice, 2008) 53-115.

[6] Mario Sbriccoli, 'Caratteri orginari e tratti permanenti del sistema penale italiano (1861-1990)', in Luciano Violante (ed), *Storia d'Italia, Annali*, vol 14, *Legge Diritto Giustizia* (Giulio Einaudi, editore 1998) 485-551

[7] Carlotta Latini, 'La sentenza "dei giornalisti". Repressione dle dissenso e uso dei tribunal penali military durante lo stato d'assedio nel 1898', in P. Marchetti (ed), *Inchiesta penale e pre-giudizio: una riflessione interdisciplinare. Atti del convegno, Teramo, 4 maggio 2006* (Edizioni Scientifiche Italiane, 2006) 243-277; Claudia Storti, 'Stato d'assedio a Milano. Maggio 1898', in Andrea Ciampani and Domenico Maria Bruni (eds) *Istituzioni politiche e mobilitazioni di massa* (Rubbettino Editore, 2018) 51-66.

[8] Carlotta Latini, 'L'emergenza e la disgrazia. Terremoto, guerra e poteri straordinari in Italia agli inizi del Novecento' (2018) 13 *Historia et ius*. After the earthquake in 1908, the government ceased its practice of resorting to states of political siege; nonetheless, military jurisdiction over civilians was increasingly extended with World War I, not only because of civilians' vast participation in military matters but also because of wartime needs that legitimised the suppression of civil liberties; see Carlotta Latini, 'Il governo legislatore. Espansione dei poteri dell'esecutivo e uso della delega legislativa in tempo di guerra', in Francesco Benigno and Luca Scuccimarra (eds), *Il governo dell'emergenza. Poteri straordinari e di guerra in Europa tra XVI e XX secolo* (Nazionalità editore, 2007) 197-219; Carlotta Latini, 'I pieni poteri in Italia durante la

Between the end of the 19th century and the beginning of the 20th, liberal scholars – in reflecting on individual freedoms – debated whether the principle of 'natural jurisdiction' established by the Statute of 1848 would be respected if military courts were maintained to try members of the armed forces and, above all, if the scope of military court jurisdiction were extended to include civilians. It was agreed that, for special jurisdiction such as military jurisdiction, having military courts try military personnel was formally compatible with the Statute, even though the system used to appoint military courts was unconstitutional in some significant respects; having military courts try civilians, however, was considered a blatant violation of the guarantees provided by the Statute, which could be justified only if the need to maintain public order outweighed the need to guarantee civil liberties.

The Fascist regime did not resort to military courts to cope with political dissent. However, in 1926, it established the Special Tribunal for the Defence of the State (*Tribunale speciale per la difesa dello Stato*), which mainly comprised military judges and operated in accordance with the military procedural rules prescribed for wartime. Compared to the practice of the liberal period, the Fascist Special Tribunal for the Defence of the State was established without declaring a state of war, not even a fictitious one; –rather, it was established solely to punish political crimes (for which, among other changes, the death penalty was reintroduced, which in Italy had been abolished for common offences by the criminal code of 1889).[9]

In breaking from previous practice, military justice was not extended to civilians during the transition from fascism to republic – namely, in the period between the fall of fascism in July 1943, which led to the creation of the Italian Republic in June 1946, and the adoption of the Italian Constitution in 1948 – even though the need to cope with exceptional circumstances could have justified it. On the contrary, it was mostly civilian criminal jurisdiction (both ordinary and extraordinary) whose scope was extended to include members of the military.

As we will see, this was the result of a series of choices that were affected by the opposing demands for punishment and pacification that characterised Italy after the fall of the Fascist regime.

Prima guerra mondiale', in *Un Paese in guerra. La mobilitazione civile in Italia (1914-1918)* (UNICOPLI, 2010) 87-103.

[9] Even though military in composition and procedure, the Special Tribunal for the Defence of the State was essentially political in nature – not surprising given the political essence of military criminal law; see Stefano Vinci, 'La politica giudiziaria del fascismo italiano nella giurisprudenza del Tribunale speciale per la difesa dello Stato (1926-1943)' (2016) 10 *Historia et ius*; Leonardo Pompeo D'Alessandro, 'Per una storia del Tribunale special: linee di ricerca', in Luigi Lacchè (ed), *Il diritto del duce. Giustizia e repressione nell'Italia fascista* (Donzelli Editore, 2015) 151-173; Alessandra Bassani and Ambra Cantoni, 'Il segreto politico nella giurisprudenza del Tribunale special per la difesa dello Stato', in Luigi Lacchè (ed), *Il diritto del duce. Giustizia e repression nell'Italia fascista* (Donzelli Editore, 2015) 175-206; Leonardo Pompeo D'Alessandro, *Giustizia fascista. Storia del Tribunale speciale (1926-1943)* (Il Mulino, 2020).

This paper looks at both legislation and caselaw to examine – from a military justice standpoint – the relationship between military law and civilian criminal law during the changeover from Fascist regime to republic, in an effort to highlight-how the relationship between politics, public opinion and justice affected the transition.

2 Italian Transitional Justice

During the transition from fascism to republic, the issue of the relationship between military justice and civilian criminal justice came to the fore as part of a reckoning with the former regime and in the punishment of Fascist crimes – especially crimes of collaborationism committed during the German military occupation of Northern Italy after September 1943.

The issue can be examined within the framework of recent studies on transitional justice.[10] Indeed, over the last few decades, the issue has received increasing attention from scholars in different countries. Italy is no exception: many studies have examined the overthrow of illiberal rule by democracy between 1943 and 1948 and delved into the relationship between law and politics during that period.

One of the main problems to address after the Fascist regime collapsed concerned the appointment of courts to punish Fascist crimes. It became immediately apparent that the effectiveness of punishments would depend on the courts appointed to hand them down.

Essentially, three options were under consideration: give ordinary civilian courts jurisdiction, give military courts jurisdiction, or establish extraordinary courts. Each option entailed a choice of whether to maintain continuity or break with the previous regime. All of them, however, had the main objective of preventing – or at least limiting – revenge, thus striking a balance between the population's demands for justice and the need to legally punish Nazi-Fascist crimes.

[10] On transitional justice (the notion of which emerged in the late 1980s concerning measures to deal with the past like prosecution, reconciliation or restitution during the changeover from dictatorships into democracies and nowadays broadly referring to all questions about the violation of human rights) and on the distinction between retributive (which includes both criminal justice and administrative justice in order to punish the perpetrators) and restorative justice (aiming at providing redress to the victims and maintenance of peace), see Ruti G. Teitel, *Transitional Justice* (Oxford University Press, 2000); Peter Malcontent (ed), *Facing the Past. Amending Historical Injustices through Instruments of Transitional Justice* (Intersentia, 2016); Olivera Simić (ed), *An Introduction to Transitional Justice* (Routledge, 2017). Per alcune esperienze storiche di giustizia di transizione, see Jon Elster, *Closing the Books. Transitional Justice in Historical Perspective* (Cambridge University Press, 2004); Luca Baldissara and Paolo Pezzino (eds), *Giudicare e punire. I processi per crimini di guerra tra diritto e politica* (L'ancora del mediterraneo, 2005); Danilo Zolo, *La giustizia dei vincitori. Da Norimberga a Baghdad* (Laterza, 2006); Pier Paolo Portinaro, *I conti con il passato. Vendetta, amnistia, giustizia* (Feltrinelli, 2011); Marcello Flores (eds), *Storia, verità, giustizia. I crimini del XX secolo* (Bruno Mondadori, 2001); Nico Wouters (ed), *Transitional Justice and Memory in Europe (1945-2013)* (Cambridge Unversity Press, 2014).

The two Badoglio governments adopted some specific measures concerning the punishment of Fascist crimes in 1943 and 1944, but the two Bonomi governments would address the issue much more comprehensively through the issuance of Legislative Decree No. 159 of 27 July 1944 and Legislative Decree No. 142 of 22 April 1945.

Indeed, Decree No. 159 of 1944 laid down the first systematic set of rules on the punishment of Fascist crimes, in particular crimes of collaborationism.

On the one hand, the decree punished crimes of collaborationism under the wartime military criminal code of 1941, which meant that it therefore applied also to civilians. Indeed, the decree specified that the penalties established for military personnel could also be applied to civilians. In this respect, it is important to bear in mind that the wartime military criminal code continued to call for the death penalty in some cases, even though capital punishment had been abolished after the fall of fascism (Legislative Decree No. 224 of 10 August 1944).[11]

On the other hand, the decree ruled that military personnel were to be tried by military courts and civilians by ordinary courts, in accordance with the usual division of jurisdiction.

However, Decree No. 142 of 1945 subsequently established extraordinary courts of assizes, which thus took jurisdiction over crimes of collaborationism away from both military and ordinary courts.

The establishment of extraordinary courts of assizes was a compromise between creating extraordinary courts and giving jurisdiction to the ordinary courts: indeed, the former option would have ensured radical punishment of crimes of collaborationism but entailed violating the fundamental freedoms that the new government instead wanted to uphold, especially following their blatant trampling by the Fascist regime; whereas the latter option would have guaranteed adherence to general principles but appeared very unreliable, given that the judiciary had not been purged of Fascists.

[11] The provision gave rise to a broad debate and cast doubt on whether the reference to the wartime military criminal code concerned only penalties or extended to the entire military justice system; see Raffaella Bianchi Riva, 'Per superiori ragioni di giustizia e di pubblico interesse'. Legislazione eccezionale e principi liberali dal fascismo alla repubblica', in Floriana Colao, Luigi Lacchè and Claudia Storti (eds), *Giustizia penale e politica tra Otto e Novecento. Modelli ed esperienze tra integrazione e conflitto* (Giuffrè, 2015) 155-179.

Indeed, the extraordinary courts of assizes were composed of a professional judge as president and four jurors chosen with the assistance of the National Liberation Committee[12]: this setup thus responded to the need – greatly felt during the transition from fascism to republic – for a democratisation of the justice system and, at the same time, ensured that the courts would remain under the ordinary judiciary's control.

The procedure for trials before the extraordinary courts of assizes was also the result of a compromise, in this case between the need for speedy trials and the safeguarding of defendants' main rights. A summary preliminary investigation phase was adopted as opposed to a formal one, thus making trials more rapid but offering defendants fewer guarantees. That said, trials in the extraordinary courts of assizes did partially adhere to due process. In particular, defendants had the right to counsel, even if only at hearings (the code of criminal procedure of 1930 excluded lawyers from the entire preliminary investigation phase). Decisions of extraordinary courts of assizes could be appealed (though only within three days) before the temporary special division of the Court of Cassation established in Milan, which was composed mainly of anti-Fascist judges. Suing as a civil party was not admitted.

The nature of the extraordinary courts of assizes (which, in theory, were to have fully performed their duties within six months but, in practice, continued to operate for two years[13]) was the subject of much debate among legal scholars and legal practitioners of the time: scholars denounced their composition and procedure as typical of political justice, while the Court of Cassation considered them ordinary courts adapted for the transition's exceptional circumstances, thus legitimising their sentencing as far as public opinion was concerned.[14]

Many studies have examined the extraordinary courts of assizes and their decisions.[15] However, no studies have fully examined Italian military courts and their decisions on

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[12] In addition, the National Liberation Committee could choose prosecutors from a pool of anti-Fascist lawyers. The decree was based on the French *cours de justice*, established in 1944 in order to sentence Vichy government members and composed of a judge and four jurors chosen by the Resistance.

[13] Legislative Decree No. 625 of 5 October 1945 transferred their jurisdiction to the special divisions of the ordinary courts of assizes (which maintained, however, the same composition as that of the extraordinary courts of assizes) and to the second division of the Court of Cassation in Rome (which is also where the judges from the temporary special division of the Court of Cassation of Milan were assigned).

[14] Bianchi Riva (n 11) 179.

[15] Most of these studies have focused on the results of the anti-Fascist purge, with the general consensus being that, on the whole, the purge was unsuccessful. It was found that courts progressively adopted a less rigorous attitude towards collaborators: cases of acquittal increased, changes in the classification of offenses became more common, and extenuating circumstances were granted with increasing frequency; on the contrary, a reduction was seen in the number of cases wherein the death penalty or long prison sentences were imposed. It should also be mentioned that the general amnesty of 22 June 1946 was broadly enforced. These results were generally blamed on the fact that, on the whole, the judiciary had not been purged after the fall of fascism, which in turn meant that sanctions against fascism were not enforced. Marcello Flores, 'L'epurazione', in *L'Italia dalla liberazione alla repubblica, Atti del Convegno internazionale (Firenze, 26-28 marzo 1976)* (Feltrinelli, 1977) 413-467; Roy Palmer Domenico, *Processo ai*

collaborationism. Indeed, although military justice has received greater attention in recent years as part of studies on transitional justice, the role of military courts continues to be overshadowed by the role of extraordinary courts of assizes.[16]

Military courts certainly made a more limited contribution to Italian transitional justice than that of the extraordinary courts of assizes. However, it is important to bear in mind that, even though the relationship between military justice and civilian criminal justice was not always consistent over time or throughout Italy (because of the different measures adopted in different areas of the country), military courts nonetheless remained responsible for punishing crimes of collaborationism until the extraordinary courts of assizes began operating – and even after the extraordinary courts of assizes were established, military courts were still called on to try Fascist crimes for various reasons.

An examination of the work of military courts is thus intertwined with a reflection on the administration of justice in exceptional circumstances such as the transition from fascism to republic, when a political response was needed to meet society's demands for justice.

3 The Punishment of Fascist Crimes in Southern and Northern Italy

As is well known, Italy was divided into two occupation zones between September 1943 and April 1945: Southern Italy was controlled by the Allies with the legitimate royal government, which was in exile in Brindisi; while Northern Italy was subject to German military occupation with the Italian Social Republic puppet state, which represented Mussolini's last attempt to reconstitute the Fascist regime. Northern Italy was where the anti-Fascist movement created the National Liberation Committee, which coordinated the Resistance at both political and military level.

In Southern Italy, the Italian government began its reckoning with fascism against the backdrop of its complex relations with the Allies. In the autumn of 1944, the first trials for Fascist crimes began, though not without their share of difficulties (especially when it came to finding uncompromised judges). As mentioned above, the trials were to be held before ordinary courts and military courts, in accordance with Decree No. 159 of 1944.[17]

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fascisti. 1943-1948: storia di un'epurazione che non c'è stata (Rizzoli, 1996); Romano Canosa, *Storia dell'epurazione in Italia. Le sanzioni contro il fascismo 1943-1948* (Baldini&Castoldi, 1999); Mimmo Franzinelli, *L'amnistia Togliatti. 22 giugno 1946. Colpo di spugna sui crimini fascisti* (Feltrinelli, 2006); Paolo Caroli, *Il potere di non punire. Uno studio sull'amnistia Togliatti* (Edizioni Scientifiche Italiane, 2020).

[16] Cecilia Nubola, Paolo Pezzino and Toni Rovatti (eds), *Giustizia straordinaria tra fascismo e democrazia. I processi presso le Corti d'assise e nei tribunali militari* (Il Mulino, 2019).

[17] This paper does not examine the Allied military courts set up in Italy to try civilians accused of war crimes or common offences, as they did not try Fascist crimes or crimes of collaborationism or handle cases concerning the purging of Fascists; see Ilenia Rossini, 'Le Allied Military Courts: gli alleati e la giustizia di guerra in Italia' (2015) 24, 2 *Geschichte Und Region/Storia e Regione*, 122-146.

Overall, trials before the ordinary courts for crimes of collaborationism appeared to result in discouragingly unsatisfactory results up to the spring of 1945 – although it is still not known with certainty how many trials were initiated, how many passed the preliminary investigation phase, how many reached the sentencing phase, and what penalties were imposed. If much remains to be investigated concerning the operations of the ordinary courts, especially at local level, even less is known about the operations of the military courts.[18]

In any case, Southern Italy punished Fascist crimes based on Decree No. 159 of 1944. In not-yet-liberated Northern Italy, however, in the absence of the legitimate government, it was up to the National Liberation Committee to discuss how the justice system would have to function once the zone was liberated from German occupation.[19]

As the partisans fought against the Nazi-Fascists, different options were debated within the National Liberation Committee. The intention was to avoid forms of political justice but, at the same time, ensure that crimes of collaborationism were adequately punished without having people take the law into their own hands.[20]

The first option – supported by the judge Domenico Riccardo Peretti Griva, for example – was to entrust the ordinary courts of assizes with trying Fascist crimes, in order to ensure the continuity of the State. This option included providing for some corrective measures in the courts' composition or procedure so as to make punishment more effective, such as tasking the National Liberation Committee with forming lists of jurors, or excluding the appeal of sentences.

The second option aimed at breaking with the past by establishing extraordinary courts as people's courts. This option – which envisaged a sort of revolutionary justice – was an expression of people's distrust of the judiciary, which had not been purged following the fall of fascism.

In order to avoid the establishment of extraordinary courts, which would have violated the core principles of the Italian legal system, the third option – supported by the judge Giovanni Colli, for example – was to have the military courts continue to function after liberation until the war ended and jurisdiction was returned to the ordinary courts. In fact, partisan courts had been set up in every military unit for the immediate and exemplary punishment of crimes committed by the Nazi-Fascists.

In order to ensure immediate punishment of the crimes that had most upset the public, the National Liberation Committee would have transformed the limited, ad hoc system

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[18] Hans Woller, *I conti con il fascismo. L'epurazione in Italia 1943-1945* (Il Mulino, 1997) 187-333.

[19] Even in the Italian Social Republic, special courts were set up to exact 'revenge' on those who had betrayed the Mussolini regime; as mentioned, this had the effect of weakening republican fascism, including in the eyes of the public.

[20] Guido Neppi Modona, 'Il problema della continuità dell'amministrazione della giustizia dopo la caduta del fascismo', in Luigi Bernardi, Guido Neppi Modona and Silvana Testori, *Giustizia penale e guerra di liberazione* (Franco Angeli 1984) 11-40.

of partisan courts into a complex, stable system for the post-liberation period. In derogation from the regulations in force, the National Liberation Committee thus gave these courts jurisdiction over proceedings for crimes that normally fell within the ordinary judiciary's jurisdiction. Furthermore, it was permitted to amend wartime military criminal procedure and the military justice system in order to expedite the administration of justice.[21]

As a result, in addition to military jurisdiction in accordance with the wartime military criminal code, the wartime military courts under the third option would have tried crimes normally falling under the jurisdiction of civilian judges. Moreover, the procedure – which, as is well known, already contained harsher provisions than in peacetime – could be subject to further exceptions, with serious violations of individual liberties.

Subsequently, the idea of establishing an extraordinary jurisdiction prevailed – not least because of the difficulties that the National Liberation Committee would have encountered after liberation in making the military courts work. In order to allow the military courts to return to their normal duties, the National Liberation Committee decided to set up people's courts for the immediate punishment of not only crimes of collaborationism committed during the occupation but also Fascist crimes committed during the 20 years of fascism.[22] However, the Allied powers prevented the idea from being implemented. Although the related decree never came into force because of Allied opposition, it nevertheless undermined the legitimacy of military courts to punish Fascist crimes in the eyes of the public.[23]

In the meantime, Decree No. 142 of 1945 was issued in April, which, as mentioned above, established extraordinary courts of assizes to try crimes of collaborationism. However, the extraordinary courts of assizes would not begin operating until May because of organisational problems that delayed their operations in many liberated areas.

Therefore, in the weeks immediately following liberation – during which numerous episodes of summary justice were carried out, fuelled by widespread demands for revenge among the population and aided by the political and judicial power vacuum that had formed – it was up to the military courts to punish crimes of collaborationism.

4 Military Justice and Public Opinion

First of all, it must be pointed out that not many military courts were actually established after liberation and that, even then, they were often resorted to only for individual cases. Indeed, military courts with a president and four judges that operated on a stable, continuous basis were established in only a few cities, namely those where the Resistance's political and military organisation was more consolidated.

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[21] Giovanni Colli, *Pagine di una storia privata* (Fratelli Palombi 1989) 8-17.
[22] Gaetano Grassi (ed), "Verso il governo del popolo". Atti e documenti del CLNAI 1943/1946 (Feltrinelli 1977), pp. 324-328.
[23] Woller (n 18) 343-354.

The work of the military courts in the weeks immediately following liberation has been heavily criticised. Though many questions remain about the defendants tried and the sentences imposed – which only local research can clarify – the biggest issue concerns the courts' very legitimacy. Indeed, they have been accused of having been excessively severe, and many doubts have been raised about whether they respected substantive and procedural guarantees.

Their work can be reconstructed (at least in part) through newspaper reports, which also shed light on certain aspects of the relationship between military justice and public opinion in the years of transition from fascism to republic.

The press felt the need to highlight the due process aspects – and, conversely, to attenuate the political overtones – of the trials against collaborationists. In this way, the press tried to reassure the population that defendants were guaranteed the right to counsel, the right to be heard and the right to a public trial (which the press itself helped to achieve), in an attempt to make the work of the military courts – and, subsequently, that of the extraordinary courts of assizes, which would ultimately be entrusted with Italian transitional justice – appear legitimate.

The intention was twofold: to convince the public (which was crying for summary justice against those responsible for Fascist crimes) of the need to proceed – albeit quickly and severely – in accordance with the law in order to satisfy the public's legitimate demands for justice without resorting to retaliatory practices or private vendettas; and to emphasise the break from the judicial practices of political repression adopted not only during fascism but also, as mentioned above, in the liberal era.[24]

One example was in Como – a city in Lombardy that was one of the hardest hit by the civil war's brutality, partly because of its proximity to Switzerland, a frequent destination for fleeing partisans, Jews and deserters. A special military war court operated there between the end of May and the beginning of June, despite the fact that an extraordinary court of assizes had already begun to operate in the city, albeit only a few days before. The extraordinary court of assizes was in fact due to start operating as early as mid-May[25]; however, probably because of organisational problems, the first trial that it should have handled was in fact held before the military court (again with some delay, likely due to difficulties in the preliminary investigation phase).[26]

The special military war court in Como was convened by General Raffaele Cadorna – commander of the Volunteers of Freedom corps during the Resistance who was later appointed to be the Italian army's chief of staff – under Art. 283 of the wartime military criminal code and in relation to Art. 4 of Royal Law Decree No. 668 of 29 July 1943. The

[24] Bianchi Riva, 'Prime note sulla giustizia di transizione nel territorio di Como (1945-1947)', in Claudia Biraghi (ed), *Fonti per la storia del territorio varesino e comense*, vol 2, *Età contemporanea (secoli XIX-XX)* (Insubria University Press, 2013) 265-283.

[25] 'L'istituzione della Corte Straordinaria d'Assise' *Il Popolo Comasco* (Como, 8 May 1945).

[26] 'Il processo Saletta davanti al Tribunale Militare' *Il Popolo Comasco* (Como, 14 May 1945).

chief of police (*questore*) had requested that the court be convened in order to try war criminals who had been active in Como and its province during the German occupation.[27]

The first trials for collaborationism thus took place before military courts. It was only once the extraordinary courts of assizes began to operate regularly that jurisdiction was finally passed over to them for all civilian and military defendants – although, as examined below, some military defendants continued to contest the jurisdiction of the extraordinary courts of assizes. That said, it cannot be overlooked that after the extraordinary courts of assizes came into operation – and perhaps solely to buy some time – even military defendants on trial before the military courts still in operation sometimes objected that the military courts lacked jurisdiction (objections that were in any case rejected).

The special military war court in Como was presided over by General Giambattista Nicolini, who had just returned from Switzerland after having taken refuge there to escape persecution by the Fascists. It was composed of four officers from Como's military units – all patriots or partisans[28] – and, over the course of 4 trials, tried 8 defendants: 6 were sentenced to death, and 2 to prison terms of over 20 years.

More than any others, it was the first trial – against the former chief of police and other Como police officers accused of torture and murder – that was the subject of propaganda in the press. Indeed, it was a way for the press to prepare public opinion for the start of a reckoning with fascism.

As pointed out by *Il Popolo Comasco*, an organ of the Como National Liberation Committee, the trial was to be public. To facilitate participation to the greatest extent possible, the trial would be broadcast on the radio, and loudspeakers would be placed in the city's main square so that everyone could follow the proceedings.[29] For perhaps the very first time, military justice emerged from the isolation to which it had always been confined and came to be seen as legitimatein the eyes of the public.

A weekly newspaper published by the Action Party called *La disfida* specified that, although the trial would take place before a military court (and not before an extraordinary court of assizes, which, perhaps thanks in part to propaganda already spread by the newspapers, appeared to be more respectful of civil liberties), the right to counsel would still be guaranteed:[30] a circumstance that was certainly not to be taken for granted given

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[27] Special military war court could be convened by a commander if an immediate trial was needed for exemplary purposes in relation to offences punishable by death and the accused was arrested in flagrante delicto. The commander had broad discretionary power when it came to assessing whether the court could be justifiably convened; see Stellacci (n 3) 558-561.

[28] The duties of public prosecutor – a role that was part of the staff of ordinary military war courts – were performed by Mario Antonio Leca, an anti-Fascist who had been arrested and sent to confinement in the 1930s.

[29] 'Pozzoli Saletta Borghi Giussani e Brunati saranno processati domani' *Il Popolo Comasco* (Como, 20 May 1945).

[30] 'Processi e difese', *La disfida* (Como, 20 May 1945).

its systematic violation in Fascist-era special courts. Indeed, defendants' right to counsel became a symbol of the guarantees ensured in trials against Fascist crimes, reassuring public opinion that the special military courts were operating within the law.

According to *L'Ordine*, a Catholic newspaper based in the province of Como, the trial took place in a perfectly legal way, in compliance with all procedural guarantees and in an environment of due serenity. And the newspaper specified that all this was especially thanks to the presence of lawyers[31].

Nonetheless, this did not stop the press from expressing displeasure – in harmony with the popular conscience – at sentences that were considered too lenient. Such was the case following the military war court's last trial, against a Black Brigade officer accused of round-ups and shootings, which ended with the court granting the defence's request for a sentence of 30 years' imprisonment instead of the public prosecutor's request for the death penalty[32].

The war courts eventually ceased operations in most areas between May and June, given the need to bring military jurisdiction back within its ordinary limits. It was ordered that complaints related to military offences be submitted to military prosecutors and those related to other offences to the prosecutors with territorial jurisdiction.

Jurisdiction over crimes of collaborationism was thus definitively transferred to the extraordinary courts of assizes.

5 Conflicts of Jurisdiction

The extraordinary courts of assizes had jurisdiction over both civilians and members of the military: a situation that was upheld by the Court of Cassation starting from the very first decisions and subsequently reiterated in legislation.

In the absence of specific legal provisions on jurisdiction, many defendants who were members of the armed forces and charged with crimes of collaborationism often argued that the extraordinary courts of assizes lacked jurisdiction and that they should thus be tried before the military courts.

The argument was generally rejected.

According to the Court of Cassation, first of all, Decree No. 142 of 1945 did not reproduce the provision of Decree No. 159 of 1944 whereby it was expressly established that civilian courts had jurisdiction over civilians and military courts over members of the military.

[31] 'Le udienze al processo Saletta', in *L'Ordine* (Como, 21-22 May 1945). However, it must be pointed out that few lawyers were prepared to take on the cases of Fascist and Nazi collaborators. As a matter of fact, lawyers who took on such cases were seen to be supportive of their clients and, for this reason, the public openly disapproved of these lawyers, including by insulting and threatening them.
[32] 'In margine al processo Noseda', in *La disfida* (Como, 10 June 1945).

Second, the extraordinary courts of assizes' exclusive jurisdiction over crimes of collaboration with the Germans was confirmed by the fact that Decree No. 142 of 1945 expressly provided that senior officers in the Italian Social Republic's armed forces were to be tried before those courts.[33]

Similarly, extraordinary courts of assizes had exclusive jurisdiction over minors when it came to crimes of collaborationism – this despite the fact that juvenile courts had been in operation since 1934.[34]

The issue of the relationship between military justice and civilian criminal justice was subsequently resolved by Legislative Decree No. 466 of 2 August 1945, which, notwithstanding Art. 49 of the Italian criminal code, extended the jurisdiction of the extraordinary courts of assizes to crimes of collaborationism. Only if issues of a particularly complex military nature arose could a trial for crimes of collaborationism be referred to a military court.

Legislative Decree No. 625 of 5 October 1945 modified the relationship between military justice and civilian criminal justice by establishing that jurisdiction would have to be shifted to the military courts if issues arose which entailed a trial of a military nature. It also established that, in that case, ongoing investigations into possible crimes of collaborationism would be carried forward by the same investigating judge or prosecutor (depending on whether a summary or a formal preliminary investigation was being carried out) but the hearings would have to be held before the extraordinary courts of assizes.[35]

The doubt on jurisdiction was resolved by Legislative Decree No. 201 of 12 April 1946, which reaffirmed the provision attributing jurisdiction over crimes of collaborationism to the courts of assizes even if military personnel were involved, thus specifying that military courts had no jurisdiction over such matters and that Arts. 49 and 50 of the Italian criminal code did not apply.

Needless to say, the relationship between the extraordinary courts of assizes and the military courts was an issue, as evidenced by, for example, a decision handed down by the Supreme Military Court in May 1950.

It started in February 1946, when two individuals accused of collaborationism were brought to trial before the territorial military war court in Rome. The court acquitted them in May 1946, citing insufficient evidence. The public prosecutor, however,

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[33] Court of Cassation, Special Division, 18 June 1945 n. 7; Court of Cassation, Special Division, 17 August 1945 n. 129; Court of Cassation, Special Division, 29 August 1945 n. 162.

[34] Raffaella Bianchi Riva, '''Una saggia politica criminale". I "ragazzi di Salò" nella giurisprudenza della corte di cassazione' (2019) 5 *Italian Review of Legal History* 384-436.

[35] The Court of Cassation ruled that, if the preliminary investigation was being conducted by the military judicial authority, that authority was to continue the investigation; however, in the case of a formal preliminary investigation, the military investigating judge could not order a committal for trial, and in the case of a summary preliminary investigation, the military prosecutor could not issue a summons. See Court of Cassation, Joint Divisions, 4 May 1946.

requested that the decision be annulled and that the trial documents be forwarded to the ordinary courts, as he did not see any issues in the case that would require a military trial or justify giving jurisdiction to a military court as provided by law. The Supreme Military Court upheld the public prosecutor's appeal, setting aside the acquittal for lack of jurisdiction of the military court and ordering that the proceedings be transferred to the ordinary courts.[36]

After the abolition of the extraordinary courts of assizes in 1947, military courts returned to having jurisdiction over crimes of collaborationism committed by members of the armed forces, even though most of the trials relating to this matter had already been held.

6 The Court of Cassation vs the Supreme Military Court

Under Decree No. 159 of 1944, jurisdiction over military personnel accused of collaborationism belonged to the territorial military courts (which were war courts until 15 April 1946, when the state of war officially ceased); that situation lasted until Decree No. 142 of 1945 transferred jurisdiction to the extraordinary courts of assizes.[37] However, in the areas of Italy where the extraordinary courts of assizes did not come into operation, the military courts continued to try crimes of collaborationism under Decree No. 159 of 1944, despite extraordinary courts of assizes having come into operation elsewhere.

In many collaborationism cases, this led to conflicting rulings between military courts and extraordinary courts of assizes and, at the top, between the Court of Cassation and the Supreme Military Court.

Rulings handed down by territorial military courts could indeed be appealed before the Supreme Military Court, which was made up of military and ordinary judges. Appeals to the Supreme Military Court – which was functionally equivalent to the Court of Cassation – consisted of a request to annul the ruling, thus excluding the possibility of a review on the merits.[38]

One of the issues that most challenged ordinary and military courts was how to legally classify collaborationism-related facts submitted to them for adjudication.

Indeed, Decree No. 159 of 1944 referred only to the provisions of the wartime military criminal code of 1941 on crimes against loyalty and military defence of the State.

It was up to the courts to identify which provision of the wartime military criminal code that theoretically referred to collaborationism (among those on crimes against loyalty

[36] Supreme Military Court, 5 May 1950 n. 653.

[37] Supreme Military Court, 6 July 1945 n. 2233. According to the peacetime military criminal code of 1941, the common code of criminal procedure applied also to military courts unless the law provided otherwise, with the aim of speeding up trials. Unlike common criminal trials, for instance, in military trials no civil action for damages was allowed; furthermore, no appeals were allowed – only requests to annul rulings before the Supreme Military Court. See Stellacci (n 3) 519-528. On the operation of military courts during the state of war, see *ibidem*, 555-558.

[38] Stellacci (n 3) 561-575.

and military defence) to apply. The choice often depended precisely on the penalty envisaged under the provision.

The Court of Cassation generally classified acts of collaborationism as aiding the enemy under Art. 51 (punishable by death), sharing intelligence or corresponding with the enemy under Art. 54 (also punishable by death, unless no damage was caused by the offence), or aiding the enemy in its political schemes under Art. 58 (punishable by 10–20 years' imprisonment).[39]

On the other hand, Art. 56, which punished communicating or corresponding with the enemy without the intent of aiding and abetting it (punishable by 1–7 years' imprisonment), was scarcely taken into consideration by the extraordinary courts of assizes and the Court of Cassation, except – according to Giuliano Vassalli's study – for one case in which the latter ruled it was inapplicable to collaborationism. Indeed, the Court of Cassation annulled a sentence handed down by an extraordinary court of assizes that had convicted a defendant under Art. 56, holding that this provision was applicable only to the military.[40]

It was only natural, therefore, that Art. 56 would come into greater prominence before the military courts (although even here, the more prevalent charges remained those relating to providing military or political aid to the enemy or sharing intelligence with the enemy).

The territorial military war courts sometimes held that the facts submitted to them for adjudication did not constitute intent to aid the enemy and that such intent was thus to be excluded, leading them to classify the facts as unlawfully communicating with the enemy instead of aiding the enemy or sharing intelligence or corresponding with the enemy – even if such a classification was different from the original charge.[41] This obviously made it possible to give defendants more lenient sentences.

As to the applicability or non-applicability of Art. 56 to collaborationism, the Supreme Military Court ruled in several respects.

In October 1945, for example, the Supreme Military Court upheld a sentence handed down in April 1944 by the territorial military war court in Bari, in which a member of the Volunteer Militia for National Security had been sentenced to one year of imprisonment. The defendant's defence argued that, in the days immediately following the armistice – when the events of the case had taken place – the Germans could not be considered enemies. But the Supreme Military Court held that the fact that they were enemies, which

[39] Raffaella Bianchi Riva, 'L'ordine del superiore gerarchico nella giustizia di transizione italiana: diritto, etica e politica' (2019) 16 *Historia et ius*.

[40] Giuliano Vassalli, 'La collaborazione col tedesco invasore nella giurisprudenza della cassazione' (1945-1946) L-LI *La Giustizia penale*.

[41] Supreme Military Court, 30 November 1945 n. 3258; Supreme Military Court, 1 March 1946 n. 576; Supreme Military Court, 15 March 1946 n. 754; Supreme Military Court, 12 July 1946 n. 1092.

is precisely what had made the defendant's actions a crime, could be deduced not only from the order issued by the Italian High Command on 11 September 1943 but also from the veritable acts of war that the German army had committed against the Italian army.[42]

When it became clear that the Germans were to be regarded as enemies, defence lawyers began to argue that Art. 56 had been designed with reference to the experience of World War I in order to punish what could be described as 'brotherly pacts with the enemy in the trenches': such pacts presupposed the deployment of two opposing armies on the same front and thus could not occur in enemy-occupied territory.

Initially, the Supreme Military Court accepted this defence argument: it held that the crime of unlawfully communicating with the enemy could be committed only when opposing armies were facing each other in the trenches or when the national army had invaded enemy territory, and that it could not be committed when the enemy had invaded national territory, as was the case with the German occupation after September 1943. Indeed, in the latter case, it was very difficult to avoid contact with the enemy, which on the contrary was often a necessity; consequently, communication with the enemy (in the absence of intent to aid and abet it) did not constitute a crime. For example, in March 1946, the Supreme Military Court annulled a sentence handed down by the territorial military war court in Rome that had sentenced two captains from the Corps of Engineers to 2 years and 11 months' imprisonment.[43]

Furthermore, for communication to constitute a crime under Art. 56, it had to be carried out without authorisation or in the presence of a ban against it established by regulations or superiors. The Supreme Military Court thus held the provision could not apply to collaborationism because, among other things, no military body existed in occupied Italy after the armistice that was capable of issuing such a ban. In November 1945, for example, the Supreme Military Court rejected the appeal of a public prosecutor who argued that a ban on communicating with the enemy was implicit in a declaration of war, ruling that it conflicted with the letter of the law, which required an express ban; it thus upheld the sentence in question, handed down by the territorial military war court in Rome, which had acquitted the defendants on the grounds that no crime had been committed.[44]

This interpretation allowed many defendants to be fully acquitted.

In a rather sudden change in practice, however, the Supreme Military Court subsequently held that Art. 56 was applicable to collaborationism. Indeed, according to the Court, it was up to the the judge to adapt the rule to changing conditions – to distinguish the circumstances surrounding the introduction of a law (*occasio legis*) from the law's purpose (*ratio legis*). Though the German occupation had led to a de facto situation not envisaged by Art. 56, it could not be denied that a ban on communicating with members of an invading enemy's armed forces remained. There was thus no reason

[42] Supreme Military Court, 12 October 1945 n. 2738.
[43] Supreme Military Court, 1 March 1946 n. 576.
[44] Supreme Military Court, 20 November 1945 n. 3123.

to limit application of the law to 'brotherly pacts with the enemy in the trenches' and deny its application in other cases of contact with the enemy[45]. Based on this interpretation, in March 1946, the Supreme Military Court upheld a sentence handed down by the territorial military war court in Rome against an air force colonel who had had personal contact and telegraphic correspondence with a German command post: although the sentence had acquitted the colonel of the charge of unlawful communication with the enemy because of insufficient evidence, it had acknowledged that Art. 56 was applicable to his case. And in July 1946, the Supreme Military Court upheld another sentence handed down by the territorial military war court in Rome, this time against an air force marshal who had carried out an espionage mission in favour of the Germans and had been sentenced to one year of imprisonment for unlawful communication with the enemy.

Although this interpretation made it possible to convict more soldiers for collaborationism, the fact remained that application of Art. 56 still led to much lighter sentences (if the defendants were not acquitted) than those resulting from application of Arts. 51, 54 and 58.

7 Conclusion

In the 19th and 20th centuries, the need to cope with emergencies often led Italian governments to extend the scope of military justice to include civilians in order to ensure prompt and effective punishment of crime. Why, then, during the transition from fascism to republic, did the government decide to do the contrary – that is, to resort primarily to extending the scope of the civilian criminal justice system to include members of the military – notwithstanding the desire to immediately and severely punish Fascist crimes?

Several factors contributed to this decision, all of which were affected by the political and social issues that emerged after the fall of fascism.

Though the situation saw justice of an extraordinary nature being administered with political overtones, the establishment of extraordinary courts of assizes accomplished the goal of legitimising the punishment of Fascist crimes in the eyes of the public. It guaranteed the people's participation in the administration of justice, thus playing a fundamental role in building the foundations of democratic order during the transition from fascism to republic.

Conversely, the public was hardly interested in the military justice system[46]. Thus, the frequent public disregard of military justice, along with the widespread prejudice that the military justice system gave scant regard to a fair trial (fuelled precisely by previous governments' frequent recourse to military justice to repress political dissent), probably

[45] Supreme Military Court, 15 March 1946 n. 754; Supreme Military Court, 12 July 1946 n. 1092.

[46] Fabio Ratto Trabucco, 'Sorella minore o "minorata"? La giurisdizione speciale militare fra antistoricità, autoconservazione ed incostituzionalità' (2020) CLII, 1 *Archivio giuridico* 153-242.

contributed to the government's decision to establish extraordinary courts of assizes during the overthrow of illiberal rule by democracy.

That said, the role played in those years by military courts both before and after the establishment of extraordinary courts of assizes was not irrelevant. Indeed, they were at the centre, together with the extraordinary courts of assizes, of an intense propaganda campaign that not only helped highlight the due process aspects of military criminal trials but also enabled the population to become aware of the problem of special military jurisdiction. Indeed, they helped give rise to a debate that, during the Republican era, would focus on the adaptation of substantive and procedural military law to constitutional values.[47]

In any case, the practice of subjecting civilians to military justice in exceptional circumstances was not over. As a matter of fact, Legislative Decree No. 234 of 10 May 1945 reintroduced the death penalty for robbery committed in certain circumstances and established a special military court composed of an officer of the armed forces, an ordinary judge and a lay judge[48], thus demonstrating that military justice retained its characteristic special nature, which would long contribute to the widespread suspicion of it and would lead to delays and difficulties in adapting it to the Italian constitution.

[47] Rodolfo Venditti, 'Il percorso evolutivo della giustizia militare nell'ultimo cinquantennio', in Nicola Labanca and Pier Paolo Rivello (eds), *Fonti e problemi per la storia della giustizia militare* (Giappichelli, 2004), 253-264.

[48] Floriana Colao, 'La pena di morte in Italia dalla giustizia di transizione alla crisi degli anni Settanta. In memoria di Mario Da Passano e Mario Sbriccoli, a dieci anni dalla morte' (2016) 10 *Historia et ius*.

The success of military operations, the safeguarding of national interests and the discipline of the troops within the overall context of the rule of law have always presented great concerns for national armed forces. Nowadays, military justice faces several issues and criticisms. The prospect of 'high-intensity' warfare in Europe, battlefield robotisation, augmented soldiers, artificial intelligence and other present and potential future technological developments are new contemporary challenges for military justice and military criminal law. Also, the constant pressure for the 'civilianisation' of military justice systems since the 17th century, which implies bringing civilian and military justice closer together or even merging the two legal systems, is another issue to be addressed. A further challenge involves using mercenaries and auxiliaries on the battlefield, which blurs the lines and undermines the respect of the law of armed conflict as well as makes the application of the national rules of military justice difficult.

What are the legal and political foundations of military justice? How does it function? How to improve it and reform it? What does the future hold for military law and military justice? What can we learn from history?

Indeed, historical research can help us understand the different ways in which military justice systems have been constructed, have evolved and functioned, particularly in wartime, while comparative law may be useful in understanding the great variety of military justice systems around the world.

This volume brings together major contributions to the 1st International Military Justice Forum, which convened on 18 and 19 November 2021 in Paris, hosted by the Court of cassation, the French Judicial Supreme Court, and the Hotel des Invalides, a historical place for the French Military Forces.

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